PRC Anti-Monopoly Law (AML)

- Effective August 1, 2008
- China’s first comprehensive competition law
- AML prohibits private “Monopolistic Conduct”
  - “Monopoly Agreements” by Multiple Firms
    ≈ US Sherman Act § 1, EC Treaty Article 81
  - “Abuse of Dominance” by Single Firm with Market Power
    ≈ US Sherman Act § 2, EC Treaty Article 82
  - Concentrations (e.g., mergers) that “eliminate or restrict competition”
    ≈ US Hart Scott Rodino process, EC Merger Regulation
- AML prohibits “Administrative Monopoly”
  ≈ Anticompetitive misuse of state power
- Extraterritorial “effects” jurisdiction
Implementation of the AML

- After 13+ years of drafting, final text follows foreign models (chiefly EU, US, German, Korea, Japan, Taiwan), **but**
  - Omits key elements of foreign doctrines.
  - Unintended results of mixing foreign models
  - “Public Interest” Exceptions to ALL rules
- Hard decisions deferred to implementation
  - Five Years into Implementation…
    - Weak consensus on goals of Chinese antitrust
      - Reform vs. protectionism, national security, indigenous Innovation
    - Financial crisis overshadows & undermines AML
- Transparency, discretion, politicization & turf wars
- *Innovation, Independence, Pretext, & Growing Pains*
Enforcement Structure

- Antimonopoly Commission (AMC)
  - Inter-agency policymaking and coordination
- Ministry of Commerce (MOFCOM)
  - Merger review under the AML
  - Monopolization in foreign trade (Foreign Trade Law)
- State Administration of Industry & Commerce (SAIC)
  - Monopoly Agreements under AML (except pricing issues)
  - Abuse of Dominance under AML (except pricing issues)
  - Continues to enforce Anti-Unfair Competition Law (1993)
- National Development & Reform Commission (NDRC)
  - Pricing-related monopoly agreements under AML
  - Pricing-related abuse of dominance under AML
  - Retains sweeping authority under Price Law (1997)
- Courts hear civil claims for damages & appeals
Mandatory Merger Notification System

- All concentrations meeting the thresholds must be reported in advance for review and clearance.
- State Council authorized to set thresholds
- Consummating unreported concentrations prohibited
- Possible investigation of transactions that do not trigger notification thresholds
- Penalties for Consummating Unapproved Concentrations
  - Unwinding
  - Fines up to RMB 500,000
  - Collateral Retaliation (?)
Reportable Concentrations

- Concentration = Change in Control
  - “Mergers”
  - Acquiring control over “another business operator’s assets or equity”
  - Acquiring “control of or capability of exercising decisive influence over another business operator by contract or other means”
- No Clear Definition of “Control”
  - Draft Notification Rules [Not been adopted by State Council]:
    - Actual control of shares or board majority
    - Decisive influence over production and operations
    - “Becoming Largest Shareholder”?
- Joint Ventures
  - No “full-functionality” requirement
Notification Thresholds

Notification requires if during the preceding year

(A) *Either*

(1) All parties’ combined global turnover > RMB 10 billion (US$1.61 billion, ¥121.6 billion); OR

(2) All parties combined China turnover > RMB 2.0 billion (US$323 million, ¥24.3 billion); AND

(B) At least two parties’ China turnover > RMB 400 million (US$65 million)

- Calculated at “Ultimate Parent Level”
- MOFCOM accepts data for parties’ financial years
- Consider “Target” rather than “Seller” in acquisitions
- Latent Catch-all for small transactions
- Creeping Acquisitions & Circumvention
REVIEW PROCESS

Pre-Notification Consultation

Intake: Is Filing Complete?

Initial Review (30 Days)

Full Review (90 Days)

Extended Review (60 Days)

APPROVE

BLOCK!

CONDITIONAL APPROVAL

ENFORCEMENT

“Preview”: Clock Does Not Start Until MOFCOM Deems Filing Complete
Merger Review Standard

- Transaction should be prohibited or subject to conditions if it will “eliminate or restrict competition”
- May still be cleared if parties prove
  - Deal’s benefits clearly outweigh negative effects
  - OR
  - Deal is in “public interest”
- Implication: “Public Interest” may trump competition
- Implementing rules on market definition and merger analysis import foreign enforcement principles and practices

- Elements to be considered
  - Market shares & market power of parties
  - Concentration of the relevant market
  - Effect on market access and technological progress
  - Effects on consumers and upstream and downstream enterprises
  - Effects on “national economy”
  - Other relevant factors “affecting market competition”
## Completed Merger Reviews

**August 1, 2008 - March 31, 2013**

<table>
<thead>
<tr>
<th>Completed Reviews</th>
<th></th>
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<tbody>
<tr>
<td>Unconditional clearance</td>
<td>562</td>
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<tr>
<td>Conditional clearance</td>
<td>16</td>
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<tr>
<td>Prohibition (Block)</td>
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<tr>
<td>Decision</td>
<td>First submission</td>
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<td></td>
<td></td>
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<tr>
<td>INBEV / Anheuser-Busch</td>
<td>September 10, 2008</td>
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<tr>
<td>Coca Cola / Huiyuan (Blocked)</td>
<td>September 18, 2008</td>
</tr>
<tr>
<td>Mitsubishi Rayon/Lucent</td>
<td>December 22, 2008</td>
</tr>
<tr>
<td>Panasonic/ Sanyo</td>
<td>January 21, 2009</td>
</tr>
<tr>
<td>Pfizer/ Wyeth</td>
<td>June 9, 2009</td>
</tr>
<tr>
<td>General Motors/ Delphi</td>
<td>August 18, 2009</td>
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<tr>
<td>Novartis/Alcon</td>
<td>April 20, 2010</td>
</tr>
<tr>
<td>Uralkali/Silvinit</td>
<td>March 14, 2011</td>
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<tr>
<td>Western Digital/Hitachi GST</td>
<td>April 2, 2011</td>
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<tr>
<td>GE/Shenhua JV</td>
<td>April 13, 2011</td>
</tr>
<tr>
<td>Henkel/Tiande Chemical JV</td>
<td>August 8, 2011</td>
</tr>
<tr>
<td>United Technologies/Goodrich</td>
<td>December 12, 2011</td>
</tr>
</tbody>
</table>
Checkpoint or Chokepoint?

- Bottleneck at “preview” acceptance stage
- Lengthy formal review
- MOFCOM Resource Constraints
  - Headcount & Turnover
- Internal & External Clearance Process
- Low “Phase 2” Thresholds
- Institutional Incentives
  - Clearing Bad Deals vs. Delaying Good Deals
  - Prioritization
- MOFCOM Responds: Draft “Fast Track” Simplified Procedures Proposed April 2013
Substantive Decisions

• Increasing Sophisticated Analysis
  – Early decisions brief and formulaic, with limited analysis
  – Now Increasingly sophisticated use of “foreign” antitrust principles
• Relatively low market shares trigger concern about concentration
• Tension between “follower” of foreign regulators and “leader” setting independent path → respected as credible or decisive?
• Compliance by State-Owned Enterprises?
• Remedies
  – Liberal use of behavioral remedies (supervision vs. symbolism)
  – Structural & Quasi-Structural Remedies
• Remedy Negotiation Process
• Economic nationalism & industrial policy & politics
Conduct Rules

- Late Start Compared to MOFCOM
  - Agency Implementing Rules only released in January 2011
  - Judicial Interpretations only released in May 2012
- Agency Enforcement
  - Resource Constraints & Learning Curves
  - Implementing Rules provide little guidance on offenses or defenses
  - Discretionary Leniency Program
  - Soft Guidance or Warnings vs. Fines
  - Target Selection: Kill the Rooster to Scare the Monkey?
  - NDRC/SAIC coordination
  - NDRC Rules: Non-Price “Disguised” Price-Fixing?
  - Overlaps between AML, Unfair Competition Law, Price Law
- Judicial Enforcement
  - Few cases (<100), low-value claims, no class action
  - Prudent or Gunshy?
In January 2013, NDRC imposed monetary sanctions totaling RMB353 million on 6 Korean & Taiwanese LCD manufacturers for international price cartel under *Price Law*.

First extraterritorial enforcement

Found cartel members met monthly to exchange market information and discuss price from 2001 to 2006.

NDRC emphasized fines under AML would have been higher.

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount</th>
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<tbody>
<tr>
<td>LG</td>
<td>RMB118 million</td>
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<tr>
<td>Samsung</td>
<td>RMB101 million</td>
</tr>
<tr>
<td>Chimei InnoLux</td>
<td>RMB 94.41 million</td>
</tr>
<tr>
<td>AU Optronics</td>
<td>RMB 21.89 million</td>
</tr>
<tr>
<td>Chunghwa Picture Tubes</td>
<td>RMB16.20 million</td>
</tr>
<tr>
<td>HannStar.</td>
<td>RMB 240,000</td>
</tr>
</tbody>
</table>
Liquor Resale Price Maintenance

- In February 2013, Wuliangye and Maotai fined for RMB202 million and RMB247 million for resale price maintenance (RPM).
- RPM enforced through deduction of deposits, deduction of marketing supporting expenses, fines, termination of distributorship and etc.
- NDRC indicated fines (1% of annual revenue) lighter than 10% maximum in light of parties’ voluntary remedial measures.
- Per Se Prohibition vs. “Rule of Reason”?
- Conflict with Shanghai No. 1 Intermediate People’s Court, (May 18, 2012) Beijing Rainbow Medical Equipment Technology & Trading Co. Ltd. vs. Johnson & Johnson (Shanghai) Medical Equipment Co. Ltd. and Johnson & Johnson (China) Medical Equipment Co. Ltd.
• Longstanding public dispute between Tencent and Qihoo 360
• Prior litigation, petitions for investigation, and intervention by MII
• Qihoo sued Tencent in Guangdong High People’s Court alleging abuse of dominance
• Court ruled in Tencent’s favor on March 29, 2013
  – Qihoo’s allegations of abuse of dominance against Tencent rejected on threshold market definition issue
  – Court commentary reached competitive effects concerns
• Presiding Judge: "The anti-monopoly law aims to protect competitors and consumers, instead of the monopoly itself. Those who gain a dominant market position through technological innovation, better operation and management, and price advantages are not the targets of the country's anti-monopoly law. The anti-monopoly law only disallows any companies to abuse their dominant market position to wipe out competition and damage consumers' interests.” China Daily 3/29/2013
Thank you!
Any questions?

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