



O'MELVENY & MYERS LLP

Nathan Bush  
Singapore/Beijing  
nbush@omm.com  
April 2013



## Chinese Antitrust Law: First Five Years



# 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

<b>August 1, 2008 - March 31, 2013</b>	<b>Completed Reviews</b>
<b>Unconditional clearance</b>	562
<b>Conditional clearance</b>	16
<b>Prohibition (Block)</b>	1



# Conditional Clearances & Blocks

Decision	First submission	Initiation	Final Decision		Timing		
			Date	Phase	PREVIEW	REVIEW	TOTAL
INBEV / Anheuser-Busch	September 10, 2008	October 27, 2008	November 18, 2008	Phase I	47	22	69
Coca Cola / Huiyuan (Blocked)	September 18, 2008	November 20, 2008	March 18, 2009	Phase II	63	118	181
Mitsubishi Rayon/Lucent	December 22, 2008	January 20, 2009	April 24, 2009	Phase II	29	94	123
Panasonic/ Sanyo	January 21, 2009	May 4, 2009	October 30, 2009	Phase III	103	179	282
Pfizer/ Wyeth	June 9, 2009	June 15, 2009	September 29, 2009	Phase II	6	106	112
General Motors/ Delphi	August 18, 2009	August 31, 2009	September 28, 2009	Phase I	13	28	41
Novartis/Alcon	April 20, 2010	April 20, 2010	August 13, 2010	Phase II	0	115	115
Uralkali/Silvinit	March 14, 2011	March 14, 2011	June 2, 2011	Phase II	0	80	80
Western Digital/Hitachi GST	April 2, 2011	May 10, 2011	March 2, 2012	Phase II (Refiled)	38	297	335
GE/Shenhua JV	April 13, 2011	May 16, 2011	November 10, 2011	Phase III	33	178	211
Seagate/Samsung	May 19, 2011	June 13, 2011	December 12, 2011	Phase III	25	182	207
Penelope/Savio Macchine Tessili	July 14, 2011	September 5, 2011	October 31, 2011	Phase II	53	56	109
Henkel/Tiande Chemical JV	August 8, 2011	September 26, 2011	February 9, 2012	Phase III	49	136	185
Google/Motorola	September 30, 2011	November 21, 2011	May 19, 2012	Phase III	52	180	232
United Technologies/Goodrich	December 12, 2011	February 6, 2012	June 15, 2012	Phase III	56	130	186
Walmart/Niu Hai Holding	December 16, 2011	February 16, 2012	August 13, 2012	Phase III	62	179	241
ARM, Giesecke & Devrient/Gemalto JV	May 4, 2012	June 28, 2012	December 6, 2012	Phase III	55	161	216



# 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?



## LCD Panel International Cartel Case

- 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.

Company	Amount
LG	RMB118 million
Samsung	RMB101million
Chimei InnoLux	RMB 94.41 million
AU Optronics	RMB 21.89million
Chunghwa Picture Tubes	RMB16.20million
HannStar.	RMB 240,000



# Liquor Resale Price Maintenance

- In February 2013, Wuliangye and Maotai fined for RMB202million and RMB247million 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.





# Qihoo 360 v. Tencent

- 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?

Nathan Garrett Bush  
O'Melveny & Myers LLP  
Yin Tai Center, Office Tower, FL 37  
2 Jianguomenwai Avenue  
Chaoyang District  
Beijing, 100022 P.R.C.  
Tel: + 8610-6563-4207  
Fax: + 8610-6563-4201  
nbush@omm.com