Unsuccessful Acquisition of Huiyuan Juice by Coca Cola –
Impacts on Merger and Acquisition of Shipping Companies in China

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Introduction

Merger and acquisition (M&A) is a phrase referring to a common commercial activity. It is a strategy which usually assists a company to expand and grow. M&A also take place in the shipping industry. In September 2007, Inter Marine Container Lines decided to strengthen its north European box feeder business by acquiring Baltic Container Lines, a third party feeder based in Poland in September 2007.

M&As are usually funded by credit facilities. After the financial tsunami starting from the fourth quarter of 2008, most financial institutions have taken a conservative approach to their credit facilities. This has resulted in a considerable reduction in M&As. The more high profile ones include a US$310m voluntary offer by Compagnie Generale de Geophysique Veritas ("CGGV"), a French shipping company, to acquiring its Norwegian rival Wavefield Inseis in November 2008. The acquisition helped boost CGGV's fleet of seismic survey vessels. In December 2008, Historic General Maritime merged with Arlington Tankers to form a new entity known as General Maritime Corporation. The merger was expected to generate cash cost savings and realize cost reductions related to executive transitions. In January 2009, the acquisition of Broström by Maersk propelled the Danish powerhouse to the top of the product tanker league. In April 2009, the Sohmen family triggered off the compulsory acquisition of minority shareholders in BW Gas after their shareholding in BW Gas increased to 99%.

Business in China

China is a substantial market. Many overseas' investors wish to set up or expand their business in China. Merging with or acquiring an existing local company in China is one of the fastest ways for foreign companies in achieving such objective.

Anti-Monopoly Law in China

When two substantial companies are combined, they may have sufficient control over a particular product or service. This may restrict economic competition for such product or service. As a result, many states have law and regulations that are aimed to protect consumer interests and to ensure that entrepreneurs have an opportunity to compete in the market

economy.

The idea of a comprehensive anti-monopoly law for China surfaced in 1987, in response to the diverse and incoherent existing laws such as Anti-Unfair Competition Law, Price Law and Foreign Trade Law. After joining the World Trade Organisation in 2001, China passed the Provisional Rules on Foreign Investors' Mergers or Acquisitions of Domestic Undertakings[1]. The final version of the Anti-Monopoly Law (AML) was finally adopted by the Tenth National People's Congress (NPC) on 30 August 2007 and took effect on 1 August 2008.

The AML took input from U.S. law and various European models while having provisions that evidence the important socialist heritage of China's largely market economy.

The aim of the AML is to prohibit "monopolistic conducts" and also administrative monopolies. Its general structure includes four substantive sections (1) prohibit certain types of agreements unless they fall within specified exemptions; (2) prohibit certain behaviour classified as abuse of dominant market position; (3) establish a broad merger review scheme; and (4) prohibit abuse of government administrative powers restraining competition.

Since the AML has only 57 articles, it is not intended to set down all the rules in great detail. On the contrary, it has just provided a general framework and some basic principles on regulating monopolistic conducts.

Unsuccessful Acquisition of Huiyuan Juice by Coca Cola

Shortly after the AML coming into force in August 2008, Coca Cola announced[2] its agreement with Huiyuan Juice to purchase all its shares on 3rd September 2008. As a result, the intended transaction was subject to AML. This paper will look at the decision of China's Ministry of Commerce (MOC), applying the newly enacted AML, to turn down this transaction and then evaluate the impact of AML on shipping companies that wish to expand their business operations by pursuing M&A in China.

Coca Cola entered into the Chinese market in 1979. At the time of the Coca Cola's purported take-over, the beverage market in China is divided into the sparkling market primarily selling soft drinks and the non-sparkling markets selling fruit juice. Coca Cola is one of the leading suppliers in the sparkling market with a market share of 52.5%. More than 50% of the beverage market is selling fruit juice. The fruit juice market is further divided into 3 categories, namely, the 100% pure juice, the 30% concentrated juice and the 10% diluted

[1] It became effective in March 2003.
[2] Reuters, "Coke to acquire firm in China", *The New York Times*, 2 September 2008.

juice. Huiyuan Juice has a market share of 44% in pure juice[3]. Coca Cola's attempt to acquire Huiyuan Juice was valued at approximately US$2.4 billion. It would have been the largest acquisition of a Chinese enterprise by a foreign undertaking in China.

Compulsory Notification in Merger and Acquisition

Article 21 of the AML requires notification of concentrations that reach notification thresholds.

Article 20 of the AML lists three forms of concentration: mergers; acquisitions of control over other undertakings through acquisition of equity or assets; or acquisitions of control over other undertakings or of the capacity to exercise decisive influence over other undertakings by contract or other means.

Given that Coca Cola planned to purchase all the shares of Huiyuan Juice, the transaction fell with the ambit of Article 20 and hence was required to give prior notification to the MOC.

Article 21 itself does not set out the threshold nor which undertaking of a concentration or any of them has the duty to effect the notification. On 3rd August 2008, the State Council announced the Rules on the Threshold for Notification by Concentration Undertakings (the Threshold Rules)[4].

So far as the timing is concerned, the Threshold Rules provided some certainty for Coca Cola to ascertain out whether its intended purchase of Huiyuan Juice was within the scope of Article 21. Rule 3 provides that a statutory notification is required if a threshold is met.

The Regulation on Notification Thresholds specifies the circumstances in which a transaction will amount to a concentration of undertakings by defining the circumstances that will amount to an acquisition of control. The Regulation also specifies three notification thresholds which determine whether a concentration must be notified: two are based on parties' turnover, the third on market share in China.

Elements in the Reviews

Article 27 directs the Anti-Monopoly Bureau (AMB), in reviewing mergers and acquisitions, to consider among other factors the parties' market shares and market power; market concentration, and structure; the "likelihood of elimination or restriction of competition in the relevant market as a result of the proposed concentration"; the effect on consumers and other relevant business operators; and the "effect on the development of the national economy and

[3] *Economic News Daily*, 19 March 2009, p A01.
[4] A Chinese version of the rules can be found at http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm

public interest."

Clearer guidance on the six factors will be provided in implementing rules to be announced in the future. In fact, public consultation of the draft Provisional Rules on Review of Concentrations of Undertakings (the Review Rules) was completed in February 2009. Since the Review Rules have not been formally announced, they do not apply to the Coca Cola case. However, it seems that some of the rules in the Review Rules have already been put into practice.

This language may permit protection of domestic competitors as well as consumers but the provision requiring consideration of the effect "on the development of the national economy and public interest" squarely raises the question of whether merger enforcement will be utilized for macroeconomic or even protectionist goals that would better be kept separate from competition issues.

Impact on M&A of Shipping Companies in China

The decision on Coca-Cola's bid had been eagerly anticipated by other investors as a litmus test of China's attitudes towards overseas investment in the wake of the promulgation of the AML. The MOC's written decision was brief. It did not provide how it reached its decision. Concerns have been voiced that the AML would be used to bar foreign enterprises from key sectors of the economy. The dominant position of Coca Cola and Huiyuan Juice are in two different markets i.e. one is in sparkling soft drink while the other in pure juice. The position in one market cannot be automatically transferred to another market due to many factors e.g. different age groups in sparkling and fruit juice markets, consumer behaviour and different segments in a market. The declaration did not state clearly how the healthy competition of the fruit juice market would be affected by the concentration.

Domestic and foreign investors, who plan to expand their shipping fleet in China through merger or acquisition, naturally wish to clearly understand what the requirements are in the procedure as well as the contents of the AML in China. The provisions of the AML do not specifically define the meaning of 'market'. The AMB is the authority that is vested with the power of interpretation.

In so far as the shipping community is concerned, it is not clear, for instance, whether a merger between a shipping company which owns a tanker fleet, and another shipping company which only owns a fleet of dry bulk carriers, would be considered in the same shipping market. Likewise, how about between handysize and handymax in dry bulk markets? It is not clear how the AMB calculates the turnover of a shipping company because

turnover directly affects the threshold of notification in a merger and acquisition. A shipping company in an M&A may want to modify its business so as to satisfy the requirements of the AML. But the Coca Cola case did not shed much light on the standard of monopoly if shipping agreement or shipping cartel is involved, what benchmark represents abuse of dominant market position in shipping industry by undertakings, or merger of shipping companies that may have the effect of eliminating or restricting competition in shipping.

Conclusion

Monopoly eliminates or restricts competition which will in turn compromise interest of the general public. On the other hand merger and acquisition may assist companies to improve their competitiveness in a free market. It is not easy to strike a balance between anti-monopoly and encouraging competition. Transparency in the whole process of filing a concentration, except disclosing trade secret, is important not only in the case of Coca Cola but also in M&A involving other industries including shipping in the future.

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