Antitrust & International Trade

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CHINA ANTI-MONOPOLY LAW: MOFCOM Approves InBev/AB Merger and Explains Its Processes and Reasoning

In the first major test of China's new merger control regime, the Ministry of Commerce of the People's Republic of China ("MOFCOM") has published its decision approving the proposed InBev/Anheuser-Busch merger (see translation set forth below), and released on its website an interview with Shang Ming, Director of MOFCOM's Anti-Monopoly Bureau, in which he provides details relating to MOFCOM's handling of this case and others. Taken together, these developments indicate that China is moving swiftly to implement its Anti-Monopoly Law ("AML"), which entered into effect on August 1, 2008, and that MOFCOM, which has responsibility for merger notifications and review under the AML, is striving to impart a degree of transparency to its deliberations under the new law. Noteworthy aspects of MOFCOM's InBev/Anheuser-Busch decision include the following:

Timing: The parties made their submission to MOFCOM on September 10, 2008, and pursuant to MOFCOM's requests submitted supplementary materials twice in October. MOFCOM rendered its decision on November 18, 2008. MOFCOM's processing of each step of the case was carried out well within the time frames for which the AML provides. Interestingly, Director Shang notes that the parties had briefed MOFCOM extensively in advance of making their submission and discussed possible mitigation arrangements, which helped facilitate MOFCOM's expeditious handling of the case, and emphasizes that MOFCOM's pre-submission consultation scheme is available to all applicants.

Restrictive Conditions: MOFCOM's decision requires that, going forward, neither InBev nor Anheuser-Busch shall increase their respective shareholdings in Guangzhou Zhujiang Brewery or Tsingtao Brewery without first obtaining MOFCOM approval; that InBev shall inform MOFCOM in the event of a change of control at the InBev level or to any of InBev's controlling shareholders; and that neither InBev nor Anheuser-Busch shall seek to purchase shares in China Resources Snow Breweries or Beijing Yanjing Beer, both major players in China's beer market, without MOFCOM's advance approval. The imposition of these requirements is reminiscent of the US Federal Trade Commission's past practice of imposing "prior notice and approval" post-merger conditions on approved transactions. Director Shang's remarks do not comment on these restrictions other than to say that they were felt to be necessary to ensure that consummation of this merger does not bring about anti-competitive effects in the future. It is interesting to note, though, that the four major players cited in the decision (Tsingtao, China Resources Snow, AB (through its investee companies in China) and Beijing Yanjing) currently account for over 50% of China's annual beer production. Director Shang commented that, like other antitrust enforcers, MOFCOM may resort to either structural or behavioral remedies, or a combination of both, under its Article 29 "conditions" authority.

In his remarks, Director Shang points out that while the InBev decision is the first that MOFCOM's Anti-Monopoly Bureau has published, it is by no means the first they have decided since the AML came into effect: the Bureau, he says, has already accepted 13 cases for processing, and has decided eight. Under Article 30 of the AML, MOFCOM is required to publicly announce decisions that deny approval as well as decisions granting conditional approval, but not decisions granting unconditional approval. One can therefore assume that the eight previously-decided cases that have not been announced were decisions to grant unconditional approvals.

Emerging Development on the Domestic AML Front: On a related note, a domestic PRC company, Tangshan Renren Information Service Co. ("Renren"), recently lodged a complaint against Baidu, the largest Chinese internet search engine, asserting abuse by Baidu of its alleged dominant market share. Although the Renren case is still unfolding, it serves to demonstrate that the AML is not going to be used merely to target foreign multinational corporations, but is likely to have broad implications for Chinese companies as well.

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The Ministry of Commerce of the People's Republic of China ("MOFCOM") has received the anti-monopoly filing materials submitted by InBev N.V./S.A ("INBEV") relating to its acquisition of ANHEUSER-BUSCH COMPANIES INC ("AB"). Following review of said materials, MOFCOM hereby decides as follows:

I. **Review Procedure:** INBEV submitted its anti-monopoly filing materials to MOFCOM on September 10, 2008. INBEV made supplements to said materials on October 17 and October 23, respectively. MOFCOM initiated the review process and issued a Case Establishment Notice on October 27, 2008.

II. **Decision:** Following establishment of the case file, MOFCOM has reviewed the materials submitted, consulted with relevant government agencies, and solicited opinions from relevant beer industry associations, principal domestic manufacturers of beer and raw materials, and distributors of beer products. Based upon Article 28 of the Anti-Monopoly Law, MOFCOM has decided not to prohibit this merger transaction.

III. **Attached Restrictive Conditions:** Given that this merger is very large in scale, and that the new combined enterprise will have a relatively large market share and its competitive strength will be significantly enhanced, in order to reduce the possible anti-competitive impact on China's beer market in the future, MOFCOM has decided to attach restrictive conditions to said decision and, accordingly, requires INBEV to observe the following obligations:

1. INBEV shall not increase AB's current shareholding of 27% of the equity of Tsingtao Brewery Co., Ltd.;
2. INBEV shall promptly notify MOFCOM if the controlling shareholders of INBEV or the shareholders of said controlling shareholders shall change;
3. INBEV shall not increase its current shareholding of 28.56% of the equity of Guangzhou Zhujiang Brewery Group Co., Ltd.; and
4. INBEV shall not seek to hold any shares of China Resources Snow Breweries Co., Ltd. or Beijing Yanjing Brewery Co., Ltd.

In the event of any intended contravention of any of the above covenants, INBEV shall promptly report the matter in question to MOFCOM in advance and shall not implement any such action absent MOFCOM's prior approval.

This decision shall become effective on the date of its publication.

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA

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