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InBev-Anheuser-Busch: China's First Public Merger Decision Under the AML

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On November 18, 2008, the Anti-Monopoly Bureau of the Chinese Ministry of Commerce ("MOFCOM") published the first merger decision under China's Anti-Monopoly Law ("AML") and conditionally approved InBev NV/SA's ("InBev") proposed acquisition of Anheuser-Busch Companies, Inc. ("AB").

Between August 1, 2008, when the AML came into effect, and November 19, 2008, MOFCOM reportedly received more than 10 merger filings, accepted 13 filings, and decided eight of them. The InBev-AB case is the first and, to date, only case in which MOFCOM has issued a public decision since the AML became effective.

The InBev-AB decision, along with recent comments by an enforcement official, provides additional insight into merger review practice under the AML in China:

- **Process:** Consultations with MOFCOM about the information to be included in the filing may be necessary before the 30-day waiting period begins; in addition, early termination of the waiting period is possible.
- **Substantive Analysis:** MOFCOM may use the merger review process to provide substantive views on future acquisition activity by the acquiring entity.
- **Remedies:** MOFCOM may impose prior approval limitations on merging parties' future acquisitions, as the U.S. Federal Trade Commission generally did until 1995.

Summary of the Decision

In a one-page decision, MOFCOM approved the InBev/AB transaction, subject to several conditions. The decision does not provide a detailed analysis of the antitrust issues presented by the transaction, but observes that it is a significant consolidation and that "the competitiveness of the consolidated new enterprise will be increased significantly."

The decision also observes that the transaction will give the parties a large combined market share. In order to "reduce the possible adverse effects on future competition in the Chinese beer market," therefore, MOFCOM required InBev-AB to obtain its consent before implementing any of the following transactions:

- increasing AB's existing 27% equity share in Tsingtao Brewery;
- increasing InBev's existing 28.56% equity share in Zhujiang Brewery; and
- purchasing any stake in China Resources Snow Breweries and Beijing Yanjing Brewery, two of China's largest domestic brewers.

InBev-AB was also directed to inform MOFCOM of any change in its controlling shareholders or "the shareholders of InBev's controlling shareholders."

Key Implications

Filing Procedure and Timing of Review

Merging parties must be prepared to provide extensive information with their merger notification filing, and should begin preparation of filings as soon as is practical.

- The decision underscores the importance of providing sufficiently detailed information with the merger filing to satisfy MOFCOM that it is complete.
 - InBev first submitted its merger notification to MOFCOM on September 10, 2008, but MOFCOM did not accept the initial filing as complete.
 - InBev made supplemental submissions on October 17 and October 23. The official 30-day waiting period began only when MOFCOM issued its notice of acceptance on October 27, 2008.
- MOFCOM has yet to issue specific regulations regarding the information to be provided in merger filings under the AML. The Anti-Monopoly Bureau has referred parties to the pre-AML filing guidelines for acquisitions of domestic enterprises by foreign investors.
 - The guidelines instruct parties to submit extensive information about the relevant markets and the parties involved.
 - The guidelines require notarized and authenticated documents, as well as translations or abstracts of significant portions of a filing company's financial statements, which may take time to prepare.
- The chief of the Anti-Monopoly Bureau emphasized in a recent interview that MOFCOM has the authority to make specific requirements for the notification materials on a case-by-case basis. This suggests that parties are well-advised to engage in consultations with MOFCOM as soon as is practical to avoid material delays with the acceptance of their filing materials.

Early termination of the waiting period in China now appears possible. Despite the delay in the start of the 30-day waiting period, MOFCOM issued its decision on November 18, 2008 – well before the expiration of that period.

Substantive Analysis of Transactions

For transactions that raise substantive issues, MOFCOM is likely to solicit the views of a broad range of industry participants and third parties. The decision reveals that MOFCOM consulted a number of stakeholders as part of its review of the transaction, including relevant government agencies, beer trade associations, domestic beer and raw material producers, and domestic beer distributors.

MOFCOM may use the merger review process to provide substantive views on future acquisition activity by the acquiring party.

- MOFCOM concluded that, as a result of the merger, “the competitiveness of the consolidated new enterprise will be increased significantly.”
- MOFCOM, however, imposed conditions on future acquisitions (or change in shareholder ownership) by InBev, in order to “reduce the possible adverse effects on *future* competition in the Chinese beer market” (emphasis added).

Merger Remedies

As mandated by the AML, MOFCOM will issue public decisions for only those transactions that it prohibits or on which it imposes conditions. Article 30 of the AML requires publication of decisions that prohibit or attach restrictive conditions to mergers.

- The AML does not require MOFCOM to issue a public decision with respect to those transactions that are approved without conditions. In these cases, only the parties will be notified. Whether MOFCOM nevertheless may choose to issue statements explaining its reasons for approving certain transactions remains to be seen.
- The InBev-AB case accordingly represents a significant milestone as the first decision under the AML that attaches affirmative conditions to a merger (presumably other decisions under the AML have involved unconditional approvals).

MOFCOM may impose prior approval limitations on merging parties' future acquisitions, as the U.S. Federal Trade Commission generally did until 1995.

- The remedy in this case, which prohibits InBev from acquiring interests (or additional interests) in specific beer companies, is directed at reducing the likelihood of *future* adverse competitive effects.
- In this regard, the remedy is akin to the policy the U.S. Federal Trade Commission employed

for many years that required merging parties, as a condition to approval of a merger that lessened competition, to seek the FTC's prior approval for any subsequent acquisition in the affected markets for a period of 10 years.

- The FTC's practice differed in that it did not attach a prior approval limitation to transactions it approved without condition. Also, the FTC abandoned this general policy in 1995 in light of its experience that the vast majority of covered transactions would be reportable under the Hart-Scott-Rodino Act.
- As MOFCOM reviews additional transactions under the AML, it may reach the same conclusion as did the FTC. Here, for example, it is likely that a future InBev acquisition of control of any of the beer companies identified in the decision would trigger an obligation to notify and obtain approval from MOFCOM.