

ANTITRUST ALERT

FIRST IMPRESSIONS OF CHINA'S NEW ANTI-MONOPOLY LAW—CAUTION AHEAD: HOW BEER, SOFT DRINK AND IRON ORE MERGERS MAY IMPACT YOUR INVESTMENT IN CHINA

On November 18, 2008, a few months after China's new Anti-Monopoly Law (AML) came into effect, the \$52 billion merger between InBev and Anheuser-Busch, the first of a trio of significant mergers undergoing antitrust review, was decided by the Chinese Ministry of Commerce (MOFCOM), the agency charged with reviewing business concentrations. The conditional approval of the InBev-Anheuser-Busch merger is laced with some potentially interesting nuance, such that this bellwether decision, along with other pending transactions currently before the AML—notably Coca-Cola's acquisition of Huiyuan Juice Group and BHP Billiton's merger with Rio Tinto—may signal to the business community the direction that the Chinese may undertake in reviewing mergers and acquisitions affecting Chinese businesses.

THE INBEV-ANHEUSER-BUSCH MERGER: TOO MUCH COMPETITION?

In deciding not to prohibit the merger, MOFCOM announced that it consulted relevant parties (including beer industry associations, primary Chinese beer producers, producers of beer material and beer distributors). However, MOFCOM also stated that the post-merger company will “hold a high market share and *will be much more competitive* in the Chinese beer market” (emphasis added). In order to minimize the negative impact of the merger on competition, MOFCOM set forth the following restrictions and required InBev to comply with the following obligations—

1. Anheuser-Busch's current 27 percent shareholding percentage in Tsingtao Brewery Co., Ltd. cannot be increased
2. InBev cannot increase its current 28.56 percent shareholding in Zhujiang Brewery Joint-Stock Co., Ltd.
3. InBev must notify MOFCOM in a timely fashion in case of change(s) to the controlling shareholder of InBev, or the shareholder(s) of the controlling shareholder

4. The post-merger company cannot seek to acquire shares of two other Chinese brewers: China Resources Snow Breweries Co., Ltd. or Beijing Yanjing Brewery Co., Ltd.

If InBev breaches any of the above commitments, it must apply to MOFCOM in advance, and it shall not implement any change to its commitment before receiving approval from MOFCOM.

MOFCOM has appeared to attach considerable significance to the merged firm's minority interests in its domestic competitors. Implicit in MOFCOM's decision is the acknowledgment that domestic beer competitors will still constrain the merged entity competitively, and its limitation on InBev increasing its ownership share in domestic competitors (points 1 and 2) *might* be based on MOFCOM's belief that these partially owned domestic competitors would compete significantly with InBev following the transaction, despite InBev's ownership interest in them. Thus, its express prohibition on InBev expanding its current minority interest holdings or acquiring other competitors could be consistent with (although clearly more regulatory than) the approach taken in the United States and the European Union. MOFCOM's explanation for the relief, however, has the hallmark of a preventative measure designed to protect Chinese competitors, rather than competition in Chinese beer markets. Explicitly written into the AML as one of the factors to be taken into consideration when reviewing a business concentration is "the impact of the concentration of business operators on the development of national economy."

MOFCOM's statement that the merged entity will be "much more competitive in the market," if interpreted literally, may portend a potential significant analytical and doctrinal divergence in antitrust that has not been evoked since the split decision between the EU and the United States over the proposed merger of GE and Honeywell in 2001. In GE-Honeywell, the United States cleared the deal while the EU prohibited it, resulting in a significant divergence of analysis. The EU found that combining the two companies' activities would have resulted in the creation of dominant positions in various markets, and that such integration would have enabled the merged entity to leverage the respective market power of the two companies into the products of one another. This would have had the effect of harming competitors. While the InBev-Anheuser-Busch and GE-Honeywell deals can be distinguished factually, and the antitrust issues differ considerably, their point of commonality is the agencies' focus on domestic competitors. This issue will be something to watch as MOFCOM weighs in on future deals.

The relief obtained in the InBev transaction also warrants consideration. Even if MOFCOM's decision that the merged entity would be "more competitive" is not an accurate reflection of the agency's reasoning, as a MOFCOM official explained in an interview, the decision to impose conditions on an InBev transaction that it did not find anticompetitive was made in order to prevent the creation of a possibly anticompetitive structure. The fact that, despite not having found the deal anticompetitive, it still decided to obtain relief is evidence of an inclination to regulate and apparently is weighed against the possibility that future deals might be anticompetitive.

OTHER DEALS TO WATCH

Also currently pending is Coca-Cola's proposed \$2.4 billion takeover of China's Huiyuan Juice Group, and BHP Billiton's blockbuster \$140 billion acquisition of Rio Tinto. Given the outcome in the InBev-Anheuser-Busch deal, the pending deals will continue to test and refine the application of a newly enacted

merger control regime and will hopefully enlighten the business community regarding how the Chinese authorities are going to manage the formal merger clearance process in practice.

THE ACQUISITION OF A DOMESTIC CHAMPION

Coca-Cola/Huiyuan Juice Group: Coca-Cola's \$2.4 billion acquisition involves a very popular Chinese juice company, and it is estimated that the two companies together would control almost 37 percent of China's juice drink market. Although a significant deal in the eyes of the Chinese insofar as it involves well-known juice products, the deal does not involve acquisitions of critical domestic infrastructure or implicate national security in any way, which are some areas of the new law on which antitrust practitioners are focused. It is unclear whether domestic competitors will play a role in trying to force divestitures or otherwise affect the approval process. According to the latest report, MOFCOM does not consider the filing documents submitted by Coca-Cola to be complete as required by the AML, so the timetable is unclear regarding when the MOFCOM review of this transaction will be finished.

THE FOREIGN-TO-FOREIGN DEAL WITH CHINESE DOMESTIC EFFECTS

BHP Billiton Ltd./Rio Tinto: the \$140 billion mega-merger of the world's two mining giants is currently under MOFCOM review. The BHP-Rio Tinto deal is likely to have significant Chinese domestic implications, given Chinese industry's appetite for iron ore, a key product of the merging parties. Approximately 40 percent of the iron ore that Chinese companies import is from BHP Billiton and Rio Tinto. Although the assets being acquired by BHP are not purely domestic, the fact that China is a significant customer for iron ore could force the Chinese to adopt a more nuanced approach in reviewing the deal or even to tie it up for an extended period of time.

Although BHP-Rio Tinto doesn't harm domestic Chinese competition, it could hurt Chinese customers, and there is increasing opposition to the deal from competition authorities across the globe, most recently from the EU, which on November 6, 2008, issued a formal statement of objections to the transaction. A relieved China may follow the EU's lead.

It has been reported that representatives of China Iron and Steel Association (CISA), which represents significant iron ore customers, have openly opposed the deal, expressing concern of overconcentration and monopoly in the iron ore sector. It seems likely that the Chinese authorities would not turn a deaf ear to domestic customer complaints, and this has been proven to be true when they acted to protect domestic competitors in the InBev-Anheuser-Busch transaction.

CONCLUSION: FOREIGN INVESTORS IN CHINA WILL BE IMPACTED BY THE AML

As China continues to attract foreign investment, investors must be sensitive to anti-monopoly issues as they are enforced under this new legal regime. The InBev-Anheuser-Busch deal, Coca-Cola-Huiyuan Juice Group and BHP-Rio Tinto highlight the potential significance of this new law to the foreign business community, as well as the unclear doctrinal approach that might guide that review. Additionally, the results indicate the potential for a regulatory outcome that controls future investment activity regardless of whether or not the transaction under review is anticompetitive.

Understandably, many of the new AML's provisions employ broad language and will be supplemented by various regulations yet to be implemented, as well as by agency interpretations and enforcement decisions. The uncertain trajectory of the Chinese approach under the AML, therefore, underscores for foreign investors who have business operations in China or who are planning to invest there the importance of securing effective and knowledgeable antitrust representation.

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