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The Effect of the Anti-Monopoly Law in China: A Practical Case

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With the enactment of the Anti-Monopoly Law, China shows its interest on taking a greater control over M&A and other activities under the umbrella of "concentration of operators." While it spells out a two-tier examination process, much of its application remains to be explored. Caroline Berube and Shelly Chen unveil the mystery by examining a mega acquisition deal between two of the largest brewers in the world.

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Introduction

For the past 18 years, the People's Republic of China (the "PRC" or "China") is believed to have been the leading developing country in terms of drawing foreign investment. Numerous multinationals that entered China in the late 1980s and early 1990s have since acquired a major market presence through advanced technology, efficient scales of production and heavy capital investment. Some of the market share was gained at the expense of fair competition; however, for fear of discouraging the much-needed inflow of foreign capital, the PRC government was hesitant to address the negative aspects or ramification of foreign investment, including the possible rise of market monopolies.

However, in the past a few years, the Chinese government appears to have developed a growing concern for the viability of domestic industries, and has taken the initiative to bring order to unruly markets by introducing tighter anti-monopoly laws. The following article provides an overview of anti-monopoly laws in China and their implications, and a relevant case study on a recent merger control case regarding the acquisition of Anheuser-Busch Companies by InBev.

Overview of Chinese Anti-monopoly Laws

On 30 August 2007, the *Anti-Monopoly Law* ("*中华人民共和国反垄断法*," the "AML") was finally enacted by the National People's Congress after around thirteen (13) years of drafting and heated debate. This law came into effect on 1 August 2008, soon after which the PRC government also issued the AML implementation rules, including the *Guidelines on the Reporting of Concentrations of Business Operators* ("*关於外国投资者并购境内企业反垄断申报指南*", February 2009) and the *Guidelines on the Definition of Relevant Markets* ("*关於相关市场界定的指南*", May 2009).

A. "Concentration of Operators" Covering More Than M&A

A merger, acquisition or buyout is considered to give effect to a "concentration of business" where a company, through the transaction, obtains the ability to control, or have a decisive influence on, other business operators through contractual or other means.[1] This provision appears to be broad and vague enough to allow the Chinese government to decide whether to approve or deny each given transaction without heavy focus on the specific details of the matter. The Chinese government may even consider the establishment of a joint venture as a concentration of business and therefore, subject such to the merger control review under the AML (as explained below).

B. Two-phase Examination

When an imminent transaction is likely to give rise to a "concentration of business" as explained above, the purchasing party should file details on the transaction (a merger-control filing) to the Anti-Monopoly Bureau as operated by the Ministry of Commerce ("MOC").[2] The MOC will decide, within thirty (30) days of notification to all parties involved (both buyer and seller), whether to conduct a further examination on the transaction. The business operators may not proceed with the transaction until a decision is made or the thirty (30) day limit expires.

The second phase of examination is a full-scale review by the MOC who will then make the final decision whether or not to prohibit or restrict the transaction.[3] The examination should not take more than ninety (90) days. However, if necessary, the MOC can extend the review period, but in any event, the extension may not exceed sixty (60) days.[4]

As a result, the maximum examination period by the MOC in the second phase is one hundred and fifty (150) days. During this examination, the MOC will look into every aspect of the intended transaction. The companies in question do not have to place a freeze on their relevant activities. They are given a chance to adjust their relevant strategies and also to present any arguments to the Anti-Monopoly Bureau in favour of the transaction.

C. Penalties and Remedies

The AML provides for administrative and civil penalties, which may be applied separately or together towards the business operators who violate the control rules.

The buying party has an obligation to submit a merger-control filing to the Anti-Monopoly Bureau prior to the closing of the transaction. Should a

Photo: John Kerher

merger-control filing not be filed, the company faces a reversal of the transaction and a fine of up to RMB 500,000 (approximately USD 73,000).[5]

There is a leniency provision in which voluntary reporting of monopoly activity may lead to a mitigation or exemption of penalty.[6] Such voluntary reporting relates to reporting made after the transaction has occurred.

Case Study: Acquisition of Anheuser-Busch Companies by InBev

A. Background

On 13 July 2008, InBev announced its proposed acquisition of all equity shares in Anheuser-Busch Companies ("AB"). Both are among the world's largest brewing companies. A merger-control filing was thereafter submitted to the Anti-Monopoly Bureau of the MOC on 10 September 2008. InBev and AB filed supplementary filings on October 17th and 23rd, at the request of the MOC and the review process was not commenced until 27 October 2008.

B. The Bureau's Decision

After a full-scale review and investigation, the Anti-Monopoly Bureau decided that, since the acquisition of AB by InBev would not have the effect of eliminating and restricting competition in the national or provincial market, nor to the product market or the competitive structure of the Chinese beer market, it would not prohibit the transaction under the AML.[7]

However, given that the InBev-AB transaction is a large-scale acquisition, the newly-formed company will become more competitive and therefore more capable to significantly increase its market share after the InBev-AB transaction. In order to reduce the possible negative influence on future competition within the Chinese beer market, the Anti-Monopoly Bureau decided to permit the transaction, but with the following restrictive conditions under Art 30 of the AML:

1. AB will not increase its present share proportion of 27 per cent in Tsingtao Brewery ("青岛啤酒股份有限公司"). Subsequently, in early 2009, AB sold most of its share in the company to Asahi Breweries and now only holds 7 per cent;
2. InBev must inform the MOC of any changes concerning InBev's controlling shareholders or its controlling shareholders' shareholders;
3. InBev shall not increase its present share proportion of 28.56 per cent in Guangzhou Zhujiang Brewery Group Co, Ltd ("广州珠江啤酒集团有限公司"); and
4. InBev shall not seek to hold any shares of China Resources Snow Breweries ("华润雪花啤酒有限公司") or Beijing Yanjing Brewery ("北京燕京啤酒股份有限公司").

Conclusion

As mentioned above, the ALM affords considerable latitude to the government in the realm of merger control, especially when fair market competition is potentially jeopardised by concentration of business of foreign enterprises. Although the advent of the AML is welcomed and a positive step toward a more transparent legal regime, the merger control process is still uncertain, to some extent, in terms of its application. Some have argued that the broad scope of the powers given under the AML will lead to decisions by the Chinese authorities that are without proper basis or respect to the rationale behind such law. Furthermore, we believe that the broad definition of a "concentration of business" may confuse some parties as to whether they are obligated to file a merger-control filing.

Notes:

1 Article 20 of the AML.
2 Article 25 of the AML.
3 Article 26 of the AML.
4 Article 27 of the AML.
5 Article 48 of the AML.
6 Article 46 of the AML.
7 Article 28 of the AML.