



JONES DAY  
**COMMENTARY**

## CHINA'S ANTITRUST AGENCY PROVIDES INSIGHTS INTO THE MERGER REVIEW PROCESS UNDER THE NEW ANTI-MONOPOLY LAW

The China Ministry of Commerce ("MOFCOM"), which serves as the antitrust authority in charge of merger control under the new Anti-Monopoly Law ("AML"),<sup>1</sup> announced on November 18, 2008, its conditional approval of the acquisition of Anheuser-Busch Companies Inc. by InBev N.V./S.A. ("InBev"). This landmark decision provides a window into MOFCOM's developing practices and procedures for merger reviews in the new antitrust regime.

Since the new AML came into effect on August 1, 2008, MOFCOM has received many antitrust notifications, 13 of which have been formally accepted and eight of which have been decided, including the InBev decision. As the first conditional approval or rejection, the InBev decision is the only one that has been publicly announced. To date, MOFCOM has promulgated no implementing rules or guidelines establishing or explaining the procedures and substantive approach

1. Article 10 of the AML provides that the Anti-Monopoly Enforcement Authority ("AMEA"), designated by the State Council, is responsible for the enforcement of the AML. Pursuant to the State Council Restructuring Plan for SAIC ("State Council Plan"), published in March 2008 after the 11th Session of the National People's Congress, three ministries—MOFCOM, the State Administration for Industry and Commerce ("SAIC"), and the National Development and Reform Commission ("NDRC")—were empowered to establish bureaus to carry out specified AML enforcement functions, with MOFCOM responsible for merger reviews. MOFCOM's Anti-Monopoly Bureau was formally established in September 2008. Article 9 of the AML provides for the establishment by the State Council of another body, the Anti-Monopoly Committee ("AMC"), which is authorized to develop competition policy, draft and publish anti-monopoly guidelines, and coordinate the anti-monopoly enforcement activities of the agencies that comprise the AMEA. The AMC was officially established on August 1, 2008, the day the AML became effective. Vice Premier Wang Qishang was appointed to head the AMC in September, 2008.

that will be applied in merger reviews, although the State Council did promulgate the Notification Thresholds Regulation a few days after the AML became effective.<sup>2</sup> It was therefore a welcome development that, after the announcements of the decision in the InBev matter, MOFCOM published on its web site an “Anti-Monopoly Review Q&A,”<sup>3</sup> which provides insights of Mr. Shang Ming, Director General of MOFCOM’s Anti-Monopoly Bureau (“AMB”), into MOFCOM’s ongoing formulation of its policies and practices. The following seeks to capture the substance of the MOFCOM Q&A document and comments on the insights provided by the Q&A.

## WHEN WILL THE FILING BE ACCEPTED AS “COMPLETE”?

Under the AML, first-stage review may take up to 30 days from the date MOFCOM accepts the filing as “complete.” The date that MOFCOM deems the filing to be complete is therefore critical for timing. Article 23 of the AML provides that the notifying party shall submit the following documents and information to the Anti-Monopoly Enforcement Authority under the State Council (“AMEA,” *i.e.*, MOFCOM in merger control cases):

1. The notification;
2. An explanation of the effects that the concentration may have on competition in the relevant market;
3. The concentration agreement;
4. The audited financial reports of the undertakings involved in the concentration for the previous fiscal year; and
5. Other information requested by the AMEA.

The Anti-Monopoly Review Q&A notes that every transaction has its own unique features and that consequently it is difficult to provide a complete list of materials that will be

appropriate for all transactions. Therefore, the AMB will make specific requests for filing materials based on the potential effects on competition presented in each case. MOFCOM believes that this approach is authorized by paragraph 5 of Article 23, which states that undertakings that submit a notification shall provide other information required by the AMEA.

This process makes the standard for “completeness” highly subjective and determined solely in MOFCOM’s discretion, rendering the Anti-Monopoly review timetable highly unpredictable. Parties may need to supplement their filings to address repeated requests for additional information before MOFCOM accepts the filing as complete and starts the clock on the 30-day initial waiting period. The InBev case itself provides a useful example. The parties first submitted their filing on September 10, and they supplemented their submission twice in response to MOFCOM’s requests for additional information. The filing was finally accepted on October 27. Interestingly, the pre-filing stage took more than seven weeks, but the decision was released only a little more than two weeks after formal “acceptance.”

MOFCOM is not required to publish notice of its acceptances of merger filings and may simply notify parties in a less formal way (including verbal notification) when the filing is accepted as complete and the 30-day waiting period starts. According to the Anti-Monopoly Review Q&A, MOFCOM is currently drafting detailed rules regarding the documents and materials that must be submitted for merger review. Before those new rules are promulgated, parties must follow the Anti-Monopoly Filing Guidelines previously published by MOFCOM under the Foreign M&A Regulation. The merger control rules in the Foreign M&A Regulation appear to have been superseded by those in the new AML, although there has been no express repeal or formal statement that those old rules have been supplanted.

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2. Regulation of the State Council on Notification Thresholds for Concentration of Undertakings, adopted by Decree of the State Council of the People’s Republic of China on August 1, 2008, and announced on August 3, 2008 (“Notification Thresholds Regulation”). Regulations (*fagui*), such as the Notification Thresholds Regulation, are issued by the State Council, are binding on Chinese courts, and are a basis for civil obligations, unlike rules (*guizhang*) that are enacted by agencies other than the State Council.

3. Q&A Regarding Issues in Anti-Monopoly Reviews of Concentrations of Undertakings with Mr. Shang Ming, Director General of Anti-Monopoly Bureau of MOFCOM, available in Chinese at <http://www.mofcom.gov.cn/aarticle/ae/jai/200811/20081105906777.html>

## HOW WILL MOFCOM CONDUCT ITS REVIEW?

Article 27 of the AML lists the factors that the enforcement authority shall consider for merger review, which include:

1. The market share of the undertakings involved in the relevant market and their ability to control the market;
2. The degree of market concentration in the relevant market;
3. The effect of the concentration on market entry and progress of technology;
4. The effect of the concentration on consumers and other undertakings;
5. The effect of the concentration on national economic development; and
6. Other factors affecting market competition as determined by the Anti-Monopoly Enforcement Authority under the State Council.

Unfortunately, MOFCOM's decision not to prohibit the InBev transaction does not include any competition analysis or reasoning. It merely indicates in a conclusory manner that MOFCOM conducted a full review of all the factors set out in the AML, focusing especially on the geographic market, product market, and competitive conditions in the relevant market. Although an Economic Division has been created under the AMB, it is still unknown to what extent economic evidence is permitted or relied upon in MOFCOM's merger analysis.

The Anti-Monopoly Review Q&A provides some insights into MOFCOM's substantive approach. It explains that in the InBev deal, for example, MOFCOM conducted many meetings, seminars, and hearings to solicit opinions from other relevant government ministries, local governments, beer trade associations, major domestic beer manufacturers, raw material suppliers, and beer distributors. It also indicates that MOFCOM was able to complete its review of the InBev transaction efficiently and promptly because it made careful study of key issues even before the filing was formally accepted and had developed solutions to offset any adverse effects

on competition. In some cases, MOFCOM might not be able to find a reconciled solution agreeable for every stakeholder. For example, the filing for The Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited was not accepted as complete until early December, despite the submission of filings starting in early September.

## WHAT KINDS OF REMEDIES ARE AVAILABLE?

After its review, MOFCOM may issue a decision to prohibit or not to prohibit the transaction, the latter of which includes conditional or unconditional approval. Under Article 30 of the AML, MOFCOM must publish any decisions to prohibit a transaction or to attach conditions to any approval of deal. Because the other seven cases decided to date were unconditional approvals, only the InBev decision has been published.

The Anti-Monopoly Review Q&A indicates that MOFCOM may impose three types of restrictive conditions on a transaction: (1) structural remedies, *i.e.*, requirements that the parties divest specified assets; (2) behavioral remedies, *i.e.*, prohibitions of certain abusive behaviors that will or may eliminate or restrict competition; and (3) combinations of structural and behavioral remedies.<sup>4</sup>

MOFCOM conditioned its approval of the InBev transaction on four commitments, namely that InBev shall: (1) not increase Anheuser-Busch's existing 27 percent share in Tsingtao Brewery Co., Ltd. (a domestic competitor); (2) report to MOFCOM any change in its controlling shareholders or the shareholders of the controlling shareholders; (3) not increase InBev's existing 28.56 percent share in the Zhujiang Brewery Co., Ltd. (another domestic competitor); and (4) not seek to acquire stakes in China Resources Snow Brewery (China) Co., Ltd. or Beijing Yanjing Brewery Co., Ltd. (two additional domestic competitors). Further, InBev is required to report to MOFCOM in advance for approval of any violation of any of the above commitments.<sup>5</sup>

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4. Article 29 of the AML provides that, where a concentration is approved, restrictive conditions may be attached to the implementation of the concentration.

5. MOFCOM Announcement No. 95 [2008], available in Chinese at <http://fdj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html>

The Anti-Monopoly Review Q&A concludes as follows:

[T]he results of the [InBev] review show that this transaction does not result in eliminating or restricting effect on competition in the beer market in China; therefore MOFCOM decided not to prohibit the transaction. However, in order to prevent the formation of a structure that impairs competition after the transaction, MOFCOM imposed necessary restrictive conditions.

It appears that MOFCOM was more concerned about the effects of potential future transactions, increasing existing shareholding, or acquiring shares in other beer manufacturers, rather than the effects of the proposed transaction. The conditions imposed may be intended to address, and alert market participants to, MOFCOM's concern about further concentration affecting local manufacturers in this industry.

Although MOFCOM has not published a full analysis of its decisions and remedies, the published InBev announcement and the subsequent Anti-Monopoly Review Q&A citing the InBev case reflect MOFCOM's efforts to increase transparency. However, MOFCOM's broad discretionary powers under the vague language of the AML, without MOFCOM rules or State Council regulations that establish clear procedures and standards, continue to make antitrust clearance in China relatively difficult to predict accurately.

## WHAT ARE THE REQUIREMENTS FOR ADMINISTRATIVE RECONSIDERATION OF, AND COURT CHALLENGES TO, MOFCOM DECISIONS?

Though MOFCOM's Q&A did not address the subject, pursuant to Article 53 of the AML, merger decisions must go through "administrative reconsideration" before an

administrative lawsuit challenging a MOFCOM merger review decision can be filed in court.<sup>6</sup> InBev's agreement to the conditions set out in MOFCOM's decision suggests it is unlikely to challenge the decision (and that it would be less likely to succeed in any challenge). It should be noted that it is not clear under the AML whether other interested parties have the right to raise objections or file a petition for "administrative reconsideration." According to the Chinese Administrative Reconsideration Law, the parties themselves have 60 days from the date of a merger decision to petition for an administrative reconsideration. If the parties are not satisfied with the reconsideration decision, they may then file an administrative suit with the courts within 15 days of that decision.

Further, MOFCOM's failure to publish a detailed decision in the InBev case could make it more difficult for the parties or potentially interested parties (assuming they have standing) to challenge the decision. However, in another "Q&A" document published by the Supreme People's Court ("SPC") in early November, the SPC indicated that, in judicial reviews of Anti-Monopoly decisions, the defendant (MOFCOM or one of the other agencies within the AMEA<sup>7</sup>) bears the burden of proof to establish the substantive grounds and reasonableness of its decision.

## CONCLUSION

The MOFCOM and SPC Q&A documents provide useful guidance on issues that are critical to companies seeking to understand and comply with the Anti-Monopoly Law. Formal regulations, rules, and guidelines are still needed to develop consistent procedures and predictable substantive analysis of antitrust issues.

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6. The AML does not require such administrative reconsideration as a prerequisite for suits challenging Anti-Monopoly Enforcement Authority decisions in nonmerger cases, such as cases involving monopoly agreements or abuses of a dominant market position. Such administrative reviews of agency decisions, as well as lawsuits alleging abuses of administrative powers under Chapter V of the AML are within the jurisdiction of the Administrative Disputes Tribunal and are conducted in accordance with the Administrative Litigation Law. In contrast, pursuant to the Supreme People's Court ("SPC") Notice on Study and Adjudication of AML Disputes, published by the SPC on July 28, 2008, other AML lawsuits, filed pursuant to the civil liability provisions of Article 50 of the AML, are classified as causes of action within the broad category of "IP Disputes" and will be handled by the special Intellectual Property Tribunals established within certain People's Courts.

7. In addition to MOFCOM, which enforces the merger and acquisition, or "concentration," provisions of the AML, the AMEA comprises the Anti-Monopoly enforcement offices of the SAIC, which enforces the abuse of dominance provisions, and the NDRC, which enforces the monopoly agreement provisions.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**H. Stephen Harris Jr.**

1.404.581.8197

[sharris@jonesday.com](mailto:sharris@jonesday.com)

**Peter J. Wang**

86.21.2201.8040

[pjwang@jonesday.com](mailto:pjwang@jonesday.com)

**Yizhe Zhang**

86.10.5866.1111

[yzhang@jonesday.com](mailto:yzhang@jonesday.com)

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