

反垄断法热点问题

关于商务部近期附条件批准百威英博收购南非米勒酿酒公司的决定 ——与美国和欧盟反垄断批准决定的比较

2016年7月29日,中华人民共和国商务部(以下简称“**商务部**”)附条件批准了百威英博(ABI)收购南非米勒酿酒公司(SABMiller,以下简称“**南非米勒**”)的交易(以下简称“**本次交易**”)。商务部所附条件为:南非米勒需要将其在华润雪花啤酒有限公司(以下简称“**华润雪花**”)中的全部49%股权出售给华润啤酒(集团)有限公司(以下简称“**华润啤酒**”)。这是商务部第二次在其经营者集中审查中采用“先行修正”的方式附条件批准某项交易。

南非米勒于1994年进入中国市场,与华润集团设立合资企业雪花啤酒。除了华润雪花中的49%股权外,南非米勒还在中国出售少量的麦芽酒。商务部的决定实质上是要求百威英博剥离南非米勒的几乎全部中国业务。¹

作为背景信息,商务部此前曾对百威英博的其他交易做过经营者集中审查:早在2008年,商务部曾发布公告附条件批准了英博集团公司(INBEV N.V./S.A.,以下简称“**英博**”)

收购AB公司(ANHEUSER-BUSCH COMPANIES INC.)的交易。除其他一些附加条件外,英博被禁止(i)增加其在珠江啤酒的持股比例,或(ii)寻求持有华润雪花的股份。²2015年8月25日,商务部批准了百威英博增持其在珠江啤酒中的股份,即从25.62%增持到29.99%。商务部经审查认为该增持不会改变珠江啤酒的控制权结构。然而,对于收购南非米勒的本次交易,商务部不允许百威英博通过收购南非米勒而持有华润雪花中的任何股权。

在商务部对本次交易做出决定之前,欧盟委员会(以下简称“**欧委会**”)和美国司法部均通过附加类似的结构性救济措施批准了本次交易。为了尽早通过经营者集中审查,百威英博针对各主要司法管辖区均提供了有力的解决方案。在反垄断执法机构方面,美国司法部在其发布的公告中称,其与多个司法管辖区的执法机构就本案开展了国际合作,其中包括欧盟和中国。³

¹ 参见商务部《关于附加限制性条件批准百威英博啤酒集团收购英国南非米勒酿酒公司股权案经营者集中反垄断审查决定的公告》, <http://fldj.mofcom.gov.cn/article/ztzx/201607/20160701369044.shtml>。

² 参见商务部2008年就英博集团公司收购AB公司的公告, <http://fldj.mofcom.gov.cn/article/ztzx/200811/20081105899216.shtml>。当时,英博持有珠江啤酒28.56%股权。

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³ 参见美国司法部公告 <https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer>。

下面的表格列举了中国、欧盟和美国三大执法机构的决定之间的某些相似性：

	中国	美国 ⁴	欧盟 ⁵
市场力量	<p>华润雪花（南非米勒持股 49%）和百威英博分别为第一和第三大竞争者，合并市场份额为 43%。</p> <p>在大众化啤酒市场，合计市场份额超过 70% 的省份有 7 个，此外，合计市场份额超过 50% 的省份有 4 个；</p> <p>在中高档啤酒市场，合计市场份额超过 70% 的省份有 5 个，此外，合计市场份额超过 50% 的省份有 8 个。</p>	<p>百威英博和 MillerCoors（南非米勒持股 58%）分别为第一和第二大竞争者，合并市场份额为 72%。</p> <p>在超过 15 个标准都市统计区（Metropolitan Statistical Areas），合计市场份额超过了 70%。</p>	<p>百威英博和南非米勒分别为第三和第四大竞争者。</p> <p>百威英博在比利时和卢森堡有较强的市场地位。南非米勒则在波兰、捷克、斯洛伐克、匈牙利和罗马尼亚有较强的市场地位。</p>
剥离的资产	<p>南非米勒在华润雪花中所持有的 49% 股权。</p>	<p>南非米勒的整个美国业务 - 包括南非米勒在 MillerCoors 中的股权，在美国酿造和销售南非米勒啤酒的权利，以及在全球范围内对米勒啤酒品牌所享有的权利。</p>	<p>基本上涵盖了南非米勒在欧盟的全部啤酒业务，包括：（资产包 1）南非米勒在法国，意大利，荷兰和英国的全部业务；和（资产包 2）南非米勒在捷克共和国，匈牙利，波兰，罗马尼亚和斯洛伐克的业务。</p>

⁴ 参见美国司法部的指控书，
<https://www.justice.gov/opa/file/877506/download>.

⁵ 参见欧委会公告，http://europa.eu/rapid/press-release_IP-16-1900_en.htm

	中国	美国 ⁴	欧盟 ⁵
对未来业务扩张的限制	根据商务部在 2008 年对英博收购 AB 公司所作的附条件决定，百威英博未经商务部批准不得收购青岛啤酒、珠江啤酒或华润雪花中的任何股权。	美国司法部的决定要求百威英博未经批准不得收购任何啤酒经销商或酿酒厂，包括未达美国 HSR 申报标准的收购。	无特别限制。

此外，商务部的决定中能够体现出某些与美国或欧盟审查机构的决定之间的区别，如市场定义，对经销商可能造成的危害的关注，第一次采取“先行修正”措施以及对华润啤酒收购华润雪花的经营者的集中审查。

一、市场定义

在以往案例中，欧委会通常认为，啤酒的相关产品市场应当区分即时消费类（on-trade）（提供给酒吧，俱乐部和餐馆的啤酒）和零售类（off-trade）（提供给商店和其他零售网点的啤酒）。地域市场一般为各欧盟成员国。在某些情况下，由于案件需要，欧委会还考察了某项交易是否会在更窄的产品市场——高端啤酒市场产生反竞争效果。⁶在美国司法部就本次交易所做的决定中，美国司法部考察了各标准都市统计区这一地域市场。虽然美国司法部在竞争分析中提到了进一步将啤酒市场划分为“低端、中端、高端”三类的可能性，但其只列举了各标准都市统计区内，在较大的产品市场（即包括各个不同价格水平的啤酒市场）中的合并市场份额。在商务部的决定中，商务部将啤酒市场区分为“大众”及“中高档”两类，并以每 500 毫升售价人民币 5 元为基准（约每 500 毫升售价 0.75 美元）。商务部在审查本次

交易在各省份的合计市场份额时，采用的是较窄的大众啤酒和中高档啤酒市场的数据。这可能会导致各省地域市场中得出更高的合计市场份额。此外，不同于欧美审查机构，商务部更倾向于就相关市场做出精确界定，而不是模糊或开放的市场界定。因此，商务部就本次交易也做出了精确的相关市场界定，并根据该相关市场计算出了双方的合计市场份额。

二、对经销商的特别关注

商务部的审查决定在竞争分析部分阐述了四方面的考虑因素，包括：（1）交易将进一步提高百威英博的市场控制力；（2）交易将减少两个紧密竞争者之间的竞争；（3）交易将提高相关市场的进入壁垒；（4）交易将损害下游经销商利益。与美国司法部和欧委会不同，商务部的决定中侧重分析了交易对市场结构（市场份额）和下游经销商的影响。而美国司法部和欧委会则主要分析了本次交易在已经非常透明的啤酒市场上进一步推动价格上涨的可能性。商务部审查发现中国大多数啤酒经销商规模较小、经销范围有限，对啤酒生产商的议价能力不强。交易完成后，由于百威英博和华润雪花之间的竞争减少，经销商谈判地位将更弱，可能获得的销售激励减少，经销商

⁶ 参见“Commission clears acquisition of Beck's by Interbrew”，http://europa.eu/rapid/press-release_IP-01-1499_en.htm。

利益将受到损害。

三、采取“先行修正”措施以及对华润啤酒收购华润雪花 49%股权的经营者集中审查

先行修正是在经营者集中审查中可能采取的一种结构救济，当事方可以重组交易或在交易获批实施之前与买家签署出售剥离资产的有关协议。在美国，美国司法部相对另一反垄断执法机构——联邦贸易委员会而言，更频繁地采用了先行修正措施。如果当事方提出的先行修正措施能够消除美国司法部的竞争关注，美国司法部将不需要发布附条件批准的同意令或将案件提交到法院。在欧盟，如果欧委会批准了先行修正措施，欧委会仍然会发布一个包含该救济措施的附条件批准决定。⁷ 商务部在本次交易的审查决定中采用了“先行修正”措施。商务部的模式跟欧盟类似，即在接受当事方提出的先行修正方案之后，发布包含该方案的附条件批准决定。华润啤酒收购华润雪花 49%股权的协议是在商务部正式确认申报文件完整性并受理本次申报之前签署的。

欧委会对先行修正方案予以认可后，将以此为条件批准经营者集中，且不再对剥离资产的买

方进行重复审查。而在本次交易中，华润啤酒就其计划收购华润雪花 49%股权的交易向商务部另行提交了经营者集中申报。商务部在审查本次交易的同时也在审查华润啤酒提交的申报。既然商务部认可了华润啤酒收购华润雪花作为批准本次交易的附加条件，表明商务部对华润啤酒的拟议收购没有竞争关注。因此，可以预计商务部将无条件批准华润啤酒收购华润雪花 49%股权的经营者集中申报。

商务部在其附条件的批准决定中第一次采取“先行修正”是其于 2015 年 11 月 25 日附条件批准的恩智浦收购飞思卡尔的交易。恩智浦在商务部初步审查阶段提出剥离方案，但直到进一步审查期限的延长期才与买方正式签署出售该剥离资产的协议。该决定还规定剥离业务交割之前，恩智浦与飞思卡尔之间的股权收购交易不得实施。⁸ 商务部在近期公布的审查决定中越来越多地采用“先行修正”措施。这体现出商务部更加自如地使用不同类型的救济措施，同时也体现出商务部认为“先行修正”是确保相关结构性救济措施顺利实施的有力手段。

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⁷ 参见《先行修正和买家前置规则比较研究》，作者叶军，<http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=92749>。

⁸ 参见商务部附加限制性条件批准恩智浦收购飞思卡尔的交易的决定，<http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml>

Anti-Monopoly

MOFCOM's Recent Decision on Anheuser-Busch InBev's Acquisition of SABMiller – A comparison of the US and the EU Decision

On July 29, the PRC Ministry of Commerce (“MOFCOM”) approved the Anheuser-Busch InBev (ABI)’s acquisition of SABMiller (“Transaction”) conditional on SABMiller’s divestiture of its 49% stake in China Resources Snow Breweries Co., Ltd (“CR Snow”) to China Resources Beer (Holdings) Company Limited (“CR Beer”). This is the second time that MOFCOM has adopted the “fix-it-first” solution in its decision.

SABMiller entered the Chinese market in the year of 1994 by forming the joint venture CR Snow with CR Beer. Besides holding stake in CR Snow, SABMiller also sells a small amount of malt liquor. The MOFCOM’s decision requires ABI to sell essentially the entire SABMiller beer business in China.¹

To better understand MOFCOM’s decision, it is essential to understand the terms of MOFCOM’s 2008 decision on InBev’s acquisition of Anheuser-Busch. Conditions included prohibiting ABI from (i) increasing its shareholdings in Zhujiang Brewer, and (ii) acquiring any shareholdings in CR Snow². On August 25, 2015, the MOFCOM approved ABI’s shareholding increase in Zhujiang Brewer from 25.62% to 29.99% finding that such shareholding increase would not change the controlling structure of Zhujiang Brewer. Nevertheless, with respect to this Transaction, the MOFCOM refused to allow ABI to acquire any shareholdings in CR Snow originally held by SABMiller.

Before MOFCOM’s decision, the EU

¹ See MOFCOM’s decision on ABI’s acquisition of SABMiller, available at <http://fldj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml>.

² See MOFCOM’s decision on InBev’s acquisition of Anheuser Busch in 2008, available at <http://fldj.mofcom.gov.cn/article/ztxx/200811/20081105899216.shtml>. At that time, ABI’s shareholdings in Zhujiang Brewer was 28.56%.

Commission and the US Department of Justice (“DOJ”) had approved the Transaction with similar constructional conditions. ABI adopted the strategy of offering extensive divestiture solutions in various jurisdictions in order to facilitate the merger review process. On the agency side,

DOJ mentioned in its news release that it had cooperated with its counterparts in a number of jurisdictions, including the EU and China.³ The table below illustrates some similarities among the decisions issued by the three agencies:

	China	US ⁴	EU ⁵
Market position	CR Snow (SABMiller holds 49%) and ABI are the first and third largest with a combined market share of 43%.	ABI and MillerCoors (SABMiller holds 58%) are the first and second largest with a combined market share of 72%.	ABI and SABMiller are the third and fourth largest.
	<p>In the popular beer market, the combined market shares exceed 70% in 7 provinces, and exceed 50% in another 4 provinces;</p> <p>In the medium-high grade beer market, the combined market shares exceed 70% in 5 provinces, and exceed 50% in another 8 provinces.</p>	In more than 15 Metropolitan Statistical Areas, the combined market shares exceed 70%.	ABI holds strong market positions in Belgium and Luxembourg. SABMiller holds strong positions in Poland, Czech Republic, Slovakia, Hungary and Romania.

⁴ See DOJ’s Complaint, available at <https://www.justice.gov/opa/file/877506/download>.

⁵ See EU Commission’s press release at http://europa.eu/rapid/press-release_IP-16-1900_en.htm.

³ See DOJ’s news release, available at <https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer>

	China	US ⁴	EU ⁵
Divestiture Assets	SABMiller's 49% shareholdings in CR Snow.	SABMiller's entire U.S. business – including SABMiller's ownership interest in MillerCoors, the right to brew and sell SABMiller beers in the United States and the worldwide Miller beer brand rights.	Essentially the entire SABMiller beer business in the EU, including: (Package 1) The whole of SABMiller's business in France, Italy, the Netherlands and the UK; and (Package 2) SABMiller's business in the Czech Republic, Hungary, Poland, Romania and Slovakia.
Restrictions on future acquisitions	Based on the MOFCOM's previous decision on InBev's acquisition of Anheuser Busch in 2008, ABI needs to seek MOFCOM's preapproval before any future acquisitions in Tsingdao Brewer, Zhujiang Brewer or CR Snow.	The settlement precludes ABI from acquiring beer distributors or brewers, including non-HSR reportable craft brewer acquisitions, without DOJ's review.	None

Additionally, the MOFCOM's decision reveals some differences between MOFCOM and its US and EU counterparts in certain considerations, such as the market definition, special concerns on possible harm to distributors, its fix-it-first solution and the connected merger review of CR Beer's acquisition of CR Snow.

I. Market definition

As in previous cases, the EU Commission

has accepted that the supply of beer to the on-trade sector (i.e. pubs, clubs and restaurants) should be examined separately from the supply of beer to shops and other retail outlets (off-trade), and that the geographical scope of competition is mostly national. In some cases when necessary, the EU Commission has also examined whether the deal could raise competition concerns in relation to a narrower market for premium

beer.⁶ In the DOJ's complaint against this Transaction, the DOJ examined the geographic market of each Metropolitan Statistical Area ("MSA"). Although the DOJ mentioned the possibility of further dividing the beer market to "sub-premium, premium and high-end" categories, it only examined the combined market shares of the parties in each MSA in the larger product market of beers including all price levels. In the MOFCOM's decision, the MOFCOM divided the beer market into the popular and the medium-high grade beer markets using the benchmark of RMB 5 per 500ml (approximately USD 0.75 per 500ml). The MOFCOM examined the combined market shares of the parties in each provincial market for the narrower product markets of popularization and medium-high grade respectively. This may lead to higher combined market shares in each provincial market. In addition, unlike its western counterparts, MOFCOM generally prefers precise market definitions rather than fuzzy or open-ended market definitions. That is why it provided a precisely defined market definition for this Transaction and calculated the parties' market shares based on the market definition.

II. Special concerns on harm to distributors

In its competition analysis, the MOFCOM

considered four factors, including (a) the deal will further enhance ABI's market controlling power, (b) the deal between the two closely competing beer makers will lead to reduced competition, (c) the deal will increase barriers to entry, and (d) the deal will hurt downstream distributors. Unlike the DOJ and the EU Commission, which mainly focused on the likelihood of price increases in the already transparent beer market, the MOFCOM's decision analyzed the market structure (or market shares) and possible harm to downstream distributors. The MOFCOM found that most beer distributors are small in scale with limited coverage, and lack significant bargaining power. After the Transaction, due to reduced competition between ABI and CR Snow, the distributors' bargaining power will be further weakened. The distributors would have less access to ABI's incentive programs, and thereby their interests will be harmed.

III. Fix-it-first and the connected merger review of CR Beer's acquisition of 49% shareholdings in CR Snow

Fix-it-first is one of the structural remedies used in merger control review, where the parties can restructure the transaction or sign an agreement with the future buyer to divest assets before the implementation of the transaction. In the US, the DOJ uses the fix-it-first remedy more frequently compared to the Federal Trade Commission. If the

⁶ See "Commission clears acquisition of Beck's by Interbrew", http://europa.eu/rapid/press-release_IP-01-1499_en.htm.

proposed fix-it-first remedy eliminates the DOJ's antitrust concerns, there would be no need for DOJ to issue a consent decree or file a case. In the EU, if the EU Commission approves the "fix-it-first" proposal, the Commission will issue a decision conditional on the proposal.⁷ The MOFCOM's has adopted a "fix-it-first" remedy in its decision, and the MOFCOM followed a model similar to the EU by issuing a decision attached with conditions. CR Beer signed the purchasing agreement of 49% stake of CR Snow in the pre-acceptance review period before the MOFCOM officially acknowledged the completeness of the filing documents and accepted the case.

Unlike the EU, where the buyer doesn't need to file another merger notification for the "fix-it-first" transaction, CR Beer, which is the buyer of the 49% stake of CR Snow, filed a separate merger notification with the MOFCOM. The two notifications were reviewed in parallel by the MOFCOM. Approving the Transaction conditional on CR Beer's proposed acquisition of CR Snow shows that the MOFCOM does not have

competition concerns on CR Beer's acquisition. Therefore, the merger notification made by CR Beer regarding its acquisition of CR Snow should be approved by the MOFCOM without conditions.

The first time when the MOFCOM approved a transaction subjecting to a fix-it-first remedy was on November 25, 2015 in the NXP/Freescale case. NXP proposed the relevant divestiture during Phase I of the MOFCOM's review period, but had not sign the agreement with the buyer until the case entered into the extended Phase II. In its decision, MOFCOM requires that the closing of the divesting transaction should be the prerequisite of closing the NXP/Freescale transaction.⁸ The MOFCOM seems to have adopted the fix-it-first remedy frequently in its recent decisions. This shows that the MOFCOM became more and more confident in using various remedy tools and that the MOFCOM considers the fix-it-first solution as a good way to ensure the effectiveness of the relevant structural remedies.

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⁷ See Jun Ye, "Comparison Analysis of fix-it-first and up-front buyer", available at <http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=92749>.

⁸ See MOFCOM's decision on NXP's acquisition of Freescale, available at <http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml>