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BAO RUI LEGAL

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ANTITRUST & COMPETITION LAW

Review of the PRC Anti-Monopoly Law

It has been a year since the PRC Anti-Monopoly Law ("**AML**") entered into effect as from 01 August 2008. Based on the latest statistics of the Anti-monopoly Bureau of Ministry of Commerce ("**MOFCOM**"), as of 30 June 2009, MOFCOM has received 58 applications for antitrust review, out of which 43 cases have obtained clearance without substantive conditions, 2 cases were approved subject to a number of substantive conditions, and 1 case (i.e. the well-publicized acquisition of Huiyuan Juice by Coca-Cola) was rejected.

The acquisition of ANHEUSER-BUSCH COMPANIES INC. by INBEV N.V. /S.A. was the first case to obtain conditional approval in the AML regime. In this case, ANHEUSER-BUSCH COMPANIES INC. was restricted to acquire further shares in four named Chinese brewers without obtaining prior approval from MOFCOM. Similar express restriction can be found in the second case that obtained conditional approval, i.e. the

acquisition of Lucite International Group Limited by Mitsubishi Rayon Company Limited, where MOFCOM sets out a number of divestment conditions to address its concerns regarding competition.

These cases highlight MOFCOM's willingness to take a strong position in applying the AML not only to onshore transactions but also to offshore deals where China may be affected, regardless of whether it is a vertical or horizontal concentration.

MOFCOM's statements usually begin with the identification of the relevant markets, but the basis for MOFCOM's position in relation to the identification of relevant markets has never been clearly stated in its previous statements. On 24 May 2009, the Anti-monopoly Committee under the State Council of the PRC promulgated the *Guidelines regarding Definition of Relevant Market* (in Chinese, 关于相关市场界定的指南, hereinafter referred to the "**Guidelines**"), according to which

the identification of *Relevant Market* can be assessed in relation to these essential variables: the product market, the geographical market, the temporal factors, and other factors (such as intellectual property rights). The Guidelines set out the general methodology to the definition of the relevant markets: *interchangeability*, the extent to which the goods or services under scrutiny are interchangeable with other products. This issue, as elaborated in the Guidelines, will be addressed by looking at both the *demand* and the *supply* of the market.

MOFCOM's announcements under those cases also emphasize the significance of negotiations and discussions with MOFCOM for the final outcome. Based on our competition law practice in China, it is important to consider competition issues at the early stage if there is any time constraint to close the transaction. It is advisable to undertake the pre-filing correspondence with and/or merger filings at MOFCOM in an early stage, so as to avoid any unnecessary delay and to allow more time for the later negotiation sessions with MOFCOM.

BANKING

Good news to PRC International Trading Companies and Commercial Banks

In early July 2009, PRC governmental authorities promulgated the *Measures for the Administration of Pilot RMB Settlement in Cross-border*

Trade (跨境贸易人民币结算试点管理办法) and *its implementation rules* (collectively, the "**Rules**") in an effort to cope with risks faced by PRC international trading companies' exchange rate fluctuation as a result of the financial crisis in the world. The Rules' promulgation is accelerated after the State Council has decided on the trial regions for the RMB settlement. The onshore trial regions include Shanghai, Guangzhou, Shenzhen, Zhuhai and Dongguan, while the offshore regions include Hong Kong, Macao and members of Association of South East Asian Nations (东南亚国家联盟).

Along with the implementation of the Rules, qualified enterprises in the onshore trial regions may enjoy the advantages including: (1) avoidance of loss incurred due to exchange rate fluctuations; (2) avoidance of financial costs arising from conversion of foreign exchange; (3) exemptions from the foreign exchange clearance procedures for the import and export transactions settled in RMB; and (4) exemptions from presenting the foreign exchange clearance evidences in applying for refund of taxes of export.

The commercial banks within the onshore trial regions enjoy benefits from the Rules as well. According to the Rules, the trade payment may be settled through commercial banks in the onshore trial region and PRC commercial banks in the same regions may act as agent banks by signing RMB settlement agent agreements with offshore banks.

Furthermore, onshore agent banks may provide trade financing in RMB to offshore enterprises.

In the long run, the Rules may help to accelerate the process for RMB becoming an internationally recognized currency.

Offshore Entities may Open Foreign Exchange Accounts at Onshore Banks without Approval of SAFE

On 13 July 2009, State Administration of Foreign Exchange ("**SAFE**") promulgated *Notice on the Relevant Issues relating to Administration of Onshore Foreign Exchange Accounts of Offshore Institutions* (国家外汇管理局关于境外机构境内外汇账户管理有关问题的通知). According to this rule, the domestic banks may open onshore foreign exchange accounts ("**Accounts**") for offshore entities without approval of SAFE.

Remittance from domestic entities and individuals to the Accounts shall be deemed as cross-border remittance and shall follow the rules for administration of foreign exchange in cross-border transactions, and vice versa. The banks will need to examine valid commercial documents and evidence before permitting remittances.

Foreign-denominated cash is not allowed to be deposited into or withdrawn from the Accounts, and funds in the Accounts are not allowed to be converted from foreign currency to RMB, unless prior approval from

related branches or offices of SAFE is obtained.

In addition, amounts standing to the credit of the Accounts will take up the short-term foreign debt quota of the onshore banks.

FOREIGN INVESTMENT & OFFSHORE INVESTMENT

New law with respect to the Provision of Financial Information Services by Foreign Institutions in China

State Council Information Office of the PRC, Ministry of Commerce and State Administration of Industry and Commerce published the "*Regulation on Administration of the Provision of Financial Information Services by Foreign Institutions in China*" (in Chinese, 外国机构在中国境内提供金融信息服务管理规定, "**Regulation**") on 30 April 2009. Pursuant to this Regulation, foreign financial information service providers are allowed to provide financial information services in China after obtaining approval from the examination and approval authority (i.e. State Council Information Office of the PRC). Foreign financial information service providers can also set up enterprises to carry out the same business in China.

It shall be highlighted that the validity term of the aforesaid approval is only two (2) years, although it could be extended upon renewal application. Moreover, the scope of such approval is strictly limited to the services of

providing financial information, which, according to this Regulation, shall refer to the information or financial data applicable to financial analyst, financial trader, financial decision-maker or other users in financial transactions, and shall not include any of news agency services.

MOFCOM Releases Examination and Approval on Foreign Investment

On 4 May 2009, Ministry of Commerce published a Notice (namely, 商务部关于省级商务主管部门和国家级经济技术开发区审核管理部分服务业外商投资企业相关事项的通知) to authorize its counterpart at provincial-level to be in charge of the examination and approval of foreign investment in the following industries, except for the foreign investment with the total investment value of more than the benchmark, i.e. US Dollars 100 million for projects in encouraged / permitted industry or more than US Dollars 50 million for restricted industry:-

- (1) medical institution;
- (2) auction;
- (3) distribution of book, newspaper and journal;
- (4) Sino-foreign cooperation in wholesale of audio-visual products;
- (5) foreign investment in non-oil mineral exploration; and
- (6) various non-oil mining.

In addition, according to this Notice, the provincial commercial administrative authorities shall also

be responsible for the examination and approval of merger and acquisition cases, if the consideration for the transaction is less than United States Dollars 100 million for projects in encouraged/permitted industries or United States Dollars 50 million for projects in restricted industries.

SAFE Promulgates new Rules to Encourage Offshore Investment

On 13 July 2009, SAFE promulgated the *Provisions of Administration of Foreign Exchange in respect to Overseas Direct Investment by Domestic Entities* (in Chinese, 境内机构境外直接投资外汇管理规定, "Provisions") in an effort to encourage domestic entities to cross the border out of China for better growth and development. The Provisions have simplified the procedures of foreign exchange administration for overseas direct investment by domestic entities. The prior review of the source of foreign funds is changed to subsequent registration, and remittance of investment funds overseas does not require separate prior SAFE approval after the certificate of registration of foreign investment is issued by SAFE.

The Provisions also broadened the scope of funds and assets that can be used for overseas investment and have some new provisions relating to the transfer of equity/shares in the overseas investee companies and payment of consideration and other matters in connection therewith.

The Provisions also provide that

domestic entities may lend money to, or provide security for financing of, their overseas investee companies.

In connection with the lending of money by domestic entities to their overseas subsidiaries, SAFE further issued the *Notice on the Relevant Issues concerning the Foreign Exchange Administration of Overseas Loans Granted by Domestic Enterprises* (国家外汇管理局关于境内企业境外放款外汇管理有关问题的通知), setting out the provisions regarding qualification of the lenders, administration of lending quota, lending account, etc.

NDRC Emphasizes Supervision and Administration on Offshore Investment

National Development and Reform Commission ("**NDRC**") of the PRC recently published a *Notice on the Administration of Offshore Investment* (in Chinese, 国家发展改革委关于完善境外投资项目管理有关问题的通知, "**Notice**") to elaborate on the procedural requirements on offshore investments, including mergers and acquisitions, as well as bidding projects.

According to this Notice, a Chinese company with offshore investment is required to submit a project information report to both NDRC and the relevant industry supervision department of the State Council *before* entering into any binding agreement, providing any binding quotation, submitting applications to local authorities outside China, or

submitting any official bid.

This Notice indicates that NDRC will take a cautious position in the supervision and administration of Chinese domestic companies (especially stated-owned enterprises) in offshore investments and transactions.

TAX

New Income Tax Incentive for Venture Capital Enterprises

Good news for venture capital enterprises which have equity investments in unlisted small and medium high-technology enterprises in China. On 30 April 2009, State Administration of Taxation of the PRC issued a *Notice on the Issues concerning Implementation of Income Tax Incentive for Venture Capital Enterprises* (in Chinese, 国家税务总局关于实施创业投资企业所得税优惠问题的通知, "**Notice**"), according to which, subject to the following conditions, venture capital enterprises registered in China are entitled to deduct 70% of their equity investment amounts from taxable incomes before enterprise income tax:-

1. such venture capital enterprises shall be registered under Chinese laws in form of either "limited liability company" or "joint stock limited company", which means that the above-mentioned tax incentive is unavailable to venture capital enterprises incorporated in form of

- partnership enterprise;
2. the filing formality as required under the *Temporary Measures regarding the management of Venture Capital Enterprises* (in Chinese, 创业投资企业管理暂行办法) at relevant authority shall be completed and the relevant verification authority is of the opinion that the investment of venture capital enterprise is in compliance with the foregoing Temporary Measures;
 3. the investee company shall be recognized as a qualified high-technology enterprise and shall be an unlisted small or medium enterprise, with less than 500 employees and less than RMB 200 million annual turnover and less than RMB 200 million total assets. According to this Notice, within the term of investment, even if the investee company has developed and can no longer be recognized as a small or medium enterprise, the venture capital enterprise can still enjoy the tax incentive provided that such investee company remains as a qualified high-technology enterprise;
 4. the term of equity investment in the above-mentioned investee companies shall be no less than 24 months. According to this Notice, if the recognition as a qualified high-technology enterprise is obtained after the equity investment, the term of equity investment shall be calculated from the date when the investee company obtains the aforesaid recognition. The exception is where the recognition is obtained before the end of year 2007 and the investee company has continuously remained as a qualified high-technology enterprise in year 2008, the term of equity investment could be calculated from the date the investment is actually injected into the investee company; and
 5. other conditions as required by Ministry of Finance of the PRC and State Administration of Taxation.

China Strengthens Administration on Taxation regarding Individual Income arising from Share Transfer

On 28 May 2009, State Administration of Taxation of PRC issued *the Notice on Strengthening Administration on Taxation regarding Individual Income Tax arising from Share Transfer* (in Chinese, 国家税务总局关于加强股权转让所得征收个人所得税管理的通知, "**Notice**").

The Notice requires that any of share transferor or share transferee, who is obliged to pay, withhold or collect taxes administrative authority after the execution of share transfer agreement and completion of share transfer but before the alteration registration of share transfer at the company registration authority. The alteration registration of share transfer can only be processed upon

proof of full payment of tax or tax payment exemption is obtained from the relevant taxation administrative authority.

Moreover, according to the Notice, the relevant taxation administrative authority has the right to assess the

taxable amount if, in its opinion, the taxable amount is apparently low and there is no reasonable justification. This demonstrates the intent of the State Administration of Taxation to end the practices that transaction parties are liable to pay lower taxes by agreeing on lower consideration.

OUR FIRM

Bao Rui Legal is a full-serviced partnership law firm located in Shanghai, which is qualified to practise Chinese law. It is oriented to serve both domestic and overseas clients with high quality and efficient professional services to meet the diverse requirements of clients in various industries. Bao Rui Legal has a close alliance with numerous foreign law firms, investment companies and other related professional institutions.

Bao Rui Legal actively engages in providing legal services in investments and finance of domestic and overseas corporations, including legal services in merger and acquisition, capital market, real estate financing, venture capital and private equity finance, foreign investment, fund and trust. Bao Rui Legal represents clients in a variety of industries including banking and financial services, construction, real estate, strategic investment, insurance, healthcare and pharmaceutical, manufacturing, IT, telecommunication, media, aviation, shipping, energy, entertainment and lifestyle. Our clients are both foreign and domestic, from China, East-South Asia, America, Europe, etc.

Bao Rui Legal's professional team is well-trained with integrated professional background, and possesses experiences in reputable foreign and domestic law firms as well as proficiency in the advanced models of legal services seen in foreign law firms. Bao Rui Legal's professionals are fluent in Chinese and English.

You may visit us at www.baoruilegal.com.

If you have any query about the information in this publication or you wish to seek more detailed legal advice, please feel free to contact us.

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