SAB ruling expected in coming days

Friday, 5 July 2013 *(over a year ago)* by Joe Rowley

Mexico's Federal Competition Commission (CFC) is thought to be close to ruling on SAB Miller's challenge to exclusivity agreements struck by Grupo Modelo and Cuauhtémoc Moctezuma, owned by Heineken, one month after AB InBev closed the biggest deal in the country's history following its acquisition of the Mexican brewer.

The deal between the world's largest brewer, AB InBev, and Mexico's largest beer group, Modelo, concluded with the complete divestiture of the Mexican brewer's business in the US early last month.

AB InBev, which previously held a 50 per cent share in Modelo, paid US$20.1 billion for the remaining stake in the Mexican brewer. Putting that into context, Von Wobeser y Sierra SC partner Claus von Wobeser, counsel to AB InBev throughout the deal, notes; "Mexico has received in the last 10 years foreign investment of around US$20 billion per year," he says. "To have one deal of this amount is huge. It is very significant for the Mexican economy and it is a show of trust of foreign companies in the Mexican market."

Mexico's Federal Competition Commission (CFC) unconditionally approved the merger in November, ruling that the tie-up would not have any adverse effects on competition as it only represented a consolidation of AB InBev's existing influence. "AB InBev does not produce, distribute or commercialise its products in Mexico, given that Grupo Modelo distributes the AB InBev products," noted the commission. "In addition, the presence of AB InBev's products in the beer market is marginal."

But SAB Miller, which holds just one per cent of the Mexican beer market, has challenged the transaction twice, claiming Modelo and Heineken's control of 98 per cent of the market is an obstacle for new entrants. A decision on the latest case could arrive within the coming days, according *Bloomberg,* which yesterday cited three people with direct knowledge of the matter. If SAB Miller's challenge is successful, the CFC could loosen Modelo and Heineken's grip on the market by forcing them to relinquish exclusive distribution agreements with so-called mom-and-pop convenience stores and restaurants. The CFC dismissed SAB Miller's previous complaint in 2007.

The merger closed on 4 June and secured AB InBev's dominant position in Mexico's rapidly growing beer market, which some predict could spark renewed competition between AB InBev and Heineken, Mexico's second-largest brewer after acquiring FEMSA's beer unit in 2010.

"Mexico has become the new battleground for AB InBev and Heineken," says Creel, García-Cuéllar, Aiza y Enriquez SC partner Jean Michel Enriquez, counsel to Modelo, although he adds it is unlikely that Heineken will respond with a merger of its own, due in large part to the combined market share of the two companies (AB InBev alone holds around 60 per cent) and the company's own "strategic considerations".

The Dutch brewer's previous merger with FEMSA led to advertising and distribution issues that caused the company to lose ground to Modelo. Heineken has since been working to regain market share, recently confirming it was studying plans to build its seventh brewery in Mexico by 2016 in a bid to expand production ahead of expected growth in the market.

SAB Miller passed up the opportunity to acquire a FEMSA's beer unit in 2010.

Looking North

AB InBev and Modelo's tie-up has also had a seismic effect north of the border. In January, the failure of the two parties to satisfy the concerns of the US Department of Justice (DOJ) over competition in the US market led the department to sue to block the merger.

Among the DOJ's objections was a concern that the merger between the two brewers would remove a competitive influence on US beer prices through Modelo's ownership of the country's number one imported beer, Corona.

With the DOJ judgment having the potential to jeopardise the global deal, AB InBev returned to the division to propose further remedies.

As Wobeser notes, the outcome of the transactions in Mexico and the US ultimately hinged on the successful closing of the Mexican brewer's US divestment.

Having already agreed to sell its 50 per cent stake in Crown Imports, which owns the rights to import Corona into the US, to Modelo's joint venture partner Constellation Brands, Modelo also offered to sell Constellation its "state-of-the-art" brewery in Piedras Negras, on the Mexican side of the US-Mexico border, and provide perpetual licences for its Corona and Modelo brands.

AB InBev had previously offered a supply agreement and fixed price agreement to Constellation that initially seemed to be accepted. McDermott, Will & Emery LLP partner Warren Rosborough, who provided antitrust counsel to Constellation, says the DOJ's demand for tougher protections in the second round of negotiations reflected its concerns about the enforceability of the contracts rather then the likelihood of Modelo reneging on them.

Rosborough adds that the DOJ's main concern may have rested on the possibility that "side deals" could be struck, which the parties could dress up as service or consultancy contracts, and lead to higher prices for consumers. "I can understand their concern, but while possible that is a theoretical concern as neither party ever voiced intentions to have additional contracts with each other," he explains.

In April, the DOJ agreed to drop the suit, removing a major obstacle for the global merger to go through. Constellation, which paid US$4.9 billion for full control of Crown, subsequently became the largest supplier of wine, beer and spirits in the US following the deal that closed on 7 June.

Reflecting on the ruling, Baker & McKenzie LLP partner Miguel Noyola, counsel to Constellation, says the conditions imposed by the DOJ could have an impact outside the US. "This transaction is significant not only from the perspective of its size, but also from the perspective of Mexico," he says. "The deal was a major transaction, and the planned significant expansion of the plant will also help highlight the relevance of Mexican products abroad."

For the M&A leg, AB InBev turned to the New York and Washington, DC offices of Skadden, Arps, Slate, Meagher & Flom LLP and Mexican firms Von Wobeser y Sierra and Mijares, Angoitia, Cortés y Fuentes SC, while Freshfields Bruckhaus Deringer LLP provided antitrust advice in other jurisdictions where the company has operations. The London office of Clifford Chance LLP advised on financing aspects.

Modelo, which produces beer brands including Corona and Modelo Especial, turned to the New York office of Cravath, Swaine & Moore LLP for corporate, tax, executive compensation and benefits, and antitrust advice, Mexican firms Creel and Ritch Mueller SC, and independent practitioner Alejandro Duclaud.

For the US divestment, AB InBev retained the New York office of Sullivan & Cromwell LLP and Von Wobeser for corporate, banking and finance and antitrust advice.

Constellation turned to the Mexico and Chicago offices of Baker & McKenzie LLP, the Rochester office of Nixon Peabody LLP and the Washington, DC office of McDermott, Will & Emery LLP.

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This article was amended on 15/07/2013 to make clear SAB Miller challenged the exclusivity agreements reached by Grupo Modelo and Heineken.

Comments

There are currently no comments.