

Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China

Editor's Note: The Antitrust Source first interviewed Director General Shang in the February 2009 issue,* about six months after the Anti-Monopoly Law (AML) took effect. Two years later, we again sought DG Shang's views on how China's merger review process has developed. DG Shang also provides a preview of rules and regulations that will be forthcoming from the Ministry of Commerce (MOFCOM), and gives advice to businesses on how to facilitate the review process.

This interview was conducted on January 7, 2011, by Fei Deng and Yizhe Zhang for The Antitrust Source. Director Yin Yanling and Mr. Lin Hang, two other officials from the Anti-Monopoly Bureau of MOFCOM, were also present at the interview. We would like to express our thanks to DG Shang for sharing his views with us, and to other officials from MOFCOM for facilitating this interview.

—FEI DENG, H. STEPHEN HARRIS, JR., AND YIZHE ZHANG



DG Shang Ming

THE ANTITRUST SOURCE: The Antitrust Source's 2009 interview of you generated a lot of interest from our readers. We are honored to have the opportunity to talk with you again and would be delighted to hear what has happened since then. Could you give us an update on the Anti-Monopoly Bureau's merger review activities?

DIRECTOR GENERAL SHANG MING: In 2010, MOFCOM continued to improve its enforcement mechanism in conducting antimonopoly review of concentrations of undertakings. Generally speaking, there are three characteristics of our 2010 antimonopoly review work.

(1) There was a significant increase over the previous year in the number of notifications filed and in the number of notifications accepted. During 2010, MOFCOM's Anti-Monopoly Bureau conducted more than 100 pre-acceptance consultations, and received more than 120 filings, of which more than 110 were accepted. In comparison, during 2009, 77 filings were accepted. In 2010, the Anti-Monopoly Bureau completed the review of most of the accepted filings. The percentage of cases that were reviewed is about 20 percent higher than year 2009. In 2010, among the reviewed cases, one was approved subject to commitments, two were withdrawn by the filing parties, and all others were approved without restrictive conditions imposed. Compared with the merger review enforcement in the European Union, the percentage of cases approved unconditionally is higher for MOFCOM than for the European Commission.

(2) A substantial percentage of filings involved manufacturing industries and listed companies. In 2010, about 70 percent of filings came from manufacturing industries. Other industries accounted for smaller percentages. At the same time, most of the filings involved listed companies, at a percentage of about 60 percent.

* Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People's Republic of China, ANTITRUST SOURCE, Feb. 2009, <http://www.abanet.org/antitrust/at-source/09/02/Feb09-ShangIntrvw2-26f.pdf>.

(3) Follow-up monitoring of remedy enforcement achieved satisfactory results. Between the enactment of the AML in 2008 and November 2010, MOFCOM approved six cases subject to restrictive conditions: Inbev/Anheuser-Busch, General Motors/Delphi, Mitsubishi/Lucite, Pfizer/Wyeth, Panasonic/Sanyo, and Novartis/Alcon. In 2010, MOFCOM conducted follow-up investigations to determine whether the parties have abided by their obligations. MOFCOM found that in all cases—but especially for those cases that involved behavioral remedies—the parties have abided by their obligations, and there have not been any complaints received from relevant parties so far.

ANTITRUST SOURCE: MOFCOM has also published some new rules during the last two years. Can you give us an update on those?

DG SHANG MING: In terms of legislation, MOFCOM has continued to make progress on rules complementary to the AML. MOFCOM has drafted and promulgated several rules, including *Rules on Notification of Concentration Between Undertakings* (Notification Rules), *Rules on Review of Concentration Between Undertakings* (Review Rules), and *Provisional Rules on Divestiture of Assets or Businesses to Implement Concentrations between Undertakings* (Provisional Divestiture Rules).

The Notification Rules serve the purpose of specifying the requirements for the notifying party to comply with, and the requirements for the antitrust agency to accept the filing. The Notification Rules define issues, including but not limited to the calculation of transaction turnover amount, pre-notification consultation, the documents and materials required for the notification filing, voluntary submission of other documents and materials, confidentiality obligations during the notification and review process.

The Review Rules specify procedural matters regarding antimonopoly review of concentrations of undertakings, including withdrawal of a notification, the reviewing procedure, the proposal and revision of restrictive conditions, the right of notifying parties to make statements and defenses, the decision of further review, the monitoring of the implementation of restrictive conditions, etc.

The Provisional Divestiture Rules serve the purpose of providing more detailed and clarified rules for the implementation of restrictive conditions involving divestiture of assets or businesses and specifying the qualification and selection of the monitoring trustee and the divestiture trustee.

Up to now, these regulations have been implemented with good results. The procedures of acceptance and review are becoming more orderly. The rights of the relevant parties are better protected. The decisions and the implementation of decisions are more informative and transparent.

ANTITRUST SOURCE: Does MOFCOM have any plans to draft or publish any new guidelines or rules in the coming year?

DG SHANG MING: In 2011, MOFCOM is going to continue the work of drafting other rules complementary to the AML that regulate concentration of undertakings.

In 2011, the priority of MOFCOM's antimonopoly rule making is to push forward the drafting of *Regulations for Implementation of Antimonopoly Review of Concentrations of Undertakings* (Implementations Regulations). Although there have already been a few promulgated rules and regulations in the aspect of concentrations of undertakings, most of them are of weaker authority and not quite systematic. There are still some critical issues faced in the enforcement of AML that deserve to be further explained. MOFCOM hopes to address all of these issues in the framework

of Implementations Regulations to ensure the consistency of enforcement, improve the predictability and workability of the review process, and improve the effectiveness of the AML implementation.

At the same time, in order to provide better guidance on our analysis of the competitive impacts of concentrations of undertakings, MOFCOM is in the process of drafting guidelines entitled *Rules on Evaluating the Competitive Effects of Concentrations of Undertakings* (Evaluation Rules). The Evaluation Rules will further clarify the factors considered and analytical perspectives used in evaluating the competitive effects of particular concentrations of undertakings. In addition, in order to further clarify the procedures involved in determining the remedies for the purpose of conditional approval of concentrations of undertakings, MOFCOM is in the process of drafting *Rules on Imposing Restrictive Conditions on Concentrations of Undertakings*, consistent with the Provisional Divestiture Rules promulgated in 2010. This set of rules will specify with further clarity the category of remedies, applicable parties, and relevant steps and procedures to follow.

ANTITRUST SOURCE: Have there been any changes in the review mechanism in the Anti-Monopoly Bureau since we last interviewed you in 2009?

DG SHANG MING: The Anti-Monopoly Bureau was set up in 2008. As we gain more experience and improve relevant procedures over time, our review mechanism has improved as well. There are three aspects that are worth mentioning here:

(1) We have always set the goal of improving the quality of our review work as a high priority. With accumulation of experience, particularly in aspect of analytical tools, we have been actively seeking to apply economic analysis tools, emphasizing the gathering and utilization of market survey data, and improving the effectiveness and reliability of our case review tools. In terms of analytical perspectives, the Anti-Monopoly Bureau emphasizes the complete evaluation of all kinds of effects, analyzes all possible factors that may induce competitive effects, and avoids the tendency of simplistic structural methodologies. Some outsiders have speculated, based only on information from the notices that MOFCOM has published so far, that MOFCOM is inclined to use such structural methodologies. However, this speculation is baseless.

(2) We highly value the use of a self-monitoring system within the Anti-Monopoly Bureau. In order to standardize the review process, improve the efficiency of the review process, and better serve the needs of this process, the Anti-Monopoly Bureau has made an adjustment to the setup and function of its divisions, separating out into different divisions the functions of pre-notification consultation and pre-acceptance review of notification filing materials, post-acceptance investigation and review, and our self-monitoring of cases we handle. This adjusted organization serves well the function of self-monitoring: currently, for each individual case, the Anti-Monopoly Bureau sets up a dedicated team, consisting of three or more persons, from various backgrounds of law and economics with one person on the team in charge of the self-monitoring of the case. This setup has been functioning well in our implementation as it provides a good balance and a way to monitor our review work.

(3) The Anti-Monopoly Bureau greatly emphasizes enhancing international communication and cooperation. The Anti-Monopoly Bureau has maintained working communication with antitrust agencies of other countries and regions including the United States and European Union. The Anti-Monopoly Bureau has also held, or participated in, programs such as seminars and training sessions organized by various international institutions such as OECD. Such exchanges and cooperation programs provide a good platform for sharing experiences, and help us improve the

quality of our policy making and training. Up to now, the areas of exchange and cooperation have mainly concentrated on exchanging thoughts about general theoretical matters and evaluation of competition policy and rule making. In the future, the Anti-Monopoly Bureau hopes to further deepen international exchange and cooperation.

ANTITRUST SOURCE: Can you elaborate on the use of economic analysis in the review process of the Anti-Monopoly Bureau? What is the role of the economics division? Would it be possible for the Anti-Monopoly Bureau to hire outside economists if such needs arise?

DG SHANG MING: The economics division of the Anti-Monopoly Bureau was specifically set up to be tasked with dealing with issues related to economic analysis during our case review process. The Anti-Monopoly Bureau has several professional staff members with an economics background who specialize in economic analysis. In addition, the Anti-Monopoly Bureau has organized a number of seminars, in which the topics covered involve many issues related to economic analysis and application, in order to help our staff understand and grasp the basic economic analytical methods. For individual cases, the Anti-Monopoly Bureau does not rule out the possibility of involving outside economists. The Anti-Monopoly Bureau will implement appropriate application of economic analysis and utilize economic analysis tools to the fullest, based on the specifics of individual cases.

ANTITRUST SOURCE: What is the role of local commerce offices in antimonopoly review of concentrations of undertakings?

DG SHANG MING: In China, the power and responsibility for antimonopoly review of concentrations of undertakings belongs to MOFCOM, the only government agency at the national level. MOFCOM currently does not have its own local offices at the provincial or other local levels. For specific cases, MOFCOM could ask its local counterpart agencies to help verify local facts, but the specific functions of case review are performed by MOFCOM, including the final decision that comes from MOFCOM.

ANTITRUST SOURCE: What is your overall evaluation of the compliance of merging parties in China? Do you feel that so far the merging parties have been cooperative in providing the information that MOFCOM requests?

DG SHANG MING: From what we have experienced in the review work in 2010, most of the filing parties cooperated actively in facilitating our review in terms of submitting required notification materials and relevant materials as requested. This kind of cooperation makes our work proceed more efficiently and more smoothly, thereby making it easier for the filing parties themselves to complete the concentration. We appreciate and value the cooperation of most of the filing parties to fulfill their obligations as required by the law, and we sincerely hope that the filing parties will continue their support and cooperation in the process of our antimonopoly review work in the future.

Nevertheless, I also have to point out that there exist some cases where the filing parties did not provide their information and materials in a timely, truthful, and accurate fashion. There could be two reasons: either the filing parties did not have the information themselves, or the filing parties intentionally did not provide the requested information. Such situations negatively affected our process of case review. We hope this will happen less or not at all in the future.

In addition, there are a small number of undertakings whose concentrations exceed the notification threshold but did not file as required by the law. This is an outright violation of the law. We will discipline and punish such behavior, and we also welcome relevant individuals and businesses who learn about such cases to report them to us.

ANTITRUST SOURCE: What advice would you like to offer to private parties that might be subject to China's merger review process in the future?

DG SHANG MING: MOFCOM will continue to improve the enforcement mechanism, including making supplementary rules and regulations and improving the efficiency of our reviews. I think the undertakings should pay attention to the following aspects when conducting notification filings in the future:

(1) Make an effort to understand the relevant rules and regulations in the Chinese antimonopoly legal system related to concentration of undertakings, pay attention to MOFCOM's updates on law enforcement of concentration of undertakings, and communicate and consult with MOFCOM actively when questions arise in the notification and review process or when questions arise regarding the interpretation of the law and regulations. The Antimonopoly Bureau has set up a consultation division specifically to answer such questions.

(2) Cooperate willingly and actively with MOFCOM case teams in both the pre-notification consultation process and the review and investigation process, etc. Provide truthful and accurate relevant information consistent with MOFCOM's request. Try to reduce or avoid the delay in case processing caused by incomplete or untimely information.

(3) Comply with the law seriously. We strongly discourage lobbying efforts that go beyond the rules and regulations, otherwise it will create an unnecessary disturbance to the regular work process of MOFCOM and negatively impact the completion of the review process.

ANTITRUST SOURCE: Thanks very much for sharing your views with us. Is there anything else you would like to add?

DG SHANG MING: It's my pleasure to share my thoughts. I want to emphasize that the Anti-Monopoly Bureau has only had a little more than two years of implementation experience so far. During 2010, we made some new changes and progresses. But I believe there is much room for improvement in the future. ●