

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

**Editors' Note:** This is the third interview with Director General Shang by The Antitrust Source.\* We once again follow up with DG Shang regarding the recent developments in China's merger review process and MOFCOM's plans for the future. We thank DG Shang for sharing his views with us, and SUN Miao and other officials from MOFCOM for facilitating this interview.

This interview was conducted in writing for The Antitrust Source by Fei Deng and Yizhe Zhang on March 7, 2014.

**THE ANTITRUST SOURCE:** MOFCOM recently issued the *Interim Rules of the Criteria for Simple Cases of Concentrations of Undertakings*.<sup>1</sup> Compared to the review of the regular case, how does the review of a simple concentration differ with respect to the review time, procedure, and the information the parties are required to provide?



**DIRECTOR GENERAL SHANG MING:** On February 11, 2014, MOFCOM issued an announcement regarding the implementation of *Interim Rules on the Criteria for Simple Cases of Concentrations of Undertakings* (Criteria Rules on Simple Cases). The Criteria Rules on Simple Cases lay out clear quantitative and qualitative criteria under which a case will qualify as a simple case as well as exceptional circumstances under which the criteria will not apply.<sup>2</sup> Right now, we are working on the relevant procedural rules for such cases, including how to apply for simple case status, the materials to be provided, the review procedures and time frames, etc. We will issue these procedural rules when appropriate.

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\* 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>; 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. 2011, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/antitrust\\_law/feb11\\_shangintrvw2\\_23f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_shangintrvw2_23f.authcheckdam.pdf).

<sup>1</sup> See <http://fldj.mofcom.gov.cn/article/ztxx/201402/20140200487001.shtml> (in Chinese).

<sup>2</sup> *Id.*; see also <http://www.jonesday.com/antitrust-alert--china-moves-towards-an-expedited-review-for-mergers-but-leaves-details-unclear-02-24-2014/>. The Rules specify the following criteria under which a concentration would be treated as a "simple" case: (1) a horizontal merger where the combined share of all parties is less than 15% in each relevant market; (2) a vertical merger where the parties' market shares do not exceed 25% in either the upstream or downstream market; (3) a conglomerate merger where the market share of each party in each market involved does not exceed 25%; (4) a joint venture established outside of China that has no activities in China; or (5) an acquisition of a foreign company that has no activities in China. The Rules provide that a case will not be treated as "simple" if (1) the concentration involves a joint venture previously controlled by two or more parties that post-concentration will be controlled by one of the parties and the joint venture competes with the controlling party in the same relevant market; (2) the relevant markets are difficult to define; or (3) MOFCOM believes that the concentration may result in adverse effects to market entry, technology development, consumers, other undertakings or the national economy. The Rules also provide that MOFCOM will revoke the "simple" case status if it finds out that the notifying party concealed material information or provided false or misleading information, if third parties provide evidence showing the existence of competitive concerns, or if significant changes occur with respect to the concentration or in the relevant markets.

**ANTITRUST SOURCE:** Recently, the information disclosed by MOFCOM's conditional approval announcements of concentrations has been more comprehensive and, as exemplified by the announcement regarding the acquisition of Life Technologies by Thermo Fisher Scientific, has included the results of economic analysis. Does this reflect that MOFCOM is utilizing more applied economic analysis tools in its reviews?

**DG SHANG MING:** The importance of economic analysis in the review of concentrations has been widely recognized. The application of economic theories and models not only provides the Bureau with new tools to obtain evidence, but also enhances the scientific credibility of the review. MOFCOM has always highly valued the application of economic theories and analytical methods and has built a specialized economist team. MOFCOM will selectively apply economic analysis tools in the review process based on the actual circumstances. For those significant and complicated cases, MOFCOM may also engage outside economists to facilitate the analysis when necessary.

**ANTITRUST SOURCE:** The *Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings (Draft for Public Comment)* were published for comment in March 2013. When do you expect to issue the final Provisions? Could you give us some insight on what factors MOFCOM will take into account when making decisions to impose restrictive conditions and how these factors are considered? How does MOFCOM evaluate the efficiency defenses that the notifying parties make?

**DG SHANG MING:** In March 2013, *Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings (Provisions)* were released on MOFCOM's website, soliciting public comment. We reviewed and compiled a large number of opinions and suggestions provided by the public during the process, and further revised the draft. Currently, the main body of the Provisions has been finalized, and the Provisions are under MOFCOM's internal legislative procedure. We are aiming to issue the final Provisions within this year.

Regarding the factors considered and practices adopted when deciding whether to impose restrictive conditions, MOFCOM will notify and explain to the notifying parties within a reasonable period of time, should MOFCOM, during the review process, find any adverse impact the concentration may have on competition. Within the prescribed period of time, the notifying parties then shall submit proposals on restrictive conditions that would be sufficient to eliminate the adverse effect on competition. Of course, the parties are welcome to voluntarily submit proposals on restrictive conditions before MOFCOM raises any concerns. If the notifying parties have proposed restrictive conditions within the prescribed time period, MOFCOM will discuss them with the parties, evaluate the effectiveness, feasibility and timeliness of the proposals, and inform the parties of the evaluation results. If the parties have not proposed restrictive conditions, or if the proposed restrictive conditions fail to sufficiently mitigate the adverse effect on competition, then MOFCOM will prohibit the transaction.

In considering relevant factors, MOFCOM focuses on whether the restrictive conditions to be imposed can mitigate the adverse effect on competition. The factors considered may come from various perspectives, including efficiency, whether a bankrupt company is involved, the balance of the public interest, etc.

**ANTITRUST SOURCE:** It would appear from the published decisions that MOFCOM is more inclined to impose behavioral remedies rather than structural remedies in horizontal merger cases. Do you agree with this conclusion?

**DG SHANG MING:** MOFCOM has no general preferences over the type of remedy, but rather we determine the type of remedy according to the specific nature of each case and the necessity of addressing competition issues. There are plenty of examples where the remedies imposed by MOFCOM are purely structural, or a combination of structural and behavioral. In order to decide the remedies to impose, the primary consideration is the specific circumstances of the case, including the extent to which the transaction negatively impacts competition, the appropriateness and the feasibility of the remedies, as well as the difficulty in monitoring the implementation of such remedies. It is not appropriate to conclude that MOFCOM has a general preference for a particular type of remedy based only on a few individual cases.

**ANTITRUST SOURCE:** One of the major disadvantages of behavioral remedies is that continuous monitoring may require substantial human resources and costs. Given MOFCOM's limited staffing, how can MOFCOM ensure effective monitoring of behavioral remedy implementations?

**DG SHANG MING:** Compared with structural measures, monitoring of behavioral remedies is more difficult and more resource-consuming for regulatory authorities. As for the monitoring of a hold-separate commitment, we require the parties to engage a monitoring trustee to be responsible for monitoring the remedy implementation. On one hand, we require the monitoring trustee to fulfill their duties and to do their job with due diligence. On the other hand, we may require the parties to submit implementation reports on a regular or ad hoc basis.

**ANTITRUST SOURCE:** In practice, how does MOFCOM supervise the trustee to ensure that it does not abuse its mandate by expanding the scope of its duties?

**DG SHANG MING:** MOFCOM will require the notifying parties to propose several trustee candidates and will evaluate them. An important consideration is whether the monitoring plan the trustee proposes is clear and feasible. When the monitoring trustee is appointed, MOFCOM will further evaluate the monitoring plan and set clear boundaries on the rights and obligations of the appointed monitoring trustee. The notifying parties must provide the monitoring trustee with all necessary support. The notifying parties may report to MOFCOM if they disagree with the monitoring trustee's conduct.

**ANTITRUST SOURCE:** What new rules or guidelines does MOFCOM plan to promulgate in the near future? Also, as indicated by some media outlets, the National People's Congress (NPC) is contemplating amending the Antimonopoly Law. What role will MOFCOM have in this process?

**DG SHANG MING:** In 2014, MOFCOM will focus its work on issuing the abovementioned *Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings* and guidance for the notification of simple cases. In the meantime, based on experience gained over the past five years, MOFCOM is considering amending the *Notification Measures of the Concentration of Undertakings* and the *Review Measures of the Concentration of Undertakings*.

With regard to the amendment of the Antimonopoly Law, the provisions of the Antimonopoly Law are general in nature. Over the past five years of enforcement, MOFCOM has promulgated a series of supplementary rules to make the law more enforceable. However, for some important issues such as the definition of control, as an enforcement agency we have no power to interpret them; they are subject to authoritative interpretation by the upper legislative bodies. Therefore, it

is a primary task in the mid- and long-term to amend the Antimonopoly Law so as to provide a clearer basis for its enforcement. MOFCOM will actively cooperate with the legislative bodies to facilitate this process.

**ANTITRUST SOURCE:** MOFCOM has recently issued warnings and fines where merging parties failed to notify a concentration with MOFCOM. Could you offer some more details about these cases and how MOFCOM learned about these suspected notification failures?

**DG SHANG MING:** The information of suspected unnotified cases mainly comes from two sources: one is third-party whistle-blowing, and the other is clues MOFCOM discovers during its reviews of other concentrations.

With regard to suspected unnotified cases, during the investigation MOFCOM will take into account the nature, extent, and duration of the failure to notify, as well as whether the concentration has or may have the effect of eliminating or restricting competition. Where, after investigation, the concentration is verified to be a concentration that was not duly notified, MOFCOM may impose a fine of up to RMB500,000 on the undertakings and can additionally require the investigated parties to take measures to restore competition to the state that existed before the concentration. Depending on the specific circumstances, such measures may include terminating implementation of the concentration, disposing the parties' shares or assets within a specified time limit, selling their businesses within a specified time limit, and other necessary measures.

Up to now, MOFCOM has investigated and punished 11 unnotified cases, and the main penalties imposed have been warnings and fines.

**ANTITRUST SOURCE:** Over the past five years, MOFCOM has made a number of efforts to increase the transparency of its enforcement work, including the timely release of the announcements regarding conditional approvals and prohibitions, as well as the quarterly release of the statistics for unconditional approvals. What other measures will MOFCOM take to further increase its enforcement transparency?

**DG SHANG MING:** MOFCOM has always paid great attention to the transparency of its antimonopoly enforcement. At the enforcement level, in addition to the disclosure of cases prohibited and conditionally approved in accordance with the law, it can be observed that, over the past five years, the content of the published decision has been transformed from simple to comprehensive, with an increasing amount of information provided over time. Since October 2013, MOFCOM has started to disclose basic information on all unconditionally approved cases. These data are currently disclosed on a quarterly basis. At the legislative level, over the last five years, MOFCOM has promulgated a series of supplementary rules to provide clear guidance to the notifying parties and to increase the transparency of enforcement. In the future, MOFCOM will continue to issue relevant rules and further steadily increase the transparency of enforcement.

**ANTITRUST SOURCE:** Looking back over the past five years since MOFCOM's formation, what have you learned, what might you have done differently, and what are your future goals for the Bureau?

**DG SHANG MING:** As a witness to the entire process from the drafting to the enforcement of the Antimonopoly Law, I am delighted to see that MOFCOM has made positive progress on many aspects since the promulgation of the Antimonopoly Law five years ago. Personally, I think our

greatest achievement is that competition policy and the notion of competition has stepped up from unheard-of to front-and-center in the everyday life of Chinese society, and its important role in economic development has been widely recognized. In some of the significant government documents recently released, terms such as “fair competition” and “antimonopoly” were repeatedly mentioned, which is significant historical progress. Moreover, as individuals and as a team, we who make competition policies and enforce the law have grown rapidly. In respect of antitrust review of concentrations, China has become one of the most important jurisdictions in the world in a short time. Specifically, over the past five years we have made positive progress in the following aspects:

(1) We have built a professional enforcement team. We have established a scientific work process and trained a young and professional enforcement team through the adoption of internal rules, training and building of talent and capabilities, and gradual improvement in the structure of our internal organization.

(2) We have gradually improved the legal system regarding merger review. In the past five years, on average we issued two sets of supplementary rules per year and have established a multilayer system of rules, consisting of, from top to bottom, State Council regulations, AMC guidelines, MOFCOM ministerial rules, and guidance of the Antimonopoly Bureau of MOFCOM.

(3) We have duly carried out our enforcement work. From 2008 to the end of February 2014, MOFCOM has completed the review of 775 concentrations, among which 753 cases were unconditionally approved, 21 were conditionally approved, and 1 was prohibited. Through enforcement work, we have maintained the effectiveness of market competition and protected consumer welfare.

(4) We have promoted competition culture. MOFCOM has organized and carried out many kinds of competition training activities to enhance the legal awareness of antimonopoly law among various levels of government authorities, enterprises, and the general public, and has fostered the formation of the Chinese competition culture.

(5) We have engaged in full international cooperation. MOFCOM has established cooperation mechanisms with the competition enforcement agencies in major jurisdictions and has also established good cooperative relationships with international organizations such as OECD, APEC, and UNCTAD.

Of course, we are fully aware that we only have several years of enforcement experience, and there is still a lot to be further improved. The new administration of the Chinese government has offered a grand blueprint for China's future reform. I believe that the Antimonopoly Law will play an increasingly important role in China's in-depth reform and the wider opening-up. Specifically, MOFCOM's future work priorities include:

(1) To continue issuing supplementary rules. MOFCOM will keep summarizing the accumulated enforcement experience and will continue to promulgate supplementary rules to meet the needs of enforcement.

(2) To enhance law enforcement. MOFCOM will summarize the experience accumulated in concentration reviews, further enhance the review quality and efficiency, more strictly investigate and punish unnotified cases, and strengthen the awareness of the need for compliance in the whole society through strict enforcement of the law.

(3) To promote a culture of competition. The enforcement of the Antimonopoly Law requires support, understanding, and cooperation from all sectors of the society, and requires a good legal environment, where not only the enforcement agencies are required to responsibly perform their duties, but also undertakings are required to voluntarily abide by the law. MOFCOM will actively promote a culture of competition through its enforcement, innovated training activities, etc.

(4) To further deepen international cooperation. MOFCOM will continue to deepen the cooperation with the antimonopoly authorities in other major jurisdictions, further enhance case cooperation, and continue to contribute to maintaining the structure of market competition around the world. ●