

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: China's new Anti-Monopoly Law (AML) came into effect in August 2008. Three government agencies have enforcement authority under parts of the AML. The Ministry of Commerce (MOFCOM) has responsibility for merger notification and merger control. Indeed, in the last six months, MOFCOM already has intervened in a cross-border deal involving brewers InBev N.V./S.A. and Anheuser-Busch Companies, Inc., and is reviewing Coca-Cola Companies' proposed acquisition of China Huiyuan Juice Group Limited.

Mr. Shang Ming is the Director General of MOFCOM's Anti-Monopoly Bureau. In this interview with The Antitrust Source, DG Shang discusses the structure, focus, and future of MOFCOM's merger mission. He also graciously provides helpful history and perspective on the AML.

From 2003 to August 2008, when the Anti-Monopoly Bureau was established, DG Shang chaired the Anti-Monopoly Office while serving as the Director General of the Department of Treaty & Law. DG Shang has written extensively on competition law and foreign trade. Among other works, his recent books include Merger Control in EU and Several Member States: Legislation & Enforcement Practice; Anti-Monopoly Law of the People's Republic of China: Interpretations and Applications; Regulating Abuse of Dominance by Anti-Trust Law; and Anti-Monopoly Laws and Practices of Major Countries and International Organizations.

During his service in the government that began in 1982, DG Shang long has engaged in foreign trade and economic affairs, as well as work on commercial laws, including the negotiation of bilateral and multilateral trade and investment agreements, intellectual property protection agreements, and anti-dumping agreements; legislation on market circulation, foreign trade, foreign investment, and foreign economic cooperation; government consultations on important trade disputes and intellectual property protection; WTO law and dispute settlement; and guidance for investigation and responding in anti-dumping, countervailing, and safeguard measure cases. Since August 2008, DG Shang has focused on antimonopoly review of mergers.

In addition to his government work, DG Shang serves as vice president of the China International Law Association, the China International Economic Law Research Institute, and the China International Economic Law Association. He is the vice chairman and an arbitrator of the China International Economic and Trade Arbitration Commission, a research fellow of the International Law Research Center under the Chinese Academy of Social Sciences, and an adjunct professor of the University of International Business and Economics and the China University of Political Science and Law.

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—H. STEPHEN HARRIS, JR. AND KEITH D. SHUGARMAN

THE ANTITRUST SOURCE: China's new Anti-Monopoly Law (AML) was drafted carefully after many years of thoughtful debate that involved leading competition officials, scholars, economists, and practitioners from throughout the world. Could you describe your involvement in the drafting of the law and its legislative enactment?



Shang Ming

DIRECTOR GENERAL SHANG MING: The Ministry of Commerce (MOFCOM) always has attached great importance to its antimonopoly work, and in 2003 took over the assignment of drafting the AML. During the legislative process, MOFCOM finished a draft of the AML, based on extensive research and debate, and submitted it to the State Council in February 2004. Thereafter, MOFCOM cooperated closely with the Legislative Affairs Office of the State Council and the National People's Congress throughout the process of legislative deliberation, actively participating in legislative discussions and promoting the adoption of the Anti-Monopoly Law as early as possible.

ANTITRUST SOURCE: We understand that that MOFCOM's Anti-Monopoly Bureau officially was organized in early September and comprises six divisions with distinct responsibilities. Could you please explain the functions of the divisions?

DG SHANG MING: At present, the Bureau consists of six divisions, namely the General Affairs Division, Competition Policy Division, Investigation Division I, Investigation Division II, Supervision and Law Enforcement Division, and Economic Analysis Division. The General Affairs Division is responsible for administrative affairs of the Bureau and external liaison. The Competition Policy Division is responsible for drafting relevant regulations on the concentrations of undertakings and formulating relevant rules and regulatory documents. Investigation Division I and Investigation Division II are responsible for antimonopoly review of filings of concentrations of undertakings. The Supervision and Law Enforcement Division mainly is responsible for handling and investigating reported concentrations of undertakings, and punishing non-compliance with the law. The Economic Analysis Division is responsible for conducting economic analysis on concentrations of undertakings in the process of antimonopoly review. In addition, the Bureau also takes the lead in organizing consultation and negotiation of competition-related articles in multilateral agreements, and is responsible for international exchange and cooperation on multilateral competition policy.

ANTITRUST SOURCE: In addition to enforcement of the merger and acquisition provisions of the AML, we understand that MOFCOM will undertake day-to-day working functions for the Anti-Monopoly Commission (AMC) that was established recently pursuant to the new law. Could you please explain who will serve as the members of the AMC, and the specific functions and mission of the AMC. In addition, what kinds of activities will MOFCOM undertake on behalf of the AMC, in the contexts of both domestic enforcement and international cooperation?

DG SHANG MING: In order to implement the AML, the State Council has formed the Anti-Monopoly Commission, which is chaired by Vice Premier Wang Qishan and includes member departments, such as the National Development and Reform Commission, MOFCOM, and the State Administration for Industry and Commerce, etc. The AMC under the State Council is responsible for the organization, coordination, and supervision of antimonopoly-related work, specifically performing the following duties: the study and formulation of competition policies; the organization of research, assessment of, and the preparation of reports regarding the overall competitive condi-

tions of markets; the drafting and promulgation of antimonopoly guidelines; coordination of anti-monopoly law enforcement; and other duties as stipulated by the State Council. The AMC has no specific law enforcement functions.

Currently, the Anti-Monopoly Bureau of MOFCOM has the following functions: conducting anti-monopoly review of concentrations of undertakings according to law; providing guidance for domestic enterprises taking part in overseas antimonopoly litigation; participating in international exchanges; and cooperation on multilateral competition policy. In addition, the Bureau also assumes day-to-day work of the AMC under the State Council.

ANTITRUST SOURCE: Before the enactment of the AML, MOFCOM had conducted reviews of certain mergers involving foreign investors under the old provisional rules and then the revised foreign M&A rules. In what ways is that experience useful to the Bureau's merger reviews under the AML? Is it clear that the AML and the Notification Thresholds Regulation superseded the relevant rules under the M&A Regulation? Will this be confirmed formally in some way? How will MOFCOM's procedures under the AML differ from those it used under the foreign M&A rules?

DG SHANG MING: In 2003, six ministries and commissions jointly promulgated the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (which was amended and replaced by the *Regulations on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors*, promulgated in 2006), whereby MOFCOM began antimonopoly review of mergers and acquisitions. From 2003 to the end of July 2008, MOFCOM accepted more than 600 notifications of mergers and acquisitions by foreign investors, and conducted substantive reviews of several important notifications. During these substantive reviews, MOFCOM conducted many hearings and meetings, and sent out questionnaires to competitors of the parties to the transactions, as well as to consumers and industrial associations. Through more than four years of such enforcement practice, MOFCOM has made positive progress in terms of antimonopoly legislation and law enforcement, gained certain experience, and cultivated professionals, which provide a solid foundation for better fulfilling its antimonopoly functions. After the AML and the *Regulations of the State Council on Notification Thresholds for Concentrations of Undertakings* came into effect, they replaced the relevant provisions in the *Regulations on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors*, which will be amended by the relevant departments according to statutory procedures so that those antimonopoly provisions will be repealed. MOFCOM has conducted antimonopoly reviews of concentrations of undertakings pursuant to the newly enacted laws and regulations.

ANTITRUST SOURCE: Mr. Shang, as you know, concern was expressed during the drafting of the law regarding whether the AML would be applied to foreign companies in the same manner as it is applied to Chinese companies. Now that the law is in force, and some foreign mergers have been submitted for review, could you please comment on whether decisions on mergers involving foreign parties will differ in any way from decisions on purely domestic ones?

DG SHANG MING: The enactment of China's AML is expected to permit enterprises of all types to develop and expand through fair competition, and at the same time to prevent the elimination of competition by monopolistic actions, so as to facilitate the winning of the superior and the weeding out of the inferior, and transform the mode for economic growth. It should be noted that the AML will be uniformly and equally applicable to both domestic and foreign enterprises of all

types without any discriminatory treatment. In order to ensure the consistency of antimonopoly legislation and the uniform implementation of antimonopoly laws, existing antimonopoly provisions should conform to the AML, and no antimonopoly legislation or enforcement will target certain types of enterprises.

ANTITRUST SOURCE: Turning to questions about specific procedural and substantive issues faced by parties filing merger notifications, is there a uniform standard of “completeness” that MOFCOM applies to determine whether to accept a filing? Is there any limitation on the number of requests for additional information that MOFCOM may make, or the amount of time that MOFCOM may take, before its acceptance of the filing? If parties have questions about the procedure or the specific information that should be included in a filing, does the Bureau provide informal consultation by telephone or email to assist the filing parties in ensuring their filings are complete and their understanding of the thresholds is correct?

DG SHANG MING: Article 23 of the AML provides that undertakings filing notifications of concentration shall submit the following documents and information: (1) the notification letter; (2) the explanation regarding the impact that the concentration may have on the competition in the relevant market; (3) the concentration agreement; (4) the financial accounting reports of the undertakings involved in the concentration in the preceding accounting year audited by a certified public accountant; (5) other documents and information required by the Anti-Monopoly Enforcement Authority under the State Council. This provision, however, only stipulates in principle the documents and information to be submitted for a notification without giving a detailed list of documents and information. As a basic law that guides antimonopoly enforcement, the AML cannot provide greater detail, so it is impossible to narrow down to a very detailed and specific degree the information that may be required in connection with any given transaction. Unlike some other types of cases, every merger filing case is different—for example, the nature of the parties, the transaction, or the industries involved vary considerably between cases. Therefore, it is difficult to adopt a “one size fits all” approach to setting a uniform requirement on notification materials for all cases. When dealing with a specific case, the Anti-Monopoly Bureau will issue specific requirements for notification materials according to the feature of each case and its effect upon competition in the market. Actually, this is exactly the meaning of Article 23 (5) of the AML: “other information required by the Anti-Monopoly Enforcement Authority under the State Council.”

As for concentration notification cases, MOFCOM implements a pre-notification consultation system. When the notifying party has any questions about the notification, it may request a meeting for negotiation or consultation with the Anti-Monopoly Bureau by sending its questions in writing to the Bureau. After receipt of such a request, the Anti-Monopoly Bureau will study the issues raised, and reply to the notifying party face to face. After the notification of a concentration of undertakings is officially accepted, if a notifying party has any doubts or questions, it may communicate with the Anti-Monopoly Bureau via various means, such as email or telephone, depending on the circumstances.

ANTITRUST SOURCE: The concentration provisions of the AML use fairly general language regarding both the review procedures and the substantive standards to be applied. As you know, many other jurisdictions have enacted regulations or established procedural rules to implement their statutes, and issued guidelines and informal interpretations to provided detailed explanations of the agencies' processes and analytical approaches to merger reviews. Do you foresee the enact-

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and studies in connection with our practical experience, and implementing guidelines, rules, regulatory documents, and working rules under the AML are in the process of being drafted and will be promulgated in due time.

ment of more implementing regulations or the publication of other sources of guidance for parties and practitioners seeking to understand the process? For example, will MOFCOM provide explanations on such matters as how turnover should be calculated, or the Bureau's approach to defining relevant markets, beyond the general definition in Article 12 of the law?

DG SHANG MING: Although the AML contains only fifty-seven Articles, it is operational to a relatively high degree as a law. In practice, we need gradually to develop experience and further improve and fine-tune our legislative and enforcement work. The *Regulation of the State Council on Notification Thresholds for Concentrations of Undertakings*, coming into force upon promulgation by the State Council on August 3, 2008, contains provisions regarding the notification thresholds as well as investigation of concentrations of undertakings below the notification thresholds. Of course, in order to implement properly the AML, having only one such implementing regulation will not be enough. We are doing research and studies in connection with our practical experience, and implementing guidelines, rules, regulatory documents, and working rules under the AML are in the process of being drafted and will be promulgated in due time.

ANTITRUST SOURCE: In addition to reviewing the documents submitted by the parties to a transaction, what kinds of investigative methods are currently employed by MOFCOM? How much weight will MOFCOM give to opinions from competitors and customers?

DG SHANG MING: In antimonopoly reviews of concentrations of undertakings, MOFCOM will, depending on the circumstances presented by a given case, investigate and gather facts and evidence from relevant parties, including relevant governmental authorities, functional departments, trade associations, experts, parties to the transaction, competitors, upstream and downstream enterprises, and consumers. Various means are employed, including primarily meetings, hearings, telephone inquiries, written solicitations of opinions, on-site investigations, studies, and questionnaires. During the review process, MOFCOM duly will ensure the rights of competitors, consumers, and other interested parties to state their opinions, and also will ensure that decisions will be grounded on sufficient facts.

ANTITRUST SOURCE: What standards will the Bureau apply to determine whether a proposed concentration presents sufficiently substantial issues to subject it to further examination beyond the initial thirty-day period? Do you anticipate that MOFCOM's approach will be comparable to the approach taken by any other jurisdictions, such as the European Union or the United States? Will MOFCOM consider factors other than the merger's effect on price and, if so, what are the other factors and how much weight will they be given? Once a matter is in the ninety-day second phase, what circumstances would cause the Bureau to extend that time limit, as is permitted under Article 26, up to an additional sixty days?

DG SHANG MING: Article 27 of the AML provides that the following factors shall be considered in the review of concentrations: (1) The market shares of the undertakings involved in the relevant market and their ability to control the market; (2) The degree of market concentration in the relevant market; (3) The impact of the concentration on market entry and technical progress; (4) The impact of the concentration on consumers and other undertakings; (5) The impact of the concentration on national economic development; and (6) Other factors affecting market competition as determined by the Anti-Monopoly Enforcement Authority under the State Council.

During the first stage review of the concentrations of undertakings, the Anti-Monopoly Bureau will consider all those factors as a whole, and, if there are likely to be competition concerns which need further investigation, a second stage review will be initiated in accordance with the law. In this regard, our approach is similar to those of other jurisdictions, such as the European Union and the United States.

According to Article 26 of the AML, a second stage review shall be completed within ninety days from the date of the decision for such further review. Under any of the following circumstances, the Anti-Monopoly Enforcement Authority under the State Council may extend the time limit, provided that the extension does not exceed sixty days at the maximum: (1) The undertakings agree to extend the time limit for the review; (2) The documents submitted by the notifying undertakings are inaccurate and need further verification; or (3) The relevant circumstances have significantly changed after notification by the undertakings.

On November 18, 2008,

the Ministry of

Commerce decided

to grant a conditioned

approval of InBev's

acquisition of

Anheuser-Busch

Companies (AB) with

certain restrictive

conditions attached

.... This is the first

such conditioned

approval given by

MOFCOM in its review

of concentrations

since 2003.

ANTITRUST SOURCE: Could you please describe the extent to which MOFCOM intends to rely on hearings in its investigation of mergers and acquisitions? Will hearings be public or confidential? Are there certain issues that you believe are likely to require a hearing when they arise in the course of a merger review? Is it possible that hearings might be conducted during the first stage review in some cases? Do you anticipate that MOFCOM will issue procedural rules or guidelines on the conduct of hearings?

DG SHANG MING: Hearings are one of the means for the Ministry of Commerce to obtain facts, conduct investigation and gather evidence, and ensure that the relevant parties are able to state their opinions fully. Depending on the specific circumstances, complexity, and importance of each case, the necessity, form, and timeline of hearings may differ. We currently are drafting detailed procedures and rules for hearings.

ANTITRUST SOURCE: In concentrations that raise concerns, will MOFCOM seriously consider remedies to alleviate those concerns and still allow the remainder of the merger to proceed in order to realize procompetitive benefits? If so, must those remedies be structural, such as divestiture, or will MOFCOM consider behavioral undertakings? Does MOFCOM intend to impose penalties on transactions that are consummated during the course of MOFCOM's review, especially foreign-to-foreign mergers that may have been cleared already by other jurisdictions? If so, what kinds of penalties are likely?

DG SHANG MING: Article 29 of the AML provides that "where a concentration is not prohibited, the Anti-Monopoly Enforcement Authority may decide to attach restrictive conditions to offset the negative impact of the concentration on competition." On November 18, 2008, the Ministry of Commerce decided to grant a conditioned approval of InBev's acquisition of Anheuser-Busch Companies (AB) with certain restrictive conditions attached, and issued an announcement, [2008] No. 95, to that effect. This is the first such conditioned approval given by MOFCOM in its review of concentrations since 2003. The restrictive conditions include that the 27 percent equity interest currently held by AB in Qingdao Beer shall not be increased; any change to InBev's controlling shareholder or any change to the shareholders of such controlling shareholder shall be promptly notified to the MOFCOM; the 28.56 percent equity interest currently held by InBev in Zhuijiang Beer shall not be increased; and no effort or attempt shall be made to acquire any shares in Huarun Snow Beer (China) or Beijing Yanjing Beer. The purpose of those restrictive conditions

is to mitigate any adverse impact that such merger may have on future competition in the Chinese market. MOFCOM will, depending on the specific circumstances of the case, elect to take structural remedies or behavioral remedies or, in certain cases, a combination of both.

According to Article 21 of the AML, a prior notification shall be filed with the Anti-Monopoly Enforcement Authority by the undertakings if the concentration exceeds the thresholds of notification stipulated by the State Council. The concentration transaction shall not be implemented without prior notification. Article 48 of the AML provides that where undertakings implement concentrations in violation of the relevant provisions of this Law, the Anti-Monopoly Enforcement Authority under the State Council shall order the undertakings concerned to stop implementing the concentration, to dispose of its stock, to transfer of its business within a time limit, and adopt other necessary measures to restore to the condition before the concentration. It also may impose a fine of up to RMB 500,000.

Where any undertaking fails to report any transaction that should be notified under the law, MOFCOM will render a decision that takes into account the above stipulations of the AML, the specific circumstances of the case, approaches taken by other jurisdictions, and the enforceability of the decisions. The measures taken in such cases will be more or less similar to that taken by other countries, but may differ in degree.

ANTITRUST SOURCE: Director-General Shang, we are most grateful for the opportunity to have the benefit of your views on these important issues. ●