
CPI Antitrust Chronicle

February 2011 (2)

U.S.-China Antitrust Cooperation: Onward and Upward

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I. INTRODUCTION

This brief note highlights some ongoing antitrust cooperation between the United States and China. Over the past twenty years, the rapid growth in the number of jurisdictions with antitrust laws and antitrust enforcement agencies has boosted the importance of cooperation among antitrust agencies. Cooperation aims to ensure sound antitrust enforcement in an increasingly global marketplace, although it does not, nor should it be expected to, guarantee consistent results in every case. Nonetheless cooperation can be extremely helpful in enhancing convergence towards internationally-recognized antitrust best practices, expediting parallel agency reviews, saving valuable agency resources, and ensuring that antitrust remedies in different jurisdictions are consistent.

II. COOPERATION OVER LEGISLATION AND LEGISLATIVE IMPLEMENTATION

Extending over approximately thirteen years, the promulgation of China's Anti-Monopoly Law ("AML") was an extensive process. During the years that led to the AML's adoption in 2008, the U.S. antitrust agencies had repeated opportunities to provide comments and suggestions on successive drafts of the law. Through informal, formal, bilateral, and multilateral contacts, the Chinese agencies and legislature involved in the drafting process obtained a wide variety of views on the AML's proposed provisions from the public and private sectors in China and abroad. We at the U.S. antitrust agencies were pleased with this transparency, which allowed us to work closely with our counterparts in China. We also were pleased to see, in successive drafts, several changes to the AML that were consistent with positions that the U.S. agencies have advocated. For example, early drafts contained provisions that appeared to broadly condone collusion in the context of trade associations. Our concerns about these provisions in earlier drafts have been alleviated by the final text of the AML, which clarifies that trade associations will not be exempt from antitrust scrutiny and standards.

Our long rooted cooperation tradition continues as China assumes the demanding process of implementing the AML through issuance of specific guidelines and regulations. We follow these developments, and regularly offer our Chinese colleagues comments and suggestions, based on our longer experience of antitrust enforcement. In doing so, we are able to relate not only what we now regard as sound antitrust policy, but also the process by which we arrived where we are today, which was often replete with mistakes and policies that we now view as misguided. "There are no mistakes, only lessons" goes the Chinese adage. And indeed, we feel

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that such lessons, learned the hard way through experience, are valuable both at home and abroad, to help avoid the same missteps.

III. ONGOING INFORMAL AND FORMAL WORK COOPERATION

In light of the rapid spread of antitrust enforcement around the world and the growing number of parallel multi-jurisdiction antitrust investigations and merger reviews over the past two decades,² the U.S. Federal Trade Commission (“FTC”) increasingly cooperates and coordinates with counterpart agencies reviewing the same mergers or similar conduct carried out by the same companies. Such cooperation, which usually includes sharing of information, can save agencies valuable time and resources and, especially in transnational mergers, can help avoid conflicting outcomes whereby remedies imposed or accepted by one agency are inconsistent with those by an agency in another jurisdiction.

Cooperation does not require a formal agreement, and does not necessarily involve confidential information. Agencies routinely share non-confidential information, such as public information, or what is referred to as “agency confidential” information—information that the agency does not routinely disclose but on which there are no statutory disclosure prohibitions. Examples include general staff views on market definition, competitive effects, and remedies. This type of consultation can entail frequent contact between U.S. staff and their foreign counterparts and helps identify common areas of concern. Sharing of any confidential information generally requires waivers from the parties who provided the information, and is generally shared on condition that the recipient maintain the confidentiality of the information to the extent possible. Along these lines, we have engaged in some initial cooperation with our Chinese counterparts, and look forward to expanding such cooperation, for the benefit of both Chinese and U.S. businesses and consumers.

In addition to our informal cooperation, the United States and its antitrust agencies have signed eight international antitrust cooperation agreements and one antitrust memorandum of understanding.³ The agreements provide a more formal framework and more options for antitrust exchanges between the U.S. agencies and counterpart agencies. The FTC has also signed a memorandum of understanding with China’s State Administration of Industry and Commerce (“SAIC”) for cooperation on consumer protection matters.⁴ We are also discussing the possibility of entering into a potential memorandum of understanding between the U.S. antitrust agencies and our Chinese counterparts. We hope these negotiations will bear fruit during the nascent year of the Rabbit.

IV. FTC TO HOST A MOFCOM INTERNATIONAL FELLOW

The FTC International Fellows Program was established in 2007 and aims to strengthen international enforcement relationships between the FTC and counterpart agencies abroad. The program was authorized by the passage of the U.S. SAFE WEB Act of 2006 (“SAFE WEB

²See, for example, Joseph Wilson, GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS, 30-32 (2003).

³ These are available at <http://www.ftc.gov/oia/agreements.shtm>. Under U.S. law, these agreements are “executive agreements,” formal, binding international agreements. To date, the cooperation agreements were signed between the U.S. Government and the counterpart government, while the memorandum of understanding was signed between the respective antitrust agencies of the two jurisdictions.

⁴Available at <http://www.ftc.gov/os/2007/06/070612chinamou.pdf>.

Act⁵).⁵ Section 9 of the Act⁶ provides for temporary appointment of staff exchange visitors from foreign law enforcement agencies as special government employees, who are subject to the ethical and legal requirements and sanctions applicable to other FTC employees with access to nonpublic materials. The Act also authorizes the FTC to temporarily detail its own officers or employees to foreign government agencies.

To implement this provision, the FTC created an International Fellows Program⁷ under which officials and staff of many counterpart foreign agencies have worked with FTC case teams for three to six month periods to experience first-hand how an FTC case team performs its work. Since first implementing the staff exchange provision of the SAFE WEB Act in late 2007, the agency has hosted 33 international colleagues from counterpart agencies spread over six continents. We look forward to soon hosting our first Chinese international fellow at the FTC, who will be joining us from MOFCOM, and hope other Chinese antitrust enforcers will follow in his footsteps.

V. CONCLUSION

Bilateral antitrust cooperation between the United States and China in recent years has been robust, and is an organic part of a vast antitrust cooperation landscape. We look forward to continuing to improve our cooperation with our counterpart Chinese agencies, to the benefit of U.S. and Chinese businesses and consumers.

⁵ The full text of the Act is available at <http://www.gpo.gov/fdsys/pkg/BILLS-109s1608enr/pdf/BILLS-109s1608enr.pdf>.

⁶ Section 25a of the Federal Trade Commission Act, codified as 15 U.S.C. § 57c-1. The full text of the FTC Act is available at http://www.ftc.gov/ogc/FTC_Act_IncorporatingUS_SAFE_WEB_Act.pdf.

⁷ More details about the program are available at <http://www.ftc.gov/oia/fellowsprogramannouncement.pdf>.