

U.S. and Chinese Antitrust Agencies to Sign Cooperation Agreement

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On June 24, 2011, Assistant Attorney General Christine Varney announced that the U.S. antitrust enforcement agencies will be signing a cooperation agreement with their Chinese counterparts. As a consequence, companies can now expect to see the Chinese authorities participating in coordinated “dawn raids” and related cooperative enforcement initiatives with the U.S. and EU antitrust enforcers in international cartel cases.

On June 24, 2011, Christine Varney, Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice (DOJ), announced that the Federal Trade Commission and DOJ will sign a Memorandum of Understanding (MOU) with China’s three competition law enforcement agencies—the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC). The Memorandum is expected to be signed at the end of August 2011.

In making the announcement, Varney observed that cooperation with other competition agencies in emerging economies such as China can be a “first step” in addressing the concern that emerging economies will use competition laws “as a method to promote their trade interests.” She also said that she expected the MOU with China will provide a sound basis for enhanced cooperation on a day-to-day basis between the signatory agencies, and minimize possible conflicts between U.S. and Chinese antitrust enforcement initiatives.

The U.S.-China MOU is expected to be modeled on the EU-U.S. “Agreement Regarding the Application of Competition Rules.” It would therefore include a commitment to coordinate with each other on investigations and proceedings dealing with anticompetitive conduct (such as cartel investigations) and merger reviews of interest to both countries under their respective antitrust laws, including providing early notice to each other regarding investigations that implicate the other’s interests. Like the U.S.-EU agreement, the U.S.-China accord will also include information exchange obligations. Confidential information, the disclosure of which is prohibited by law in either jurisdiction, will not, however, be shared with the other country’s competition agencies.

When the U.S.-China MOU comes into effect, it will be the latest in a growing number of cooperation agreements in the international antitrust enforcement community. The U.S. enforcement agencies have long-standing cooperation agreements in place with a large number of sister antitrust enforcement agencies, including the European Commission, the German Cartel Office, the U.K. Office of Fair Trade, Japan’s Fair Trade Commission and South Africa’s Competition Commission. The Chinese competition authorities likewise have already entered into cooperation arrangements with the European Commission, the U.K. Office of Fair Trade and other agencies. Taken collectively, the growing number of these international accords is symptomatic of the “globalization” of antitrust, which

has important implications for international competition policy and for multinational companies that conduct business in the jurisdictions concerned.

From a policy standpoint, these cooperation agreements and related technical consultations promote greater harmonization and convergence in the application of antitrust and competition laws around the world. This benefits the business community in promoting legal certainty and mitigating the risk of being subjected to fundamentally inconsistent legal standards in the various jurisdictions where organizations conduct business. These accords also benefit the business community in a more concrete sense—for example, by reducing the risk of the imposition of conflicting undertakings required for merger clearances, duplicative penalties in international cartel cases, and conflicting agendas and requirements for qualifying cartel “whistleblowers” under the various amnesty and leniency programs in “cooperating” jurisdictions.

On the other hand, one should not lose sight of the fact that the ultimate objective of these cooperation agreements is more effective—and aggressive—antitrust enforcement around the globe through coordinated enforcement efforts, especially in the area of international cartel enforcement. As a consequence, companies can now expect to see the Chinese authorities participating in coordinated “dawn raids” and related cooperative enforcement initiatives with their U.S. and EU counterparts in international cartel cases, just as witnessed between the United States and the European Union, Canada, Japan and other countries following their cooperation agreements. And while the U.S.-China MOU will be but the latest example of these international accords, it is particularly noteworthy in that the enforcement authorities with oversight over the world’s three largest economies—the United States, Europe and China—will now have a shared enforcement mission and mechanisms in place to carry that mission out on a coordinated basis.

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