

Global Antitrust Cooperation: EU's Top Regulator Signs MoU with China

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Introduction

On 20 September 2012, **European Commission** officials concluded a **Memorandum of Understanding (MoU)** with Chinese officials in respect of **antitrust law**. Signed by the **Directorate General for Competition** and two of China's antitrust law enforcement authorities, the **National Development and Reform Commission (NDRC)** and the **State Administration of Industry and Commerce (SAIC)**, the MoU strengthens the relationship between the two jurisdictions' respective antitrust authorities.

The MoU reflects a growing willingness on the part of the Chinese antitrust authorities to conclude MoUs with their antitrust counterparts in various jurisdictions. Other notable recent examples include the MoU signed with the **UK Office of Fair Trading** on 17 April 2012 and the MoU concluded with the **US Department of Justice and US Federal Trade Commission** on 27 July 2011.

Antitrust Enforcement in China

The **Anti Monopoly Law of China (AML)** was adopted into law in August 2008, with enforcement split between different bodies. General antitrust policy guidance and coordination is the responsibility of the Anti-Monopoly Commission, the SAIC handles non-price related violations, the NDRC deals with price-related violations, and merger reviews are undertaken by the **Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM)**.

The MoU

The MoU complements the **EU-China Competition Policy Dialogue**, signed in 2004 with MOFCOM. The 2004 Policy Dialogue not only provided for a structured dialogue to share experiences and views on competition matters, but also placed emphasis on the provision of technical and capacity building assistance to China. Moreover, whilst the 2004 terms of reference already covered anti-monopoly cooperation, the aim of the European Union in concluding the new

MoU is to forge formally direct links with the SAIC and the NDRC, particularly in the investigation and sanctioning of international cartels.

By expressly creating a framework with these two authorities, the new agreement clearly delineates the framework of cooperation between the Commission and the relevant Chinese enforcement authorities. In this respect, it may have been useful to include the **Supreme People's Court (SPC)** as a party to the MoU. This is because, as private enforcement of antitrust rules becomes increasingly common in China, the role of the SPC, its interpretation of the MoU, and the methodology it applies in arriving at its decisions will be of paramount importance.

With particular reference to the AML, the MoU seeks to increase mutual understanding and awareness by strengthening coordination and cooperation. The new framework covers discussion on competition legislation, enforcement and technical cooperation in the areas of cartels, abuse of a dominant position and other restrictive agreements. It explicitly makes provisions, subject to EU and Chinese law, for the sharing of non-confidential information and the direct coordination of enforcement activities. In this respect, the inclusion of more specific implementation steps may have been useful to further enhance the effectiveness of the MoU.

The agreement contains no provisions regarding cooperation in the area of merger control; in fact, matters relating to concentrations are expressly excluded. This is because cooperation in the field of merger control is already provided for in a separate arrangement with MOFCOM.

Increasing The Effectiveness of Antitrust Enforcement

Although the EU-China relationship in antitrust matters is still in its infancy, cooperation has already borne fruit: witness the fact that the spirit and letter of the AML draws much inspiration from the EU antitrust system. In this respect, the MoU may encourage China to take into account EU precedent as an interpretative aid in the application of its AML. One such example can be seen in the Seagate/Samsung hard disk drive decision where MOFCOM referred specifically to, and appeared to take into account, the effect of a recent decision by the Commission.

In view of the globalised nature of trade and the multi-jurisdictional effects of cartels, unilateral conduct and mergers, cooperation with third countries has become a must. The recently signed MoU points towards an enhanced level of cooperation between the European Union and China in antitrust matters and reflects a growing trend amongst antitrust authorities of varying maturity to conclude bilateral antitrust cooperation agreements. This ultimately facilitates the convergence of antitrust policy and increases the effectiveness of its enforcement. For parties with activities in the European Union and China, the MoU is a welcome step in the right direction and a move towards increased predictability and legal certainty in the application and enforcement of the competition rules.

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