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The panda bear hug

As China and the United States embrace, will their new MOU on antitrust increase regulatory efficiency and harmonise antitrust enforcement? Alec Burnside, Joseph Bial and Christian Lorenz of Cadwalader, Wickersham & Taft ponder the benefits and rationale of co-operation among antitrust regulators

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THE PANDA BEAR HUG

As China and the United States embrace, will their new MOU on antitrust increase regulatory efficiency and harmonise antitrust enforcement? **Alec Burnside**, **Joseph Bial** and **Christian Lorenz** ponder the benefits and rationale of co-operation among antitrust regulators

I. Introduction

On 27 July this year, the United States antitrust agencies signed a Memorandum of Understanding (MOU) with their counterparts in China.[1] Hailed as "historic" by Christine Varney, Assistant Attorney General for the US Department of Justice, Antitrust Division, and a "true milestone" by Jon Leibowitz, Federal Trade Commission Chairman, the agreement paves the way for increased co-operation and communication with respect to the enforcement of their respective antitrust laws and competition policies. The MOU builds on past co-operation, providing a framework for a continued "joint dialogue" among both nations' antitrust agencies. But most importantly, the MOU contemplates co-operation between agencies on specific investigations, including at the staff level.

The United States is of course not alone in engaging with China on the competition front. Indeed, earlier this year the United Kingdom Office of Fair Trading also signed memoranda of understanding with two of the Chinese agencies tasked with applying the competition laws.[2] And the European Union has been actively engaged for quite some time in discussions under their 24 November 2003 Dialogue on Competition.[3] Recently, a Chinese delegation led by Gao Hucheng, International Trade Negotiation Representative and Vice Minister of the Ministry of Commerce ("Mofcom"), met with Joaquín Almunia, Vice President of the European Commission and Commissioner responsible for competition, and other competition regulators to discuss competition policy. And in June this year, at the EU-China Competition Week held in Beijing, regulators from the two sides met for a series of sessions on topical issues in antitrust policy.

While the UK's memoranda and the EU's Dialogue on Competition provide an important basis for high-level discussion of law, policy and enforcement, the US-Sino MOU takes an important step further in recognising and encouraging co-operation with respect to specific cases at the staff level. Though the language in the US-Sino MOU leaves much room for discretion, and though it remains to be seen whether and to what extent there will be active co-operation on specific investigations, there are reasons to be optimistic. In the many years leading up to the enactment of the Chinese Antimonopoly Law (AML), the Chinese regulators proved their interest in consulting with and gaining from the experience of other jurisdictions in formulating the new Chinese law and competition policy.

Recognising the increasing role China will play in antitrust enforcement and the world economy as a whole, the United States and China have taken what has potential to be an important step down the road towards increasing regulatory efficiency and harmonising antitrust enforcement. The benefits should accrue to both businesses and regulators alike. In similar vein, European Union and China officials met at the June EU-China Competition Week in Beijing to discuss the status of a EU-Sino Co-operation Memorandum of Understanding, although there is no indication as to how close the two are to reaching an agreement, or whether the agreement would include provisions relating to specific co-operation at staff level.

II. The ascendancy of China as an antitrust regulator

Since enacting the AML in August 2008, China has quickly become one of the major antitrust jurisdictions, which multinational businesses must take into account when implementing transactions and conducting business. In 2010, China reviewed more than 100 merger notifications, and that number is expected to double in 2011.

The AML was more than a decade in the making, and while there are some distinctly Chinese elements of the law, such as "promoting the healthy development of the socialist market economy,"[4] the law for the most part reflects basic elements of existing antitrust laws around the world. This reflects the input which the drafters of the AML sought from the United States, the European Union and other established antitrust jurisdictions.

Most consider the pre-enactment discussions and commentary periods a success, as successive drafts and the final law itself saw changes and modifications that took into account the concerns and comments voiced by other jurisdictions based on their own experience in antitrust enforcement.

Since the enactment of the AML, there has been a natural interest among observers in seeing how it has been applied in individual cases. The most common critique – as is often the case with new competition law regimes, to say nothing of established ones – is that the law is being used to promote domestic industrial policy, favouring national champions at the expense of foreign companies, or for protectionist goals. Other criticisms relate to the treatment of state-owned enterprises under the AML - or lack of application to them. To date, Mofcom has blocked one transaction and imposed conditions on seven; with one exception, all the parties to these transactions have been foreign companies.[5] Much has been published about Mofcom's analysis in these transactions, e.g., in *Coca-Cola/Huiyuan*, and this ground will not be retraced here.

> **Since enacting the anti-monopoly law, China has quickly become one of the major antitrust jurisdictions**

Before any rush to judgment, though, and without denying the obvious interest in observing how Chinese practice develops, similar instances in other jurisdictions will be recalled. The French, for example, were famously motivated to defend the strategic importance of yoghurt, when PepsiCo was said to be considering the acquisition of Danone. China's state-owned CNOOC memorably withdrew its bid for California-based Unocal in response to considerable political opposition, while state-owned Dubai Ports (DP World) was arm-twisted into relinquishing an acquisition (from foreign investors) of six US ports, based on concerns the sale would compromise national security.

At the same time, the United States has had its concerns that European industrial interests were being served in DG Competition's approach to cases such as *Boeing/McDonnell Douglas* and *GE/Honeywell*, where mergers of two US-headquartered businesses received more intensive scrutiny in Europe than they had in the US. Of course each of these cases had its own particular features, and doubtless protagonists in any one of them would debate the rights and wrongs of the situation. But, standing back from individual cases, the question is whether, over time, and as China processes new cases and gains experience, these initial concerns recede or advance. Co-operation with other agencies, as intended in the new US-Sino deal, has the potential to bring harmony in place of discord in these situations.

III. The importance of co-operation and convergence in antitrust enforcement

In assessing the potential for the US-Sino MOU, the US-EU co-operation agreements are instructive. For decades, US and EU regulators have been in direct and active co-operation on specific transactions. The framework for their co-operation is provided by the 1991 and 1998 US-Commission of the European Communities Co-operation Agreements.[6] These agreements have played an important role in fostering communication and co-operation between the two jurisdictions. While not always visible to the public or parties, co-operation among regulators on specific transactions can be as prevalent as co-operation among the various law firms representing the parties. And regulators (though perhaps not surprisingly) encourage the parties to involve all jurisdictions early on so as to avoid delays later in the process if, for example, a potential remedy one regulator has approved (e.g., sale of a divested business to a particular buyer) is not acceptable to another.[7]

For regulators to share confidential business information received from the parties, a waiver by the parties is often required, i.e., waiver of confidentiality duties under the relevant domestic statues. But even without such waivers, co-operation and co-ordination among regulators can be valuable and efficient. Sharing ideas regarding market definition and theories of harm, for example, does not necessarily require sharing of confidential business secrets and can quickly get regulators up the learning curve, saving time and facilitating more consistent results.

Bilateral agreements do not of course guarantee against inconsistent rulings. Even the "most sophisticated" jurisdictions have reached different results in high-profile transactions, such as *Boeing* and *GE* mentioned above, and more recently in *Oracle/Sun*. Conflicting decisions are, however, few and relatively far between, and in practice fall-outs in individual cases have led the EU and US to re-double their efforts to co-operate effectively.

Given the benefits of co-operation to both businesses and regulators, it might be thought surprising that the United States and European Union have so few co-operation agreements or MOUs in place with other countries. Well over 100 jurisdictions now enforce competition laws, but the United States and European Union have only a handful of such agreements. Currently, the United States has nine co-operation agreements,

with Australia, Brazil, Canada, Chile, the European Union, Germany, Israel, Japan and Mexico; in addition to China, the US antitrust agencies also have an MOU in place with Russia. The European Union has four co-operation agreements in place, with Canada, Japan, Korea and the United States; and the Directorate-General for Competition of the European Commission also has MOUs in place with Brazil and Russia (and one with Korea pre-dating the co-operation agreement).

While the absence of such an agreement does not prevent jurisdictions from co-operating, and the existence of an agreement does not free them from national rules requiring protection of confidential information, the existence of an agreement does provide an important framework for co-operation. The agreements may anticipate joint conferences and seminars on antitrust developments, allowing the jurisdictions to share their experience in evaluating specific transactions and conduct, and they set a “tone from the top,” emphasising the importance which those leading the agencies place on co-operation. More specifically, the agreements provide the practical framework for actual co-operation at the working level, acquainting staff with their counterparts, providing points of contact, etc.

Co-operation and communication among regulators should tend to reduce the costs of compliance for businesses

The relative dearth of bilaterals may, however, be a function of the success of the International Competition Network (ICN), since its launch in 2001. The ICN has rapidly become an indispensable forum for dialogue among competition authorities, building consensus and convergence in the application of antitrust laws and policy – and bringing officials into regular contact.

Co-operation increases the likelihood of consistent and predictable outcomes, clearly desirable for multinational corporations thinking strategically across jurisdictions, but it can also be a tool for regulators to explain how their own analyses and competition policies work in practice. Similarly, areas of disagreement among regulators can be highlighted early on, so that they can either be addressed or, at least, identified so as not to create unnecessary delay late in the process. More developed antitrust regimes see the opportunity to share their experiences with those newer to antitrust enforcement, so seeking to encourage some measure of convergence in their respective analyses.

Put another way, co-operation can be used as containment. This was an underlying (albeit rarely spoken) rationale for the establishment of the ICN, given the concern that the proliferation of new merger control regimes would stifle international M&A activity. The notion is though older than that: going back some decades, a recurrent concern in Europe was the “long-arm” jurisdiction applied by the US agencies in international antitrust enforcement, and how this could be restrained. The “positive comity” provisions of the second EU-US co-operation treaty explicitly require each side to consider the other’s interests before certain enforcement steps. Such positive comity provisions have not taken wider root, but the interest in co-operation between regulators is in part a proxy for them.

IV. The US-Sino MOU and EU-Sino co-operation compared

The new US-Sino MOU recognises that the agencies should work together by, among other things, (1) sharing information with respect to competition policy and enforcement; (2) participating in training programmes, workshops and internships; (3) providing comments on proposed rules, regulations and guidelines; and (4) exchanging views with respect to multilateral competition law and policy. As to direct bilateral co-operation at the working level, the MOU provides for the following:

Each agency recognises that, when a U.S. antitrust and a Chinese antimonopoly agency are investigating related matters, it may be in those agencies’ common interest to co-operate in appropriate cases, consistent with those agencies’ enforcement interests, legal constraints, and available resources.[8]

While it does not have an analogous provision in its EU-Sino Dialogue on Competition, the European Union has reported that “issues relating to concrete cases were discussed during high-level visits...”[9] Moreover, as recently as June this year, Deputy Director-General Cecilio Madero of DG Competition met with SAIC Vice Minister Zhong Youping in China to discuss the status of an EU-Sino MOU. Both parties appear to be working toward supplementing the 2003 Dialogue on Competition, but the overall timeline of this project is unclear, and whether the MOU will contain provision for co-operation on specific cases remains to be seen.

V. The importance of continuing the dialogue with China

China is the world’s second largest economy and is committed to establishing itself as a major global player in antitrust enforcement. Now more than ever, it is important for the United States, European Union and China to continue to engage one another bilaterally to foster co-operation and communication among the regulators. As the antitrust agencies of the United States and China have recently done, the agencies of the European Union and China may too take the next step in working together and enter into an MOU that, in addition to more clearly setting out the interactions and discussions the two will have, encourages direct co-operation on specific investigations.

Working bilaterally on specific cases will promote further transparency of the analysis and the decision-making process of the regulators (at least for the co-operating agency, though this can be expected to increase overall transparency as well). The Chinese regulators have published a number of regulations and guidance notes, but the newness of the AML itself and the few published decisions (only the eight decisions blocked or conditionally approved have been published) and their investigations leave a fair measure of uncertainty as to how the AML will be applied.

Bilateral co-operation should also result in more consistent, predictable application of antitrust analyses, and indeed remedies where applicable. This is the case in terms of consistency across jurisdictions as well as consistency within China, as regulators at the working level gain exposure and experience.

Co-operation and communication at the staff level will likely lead to significant efficiency gains with respect to enforcement. The sharing of information and experience will allow Chinese regulators (or their US and EU counterparts) to move quickly up the learning curve in their analyses of particular markets and conduct. While the rate at which China has blocked transactions and/or cleared transactions with conditions (approximately six percent of notified transactions) is comparable to that of the United States and the European Union, not surprisingly as merger control in China gets off the ground, far more cases go into Mofcom’s Phase II investigation than in the other jurisdictions (more than 60 percent in 2010). While this rate will continue to fall as regulators gain experience, for multinational transactions, bilateral co-operation and communication can also help to cut down the time of review, reducing the costs of regulatory compliance for businesses.

Additionally, as a collateral benefit, increased co-operation, communication and transparency regarding antitrust analyses will increase incentives and opportunities for foreign investment, both into and out of China, as the playing field becomes more transparent, predictable, efficient and balanced.

And co-operation and communication among regulators should tend to reduce the costs of compliance for businesses.

The United States and China have taken the next step, and to stay in sync with, and part of, the global antitrust discussion, the European Commission could well follow . ■

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Footnotes

1 Memorandum of Understanding on Antitrust and Antimonopoly Cooperation Between the United States Department of Justice and Federal Trade Commission, On The One Hand, and The People’s Republic of China National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce, On The Other Hand, 27 July 2011, available at http://www.justice.gov/atr/public/international/docs/273310.pdf.

2 Memorandum of Understanding on Cooperation between the Office of Fair Trading of the United Kingdom of Great Britain and Northern Ireland and the State Administration for Industry and Commerce of the People’s Republic of China, 21 March 2011, available at http://www.oft.gov.uk/shared_oft/about_oft/international/MoU_with_China_SAIC.PDF; Memorandum of Understanding on Cooperation between The Office of Fair Trading of the United Kingdom of Great Britain and Northern Ireland and National Development and Reform Commission of the People’s Republic of China, 10 January 2011, available at http://www.oft.gov.uk/shared_oft/about_oft/international/China.pdf.

3 Declaration on the Start of a Dialogue on Competition by the EU and China, 23 November 2003, available at http://ec.europa.eu/competition/international/legislation/china.pdf.

4 Antimonopoly Law of the People’s Republic of China, Article 1.

5 Mofcom blocked the proposed *Coca-Cola/Huiyuan* transaction and imposed conditions on *InBev/Anheuser-Busch*; *Mitsubishi Rayon/Lucite*; *GM/Delphi*; *Pfizer/Wyeth*; *Panasonic/Sanyo*; *Novartis/Alcon* and *Uralkali/Silvinit*.

6 Copies of these and other bilateral antitrust agreements are available at http://ec.europa.eu/competition/international/bilateral/index.html, and http://www.justice.gov/atr/public/international/int-arrangements.html.

7 *See* Naomi Licker & Jeanine Balbach, *‘Best Practices for Remedies in Multinational Mergers’*, Competition Law International, Sept. 2010. See also Ky P. Ewing, *‘Competition Rules for the 21st Century: Principles from America’s Experience’*, International Competition Law Series, Volume 9, May 2003.

8 U.S.-Sino MOU.

9 European Commission 2010 Annual Report, available at http://ec.europa.eu/competition/publications/annual_report/2010/part2_en.pdf.