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A New Chinese Policy Could Create Antitrust Issues

Law360, New York (September 12, 2012, 12:58 PM ET) -- Chinese companies should be careful not to interpret as carte blanche for anti-competitive behavior a recent policy statement by the Chinese government encouraging PRC companies to coordinate their activities and cooperate with each other while investing overseas. The statement also highlights the need for foreign companies to be on guard for possible anti-competitive conduct by their PRC business partners (and competitors).

On June 29, 2012, 13 agencies — including the three agencies responsible for enforcing China's Anti-Monopoly Law: the Ministry of Commerce ("MOFCOM"), National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC") — issued a jointly drafted "implementation opinion" titled "Encouragement and Guidance on Private Capital's Healthy Development." The opinion contains broad sweeping policy statements regarding Chinese foreign investment.

It is one of many follow-up opinions to the policy statement of May 2010 issued by the State Council regarding the development, management and regulation of private investment, which is considered to be one of the milestone policy statements after the 2005 statement on private investment. Although strictly speaking State Council and agency opinions are not law, the provincial governments and Chinese companies are well advised to and do take such statements seriously.

Under the first heading of the implementation opinion, titled "To Strengthen Macro Guidance on Private Enterprises' Outbound Investments," there is language potentially ripe for misinterpretation: "The government intends to guide the enterprises to intensify the coordination and cooperation among each other to prevent disorderly and malicious competition."

On one hand, this may reflect well-intentioned advice to PRC companies not to needlessly cannibalize each other's businesses and to have healthy competition among each other as they generate efficiencies through research and development joint ventures, production joint ventures, all-in joint ventures, and the like. Such activities can reap pro-competitive benefits, such as increased asset utilization, reduced production costs, economies of scale, and can enable new investment.

On the other hand, competitor coordination and cooperation can potentially lead to anti-competitive results and significant antitrust risks. For instance, R&D joint ventures run the risk of limiting competition for innovation. Production joint ventures can create antitrust issues related to information flow and agreements on prices and output. All-in joint ventures, which integrate all aspects of a business, can have antitrust issues similar to mergers in terms of potential detrimental consequences to actual or potential competition.

When the Chinese government tells private enterprises to intensify coordination and cooperation among each other, there is the risk that competitively sensitive information may be exchanged, which could lead to suspicions of cartel activity: The greater the overlap of business activities, arguably the more likely it is that the information exchanged will be competitively sensitive. The PRC companies may come under scrutiny by potential foreign partners as well as foreign antitrust enforcement agencies, or as in the case of the U.S., be sued by private parties.

In particular, PRC companies should be aware of the extraterritorial scope of the U.S. antitrust laws as defined by the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a. The FTAIA sets forth a “general rule” providing that U.S. antitrust laws do not apply to conduct involving foreign commerce, which has generally been defined to mean transactions involving a non-U.S. buyer and/or seller. But the FTAIA provides two significant exceptions to this rule. First, conduct involving foreign commerce is subject to U.S. antitrust laws if it “involves” U.S. import commerce. Second, under the FTAIA’s so-called “domestic injury” exception, U.S. laws apply to foreign conduct where (1) the conduct “has a direct, substantial, and reasonably foreseeable effect” on U.S. commerce, and (2) that effect “gives rise to” the plaintiff’s antitrust claim.

U.S. court decisions and publicly announced positions of the U.S. Department of Justice and Federal Trade Commission all help shed light on the standards PRC companies should be aware of.

With regard to the “involves import commerce” standard, the Third Circuit has stated that the issue is whether the anti-competitive behavior was “directed at an import market”. The DOJ/FTC’s position is broader: “A price-fixing conspiracy ‘involves’ U.S. import commerce even if the conspirators set prices for products sold around the world (so long as the agreement includes products sold into the United States) and even if only a relatively small proportion or dollar amount of the price-fixed goods were sold into the United States.”

With regard to the FTAIA’s alternative “direct, substantial, and reasonably foreseeable effect” requirement, the Seventh and Ninth Circuits have stated that such effects must be “an immediate consequence” of the alleged foreign anti-competitive conduct. The DOJ/FTC definition is again broader: “defining ‘direct’ as reasonably proximate gives each of the three parts of the direct effects exception its own function: ‘direct’ goes to the effect’s cause, ‘substantial’ goes to its amount, and ‘reasonably foreseeable’ goes to its objective predictability.”

Although the DOJ/FTC positions do not coincide completely with U.S. court decisions, foreign defendants should be aware of the possibility that the courts could move toward a broader interpretation of the elements of the FTAIA. From the perspective of private plaintiffs in the United States, this increases the likelihood of keeping PRC defendants in court.

So how can PRC companies protect themselves? Or, from the perspective of U.S. companies, what should they keep on their radar screen? When a PRC firm sells products to U.S. purchasers or otherwise enters the U.S. market, it should consider putting an effective antitrust compliance policy and training program in place, in particular, with respect to preventing collusive behavior that could arouse the interest of the U.S. Department of Justice.

Simultaneously, it may also be prudent to conduct internal due diligence to review current activities from the perspective of antitrust compliance to find out where the company may be exposed. Ideally, due diligence should cover both written documents and interviews with employees.

Some areas to review are any communications with competitors, internal emails and other documents concerning price increases, price announcements, internal market updates and minutes of meetings. Companies may wish to advise employees not to talk to competitors about any business issues, and to be careful, in particular, to never agree or do anything suggesting an agreement to implement any price change suggested by a competitor. Another area of particular concern are communications or agreements with competitors concerning the allocation, division, or sharing of customers or markets.

While it is encouraging to see that the Chinese government is taking steps to promote the economic viability of private enterprises on a par with that of state-owned entities, this implementation opinion could also lead to practices by Chinese private companies that risk governmental and private antitrust enforcement in the United States. Accordingly, PRC companies doing business abroad must be vigilant in ensuring that their activities comply with the parameters of relevant foreign antitrust standards.

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