The US-China Business Council (USCBC) Comments on the Draft Regulations on the Prohibition of Monopoly Agreements and the Draft Regulations on the Prohibition of Abuse of Dominant Market Position

The US-China Business Council (USCBC) represents almost 220 US companies with significant operations in China that have strong, consistent interests in the continued development and fair enforcement of China's Antimonopoly Law (AML). We would like to thank the State Administration of Industry and Commerce (SAIC) for providing USCBC the opportunity to offer comments on the latest draft revisions to three key regulations related to the AML: Regulations on the Prohibition of Monopoly Agreements, Regulations on the Prohibition of Abuse of Dominant Market Position, and Regulations on the Prohibition of Abuse of Administrative Powers to Eliminate and Restrict Competition. This document provides comments on the first two of the above-mentioned regulations. We believe this process reflects a positive effort to provide more transparency in the formulation of policy and legislation and will result in better regulatory outcomes that are widely supported by various stakeholders in China.

USCBC member companies include many global leaders that have a strong interest in China's regulatory system for monopolistic agreements and market dominance. USCBC notes the steady progress China has made in recent years in developing its antitrust regime, most notably with the 2008 passage of the AML, and the set of more recent follow-up regulations. These most recent draft regulations address some important lingering questions on the AML, particularly on AML enforcement methodology. At the same time, we respectfully suggest the following clarifications and revisions to the draft regulations to ensure that the interests and obligations of all parties are adequately balanced.

Recognizing that there are many provisions on which to comment, and that other organizations may address these provisions, our comments are focused on the following areas:

I. Regulations on the Prohibition of Monopoly Agreements (Monopoly Agreement Regulations)

Restricting new technology

USCBC appreciates that Article 6 provides more detail on the types of technology agreements that are restricted under the AML, thus providing greater clarity to Article 13(iv) of the AML. Language in Article 6, however, seems overly broad and may inadvertently restrict common business arrangements that are not typically deemed anticompetitive in other jurisdictions, such as "field of use" restrictions in technology and intellectual property (IP) licensing agreements or provisions negotiated in joint venture contracts that voluntarily restrict the parties from developing new products or technologies. USCBC respectfully suggests that SAIC more clearly set out the criteria that must be present in order for a technology-related agreement to be restricted under Article 13(iv) of the AML.

In particular, draft Article 6.5 is concerning because it prohibits agreements that "refuse to adopt new technical standards." Athough the intent to encourage the widespread use of new standards is positive when such standards are developed in an open and transparent process, these restrictions could unnecessarily curtail an array of technology-related agreements for products that may or may not require new technical standards and could prevent companies from developing competing technologies that would ultimately benefit the evolution of technical standards. Additionally, these restrictions contradict international best practices and trends in this area, such as the European Commission's draft revised guidelines on horizontal cooperation agreements, which states that "standardization agreements which set no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms" do not restrict competition. We respectfully ask SAIC to provide greater clarity in Article 6.5 and to clearly state that the provision is not intended to prohibit agreements among suppliers to develop and use a technology that competes with a standard.

Leniency

USCBC appreciates amendments in the Monopoly Agreement Regulations that exempt from any penalties the first undertaking that reports participation in a relevant monopoly agreement and provides materials and important evidence. With such leniency clauses, companies are more likely to report the infringing behavior of other companies, and SAIC can more easily investigate and sanction monopoly agreements. Articles 12 and 13 of the draft Monopoly Agreement Regulations also allow second and subsequent parties who report their own participation in a relevant monopoly agreement to receive reduced penalties at SAIC's discretion. To further boost enforcement of the AML, USCBC respectfully suggests that SAIC specify the degree of penalty reduction for self-reporting parties (and elaborate on the factors that SAIC will consider when exercising its discretion in relation to such reduction) to encourage relevant business operators to report abusive monopoly agreements. New language setting a minimum level of penalty reduction at 20 percent would encourage more parties to self-report – saving SAIC time and resources – while still permitting SAIC the discretion to determine the appropriate degree of penalty reduction above that minimum threshold.

Minimum fines

Article 11 of the Monopoly Agreement Regulations sets a fine for business operators participating in a monopoly agreement of 1 percent to 10 percent of turnover in the previous fiscal year. USCBC recommends that SAIC clarify that fines in this context will be calculated based on turnover of the relevant business operator in the market concerned (rather than entire business operator turnover.)

II. Regulations on Abusive Acts of Market Dominance (Market Dominance Regulations)

Definition of "dominant market position"

Though USCBC appreciates SAIC's efforts to provide more detail on what constitutes a "dominant market position," enhancing SAIC's ability to determine companies with "dominant market position" and therefore enforce the Market Dominance Regulations, some aspects of the definition raise concerns. Our companies would like to see a more specific definition of "dominant market position."

Article 3 of these regulations states that a company has a "dominant market position" if it is capable of controlling the price and the quantity of a product or other trading conditions in the relevant market, or is capable of impeding or affecting the entry into the relevant market by other players. Under this definition, an operator could be considered to have a "dominant market position" merely if a potential competitor does not enter the market because it cannot be cost-competitive, as this situation could be construed to fall under the definition of "impeding or affecting the entry into the relevant market by other undertakings." USCBC respectfully suggests that SAIC clearly define these terms and add language stating that the market entry costs must be significantly higher than they would be in the absence of the potential market dominator to be deemed as capable of hindering market entry.

USCBC also believes Article 7 of the Market Dominance Regulations would be more effective if SAIC specified when business operators with dominant market position without a justifiable reason are prohibited

from applying differentiated treatment to equivalent counterparties in regard to trading conditions. The current language unreasonably restricts certain justified arrangements. To avoid this, USCBC respectfully suggests that language in the first paragraph of Article 7 be amended to read "Business operators with a dominant market position that resulted in foreclosure of competition in the relevant product market in China are prohibited, without a justifiable reason, from applying the following differentiated treatment in regard to the trading conditions to equivalent counterparties."

Bundling

USCBC is concerned that wording in Article 6 of the Market Dominance Regulations puts too much emphasis on whether particular bundling practices are common, as this wording does not acknowledge that bundling is an acceptable and normal business practice often used in various industries, leading to economies of scale and other economic benefits. Current language in Article 6 specifies examples of "tie-in sales or imposing other unreasonable trading conditions." USCBC suggests that SAIC reword paragraph (1) in Article 6, which currently states that "forcing the bundling or combining of different products for sale, which breaks the usual practice or consumption habits or disregards the functions of products" to focus on factors such as whether the relevant practice is likely to lead to significant anticompetitive foreclosure.

Refusal to Trade

Although USCBC appreciates the list of actions provided in the Market Dominance Regulations that would constitute a "refusal to trade" in violation of Article 17(iii) of the AML in the absence of a valid justification, we are concerned that it may be construed as further broadening the scope of the "refusal to trade" prohibition. The list adds to the high burden that dominant business operators face by having to justify any commercial decision they make to avoid trading with another business operator, instead of leaving the responsibility of identifying such refusals that may have substantial anticompetitive effects (and thus that the responsible business operator may need to justify) with SAIC. To address this issue, USCBC respectfully suggests SAIC change Article 4 to be worded as follows: "SAIC shall have the authority to restrict any undertaking that has a dominant market position and that is proven to have refused transactions with their counterparts without a justifiable reason by:."

Unreasonable trading conditions

USCBC commends clarifications under Article 6 of the Market Dominance Regulations that indicate what kinds of trading conditions SAIC considers "unreasonable." We are concerned, however, that the reference to "irrelevant" terms is open-ended and ambiguous and could lead to uneven enforcement or implementation in different areas. We suggest that this term be removed. If this is not possible, we suggest that language be added to clarify how relevance will be assessed in this context.

Minimum fines

Article 14 of the draft Market Dominance Regulations provides that a business operator found to have abused its dominant market position will be fined 1 percent to 10 percent of turnover in the previous fiscal year. USCBC recommends that SAIC clarify that fines in this context will be calculated based on turnover of the relevant business operator in the market concerned (rather than entire business operator turnover.) The relevant wording in Article 14 of the draft Market Dominance Regulations should also be amended to reflect that the fine imposed can be less than 1 percent in circumstances SAIC deems appropriate.

Conclusion

USCBC would like to thank SAIC for this opportunity to submit comments on the draft revised regulations. We hope that these comments will prove constructive to the positive development of China's AML regulation. USCBC welcomes any feedback that SAIC may have and would be pleased to further discuss the content and various provisions at SAIC's request.

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