

## ANTITRUST TRADE AND PRACTICE

## Expert Analysis

# Chinese Antitrust Enforcement And the U.S.: an Uncertain Path

**A**s China's political and economic impact continues to grow around the world, U.S. regulators—including antitrust enforcers—have been forced to grapple with how to protect U.S. interests in a system sprung from a very different government ideology. This clash has played out in the antitrust context in the drafting, implementation and subsequent reaction to China's Anti-Monopoly Law (AML). How China has implemented the act has drawn criticism from the U.S. and others as to the lack of transparency in its decision-making process and adequacy of protections for foreign interests.

These issues recently came under the spotlight in the form of a June 7 U.S. House of Representatives Judiciary Committee hearing on "International Antitrust Enforcement: China and Beyond." The hearings focused on China's Anti-Monopoly Law. Passed in

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2007, the AML represented a complete overhaul of China's antitrust enforcement system, with changes in areas including merger review and how

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agreements between actual or potential competitors and abuses of market power are evaluated.

As professor and former Federal Trade Commission Chairman William Kovacic noted at the hearing,<sup>1</sup> the AML was created "to facilitate the transition from reliance on

central planning and state ownership toward a market-based economic regime." However, U.S. officials have expressed concern that China is utilizing the AML to advance its political and economic agenda. In her address at the June 7 hearing, FTC Commissioner Maureen Ohlhausen noted the FTC's apprehension that the Chinese government is utilizing its antitrust laws to benefit Chinese companies and industry.<sup>2</sup> Likewise, Senior Counsel Mark Cohen, representing the USPTO, stressed that U.S. companies fear a skewed enforcement of the antitrust laws that specifically targets U.S. businesses to the benefit of Chinese companies, many of which are state-owned or controlled.<sup>3</sup>

Sean Heather, executive director of International and Antitrust Policy at the U.S. Chamber of Commerce, said political motivations have turned the AML into "a tool to advance industrial policies that distort markets, reserve them for national champions, and undermine the value of the intellectual property of [Chamber of Commerce] members."<sup>4</sup> Heather

specifically cited the AML's commitment to promoting the "socialist market economy," a mandate open to interpretation by Chinese enforcers, and noted examples of the Chinese agencies requiring foreign companies to reduce prices despite a lack of anti-competitive behavior and utilizing merger reviews to protect national champions from legitimate foreign acquisitions.

### U.S. Agencies

Previously lacking well-developed competition law, Chinese officials began exploring the possibility of implementing an enforcement regime in the early 1980s. The result was the Anti-Unfair Competition Act, a simple—but vague—attempt to enact meaningful antitrust reform. Recognizing the act's shortcomings, the Chinese government formed a drafting committee that eventually led—years later and following significant dialogue with a host of international antitrust enforcers—to the creation of the AML.

To pursue the AML's many mandates, including monitoring and policing monopolization, market power abuses, vertical issues, collusion and anticompetitive mergers, China divided enforcement authority among three agencies: the Ministry of Commerce (MOFCOM), tasked with merger review and enforcement; the National Development and Reform Commission (NDRC),

which investigates price-related violations; and the State Administration for Industry and Commerce (SAIC), responsible for investigating non-pricing violations.

Over the course of the last several years (both during the drafting process and post-enactment), U.S. and Chinese competition authorities have engaged in a frequent dialogue on a host of antitrust-related issues. Speaking on behalf of the FTC before the House subcommittee, Commissioner Ohlhausen noted that the commission has made "engagement with the three Chinese anti-monopoly agencies one of its highest international priorities," a commitment that has played out in meetings with the Vice Ministers of the Chinese agencies, outreach through the FTC's technical assistance program and various other workshops with the Chinese agencies. Ohlhausen touted MOFCOM's adoption of a revised merger review procedure in 2015 as a promising result of these engagement efforts. Indeed, MOFCOM's new process greatly streamlines merger reviews and is modeled on procedures adopted by the U.S. authorities.

Cohen, representing the USPTO, also lauded the Patent and Trademark Office's relationship with the Chinese agencies, reflected in Under-Secretary Michelle Lee co-chairing a working group of the Joint Commission on Commerce and Trade, which

included significant dialogue on the AML. Further, Cohen noted that the USPTO has directly engaged with the Chinese agencies on IP-related antitrust issues on the ground via the USPTO's IP Attache Program, which advances U.S. IP protection efforts abroad, including via attaches stationed in Beijing, Guangzhou and Shanghai. Heather commented on the positive relationship between the Chamber of Commerce and the Chinese agencies.

### IP Concerns

One of the primary concerns that emerged from the hearings on China's implementation and enforcement of the AML relates to China's handling of IP-related antitrust issues, consistently a focus in China as a result of the growing tech presence in the country and the overlap of IP and antitrust responsibility of various government agencies and ministers. Commissioner Ohlhausen specifically raised the concern that China's regime may unduly regulate royalties charged by patent holders. Drafts of AML guidelines, currently under development by Chinese regulators, discuss the possibility of penalizing those who refuse to license IP "necessary" to compete in a given market.

The FTC believes such penalties could deter innovation and adversely affect competition, a point echoed by the Chamber of Commerce, which

believes China's approach to IP in the antitrust context may "systematically and unfairly curb the influence and competitiveness" in China and around the world.

Cohen, in particular, highlighted this challenge, noting that China's significant antitrust penalties for restricting access to IP conflict with relatively weak IP protection, a clash that may have a chilling effect on the expansion of U.S. businesses in China. U.S.-based companies such as InterDigital, Microsoft and Qualcomm, recently assessed a \$975 million antitrust fine in an IP-related investigation, have been the target of Chinese scrutiny. And their concerns may be justified. In the *Huawei v. InterDigital* case,<sup>5</sup> the presiding Chinese chief judge stated that "Chinese enterprises should bravely employ anti-monopoly lawsuits to break technology barriers and win space for development," a statement that certainly resonated with foreign companies bent on expanding their Chinese presence.

### Ideological Differences

At the House subcommittee hearing, Professor Thomas Horton of the University of South Dakota School of Law noted that the entanglement between China's enforcement activities and its social, political, economic and moral priorities is a natural extension of China's socialist identity.<sup>6</sup> Indeed, Horton noted numerous

recent instances in which Chinese officials staunchly rebuked criticism that China's enforcement system is failing to live up to the "western" model embraced by the U.S. and others.

In reviewing each of the opinions at the hearing, one key concern permeates each criticism and suggestion: that the AML and China's enforcement of it are too intertwined with Chinese economic and political agenda. It is not particularly surprising that three government agencies—the FTC, USPTO and Chamber of Commerce—would cite this issue as very concerning, particularly since it directly threatens the financial well-being of U.S. companies. Each of the agencies discussed their history of collaboration with the Chinese agencies and stressed the importance of an ongoing dialogue, yet Horton raised an interesting point: Are U.S. efforts to conform the Chinese system to western models in vain?

As Horton noted in his speech to the House subcommittee, looking at China's enforcement efforts through the lens of western values of capitalism and democracy may be a fool's errand—China's system is distinctly different and many Chinese officials, while grateful for the input, likely do not want to see an enforcement regime that perfectly emulates those of the United States, the European Commission and other western enforcement agencies. It is

like comparing apples and oranges, but the U.S. agencies see the orange as a different type of apple, rather than a completely different fruit.

One thing is for certain, however: how the U.S. agencies choose to approach this conflict—whether viewed as one that can be remedied or not—may have a profound impact on U.S./China relations, as well as the international development of antitrust law, for years to come.



1. William E. Kovacic, Global Competition Professor of Law and Policy, George Washington University Law School, Testimony Before U.S.-China Econ. & Sec. Review Comm'n Hearing on the Foreign Investment Climate, China: Present Challenges and Potential for Reform (Jan. 28, 2015).

2. Maureen Ohlhausen, Commissioner, Fed. Trade Comm'n, Prepared Statement of the Federal Trade Commission Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, International Antitrust Enforcement: China and Beyond (June 7, 2016).

3. Mark A. Cohen, Senior Counsel-China, Office of Policy & Int'l Affairs, U.S. Patent & Trademark Office, Statement Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, International Antitrust Enforcement: China and Beyond (June 7, 2016).

4. Sean Heather, Vice President, Global Regulatory Cooperation, Executive Director, International & Antitrust Policy, U.S. Chamber of Commerce, Statement Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, International Antitrust Enforcement: China and Beyond (June 7, 2016).

5. Referenced in Cohen's speech, p. 5.

6. Thomas J. Horton, Professor, University of South Dakota School of Law, Statement Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, International Antitrust Enforcement: China and Beyond (June 7, 2016).