



Statement of the U.S. Chamber of Commerce

**ON: International Antitrust Enforcement:
China and Beyond**

**TO: U.S. House of Representatives Judiciary
Subcommittee on Regulatory Reform, Commercial
and Antitrust Law**

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The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

I. Chamber Approach to Competition Policy and Antitrust Enforcement

The U.S. Chamber has a long-standing and significant role in competition policy and enforcement advocacy at home and around the world. Through the U.S. Chamber's Antitrust Council and International Division, we work globally to promote the following principles:

1. Antitrust law must be grounded in consumer welfare and enforcement should reflect a rigorous approach to sound economic analysis,
2. Antitrust enforcement proceedings must be transparent and afford due process,
3. There needs to be meaningful checks and balance as part of any antitrust proceeding as well as meaningful and independent judicial review,
4. Remedies need to be appropriate and narrowly tailored.

II. International Antitrust Initiatives and Advocacy

Internationally, we believe competition and trade policy should be complementary. The benefits of international trade will be lost if markets do not operate in pro-competitive ways.

Related and equally important, governments must not use competition policy as an industrial policy tool to promote national champions and achieve protectionist goals that circumvent commitments to open trade and investment.

In recent years, antitrust agencies have proliferated rapidly around the world.

There are more than 120 competition enforcement agencies in existence today.

The policy of the United States government has been to actively promote and encourage this development—even as the results of this ongoing effort have been mixed.

For many jurisdictions, the introduction of competition law and enforcement has been a positive development.

In other jurisdictions, governments are introducing and enforcing antitrust regimes, at least in part, to promote industrial policy and undermine the competitiveness of American firms in their home markets and around the world.

III. The Chamber's Engagement on China's Anti-Monopoly Law

The Chamber's work in China on the Anti-Monopoly Law (AML) development and implementation has long been a critical component of our international antitrust work plan.

Over many years, we have worked constructively with China's Anti-Monopoly Law Enforcement Authorities (AMEAs)—the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC)—as well as China's judiciary and leading academic experts, to share our experiences in the development and enforcement of U.S. antitrust laws.

Since 2006, we have hosted delegations from the National People's Congress, NDRC, MOFCOM, SAIC, and China's judiciary, with which we have exchanged views on the U.S. antitrust regime, the AML drafting process, and the development and application of related AML implementing guidelines and rules.

We are proud to have been the lead private sector sponsor of a public-private partnership with the U.S. government, funded by the U.S. Trade and Development Agency, which provided extensive training for China's AMEAs.

We have appreciated the opportunity afforded by the AMEAs to provide submissions on numerous AML implementing regulations, guidelines, and rules, two of which are appended to this testimony.

In addition, the Chamber in September 2014 issued a comprehensive and well-documented report examining the first five years of enforcement under China's AML. The report entitled *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy* is also attached to this testimony.

As we noted in our report, the Chamber was pleased that the Third Plenum Decision Document, released in 2013, recognized that the market should play a “decisive” role in allocating resources.

Indeed, implementation of the AML provides an enormous opportunity for China to accelerate its economic transition by boosting competition and reducing the prominence of monopolies and oligopolies in its economy; increasing consumer welfare, choice, and consumption; and stimulating market-driven innovation.

In short, the AML has the potential to stimulate a new round of dynamic growth and efficiencies across all aspects of the Chinese economy – an outcome that would also contribute positively to U.S.-China relations.

We particularly welcomed the commitment of the Communist Party leadership to reduce government involvement and unnecessary regulation, increase the role of market forces, and facilitate the greater utilization of intellectual property. These important statements underscore the importance of free and fair competition without regard to the nationality of market actors or other industrial policy considerations.

Indeed, China has made some progress in implementing the AML, consistent with input from the U.S. government and American business.

Specifically,

- China has used the AML to prevent undue concentrations of market power, combat cartels and abuse of market dominance, and pursue other goals that enhance the overall competitive environment in China.
- China has gradually begun to increase the efficiency of its merger review process, appropriately recognizing that mergers are time sensitive.
- China has made some improvements in due process, with the most egregious reports of due process violations having subsided.
- China has also announced that as of July 1, it will begin implementation of a new Fair Competition Review System, which, as a first step, will include self-examination by government agencies at all levels of their policies to determine whether the regulations include anticompetitive elements. While this policy is

unlikely to benefit foreign-invested companies in the near term, it represents a step in the right direction.

In part, some of these improvements can be traced to high-level engagement between the two governments on AML policy and enforcement concerns, including in meetings between Presidents Barack Obama and Xi Jinping in November 2014 in Beijing and September 2015 in Washington.

Specifically, the U.S. Chamber of Commerce welcomed the commitment by the two presidents during President Xi's State Visit in 2015 that:

*Both countries affirm the importance of competition policy approaches that ensure fair and non-discriminatory treatment of entities and **that avoid the enforcement of competition law to pursue industrial policy goals.***

IV. China's Use of the AML as a Tool of Industrial Policy

However, China's enforcement of the AML continues to fall short of this ideal, and the Chamber remains concerned about China's use of the AML as a tool to advance industrial policies that distort markets, reserve them for national champions, and undermine the value of the intellectual property of our members.

The Chamber believes the U.S. government needs to continue to respond to this challenge with a "whole-of-government" approach.

In practice, this means that the Department of Justice and Federal Trade Commission need to closely coordinate with other agencies within the U.S. government on China competition policy matters, ideally under a new statutory requirement.

It's critical that U.S. government interagency coordination and execution of competition policy advocacy vis-à-vis China occur within the framework of the Administration's broader economic and commercial policy toward China, as set by the President of the United States, that aims to promote open and competitive markets, vigorously protect intellectual property rights, and ensure that American

firms receive the best treatment that China is according to any of its own firms (including its emerging national champions) —both state-owned and state-supported—across key sectors of the Chinese economy.

I'll return to this point in my conclusion.

Any assessment of China's AML and its enforcement should begin with the three AMEAs responsible for enforcing the AML: MOFCOM, NDRC, and SAIC.¹ This tripartite division of enforcement responsibilities tends to lead to dispersion of competition law expertise among several different agencies and a heightened risk of inconsistent interpretation and application of the AML.

Most importantly, exposure of competition law enforcement personnel to the institutional pressures of the larger agency to which they belong, particularly for NDRC introduces a significant bias toward domestic industrial policy and price caps.

Further, to date, the AMEAs' have demonstrated limited willingness or capability to conduct sound and persuasive economic analysis, and in the absence of an independent judiciary, the AMEAs have wide latitude to inject industrial policy concerns into their AML enforcement activity.

Equally important, the AML itself includes provisions (i) encouraging the “healthy development of [a] socialist market economy,”² (ii) establishing a special role for SOEs (described as the “lifeline of the national economy”),³ (iii) carving out a privileged role for administrative monopolies,⁴ and (iv) providing a prohibition on abuse of dominance that is specific to intellectual property rights (IPR).⁵ “Socialist” in this context means “public ownership”—a reference to SOEs.

Although many competition laws contain vague statements regarding the public good that may be subject to misinterpretation, this and other references to

¹ MIIT has stated that it wishes to have greater powers to administer the AML with respect to both merger review and investigations in relation to the information technology industry. *See* Rebecca Zhang, “China’s MIIT eyes extended regulatory reach on antitrust, unfair competition issues,” PaRR (May 27, 2014).

² Art. 1.

³ Art. 7.

⁴ Art. 8.

⁵ Art. 55.

industrial policy in the text of the AML arguably put China outside international competition law norms. For example, even in the European Union—a competition law jurisdiction considered to give greater weight to industrial policy⁶—competition law does not identify the development of the economy as a goal of competition law, does not explicitly carve out a special role for SOEs, and does not treat anti-competitive conduct involving intellectual property (IP) any differently from other forms of anti-competitive conduct.

As a result, in many cases involving foreign companies, China’s AMEAs have skewed the implementation of the AML and related statutes to support China’s industrial policy goals, including through discrimination and protectionism.

In other words, although the legal machinery of the AML has been used to protect competition and prevent monopolistic conduct, China has also employed it both domestically and extraterritorially to pursue objectives that do not reflect a free, open, and fair market-based economy. Examples include the following:

- *Promoting industrial policy, even at the expense of free and open competition.*

MOFCOM’s merger reviews have created opportunities for China’s own national champions to expand and increase their market shares, capped prices for products and technology on which domestic companies rely, and protected famous Chinese brands from acquisition by foreign companies. Similarly, through AML investigations, NDRC has forced foreign companies that market consumer products, including but not limited to soaps, detergents, infant formula, and automobiles, to reduce prices, even when such prices appear to be the result of market forces rather than anti-competitive conduct.

The Chamber is monitoring closely recent announcements that China has launched a new enforcement campaign against the pharmaceutical and medical device industries in China, which many believe will focus disproportionately against U.S. and other foreign companies, with the aim of lowering prices and promoting national champions, irrespective of economic analysis that demonstrates harm to consumer welfare and abuse of a dominant market position.

⁶ See, e.g., D. Daniel Sokol, “Merger Control under China’s Anti-Monopoly Law,” Minnesota Legal Studies Research Paper No. 13-05 (Jan. 27, 2013), at 6–7.

○ *Curtailing Intellectual Property (IP) rights.*

In the merger review context, MOFCOM has permitted certain transactions only on the condition that the foreign companies involved cap IP license fees, including for non-standards essential patents (SEPs), and license their technology on terms that are otherwise exceptionally favorable to licensees—generally Chinese electronics manufacturers. In the investigations context, NDRC has appeared to use AML investigations to pressure U.S. telecommunications and semiconductor firms to lower license fees associated with 2G, 3G, and 4G wireless telephone technologies.

The beneficiaries of these policies are often Chinese national champions in industries that China considers strategic, such as commodities and high technology.⁷ China seeks to strengthen such companies through the AML and, in apparent disregard of the AML, encourages them to consolidate market power, although this is contrary to the normal purpose of competition law.⁸ By contrast, foreign companies suffer disproportionately from China's patterns of enforcing the AML.

In fact, all transactions blocked or conditionally approved by MOFCOM to date have involved foreign companies, and the curtailment of IP rights appears designed to strengthen the bargaining position of domestic licensees.

⁷ Regarding the specific industries that China considers strategic, *see generally* US-China Business Council (USCBC) "USCBC Summary of the National Development and Reform Commission (NDRC) 2014 Work Plan" (Feb. 5, 2014), *available at* http://www.uschina.org/sites/default/files/2014%20NDRC%20Work%20Plan_0.pdf.

⁸ NDRC, the Ministry of Industry and Information Technology (MIIT), and other agencies have an official policy to achieve industrial concentrations for domestically-invested companies in the automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals, and agriculture industries. *See* Guiding Opinions on Accelerating the Promotion of Mergers and Reorganizations of Enterprises in Key Industries, issued by MIIT, NDRC, Ministry of Finance, Ministry of Human Resources and Social Security, Ministry of Land and Resources, MOFCOM, People's Bank of China (PBC), State-Owned Assets Supervision and Administration Commission (SASAC), State Administration of Taxation (SAT), SAIC, China Banking Regulatory Commission (CBRC), and China Securities Regulatory Commission (CSRC) (Jan. 22, 2013), Gong Xin Bu Lian Chan Ye [2013] No. 16 (*hereinafter* 2013 MIIT Joint Opinions). Indeed, all three AMEAs are among the authors of this document. Companies and local governments may oppose this policy, but there is no indication that the AML constitutes an impediment to implementing it. *See* David Stanway, "China Ditches Steel Industry Consolidation Targets in New Plan," Reuters (Mar. 25, 2014) (quoting Xu Leijiang, the chairman of Baoshan Iron and Steel, as stating that the policy created "huge monsters" weighed down by debt and unprofitable investments).

V. Concerns Regarding Intellectual Property

The U.S. Chamber of Commerce and our members are particularly concerned about China's ongoing efforts to develop implementing guidelines under the AML that would promote what Chinese officials have promised will be more strict administration and enforcement against abuse of IPR.

Earlier this year, and in response to a request from China's Anti-Monopoly Law Commission (AMC) to develop a unified set of guidelines to govern IP abuse, the NDRC and the SAIC each released draft AML IP Abuse Guidelines that endorsed a broad, unbalanced essential facilities doctrine, and impose stiff antimonopoly sanctions for refusing to license IP or charging "excessively high" royalties.

U.S. Chamber comments on these measures to the Chinese government are appended to our written testimony.

China's Ministry of Commerce has also developed draft guidelines to govern the treatment of intellectual property in merger review cases, but those guidelines have yet to be released for public comment.

The Chamber understands that the AMC hopes to reconcile the various draft guidelines into a single binding document by the end of 2016.

As drafted, the NDRC and SAIC Guidelines would force companies with "dominant market positions" or that possess critical technologies to license their intellectual property to Chinese competitors or to lower licensing costs to benefit local firms.

The Chamber is deeply concerned that virtually any unilateral refusal to license could be characterized as an abuse of IPR under the proposed guidelines, and thereby be subject to significant AML sanctions.

The approach adopted in the draft NDRC and SAIC guidelines coincides with a significant uptick in the velocity, scope, and scale of new Chinese industrial

policies that aim to promote domestic champions in industries ranging from information and communications technology to medical devices and pharmaceuticals to other areas of advanced manufacturing.

The fear among many foreign companies is that China aims to use the AML, including forthcoming IP abuse guidelines, in concert with industrial policies like Made in China 2025 and Internet Plus that *de facto* promote Buy China and other localization policies, to systematically and unfairly curb the influence and competitiveness of foreign companies in its market and globally.

The Chamber believes that China's use of the AML in concert with other industrial policies that aim to promote domestic champions is not in China's long-term interest.

As China makes efforts to ascend the value-added chain, it would be perverse for it to deem the most important and valuable innovations, by reason of their value, essential facilities and to force the innovative owner to license at potentially artificially lower than market rates.

Assistant Attorney General Bill Baer at the 19th Annual International Bar Association Competition Conference put it best:

“We don't use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate. For this reason, U.S. antitrust law does not bar “excessive pricing” in and of itself. Rather, lawful monopolists are perfectly free to charge monopoly prices if they choose to do so.”

The NDRC and SAIC drafts also seem to be in tension—if not in conflict—with China's own domestic IP laws as well as its international IP obligations.

Over the past year, competition concerns, including related to IP, have also arisen within other proposed draft revisions to Chinese law, including the Anti-Unfair Competition Law.

The draft revisions prohibit “unfair trading” by an undertaking “taking advantage of its comparative advantage position.” The concept of “comparative advantage position” is inherently vague and compared with the “abuse of dominance” clause in Article 17 of the AML, it creates a much lower threshold for the enforcement agencies to intervene and regulate—with essentially the same type of powers and remedies—making it in direct conflict with the AML.

As China continues the drafting process of its AML IP Abuse Guidelines and other measures that could be used to undermine the legitimate exercise of IP rights, the American business community hopes that China will remove its unbalanced essential facilities doctrine; delete provisions on excessive pricing; and eliminate provisions that prohibit or restrict the refusal to license.

IP rests on the basic principle that it comes with an exclusionary right and if the holder chooses to extend a license it generally has the right to do so on terms of its own choice.

The U.S. Chamber of Commerce strongly supports ongoing efforts by the Obama Administration at the highest levels to forestall an adverse outcome on China’s pending IP abuse measures that could be unfairly used against U.S. firms in China as well as harmful to China’s innovation goals.

VI. Concerns Regarding Due Process

Concerns regarding the substance of China’s AML and its enforcement are compounded by continuing concerns over transparency and due process of enforcement.

Notwithstanding some progress in China regarding due process and transparency, there remains a perception that the targets of an enforcement proceeding are in violation of law prior to evidence having been gathered or presented.

Unlike the U.S. system in which the target of an investigation ultimately will have its case heard before an independent judicial body, China’s AML regrettably places the burden of proof squarely on the shoulders of defendant. Historically,

limited evidence is presented to the defendant in support of often vague or novel theories of harm. Targets of investigation can be told the evidence that has been gathered cannot be shared because it is confidential in nature.

Adding to the problem is the fact all three of China's antitrust agencies are responsible for broader missions that run counter to a consumer-welfare approach to antitrust enforcement. These responsibilities include industrial policy planning and representing the interest of Chinese industries, including state-owned enterprises.

The result is that within the Chinese system, stakeholders in China's government that may not be directly visible have the potential to weigh in and steer the outcome of an antitrust investigation.

The absence of an independent judiciary as well as potential threats of retaliation against companies serves as a strong check against companies that might otherwise seriously consider appealing an administrative decision.

The result, more often than not, is an investigative process that incentivizes any foreign target of an investigation to settle on terms favorable to the Chinese government.

VII. Recommendations for Congressional Oversight

The Chamber wishes to reiterate its strong support and deep appreciation for the President's efforts to address AML challenges with President Xi as well as efforts by cabinet officials from the Departments of Justice, Treasury, and Commerce, as well as USTR to address AML.

The Chamber also appreciates the efforts of the Federal Trade Commission, including the significant efforts of Commissioner Ohlhausen, to address AML policy and enforcement challenges with China.

Yet more work needs to be done to address the continuing, and in some cases, growing concern of China's use of its AML as a tool of industrial policy.

In that spirit, the Chamber recommends the Congress and this committee, as part of its oversight function, consider the following recommendations:

- Endorse a “whole of government approach” wherever antitrust is misused and abused. From the perspective of our members, a whole- of- government approach is essential as efforts continue to curb the industrial policy impulses embedded in the AML and China’s regulators, and agreements reached at the U.S.-China Strategic and Economic Dialogue and U.S.- China Joint Commission on Commerce and Trade have established a baseline of best behavior and practice upon which the U.S. government must continue to build. In practical terms, a whole-of- government approach should, at its core, statutorily mandate full interagency coordination and information sharing in efforts to address competition policy around the world.
- Ensure through rigorous oversight that the Administration is doing everything in its power to ensure provisions of China’s IP Abuse Guidelines regarding essential facilities, refusal to license, excessive pricing are consistent with U.S., EU and Japanese approaches. This must be a top and urgent priority.
- Work with the Administration to ensure that the ongoing bilateral investment treaty negotiations with China and other governments include provisions that deter use of antitrust laws as a tool of industrial policy to hinder market access and undermine intellectual property rights.
- Through oversight, foster a hyper-sensitivity in support of transparency and due process.
- Exercise domestic oversight with an eye toward international impact of domestic antitrust decisions. Upon occasion, there have been outcomes from U.S. agencies that may appear to conflict with U.S. international economic policy positions. Domestic enforcement cases must be explained to international audiences so that they are not perverted by

other jurisdictions to achieve outcomes inimical to U.S. government intent and interests. Extraterritorial remedies must be avoided.

- This committee should increase scrutiny of technical assistance programs, but as authorizing committees, it is important to ensure there are sufficient funds available for travel to engage with priority jurisdictions.
- Finally, Congress should be more vocal in its support for expanded competition chapters in free trade agreements. In particular, there is much more that can be done to advance transparency and due process in antitrust enforcement as well as curb misuse of antitrust for industrial policy purposes in our trade agreements.

VIII. High Stakes: U.S. Antitrust Agencies Must Lead By Example Abroad Through Sound Enforcement at Home

These recommendations, however, are not enough to ensure positive outcomes. U.S. antitrust authorities must lead by example.

It is also worth mentioning that the Chamber has stressed to both U.S. antitrust agencies that what happens at home matters abroad. It is critical that the U.S. be an example for other jurisdictions.

While the U.S. antitrust enforcers should not hesitate to enforce U.S. law out of fear for how it will be interpreted, U.S. enforcers need to be conscious that the world is watching and must be prepared to defend their decisions both at home and abroad.

This has not always been the case. For example, in both the Bosch case and in Google/Motorola Mobility, the commitments required under consent orders prohibited the ability of these companies to seek injunctive relief for patents encumbered by commitments made to standard setting bodies.

The concern with these decisions is that the FTC failed to clearly constrain these commitments to apply solely within the United States, despite the fact that intellectual property rights are recognized on a national basis⁹.

In these cases a poor example was set, even if the parties were willing to agree to it, because the remedy had an ill-advised extraterritorial impact.

IX. The stakes for the U.S. economy are significant and go well beyond China.

For much of the last thirty years, tensions in the global antitrust system have existed between the United States and Europe. While some of those tensions have been worked through, there remain real and substantial differences in substance, approach and procedure.

As the United States has looked to help guide nascent antitrust jurisdictions, so has the European Union. One might argue that the European approach to antitrust has prevailed in many countries, even as U.S. influence can also be seen in foreign statutes and agency regulations.

The flexibility provided by the European administrative process combined with its approach to competition law is attractive to foreign jurisdictions. Its open ended nature is also ripe for abuse in foreign jurisdictions where rule of law in general can be a challenge.

Of course no jurisdiction is a complete copy and paste of either the U.S. or EU approach, so native interpretations drive slight deviations. These deviations present problems for continuity to the global antitrust system under the best of conditions.

However, the more deviations from the norm that exist, the less one is still able to identify a global norm. The result is increasingly questionable investigations, enforcement decisions, and remedies. What was once viewed as an outlier can become tolerated and even acceptable.

⁹ In addition to the extraterritorial concern, the Chamber also raised concern in the Bosch case over the lack of transparency on the part of the Federal Trade Commission to understand why the patents named in the consent order were made available on a royalty-free basis.

The concern is not just antitrust newcomers like China or India, but concerns abound in multiple jurisdictions including well established jurisdictions like Europe and Korea. For example, the Korean Fair Trade Commission (KFTC) in a press release about recent changes it was seeking to make to its IP abuse guidelines stated:

“In particular, domestic companies are expected to be protected from the abuse of patents, as the amendment will provide a basis for effectively regulating global companies’ abuse of monopoly with patents.”

In addition to this statement the KFTC’s 2015 Enforcement Plan stated that one of its primary goals was to strengthen enforcement against global monopolistic enterprises holding original technologies having a significant influence in the Korean industry.

Statements such as these demonstrate that perverse use of antitrust is creeping towards becoming an acceptable international norm. China’s actions are further challenging “international norms” by stretching them, while also claiming to live within them.

For example, last year China issued a fine to Qualcomm for just under one billion dollars. This amount seems like a lot, but it is actually the third highest fine behind the questionable fines issued by Europe to Intel and Microsoft.

China also raised eye brows over the conditions it imposed on the Microsoft/Nokia merger, only for Korea to follow and place significantly more questionable conditions on that same merger.

In these examples, China’s actions can be seen to further stretch international norms, while not positioning China as an absolute outlier. But it also demonstrates that the world of international antitrust presents problems beyond China.

X. Conclusion

The Chamber thanks the committee for holding this hearing, would like to acknowledge the hard work of the Administration to confront these difficult challenges and is happy to answer any questions.