AMCHAM EU
AMERICAN CHAMBER OF COMMERCE TO THE EUROPEAN UNION
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Mr Guillaume Loriot
Deputy Head of Cabinet
Cabinet of Vice-President Almunia
European Commission
B-1049 Brussels

Thursday 31 October 2013

RE: AmCham EU's competition concerns regarding Chinese competition enforcement

Dear Mr Loriot,

In the five years since China's Anti-Monopoly Law (AML) became effective, their competition regime has made significant strides to adopt modern economic principles and international best practices. The recent agreements between the EU, NDRC, and SAIC, which complement the existing EU-MOFCOM agreement, are a positive indicator that China's approach to competition issues is moving into accord with international norms. In addition, the March 2013 opinion in *Qihoo 360 v. Tencent* indicates that Chinese courts are capable of applying modern, economically sound analysis to complex antitrust claims. Similarly, the *Ruibang v. Johnson & Johnson* decision suggests that Chinese courts appreciate the complexity inherent in resale price maintenance issues and understand the value of taking evidence in relation to a number of relevant factors to fully evaluate claims.

Despite this progress, we wish to bring to DG Competition's attention five areas of concern regarding current competition enforcement in China: the potential misuse of competition policy to foster protectionism, the lack of respect for intellectual property rights (IPR), the lack of transparency, significant delays in the merger review process and the rise of private antitrust litigation.

Antitrust and Protectionism

Recent enforcement actions suggest that Chinese regulators may be using competition law to protect domestic corporations and to respond to perceived mistreatment of Chinese corporations abroad in lieu of enforcing sound antitrust principles in an even-handed manner.[1] For example, in July 2013, SAIC announced an investigation into misuse of market dominance by a foreign packaging firm, and NDRC announced reviews of infant formula milk pricing by several US and EU-based firms and of a New Zealand firm's dairy business. Domestic Chinese firms do not appear to have been targeted in these two probes, though they have been in some others, including an investigation into pharmaceutical companies.

Industrial policy concerns appear to be particularly acute in mergers involving strategic commodities. MOFCOM is required by law to consider the central government's industrial policy perspectivesand

[1]Similar concerns have been raised regarding China's investment, IP, standards setting, government procurement, tax, trade, and information security policies.

Avenue des Arts/Kunstlaan 53, B-1000 Brussels, Belgium
Telephone: +32 (0)2 513 68 92 Fax: +32 (0)2 513 79 28 Email: amchameu@amchameu.eu Website: www.amchameu.eu

this runs the risk that domestic industry interests are factored into merger analysis.[2] As a result, required remedies do not always address competition concerns and this has been raised for example in cases involving certain commodities, such as *Marubeni/Gavilon* (grain), *Glencore/Xstrata* (copper), and *Uralkali/Silvinit* (potash). In addition, there appears to be a trend where transactions involving foreign firmsare increasingly require conditional approvals, while deals involving only Chinese entities typically receive unconditional approval.

We are also concerned that MOFCOM has imposed remedies that allow MOFCOM or a MOFCOM-appointed monitor or trustee to oversee the day-to-day management of either (1) the acquiring party or (2) the acquired assets post-transaction. For example, the remedies in *Uralkali/Silvinit* constrained the company's ability to independently determine future pricing and supply levels. In *ARM-G&D-Gemalto*, the remedy required disclosure of certain technological information to competitors. MOFCOM has also imposed significant behavioural remedies in cases such as *Seagate/Samsung* that not only require companies to operate acquired businesses as separate competitors, but which also impose unusual operational and/or monitoring requirements. Seagate, for example, was requested to invest certain amounts in innovation and to maintain a particular business model for an indefinite period of time.

Antitrust enforcement should be founded on sound economic analysis and due process that apply equally to all players, domestic or foreign. The EU should engage with its Chinese counterparts at all levels to ensure that markets are open, competitive, and respectful of legitimate property rights, in order for all participants to reap the full benefits of international trade and investment.

The AML and Intellectual Property Rights

SAIC's sixth draft of its IPR competition guidelines, which are now in the form of draft regulations[3], still raise significant concerns about the respect for the fundamental rights of IPR holders and appears to be motivated in part by industrial policy. Although improved in a number of respects against the prior version, the current draft includes a provision requiring technology transfers and compulsory licensing by IPR holders. Draft Article 8 states that an undertaking with a dominant market position may not refuse to license when its IPR is a necessary facility for the licensee to compete". A similar provision requiring licensing of 'essential' IPR was included in a 2005 draft of the AML but was removed as a result of extensive criticism. The current proposal appears to be even more problematic than the previously rejected AML language because draft article 8 not only requires licensing but also authorises the imposition of restrictions on royalty rates and other license terms.[4] Both provisions

[2] MOFCOM's decision to block the *Coca-Cola/Huiyan* transaction has been widely viewed as a victory for industrial policy over competition concerns, driven by input from NDRC. In more recent cases, MOFCOM appears to have retreated from the approach represented by the Coca-Cola decision.

[3] MOFCOM and NDRC will not be bound by the IPR regulations, creating uncertainty as to their IPR enforcement intentions.

[4] Draft Article 8 requires that all IPR licenses adhere to 'reasonable terms and conditions' unless 'due justification' is shown. This limits the licensing terms the patent owner can use, and shifts the burden of proof to the IPR owner to justify any differences in license terms.

Other aspects of SAIC's draft regulations that raise concerns include an overbroad ban on exclusive grantbacks in Article 10, an over-inclusive list of 'core' violations in Article 6 for which justification is not permitted, and the ability under Article 10(5) of SAIC to prohibit additional practices that do not harm competition.

Avenue des Arts/Kunstlaan 53, B-1000 Brussels, Belgium
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threaten to discourage innovation and will make the markets less competitive and dynamic than otherwise possible.

In this context, we respectfully refer to the following remarks of Federal Trade Commissioner Maureen Ohlhausen in June 2013[5]:

> No matter how good our intentions, my concern is that our actions, if not properly explained, may send a message to our foreign counterparts that we do not place a very high value on intellectual property rights, which is clearly inconsistent with the appreciation for IP rights that we typically hold in the United States.
>
> Let me share with you an example of what I mean. Recently, I was in China attending a conference and meeting with Chinese competition officials. At the conference, I heard people **claim that the United States has a well-established essential facilities doctrine, which is not exactly correct. In addition, it was suggested that when read in light of this doctrine, the** FTC's Google decision implies that a SEP is an essential facility and an unreasonable refusal to license that SEP constitutes monopolization. It was further suggested that the best remedy for monopolization with a SEP would be compulsory licensing because permitting more parties to use the SEP would facilitate competition.
>
> This is not a correct reading of relevant U.S. law or, in my opinion, of the FTC's decision in Google. **This sort of misinterpretation is troubling on two levels. First, it undercuts the value of intellectual property rights and gives our counterparts abroad the misperception that we support wide application of compulsory licensing, which is completely incorrect. Second, if these misperceptions about our SEP enforcement actions here in the U.S. are actually implemented elsewhere in the world, the resulting harm to patent rights would create serious disincentives for investment in research and development and harm innovation**.

We would like to emphasise the Commissioner's conclusions because we are very concerned that the current debate in the EU and the US about various theories related to technology transfer in a standardisation context are being misinterpreted and cited as support for regulatory intervention in China.

Lack of Transparency in Enforcement Proceedings

We applaud both MOFCOM and SAIC for their efforts to solicit and incorporate comments on proposed regulations and guidelines from industry participants, and we are encouraged by MOFCOM's recent release of quarterly data describing merger review decisions.

[5]Commissioner Maureen Ohlhausen 'Recent Developments in Intellectual Property and Antitrust Laws in the United States' at a George Washington University Law School on the Interaction of IP and Antitrust: A US-China Comparative Perspective, 17 June 2013 (see http://ftc.gov/speeches/ohlhausen/130617intellectualpropertyantitrust.pdf).

Avenue des Arts/Kunstlaan 53, B-1000 Brussels, Belgium
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All three authorities, however, often refrain from explaining their enforcement decisions in detail (as compared to the press releases, speeches, and statements common in the EU, US, and other authorities). This lack of transparency, a concern in its own right, also stimulates concerns regarding the misuse of competition policy in fostering protectionism.

Additional guidance is needed throughout the merger review process. The Remedy Rules issued in 2010 offer little guidance on the use of behavioral remedies; notifying parties often do not learn of concerns until late in the review; and MOFCOM often does not publish detailed explanations of decisions, making it difficult to use past decisions as predictors. For example, it appears that in *Wal-Mart/Yihaodian*, the authorities did not discuss in detail why a remedy was needed for a merger involving separate but related markets. In the *ARM-G&D-Gemalto* joint venture case, MOFCOM required sharing of technological information with competitors but offered little explanation for its decision. And in *Google/Motorola*, which cleared EU and US review without conditions, MOFCOM did not explain the reasons behind its remedies. In short, the current lack of guidance makes it difficult for firms to navigate the merger review process in a timely manner, or to understand or have the ability to respond to MOFCOM's concerns.

Merger Review Delays

Lengthy delays continue to plague MOFCOM's merger review process, which can take six months or more for even a simple merger that has already received clearance from other international authorities. The*Marubeni/Gavilon* transaction, which took a year to clear, is one such example.

The delays are due in part to the fact that MOFCOM remains significantly under resourced compared to its counterparts in the EU and US. Case handlers are increasingly sophisticated and comfortable with complex issues, but often require firms to withdraw and refile their applications for reasons that may not bear on the merits. In addition, MOFCOM must obtain input from a number of disparate agencies, and must oversee a national security review contemporaneously with merger clearance. Delays may be compounded going forward by the newly revised merger notification form, which imposes even greater requirements for information and documentation (well beyond those required by other jurisdictions), and which emphasises the parties' Chinese activities.

At the same time, MOFCOM appears to be moving toward less burdensome procedures for merger clearance in cases that are unlikely to generate competition concerns, and has indicated that it recognises the delays and inefficiencies in the clearance process. Consistent with international norms, we encourage the European Commission to support MOFCOM's development of a less burdensome notification form and continue to provide technical assistance to MOFCOM.

Private Antitrust Litigation

The numbers of newly filed private antitrust actions under article 50 of the AML are raising steadily, a trend that is expected to continue. Although the May 2012 Judicial Interpretation strengthens a number of procedural rules (as discussed above), it also relaxes the burden of proof on plaintiffs in dominance cases. In particular, the Supreme People's Court has adopted a rule that now places the burden of establishing the absence of anti-competitive effect for cases brought under article 13(1)-(5) of the AML on defendants, rather than on plaintiffs. Also, plaintiffs face a far lower hurdle to

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establishing dominance, as they may now use evidence of public statements by allegedly dominant companies in order to establish dominance in fact. We encourage the European Commission to promote the development of clear, predictable legal standards and procedures and the use of sophisticated economic analysis in the Chinese judicial system's handling of competition cases.

We hope that our observations on the current state of Chinese competition enforcement will prove useful. We would like to assure you of AmCham EU's determined support in promoting sound competition policy across the global antitrust community, in particular with respect to enforcement of antitrust laws based on sound analytical frameworks and consumer welfare and procedural fairness. Should you require any further information, please do not hesitate to contact Pierre Bouygues at the AmCham EU Secretariat (pierre.bouygues@amchameu.eu; +32 (0)2 289 10 32).

Mathew Heim Gabriel McGann
Co-Chairs of the AmCham EU's Competition Policy Committee

Addressees:
Guillaume Loriot, Deputy Head of Cabinet to Vice-President Joaquín Almunia, European Commission
Cecilio Madero-Villarejo, Deputy Director General with special responsibility for antitrust, Directorate General Competition, European Commission
Blanca Rodriguez-Galindo, Head of the International Relations Unit, Directorate General Competition, European Commission
Peter Berz, Head of the Far East Unit, Directorate General Trade, European Commission
Christos Kyriatzis, Head of the International Affairs and Missions for Growth Unit, Directorate General Entreprise, European Commission

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.

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