



## US-China Business Council Comments on Draft Regulations on the Prohibition of Monopoly Agreements and Draft Regulations on the Prohibition of Abuse of Market Dominance

The US-China Business Council (USCBC) represents more than 220 US companies with significant operations in China that have strong, consistent interests in the development and implementation of China's antimonopoly laws. We would like to thank the Ministry of Commerce for providing the opportunity to offer comments on the *Regulations on the Prohibition of Monopoly Agreements* and *Regulations on the Prohibition of Abuse of Market Dominance*. As other relevant organizations and companies have already put forward specific proposals, we shall limit our comments to the following areas.

### OVERALL RECOMMENDATIONS

#### Clarification of “Reasonable Grounds” for Business Practices

USCBC has found that the draft calls for prohibition of some standard business practices, unless companies can demonstrate “legitimate reasons” for these activities. These activities include: (a) sole rights to a specific region or client (Article VI, *Regulations on the Prohibition of Monopoly Agreements*; Article IX, *Regulations on the Prohibition of Abuse of Market Dominance*); and (b) the right to make decisions about existing or future transactions with trading partners (Article VIII, *Regulations on the Prohibition of Abuse of Market Dominance*). USCBC is fully aware of the efforts of the State Administration for Industry and Commerce (SAIC) to prevent monopolistic behavior. Without clarification of the principles and procedural details governing the prohibition of these business activities, however, enterprises will be unable to judge whether their business activities comply with these regulations, which would likely have a significant influence on their normal business operations.

USCBC therefore respectfully suggests further clarification and supplementation of the related articles to aid enterprises in understanding the above issues.

- **Suggestion 1** Add supplemental language about “legitimate reasons” for business practices to provide guiding opinions so that enterprises may judge whether their business activities are operable.
- **Suggestion 2** In drafts for comment, clarify that enterprises can communicate and consult directly with SAIC during investigation periods to determine whether their business activities fall within the scope of monopolistic behavior and allow them the right to provide related evidence. This communication and consultation can be posted on the SAIC website for the consideration of enterprises and provincial-level administrations of industry and commerce (AICs).

#### National Supervision and the Uniform Implementation of Laws and Regulations

The central government is working hard to create a national market to create good commercial conditions for companies. Therefore, guaranteeing the unified implementation and enforcement of antitrust laws and regulations is particularly important. We are very pleased to see that the newly released *Regulations on the Prohibition of Monopoly Agreements* and *Regulations on the Prohibition of Abuse of Market Dominance* have clearly divided the authority for investigating and handling cases between national and provincial AICs. USCBC hopes that revised versions of these regulations can also include the following: SAIC will remain centrally responsible for antimonopoly enforcement and will authorize AICs at or below the provincial level to handle individual cases. This will benefit SAIC in building investigative experience and

in setting guidelines related to antitrust law. Fair, unified implementation of antitrust laws and regulations will promote the creation of a unified national market.

## **OTHER PROVISIONS**

### **Regulations on the Prohibition of Monopoly Agreements (Draft)**

Article III (c) defines “collaborative behavior that is tacit and consistently coordinated” as an important form of a monopoly agreement. As language used in this definition is vague, USCBC is concerned that implementing concrete enforcement will be somewhat difficult. Therefore, USCBC respectfully suggests that this provision be amended to read: “agreements and decisions not clearly set down in written or oral fashion, where there exists collaborative behavior between operators that is tacit and consistently coordinated (for which proof of reasons must be shown).”

Article IV states that, in determining collaborative behavior, regulators should consider the market structure and market changes, in addition to (a) the consistency of the operator's behavior and (b) the sameness or similarity of behavior without any rational reason. Sometimes, however, several operators using independent judgment to make separate decisions can result in market behavior that seems to be similar or identical. This is particularly common in industries with high levels of information transparency. Therefore, decisions about concerted action based solely on (a) and (b) may lack sufficient rationale and may also make collection of evidence by national or local administrations of industry and commerce very difficult. In this light, USCBC respectfully recommends that this provision provide a more specific definition of collaborative behavior and recommends differential treatment for similar but independent behavior based on operators’ considerations of economic self-interest (without a desire to limit competition) versus similar joint behavior aimed at limiting competition.

### **Regulations on the Prohibition of Abuse of Market Dominance (Draft)**

We also note that Article V of this draft clarifies the factors used to determine whether operators have a dominant market position, including market share, and that Article VI states the standards for market share ratio that will be used in that determination. The actual collection and analysis of market share data is not the only possible method, however; such related information is likely to change along with changes to market characteristics and other related key developments. Conclusions drawn based on this objective situation will be hard-pressed to avoid bias. In light of this fact, we respectfully recommend that to ensure consistent enforcement of these laws and regulations, Article VI and other associated laws and regulations be amended to state that SAIC, before determining whether operators occupy a dominant market position, should report data and survey analysis of related market share to operators; operators should also be able provide evidence that they do not possess a dominant market position in accordance with Article VII.

In the actual business environment, operators—for normal and reasonable business purposes—commonly have the right to choose to refuse, curtail, limit, or discontinue transactions with trading partners. For example, to provide consumers with high-quality products and services, operators may, in accordance with quality standards for products and services, refuse or discontinue transactions with trading partners at any time. This is actually beneficial to protecting the interests of consumers and promoting market competition. In contrast, the behavior of an operator with dominant market position aimed at limiting or eliminating competition can have only a negative influence on competition and social welfare. For this reason, USCBC respectfully recommends amending Article VIII to read: “Under same-level trading conditions, refusing, cutting, limiting, or halting transactions with trading partners and thus eliminating or limiting market competition can be seen as having no justifiable reason.”

## **CONCLUSION**

The US-China Business Council would like to thank SAIC once again for giving the opportunity to make recommendations on the draft. We hope the above suggested changes play a constructive and positive role in helping to further improve the PRC Antimonopoly Law and help SAIC maintain effective market competition. We hope to encourage operators to develop industrial and social innovation based on fair competition and to promote the development of socially productive forces to create greater social welfare.

Finally, USCBC welcomes feedback from SAIC and hopes to have the opportunity to discuss the contents and provisions of the draft more fully.

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The US-China Business Council

Contact: Robert Poole, Vice President (Overall responsibility for China)

Tel: 010-6592-0727

Fax: 010-6512-5854

E-mail: [rpoole@uschina.org.cn](mailto:rpoole@uschina.org.cn)