US-China Business Council Comments on the Draft Revision of the Anti-Monopoly Law of the People's Republic of China

February 3, 2020

On behalf of the more than 220 members of the US-China Business Council (USCBC), we appreciate the opportunity to submit comments on the draft revision of the Anti-Monopoly Law of the People's Republic of China (hereby referred to as "the Draft") to the State Administration for Market Regulation (SAMR).

We support that the draft strengthens the foundational role of competition policy and incorporates the fair competition review system into the framework of the Anti-Monopoly Law (AML). Both elements will help China transition to a market-based economy by ensuring fair competition and by limiting government restrictions on market competition.

However, we believe that the draft includes several elements that might contradict the intention behind the positive revisions in the draft. The draft strengthens the sanctions on anti-trust behaviors as well as failure to report the transactions covered under the merger control rules. While we understand that the intention behind these changes is to impose higher compliance requirements to combat monopolistic behaviors, these revisions to the merger control regime could potentially undermine the legal certainty and predictability that the business community needs given the greater challenges companies are likely to face in trying to meet these higher compliance requirements.

USCBC respectfully submits the following article-specific recommendations. We are pleased to further discuss our views with SAMR.

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Specific suggestions are as follows:

Article 4

We appreciate the recognition of the fundamental role of competition policy and recommend the establishment or strengthening of enforcement mechanisms to accommodate the role of competition policy in national governance.

Article 9

We appreciate the adoption of fair competition system into AML. We also suggest making it clear that the fair competition review system is under AML, not the system in parallel to competition policy or AML enforcement, and to see detailed enforcement mechanism in the AML or supervision by the authorized SAMR.

Article 10

We suggest making it clear in item four that the Anti-monopoly Commission is coordinating fair competition review, not enforcing fair competition review.

Article 11

Under China's institutional reforms that were implemented in 2018, the three AML enforcement agencies were merged into the AML enforcement authority under the SAMR, which was an important step taken by China in unifying AML enforcement and improving the overall level of law enforcement. With the establishment of the fundamental status of competition policy and the continuous accumulation and increase of law enforcement cases, we understand that the amendment to this Article will give AML enforcement authorities greater flexibility in law enforcement teams and capacity building as the anti-monopoly undertakings develop. However, at the same time, we suggest that further clarification of the enforcement authority and responsibilities between the central to the local-level AML enforcement authorities in order to avoid unfair competition that could be caused by repeated law enforcement or inconsistent law enforcement standards as well as any reduction of market predictability. Especially for the review of concentration of undertakings, it should be clear whether the newly added local law enforcement authorities have the authority to review such cases and to provide explanations.

Article 15

Item four clarifies that restricting access to new technologies or equipment, or the development of new technologies or products, will be considered as one type of monopoly agreements. The scope of “access to” is broad and unclear. We recommend retaining the original language, adjusting “access to” to “the purchase of,” or further clarifying the definition of “access to.”

Article 16

This Article lists monopoly agreements related to resale prices while the provisions of the AML on the resale price maintenance agreement could be interpreted differently. We suggest that the amendment to this Article refer to the best practices of relatively mature jurisdictions in Europe and the United States and explicitly apply reasonable principles to determine relevant agreements. In measuring the welfare effect of the lowest resale price, institutions should assess the impact of both price and output. Adaptation to reasonable principles will help improve the stability and predictability of the AML.

Article 17

The scope of “arrange or assist” is broad and unclear. We recommend deleting this Article. We also suggest deleting the relevant expressions in Article 53 at the same time.

Article 18

Because this Article is an exception, we suggest that the word " monopolistic" be removed from "where an undertaking can prove that the concluded monopolistic agreement is for any of the following purposes.” This Article is an exemption from Articles 15, 16, and 17. If the provisions of this Article are met, then what is concluded should not be a "monopolistic agreement" but an agreement. Next, we recommend that the exceptions made in this article be extended to Article 14 as well. In addition, the expression of “necessary condition” may be overly restrictive, and it may be appropriate to simply require that the agreements are the “least restrictive means” of achieving the relevant benefit. For example, in the United States, the existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary. See DOJ FTC 2017 Antitrust Guidelines for the Licensing of Intellectual Property § 3.4. Therefore, we suggest adjusting the “necessary condition” to “the least restrictive means.” Finally, we suggest adding an item that for resale price maintenance, if the maintenance of normal resale price can be justified, the exception in this Article should also be applied.

Article 20

Compared with Article 17 of the current AML, the amendment of this Article is largely consistent with the existing Article, but in the sixth paragraph, one of the qualification conditions "equivalently or similarly situated" is deleted. We believe that this item should be retained in the revised draft. In practice, due to the complexity of business environment, it is common and reasonable to provide differential treatments to trading counterparties that are not similarly situated. Thus, illegal discrimination usually requires the prerequisite that the trading counterparties be similarly situated. The factors of the prerequisite are different from and cannot be replaced by justifiable reasons. For example, according to the Interim Regulation on Prohibiting the Abuse of Market Dominant Position, factors for determining situations of trading

counterparties usually include “transaction safety, transaction cost, scale and capacity, credit rating, the stage of transaction, and the duration of the transaction” while the examples of justifiable reasons include customary industrial practice and preferential treatment of new customers.

In addition, we suggest that this Article be more specific about the applicable criteria for each item. For example, in item one, selling commodities at unfairly high prices or buying commodities at unfairly low prices is regarded as an act of abusing dominant market positions. However, there are no clear terms to further explain how to define the concept of unfairly high prices or unfairly low prices, making it difficult for operators to evaluate and follow potential compliance risks when pricing. In addition, in market activities, the price alone cannot directly determine whether the price has the effect of protecting competition or damaging competition. In the areas of high value-added and technological innovation, the high prices of products and services often reflect the large amount of R & D and innovation investment made by operators in the early stage.

The second to sixth items of this Article contain the concept of "without justifiable reasons," but did not elaborate or explain this concept. We suggest that the draft give an example of what is "without justifiable reasons." For example, in market competition and operations, the differential treatment to trading counterparties in terms of transaction conditions including prices is often the result of market competition. If it is not clear what constitutes "without justifiable reasons," it is easy to cause "illegal law enforcement."

Article 21

We appreciate the Chinese government's forward-looking legislative concept, which reflects the regulator's concern and legal protection for the possible monopoly behavior of new Internet businesses. But the scope of “the Internet field” is unclear without giving more detailed definition. We recommend the language along the lines of “an undertaking that provides services to consumers over the Internet” to reflect the principle that the AML protects competition and consumer interests.

Article 23

We suggest that this article further clarify the concept of “control” by adding some examples to the list, such as “including but not limited to the following: taking over the certain amount of equity or senior management appointment.”

Article 24

This Article authorizes the State Council AML enforcement authority to formulate and revise the threshold for declaration and make it public in a timely manner in light of economic

development levels and industry size. We suggest adhering to the principle of equal treatment of domestic and foreign investment in the process of formulating and revising the declaration standards. In the early stages and in the process of development, the State Council AML enforcement authority shall provide open and transparent procedures and channels to fully listen to the opinions of business and industry experts, draw on international experience, and formulate and modify declaration standards based on actual economic development and economic indexes.

In addition, this Article authorizes the State Council AML enforcement authority to conduct an investigation where the concentration of undertakings has yet to reach the threshold but has or could have the effect of eliminating or restricting competition. Such new requirement would have the effect of making the additional consideration on the impact of market competitiveness be assessed and proved beyond the existing criteria of merger filing. It will put companies in a difficult position of deciding whether to file a transaction should or not. In reality, there would be different views on whether market competitiveness is restricted or eliminated during the investigation, and if State Council AML enforcement authority concludes the case should be filed, consequences are quite severe and significant including interruption of company's operation (Article 34). The law should stimulate market vitality while protecting competition. We suggest including a more detailed description and elaboration of this Article to provide clear guidance and expectations on the concentration of undertakings.

Article 30

We would like to suggest a cap for the period on “stop the clock,” such as “the time not included in the review time limit shall not exceed 60 days (which is the third phase of the review time).”

Article 39

We suggest adding one item on not discriminating against foreign companies by indigenous policy or security standards in government procurement activities.

Article 44

We realize that in recent years, the state has strengthened the joint enforcement of administrative law enforcement and public security organs to crack down on intellectual property infringement and other issues. But the AML has given local AML enforcement authorities the right to obtain evidence to investigate suspected monopoly cases. This Article does not clearly state the circumstances under which the public security organs should assist in accordance with the law, which will cause concerns about excessive enforcement. In addition, anti-monopoly cases are not criminal cases. If a linkage mechanism is introduced, more detailed explanations are needed.

Article 45

Based on due process principle, the enforcement officers should externally present the approval document when conducting law enforcement. In addition, we suggest adding some provisions to ensure procedural rights of persons being investigated. The details are as follows:

Adding that "When the AML enforcement authority is investigating suspected monopolistic conducts, if the investigated party or person requests the presence of lawyers or other relevant persons, the AML enforcement authority shall agree."

Adding that "If the person questioned or under investigation requests the copy of the written record, the law enforcement officers shall agree. Where the law enforcement officers duplicate documents or materials, or seal up or impound evidence, the law enforcement officers shall provide the investigated party or person with a list of documents or materials being duplicated, or a list of evidence being sealed up or impounded."

Article 50

In many instances, suspending an investigation when an undertaking commits to adopt specific measures to eliminate the consequences of its conduct is the most efficient manner to restore competition. This is because such a resolution may prevent ongoing harm to competition that would otherwise be ongoing during the investigation. However, the suspension of investigation does not apply to the first three items of Article 15. We hope that the reasons for the inapplicability will be clearly explained in the amendment.

Article 51

Where the State Council AML enforcement authority make a review decision on the concentration of undertakings, the operators and market expectations should be protected in accordance with law. The existence of this Article will hurt market and government credibility. If a third party disputes the decision, the dispute should be resolved through court proceedings to avoid the uncertainty of administrative decisions caused by the possible excessive discretionary power of the administrative organs, which may cause harm to the operators and the market.

Article 53

This Article stipulates that where the monopolistic agreement has not been implemented, it may be fined not more than 50 million yuan. Where the monopolistic agreement has not been implemented meaning that there are virtually no consequences of excluding or restricting competition, the 50 million penalty limit may be too harsh. Failure to establish a separate lower limit on the amount of punishment for this action may give the law enforcement authorities too much discretion; even if the company does not actually implement the monopoly agreement, it will be punished with a huge fine, which does not meet the proportional principle of administrative punishment and the principle of proportionality of punishment and crime. We

suggest separately setting a more reasonable limit on the amount of punishment in the situation where the monopolistic agreement has not been implemented.

Article 55

This article increases the liabilities to the merger parties for failing to file or "gun-jumping." It is critical for the legislative authority to make the filing thresholds clear, objective, and practical which will help companies comply with the law.

Article 57

In the case that the current Criminal Law of the People's Republic of China does not directly involve the crime of monopoly, there is no corresponding legal basis for the criminal responsibility mentioned in this Article. In this case, if it is decided that criminal liability shall be investigated for violations of the AML, it may cause greater panic and anxiety among enterprises and enterprise management personnel. We hope that the amendment to the AML shall formulate regulations carefully in accordance with the Criminal Law and clarify which types of violations of the AML will involve criminal liability for the purpose of creating a good business environment.

Article 61

Article 46 adds the personal privacy confidentiality obligation of AML enforcement agency and its officers. We suggest adding legal liability of divulging personal privacy accordingly.

Article 62

It is important to distinguish between "the abuse of administrative power to eliminate or restrict competition" and "lawful administrative enforcement of IP." The latter generally encourages innovation and promotes competition, and thus should fall outside of the anti-trust law. We suggest that this Article be amended as follows: "This law is not applicable to administrative enforcement acts, in accordance with laws and administrative regulations on intellectual property rights, by administrative department or an organization authorized by laws or regulations."