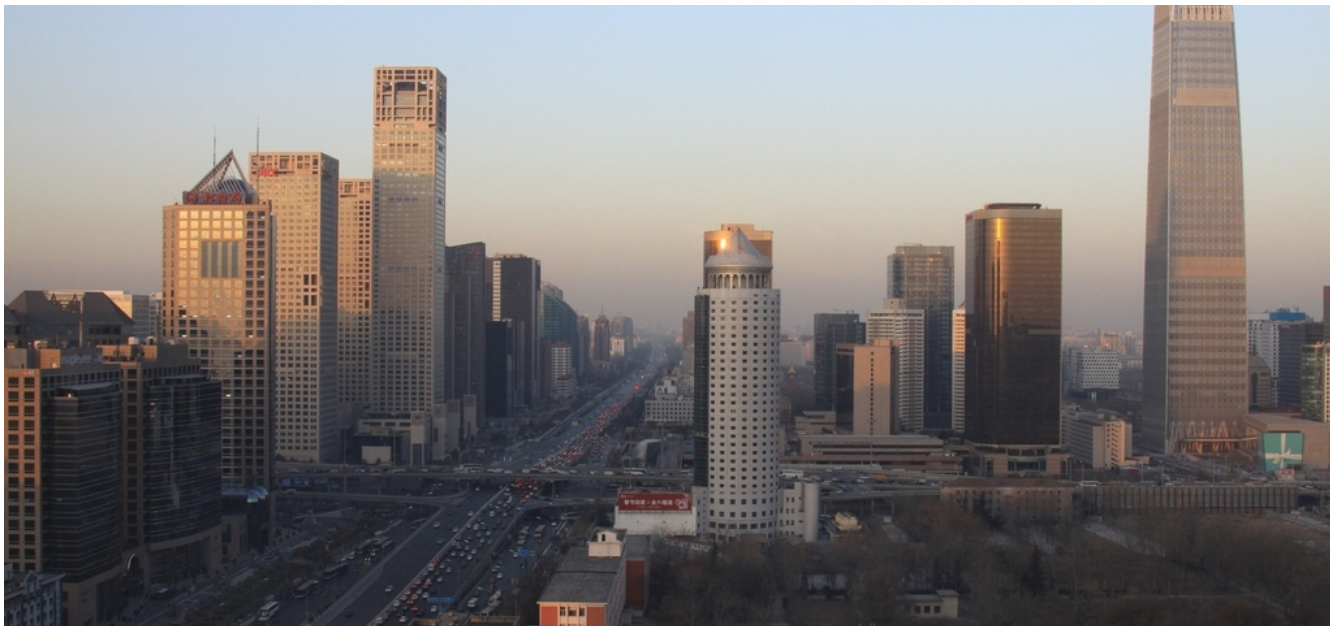


GAI suggests amendments to China's anti-monopoly law

Monday, 14 December 2015 (1 hour ago)

Sonya Lalli



Beijing (Credit: Kentaro IEMOTO / Flickr)

The Global Antitrust Institute at George Mason University School of Law has made a host of recommendations that would bring China's anti-monopoly law in line with western standards.

The statements, sent to a top Chinese university last week, add to the GAI's growing position as one of the most active and assertive antitrust think tanks in the US. In the months since former US Federal Trade Commission member Joshua Wright returned to George Mason and helmed the GAI, the institute has issued public comments on antitrust and intellectual property issues throughout Asia, including in [Japan](#) and previously, [China](#).

In November, researchers from the Competition Law Research Center at the China University of Political

Science and Law in Beijing invited lawyers and universities to comment on potential amendments to the country's anti-monopoly law as part of an ongoing law reform project in conjunction with China's National Development and Reform Commission.

In its recommendations, the institute suggested deleting from the law references to non-competition goals, such as the "promoting the healthy development of the socialist market economy". The institute said competition policy is most effective when it focuses on competition and consumer welfare, rather than multiple and often conflicting goals.

The antitrust institute also recommended scrapping exemptions for state-owned enterprises, arguing such privileges and immunities can distort competition between state- and privately owned rivals.

"In general, [state-owned] enterprises are not as efficient as privately owned firms given that, unlike private firms, which are generally driven by profit, SOEs may have a number of other objectives including employment, social goals, or wealth distribution," the report said.

The antitrust institute proposed a number of other amendments; it said China should recognise that vertical restraints are generally procompetitive – and thus should be analysed under an effects-based approach, and urged the state to reconsider its definition of a "market dominant position".

Pointing to the US's shift towards analysing the competitive effects of a company's actions or deals, the institute said China should clarify that an entity will only be found to have a dominant market position if it is able to profitably maintain market prices above or market output below competitive levels for a significant period of time.

The institute also recommended China specify that the legitimate use of intellectual property rights includes the right to exclude, and said that if a government is "too willing to step in" and take gains from innovation and dynamic competition, potential innovators will lack incentive to risk investment.

Ultimately, the decision on whether to amend the anti-monopoly law, which has been in force since 2008, will rest with the National People's Congress Standing Committee.

Sébastien Evrard at Gibson Dunn & Crutcher in Hong Kong said "it is commendable that 7 years after the entry into force [of the anti-monopoly law], the regulators are engaging in a review process to see whether they can make the system work better".

Adrian Emch at Hogan Lovells in Beijing said that as with many things in China, the key with the anti-monopoly law is how it is used in practice.

“The bigger picture issues are antitrust awareness and compliance by the Chinese business community as a whole, and the need to create a proper competition culture,” he said. “The government is moving in that direction, as there is pressure to abolish or at least reduce privileges of state-owned enterprises.”

“Another key issue which can only be addressed at the high level, not necessarily within the AML amendment process, is whether to create a single antitrust authority, instead of the three-agency regime that currently exists,” Emch added.

A lawyer who wished to remain anonymous said the antitrust institute’s report tries to align the AML with the US Sherman Act – such as with the recommendations that China should not take into account industry policy considerations, and that they should let patent owners use their IP rights to exclude competitors.

“It’s been the same story for the past 10 or 15 years, and it is unlikely that China will take this into account,” the lawyer added.

The China University of Political Science and Law and Mofcom did not respond to a request for comment before press time.

Koren Wong-Ervin, director at the Global Antitrust Institute, also did not respond to a request for comment before press time.