



Global Antitrust Institute comments on China's revised Anti-Unfair Competition Law

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IN BRIEF

MLex Summary: The Global Antitrust Institute of George Mason University has submitted comments on the recent draft revisions to China's Anti-Unfair Competition Law. Koren W. Wong-Ervin, who wrote the comments, strongly urged the removal of an article that says business operators selling goods must not bundle the sale of goods against buyers' wishes, and must not attach other unreasonable conditions. As an alternative, Wong-Ervin suggested revisions to make the article consistent with China's Antimonopoly Law.

The comments follow:

In summary, the GAI made the following comments:

- As an initial matter, we commend the National People's Congress for deleting Article 6 on abuse of superior bargaining position.
- With respect to the remaining draft provisions, we respectfully recommend that any provisions that relate to conduct covered by China's Anti-Monopoly Law (AML) be omitted entirely.
- In particular, we strongly urge that Article 11 (which provides that "[b]usiness operators selling goods must not bundle the sale of goods against buyers' wishes, and must not attach other unreasonable conditions") be omitted in its entirety, as such conduct is already covered by Article 17(5) of the AML.
- In the alternative, at the very least, Article 11 should be revised to adopt an effect-based approach under which bundling will be condemned only when: (1) the seller has market power in one of the goods included in the bundle sufficient to enable it to restrain trade in the market(s) for the other goods in the bundle; and (2) the anticompetitive effects outweigh any procompetitive benefits. Such an approach would be consistent with Article 17(5) of the AML, which provides for an effects-based approach that applies only to firms with a dominant

market position.

- As explained in our comment, bundling is ubiquitous and widely used by a variety of firms and for a variety of reasons.[1] In the vast majority of cases, package sales are "easily explained by economies of scope in production or by reductions in transaction and information costs, with an obvious benefit to the seller, the buyer or both." Those benefits can include lower prices for consumers, facilitate entry into new markets, reduce conflicting incentives between manufacturers and their distributors, and mitigate retailer free-riding and other types of agency problems.[2] Indeed, "bundling can serve the same efficiency-enhancing vertical control functions as have been identified in the economic literature on tying, exclusive dealing, and other forms of vertical restraints."
- The potential to harm competition and generate anticompetitive effects arises only when bundling is practiced by a firm with market power in one of the goods included in the bundle. As the U.S. Supreme Court has explained, "there is nothing inherently anticompetitive about package sales,"[3] and the fact that "a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller" does not imply an "adverse impact on competition." Rather, for bundling to harm competition there would have to be an exclusionary effect on other sellers because bundling thwarts buyers' desire to purchase substitutes for one or more of the goods in the bundle from those other sellers to an extent that harms competition in the markets for those products.[4] Moreover, because of the widespread procompetitive use of bundling, by firms without and firms with market power, making bundling per se or presumptively unlawful is likely to generate many Type I (false positive) errors which, as the U.S. Supreme Court has explained, "are especially costly, because they chill the very conduct the antitrust laws are designed to protect."