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New China laws go too far says Global Antitrust Institute

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George Mason University (Credit: Ron Cogswell/Flickr)

Academics at George Mason University have called for proposed amendments to China's antitrust laws to be changed or scrapped entirely because they stray too far from international competition law norms.

Members of the Global Antitrust Institute located at the school just outside of Washington, DC, said the proposed changes would place an additional regulatory burden on companies doing business in China that could weaken competition.

The comments, published last Thursday, said any changes to China's competition regime should only apply to situations where there is "substantial evidence of harm to competition" and the current proposals should be reigned in.

Of particular concern is article 6 of the proposed changes. The section prohibits a company "taking advantage of its comparative advantage position," which the institute takes to mean its bargaining power.

The provision, the report argued, goes too far into regulating methods of competition and risked protecting companies to the detriment of consumers.

The institute said the conditions when bargaining is likely to harm competitions are limited. Quoting the International Competition Network, the report said if there is no harm to competition, governments should shy away from intervening in privately negotiated contracts.

Intervening to regulate companies' bargaining power in the absence of a market failure is likely to result in less efficient agreements, leaving both parties worse off, the institute said. These costs will ultimately be passed on to the consumer.

The proposals extend the principle of "unfairness" beyond standard competition law principles, the report said.

Competition regimes that attempt to combine welfare and effect-based approaches with prohibitions on the method of competition tend to face "significant tension if not outright conflict" between those two systems.

"Competition policy should not pick winners and losers in the marketplace," the report said. "But rather, should govern the competitive process."

In the report, the institute, which includes US Court of Appeals judge Douglas Ginsburg and former US Federal Trade Commission member Joshua Wright, urge China to learn from the mistakes of the FTC.

"For nearly 100 years, the FTC operated without a consistent definition of an 'unfair methods of

competition’,” the report said. “The FTC corrected this approach by linking unfairness explicitly to the concept of harm to competition.”

The comments refer to Wright’s successful push for the FTC to publish guidance that explained how the agency would enforce its unfair methods of competition powers. The agency published that guidance just before Wright left office last year.

Adrian Emch, a partner at Hogan Lovells in Beijing, said the institute’s hostile attitude to the changes probably result from its US outlook.

“Germany, Japan and Korea have rules similar to article 6 of the proposed AUCL reform,” Emch said.

"From a US perspective, the proposed prohibition of abuse of a 'relatively advantageous position' may look strange...something falling right in-between antitrust and consumer protection. Neither fish nor flesh,” Emch said. “That may be why they propose far-reaching changes, to bring the provision in line with standard antitrust principles."

The proposed changes to China’s AML were published in February alongside changes to the country’s bribery laws and intellectual property rights.