

**COMMENT OF THE GLOBAL ANTITRUST INSTITUTE,
ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY,
ON THE PROPOSED REVISIONS TO THE PEOPLE’S REPUBLIC OF
CHINA ANTI-UNFAIR COMPETITION LAW**

March 19, 2017

This comment is submitted in response to the Legislative Affairs Commission of the Standing Committee of the National People’s Congress (National People’s Congress) of the People’s Republic of China’s public consultation on the February 26, 2017 draft revisions to China’s Anti-Unfair Competition Law (AUCL). We submit this comment based upon our extensive experience and expertise in antitrust law and economics.¹

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. As China recently recognized in the Sixth Meeting of the U.S-China Strategic and Economic Dialogue, “the objective of competition policy is to promote consumer welfare and economic efficiency, rather than to promote individual competitors or industries, and . . . enforcement of its competition law should be fair, objective, transparent, and non-discriminatory.”² The AUCL should be implemented in a manner consistent with these objectives of competition policy and in a manner that is consistent with the AML.

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

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² Press Release, U.S. Dep’t of Treasury, Sixth Meeting of the U.S.-China Strategic and Economic Dialogue U.S. Fact Sheet—Economic Track (July 11, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl2563.aspx>.

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.³

As explained in Section II, below, bundling is ubiquitous and widely used by a variety of firms and for a variety of reasons.⁴ 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.”⁵ 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.⁶ 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.”⁷

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,”⁸ 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.”⁹ 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

³ Article 17 provides that “[u]ndertakings holding dominant market positions are prohibited from doing the following by abusing their dominant market positions . . . (5) without justifiable reasons, conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions.” AML, <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>.

⁴ See, e.g., Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling By Firms?: A Survey of the Economic Literature*, 1 J. COMP. L. & ECON. 4, 707-08 (2005) [hereinafter Kobayashi]; see also THOMAS T. NAGLE & REED K. HOLDEN, *THE STRATEGY AND TACTICS OF PRICING: A GUIDE TO PROFITABLE DECISION MAKING* 3d ed. (Prentice Hall 2002); David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005); Stefan Stremersch & Gerard J. Tellis, *Strategic Bundling of Products and Prices: A New Synthesis for Marketing*, 66 J. MKT’G 55 (2002) [hereinafter Stremersch & Tellis].

⁵ Kobayashi *supra* note 4, at 708; see also Stremersch & Tellis, *supra* note 1, at 70; David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practice: A Neo Chicago Approach*, 72 U. CHI. L. REV. 27 (2005).

⁶ Kobayashi, *supra* note 4, at 708; see also Bruce H. Kobayashi, *Two Tales of Bundling: Implications for the Application of Antitrust Law to Bundled Discounts*, GEORGE MASON UNIVERSITY LAW & ECONOMICS WORKING PAPER No 05-27 (2005).

⁷ Kobayashi, *supra* note 4, at 708.

⁸ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 25 (1984).

⁹ *Id.* at 16.

for those products.¹⁰ 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.”¹¹

I. Unfairness Under the AUCL Should Be Linked to Universal Competition Law Principles

Unfair competition has increasingly been a focus of antitrust agencies around the world, a trend that raises difficult questions regarding the relationship between unfair methods of competition laws and traditional antitrust laws. In many competition policy regimes, the differences between the two can lead to significant tension and even conflict. Traditional antitrust laws, which condemn only conduct that harms competition and is not outweighed by any procompetitive efficiencies, are grounded on the notion that there should be no regulation of *ex post* outcomes between firms, i.e., traditional antitrust laws are designed to protect the competitive process and not to micromanage market outcomes. In contrast, some unfair competition laws have been applied in a manner that prohibits conduct when efficiencies outweigh any anticompetitive effects, a risk that should be avoided. One way to avoid this risk is to limit unfair competition law to conduct not already covered by traditional antitrust laws. Another is to apply the same principles to unfair competition laws as have long been applied under traditional antitrust laws.

From an economic perspective, there is no generally accepted definition of “unfairness.” However, there are two competing views of the proper relationship between unfairness and competition law. The *ex ante* approach views unfairness law as a complement to antitrust enforcement and is consistent with an economic approach to antitrust law. Under this view, unfairness liability does not conflict with competition law, but instead protects the competitive process by filling in the gaps in traditional antitrust laws. Under an *ex ante* approach, fairness is determined by considering barriers to entry, exclusion of rivals from the opportunity to compete, and other factors consistent with an effects-based approach of traditional competition law. This requires a showing that the alleged business’s conduct has actually caused harm to competition.

The *ex post* approach views unfairness and competition law as substitutes, with unfairness liability untethered from economic principles. This approach looks to govern the outcomes of bargaining disputes or prices themselves by evaluating the relative positions of the parties and the result from the transaction. This can result in a chilling effect that affects procompetitive conduct such as innovation, which ultimately benefits consumers. Most importantly, it does not take into account any effect on competition, and thus undermines the objectives of effect-based competition law regimes.

¹⁰ See Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing* at 7 (2009), https://www.law.gmu.edu/assets/files/publications/working_papers/08-37%20Antitrust%20Analysis%20of%20Tying.pdf [hereinafter Abbott & Wright].

¹¹ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (internal quotations omitted).

Recognizing the distinction between these two approaches is a difficult task for any governmental agency. For the majority of its 100-year history, the U.S. Federal Trade Commission (FTC) approached its evaluation of unfair methods of competition from an *ex post* perspective; it is generally recognized now that the practice of evaluating unfairness untethered from competition law principles is likely to lead to bad outcomes for consumers.¹² As a result, the FTC has adopted a consistent method of dealing with unfair methods of competition in the 2015 FTC Unfair Methods of Competition Statement, which embraced *ex ante* unfairness analysis that tethered the evaluation of fairness to underlying traditional antitrust policy.¹³ This policy statement clearly states that the FTC will be guided by three principles when enforcing Section 5's "unfair method of competition" provision: (1) promote consumer welfare as that term is generally understood in U.S. antitrust law precedent; (2) evaluate conduct by balancing harm to the competitive process against the procompetitive benefits of that conduct; and (3) do not apply Section 5 to the conduct if the U.S. antitrust laws are sufficient to address the competitive concern at issue.

Tethering unfairness to antitrust principles ensures consistency in applying the economic principles that guide competition laws. By focusing on an effects-based approach, antitrust agencies evaluate conduct based on harm to competition and allow for consideration of procompetitive efficiencies.

II. Article 11 (Governing Bundling) Should Be Omitted in Its Entirety or, At the Very Least, Revised to Adopt An Effects-Based Approach

As an initial matter, it is important to distinguish between pure and mixed bundling. Pure bundling occurs when a firm offers only the package and not the stand-alone goods. Mixed bundling occurs when both the package and the individual goods are available from the bundling firm. Thus, if the seller offers the goods separately from the bundle then the conduct at issue constitutes mixed bundling and there is no coercion.

Bundling is not only widespread in practice, but also prevalent in markets in which no firm has significant market power. In competitive markets, "the presumptive explanation for bundling" is either economies of scope in production or reductions in transactions and

¹² See generally William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 940-43 (2010) ("The FTC's record of appellate litigation involving applications of Section 5 that go beyond prevailing interpretations of the other antitrust laws is uninspiring."); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *What's Your Agenda?*, Remarks at the ABA Antitrust Spring Meeting 6-7 (Apr. 11, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/whats-your-agenda/130411abaspringmtg.pdf ("[I]t is no surprise that [Kovacic & Winerman] conclude the 'FTC experience with Section 5 is generally a bleak record.'").

¹³ FED. TRADE COMM'N, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

information costs, which benefit the seller, the buyer, or both.¹⁴ Offering consumers more choices can be costly for firms; if the costs of providing more choice exceed the benefits to consumers, more choice can make consumers worse off. For example, for a company with 1,000 patents, the number of possible licensing combinations of patents is on the order of 10^{301} .¹⁵ Thus, there is a significant cost of prohibiting bundling, including the significant (if not cost-prohibitive) transaction costs to both patent owners and implementers if they were forced to analyze each and every patent in a large portfolio and negotiate a license on each.

These procompetitive uses also apply when used by firms with significant market power. In that setting, however, bundling has the potential to harm competition and generate anticompetitive effects. Market power is a necessary but not sufficient condition for harm to competition. Without power in one of the goods included in the bundle, the seller would not be able to force the buyer to purchase its bundle because the buyer could easily purchase the bundle of goods separately from other sellers. Even then, as the Supreme Court has explained, 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.”¹⁶ Rather, for bundling to harm competition there would have to be an exclusionary effect on other sellers as a result of buyers’ thwarted desire to purchase an item in the bundle from another seller.¹⁷

While the economic literature demonstrates the possibility that bundling by sellers with market power can generate anticompetitive harm, “it does not provide a reliable way to gauge whether the potential for harm would outweigh any demonstrable benefits from the practice.”¹⁸ As such, treating bundling as per se or presumptively unlawful can generate significant costs by erroneously condemning or deterring efficient business practices.

For these reasons, we strongly urge the National People’s Congress to omit Article 11 in its entirety or, at the very least, to adopt an effects-based approach with a market-power screen similar to the approach set forth in Article 17 of the AML.

III. Conclusion

We appreciate the opportunity to comment and would be happy to respond to any questions the National People’s Congress may have regarding this comment.

¹⁴ Kobayashi, *supra* note 4, at 708.

¹⁵ See Anne Layne-Farrar & Michael A. Salinger, *Bundling of RAND-Committed Patents* at 11 (June 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585528.

¹⁶ *Jefferson Parish*, 466 U.S. at 16.

¹⁷ Abbott & Wright, *supra* note 10, at 7.

¹⁸ Kobayashi, *supra* note 4, at 707.