

Statement for the Record
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Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on
“Recent Trends in International Antitrust Enforcement”

Washington, DC
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As reported in the media, all five of the witnesses who participated in this hearing agreed that “there is the potential threat of other countries using antitrust enforcement to single out American companies—but disagreed on how to respond.”¹ Part of the reason they disagreed on their suggested responses stems from the lack of a uniform understanding among the witnesses (and others) on the nature and extent of the antitrust enforcement problems overseas.

In its submission, the American Antitrust Institute noted that it was “not aware of any empirical studies that address the extent of the abuses alleged in the Report and whether they reflect systemic problems within certain foreign jurisdictions.”² The witnesses only used a handful of examples during the hearing to describe overseas trends in antitrust enforcement, and of that handful, two of them were seriously mischaracterized (as noted in detail below).

This lack of relevant and reliable data was not limited to the hearing testimony. The “Expert Group Report” on which the hearing was based cited no specific examples as support for the assertions that “Certain of our major trading partners *appear* to have used their laws to actually harm competition by U.S. companies, protecting their own markets from foreign competition, promoting national champions, forcing technology transfers and, in some cases, denying U.S. companies fundamental due process.”³ In other parts of the Expert Group Report, such assertions are framed as “concerns” or may be more conclusive in their tone but, again, they are made without citing specific cases as support or even identifying the jurisdictions involved.⁴

Despite the lack of data, the recommendations made in the Report and referred to in the hearing are extensive. One of the Expert Group Report’s recommendations is to have the suggested Working Group “review foreign regulations and policies that have the effect of imposing substantial anticompetitive harm on U.S.-based businesses seeking to compete in foreign countries and global markets.”⁵ Such regulations and policies should be studied carefully to determine whether and how often they have been implemented. Intel recommends that the Working Group, if established, also should commission an empirical study to determine the nature and extent of the abuses alleged in the Report. This kind of baseline data is necessary to prioritize and effectively implement many of the Report’s recommendations.

¹ “Congress addresses foreign antitrust against U.S. companies,” Charles McConnell, GCR (June 30, 2017).

² See Prepared Statement of Randy M. Stutz, American Antitrust Institute, “Hearing on Trends in International Antitrust Enforcement” (June 29, 2017), at p.3.

³ Cover Letter to Report and Recommendations of the International Competition Policy Expert Group, Commissioned by the U.S. Chamber of Commerce (2017), at 1 (emphasis added) [hereinafter “Expert Group Report” or “Report”].

⁴ See, e.g., Expert Group Report at pp. 6 & 13.

⁵ Expert Group Report at p. 8.

By recommending that more analysis be done before implementing the Expert Group’s recommendations, I am by no means implying that most or all antitrust enforcement by foreign agencies against U.S. companies has merit or is without problems. On the contrary, Intel has incurred its own dubious antitrust enforcement issues in several foreign jurisdictions. I am simply stating the obvious: If we are going to use trade tools against bad faith international antitrust enforcement, we better be sure of the nature, seriousness and extent of the problems targeted. And neither the Report nor the hearing testimony indicate a consensus here.

For instance, witness Deborah Garza noted: “there is concern that certain major trading partners have in some cases denied foreign companies fundamental due process and in other cases applied their competition laws to protect their home markets from foreign competition, promote national champions and/or force the transfer of technology at royalty rates that favor local technology implementers . . . *Koren Wong-Ervin and Alden Abbott have provided examples in their testimony.*”⁶ But Mr. Abbott did not use any specific examples in his testimony,⁷ and as noted below, two of the three examples Ms. Wong-Ervin relied on were mischaracterized.

I. Some of the Very Limited Examples Used in Testimony to Support the Expert Report’s Significant Recommendations are Seriously Flawed

Ms. Wong-Ervin cited three specific examples of governments that are “denying U.S. companies fundamental due process, protecting their own markets from competition, and, in the case of IPRs in particular, using competition law to reduce royalty payments to U.S. companies to unduly favor their domestic manufacturers.”⁸ Two of the three examples involve antitrust decisions by China and South Korea against Qualcomm; neither of those examples support Ms. Wong-Ervin’s conclusions.

1. China NDRC’s Decision Against Qualcomm

Ms. Wong-Ervin stated that China’s National Development and Reform Commission (NDRC) “imposed a nearly \$1 billion fine against the company and, among other things, arbitrarily required it to use a royalty base of 65% of the net selling price of devices when licensing its 3G and 4G technologies.” The fine is correct, in line with the fine imposed by South Korea, and understandable given the U.S. FTC’s factual findings that Qualcomm’s base royalty rate “is *significantly higher* than those of other licensors of cellular SEPs”; “Qualcomm *refuses to license* FRAND-encumbered cellular SEPs to competing suppliers of baseband processors, despite its FRAND commitments” to do so; and, “[a]mong SEP holders, Qualcomm garners an *outsized share* of licensing revenues paid by OEMs” who “pay Qualcomm *far more* in royalties than they pay other SEP licensors, even those with comparable portfolios of cellular SEPs.”⁹ The FTC’s complaint discusses in detail Qualcomm’s anti-competitive licensing practices that have excluded competitors and imposed years of excessive royalties on phone manufacturers.

⁶ Prepared Statement of Deborah A. Garza, “Hearing on Trends in International Antitrust Enforcement” (June 29, 2017), at p. 2.

⁷ In his written submission (pp.3-4), Alden referred to an ABA January 2017 Presidential Transition Report that mentioned numerous problems overseas, namely substantive divergences, but it does not cite any specific examples.

⁸ Prepared Statement of Koren Wong-Ervin, “Hearing on Trends in International Antitrust Enforcement” (June 29, 2017), at p. 2.

⁹ *Federal Trade Commission v. Qualcomm Inc.*, United States District Court (N.D. Cal. January 17, 2017), at para. 58-60 (emphasis added).

Yet, contrary to Ms. Wong-Ervin's assertion, the NDRC did not "arbitrarily" reduce Qualcomm's royalty base in its decision. Rather, Qualcomm itself proposed to the NDRC 65% of the net selling price as an appropriate royalty base in a "rectification plan" the company submitted to the agency. Then, in a February 9, 2015 press release, Qualcomm intimated that the NDRC specified the royalty rate. As a result, the NDRC later had to publicly clarify¹⁰ that its penalty decision "shouldn't be seen in any way as a tacit endorsement of the royalty rates charged by the U.S. chipmaker because the Chinese antitrust regulator didn't decide the exact level of royalties in its decision."¹¹ With the anti-competitive conduct now addressed, the NDRC left Qualcomm and phone manufacturers free to negotiate royalty rates or to use the judiciary to determine an appropriate rate. NDRC's resolution of the royalty issue is very different than Ms. Wong-Ervin's version, which she supported by citing to a Qualcomm press release.¹²

For various other reasons, the NDRC decision against Qualcomm is not, as Ms. Wong-Ervin stated, an example of China "using competition law to reduce royalty payments to U.S. companies to unduly favor their domestic [Chinese] manufacturers." These reasons include:

- First, a variety of U.S. and other companies, not just Chinese manufacturers, want governments to use antitrust law to stop Qualcomm's anticompetitive licensing practices so that they can freely negotiate a reasonable royalty and are no longer forced to accept excessive royalties due to Qualcomm's "no license, no chip" policy and refusal to license competitors. This point is evident from the various amicus briefs submitted to support the FTC complaint against Qualcomm that was filed in U.S. federal district court.
- Second, Ms. Wong-Ervin incorrectly asserted during the hearing that the NDRC decision against Qualcomm "was based on excessive pricing, something that we don't do in the United States ... particularly with IP, because we don't want to harm incentives to innovate and because high prices *alone* don't harm competition." The NDRC's decision, however, was about anticompetitive practices and not high prices *per se*. Just like the KFTC decision and the U.S. FTC's allegations in its complaint, the NDRC found that Qualcomm also engaged in other abusive conduct that led to high royalty prices. According to the NDRC, the abusive practices Qualcomm engaged in included: (1) tying its SEPs with non-SEPs in package licenses; (2) requiring licensees to provide Qualcomm a license to their own patents, even if not SEPs, free of charge; and (3) conditioning the

¹⁰ The NDRC made the clarification at an antitrust seminar on March 21, 2015, which was organized by the Institute of American Studies at the Chinese Academy of Social Sciences in Beijing. Intel and a number of other companies and officials attended the seminar.

¹¹ "China's NDRC didn't endorse the level of royalties by Qualcomm, officials says," *mlex* (23 Mar. 2015) (quoting statement of NDRC official at March 21, 2015 antitrust seminar).

¹² We note with interest an academic letter issued last year and signed by more than 50 scholars, which concluded that "Intellectual property scholarship is in danger of being compromised by undisclosed donors and conflicts of interest." See <https://law.stanford.edu/press/ip-academics-pledge-voluntary-ethics-code/>. Specifically, the letter pointed out that with "an influx of large contributions from corporate and private actors who have an economic stake in ongoing policy debates," academics can become "polarized" and "locked into" certain positions that make them look like lobbyists. "Open Letter on Ethical Norms in Intellectual Property Scholarship," Robin Feldman, Mark A. Lemley, Jonathan S. Masur & Arti K. Rai, *Harvard Journal of Law & Technology*, Vol. 29, n. 2 (Spring 2016), pp. 1-2. Among other ethical norms that the letter seeks to establish, its many signatories offer a voluntary pledge that includes disclosing (i) any direct funding for research when it is submitted for publication; (ii) all personal sources of income over \$1,000 for legal work, consulting work, or other research on their faculty web pages or an equivalent venue; and (iii) all sources of funding for any institutes and centers on their relevant websites. *Id.* at 9-10.

supply/sale of its baseband chips on an agreement by at least some of the licensees to not challenge the license's unreasonable conditions. Thus, the NDRC found that Qualcomm violated Article 17(v) of China's Anti-Monopoly Law (AML) that prohibits dominant entities from imposing, without justification, unreasonable licensing terms and tying goods, which led to charging excessive royalties in violation of AML Article 17(i).¹³ So, again, the NDRC decision was not solely based on excessive prices, as also evidenced by the content of Qualcomm's rectification plan cited in Ms. Wong-Ervin's submission.

- During the hearing, Ms. Wong-Ervin indicated she was not aware of any antitrust agency that has completed an investigation of Qualcomm's conduct and also has concluded that Qualcomm has not engaged in anti-competitive behavior. But Ms. Wong-Ervin then proceeded to dismiss the NDRC case as an anomaly because "In China and some other jurisdictions *they are obliged to investigate when there are complainants.*" She continued, "remember, China is largely an implementer of technology, not an innovator, and they have a lot of manufacturers that complain and say, I want lower royalties.' *And so they're obligated, they don't have to have a good-faith basis, they have to investigate.*" Ms. Wong-Ervin's understanding of Chinese law is incorrect. The AML enforcement agencies have full discretion to decide whether to investigate a complaint they receive. Article 38 of the Anti-Monopoly Law (AML) stipulates: "Any individual or entity may report suspected monopolistic practices to the AML enforcement agencies ... If the report is submitted in written form with relevant facts and evidence, the AML enforcement agencies shall carry out any *necessary* investigation" (emphasis added). An investigation is only "necessary" if sufficient facts are pled and relevant management within the AML enforcement agency approves opening one. Otherwise, the agency will ignore the request or it may send out an informal inquiry to the relevant parties if it thinks more information may be helpful to make a decision on whether to investigate.¹⁴ The Chinese enforcement agencies are keenly aware of the need to avoid opening up investigations where entities are using the AML in bad faith to restrain pro-competitive conduct by a competitor.

In brief, the NDRC decision against Qualcomm should not be used to support the Expert Group's recommendations. Ms. Wong-Ervin is not the only one who has accepted at face value Qualcomm's mischaracterizations of the NDRC decision. Professor Eleanor Fox wisely cautioned that we should keep politics out of antitrust enforcement, but her written submission seems to support President Obama's complaint to Premier Xi Jinping in 2015 about the excessive reach of the AML to allegedly diminish Qualcomm's intellectual property rights. Professor Fox refers to that case as an example of a serious problem that deserved appropriate intervention at the highest political level.¹⁵ For the reasons stated above, we disagree.

¹³ See Administrative Penalty Decision, National Development and Reform Commission of PRC (February 9, 2015), No. 1; available in Chinese at http://www.ndrc.gov.cn/fzgggz/jgidyfld/fjgld/201503/t20150302_666176.html (unofficial translation in English by T&D associates available upon request).

¹⁴ See generally "Procedural Rules for Investigation conducted by SAIC on the monopolistic agreement and abuse of dominance Cases" (No. 42 Order issued by SAIC on May 26 2009); "Procedural Rules for Administrative Enforcement on Anti-monopolistic Pricing Conducts" (No.8 Order, issued by NDRC on December 29 2010).

¹⁵ Prepared Statement of Eleanor M. Fox, New York University School of Law, "Hearing on Trends in International Antitrust Enforcement" (June 29, 2017), at p. 6.

2. South Korea's FTC Decision Against Qualcomm

The second of three examples Ms. Wong-Ervin used in her written submission refers to Korea's Fair Trade Commission's decision against Qualcomm. On multiple occasions, Qualcomm has encouraged U.S. government officials in the White House, on Capitol Hill, in the U.S. antitrust agencies, and at the U.S. Trade Representative's office to intervene in the KFTC investigation. Qualcomm's main argument to U.S. officials has been that it suffered serious due process problems, which allegedly violated the competition chapter in the Korea/U.S. Free Trade Agreement (KORUS FTA).

The KFTC has given Qualcomm significant opportunities to present its case both in writing and orally, which far exceeded the requirements in KORUS. Indeed, Qualcomm has filed voluminous written submissions to the KFTC, which included both legal memoranda and numerous expert reports. Qualcomm also has participated in multiple hearings, in which it presented extensive oral testimony. Qualcomm's executives and expert witnesses testified on a broad range of matters, including the modem chipset industry, industry licensing practices, antitrust economics, modem technology, Korean patent law, U.S. patent law, and international law. Qualcomm's counsel presented oral argument at all of the hearings that the KFTC held. The KFTC gave Qualcomm a full opportunity to rebut evidence presented against it, both in writing and at the oral hearings, and extended deadlines for both written submissions and hearing dates to accommodate Qualcomm. We know all of this first hand because Intel, along with other entities, participated in the KFTC proceedings.

In her oral testimony, Ms. Wong-Ervin repeated Qualcomm's unfounded claim that the KFTC denied the company the right to cross-examine other witnesses. Pursuant to the KFTC's Rules on Committee Operation and Case Handling Procedure ("KFTC Rules"), the KFTC did afford Qualcomm the right to cross-examine individuals who testified at various hearings in support of the Examiner's Report. But for reasons unknown to Intel, Qualcomm elected to waive the right of cross-examination. Qualcomm waived this right despite complaining vocally (and falsely) to both U.S. executive and legislative branch officials that it was being denied the opportunity to cross-examine witnesses. In brief, consistent with the KORUS FTA, Qualcomm was given "a reasonable opportunity to cross-examine any witnesses or other persons who testify in the hearing and to review and rebut the evidence and any other collected information on which the determination may be based."¹⁶ Indeed, the rights of defense the KFTC extended to Qualcomm not only exceed the KORUS FTA's requirements, but also exceeded the rights given to U.S. respondents in other foreign antitrust agency proceedings in which we have participated.

II. The U.S. Government Should Only Intervene Politically in Specific Enforcement Cases When the Evidence of Administrative Abuse is Clear and Convincing

Professor Eleanor Fox notes, "The Report suggests that US firms have been subject to discrimination. I am not so sure that this is the case; or, if it is the case, that it can be proved." She then proceeds to make the case that U.S. political intervention should be rare, reserved for a

¹⁶ KORUS FTA, Article 16:1, ¶ 3. To satisfy KORUS requirements, the KFTC amended its rules before ratification of the treaty to provide more time for respondents to file a response to the agency's charges and to allow cross examination of witnesses. See KFTC Rules, Articles 29(10) and 41-2.

“specific urgent issue” involving the “big offenses” in “critical and serious cases” where “discrimination is strongly suspected” or where “due process has been ignored.”¹⁷

Intel’s views are generally in line with those of Professor Fox. However, for reasons stated in Section I above, we strongly disagree with her characterization of Qualcomm’s complaints about its cases in China and South Korea as examples of “big offenses.” Professor Fox offered no factual or legal support for using those brief anecdotes, and may have simply picked them up from Ms. Wong-Ervin’s submission. The propagation of bad examples, ironically, gives validity to Ms. Wong-Ervin’s recommendation that “the U.S. government conduct a study to determine whether there is evidence of discriminatory enforcement, the use of industrial policy, economically flawed analysis, good faith analysis that misses the mark for other reasons, or sound analysis.”¹⁸

It is also worth pointing out, as Professor Fox did, that the “band-wagon effect” among regulators that occurs once a high profile antitrust case launches in one jurisdiction does not, alone, mean there is unfairness. Moreover, Ms. Wong-Ervin correctly stressed, “In global markets ... one would expect the facts to be similar and that enforcers around the world applying sound economic principles would reach similar conclusions.”¹⁹ For example, as noted earlier, no antitrust authority that has completed its investigation of Qualcomm’s licensing and/or sales conduct has dismissed the investigation for absence of anti-competitive conduct. In summary, U.S. officials should not pressure foreign antitrust regulators to lighten or drop their enforcement of a specific case against an American company unless objective and convincing evidence of misuse of government power exists.

Notwithstanding the foregoing poor examples of alleged administrative abuse, there are other examples where such abuse was highly probable or evident. For example, in 2009, MOFCOM (the Chinese antitrust regulator in charge of mergers) rejected Coca Cola’s bid to buy Chinese company Huiyuan Juice Group based on the stated assumption that Coca-Cola could later use its resulting market dominance in carbonated soft drinks to limit competition in the domestic juice market through tying, bundling or other exclusive conduct, resulting in higher prices and fewer choices for consumers. However, instead of blocking the merger through a controversial “leveraging” theory, MOFCOM could have relied on the AML to enforce anti-tying provisions if and when the merged party actually engaged in the conduct of concern. For this and other notable reasons, many antitrust scholars and practitioners were concerned that China’s rejection of the deal smacked of protectionism, particularly because the acquisition was not popular in China and there was widespread domestic concern at the time that increasing investment from foreign companies would allow them to dominate many local industries. Yet, because of the size of the companies, the fact that China’s antitrust law only became effective a year earlier, and regulators had very little enforcement experience, even in this case some antitrust experts expressed caution to not rush to judgment.²⁰

¹⁷ Fox Statement, at pp. 7, 8.

¹⁸ Wong-Ervin Statement, at p. 5.

¹⁹ Wong-Ervin Statement, at p. 3.

²⁰ See, e.g., “Chinese Government Blocks Coca-Cola Acquisition of Chinese Fruit Juice Company, Covington & Burling, LLP (March 18, 2009), available at: <https://www.cov.com/-/media/files/corporate/publications/2009/03/chinese-government-blocks-coca-cola-acquisition-of-chinese-fruit->

As another valid example, Intel itself has raised due process objections in Europe that are well documented and still on appeal.²¹ Yet, due to increasing international efforts to improve due process protections that are noted in the Expert Group’s Report, including in mature antitrust jurisdictions like Europe and the U.S., clear examples of due process failures may be rarer today than they were even a decade ago. Such cooperative and constructive efforts should continue.

Conclusion

The Expert Group Report offers thought provoking recommendations to address the problems that arise from using antitrust for purposes other than increasing competition regardless of its origin. However, an empirical study should be done to examine the extent of bad faith enforcement overseas to ensure effective implementation of many of those recommendations. Such a study, which should be undertaken by academics with no conflicts of interest and then broadly published, also likely would provide some deterrent effect going forward.

[juice-compa.pdf](https://www.law360.com/articles/92190/china-shuts-down-coke-purchase-of-juice-giant); Jacqueline Bell, “China Shuts Down Coke Purchase Of Juice Giant” (March 18, 2009), available at <https://www.law360.com/articles/92190/china-shuts-down-coke-purchase-of-juice-giant>.

²¹ See Opinion of Advocate General Nils Wahl, Case C-413/14P, Intel Corporation v. European Commission (20 October 2016), Para. 215-277 (analyzing the failure of the commission to record exculpatory evidence that “went to the very heart of the matter investigated,” and agreeing with Intel that its appeal of the case on the ground of procedural error “ought to be upheld” by the European Court of Justice).