PRESENTATION TO THE INTERNATIONAL SYMPOSIUM ON THE DRAFT ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA

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I am pleased to be here in Beijing to participate in this International Seminar on the Draft Anti-Monopoly Law. We in the United States are honored to have been invited to share our experience in administering our competition laws.

As you know, competition policy is an essential element of a well-functioning economy. A competition law that is based on sound legal and economic principles facilitates economic growth and enhances consumer welfare. Our discussions are taking place at a particularly important time in the development of the Anti-Monopoly Law, and we recognize the significance of this opportunity. We hope that the views we express will assist in the formulation of a competition law regime that will contribute to the growth of the Chinese economy and the welfare of its citizens.

The Agenda for this Seminar assigns each speaker the responsibility for addressing issues relating to particular chapters of the draft law. I have been asked to address three chapters. The first part of this presentation addresses chapter 3, abuse of dominant market position. The next part addresses chapter 4, control of concentration of operators, or what we in the United States would refer to as mergers and acquisitions. The final part addresses chapter 6, with a particular focus on the structure of the anti-monopoly enforcement agency and on the agency's relationship to other authorities that supervise specific industries.

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* The views expressed in this presentation are those of the author and do not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner.

CHAPTER 3
ABUSE OF DOMINANT MARKET POSITION

A. Background on United States Law

United States law does not specifically address "abuse of dominant market position." A closely related concept may be found, however, in Section 2 of the Sherman Act,[1] which prohibits monopolization. The essential elements of the offense of monopolization are (1) the possession of monopoly power in a relevant market and (2) the willful acquisition or maintenance of the monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Our law thus requires both the possession of monopoly power and the use of anticompetitive conduct to acquire, preserve, or expand that power. The Sherman Act does not define monopoly power or list the types of anticompetitive conduct that are prohibited; this has been left to interpretation by the enforcement agencies and the courts. Monopoly power is generally defined as the power profitably to charge higher prices than, or reduce output below, the levels that would exist if the market were competitive.

Two key principles of United States law on monopolization should be highlighted for your consideration in connection with your draft law. The first and most important principle is that United States competition law does not condemn the mere possession of monopoly power, but punishes only misuse that results in a substantial injury to competition. In our view, punishment of a firm that obtains a dominant or monopoly position by reducing price or offering new or improved products or services is contrary to the goal of promoting competition. A free market system envisions that competitors will strive for a superior position through innovation, greater efficiency, or other legitimate competitive behavior. Innovation, economic growth, and vigorous competition would be stifled if the law were to punish successful market participants who achieve a dominant or monopoly position.

A second principle is that even firms with monopoly power are permitted to compete aggressively on the merits, even if a collateral effect is the failure of their competitors. Competition is a rigorous process, and it will inevitably yield both winners and losers. If a firm is more efficient and can thereby reduce costs and expand sales at the expense of its less-efficient competitors, our competition laws are not infringed. There may be harm to competitors, but no harm to competition. Competitive conduct frequently looks like exclusionary conduct, because aggressive competition may harm less efficient firms. We do not protect less efficient businesses from legitimate, vigorous competition, even where a firm holds a dominant or monopoly position. On the other hand, our competition laws prohibit a firm with monopoly power from engaging conduct that has no legitimate business justification other than to control prices or exclude competition, because this type of conduct injures competition. In other words, a firm with monopoly power may not engage in conduct that would be unprofitable except for its exclusionary effects.

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[1] The prohibitions of the Sherman Act are included under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ("unfair methods of competition").

B. Definition of a Dominant Market Position

Turning to the substance of the draft law, a proper definition of dominant market position is needed to assure that the provisions in this Chapter do not inadvertently deter procompetitive or benign conduct. The definition of dominant market position in the draft law refers to "market power," but the manner in which this is determined could create enforcement problems. The draft law creates a presumption of a dominant position based on relative market shares in the relevant market. Our experience has been that a presumption of this type can yield an erroneous conclusion. Under competition law in the United States, high market share by itself is not treated as a reliable indicator of a firm's actual control over a market in any competitive or economic sense. Actual or relative market shares are relevant, but they are only the starting points in a detailed evaluation of many factors that are pertinent to a firm's actual market power. Among the factors that must also be examined is the presence or absence of barriers to entry, examples of which include regulations, technology, or patents. An incumbent firm with a high market share will not be found to have market power under United States law if entry barriers are low, because new firms will be able to enter the market and restore competition if the incumbent raises prices to supra-competitive levels.

Other factors that are relevant to the significance of market share include the pace and nature of technological change and innovation in the relevant market; market trends, such as whether the market is expanding or contracting; the existence of excess capacity in the market that can be used to increase output in the event of a price increase; patents, specialized knowledge or other assets that confer a competitive advantage on rivals in the market; and key customers whose size or attributes create an ability to resist a price increase. These and other factors determine whether a firm with a high market share can act with substantial independence from competitive market pressures. They are essential to determining the significance of market shares. Accordingly, our experience argues against the inclusion of any presumptions based on market share. In our view, legal standards should make clear that the establishment of dominance must be based on careful analysis, taking into account the range of factors that are generally considered to be determinative of market power.

C. Prohibited Conduct

The draft law prohibits a firm with a dominant market position from engaging in conduct specified in this Chapter. The prohibitions include both price and non-price provisions.

In the United States, our competition law does not limit the price that a monopolist is permitted to charge – a monopolist may charge as high a price as the market will tolerate. In our view, condemnation of monopoly pricing would discourage innovation and entry by new competitors. Risky investments in innovation are undertaken because of the prospect of a large payoff from a major technological breakthrough or a popular new consumer product. To punish the monopolist from

receiving the payoff would deny the expected rewards of its success and would reduce the incentive to innovate and invest.

Unless the monopolist's market is characterized by barriers to entry (as that term is used in the economic sense), high prices normally will attract firms to enter the market, especially where the new entrant can offer a lower price, a better product, or enhanced services. The new entry will restore the competitive equilibrium, tending to drive prices back toward competitive levels without the need for government interference. If artificially elevated prices do not attract new entry, it may be appropriate to inquire into the reason that market forces are failing to respond. We have found that some of the most common and effective impediments to entry are anticompetitive regulatory barriers, which in principle should be within the government's own control.

Relying on market forces rather than enforcement will avoid imposing on competition officials the difficult, if not impossible, task of monitoring prices and evaluating whether they are "unfair" or "excessive." In the United States, we regard the setting of the "fair price" as beyond the competence and resources of competition authorities. Instead, in most sectors of the economy, we rely on market forces rather than regulation to control supra-competitive prices. For the limited sectors in which market forces necessarily will be inadequate and in which regulation is required, we place responsibility in the hands of expert sectoral commissions, rather than competition authorities.

With respect to below-cost pricing, United States courts are particularly cautious when evaluating claims that low pricing has led to the acquisition or maintenance of a monopoly. First, aggressive price-cutting, the mechanism through which competition may ultimately be excluded, is the same mechanism by which a firm stimulates competition. The exclusionary and competitive acts thus look precisely alike. Second, mistaken inferences of predatory pricing are very costly. By chilling reductions in price, they deprive consumers of the benefits that the competition laws were intended to protect. Third, below-cost pricing investigations can be very difficult and resource-intensive. The measurement of "cost" is critical and has been controversial in many countries. Fourth, the incidence of proven price predation is rare, and the strategy is unlikely to succeed. Therefore, under United States law, we treat predatory pricing as illegal only in a very specific situation – where an entity can reduce its prices below cost long enough to drive a competitor out of the market and then raise and maintain its prices high enough and for a sufficiently long period of time to recoup the lost profits from the below-cost sales. If the entity cannot recoup its losses, the below-cost sales are unlikely to injure competition, and they probably did not arise out of any intentional anticompetitive scheme.

The conduct prohibited in this Chapter includes certain "vertical agreements" – agreements between entities operating at different levels of the supply chain, such as a manufacturer and a retail distributor. It is widely accepted that vertical agreements do not present the same types of competitive risk as agreements between competitors (horizontal agreements). The vast majority of vertical agreements are competitively neutral or beneficial, since they align the interests of manufacturers and distributors,

encourage better service, and stimulate intra-brand competition. Insofar as dominant market position is defined as market power, the draft law properly identifies one factor that is important to the analysis of the competitive effects of vertical agreements, but other factors are also relevant. Many vertical agreements have procompetitive effects, even when the parties include firms with market power. The mere existence of market power is not sufficient for determining whether a vertical agreement is anticompetitive. Under the "rule of reason" analysis used in the United States, the next step is to assess the procompetitive and anticompetitive effects of the agreement to determine whether the particular vertical restraint unreasonably and substantially limits competition. We note that the prohibition of refusals to deal and price discrimination are the only vertical practices for which the draft law requires proof that the conduct lacks valid reasons. We would suggest similarly clarifying the draft law with respect to all vertical agreements, so as to prohibit only conduct that has no reasonable or legitimate business justification and that has the effect of excluding or substantially limiting competition.

The draft law's provision on refusal of access to a network or other infrastructure is a particular concern, because it could harm procompetitive behavior, innovation, and effective protection for intellectual property rights. In the United States, our competition law generally does not restrict the right of a firm, including a monopolist, to exercise its independent discretion as to the parties with whom it will deal. Even firms with market power are permitted to refuse to deal with rivals. To require otherwise would chill the firms' incentives to innovate, invest, and compete.

Consider the analysis of a compulsory access from the perspective of a potential investor. If the investor commits funds and the investment fails, it absorbs the entire loss; it does not receive any subsidy from its competitors. But if the investor commits funds and the investment succeeds, it must now share the benefits with its competitors. An asymmetrical system of this type discourages entrepreneurial risk-taking, encourages free-riding, and becomes what one of our commentators has called "an insurance policy for laggards." To assure that investment and innovation are not discouraged, competitors must be confident in advance that they will not be required to share their successful assets with competitors. And to the extent that a legal system contemplates that mandatory sharing may be required in some instances, it will be important to minimize the disincentive for innovation and investment by providing sufficient detail to enable competitors to recognize in advance when the sharing obligations will be imposed.

Compulsory access to a network or other infrastructure presents another problem – it chronically leads to disputes on the terms of access, especially price, and resolving those disputes often entails intervention by agencies or courts. Compulsory access provisions tend to anticipate some form of cost-based regulation, which is inappropriate for risky investments. If investors are allowed to recover merely their costs when they succeed, they will lose the incentive to take risks. Even if a risk premium is allowed, investment incentives will still be distorted. Regulating non-price terms of access is also complex and may undermine the efficient utilization of facilities. In practice, compelling access to a network or other infrastructure requires the creation of mechanisms that will be needed to regulate the price and non-price terms of access and to monitor compliance.

As we note above in connection with the objective of setting a "fair price," we have found that mechanisms of this type are generally beyond the capabilities of competition authorities. Most commentators agree that they are generally beyond the capabilities of the courts as well.

Some courts in the United States have articulated a so-called "essential facilities doctrine" under Section 2 of the Sherman Act to define exceptional circumstances in which a duty to assist competitors may be found. In these cases, the courts have required the facility to be truly "essential," not merely convenient for competitors wishing to free ride on the investments of successful rivals. Even when limited to narrow, exceptional circumstances, the "essential facilities doctrine" has been heavily criticized, and its continued vitality is subject to doubt. The U.S. Supreme Court made clear in last year's *Trinko* decision that it has never accepted or endorsed the doctrine.

For these reasons, our view is that inclusion of compulsory access provisions in a competition law is neither advisable nor practical. To the extent that compulsory access is found to be necessary as a remedy for violations of other, more general provisions of the law, that remedy should be invoked only in the most exceptional circumstances.

CHAPTER 4
CONTROL OF CONCENTRATION [MERGERS AND ACQUISITIONS]

In the United States mergers are unlawful if their effect may be to "substantially lessen competition or tend to create a monopoly."[2] Our two federal antitrust enforcement agencies, the Federal Trade Commission and the Department of Justice, have adopted Horizontal Merger Guidelines ("Guidelines") that reflect the analysis under U.S. antitrust law of mergers between competitors.[3] The analysis, and our related enforcement policies, are based on economic principles. The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate the exercise of market power. Under the Guidelines, "market power" for a seller is the ability profitably to maintain price above competitive levels for a significant period of time. Such an elevation in price (or a related reduction in output) would be a "lessening of competition" that is actionable under our merger statute.

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[2] Clayton Act § 7, 15 U.S.C. § 18. Mergers may also be challenged under the Sherman Act, 15 U.S.C. § 1, or the Federal Trade Commission Act, 15 U.S.C. § 45. The analytical framework is generally viewed as the same.

[3] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992, revised Apr. 8, 1997). Non-horizontal mergers are analyzed under the *Non-Horizontal Merger Guidelines* originally issued as Section 4 of the "U.S. Department of Justice Merger Guidelines," June 14, 1984. (All other sections have been superseded by the *Horizontal Merger Guidelines.)* There are also guidelines for joint ventures and similar arrangements among competitors. *See* Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations among Competitors* (2000).

One question under consideration in this seminar is the choice between the "substantial lessening of competition" test and the "creation or strengthening of a dominant position" test. United States antitrust enforcers are largely pleased with the operation of our current test, "substantial lessening of competition."[4] In recent years international fora such as the OECD and the International Competition Network have addressed the differences between the two tests. One conclusion of these discussions is that both tests are concerned with whether a merger will create or strengthen market power so as to enable the merged firm either unilaterally or in coordination with other firms to raise prices above the competitive level. Another conclusion is that for purposes of international convergence, the choice between the alternative substantial lessening of competition and dominant position tests is less important than having the same objectives, applying the same basic standards, and employing the same analytical framework.

Several key aspects of United States merger analysis should be highlighted for your consideration in drafting Chapter IV. First, United States merger analysis does not consider factors such as the development of the national economy, industrial policy, or other political or social consequences. Our practice is not to use our antitrust laws to address objectives other than competition. We have found that factors other than competition do not lend themselves to objective economic analysis and tend to detract from predictability and consistency in the competition agencies' decisionmaking. In the United States, issues other than competition sometimes arise in the merger review process, but they are not considered or addressed by the competition agencies. Sometimes those other issues are addressed by sectoral regulators charged with determining whether the transaction is in the public interest or by agencies responsible for policy considerations beyond competition law. Limiting the competition agency's review to competition issues enables the agency to focus on its area of expertise, promotes public confidence in the economic basis of competition law, and avoids confusion of disparate policy goals.

Second, while the United States antitrust laws protect competition, they do not necessarily protect competitors. As we have already discussed in connection with our analysis of dominance, the view of the United States is that competition based on efficiency will yield winners and losers in the marketplace, and that vigorous competition benefitting consumers necessarily will result in bad outcomes for inefficient competitors. We do not stand in the way of mergers that enhance competition, even where those mergers foreseeably will result in a more efficient entity that may put weaker competitors at a marketplace disadvantage.

Third, under United States merger analysis, there are no differences in analytic approach or in the treatment of the merging parties based on the nationality of the business owners or the location of the parties' home offices. The analysis focuses solely

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[4] Australia in 1992 switched back from a dominance test to a substantial lessening of competition test to cover mergers that raise issues of coordinated market power, i.e., market power exercised by the merged firm in coordination with horizontal competitors in the relevant market.

on adverse competitive effects. Fourth, the merger standard and analysis in our Guidelines apply uniformly to all industries subject to our merger laws.

While our law covers all mergers, the emphasis of merger analysis in the United States is on mergers between competitors because other mergers rarely present substantial risk of harm to competition. Our view is that mergers between a supplier and a customer are only likely to present competition issues when they have a significant horizontal component, such as when one of the parties is the sole source of a necessary input required by both the other merging party and its competitors.

The key elements of our horizontal merger analysis are set out in our Horizontal Merger Guidelines. The Guidelines have largely been embraced by the courts, which have issued decisions interpreting and explaining various provisions of the Guidelines. Under both the Guidelines and the judicial decisions, market share and concentration statistics are relevant to our analysis, but they are only the starting point. Low market shares and low concentration levels are generally sufficient to enable us to rule out any competition concerns, but the converse does not apply. Even where a merger involves high market shares and substantial market concentration, we examine other factors before deciding that intervention is warranted. In particular, we examine entry considerations, because timely entry by additional firms into even concentrated products or services can counteract competitive concerns. We examine whether the proposed transaction would likely result in efficiencies that could not be achieved otherwise. And we closely examine the potential market mechanisms by which the post-merger firm might try to elevate price, either unilaterally or in coordination with other firms, in order to assess whether the transaction would have an adverse competitive effect.

We have been asked to address some specific issues relating to merger control. The first relates to scope of application. United States merger law applies to a variety of acquisitions of assets, securities, or other economic instruments. With regard to assets, the law covers transactions involving substantially all of a firm's assets or certain key assets such as patents. With respect to securities, the statute itself applies to most acquisitions of "any part" of the stock of a company. The United States courts have not developed a clear standard regarding what percentage of stock must be acquired to raise concerns about the effect on competition. Acquisition of a majority of an issuer's stock clearly would suffice, but adverse effects have been found at lower percentages as well.

The draft law refers to "control," but does not define the term. Some countries define "control" as the ability to exert decisive influence over fundamental business affairs or operating policies or decisions. Our practice is to use a "bright-line," objective test, and we believe that should generally be the preferred approach for new systems. In particular, our premerger notification regulations in the United States define "control" as holding 50% or more of the outstanding voting securities or having the contractual power to designate 50% of more of the directors of a corporation. Where the firm has no

outstanding voting securities or is unincorporated, the regulations contain alternative definitions of “control.”[5]

The draft law requires advance notification to the competition agency of mergers and acquisitions of a certain size and implies that additional conditions may be announced. Establishing an appropriate premerger notification system is a challenging task. At some appropriate time we would welcome the opportunity to describe our experience in detail. For now, however, we refer you to the work of the International Competition Network (ICN), which has adopted a set of Guiding Principles for Merger Notification and Review Procedures. These Principles address transparency, non-discrimination on the basis of nationality, procedural fairness, timeliness of review, and other considerations. The ICN has also adopted Recommended Practices for Merger Notification and Review Procedures. Based on these questions that you have asked us to address in connection with the draft law, a few of the key ICN Recommended Practices should be mentioned.

One ICN Recommendation is designed to address the issue of control of extraterritorial mergers or acquisitions that may affect domestic competition. The Recommendation is specifically directed at a global problem caused by jurisdictions that assert authority to review mergers without a sufficient connection – or nexus – to the transaction. Lack of a proper nexus imposes unnecessary transaction costs on both the merging parties and the competition agency without any corresponding enforcement benefit. An important example of an insufficient nexus is the assertion of authority to review a transaction based on the worldwide sales of the parties, without regard to the parties’ level of sales in the jurisdiction. To justify agency review, the parties should have a sufficient local nexus exceeding appropriate thresholds, such as material sales or assets levels within the reviewing jurisdiction. The Comments in the Recommendation identify appropriate standards of materiality as to the level of “local nexus,” and they provide other guidance for reducing the burden on transactions that are unlikely to result in appreciable competitive effects in the jurisdiction. With more than sixty jurisdictions around the world now having some form of merger control, the efficient operation of global capital markets requires that jurisdictions not impose regulatory burdens unless they have a sufficient direct interest in the transaction. Jurisdictions increasingly are conforming their practices to satisfy this objective in light of the ICN Recommendation.

A second ICN Recommendation provides that notification thresholds should be based on objectively quantifiable criteria. One example of a criterion that is *not* objectively quantifiable is market share – another notification threshold in the draft law. At the notification phase, when there has been no determination of the “relevant market” that will provide the denominator for market share statistics, determining market share is too subjective to be an appropriate notification criterion. Determining the portion of transaction value attributable to a specific jurisdiction also is typically too subjective to be appropriate for multi-jurisdictional transactions. By contrast, assets and sales of the

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[5] *See* 16 C.F.R. § 801.1 (b). In the case of an entity that has no outstanding voting securities, “control” is defined as having the right to 50% or more of the profits of the entity, or having the right in the event of dissolution to 50% or more of the entity’s assets.

parties to the transaction are examples of objectively quantifiable criteria that are suitable for notification.

You asked us to address the use of filing fees in connection with the merger notification system. Filing fees raise some complex issues. Imposing fees certainly is feasible – of the approximately 73 jurisdictions with premerger notification regimes, approximately 31 charge filing fees. The types of fees include flat fees – a uniform charge payable at the time of application – and different types of variable fees that can be based on factors such as the revenues of one or both parties to the transaction, the value of the transaction, and the complexity of the transaction. The United States has established a tiered system that bases the amount of the fee on the value of the voting securities or asset that would be held as a result of the transaction.

Although filing fees are feasible, some commentators have identified a policy question as to whether they are advisable. The topic of filing fees, their rationale, method of determination and use is addressed in a proposed Report that the ICN will be taking up at its Annual Meeting in June in Germany. In determining whether to institute a filing fee, you might consider the reasons why some jurisdictions have adopted such a fee and others have not. The primary reasons that jurisdictions have introduced filing fees are to recover all or part of the cost of merger review or to augment the competition agency's total budget. The primary reason jurisdictions do not charge filing fees is that they believe merger review is a public service that should be funded from general tax revenues. Additional reasons include concerns that filing fees impose an unnecessary burden on the filing parties without a corresponding benefit to the agency; the negative reaction by the business community and the related risk of discouraging investment; and the view that fees may be considered contrary to the legal principle of equality between users of public service. Given the cyclical nature of mergers, we would caution that an agency runs a potential risk of inadequate funding if it relies on filing fees as a major source of its total budget.

There are significant challenges in setting an objective basis for the filing fee. The fee should be easily understood, predictable, and readily determinable at the time of filing, easily administered, affordable to merging parties, non-discriminatory between enterprises and consistent with the jurisdiction's legislative and policy framework. There is also the question of whether the fee should go directly to the agency's budget or to the government treasury. The way filing fees are used or could be used is a source of concern to some competition agencies and private practitioners. All these factors should be thoroughly evaluated in making the decision of whether to establish a filing fee system.

CHAPTER 6
THE ANTI-MONOPOLY ENFORCEMENT AGENCY

A. Establishing an Effective Competition Agency

The core mission of a competition agency is to protect and promote competition in the marketplace. In the United States and many other countries, the ultimate objective of protecting the competitive process is to maximize economic efficiency and consumer welfare. We focus on "free" rather than "fair" competition because the latter implies a goal of protecting individual competitors, rather than competition among firms in a free market. United States competition law does not promote other social or public interests. Although free and vigorous competition may sometimes need to be balanced against other societal goals, it is difficult for competition law by itself to resolve concerns that lie outside its scope. Consideration of non-competition goals would distract the competition agency from its core mission of protecting and promoting competition. Other goals, such as industrial policy, economic development or employment, are best addressed through laws or other mechanisms outside the competition law.

The competition law should provide the competition agency with sufficient powers and resources to investigate and prosecute anticompetitive conduct and impose remedies to correct the competitive harm and deter future violations. The topics of investigative powers and remedies are considered separately in this seminar, so only brief remarks will be provided here. Competition law enforcement is fact-intensive, and the competition agency should have appropriate, enforceable mechanisms for acquiring the information needed to conduct its investigations. It should also have penalties for noncooperation or noncompliance that are severe enough that firms will not view paying relatively small fines, rather than complying with the agency's requests for information, as merely a cost of doing business. At the same time, procedures must be in place to ensure that demands for information are reasonable and that firms have a reasonable opportunity to seek modification of unreasonable demands.

With respect to remedies for violations, punitive sanctions such as fines are appropriate in cases where the most important goal is to punish past conduct. This circumstance typically arises where deterrence is needed, such as in the case of cartels, or where there are no feasible measures that could restore competition to a market. In general, however, it is even more important to have effective remedies that include measures to restore or preserve competition, such as injunctions (e.g., cease and desist orders) against anticompetitive conduct or rescission of anticompetitive contractual arrangements. Authorizing such remedies is a hollow act unless the draft law also enables the competition authority to investigate compliance with its final orders and recover penalties for noncompliance. In the United States, fines generally are the penalty for noncompliance with a final agency order. We do not have authority to require a firm to cease doing business as a penalty for noncompliance, and we would not think it appropriate to invoke such authority – compelling exit generally reduces capacity and reduces competition, and that seems to be a counterproductive objective for a competition agency.

Experience suggests that a competition agency needs to be given some discretion on the particular cases that warrant its investigation. Competition authorities often identify possible anticompetitive conduct based on sources other than complaints. In the United States, a significant proportion of our cases of anticompetitive conduct come from media accounts or from information obtained in other investigations. In our view, competition laws should clearly grant power to the agency to initiate investigations on its own authority. A competition agency should also have the authority to decline to investigate a complaint that has little or no merit. For example, less efficient competitors sometimes complain to competition authorities about conduct that amounts to nothing more than vigorous, effective conduct. A competition agency that is required to investigate all complaints may expend time and resources on trivial cases. It also may become a tool by which market participants punish procompetitive behavior by filing complaints and thereby imposing the costs and burdens of responding to a legal investigation on rivals who are doing nothing more than competing vigorously.

In addition to enforcement, a competition agency plays an important advisory role. Many countries, including the United States, believe that a key function of a competition agency is to promote a culture of competition by providing expert advice to other government entities and the courts when they make decisions affecting competition. Our experience has shown that businesses will often seek to avoid the discipline of competition by asking governments to impose restrictions that achieve the same result as cartels or abuse of dominance. In such cases, the effect on competition can be even more severe than if the restriction were imposed through private anticompetitive conduct, because the government enforces the restriction. If a competition agency does not address anticompetitive consequences of government regulation, its enforcement efforts against private anticompetitive conduct can be undermined. Competition advocacy should extend to proposed draft laws and regulations, interpretation and effective operation of existing laws, and legal and other economic debates or disputes in legislative, judicial, and other settings.

In some jurisdictions the competition agency has the power, at least in principle, to bring formal challenges against anticompetitive actions by other agencies or official or quasi-official bodies. In other jurisdictions the competition agency can formally participate in another agency's public hearings and deliberations to advocate procompetitive outcomes, particularly in the context of regulatory reform. Where privatization of state-owned enterprises is a significant government program, the competition agency sometimes has a formal statutory right to review privatization proposals to promote a competitive outcome. The appropriate mechanism will depend on the legal and cultural setting. Providing an explicit mandate and mechanism(s) for competition advocacy can help ensure that the competition agency's views are conveyed and considered

As an additional aspect of a competition agency's advisory role, consideration could be given to authorizing the competition agency to issue advisory opinions on novel or complex issues relating to proposed business conduct. By providing guidance to

persons regarding their obligations under the law, advisory opinions can facilitate compliance and reduce the agency's enforcement burdens. As a mechanism for providing the business community with about how the law will be enforced in doubtful cases, ex ante advisory opinions are more satisfactory and efficient than ex post approvals for particular types of business conduct. A system of ex post approvals diverts agency resources into ratification of private arrangements and often distorts agency priorities, typically without contributing the level of certainty that the business community seeks. We note that the European Union for these reasons has recently shifted away from the ex post system under which it operated for many years.

To be effective, a competition agency, like other law enforcement agencies, requires an appropriate level of "independence" from outside influences. Essentially, the competition authority should make its decisions autonomously, based on the facts and the law and not on political considerations, and it should not discriminate in favor of domestic firms or against foreign ones. "Independence" has two components. The first is structural or organizational independence – in other words, an agency that has an appropriate degree of separation from the other units of the government. The second is perceived independence that is acquired through fair, impartial, and consistent application of the law based on sound economic principles.

Other institutional issues that the draft law might productively address more fully are transparency and due process protections. The competition agency's procedures, policies, substantive standards and actions should be transparent to ensure consistency, predictability, and public confidence. There should also be readily accessible written guidelines, regulations, or other public guidance to promote understanding and compliance with the law. We note that the draft law provides authority for the competition agency to formulate regulations and policies and promulgate decisions. Transparency also includes an explanation of the rationale for the agency's actions or policies to affected parties and the general public. We therefore recommend that the draft law require the competition agency to publish an explanation of the reasons for its decisions,[6] policies, and regulations.

Transparency must be balanced, however, with adequate protection of confidential information. Significant amounts of information obtained in a competition law investigation are confidential. Proper protection of confidential information is crucial to an agency's ability to obtain this type of information and to the agency's credibility. Inadequate protection can also damage competitive conditions in the market. We therefore recommend that the draft law also establish a mechanism for ensuring confidentiality and define the types of information that qualify as business secrets.

Due process of law – procedural fairness – is an essential guiding principle for the agency in exercising its functions. Due process entails that the agency provide to persons directly affected by law enforcement activities –

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[6] To preserve agency resources, though, the general requirement to publish an explanation of the basis for agency decisions might appropriately exclude routine merger clearance decisions.

- reasonable notice when a proceeding is initiated;
- a description of the nature of the proceeding;
- a statement of the legal authority under which the proceeding is initiated;
- a general description of the issues; and
- a reasonable opportunity to present facts and arguments in support of their position prior to any final adverse action.

The draft law should more clearly define the process, standards, and protections that apply to the agency's investigation and enforcement procedures. Due process also entails creation of appropriate rights and procedures for review of the agency's final decisions by an impartial and independent body. The current draft provision should clarify the procedures and standards for appeal.

B. The Relationship between the Competition Agency and Industry-Specific Regulators

Competition regimes should be organized to maximize certainty and predictability of decisionmaking and minimize actual or perceived conflicts between the mission of the competition agency and other government policies. Issues under consideration today concern the proper relationship of the competition agency and industry-specific regulators. More specifically, we are asked which agency should have priority and how to ensure the authority of the competition agency when there is concurrent or shared jurisdiction.

From the perspective of a competition official, competition agencies are best suited by their accumulated expertise, experience, and basic institutional characteristics to be the primary protectors of the competition process. Competition agencies are also typically in a better position to consider whether a regulated industry would be more efficient if competition were introduced in part or in full. In the United States and many other jurisdictions, however, other government bodies have authority to influence the state of competition. Sector-specific regulatory systems generally have objectives that may include, but go beyond promotion of competition. In addition, the movement toward deregulation of many industry sectors over the past decades has led regulatory agencies to emphasize competition analysis and respect for market forces. Competition agencies, including those in the United States, have worked closely with sectoral regulatory agencies to help them appreciate the potential benefits of competition.

We do not think it would be appropriate, however, for a competition agency actually to regulate sectors where competition is not judged to be appropriate. The fundamental mentality of a regulator – that competition will not protect consumer welfare – is fundamentally different from that of a competition official. And the professional skills that are required for a regulator (such as engineering and accounting) are in many ways quite different. We are aware of some cases where new competition agencies ran into difficulty when they tried to combine these functions.

Establishing the proper relationship between the competition agency and regulators is a significant and ongoing challenge in most countries. The issue has been discussed and debated in international fora in recent years. No single solution has emerged. Different jurisdictions have different approaches, and even within a single jurisdiction the approach to the relationship can vary. In one jurisdiction a competition agency has statutory powers for some aspects of sector regulation. In another, sector regulators and the competition authority exercise concurrent jurisdiction. In yet another, a formal agreement establishes a framework for cooperation between the sectoral regulators and the competition authority.

In the United States, the relationship between the competition agencies and regulators is typically defined not by formal, published agreements, but by the limited types of conduct reached by our antitrust laws and the broader range of activities and statutory objectives subject to the jurisdiction of the sectoral regulator. United States federal law has addressed the relationship in one of three ways. First, in a few limited instances, conduct is statutorily exempt from the antitrust laws, but subject to regulation. In our experience exemptions of this type are often historical anomalies that should be viewed with disfavor, and they increasingly have been eliminated in the United States and other jurisdictions. Second, certain types of conduct are evaluated only under the antitrust laws with respect to their possible effect on competition. Third, for some categories of conduct, the antitrust agencies and industry-specific regulator have concurrent or shared jurisdiction, most frequently in the area of merger enforcement and enforcement against particular types of anticompetitive conduct by a dominant firm. For example, in the banking sector the Department of Justice shares the authority with banking regulatory agencies to review mergers based on competition issues, but the banking regulatory agencies have additional responsibility to review mergers based on bank safety and soundness issues and convenience and needs issues. Firms engaged in mergers in that sector generally must make filings with both. Competition agencies may play an advisory role on competition issues that arise in a regulatory proceeding. Various regulatory statutes explicitly provide avenues for competition advocacy by authorizing either the Department of Justice or the Federal Trade Commission to participate in a regulatory proceeding.

Turning to the question of shared jurisdiction, the United States has experience in sectors that include the telecommunications, electric and gas utilities, and banking sectors. We would welcome the opportunity to share our experiences as you consider this issue in greater depth. For now, let me just make a few general observations. In making any decision on whether to establish shared jurisdiction between the regulator and the competition agency, it is important to consider the advantages and disadvantages. One stated advantage of concurrent jurisdiction is that each agency can avail itself of the other's expertise. Competition agencies have specific skills and broad experience in applying competition law to different products and services. Regulatory agencies have extensive, ongoing knowledge of the technical aspects of the products or services in the particular industries they regulate. On the other hand, concurrent jurisdiction creates potential for inconsistent outcomes, uncertainty for businesses that must comply with the

laws, and increased transaction costs from duplication of effort on the competition authority, regulator, and the parties dealing with both agencies.

Overall principles of competitive effects analysis should be common across different industry sectors. If multiple agencies perform a competition analysis, they should apply the same approach. Mechanisms for ensuring domestic consistency should be applied. Explicit statutory provisions can create a mechanism for the competition agency to convey its views on competition-related matters to the regulator and have equal authority to make its decision on competition grounds. To build on the banking industry example cited above, both our Bank Holding Company Act and our Bank Merger Act of 1966[7] require a competitive analysis by both the banking regulatory agency and the Department of Justice, and the banking regulatory agency must consider competitive effects in making its final decision. In addition, even if the banking regulatory agency approves the merger, the transaction cannot be consummated for a specified period following approval to allow the Department of Justice an opportunity to review, and if appropriate challenge, the merger. After the waiting period has lapsed, the transaction may not be challenged under the merger provisions of the antitrust laws.

Other instruments for cooperation and coordination exist or can be developed to mitigate the potential disadvantages of shared jurisdiction. We would only reiterate the importance of including in the draft law the authority for the competition agency to engage in competition advocacy to promote competition principles government-wide. The suppression of public intervention that restricts competition is as important as the prosecution of private restraints.

CONCLUSION

We are grateful to have had this opportunity to present our views on several important issues in competition policy. We look forward to future exchanges with the objective of continuing and deepening the productive dialogue between our countries.

[7] This Act specifically requires the banking regulatory agency to request, and the Department of Justice to provide, a competitive factors advisory report that the banking regulatory agency must consider in making its decision.