



# DEPARTMENT OF JUSTICE

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## THE ROLE OF COMPETITION AGENCIES IN REGULATED SECTORS

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Market economies operate from the general principle that the invisible hand of the market results in a more optimal distribution of resources and a higher level of economic welfare than does regulation of economic activity by the heavy, visible hand of the government. The role of antitrust laws should be to ensure that the invisible hand is allowed to do its work efficiently and effectively.

That does not mean, however, that economic regulation has no place in market economies. Indeed, economists agree that in at least some industries – for example, industries characterized by constantly declining supply curves (often called “natural monopolies”) – economic regulation by the government will provide more consumer welfare benefits than would a *laissez-faire* approach. Regulation has also been justified as a means of accomplishing objectives that go beyond pure competition goals – for example, to implement a policy of universal access to basic services, or to ensure that the economy can reap the benefits of network economies that might not otherwise be achieved. There may also be structural impediments or other market failures that counsel against deregulation at a given time. As a consequence, every country, including the United States, currently regulates some sectors of its economy.

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<sup>1</sup> The views expressed are those of the author, and do not necessarily reflect the views of the Department of Justice.

Over the past 120 years and concurrent with the adoption and refinement of an economy-wide antitrust law, the United States has implemented a variety of federal regulatory schemes in particular sectors. After long experience with these regulatory approaches, however, we learned that over-regulation imposes substantial costs and inefficiencies on the economy. We also discovered that some sectors that we had considered to be natural monopolies and therefore appropriate subjects for regulation rather than competition have turned out, either because of better economic understanding or technological changes, not to be natural monopolies. These sectors are now understood to be suitable for market-based competition.

As a consequence, over the past 25 years the United States has pursued a policy of deregulation, during which we have eliminated or rolled-back regulation in most of the previously-regulated sectors, seeking instead to introduce competition and its market disciplines to the greatest extent possible. These deregulatory efforts have provided huge benefits to consumers and to the economy. One study estimated that deregulation in just three industries in the United States – airlines, motor carriers, and railroads – has increased U.S. GDP by about ½ percent *each year*.<sup>2</sup>

Where sectors have been fully deregulated, it is clear that the antitrust laws should fully apply. However, where there has been only partial deregulation, so that some competition has been introduced in a sector, but some regulation continues, the interplay between competition law and sectoral regulation becomes very important. Today I will discuss how the United States has approached this problem. I will then discuss the lessons that China may wish to take from the U.S. experience. Finally, I will make a few comments on the approach taken in the latest

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<sup>2</sup> Economic Report of the President (Feb. 2002) at p.63, available at [http://www.gpoaccess.gov/usbudget/fy03/pdf/2002\\_erp.pdf](http://www.gpoaccess.gov/usbudget/fy03/pdf/2002_erp.pdf).

public version of China's draft Antimonopoly Law.

### U.S. Approaches to the Interface of Competition Law and Sectoral Regulation

In the United States, our courts have recognized the important role that our antitrust laws play in our economy and in our society as a whole. In fact, the U.S. Supreme Court has described the antitrust laws as a “comprehensive charter of economic liberty.”<sup>3</sup> In light of this high status accorded the antitrust laws, it is not surprising that our courts have been reluctant to conclude that the antitrust laws have been superseded by other regulatory systems. On the contrary, our courts have held that unless our Congress has expressed a clear intention to displace competition in a particular sector, the courts should interpret the regulatory regime and the antitrust laws in a way that tries to give effect to both.<sup>4</sup>

In actual practice, the United States has adopted several different models to define the relationship between sectoral regulators and antitrust enforcement agencies.

In a very few instances, our Congress has explicitly decided that some or all of the activities of enterprises in a particular regulated industry should be completely exempt from the antitrust laws, and subject only to the supervision of the regulatory authority. The Interstate Commerce Act, for example, exempted from antitrust scrutiny any rail carrier merger that was approved or exempted from approval by the regulatory agency. Instead, the Surface Transportation Board (“Board”), which currently oversees the rail sector, must approve rail

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<sup>3</sup> “The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.” *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958).

<sup>4</sup> See *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378, 392 (1981).

carrier mergers. The Board is required to approve mergers that are “consistent with the public interest,” based on consideration of a variety of factors, including whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.<sup>5</sup> However, the Department of Justice must be notified of proposed mergers between major (class 1) rail carriers, and may choose to participate as a party in the proceedings before the Board.<sup>6</sup>

In the vast majority of regulated sectors in the United States, by contrast, the antitrust enforcement agencies are empowered to investigate and take enforcement action against any anticompetitive conduct in that sector. This statement is subject to one important caveat, however. The courts have developed the concept of “implied immunity” to protect from antitrust attack conduct that is necessary to implement the regulatory scheme intended by Congress. However, implied antitrust immunity is not found frequently, and is reserved for situations where there is a “clear repugnancy between the antitrust laws and the regulatory system.”<sup>7</sup>

In some regulated sectors, our Congress has made it clear that the antitrust laws should fully apply to the conduct of regulated enterprises and that the courts should not find any implied antitrust immunity for such conduct. For example, the Telecommunications Act of 1996 makes clear that telecommunications carriers must conform their conduct to the requirements of both the Sherman Act as well as to the Telecommunications Act. The Congress included a specific provision in the Telecommunications Act to make clear its intention that that Act not be construed “to modify, impair, or supersede the applicability of any of the antitrust laws.”<sup>8</sup> So,

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<sup>5</sup> See 49 U.S.C.A. §§ 11324(c) and 11324(b)(5).

<sup>6</sup> 49 U.S.C.A. §11325(b)(1).

<sup>7</sup> See *United States v. National Ass’n of Securities Dealers, Inc.* 422 U.S. 694, 719-20 (1975).

<sup>8</sup> 47 U.S.C. §152 note.

for example, if long-distance telephone companies were to enter into a price-fixing agreement to set the rates for long-distance calls, the companies would be subject to criminal antitrust prosecution, just as would companies in any other sector.<sup>9</sup>

In most regulated sectors in the United States, however, both the antitrust authorities and the regulatory authorities have concurrent jurisdiction over anticompetitive conduct. Both authorities may independently block or challenge anticompetitive conduct, with the regulatory agency's operative review standard typically including both competition and non-competition factors. The approval of one agency does not necessarily mean that the other agency will refrain from challenging or blocking the same conduct. As is readily apparent, having two agencies investigating and addressing the competitive effects of the same conduct -- such as is frequently the case for mergers in regulated sectors -- can lead to conflicting decisions, particularly in the absence of close cooperation and coordination between the antitrust authorities and the regulator. Let me provide a few examples of the operation of concurrent jurisdiction in the review of competitive effects of business conduct in regulated sectors in the United States.

#### *Telecommunications*

The telecommunications sector is one of the areas where concurrent jurisdiction over mergers works reasonably well. The Federal Communications Commission ("FCC") is required to review the transfer of telecommunications licenses and authorizations, such as will occur in the merger of two telecommunications companies. The FCC review is based on whether the

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<sup>9</sup> On the other hand, a violation of the rules or duties imposed on telecommunications carriers by the Federal Communications Commission -- the federal telecommunications regulator -- is not necessarily sufficient to constitute a violation of the antitrust laws. See the Supreme Court decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004). See also, *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7<sup>th</sup> Cir. 2000).

transaction will serve “the public interest, convenience and necessity.”<sup>10</sup> The FCC’s public interest analysis is broader than the antitrust analysis conducted by the Department of Justice<sup>11</sup> under Section 7 of the Clayton Act,<sup>12</sup> since the FCC must consider not only whether the transaction preserves and enhances competition in relevant markets, but also whether the merger ensures that a diversity of voices is made available to the public and whether it will help accelerate the private sector deployment of advanced services.<sup>13</sup>

In its evaluation of the competitive effects of a merger, the FCC seeks to apply the same standards and criteria used by the Department of Justice.<sup>14</sup> To minimize the possibility that their respective analyses of the competitive effects of the transaction will lead to inconsistent results, our two agencies cooperate extensively on an informal basis. Although FCC rules generally require it to disclose any meetings with outside persons, the rules contain an exception for meetings with the antitrust authorities.<sup>15</sup> Consequently, we are able to share non-confidential industry information and discuss the appropriate relevant market parameters, theories of competitive harm, and proposed remedies. Cooperation is further enhanced when our agencies are able to share confidential information pursuant to a limited waiver of confidentiality by the parties to the transaction.

### *Electricity*

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<sup>10</sup> Sections 214(a) and 310(d) of the Communications Act of 1934, 47 U.S.C. §214(a), §310(d). The FCC is also authorized to analyze telecommunications mergers under Section 7 of the Clayton Act. 15 U.S.C. §21.

<sup>11</sup> The Federal Trade Commission does not have jurisdiction over telecommunications common carriers. See 15 U.S.C. §§21(a) and 45(a)(2).

<sup>12</sup> 15 U.S.C. §18.

<sup>13</sup> See *In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast*, 17 F.C.C.R. 23246, at 23255.

<sup>14</sup> See Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, as revised in 1997, available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

<sup>15</sup> 47 C.F.R. §1.1204(a)(6).

In the energy sector, the interstate transmission of electricity is regulated by the Federal Energy Regulatory Commission (FERC), and both FERC and the Department of Justice review mergers in the electricity sector. FERC reviews mergers pursuant to section 203 of the Federal Power Act,<sup>16</sup> which requires FERC to approve a merger if it will be “consistent with the public interest.” Under this “public interest” test, FERC considers the effects of the merger in three areas: competition, rates, and regulation. In 1996, FERC issued a Merger Policy Statement, in which it adopted the antitrust agencies’ Horizontal Merger Guidelines as the analytical framework under which it would analyze the competitive effects of a merger.<sup>17</sup> The adoption of the Merger Policy Statement by FERC means that it will analyze the competitive effects of mergers in the electricity sector with reference to the same merger guidelines as used by the antitrust agencies, which one would expect would lead both agencies to come to the same conclusion regarding the likely competitive effects of a transaction. However, FERC rules concerning disclosure of any discussions about a pending matter with outside parties (including with the Department of Justice) preclude the same informal, cooperative exchanges of information and discussion between staffs as occurs with the FCC with regard to mergers in the telecommunications area. Therefore, competitive effects analyses by FERC have not always matched the conclusions reached by the Department of Justice. I will briefly discuss one example.

In December 2004 Exelon Corporation proposed to merge with Public Service Enterprise Group, Inc., a transaction that would have created the largest electric and gas utility in the United

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<sup>16</sup> 16 U.S.C.A. §824(b).

<sup>17</sup> See Merger Policy Statement, FERC Order No. 592 (December 18, 1996), available at <http://www.ferc.gov/industries/electric/gen-info/mergers/rm96-6.pdf>.



States with assets of nearly \$80 billion and annual revenues of \$27 billion. The merging parties competed for electricity customers in the mid-Atlantic region of the United States as well as in four other states.

Both the Department of Justice and FERC separately reviewed the transaction to determine its likely competitive effects. Both agencies concluded that the proposed transaction, as originally structured, would likely substantially reduce competition in wholesale electricity rates in the mid-Atlantic region of the United States (albeit using slightly different geographic market definitions.) In June 2005 FERC announced that it would approve the transaction if the companies divested 4,000 megawatts of unspecified generation facilities in that region, and additionally agreed to sell 2,600 megawatts of energy from their nuclear plants.<sup>18</sup> One year later, the Department of Justice determined that the merger was anticompetitive, but also concluded that the competitive effects could be resolved and the transaction allowed to proceed if the parties divested six specific electricity generation plants in Pennsylvania and New Jersey, the area in which the merging companies had the greatest concentration of assets. The companies agreed to divest those plants, and the Department of Justice announced that, subject to court approval of the proposed Consent Decree, it would agree to allow the transaction to proceed under those conditions.<sup>19</sup>

The most significant difference between the FERC and Justice Department approaches in that case was in the construction of the remedy. The FERC remedy was focused primarily on lowering the concentration of ownership of generating facilities. The Justice Department

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<sup>18</sup> See FERC order authorizing merger under section 203 of the Federal Power Act (Docket No. EC05-43-000, July 1, 2005), available at <http://www.ferc.gov/whats-new/comm-meet/063005/E-4.pdf>.

<sup>19</sup> See Proposed Final Judgment in *U.S. v. Exelon Corp. and Public Service Enterprise Group, Inc.*, available at <http://www.usdoj.gov/atr/cases/f216700/216784.htm>.

approach was different. Although the Justice Department's divestiture plan would have substantially reduced market shares and concentration levels compared to the levels that would have existed had the merger gone through as originally proposed, the purpose of the DOJ-approved divestitures was to preserve competition, not to maintain market shares or concentration levels at their pre-merger levels.<sup>20</sup> Instead, the DOJ remedy sought divestiture by Exelon of specific key assets that would have made it profitable for Exelon to withhold output and raise prices in the relevant market. By contrast, FERC's unspecified divestiture did not guarantee that the merged firm would give up the critical assets needed to ensure that the merged firm could not withhold output and raise price profitably.<sup>21</sup>

### *Banking*

The jurisdiction of the Department of Justice to review bank mergers was confirmed by the U.S. Supreme Court in its 1963 decision in the Philadelphia National Bank case.<sup>22</sup> Three years later, the Bank Merger Act and the Bank Holding Company Act were amended to provide for concurrent independent reviews of bank mergers by the Department of Justice and the relevant bank regulatory agency.<sup>23</sup> Under the Bank Merger Act of 1966, the bank regulator is required to seek a report on competitive factors involved in the merger from the Department of Justice. The bank regulator must take this report into consideration in its decision-making on the

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<sup>20</sup> See, U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies, §II (October 2004), available at <http://www.usdoj.gov/atr/public/guidelines/205108.htm> ("Restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels.")

<sup>21</sup> See Competitive Impact Statement in *U.S. v. Exelon Corp. and Public Service Enterprise Group, Inc.*, available at <http://www.usdoj.gov/atr/cases/f217700/217717.htm>.

<sup>22</sup> See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

<sup>23</sup> There are four different industry-specific regulators that have authority to approve or deny bank mergers, depending on the type of bank involved in the transaction: the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision. Of those four regulators, only the Federal Reserve Board has the authority to approve or deny bank holding company mergers. See 12 U.S.C. §1828(c) and §1842.

competitive effects of the transaction, but may not be required to follow the Justice Department's advice, depending on other factors. In 1995 the Department of Justice, Federal Reserve Board and Office of the Comptroller of the Currency jointly published bank merger screening guidelines<sup>24</sup> to help ensure that the bank regulators and the Department of Justice apply similar standards in evaluating the competitive effects of a merger, although the screening guidelines make clear that the regulatory agencies and the Department of Justice, in practice, do not necessarily use the same product market or geographic market definitions. For example, the Department of Justice examines the competitive effects of the transaction in disaggregated product markets (including retail, small business and middle-market lending) while the banking agencies look at the cluster of banking services. Remedies recommended by the Justice Department and the bank regulators may also differ, with Justice Department remedies more likely to be focused on ensuring that market competition is protected, rather than simply on restoring the pre-merger structural characteristics of the market (as was also the case in the Exelon electricity merger discussed earlier.) Unlike the laws applicable to mergers in the telecommunications or energy areas, however, the bank regulators are authorized to approve an anticompetitive merger if they find that the anticompetitive effects are "clearly outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community to be served."<sup>25</sup>

### Implications for China

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<sup>24</sup> Bank Merger Competitive Review – Introduction and Overview (1995), available at <http://www.usdoj.gov/atr/public/guidelines/6472.htm>. The Office of the Comptroller of the Currency version, dated July 18, 1995, is OCC Advisory Letter 95-4.

<sup>25</sup> 12 U.S.C. §1828(c)(5).

With that background on U.S. practice, let me now turn to the question of whether China should adopt the same concurrent jurisdiction approach to review of the competitive effects of conduct in regulated sectors as is common in the United States. China should consider carefully whether it is appropriate to follow the practice of the United States in this area. It may make more sense to have one agency responsible for conducting competitive effects analyses of both mergers and other business conduct in regulated sectors. A concurrent jurisdiction approach may result in a wasteful duplication of efforts, as both the antitrust agency and the sectoral regulator each evaluate the particular conduct involved and its likely effects on competition in the industry. Although some of this duplication can be avoided through coordination between the agencies, the need for separate decisions will inevitably mean that both agencies will be required to expend significant resources investigating and evaluating the competitive effects of the same conduct.

Of even greater concern is the potential additional burden and uncertainty imposed on the business community by parallel reviews. First, both agencies will need to collect information necessary to conduct their respective competitive effects analyses from the enterprises engaged in the suspected anticompetitive conduct, as well as from other market participants. Since the competition agency and the sectoral regulator will typically not take identical approaches to the investigation, recipients of investigatory inquiries may have to incur significant costs responding separately to each agency's request. Second, separate competition reviews may lead to different and in some cases inconsistent determinations as to whether conduct is anticompetitive, which may make it more difficult for enterprises to determine in advance whether proposed conduct will be found to create competitive problems so that they can avoid costly mistakes. Finally,

dual competition reviews may lead to inconsistent remedy orders, as happened in the Exelon case that I described earlier, or to over-intervention, since the more aggressive, interventionist decision will be the one that has the most binding effect.

Therefore China may want to avoid adopting a concurrent competition review approach and instead make just one agency responsible for reviewing the competitive effects of activities in regulated sectors. Generally, competition agencies will be in a better position than sectoral regulators to engage in that analysis for several reasons. First, the competition agency will have broad experience across many sectors in determining relevant product and geographic markets and in analyzing the competitive effects of business conduct. The competition agency will be able to apply a consistent and independent eye to the competitive consequences of particular activities, and will have developed good instincts, based on sound economic analysis and extensive experience, as to what types of conduct are more likely to present competitive problems and what questions to ask in evaluating that conduct. The Antimonopoly Authority is also likely to have better investigative tools for collecting the necessary information to make those determinations, since it will have been set up and organized with precisely those functions in mind.

The sectoral regulators, by contrast, will not be as experienced in conducting competition analyses as the antimonopoly enforcement agency. Moreover, sectoral regulators are susceptible to what is known as “regulatory capture” by the industry that they regulate. The day-to-day interactions between industry officials and regulatory agency bureaucrats may lead to a commonality of interests that can interfere with the arm’s-length perspective necessary to evaluate competitive harms and to construct remedies that will protect competition for the

benefit of the economy as a whole. This commonality of interests can be further strengthened if the regulatory agencies seek to hire people with expertise obtained by working in the industry. Moreover, it is possible that regulatory agency staff may develop an interest in promoting the status quo in the industry, in part because of a desire to ensure that their own jobs will remain relevant or that there is a demand for their bureaucratic expertise when they are ready to leave government service.

Another factor weighing against putting regulatory agencies in charge of protecting competition is that regulators will typically have a pro-regulatory bias to addressing behavioral problems in the industry, both for the reasons I just discussed and because their world view is naturally influenced by the scope of their work experience – which is to rely on regulation rather than market forces. This means that in looking for remedies to address competition problems, regulators may be more comfortable approving proposed transactions that increase market power and then attempting to limit the consequences of their decisions by imposing behavioral remedies, implemented through day-to-day price or other regulation, rather than preventing the increase in market power through efficient and effective structural remedies. As a consequence, the structure of the industry may never evolve to the point where sufficient new entry is induced to permit further deregulation.<sup>26</sup>

For all of these reasons, China may want to consider giving the Antimonopoly Authority sole jurisdiction to evaluate and take enforcement action against anticompetitive conduct in regulated sectors. This does not mean, however, that the sectoral regulator should have no role to play in evaluating mergers and other conduct, and in promoting and protecting competition in

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<sup>26</sup> I am indebted to my colleague, Jade Eaton, for this point.

their industries. First, the regulatory agency should cooperate with the Antimonopoly Authority wherever possible. The sectoral regulator will have a great deal of knowledge about the structure and day-to-day behavior of the markets within its purview. To the extent that the regulatory agency can share that information and cooperate in the antimonopoly investigation, the quality and efficiency of the Antimonopoly Authority's investigation and competitive effects determination will be significantly improved. For that reason, China should ensure that there are no unnecessary barriers to cooperation between the relevant agencies in the competition area, consistent with confidentiality requirements. Second, it may be appropriate for the regulatory agency to review mergers and other conduct for consistency with the agency's regulatory objectives. For example, as I mentioned earlier, the FCC examines mergers not only for their impact on competition, but also to ensure that there are a diversity of voices made available to the public and that the transaction will promote the dissemination of advanced telecommunications services.

I would like to add one caveat to the view that the competition enforcement agency be solely responsible for analyzing the competitive effects of business activities in regulated sectors. If it is determined that competition is best preserved through day-to-day regulation – such as is typically the case in enforcing mandatory access to natural monopoly transmission networks – then this is the type of competition-protecting activity that is better suited for regulatory agencies rather than competition enforcers.

This last point raises an additional role for competition agencies in regulated sectors – engaging in competition advocacy. Where regulatory agencies are given a lead or concurrent role in promoting or preserving competition in a sector, or in balancing competition and non-

competition objectives, competition agencies will often be able to use their expertise to provide useful advice on how to accomplish those objectives through the implementation of market-based solutions. For example, in 2005 the Department of Justice engaged in competition advocacy by submitting comments to the Federal Aviation Administration on how best to allocate take-off and landing slots at congested airports – in that case Chicago’s O’Hare International Airport – in a manner that both addresses the problem of airport congestion and encourages competition.<sup>27</sup> The Justice Department recommended that the FAA conduct periodic anonymous take-off and landing slot auctions, which would thereby enable all carriers, both incumbents and entrants, to compete for access based on how efficiently they can use that scarce resource.

The competition advocacy function of antitrust agencies is a very useful and important one, particularly in regulated sectors, and I would encourage China to make clear in the Antimonopoly Law that the Antimonopoly Authority will have the authority to engage in competition advocacy activities.

#### Comments on Draft Antimonopoly Law Approach

Before closing today, I would like to take a few minutes to comment on the Antimonopoly Authority’s role in regulated sectors as envisioned by the draft Antimonopoly Law currently being considered by the National People’s Congress.<sup>28</sup> There are two primary provisions that appear to relate to the role of the Antimonopoly Authority in regulated sectors.

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<sup>27</sup> See Comments of the Department of Justice on Congestion and Delay Reduction at Chicago O’Hare International Airport (May 24, 2005), available at <http://www.usdoj.gov/atr/public/comments/209455.htm>.

<sup>28</sup> My comments are based on the June 22, 2006 draft Antimonopoly Law that was the subject of the first reading by the Standing Committee of the National People’s Congress.



First, Article 2 provides that the Antimonopoly Law does not apply “where other laws or administrative regulations provide provisions.” Second, Article 44 states that where other laws or regulations stipulate that a particular department or organ shall investigate and handle conduct that would be prohibited by the Antimonopoly Law, that administrative agency shall have primary jurisdiction to investigate and handle the conduct. However, if the agency fails to investigate and handle the matter, then the Antimonopoly Authority may investigate and take appropriate action after seeking the opinion of the relevant agency.

My first comment is that these two provisions do not appear to be completely consistent. If Article 2 is read literally, once another law or regulation gives authority to an agency to investigate anticompetitive behavior, the Antimonopoly Law should not apply, and hence there would be no scope for the Antimonopoly Authority to take action even if the regulatory authority failed to act. Putting that problem aside, the approach taken in Article 44 to vest in the sectoral regulator or other supervisory agency primary jurisdiction to investigate and address potentially anticompetitive conduct appears to avoid the problems of duplicative competitive effects investigations that I discussed earlier. However, for the reasons I stated, China may want to consider whether it would be better to give that authority to the Antimonopoly Authority rather than to the sectoral regulator.

Finally, I would like to comment on the approach taken in Article 2 to declare the Antimonopoly Law invalid against conduct with respect to which other laws or regulations “provide provisions.” As I discussed at the beginning of my talk, it is sensible to give priority to specific laws or regulations authorizing conduct that would otherwise be unlawful under the competition laws. In the United States, this conduct may be protected by an implied immunity,

even where no statute explicitly immunizes the conduct, as Article 2 appears to do. However, not all conduct in sectors covered by regulatory systems needs to be immunized from the antitrust laws. On the contrary, only conduct that is necessary to give effect to the regulatory system should be immunized. The language of Article 2 is not very clear on this point, and could be interpreted to immunize a broader range of conduct than would be necessary or appropriate. Therefore, it might be useful to re-examine the language of Article 2 with a view to clarifying that the exemption only applies to the extent of the inconsistency between the regulatory scheme and the Antimonopoly Law.

### Conclusion

In conclusion, determining the proper relationship between competition enforcement authorities and sectoral regulators is a complex issue that depends very much on the legal and regulatory systems of a country, the appropriate balance between sometimes conflicting regulatory and market-oriented objectives and the confidence that the government has in the effectiveness of the market in determining outcomes that are best for its citizens and its economy as a whole. I have provided my views on how best to address this problem, but there are many possible solutions, as is apparent just by looking at the multiple approaches taken in the United States. I wish the Chinese Government success in determining which approach is best for China.

Thank you.