美国律师协会反托拉斯法部，知识产权部和国际法部共同
对国家工商总局所起草的关于知识产权领域反垄断执法的指南草稿的建议

十月三十日，二零一二年

本文的陈述只代表了美国律师协会三个部门的共同观点。它并未经美国律师协会会员代表大会或理事会的批准，因此不应被视为代表美国律师协会的政策。

美国律师协会反托拉斯法部，知识产权部和国际法部 （以下合称“三部门”）诚恳的对中国国家工商总局 （“工商局”）所起草的关于知识产权领域反垄断执法的指南第五草稿 （“指南草稿”）提供建议。[1] 三部门钦佩工商局在指南草稿上所付出的深入思考和精力，并希望可藉此机会提供有助于完成指南最终版本的建议。适当的情况下，三部门随时可以继续为工商局提供建议或者咨询服务。三部门的意见反映了他们对美国和国际竞争法律以及潜在的经济原则的专业知识和专业经验。

高管概要

三部门赞许工商局在指南草稿中引入了现代经济分析与理论，同时提供了具体建议来更进一步明确本指南和执法政策。

第一，三部门诚恳地促请把第十七条款中的第二项撤消，因为它是没有先例的把“必要设施原则”扩展到知识产权领域里。此条款与世界贸易组织准则和国际规范存在冲突。三部门建议修改此条款，最起码需要建立“可反驳的推定”以制约在知识产权领域里的“必要设施原则”的应用，并且要求需要使用此知识产权的竞争者证明其在实际操作中不能够，或者有充分的理由证明其不能够，绕过此知识产权，同时还要证明其使用此知识产权将进一步有利于消费者的合法权益。

第二，三部门建议把不必要广泛的禁令与繁杂和难以证明的要求更换成更为通用的、其他法律辖区所应用的“合理原则”。例如，第十九条款禁止有市场支配地位的经营者进行任何独占性地回授，但没有提供任何例外允许具有有利影响的回授。三部门诚恳的建议修改此条款使它符合国际准则。

最后，三部门提供一些澄清的建议。 例如，第十二条款给与了关于市场占有率水平形成的反垄断安全港有用的指导。 但是，第十二条款现在的表述有可能被误解为市场占有率高于阈值就代表具有市场影响力的推定。 三部门诚恳地建议为了明确起见，在第十二条款加上一句“市场占有率高于阈值并不一定被推定为具有市场影响力，”相反“这样的判定将会根据第九条款所述，基于在市场结构的具体情况，竞争情形，以及对竞争有不利影响的证据。”

[1] 本建议书是基于指南草稿的非正式翻译稿。作为参考，附上指南草稿和指南草稿的非正式翻译稿。

I. 第十七条 拒绝许可知识产权

第十七条一开始即说明了一个普遍的原则，即："正常情况下"允许进行无条件或非歧视性地单方拒绝许可知识产权(IPRs)。上述表述与美国法律和国际惯例相一致，美国律师协会上述各部对此表示认同（和欢迎）。[2] 但各部谨建议删除第 17（2）条中所提出的必需设施例外适用（于一般性规定）情形的提议。[3]中国《反垄断法》（《反垄断法》）并未提及任何必需设施原则，亦未对"滥用"知识产权进行定义。《工商行政管理机关禁止滥用市场支配地位的规定》（《禁止滥用市场支配地位的规定》）第 4(5)条规定：若"产品或服务"为必需设施，则禁止占支配地位的经营者无条件拒绝交易，但并未说明该原则是否适用于知识产权。第 17(2)条是首次明确将必需设施原则延伸至知识产权领域。[4]

美国律师协会上述各部之前的意见建议《反垄断法》及实施细则中全部删除必需设施原则。各部认为至少应"明确必需设施原则根本不适用于知识产权或仅适用于极个别情况。"[5] 自提出上述意见以来，各部并未注意到有任何支持该意见变更的进展。这是因为知识产权的"本质"即是单方排他性权利。[6] 中国知识产权法明确授权知识产权权利人可以单方拒绝向他人提供其发明或著作（仅有有限的

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[2] *如：* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004)；《有关将<欧共体条约>第 82 条适用于占支配地位经营者滥用性排他行为的委员会执法指南》（*Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*），2009 O.J. (C45) ¶75 第 7 页；美国律师协会反垄断法部，《国际知识产权许可交易中的反垄断问题》(2012)，第 2 页(ANTITRUST ISSUES IN INTERNATIONAL IP LICENSING TRANSACTIONS 第 2 页 (2012)) (“多数法域的法律均规定：与知识产权许可（或拒绝许可）相关的多数安排不违反竞争法，因此这些法律在这一点上是一致的。”)。

[3] 美国律师协会上述各部谨建议工商总局亦考虑将第 17（1）条所列例外情形限定为如下情况，即：标准关键专利(“SEPs”)权利人违反了其向标准制定组织(“SSO”)所作的有关以合理、非歧视(“RAND”)条款许可其专利的承诺。

[4] 美国律师协会上述各部假定：在第 17 条第一句即提及第 16 条表明：第 17 条暗含的市场支配地位是通过权利人拒绝许可的知识产权而获得的。

[5] 2005 年对中华人民共和国所拟议的反垄断法的意见，见 18-19、21 页（“2005 年对《反垄断法》的意见”），参见 http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_prc2005wapp.authcheckdam.pdf。另请参见 2010 年 7 月 2 日对国家工商行政管理总局《工商行政管理机关禁止垄断协议行为的规定》、《工商行政管理机关禁止滥用市场支配地位行为的规定》以及《工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定》草案的共同意见（“2010 年意见”）第 5 页、第 10-11 页，见 http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_sil_saic.authcheckdam.pdf；2009 年 5 月 29 日对国家工商行政管理总局《关于禁止垄断协议行为的有关规定》和《关于禁止滥用市场支配地位行为的有关规定》（征求意见稿）的共同意见（“2009 年 5 月意见”）第 10 页、第 35-36 页，，见 http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_saic_200906.authcheckdam.pdf。为方便起见，特附上述评述意见复印件。

[6] 比如，可参见 *Dawson Chem. Co.* V. Rohm&Haas Co., 448 U.S.，第 176、215 页(1980)（“授予专利的实质是有权阻止他方从取得专利的发明中获利。”)；Stewart v. Abend, 495 U.S. 第 207 页，第 228-29 页(1990)（“版权所有人享有相关权力，可以任意拒绝向寻求利用成果的一方授予许可。”)。

例外情况）。[7]将必需设施原则适用于知识产权将极大地影响知识产权权利人的核心权利（单方排他权）、为竞争者开发自主的具竞争性知识产权设置障碍，而且通常亦会为创新设置长期的障碍。[8]

从美国律师协会上述各部成员的经验来看，一项设施很少是真正必需的，经常出现的情况是：主张强迫共享“必需”设施的人士低估了意志坚决的竞争者绕开该设施进行竞争的能力，亦可使消费者从中获益。对快速发展的技术而言尤其如此，因技术和市场的发展可带来诸多机会，从而使得可以绕开竞争者知识产权开展工作，同时较之实物基础设施，绕开知识产权开展工作相对容易。在认识到上述问题后，美国最高法院明确规定：将以怀疑态度对待所谓的“必需设施”主张，美国最高法院规定：法院在认定一般规定（即：即便是垄断者也可选择交易对象）的例外情形时应十分谨慎。[9]审理 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[10] 案的法院解释称：法院在 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp* 一案中所认定的例外情形[11] “处于或接近（谢尔曼法）第 2 章节所规定责任的外缘，”[12]，法院表示其“从未认可”必需设施原则。[13]

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[7] 《中华人民共和国专利法》第 11 条。且《WTO 与贸易有关的知识产权协议》(TRIPS) 授予专利和商业秘密所有人独家权利，该等权利仅受制于某些极为有限的例外情形。

[8] 在制定拒绝交易的标准时，仅关注静态效率是错误的（拒绝许可相关具体知识产权权利人而对竞争产生的影响），因为这会忽视对创新刺激因素的长期影响。J. Thomas Rosch, 《静态及动态分析在制药业反垄断中的作用》（2010 年 2 月 18 日）（*The Role of Static and Dynamic Analysis in Pharmaceutical Antitrust*）(Feb.18, 2010) （“若某一专利所产生的预期有助于刺激对发明进行投资（或披露）一项发明，则该等静态成本是合理的）。人们普遍认为：由专利激发的发明（或披露）产生的动态效益高于静态成本。”），见 http://www.ftc.gov/speeches/rosch/100218pharmaantitrust.pdf；Donald F. Turner, *《就知识产权利用确定反垄断及滥用限制的基本原则》（Basic Principles in Formulating Antitrust and Misuse Constraints on the Exploitation of Intellectual Property Rights）*，53 Antitrust L.J. 485, 485 (1985) （“长期看，技术进步对消费者福利的贡献大于分配无效率因非竞争定价得以消除而产生的贡献”）；*Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1186 (1st Cir. 1994) (“使专利活动接受更广泛的反垄断审查将削弱构成专利制度基础的激励因素”)；同上。第 1186-87 页（“国会自身作出了经验式假设，即：允许版权所有人收取许可费并排除他人使用其著作导致产生了一种激励机制，该机制鼓励对创作优良的艺术及功能性著作进行投资，从而从长期而言推动消费者福利。我们无法要求反垄断诉讼中的被告在每一宗拒绝许可版权著作行为受到攻击的案件中对上述立法假设的合理性进行证明和指责。”）（内部引述略）；*SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1209 (2d Cir. 1981)（认为：对声称不合理地拒绝许可合法获得的专利施加反垄断义务“会严重践踏我们专利法所提供的激励因素，从而影响整个专利制度”）。确实，可能进行该等干预会削弱或抑制前期进行创新及知识产权投资的动力。这是因为：投资动力在很大程度上取决于知识产权的预期价值或经营者预期从投资中获得的租金。新产品的引入（即便受制于庞大的市场势力）代表对社会的贡献，这是美国专利制度的基本理论。由于发明的社会回报大大超过了私人回报，预期从创新中获得的垄断利润刺激经营者从事风险性投资，以为社会增益。Dennis W. Carlton, 《对排他性行为及拒绝交易的总体分析-*Aspen 和柯达缘何被误导》（A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided）*，68 ANTITRUST L.J. 659, 672-73 (2001)；Charles I. Jones & John C. Williams, *《衡量研发的社会回报》（Measuring the Social Return to R&D）*, 113 Q.J. ECON. 1119 (1998)。

[9] *比如， Trinko*, 540 U.S.第 408 页。

[10] *同上*。

[11] 472 U.S. 585 (1985).

[12] *Trinko*, 540 U.S. 第 409-10 页。

若保留第 17(2)条，则应对其进行修订，并针对涉及知识产权的必需设施主张纳入一强有力的可反驳推定。就此，美国律师协会上述各部进一步建议对第 17(2)条进行修订，并要求证明：(1) 寻求获得设施的竞争者无法实际地或合理地绕开知识产权开展工作，以及(2) 强迫性获得（设施）将促进消费者的合法利益。该等修订将使第 17 条更加符合国际规范，而且也更加符合《工商总局关于市场支配地位的规定》。[14]

II. 不必要的过于宽泛的禁止和沉重的证明责任

A. 第十一条 行使知识产权行为对竞争影响的评价

第十一条似乎是对第七条第六款的详细阐述，第七条第六款要求执法机构分析“如果经营者行使知识产权行为排除、限制了相关市场的竞争，则进一步考察该行为的有利影响以及该有利影响是否大于排除、限制相关市场竞争所造成的不利影响。”对于国家工商总局有意仔细考察行使知识产权行为的有利影响是否能抵消任何潜在不利影响，ABA 各部门表示十分赞同。

但是，当第十一条详述界定行使知识产权行为是否能提高效率的标准时，对于什么样的做法可视为排除或限制竞争，或者需要什么样的证据证明对竞争有不利影响，其规定又不太明确。由“知识产权的取得或者独占性许可……[以及]交叉许可协议”及“拒绝许可知识产权行为”和“控制关键技术”，第十一条似乎暗示这些常见的知识产权行为是排除或限制竞争的方式。这似乎推定了这些行为的不利影响，除非能提供事实证据证明存在有利于竞争的影响。

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[13] 同上，第 411 页。事实上，专门负责知识产权争端的美国联邦上诉法院已表示 “在已报导案件中，法庭并未就单方拒绝出售或许可专利而施加反垄断责任” *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1326 (Fed. Cir. 2000). *另见* Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 第 215 页 (“强制许可在我们的专利制度中非常罕见”（“Compulsory licensing is a rarity in our patent system.”））；*另见*美国司法部及联邦贸易委员会，《反垄断执法及知识产权：促进创新和竞争》（ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION）（反垄断执法及知识产权）第 32 页 (2007) (“仅是单方无条件拒绝许可专利的反垄断责任在专利权和反垄断保护间并不发挥重要作用。”)。经济学方面亦警告政府不要进行干预，若干预会丧失巨大效益，而且理论上确定竞争损害可能存在难度，单这一点即表明在对某一作法提出谴责之前需进行定量分析。*比如，参见* Carlton, *supra* n.11, 第 672-73 页。确实，由于单方无条件拒绝许可是设立知识产权的具体法律明确规定的一项核心权利，因此事实上难以想象可根据竞争法将必需设施原则适用于知识产权。

[14] 比如，欧洲法院仅在“极个别情况”(涉及有关数据的极为广泛的知识产权许可)以及达到了严格限制（在进行专利许可时从来不会出现这种情况）的情况下强迫获得知识产权。*比如*，IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, All ER (EC) 813 (2004)（只有在如下情况下才强迫获得知识产权，即：知识产权对于在市场上进行竞争是必不可少的，而且没有可行的替代品；存在知识产权供应的上游市场；寻求获得知识产权的一方证明：其有意销售存在市场需求的新产品，或有意为不同的市场提供产品；拒绝会排除二级市场上的所有竞争）。美国律师协会上述各部认为：仅在该等极个别情况下适用必需设施原则保证如下考量的正当性，即：是否应适用于知识产权，以及若适用，是否应使用所有标准，以确保即使是占支配地位的经营者亦不会被随时或不公平地迫使许可其知识产权。

ABA 各部门建议，第十一条应得到澄清，并与第七条第六款保持一致，要求调查知识产权行使行为的反垄断执法机构，收集和评估证明知识产权行使行为具有不利于竞争影响的证据，并权衡该知识产权行使行为的不利影响和有利影响，而并非推定这些行为具有不利竞争的影响。一项知识产权许可附加的限制是否在第十一条项下合法，应取决于该限制是否阻碍了在不许可该项知识产权的情况下会出现的竞争。[15]第十一条所列行为类型本身都不是反竞争的；相反，（与任何知识产权行使行为一样）行为存在不利影响的潜在可能取决于各方的市场控制力、许可的性质和范围、所涉及的知识产权，以及第十条所述的其他因素。例如交叉许可，因为允许竞争对手间依赖彼此的创新，而能促进竞争。但如果交叉许可是在拥有显著市场控制力的竞争对手之间达成，而且是排他性的，进而构成各方之间不向任何其他市场参与者授予许可的协议，那么该交叉许可就可能存在不利影响，但还是需要提供这种影响的证据。此外，可将第十一条所规定的行为的具体类型交叉援引至《指南》中，并说明列明这些行为在那些情形下可能对竞争有不利影响，例如第十六条和第十七条关于拒绝许可的内容。

ABA 各部门还认为，可能很难适用两套复杂的标准来界定所主张效率的有利影响是否能抵消任何不利影响。首先，第十一条第二款要求相关行为是“效率产生所必不可少的”，这一项就是个过高的标准。实践中，要界定某知识产权行使的限制性行为是否“必不可少”极为困难。界定特定行为是否“必不可少”将要求国家工商总局进行推测性调查，以得出理论上限制性程度更低的替代行为。但这些理论上限制性程度更低的替代行为，在实际商业情形中对知识产权所有人来说可能不现实。ABA 各部门同意，如果知识产权所有人能通过限制性程度明显更低的方式来明确实现所主张的效率，那么国家工商总局就不必考虑该效率主张。但另一方面，在某些案件中具有有利竞争影响的行为可能不一定是真的“必不可少”的，例如捆绑许可。在这些情况下，不应“要求知识产权所有人考虑假设和理论上的替代方案”来为其行为提供合理理由。[16]另外，根据知识产权所有人所处的特定市场情形，其有利竞争的效率的评估，以及实现效率的限制条件的合理必要性评估，可能会有所不同。例如“因满足新的市场进入者的需要而合理的一项限制条件……可能在不同市场情形下就不具有有利竞争效率的合理性”。[17]

因此，各部门提议将“必不可少”一词替换为“合理必要”一词。这一标准与“合理原则”标准相符，而“合理原则”标准是其他司法管辖区用以分析商业行为是否反竞争的默认分析方式。美国反垄断执法机构一般只考虑“在协议签订时，可行的、限制性程度明显更低的方式是否合理存在。”[18]

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[15] 美国司法部及联邦贸易委员会，《知识产权许可反垄断指南》（美国知识产权指南）第 4.1.2 条（1995 年），见 http://www.justice.gov/atr/public/guidelines/0558.pdf。

[16] 关于对技术转让协议适用欧共体条约第 81 条的委员会通知，第 149 条（2004 年），见 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF（“委员会通知”）。又见美国知识产权指南第 4.2 条（“调查机构不会寻求理论上限制性更小，但在各方所处的实际商业情形下不具现实性的替代方案。”）。

[17] 美国知识产权指南第 4.2 条。

[18] 联邦贸易委员会和美国司法部，《竞争对手间合作反垄断指南》第 9 页（2000 年）。又见美国知识产权指南第 4.2 条。另一种选择是设立一种浮动标准，在反竞争影响很明确的情况下，它要求行为和所主张的效率之间具有更密切的联系。这种标准与美国反垄断执法机构评估合并效率的方式类似。参见美国司法部和联邦贸易委员会《横向兼并指南》第 10 条（2010 年）。

第二，第十一条第三款中要求“产生的效率必须能够为消费者所分享”也可能较难执行。某些效率可能对生产成本有直接影响，而其他效率产生的影响可能是间接的，如使创新更加容易或更有可能。在多数情况下，对生产成本有直接影响的效率会将影响“传导”到消费价格，但是“传导”效果通常难以准确衡量。有间接影响的效率对消费者的价值，例如使创新更加容易或更有可能的那些效率，则更难以衡量。

尽管如此，降低边缘成本的效率一般会传导给消费者，即使是由拥有市场控制力的公司产生的效率。[19]这是因为当公司面临向下倾斜的需求曲线时，新的利润最大化的价格就会降低。因此，ABA 各部门提议删除第十一条第三款，或者予以说明确保可能降低成本或刺激创新的所有效率获益都满足该标准。由于这些效率获益非常可能使消费者受益，如果国家工商总局执行更严格的标准，可能造成对总局稀缺资源的非充分利用。

B. 第十八条　　涉及知识产权的搭售

指南草案的第十八条正确的指出了搭售有利于竞争的可能性。[20] 但是，原文可能被解读为符合最后一段所列的四个条件的搭售行为既不需考虑其有利于竞争的可能性也不需证明其对于竞争的损害而必然被禁止。由于搭售有可能产生有利于竞争的影响，美国反垄断执法机构决定在对涉及知识产权的搭售行为进行处理时，仅当其对被搭售品市场的竞争产生不利影响，并且其有利于竞争的影响不能抵消其不利影响时，才对该搭售行为进行处罚。[21] 因此，本部建议在本条最后一段提及考虑因素时添加“搭售对竞争产生的有利影响或效率性”这一因素，以及对第三个条件进行进一步修改完善，明确要求“搭售对被搭售品市场有实质性**负面**影响”。这些修改旨在将第十八条与第七条和第十一条中所规定的程序进行统一。

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[19] 造成固定成本降低的效率也可能对价格产生直接影响。例如，固定价格的减少可以降低公司长期边缘成本，使公司能长期在盈利的情况下维持低价格。另外“固定成本”节省是经济的资源节省并能使社会受益。在研发程度较高且创新竞争激烈的行业里，例如计算机和电信行业，研发费用的固定成本降低可能带来“为了降低公司实现盈利机会必须克服的‘障碍’而增加投资研发的刺激。”Dennis W. Carlton 著，《修订横向兼并指南》(*Revising the Horizontal Merger Guidelines*)，JOURNAL OF COMPETITION LAW & ECON. 2010 年第 6 期第 619，629-630，639 页。这些增加的激励反过来可能会带来造福消费者的新的或更高品质的产品和服务。*同上*。

[20] 参见 Dennis W. Carlton 与 Michael Waldman 著 *Tying*, 发表于 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (2008); Phillip E. Areeda 与 Herbert Hovenkamp 著 ANTITRUST LAW ¶1717b2, 第 185 页(2d ed. 2004) (文中提到搭售有可能导致“消费者……比无搭售时以同样的花费得到更大的价值”); Marius Schwartz 与 Gregory J. Werden 著 *A Quality-Signaling Rationale for Aftermarket Tying*, 64 ANTITRUST L.J. 387, 388 (1996) (“如果当耐用品的质量被证明为优秀时其配套产品的需求也有足够的提高，则搭售可以使提供质优的耐用品有利可图。”)。

[21] 参见美国知识产权指南§ 5.3。有些情况下，搭售可能阻抑搭售品市场的市场进入，从而损害竞争。参见 *United States v. Microsoft Corp.*, 253 F.3d 34, 92-95 (D.C. Cir. 2001)。

C. 第十九条　　涉及知识产权的不合理的交易条件

第十九条对第十六条第四项所指的“涉及知识产权的不合理交易条件”做出具体界定。第十九条第一项列出一类“不合理”交易条件为“要求交易相对人将其改进的技术进行独占性地回授”。[22] 对于第十九条是否旨在对于“排他性授权”的回授作出规定有一定的模糊性。回授只有当被许可人使用许可人的知识产权而创造出的新的知识产权只能为许可人与被许可人所使用的情况下，才是排他性的。[23] 本部建议对这点作出更明晰的界定。指南草案实质上禁止了由知识产权形成市场支配地位的经营者在其许可协议中加入此类回授条款。如果旨在对于“排他性授权”的回授作出规定，本部认为第十九条第一项的规定过于严苛，有可能限制一些原本有利于竞争的授权协议。因此，本部建议删除第十九条第一项，或阐明并非所有的排他性授权都被反垄断法禁止，或阐明排他性授权要经过如第七条和第十一条所规定的审查后才能确定是否应被反垄断法禁止。[24]

回授在很多情况下都是明显有利于竞争的。回授“提供途径使得被许可人和许可人共担风险，并对许可人因为在其授权技术的基础上所产生的进一步创新予以回报，从而促进了创新和对创新产物的进一步许可。”[25] 另一方面，回授在有些情况下可能产生不利于竞争的影响，例如 (1)当回授的范畴超出该专利之外；（2）回授是用来掩盖或促使交易各方的卡特尔行为；（3）回授可能大大降低被许可人进行研发的动力从而限制创新市场的竞争。

通常认为，非排他性回授比排他性回授更有可能有利于竞争，因为后者有可能降低创新的动力。[26] 然而，排他性回授并非一定排除、限制竞争。[27] 排他性回授有可能有利于竞争，包括它可能“保证许可人不会因为被在他所拥有的技术的协助下而产生的改进技术排除在外而不能有效竞争”。[28] 例如，含“畅通”条款的排他性回授使被许可人可以充分利用改进技术知识产权，从而比不含此条款的回授更有可能有利于竞争。[29] 本部认为工商总局应将现实情况与假设情况进行对比来衡量排他性回授

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[22] 第二十一条第二项是一项相似的对于专利联营中排他性回授的禁止条款。同样，本部也建议删除或修改该条款。

[23] 在有些情况下，排他性回授可能欠缺一项“畅通”条款，从而限制了被许可人对于该改进技术的充分应用。

[24] 本部认识到除反垄断法之外的规章政策也可能对排他性回授有一定的限制，此处不对这些其他因素发表意见。

[25] 美国知识产权指南§ 5.6。

[26] 参见 Hovenkamp et al., IP AND ANTITRUST §25.3, 第 25-6 至 25-7 页等文献。

[27] 参见 Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947) (排他性回授本身并不必然违法)等文献。

[28] 见 *Int’l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043, 2007 U.S. Dist. LEXIS 89947, at *7 n.18 (C.D. Cal. Oct. 29, 2007) (援引美国知识产权指南§ 5.6 第 30 页)。另见 *Santa Fe-Pomeroy, Inc. v. P&Z Co.,* 569 F.2d 1084, 1102 n.34 (9th Cir. 1978) (“在与被许可人之间的关系上，许可人有权要求对其研发投入给予一定的保护……回授是一种寻求这类保护的合理手段”)。

对于创新可能具有的削弱性效应，即考虑如果该项交易条件不存在时创新情况会如何。对于排他性回授一概禁止将会在不增加消费者福利的前提下对创新产生不必要的削弱效应。[30]

第十九条第三项禁止协议附加“限制交易相对人在许可协议期限届满后，制造、使用、销售竞争性商品或者采用竞争性技术”的条件。虽然*广泛性*的对交易相对人在许可协议期限届满后制造、使用、销售竞争性商品或者采用竞争性技术进行限制有可能排除、限制竞争，*局限性*的对交易相对人就这些行为在其构成侵权时进行限制是不损害竞争的。实际上，这也正是许可协议设立期限（先于知识产权过期前）的初衷：协议过期后，被许可人无权再使用此知识产权。本部建议对第十九条第三项进行完善，以阐明并非禁止许可协议设立期限。并且，如果在许可协议期限届满后交易相对人在制造、使用、销售竞争性商品或者采用竞争性技术的过程中构成侵权，许可人对此类侵权的捍卫行为不构成损害竞争行为

D. 第二十三条 著作权保护中的技术措施行为

我方对国家工商总局确认了一项长期原则表示赞赏，即著作权人不会仅仅因为拥有专有权或行使其专有权而被推定具有市场支配地位，且著作权人行使这些权利本身并不会招致政府干预。在最终版的指南中清楚反映这一原则，并不再对使用技术措施创设任何强制性要求或限制对于在数字环境下著作权的行使是十分必要的。同时，保证最终版的指南不会导致中国违反其国际义务（比如，世界知识产权组织的版权条约以及组织表演和录音制品条约）也十分关键。关于第二十三条的最后一款，我方建议，合适的标准应该是看该特定的技术措施是否对竞争有不合理的负面作用。如果该技术措施对竞争没有不合理的负面作用，则其他对竞争影响较小的替代方法存在与否无关紧要。此外，如果该技术措施的主要作用是保护著作权，则我方认为其效果对于竞争的影响不应该被认为是不合理的。[31] 最后，作为善意提醒，指南草案可能会将国家工商总局至于对技术措施实施普遍管理的地位，我方反对这一作法。[32]

III. 澄清

A. 兜底条款

指南草案创设了几个兜底条款，根据这些条款执行机关可以禁止某些“其他行为”。比如，第十三条第 6 款和第十四条第 3 款禁止“（执法机构）认定的滥用知识产权的其他垄断协议”（知识产权）；第十六条禁止“（执法机构）认定的其他滥用主要由知识产权形成的市场支配地位的行为”；

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[29] 参见 Hull v. Brunswick Corp., 704 F.2d 1195, 1201-02 (10th Cir. 1983) (主张含畅通条款而不以此附加费用的排他性回授不应判为本身违法) 等文献。

[30] 在美国，法院要求证明排他性回授产生排除、限制竞争的效果。见 Transparent-Wrap Machine Corp. v. Stokes & Smith Co.; Hull v. Brunswick Corp 等。

[31] 一个更可取的方式可能是整个删去第二十三条最后一款，并将第二十三条第二款并入第十八条。

[32] 我方还建议国家工商总局考虑一下国家版权局正在考虑的著作权法修改提案，里面专辟一章规定了对技术保护措施的保护。

及第十九条禁止实施“（执法机构）认定的其他不合理的交易条件。”我方郑重请求国家工商总局为何种特别因素在适用这些兜底条款时会被考虑提供指引。

B. 具有市场支配地位的经营者在相关市场中滥用知识产权的行为

值得肯定的是，第九条和第十六条释明了经营者不会因为仅仅拥有知识产权而被推定其具有市场支配地位，执法机构只会对知识产权已构成“经营者获得市场支配地位的一个重要甚至是关键因素”的情况启动调查。我方郑重请求进一步在指南中明确：与知识产权有关的行为如果构成对市场支配地位的滥用则必须是该行为既滥用了知识产权，且在其所处的市场中，该行为取得市场支配地位是源于知识产权。比如，如果经营者在一个给定产品的市场中取得了支配地位，知识产权是获得市场地位的如第九条所言的“重要因素”，但经营者并未在相关技术市场中获得支配地位，则仍应允许该经营者根据第十七条拒绝许可其知识产权。

C. 与知识产权有关的明显垄断行为的构成要件

指南草案第三条似乎明确了经营者只有在滥用知识产权，且同时排除，限制了竞争的情形下，才会触犯《反垄断》法。我方完全支持上述做法。要构成《反垄断法》下的明显垄断行为需要同时满足两个要件：第一，该行为是一种滥用知识产权的行为（仅认定具有市场支配地位是不够的）；第二，行为必须达到排除或限制竞争的效果。占支配地位的经营实体仅仅实施了与知识产权有关的行为不足以认定其限制了竞争，因为行使知识产权的当然结果就是限制竞争。知识产权的基本要素就是排除他人使用的能力。因此，经营者的行为还必须以某种方式构成滥用。但是，指南草案似乎也在不同的条款中（以第 2 条为例）建议：对与知识产权有关的滥用知识产权行为或排除、限制竞争的行为需要进行分析认定。本草案因此建议在指南的定稿中进一步明确：与知识产权相关的违反《反垄断法》的行为必须是既滥用了知识产权且达到了排除或限制竞争效果的行为。

D. 第七条 知识产权领域反垄断执法的一般分析步骤

《指南草案》第 6 条确认了，知识产权及其本身，属于反垄断执法机构之外的其他行政机关的管辖范围。第七条的子条款中将反垄断执法限定在评价行使知识产权的行为，而非其效力，这是很适当的。与之相似，在美国（除了一些有限的情况，比如通过欺骗专利局获得了专利权）[33]，知识产权的有效性不属于反垄断执法机构的管辖范围，而是由美国专利与商标局和法院决定。反垄断执法机构仅评价行使知识产权的行为对于竞争的效果。[34]此外，美国的专利权、商标及著作权在法律上都是明确地被推定为有效了。[35]

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[33] 请见 *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Handgards, Inc. v. Ethicon,Inc.*, 601 F.2d 986 (9th Cir. 1979).

[34] 请见 U.S. IP GUIDELINES §§ 1.0, 2.0; ANTITRUST ENFORCEMENT AND IPR at 1-13.

[35] 请见 35 U.S.C. §282; Microsoft Corp. v. i4i LP, 564 U.S. __, 131 S. Ct. 2238, 2245 (2011) (presumption of validity of patents); 15 U.S.C. §§1057(b), 1115(a); ZobmondoEnt. v. Falls Media, 602 F.3d 1108, 1113-14 (9th Cir. 2010) (presumption of validity of trademarks); 17 U.S.C. §410(c) (presumption of validity of copyrights).

为了同第七条子条款中“行使”这一措辞相一致，本指南建议修订第七条的序文，阐明反垄断执法机构“将推定任何潜在的知识产权为有效，除非有证据证明该权利是权利人通过欺诈手段从管理知识产权的有关部门获得的，或者该权利人明知该权利无效，一般采取以下步骤。”但是，对于那些可能并未经过特定的有效性审查即从知识产权管理部门取得授权的知识产权，本指南可规定有效性推定不对其适用。对于知识产权效力推定的阐释也有助于厘清反垄断执法机构同与其相对应的其他行政机关及法院的管辖界限。[36]

E. 第 12 条 经营者相互关系及其市场地位对竞争分析的影响

第 12 条针对在市场份额达到何种水平时经营者可以免于接受反垄断审查提供了实用的指导。但从字面看，可将第 12 条解释为：市场份额超过该条所列标准的经营者将被推定具有市场势力。该等解释与《国际竞争网络建议规范》不符，[37] 美国律师协会上述各部认为其并未体现工商总局的意图。因此，上述各部谨建议在 12 条中再加入一句，明确说明“若（经营者）市场份额超过上述标准，则并不必然被推定具有市场势力”，而是“根据市场结构、竞争形势以及反竞争效果的证据等具体情况（如第 9 条规定）作出决定。”

此外，第 12(2)条提及“在相关市场上存在至少其他两家拥有可替代知识产权的经营者。” 鉴于该等 “可替代知识产权”可能包括质量不高的 IPR、功能低下的可替代知识产权，并/或可能导致高昂的转换成本，工商总局可考虑将该术语改为“具有密切替代关系的知识产权。”

最后，第 12 条第三段未明确说明据以断定安全港的市场类型，而美国和其他法域的指南主要着重于商品市场。[38] 鉴于第 8 条规定相关市场可以是技术市场，也可以是含有特定知识产权的产品市场，因此建议工商总局最好能明确：在计算第 12 条中规定的安全港限制时是仅参照商品市场、还是也会考虑技术市场。[39]

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[36] 事实是反垄断执法机关一般将知识产权推断为有效，除非在其他法庭根据其他法律不排斥以欺诈方式获取的知识产权的效力。

[37] *见*国际竞争网络单方行为工作小组(ICN Unilateral Conduct Working Group)，根据单方行为法而进行的支配地位/实质市场势力分析（DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS），第五部分（ “一般而言，拥有超出安全港之外的市场份额是认定支配地位/实质市场势力份额的必要但不充分条件”(Possession of a market share outside the safe harbor is generally necessary but insufficient for finding dominance/substantial market power ”)) ， *见* http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf

[38] 见《美国知识产权指南》§4.3；新加坡竞争委员会（Competition Commission Singapore），《关于处理知识产权的指南》（Guidelines on the Treatment of Intellectual Property Rights），2007 年，¶3.17；日本公平贸易委员会，《在反垄断法案规定下使用知识产权的指南》（Guidelines for the Use of Intellectual Property under the Antimonopoly Act），第 2(5)部分。

[39] 在涉及知识产权时，欧盟界定“安全港（safe harbor）”可能也考虑技术市场。*见《欧盟有关将*<欧共体条约>第 81 条适用于技术转让协议的指南》(EU Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements), 2004 (C101/02), ¶9。此外，工商总局可能希望仅在无法计算商品市场份额时考虑技术市场（*见《美国知识产权指南》*§4.3），或单对产品市场分析不足以说明对技术间竞争或研发竞争影响的情况下考虑技术市场（*见* 新加坡竞争委员会，《关于处理知识产权的指南》，2007 年，¶¶ 3.18-3.20）。

F. 第十六条 滥用主要由知识产权形成的市场支配地位

指南第十六条第一款禁止 “以不公平的高价许可知识产权”. 正如前几章的意见所指出, 要求以 “公平” 或 “合理” 的价格，及禁止“高价” 或 “低价”, 是“不符合竞争政策的公认准则及现代经济理论, 并有增加以法律惩处积极竞争的趋势, 也直接违反了公认的竞争法的宗旨”.[40] 大体言之, 我们认为竞争法不应禁止有独占权的经营者对其商品和知识产权进行最高定价. 原则上讲，经营者“收取垄断价格不仅没有违法, 而且是有利于吸引商业才能，促进创新及经济成长的风险承担”.[41] 由于知识产权本身目的是鼓励对于高风险高成本研发的投资, 此效应在知识产权领域尤其深切. 为了达成研发及保护竞争之间的平衡, 垄断价格只有在源于其他非法行为时才属违法.在此处缺乏明确性会导致许多在知识产权领域的重要问题.

首先, 知识产权不同于一般的商品化产品. 对于商品化产品,用经营者的成本价格的比率来决定其要价是否高于竞争价格是有一定的可能. 此方法在欧盟对于过高订价申诉案中用过有限的几次.[42] 但是，由于知识产权通常是高差异商品, 比较不同的产权许可的价格极为困难，甚至不可能。况且知识产权的递增成本几乎是零,使得成本价格比率失去意义. 即使能分析研发知识产权的成本, 也没有架构可以对知识产权的价格是否 “不公平” 提供适当的定义. 因此, 经营者在判断其知识产权许可是否违反指南时，将面临极大的不确定性.

第二, 禁止 “以不公平的高价许可知识产权” 有可能最终导致未曾预料到的在不适当的情况下强制许可知识产权的后果.[43] 《反垄断法》第五十五条表示经营者依照有关知识产权的法律行使知识产权的行为不受《反垄断法》干涉；通常只有经营者使用知识产权“排除、限制竞争的行为”才会被禁止。依本文第一章所提, 拥有排除的权利是知识产权的核心要素之一. “不公平的高价”的标准可能会阻止经营者取得对于创新的投资及承担风险的补赏. 进一步而言,价格不高并不表示市场具有健康的竞争. 最后, 由于增加更多一单位的知识产权许可的边际成本通常为零或近于零, 以边际成本为基础来决定知识产权的价格是否过高或过低是非常不准确的.

G. 第 21 条 专利联营

第 21 条正确地指出，专利池在“促进互补性技术的一体化、降低交易成本……等方面具有一定的积极作用”。就允许对专利池中的专利单独授予许可的专利池而言，不太可能会产生反竞争效

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[40] 2005 Comments on the AML at 2, 17-18.

[41] *Trinko*, 540 U.S. at 407.

[42] *See*, *e.g.*, United Brands Company and United Brands Continental B.V. v. Commission of the European Communities, Case 17/76 E.C.R. 207 (1978).

[43] 竞争法有可能在监管知识产权的价格方面起到有限的作用，比如对于知识产权权利人的诈欺行为的救济。但这不等同于对知识产权许可进行价格管制，也就是第十六条第一款的实际效果.

果。但同时，第 21 条还提到，“专利联营也可能具有排除、限制竞争的效果，因此需要对其进行反垄断分析认定”。各部门希望能够澄清在何种情况下需要对专利池进行反垄断分析认定。[44]

H. 第 22 条 标准制定和实施中的行使专利权行为

第 22 条规定了在判断标准的制定和实施行为是否构成对《反垄断法》的违反时所应适用的四要素检验标准。各部门建议进行以下三点澄清：

第一，建议澄清第 22 条(1)-(4)项中所列出的四项要素之间是相互关联的。为澄清该问题，可以在第三和第四项要素中插入“以及”一词，并在第四项要素后添加以下句子：“只有在四要素均具备的情况下，一行为才会构成对反垄断法的违反。”

第二，我们建议澄清，就标准的制定而言不存在一般性的披露义务。按照草案的内容，相关规定可以被解释为施加了默示的披露义务，而美国法下或相关国际规则并未规定这种义务。[45]因此各部门建议增加以下表述以便澄清：

> 第 22 条 然而，符合以下条件的行为可能会构成对反垄断法的违反…(2) (a) 专利持有人或专利申请人是标准制定组织（SSO）中有投票权的积极参与者；~~专利权人或者专利申请人不按标准制定组织的有关知识产权政策披露其可能会被纳入标准的专利信息或者已经公开的专利申请信息；~~(b) SSO 发布的书面政策所规定的相关披露义务是参与的条件之一；(c)专利持有人或申请人欺诈性地或故意地违反了 SSO 的披露义务；(d) 标准通过之后，专利持有者以其必要专利对抗标准强制性规定的实施人；(e) 如果专利持有者或专利申请人当时履行了其披露义务，标准就会纳入另一种不同的技术；以及(f) 专利持有者的行为对相关市场的竞争造成了或可能会造成不利影响。

第三，本部门强烈建议对第 22 部分最后一段进行如下修改：

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[44] 例如，可参见美国知识产权指南§5.5。

[45] 例如，可参见 Rambus Inc. v. FTC, 522 F.3d 456, 464-67 (D.C. Cir. 2008)；Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1013 (Fed. Cir. 2008) (认定在判断专利持有人是否有进行披露的义务从而导致其默示地放弃了主张专利的权利时，其依据应是专利持有人是否参加了标准制定组织，标准制定组织的书面政策是否提出了该种披露义务，以及如果提出了，披露的范围如何)；Dell Computer Corp., 121 F.T.C. 616 (1996) (起诉状及经同意的裁定)； 欧盟委员会，关于横向合作协议适用欧洲联盟运行条约第 101 条的指南(2011/C 11/01) ¶¶268, 299 [欧盟委员会第 101 条指南]，见 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF 。

~~当经营者的某项专利技术纳入国家或者行业强制标准时，应当在相关协议中明确许可费的上限。该许可费上限不应明显超过专利纳入相关标准前的许可费水平。~~标准制定机构可能希望在标准发布之前，鼓励参与的专利持有人在自愿的基础上明确其按照互惠原则，同意对标准采纳的必要专利授予许可的主要条件（包括最高价格、期限以及使用领域）。[46]

I. 第 24 条 著作权集体管理组织的行为

第 24 条明显具有确保著作权集体管理组织（CMOs）合理运行的目的，尤其是在确保透明性、可归责性和良好管理方面，对此，各部门表示赞赏。然而，各部门注意到指南草案允许对 CMOs“(一)没有正当理由，收取过高的代理费或许可费”进行干预，此条款类似于第 16 条禁止“以不公平的高价许可知识产权”的规定。各部门在第 16 条中对于该方面的意见同样适用于第 24 条。而且，在 CMO 所代表的著作权人个体仅拥有很小的市场力量的情况下，国家工商总局也会考虑 CMO 的费用是否存在不合理。各部门担心 CMOs 在其收费合理性问题上可能会受到过多审查，这可能带来处理结果相互冲突的问题。

结论

各部门认可在制定指南过程中已经进行的大量工作，同时也感谢在继续执行、实施反垄断法并就反垄断法问题提供明确指引的过程中，国家工商总局对于我们以及其他相关方意见的考虑。

附录

对国家工商总局关于《禁止垄断协议行为的规定》，《禁止滥用市场支配地位行为的规定》，以及《禁止滥用行政权力排除、限制竞争的规定》的意见的联合评论，2010 年 7 月 2 日

美国律师协会反垄断法部及国际法律部关于国家工商总局《禁止垄断协议和滥用市场支配地位行为的规定》草案的联合评论，2009 年 5 月 29 日

美国律师协会反垄断法部、知识产权法部和国际法律部关于《中华人民共和国反垄断法》建议稿的联合提案，2005 年 5 月 19 日

[46] 美国反垄断机构和欧盟委员会均承认了该种事前讨论具有促进竞争的潜力。*参见* FTC, “认识标准制定中许可使用费商谈所具有的促进竞争的潜力(Recognizing the ProCompetitive Potential of Royalty Discussions in Standard Setting),” (2005 年 9 月 23 日)，见 http://ftc.gov/speeches/majoras/050923stanford.pdf；欧盟委员会第 101 条指南¶¶257-335。各部门建议，就标准所采纳的必要专利的 RAND 许可使用费问题，一种较为合适的衡量方法是以专利技术对产品的价值为基础，排除任何因专利技术被纳入标准而产生的附加价值。

中华人民共和国工商总局《关于知识产权领域反垄断执法的指南》第五稿
指南草案的非官方译本

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, SECTION OF INTELLECTUAL PROPERTY LAW, AND SECTION OF INTERNATIONAL LAW ON THE SAIC DRAFT GUIDE ON ANTI-MONOPOLY LAW ENFORCEMENT IN THE FIELD OF INTELLECTUAL PROPERTY RIGHTS

October 30, 2012

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law (together, the "Sections") of the American Bar Association ("ABA") respectfully submit these comments on the Fifth Draft of the Guide on Anti-Monopoly Law Enforcement in the Field of Intellectual Property Rights (the "Draft Guide") of China's State Administration for Industry and Commerce ("SAIC").[1] The Sections appreciate the substantial thought and effort of the SAIC reflected in the Draft Guide, and take the opportunity to offer these comments (the "Comments") in the hope that they may further assist in the completion of the final Guide. The Sections are available to provide additional comments, or to participate in consultations with the SAIC, as appropriate. The Sections' Comments reflect their expertise and experience with both U.S. and international competition law, as well as with the underlying economic principles.

Executive Summary

The Sections commend SAIC's incorporation in the Draft Guide of economic analysis and current thinking on these issues, and offer specific suggestions to provide even clearer guidance and inform enforcement policy.

First, the Sections respectfully urge the omission of Article 17(2), which would for the first time expressly extend the essential facilities doctrine to intellectual property rights ("IPRs"). This provision is in tension with WTO obligations and international norms. At the very least, the Sections urge that the provision be revised to create a strong rebuttable presumption against an essential facilities claim involving IPRs, and to require a showing that the competitor seeking access cannot practically or reasonably work around the IP, and that access would further the legitimate interests of consumers.

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[1] These comments are based on an unofficial translation of the Draft Guide. The Draft Guide and the unofficial translation are appended for reference.

Second, the Sections recommend replacing unnecessarily broad prohibitions and onerous and difficult to prove requirements with standards that comport with the "rule of reason" standard that is the default mode of analysis in other jurisdictions. For example, Article 19 prohibits all exclusive grantbacks by companies with a dominant market position without any exception for potentially procompetitive grantbacks. The Sections respectfully suggest revising this article to bring it into conformity with international norms.

Lastly, the Sections suggest a number of clarifications. For example, Article 12 provides useful guidance on market share levels that create safe harbors from antitrust scrutiny. However, as written, Article 12 could be interpreted as creating a presumption of market power for market shares that exceed the stated thresholds. The Sections respectfully suggest Article 12 be augmented by a sentence clarifying that "market shares above the thresholds will not necessarily be presumed to indicate market power," and that rather "such determination will be made according to the specific circumstances of the market structure, the competitive situation, and evidence of anticompetitive effects, as stated in Article 9."

I. Article 17. Refusal to License Intellectual Property Rights

Article 17 begins with the general principle that unconditional or non-discriminatory unilateral refusals to license IPRs are "normally" permissible. The Sections agree with (and welcome) this general statement, which is consistent with both U.S. law and international norms.[2] The Sections, however, respectfully urge the deletion of the proposed exception to the general rule found in Article 17(2) for essential facilities.[3] China's Anti-Monopoly Law (the "AML") does not include any reference to the essential facilities doctrine, nor does it define "abuses" of IPRs. Article 4(5) of the SAIC Rules on Prohibition of Abuses of Dominant Market Positions ("Rules on Dominant Market Positions") prohibits unconditional refusals to deal by dominant firms where "the product or service" is an essential facility, but it does not address whether the doctrine applies to the application of IPRs. Article 17(2) would, for the first time, expressly extend the essential facilities doctrine to IPRs.[4]

The Sections' prior comments recommended that the essential facilities doctrine be deleted in its entirety from the AML and implementing regulations. At the very least, the Sections urged, it should be "made clear that the Essential Facilities Doctrine does not apply to

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[2] *E.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004); *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C45) ¶ 75 at 7; ABA SECTION OF ANTITRUST LAW, ANTITRUST ISSUES IN INTERNATIONAL IP LICENSING TRANSACTIONS at 2 (2012) ("The laws of most jurisdictions are consistent in providing that the majority of arrangements relating to the licensing of (or refusal to license) intellectual property do not violate competition laws.").

[3] The Sections respectfully suggest that the SAIC also consider limiting Article 17(1) to situations where a holder of standard-essential patents ("SEPs") violates a commitment to a standard setting organization ("SSO") to license those patents under reasonable and nondiscriminatory ("RAND") terms.

[4] The Sections assume that the reference to Article 16 in the first sentence of Article 17 means that the dominant market position implicated in Article 17 was achieved through the IPR that the holder has refused to license.

IPR at all or only in extraordinarily limited circumstances."[5] The Sections are unaware of any developments since their earlier comments that support a change. This is because the very "essence" of an IPR is the right unilaterally to exclude.[6] With limited exceptions, China's intellectual property laws expressly authorize intellectual property holders unilaterally to refuse to provide their inventions and works to others.[7] Applying the essential facilities doctrine to IPRs would substantially impinge upon IPR holders' core right (the unilateral right to exclude), create disincentives for competitors to develop their own competing IPR, and create long-term disincentives to innovate in general.[8]

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[5] 2005 Comments on the Proposed Anti-Monopoly Law of the People's Republic of China, at 18-19, 21 ("2005 Comments on the AML"), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_prc2005wapp.authcheckdam.pdf; *see also* July 2, 2010 Joint Comments on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements, of Abuse of Dominant Market Position and of Abuse of Administrative Powers ("2010 Comments") at 5, 10-11, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_sil_saic.authcheckdam.pdf; May 29, 2009 Joint Comments on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position ("May 2009 Comments") at 10, 35-36, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_saic_200906.authcheckdam.pdf. Copies of these Comments are appended for convenience of reference.

[6] *See, e.g.*, Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 215 (1980) ("[T]he essence of a patent grant is the right to exclude others from profiting by the patented invention."); Stewart v. Abend, 495 U.S. 207, 228-29 (1990) ("[A] copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.").

[7] Patent Law of the PRC Art. 11. Moreover, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) grants owners of patents and trade secrets exclusive rights that are subject only to certain very limited exceptions.

[8] In formulating a test for refusals to deal, it is a mistake to focus solely on static efficiency (the impact of the refusal to license upon competition with the specific IP owner at issue) because this would ignore the long-term effects upon incentives to innovate. J. Thomas Rosch, *The Role of Static and Dynamic Analysis in Pharmaceutical Antitrust* (Feb.18, 2010) ("These static costs may be justified when the promise of a patent helps motivate the investment in (or disclosure of) an invention. It is generally accepted that patents motivating invention (or disclosure) generate more dynamic efficiencies than static losses."), *at* http://www.ftc.gov/speeches/rosch/100218pharmaantitrust.pdf; Donald F. Turner, *Basic Principles in Formulating Antitrust and Misuse Constraints on the Exploitation of Intellectual Property Rights*, 53 Antitrust L.J. 485, 485 (1985) ("[I]n the long run, technological progress contributes far more to consumer welfare than does the elimination of allocative inefficiencies caused by noncompetitive pricing."); *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1186 (1st Cir. 1994) ("exposing patent activity to wider antitrust scrutiny would weaken the incentives underlying the patent system"); *id*. at 1186-87 ("Congress itself made an empirical assumption that allowing copyright holders to collect license fees and exclude others from using their works creates a system of incentives that promotes consumer welfare in the long term by encouraging investment in the creation of desirable artistic and functional works of expression. We cannot require antitrust defendants to prove and reprove the merits of this legislative assumption in every case where a refusal to license a copyrighted work comes under attack.") (internal citation omitted); *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1209 (2d Cir. 1981) (holding that imposition of antitrust liability for an arguably unreasonable refusal to license a lawfully acquired patent "would severely trample upon the incentives provided by our patent laws and thus undermine the entire patent system"). Indeed, the possibility of such intervention can weaken or stifle an undertaking's ex ante incentive to innovate and invest in intellectual property. This is because the incentive to invest is highly dependent on the expected value of the intellectual property, or the rents that the undertaking expects to extract from its investment. The introduction of a novel product, even subject to significant market

In the experience of the Sections' members, a facility is rarely truly essential, and it has often been the case that those advocating forced sharing of an "essential" facility have underestimated the ability of determined competitors to compete around the facility, with resulting benefits to consumers. This is particularly true in fast moving technologies, where technological and market developments can present multiple opportunities to work around a competitor's IP, and it is relative easier to work around an IPR as compared to physical infrastructure. Recognizing these concerns, the United States Supreme Court has made it clear that it will treat so-called "essential facilities" claims with great skepticism, stating that courts should be very cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal.[9] The Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[10] explained that the exception recognized by the Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[11] was "at or near the outer boundary of Section 2 liability,"[12] and stated that the Court had "never recognized" the doctrine of essential facilities.[13]

If Article 17(2) is retained, it should be revised to include a strong rebuttable presumption against an essential facilities claim involving IPRs. In that case, the Sections further recommend revising Article 17(2) to require proof that (1) the competitor seeking access cannot practically or reasonably work around the IP, and (2) compelled access would further the legitimate interests of consumers. These revisions would bring Article 17 closer to international norms and more clearly consistent with SAIC's Rules on Dominant Market Positions.[14]

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power, can represent a gain to society, and is the underlying rationale of the U.S. patent system. Since social return to invention significantly exceeds private return, the monopoly profit expected from innovation creates the incentive for firms to undertake risky investments to provide the gain to society. Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*, 68 ANTITRUST L.J. 659, 672-73 (2001); Charles I. Jones & John C. Williams, *Measuring the Social Return to R&D*, 113 Q.J. ECON. 1119 (1998).

9 *E.g.*, *Trinko*, 540 U.S. at 408.

10 *Id.*

11 472 U.S. 585 (1985).

12 *Trinko*, 540 U.S. at 409-10.

13 *Id.* at 411. In fact, the U.S. Court of Appeals for the Federal Circuit, which specializes in intellectual property, has stated that there is "no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent." *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1326 (Fed. Cir. 2000). *See also* Dawson Chem. Co. , 448 U.S. at 215 ("Compulsory licensing is a rarity in our patent system."); s*ee also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (ANTITRUST ENFORCEMENT AND IPR) at 32 (2007) ("[A]ntitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections."). Economics also cautions against government intervention where large efficiencies could be lost, and that the potential difficulty in identifying a competitive harm by theory alone means one must turn to a quantitative analysis before condemning a practice. *See, e.g.*, Carlton, *supra* n.11, at 672-73. Indeed, because a unilateral and unconditional refusal to license is a core right contemplated expressly by the specific statutes creating IPRs, it should be virtually inconceivable that the essential facilities doctrine can be applied to IPR under competition law.

14 For example, the European Court of Justice has compelled access to IPR only in "exceptional circumstances," involving extremely broad IPR grants over data, and where strict limitations have been met—and never in a

II. Unnecessarily Broad Prohibitions and Onerous or Difficult to Prove Requirements

A. Article 11. Assessment of the impact of exercising intellectual property rights on competition

Article 11 appears to elaborate on Article 7(6), which requires enforcement agencies to analyze whether an "undertaking exercises intellectual property rights in a way which eliminates or restricts competition in the relevant market, conducting further analysis as to the positive effects brought about by the behavior and whether the positive effects outweigh the adverse effects caused by eliminating or restricting competition in the relevant market." The Sections commend the SAIC for its willingness to carefully weigh procompetitive effects that may offset any possible adverse impact of the exercise of IPRs.

However, while Article 11 details the criteria for establishing whether the exercise of an IPR is efficient, it is less clear regarding the practices that may be viewed as eliminating or restricting competition, or what evidence is necessary to show an adverse effect on competition. By referring to "acquisitions of IPR or exclusive license . . . [and] cross licensing agreements," as well as to "refusing to license intellectual property" and "controlling key technology," Article 11 seems to suggest that these common IPR activities are means of eliminating or restricting competition. This appears to presume adverse effects from such activities, unless factual evidence of procompetitive effects can be produced.

The Sections suggest that Article 11 be clarified and aligned with Article 7(6), by requiring the anti-monopoly enforcement authority investigating the practice to collect and evaluate evidence of anticompetitive effects of the conduct being examined that can be weighed against procompetitive effects, without any presumption that the practice is anticompetitive. The legality under Article 11 of a restriction in an IP license should depend on whether the provision restrains competition that would have occurred in the absence of a license.[15]. None of the listed types of conduct is anticompetitive in itself; rather, there is a potential for adverse effect (as with any exercise of IPRs) depending upon the market power of the parties, nature and scope of the license, and the IPR involved, as well as other factors described in Article 10. Cross-licensing, for example, can enhance competition by allowing competitors to build upon one another's

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patent licensing context. *E.g.*, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, All ER (EC) 813 (2004) (compelled access may be granted only where: the IPR is indispensable to compete in the market and there are no feasible alternatives; there is an upstream market for the supply of the IPR; the party seeking access proves that it either intends to sell a new product for which demand exists, or to supply a different market; and the refusal would exclude all competition in the secondary market). The application of the doctrine only in such exceptional circumstances warrants, in the view of the Sections, consideration both as to whether it should be applied at all in the context of IPR and as to whether, if it is to be applied, all the criteria should be applied as well to ensure that even dominant market undertakings are not readily and unfairly compelled to license their IPR.

[15] U.S. Dep't of Justice and Federal Trade Commission, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 4.1.2 (1995) *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf (U.S. IP GUIDELINES).

innovations. If the cross-license is between competitors with substantial market power and is exclusive such that it amounts to an agreement between the parties not to license any other market participants, it is possible that the cross-license could have an adverse effect, but evidence of such effect should be required. In addition, it may be helpful to cross-reference some of the specific types of conduct set forth in Article 11 to the section of the Guide that elaborates on the circumstances under which such conduct may have an adverse effect on competition, such as those practices listed in Article 16 and Article 17 for refusals to license.

The Sections also believe that, as written, it may be difficult to apply two of the enumerated criteria to determine whether the beneficial effects of the proposed efficiency may be credited against any adverse impact. First, the requirement in Article 11(2) that the conduct at issue must be "indispensable towards producing the efficiency" is too high a standard. It will be extremely difficult in practice to determine whether a given exercise of an IPR is literally "indispensable." Determining the "indispensability" of a given practice will require the SAIC to engage in the speculative search for a theoretically least restrictive alternative that may not be realistic in the practical business situation faced by the IPR holder. The Sections agree that if the IPR holder could clearly achieve the claimed efficiencies by significantly less restrictive means, then the SAIC should not give weight to the efficiency claim. On the other hand, there are practices that have procompetitive effects in some cases, such as bundled package licenses, that may not be literally "indispensable." The IPR holder should not be "required to consider hypothetical and theoretical alternatives" to justify its conduct in such cases.[16] Moreover, the evaluation of procompetitive efficiencies, and of the reasonable necessity of a restraint to achieve them, may vary based on the IPR holder's specific market context. For example, "a restraint that may be justified by the needs of a new entrant . . . may not have a procompetitive efficiency justification in different market circumstances."[17]

Therefore, the Sections propose replacing the term "indispensable" with the phrase "reasonably necessary." This standard would comport with the "rule of reason" standard that is the default mode of analysis in other jurisdictions to analyze whether a business practice is anticompetitive. The U.S. antitrust enforcement agencies generally consider only whether "practical, significantly less restrictive means were reasonably available when the agreement was entered into."[18]

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[16] Commission Notice on Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements ¶ 149 (2004) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0002:0042:EN:PDF ("Commission Notice"). See also, U.S. IP Guidelines § 4.2 ("[T]he Agencies will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties.").

[17] U.S. IP Guidelines § 4.2.

[18] FTC and U.S. Dep't of Justice, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS at 9 (2000). See also, U.S. IP Guidelines § 4.2. Another alternative is to create a sliding scale that requires a closer link between the conduct and the purported efficiency in cases where the anticompetitive effect is clear. Such a standard would be analogous to the U.S. antitrust enforcement agencies' approach to evaluating efficiencies in the merger context. *See* U.S. Dep't of Justice and FTC, *Horizontal Merger Guidelines* at § 10 (2010).

Second, the requirement in Article 11(3) that the efficiency "must be capable of being shared by consumers" will also likely be difficult to administer. Some efficiencies may have direct effects on production costs, while others may have indirect effects, like making innovation easier or more likely. In most cases, efficiencies with direct effects on production costs should have "pass-through" effects on consumer prices but the pass-through effects are often challenging to measure with precision. The value to consumers of efficiencies with indirect effects, such as those that may make innovation easier or more likely, are even more difficult to measure.

Nonetheless, efficiencies that create a reduction in marginal cost generally will be passed on to consumers, even by firms in possession of market power.[19] This is because the new profit maximizing price will be lower when firms face a downward sloping demand curve. Therefore, the Sections propose the deletion of Article 11(3) or a clarification to ensure that all efficiency gains that are likely to lower costs or spur innovation satisfy the test. The substantial likelihood that efficiencies will benefit consumers suggests that it may be a suboptimal use of scarce SAIC resources to impose a stricter test.

B. Article 18. Tying sales involving IPRs

Article 18 of the Draft Guide rightfully recognizes the potential procompetitive benefits of tying.[20] However, as currently drafted, the Article may be read to impose a per se prohibition on all tying arrangements that meet the four criteria listed in its last paragraph, without considering their procompetitive benefits nor requiring them to have the effect of harming competition. Because of the possibility for efficiencies, the U.S. enforcement agencies have concluded that they would, in the exercise of their prosecutorial discretion, prosecute tying involving IPRs only where the arrangement has an adverse effect on competition in the market for the tied product and the efficiencies of the arrangement do not outweigh its anticompetitive

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[19] Efficiencies that result in a reduction in fixed costs may also have a direct effect on prices. For example, a reduction in fixed costs can lower a firm's long run marginal cost, allowing the firm to profitably maintain low prices in the long run. Moreover, "fixed cost" savings are resource savings to the economy and benefit society. In industries characterized by high levels of R&D and intense competition to innovate, such as computers and telecommunications, fixed cost reductions in R&D expenditure would likely "increase incentives to invest in R&D by lowering the 'hurdle' that firms must overcome to realize a profitable opportunity." Dennis W. Carlton *Revising the Horizontal Merger Guidelines*, 6 JOURNAL OF COMPETITION LAW & ECON. 619, 629-30, 639 (2010). These increased incentives in turn can result in introduction of new or higher quality products and services that can benefit consumer welfare. *Id*.

[20] *See, e.g.*, Dennis W. Carlton & Michael Waldman, *Tying*, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (2008); Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1717b2, at 185 (2d ed. 2004) (explaining that tying can result in "consumers . . . receiv[ing] greater value for the same expenditure as before the tie"); Marius Schwartz & Gregory J. Werden, *A Quality-Signaling Rationale for Aftermarket Tying*, 64 ANTITRUST L.J. 387, 388 (1996) ("[T]ying can make it profitable to offer high-quality durables if the demand for the complement is sufficiently higher when the durable proves to be of high quality.").

effects.[21] The Sections therefore respectfully suggest adding "consideration of the tying's procompetitive and efficiency effects" to the considerations listed in the last full paragraph of Article 18, and clarifying the third criteria to provide for considering whether "competition in the market of the tied product is adversely affected," before the four sub-sections that follow. These refinements will confirm that Article 18 is intended to be consistent with the processes set forth in Articles 7 and 11.

C. Article 19. Unreasonable trading conditions involving IPRs

Article 19 defines "unreasonable trading conditions involving intellectual property rights" prohibited by Article 16(4). According to Article 19(1), one such "unreasonable" practice is "to require the counterparty to grant back its improved technology [under sole license] to the IPR holder."[22] There appears to be some ambiguity as to whether the Draft Guide intends to address "exclusive license" grantbacks in Article 19. A grantback is exclusive when it allows only the licensor and the licensee to exercise the IPRs created by the licensee using the licensor's IPR.[23]. The Sections respectfully request clarification on this point. The Draft Guide effectively bans IPR holders with dominant market positions from including such grantback provisions in their license agreements. If the intent is to address exclusive grantbacks, the Sections believe Article 19(1) is an overly restrictive provision that may chill some potentially procompetitive licensing agreements. Therefore the Sections respectfully recommend eliminating Article 19(1) or clarifying that not all exclusive grantbacks are prohibited under the AML or that exclusive grantbacks are prohibited under the AML only after being analyzed in accordance with Articles 7 and 11.[24]

Grantbacks are clearly procompetitive in many cases. They "provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both promote innovation in the first place and promote the subsequent licensing of the results of the innovation."[25] On the other hand, grantbacks can have anticompetitive effects in some cases, e.g., (1) the scope of the grantback extends far beyond the scope of the underlying patent, (2) the grantback is used to conceal or foster a cartel arrangement among the license participants, or (3) the grantback may substantially reduce the licensee's incentives to engage in research and development and thereby limit competition in innovation markets.

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21. U.S. IP GUIDELINES § 5.3. In some cases, tying might affect competition in the market for the tying product by discouraging entry. *United States v. Microsoft Corp.*, 253 F.3d 34, 92-95 (D.C. Cir. 2001)

22 Article 21(2) includes a similar prohibition on exclusive grantback provisions in the context of patent pools. The Sections recommend the deletion or modification of that provision in accordance with the discussion in this section.

23 In some cases, an exclusive grant back requirement may lack a "flow through" provision and therefore also restrict the licensee's use of the improvement.

24 The Sections understand that laws and provisions other than the AML and other policy considerations may limit the use of exclusive grantbacks, and do not address those factors in these Comments.

25 U.S. IP Guidelines § 5.6.

It is generally accepted that non-exclusive grantbacks are more likely to be procompetitive than exclusive grantbacks because the latter may chill the incentive and the ability to innovate.[26] However, exclusive grantbacks are not necessarily anticompetitive.[27] They are potentially procompetitive, including because they may "'ensure that the licensor is not prevented from effectively competing because it is denied access to improvements developed with the aid of its own technology.'"[28] For example, exclusive grantback provisions that also include a "flow through" provision enabling the licensee to use the improvement IPR are more likely to be procompetitive than grantbacks that lack such a provision.[29] The Sections believe the SAIC should measure an exclusive grantback's potential to chill innovation against the "but for" world; in other words, the SAIC should consider the amount of innovation that would have occurred in the absence of the licensing restraint. A broad *per se* prohibition on exclusive grantbacks will unnecessarily chill innovation without a countervailing increase in consumer welfare.[30]

Article 19(3) prohibits agreements that "limit the counterparty, after the expiry of the term of the license agreement, from manufacturing, using, or selling competing goods or using competing technologies". While a general prohibition on manufacturing, using, or selling competing goods and/or technologies following the expiration of a license agreement is potentially anticompetitive, a narrower prohibition on manufacturing, using, or selling competing goods or technologies that infringe licensed IPR is not. Indeed, that is the fundamental effect of a term license (that presumably terminates before the expiration of the IPR): after expiration of the term, the licensee no longer has the right to use (or infringe) the IPR. The Sections suggest that Article 19(3) be amended to make clear that term licenses are not prohibited, and that enforcing IP rights against an undertaking that manufactures, uses, or sells competing goods or technologies that infringe the licensor's IPR after expiration of the license agreement is not deemed anticompetitive.

D. Article 23. Technical measures for copyright protection

The Sections commend the SAIC for recognizing the longstanding principle that market power cannot be presumed from the mere existence or exercise of exclusive rights by a copyright owner, and that the exercise of such rights alone does not warrant government

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[26] *See, e.g.*, 1 Hovenkamp et al., IP AND ANTITRUST § 25.3, at 25-6 to 25-7.

[27] *See, e.g.*, Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947) (exclusive grantback provision was not per se unlawful).

[28] *Int'l Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043, 2007 U.S. Dist. LEXIS 89947, at *7 n.18 (C.D. Cal. Oct. 29, 2007) (quoting U.S. IP GUIDELINES § 5.6 at 30). *See also Santa Fe-Pomeroy, Inc. v. P&Z Co.*, 569 F.2d 1084, 1102 n.34 (9th Cir. 1978) ("In relation to the licensee the licensor is entitled to some protection for its original investment in research and . . . a grantback is a reasonable device through which to seek such protection").

[29] *See, e.g.*, Hull v. Brunswick Corp., 704 F.2d 1195, 1201-02 (10th Cir. 1983) (refusing to hold exclusive grantback clause with provision for flow-through at no additional royalty illegal per se).

[30] In the U.S., courts require proof that the effect of an exclusive grant back is anticompetitive. See, e.g., Transparent-Wrap Machine Corp. v. Stokes & Smith Co.; Hull v. Brunswick Corp.

intervention. It is important that the final Guide clearly reflects this principle and does not create mandates, or mandated restrictions, on the use of technical measures that are necessary to enable the exercise of copyright in the digital environment. It is also critical that the final Guide does not result in China breaching its international obligations (e.g., under the WIPO Copyright and Performances and Phonograms Treaties). With respect to the last paragraph of Article 23, the Sections suggest that the appropriate standard is whether the particular technical measure has an unreasonable adverse effect on competition. If the particular technical measure does not have an unreasonable adverse effect on competition, then it is irrelevant whether there are alternative methods that have less impact on competition. Moreover, if the primary effect of the particular technical measure is to protect a copyright, the Sections believe that its effects on competition should not be considered unreasonable.[31] Lastly, the Sections note that the Draft Guide may place the SAIC in the position of regulating technical measures generally, and recommend against this approach.[32]

III. Clarifications

A. Catchall Provisions

The Draft Guide creates several catchall categories under which the enforcement agencies may prohibit "other acts." For example, Articles 13(6) and 14(3) prohibit "other monopoly agreements confirmed as such by the [enforcement authorities] as abusing intellectual property rights" ("IPRs"); Article 16 prohibits "other acts of abuse of dominant market positions mainly formed by [IPRs] confirmed as such by the [enforcement authorities]"; and Article 19 prohibits imposing "any other unreasonable trading conditions as identified by the [enforcement authorities]." The Sections respectfully request that the SAIC provide guidance as to the specific factors that will be considered under these catchall provisions.

B. Relevant Market in Which There is Dominance and Abusive Conduct Relating to IPRs

Commendably, Articles 9 and 16 clarify that possession of an IPR alone does not create a presumption of dominance, and the enforcement agencies will only investigate where the IPR constitutes "an important and even crucial factor for an undertaking to gain market dominance." The Sections respectfully request further clarification throughout the Guide that conduct relating to IPRs that constitute an abuse of dominant market position must be conduct that both abuses the IPR and is in a market in which that IPR is the source of the dominant market position. For example, a business that is dominant in a given product market in which IPR is "important" as provided in Article 9 should be permitted to refuse to license its IPR under Article 17 if it is not dominant in the relevant technology market.

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[31] A preferable approach may be to delete entirely the last paragraph of Article 23, and to incorporate the second paragraph of Article 23 into Article 18.

[32] The Sections also suggest that the SAIC consider the proposed amendment to the Copyright Law currently under consideration by the National Copyright Administration of China, which includes a chapter dedicated to protecting technical protection measures.

C. Elements of Prima Facie Anticompetitive Conduct Relating to IPRs

The Draft Guide in Article 3 appears to make it clear that abuse of IPR may infringe the AML only if it also eliminates or restricts competition. The Sections fully support that approach. Both elements should be required for a prima facie case of anticompetitive conduct under the AML: the conduct must be abusive (it is insufficient for the undertaking to be dominant) and the effect of the conduct must be to eliminate or restrict competition. It is not enough merely that a dominant entity engage in conduct relating to IPR that restricts competition, as the natural effect of the exercise of intellectual property rights will be to limit competition. The fundamental underpinning of IPR is the ability to exclude others from using them. Rather, the conduct must be abusive of IPR in some fashion. However, the Draft Guide also appear to suggest in several provisions (e.g., Article 2), that analysis is required where the undertaking's conduct relating to IPR *either* abuses intellectual property rights *or* eliminates or restricts competition. The Sections therefore respectfully suggest that the final Guide further clarify that the conduct relating to IPR that infringes the AML must be abusive of IPR and its effect must be to eliminate or restrict competition.

D. Article 7. General Steps of Analysis of IPR AML Enforcement

The Draft Guide in Article 6 recognizes that IPRs, in and of themselves, are under the purview of authorities other than the anti-monopoly enforcement authorities. Article 7's sub-sections appropriately apply only to evaluating the *exercise* of IPRs, not their validity. Similarly, in the U.S. (except in very limited circumstances such as where an IPR may have been obtained through fraud on the Patent Office)[33] the validity of IPRs is not under the purview of the antitrust agencies, but rather determined by the U.S. Patent and Trademark office and the courts. Antitrust agencies evaluate only the effects of exercises of IPRs on competition.[34] In addition, U.S. patents, trademarks, and copyrights also enjoy an explicit statutory presumption of validity.[35]

Consistent with the "exercise" language of Article 7's sub-sections, the Sections therefore suggest that the preamble of Article 7 be revised to clarify that the anti-monopoly enforcement authorities "will presume any underlying IPRs are valid unless there is evidence that the IPRs were obtained from the IPR authorities through fraud or deceit or that the IPR holder has knowledge that the IPR is invalid, and generally take the following steps." However, to the extent that IPRs may have been obtained from IPR authorities without specific examination for validity, the Guide might provide that the presumption of validity may not apply. A clarification of the presumption of validity would also assist in delineating the

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[33] *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Handgards, Inc. v. Ethicon,Inc.*, 601 F.2d 986 (9th Cir. 1979)..

[34] See U.S. IP GUIDELINES §§ 1.0, 2.0; ANTITRUST ENFORCEMENT AND IPR at 1-13.

[35] *See* 35 U.S.C. § 282; Microsoft Corp. v. i4i LP, 564 U.S. __, 131 S. Ct. 2238, 2245 (2011) (presumption of validity of patents); 15 U.S.C. §§ 1057(b), 1115(a); Zobmondo Ent. v. Falls Media, 602 F.3d 1108, 1113-14 (9th Cir. 2010) (presumption of validity of trademarks); 17 U.S.C. § 410(c) (presumption of validity of copyrights).

jurisdictional boundaries of the anti-monopoly enforcement authorities vis-à-vis other authorities and the courts.[36]

E. Article 12. Impact of the Relationship Between Undertakings and Their Market Positions on Competition Analysis

Article 12 provides useful guidance on market share levels that would afford undertakings safe harbors from antitrust scrutiny. However, taken literally, Article 12 can be interpreted to suggest that undertakings whose market shares exceed the thresholds will be presumed to possess market power. Such an interpretation is inconsistent with the Recommended Practices of the International Competition Network,[37] and the Sections assume it does not reflect the SAIC's intention. Hence, the Sections respectfully suggest Article 12 be augmented by a sentence clarifying that "market shares above the thresholds will not necessarily be presumed to indicate market power," and that rather "such determination will be made according to the specific circumstances of the market structure, the competitive situation, and evidence of anticompetitive effects, as stated in Article 9."

Additionally, Article 12(2) refers to "at least two other undertakings in the relevant market possessing alternative intellectual property rights." Since such "alternative intellectual property rights" can include IPRs of poor quality, poor functional alternatives, and/or may entail high switching costs, the SAIC may want to consider replacing that phrase with "closely substitutable intellectual property rights."

Finally, the third paragraph of Article 12 does not clearly identify the type of market upon which the safe harbor will be determined, unlike guidelines in the U.S. and other jurisdictions that focus primarily on goods markets.[38] Since under Article 8, the relevant markets can be either technology markets or product markets comprising specific intellectual property rights, it would be helpful to clarify whether Art 12's safe harbor limits will be calculated by reference to goods markets only or potentially also by reference to technology markets.[39]

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[36] The fact that the anti-monopoly enforcement authorities may generally presume the validity of IPRs unless they are procured through fraud or deceit does not preclude validity challenges in other fora under other laws.

[37] *See* ICN Unilateral Conduct Working Group, DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS, Section V ("Possession of a market share outside the safe harbor is generally necessary but insufficient for finding dominance/substantial market power") *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf.

[38] See U.S. IP GUIDELINES § 4.3; Competition Commission Singapore, Guidelines on the Treatment of Intellectual Property Rights, 2007, ¶ 3.17; Japan Fair Trade Commission, Guidelines for the Use of Intellectual Property under the Antimonopoly Act, part 2(5).

[39] The EU potentially calculates safe harbors in the IPR context also by reference to technology markets. *See* EU Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, 2004 (C101/02), ¶ 9. Furthermore, SAIC may want to refer to technology markets only where market shares for goods cannot be calculated (*see* U.S. IP GUIDELINES §4.3), or when the analysis of the product market alone would not adequately address the effects on competition among technologies or in R&D (*see* Competition Commission Singapore, Guidelines on the Treatment of Intellectual Property Rights, 2007, ¶¶ 3.18-3.20).

F. Article 16. Abuse of Dominant Market Position Achieved Largely Through IPRs

Article 16(1) prohibits "licensing intellectual property rights at unfairly high prices." As the Sections have indicated in previous comments, requiring the use of "fair" or "reasonable" pricing, and prohibiting "high" or "low" pricing, is "inconsistent with accepted norms of competition policy and modern economic theory, and raise the prospect of the use of the law to punish aggressive competition, directly contrary to the accepted purpose of competition laws."[40] In general, we believe that competition policy should not prohibit a monopolist from charging the highest prices that it can obtain for its products and its IPRs. It is axiomatic that the "charging of monopoly prices, is not only not unlawful; it is … what attracts 'business acumen' . . . ; induces risk taking that produces innovation and economic growth."[41] That is especially so in the case of IPR, the very purpose of which is to induce investment in risky and costly R&D. To achieve a balance between innovation and protection of competition, therefore, monopoly prices should only be unlawful if they result from other unlawful conduct. The lack of clarity here raises several important issues in the IPR context.

First, IPRs are unlike commoditized products. It may be possible to determine whether a high price for some commodities is "unfair" by calculating the amount the charged price exceeds the competitive price by analyzing the firm's cost-price ratio; this method is used in the EU in the very rare cases that its excessive pricing prohibitions is invoked.[42] In the IPR context, however, it is difficult—and in many cases impossible—to compare prices among different licenses because IPRs are usually highly differentiated products. Moreover, the incremental cost of licensing IPR is almost always close to zero, so that a cost-price ratio may be meaningless. Even if one could analyze the costs of developing an IPR, there is no framework to provide an adequate definition of an "unfair" price in the IPR context. Therefore, IPR holders will face significant uncertainty in determining whether their licensing practices violate the Draft Guide.

Second, prohibiting "licensing intellectual property rights at unfairly high prices" may ultimately have the unintended effect of imposing compulsory licensing in inappropriate situations.[43] As AML Article 55 recognizes, the exercise of an IPR that is lawful under China's IPR laws is not to be interfered with; rather, other IPR-related conduct is typically only prohibited where it "eliminate[s] or restrict[s] market competition." As noted, in Section I, above, the right to exclude is a core element of an IPR. The "unfairly high prices" standard may effectively bar firms from recouping their investments in innovation and compensation for the

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[40] 2005 Comments on the AML at 2, 17-18.

[41] *Trinko*, 540 U.S. at 407.

[42] *See, e.g.*, United Brands Company and United Brands Continental B.V. v. Commission of the European Communities, Case 17/76 E.C.R. 207 (1978).

[43] Competition law may play a limited role in regulating IPR prices insofar as it is necessary to remedy fraudulent or deceptive practices by IPR owners. This is different, however, from imposing price controls on IPR licensing in general, which is the practical effect of Article 16(1).

substantial risks they assumed in making the investment. Furthermore, prices that are *not* high are not necessarily indicative of healthy competition. Finally, determining whether IPR prices are too high or low based on some measure of marginal cost is particularly tenuous, since, as noted above, the marginal cost of licensing an additional unit of intellectual property is zero or very close to zero in many cases.

G. Article 21. Patent Pools

Article 21 rightfully recognizes that patent pools "may have a positive effect on promoting the integration of complementary technologies, reducing transaction costs" and other factors. Patent pools that allow for independent licensing of the patents in the pool are unlikely to be anticompetitive. However, Article 21 also states that "patent pools may eliminate or restrict competition, therefore anti-monopoly analysis is required to determine such effect." The Sections would welcome clarification on the circumstances in which patent pools will be subject to an anti-monopoly analysis.[44]

H. Article 22. Exercising Patent Rights During Formulation and Implementation of Standards

Article 22 sets forth what appears to be a four-part test for determining when conduct associated with the formulation and implementation of standards may constitute a violation of the AML. The Sections respectfully recommend three clarifications.

First, the Sections recommend clarifying that the four elements listed in Article 22(1)-(4) are presented in the conjunctive. This clarification can be accomplished by inserting the word "and" in between the third and fourth elements and adding the following sentence after the fourth element: "All four elements are required in order to establish a violation of the AML."

Second, we recommend clarifying that there is no general duty to disclose in the standard setting context. As drafted, the provision could be interpreted as imposing an implied duty to disclose where no such duty exists under U.S. law or international norms.[45] The Sections therefore recommend adding the following clarification:

> Article 22. However, behavior conforming to the following conditions may be a violation of the AML … (2) (a) the patent holder or patent applicant is an active voting participant in a

[44] See, e.g., U.S, IP Guidelines §5.5.

[45] *See, e.g.*, Rambus Inc. v. FTC, 522 F.3d 456, 464-67 (D.C. Cir. 2008); Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1013 (Fed. Cir. 2008) (determining whether a patent holder has a duty to disclose such that it has impliedly waived its right to assert its patent, depends on whether the patent holder participated in the SSO, whether the SSO's written policy imposed any disclosure obligations, and, if so, the scope of such disclosures); Dell Computer Corp., 121 F.T.C. 616 (1996) (complaint and consent order); EC, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01) at ¶¶ 268, 299 [EC's Article 101 GUIDELINES], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

standard setting organization ("SSO");~~ fails to disclose relevant information of its patent or already-publicized patent application information in accordance with the policy prescribed by the standard setting organizations or authorities~~ (b) the SSO has a published written policy that creates certain disclosure obligations as a condition of participation; (c) the patent holder or applicant fraudulently or intentionally breaches the SSO's disclosure obligations; (d) after adoption of the standard, the patent holder asserts its essential patents against implementers of mandatory portions of the standard; (e) but for the patent holder's or patent applicant's failure to disclose, a different technology would have been incorporated into the standard; and (f) the patent holder's conduct causes or is likely to cause an adverse effect on competition in the relevant market.

Third, the Sections urge the following revision to the last paragraph of Section 22:

~~When the patent holder's patented technology is included into national or industrial mandatory standards the patent holder should clearly state the upper limit of the license fee in the relevant agreement, and the license fee caps should not be significantly higher than the fee level before such technology is included in the standard.~~The standard setting body may wish to consider encouraging, on a voluntary basis and prior to the issuance of a standard, the participating patent holders to state the key terms (including maximum price, duration, and field of use) upon which the patent holders agree to license, subject to reciprocity, their essential patents that are incorporated into a standard.[46]

I. Article 24. Acts of Copyright Collective Management Organizations

The Sections commend the apparent intent of Article 24 to ensure the fair operation of copyright collective management organizations ("CMOs"), in particular to ensure transparency, accountability and good governance. The Sections note, however, that the Draft Guide would allow intervention against CMOs for "(1) charging excessively high agency fees or license fees without justification" similar to the prohibition in Article 16 against "licensing IPR at unfairly high prices." The Sections' concerns regarding Article 16 in this regard apply equally to Article 24. Moreover, where individual copyright holders represented by a CMO may have

[46] Both the U.S. antitrust agencies and the EC have recognized the procompetitive potential of such ex ante discussions. *See* FTC, "Recognizing the ProCompetitive Potential of Royalty Discussions in Standard Setting," (Sept. 23, 2005), *available at* http://ftc.gov/speeches/majoras/050923stanford.pdf; EC'S ARTICLE 101 GUIDELINES at ¶¶ 257-335. The Sections suggest that one appropriate measure for RAND royalty for essential patents included in a standard may be based on the value of the patented technology to the product apart from any enhanced value resulting from the fact that the patented technology has been included in the standard.

little market power, the SAIC might also consider whether the CMO fees are inadequate. The Sections are also concerned that CMOs may be subject to multiple reviews regarding the reasonableness of its fees, with the attendant risks of conflicting results.

CONCLUSION

The Sections recognize the substantial work accomplished in developing the Guide, and appreciate the SAIC's consideration of our comments and those of others as it continues with its mission to implement, enforce, and provide clear guidance on the AML.

APPENDICES

Joint Comments on the SAIC Comments on the Regulation on the Prohibition of Acts of Monopoly Agreements, the Regulation on the Prohibition of Acts of Abuse of Dominant Market Position, and the Regulation on the Prohibition of Abuse of Administrative Powers to Eliminate or Restrict Competition, July 2, 2010

Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position, May 29, 2009

Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China, May 19, 2005

Fifth Draft of the Guide on Anti-Monopoly Law Enforcement in the Field of Intellectual Property Rights of China's State Administration for Industry and Commerce

Unofficial Translation of the Draft Guide

美国律师协会反垄断法部及国际法部

对国家工商行政管理总局

《工商行政管理机关禁止垄断协议行为的规定》、《工商行政管理机关禁止滥用市场支配地位行为的规定》以及《工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定》草案的

共同意见

2010 年 7 月 2 日

*本呈递意见中所述之观点由美国律师协会反垄断法部及国际法部共同提出，且仅代表上述两部门之看法。鉴于该等意见未获*美国律师协会之会员代表大会或*理事会批准，因此不应被视为代表美国律师协会的政策。*

美国律师协会(“ABA”)反垄断法部及国际法部（以下统称“两部门”）[1]谨就中国国家工商行政管理总局（“工商总局”）2010 年 5 月 25 日颁布的《工商行政管理机关禁止垄断协议行为的规定》（征求意见稿）（“《垄断协议规定草案》”）、《工商行政管理机关禁止滥用市场支配地位行为的规定》（征求意见稿）（“《滥用市场支配地位规定草案》”）以及

[1] 起草上述意见的工作小组成员包括：Mark Botti、陈懿华、胡珊、黄存真、格理格瑞. 雷奥纳德、James R. Modrall、Allison Sheedy、孙速、王晓茹、Mark D. Whitener 以及张艳华; 邓飞、Adrian Emch、高博德、H. Stephen Harris, Jr.、 Jonathan Jacobson、Paul Jones、Mark S. Popofsky 和 Theodore Voorhees 针对工作小组成员的意见提出了建议, 此外,韩亮,和杨希希提供了帮助。本呈递意见所述之观点并不代表工作小组成员所属专业组织的观点或看法。

《工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定》（征求意见稿）（“《滥用行政权力规定草案》”）呈递如下建议和意见。[2] 两部门对规定草案所体现出的、工商总局在执行《反垄断法》过程中提出的大量想法及付出的巨大努力表示赞赏，同时对工商总局能够考虑我们就 2009 年《垄断协议规定草案》和《滥用市场支配地位规定草案》所提的意见和建议表示感谢 [3]。我们借此机会呈递我方建议，以期能进一步协助上述法规最后定稿。如有必要，两部门可提供进一步意见或参与与工商总局的商谈。两部门的意见是基于我们在美国法律方面的专长和经验、和对国际范围内反垄断/竞争法律的熟谙，以及对反垄断问题（如滥用市场支配地位等）的经济分析方面的专业知识。

概要

两部门仍担心：《工商行政管理机关禁止垄断协议行为的规定》(**征求意见稿)**中对垄断协议的定义过于宽泛，这将导致许多正当的竞争行为会被列入违反《反垄断法》的行为之列。因此我们建议对第二条和第三条进行部分修订，以便明确除了竞争对手之间没有合理解释的协同行为之外，构成垄断协议还需要其他条件。此外，两部门还担心：《工商行政管理机关禁止垄断协议行为的规定》第六条和第十条可能会禁止竞争对手共同采取有利于竞争的行为（如制定标准），因此建议工商总局能够进一步明确第六条和第十条，以避免出现上述情况。《工商行政管理机关禁止垄断协议行为的规定》第十一条规定了对违反该草案第四条至第十条所进行的处罚，我们认为可适当将该条限于适用违反第四条至第七条的行为；对违反第八条和第九条的行为，可通过没收违法所得、停止违法行为、以及按《反垄断法》第五十条规定向受害方进行补偿的方式得到充分的救济。两部门建议：将第十一条规定的用以计算罚款的相关销售额限于与垄断协议有关的销售额。此外，我们还建议第十一条能够进一步明确如何处理可能会导致垄断协议的行为。第十二条和第十三条在

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[2] 工商总局在 http://gzhd.saic.gov.cn/gszj/zqyj/login1.jsp.上公布了上述三个规定草案，并公开征求意见。征求意见公告见 http://www.saic.gov.cn/gzhd/fldf/201005/t20100525_85719.html。两部门对规定草案的意见以该等草案的非正式翻译稿为基准。

[3] 两部门于 2009 年 5 月 29 日呈递了《对国家工商行政管理总局禁止垄断协议行为规定草案和禁止滥用市场支配地位行为规定草案的共同意见》（“2009 年 5 月意见”），见 http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/abaprcamlsaicdraftregs5-09finalcombo%282%29.pdf. 。随附 2009 年 5 月意见副本供参考。

某些方面较之前的规定草案有所退步。两部门建议：为提高宽大处理制度可能的有效性，可将第十三条中所述经营者限于卡特尔参与方，并对申请宽大处理的资格进一步明确说明，而且，针对单一卡特尔中有资格申请宽大处理的参与方数量、以及特定情况下申请人可获得的处罚减免幅度，建议在第十三条中能够作出进一步说明。

针对《禁止滥用市场支配地位行为规定》（征求意见稿)，非常重要的一点是该草案不应起到适得其反的、抑制竞争及创新的效果。因此，两部门建议在该草案中加入一条并明确规定：具有市场支配地位的经营者的行为，只有在其具有反竞争影响、且该影响大于所产生的效益或其他有利竞争的效果时，才会被《反垄断法》所禁止。此外，两部门担心：草案第八条似乎将证明经营者行为是否正当的责任加在了经营者身上，因为除非经营者能提出正当理由，否则相关行为将属违法。这一作法与美国及全球其他竞争法域的作法相悖；应当由政府首先来提供占支配地位经营者的行为属非法行为，而且该等行为所产生的反竞争效果大于对竞争所产生的有利影响的证明。针对第三条所述的市场支配地位的定义，两部门建议工商总局能进一步明确在之前规定草案基础上作出修订的意图是什么。第四条采纳了《反垄断法》中明确没有引入的“必需设施理论”，但在两部门看来，第四条就认定何种设施为“必需”设施所确定的标准过低，因此建议删除该条，或至少进行修订，以采纳更加严格的条件来认定何种设施为“必需”设施。第六条涉及搭售及捆绑销售，由于在之前规定草案基础上进行了修订，该条在原来的基础上增添了新的担忧。第六条新加入了一些在认定是否存在非法捆绑销售时应考虑的因素，并且列举一些新行为类别为不合理行为，两部门担心这会阻止有利于竞争的商业行为。此外，对于第七条，两部门也有类似的担心：由于该条禁止的差别待遇较之前的规定草案更加广泛，因此可能会阻止到那些可能会有益于消费者、有利于竞争及效率的商业行为。如果保留第七条，则工商总局最好能够明确该条仅适用于损害消费者利益或具有反竞争效果的歧视性行为。两部门建议对第十二条进行进一步说明，明确规定任何经营者均可证明其单独并不具备控制市场的能力，从而反驳《反垄断法》第十九条作出的具有市场支配地位的推定。

针对《制止滥用行政权力排除、限制竞争行为的规定》》（征求意见稿)第五条，建议工商总局能够明确何为“变相强制”，并且明确说明工商总局在实施处罚时是否会考虑违法行为是由于行政机关的强制而导致的作为一个减轻情节因素。两部门还建议对第七条进行进一步说明，以明确经营者遵守行政规定的行为将不会受到处罚。此外，建议明确第五条和第七条之间的关系。

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE SAIC DRAFT REGULATIONS ON THE PROHIBITION OF ACTS OF MONOPOLY AGREEMENTS, OF ABUSE OF DOMINANT MARKET POSITION AND OF ABUSE OF ADMINISTRATIVE POWERS

July 2, 2010

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA")[1] respectfully submit these comments on the Regulation on the Prohibition of Acts of Monopoly Agreements (Comment Draft) ("Draft Monopoly Agreements Regulation"), the Regulation on the Prohibition of Acts of Abuse of Dominant Market Position (Comment Draft) ("Draft Abuse of Dominance Regulation"), and the Regulation on the Prohibition of Abuse of Administrative Powers to Eliminate or Restrict Competition (Comment Draft) ("Draft Abuse of Administrative Powers Regulation"), of China's State Administration for Industry and Commerce ("SAIC") published for comment on May 25, 2010.[2] The Sections appreciate the substantial thought and effort of SAIC reflected in the Draft Regulations to implement the Anti-Monopoly Law ("AML") and the consideration that SAIC has given to comments submitted regarding earlier drafts of the Monopoly Agreements Regulation and Abuse of Dominance Regulation published for comment in 2009,[3] and take the opportunity to offer these comments in the hope that they may further assist in the completion of final regulations. The Sections are available to provide additional comments, or to participate in consultations with SAIC, as appropriate. The Sections' comments reflect their expertise and

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[1] The members of the Working Group that drafted these comments are Mark Botti, Yee Wah Chin, Shan Hu, Cunzhen Huang, Gregory K. Leonard, James R. Modrall, Allison Sheedy, Su Sun, Elizabeth X. Wang, Mark D. Whitener, and Vanessa Y. Zhang, with comments from Fei Deng, Adrian Emch, John D. Graubert, H. Stephen Harris, Jr., Jonathan Jacobson, Paul Jones, Mark S. Popofsky and Theodore Voorhees, and assistance from Michael Han and Xixi Yang. The views stated in these comments do not necessarily reflect the views or opinions of the professional organizations with which the members of this Working Group are affiliated.

[2] The Draft Regulations were published for public consultation on SAIC's website at http://gzhd.saic.gov.cn/gszj/zqyj/login1.jsp. The consultation was announced at http://www.saic.gov.cn/gzhd/fldf/201005/t20100525_85719.html. The Sections' comments on the Draft Regulations are based on unofficial translations.

[3] The Sections' May 29, 2009 Joint Comments on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position ("May 2009 Comments") may be found at http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/abaprcamlsaicdraftregs5-09finalcombo%282%29.pdf. A copy of the May 2009 Comments is appended for convenience of reference.

experience with U.S. law and their familiarity with antitrust/competition law internationally, as well as expertise in the economics underlying the analysis of antitrust issues such as the abuse of dominant market position.

Executive Summary

The Sections remain concerned that the definition of monopoly agreement set forth in the Draft Monopoly Agreements Regulation is overbroad and will label many normal competitive actions as AML violations. We suggest some revisions in Articles 2 and 3 to clarify that more is needed for a monopoly agreement to exist, than consistent actions among competitors without reasonable explanation. The Sections are also concerned that Articles 6 and 10 of the Draft Monopoly Agreements Regulation may prohibit pro-competitive joint activities by competitors, such as standard-setting, and suggest clarifications in those Articles to avoid such outcomes. Article 11, providing for penalties for violations of Articles 4 to 10 of the Draft Monopoly Agreements Regulation, may appropriately be limited to violations of Articles 4 to 7; violations of Articles 8 and 9 may be adequately remedied by the confiscation of illegal gains and cessation of the violation, together with compensation to injured parties provided by Article 50 of the AML. The Sections recommend that the relevant revenues for calculation of penalties under Article 11 be limited to those related to the monopoly agreement. We also suggest that Article 11 be clarified as to the treatment of conduct that appears to have the potential of leading to a monopoly agreement. Articles 12 and 13 in some respects is a step backwards from earlier drafts of the regulation. The Sections recommend that, in order to increase the likely effectiveness of a leniency program, Article 13 be limited to participants in cartels, expanded to clearly explain the qualifications for leniency, and clarified regarding the number of participants in a single cartel that would be eligible for leniency, as well as the reduction in penalties that may be expected for applicants in particular circumstances.

It is important that the Draft Abuse of Dominance Regulation does not have the counterproductive effect of dampening competition and innovation. Therefore, the Sections urge that a provision be included expressly providing that conduct by an undertaking with dominant market power will not be prohibited under the AML unless it has an anticompetitive impact that is not outweighed by efficiencies or other pro-competitive effects. Moreover, the Sections are concerned that Article 8 of the Draft Regulation appears to impose the burden on an undertaking to justify its conduct, by making the conduct unlawful unless the undertaking provides a justification. This is contrary to the approach in the U.S. and other competition law jurisdictions around the world; the government should make the initial demonstration both that the conduct by a dominant firm was of a type that is unlawful and that it had an anticompetitive effect that outweighed the pro-competitive benefits. The Sections suggest that it would be helpful to clarify regarding the intent of the revisions in Article 3 as to the definition of dominant market position, from earlier drafts of the regulation. Article 4, adopting the essential facilities doctrine that was specifically omitted from the AML, sets too low a standard for finding that a facility is "essential," in the Sections' view, and should be deleted or at least revised to adopt substantially more stringent conditions for a facility to be deemed "essential". Article 6, regarding tie-ins and bundling, is a source of old and new concerns as a result of revisions made from earlier drafts of the regulation. The addition of new factors to be considered in determining the existence of illegal bundling and the designation of new categories of conduct as unreasonable raise concerns

that pro-competitive business conduct will be deterred. The Sections are similarly concerned that Article 7, establishing a broader prohibition against discriminatory terms than earlier drafts of the regulation, will deter pro-competitive and efficient business practices that may benefit consumers. If Article 7 is retained, it should be clarified to apply only to discriminatory conduct that harms consumers or has anti-competitive effects. The Sections suggest that Article 12 be clarified to state expressly that any undertaking may rebut the presumptions arising under AML Article 19 by showing that it individually lacks the ability to control the market.

Article 5 of the Draft Abuse of Administrative Powers Regulation would benefit from clarification of the term "disguisedly compelled" and of whether SAIC will consider administrative compulsion as a mitigating factor in imposing penalties. The Sections also suggest that Article 7 be clarified to make it clear that conduct of undertakings in compliance with administrative measures shall not be penalized. The relationship of Articles 5 and 7 should be clarified.

I. Draft Monopoly Agreements Regulation

a. Articles 2 and 3 – Definition of Monopoly Agreement

Article 2 of the Draft Monopoly Agreements Regulation defines a "monopoly agreement" to include "other concerted actions," and then defines "other concerted actions" to be "virtually existing concerted actions among undertakings even though there are no expressly concluded written or oral agreements or decisions." Article 3 states that three factors will be taken into consideration in determining whether an "other concerted action" took place: "(1) whether the actions of the undertakings are consistent, (2) whether there are communications of intent or exchange of information among the undertakings, and (3) whether the undertakings can make reasonable explanations as to the concerted actions."

In their May 2009 Comments, the Sections explained that, under United States law, only actual agreements are unlawful (see May 2009 Comments, p. 19), but that, in the absence of direct evidence of an agreement, the existence of an agreement can be inferred from circumstantial evidence (see May 2009 Comments, p. 20). Notably, however, "parallel behavior" alone does not constitute sufficient evidence to infer an actual agreement under United States law (see May 2009 Comments, p. 20).

SAIC may intend through Articles 2 and 3 to create a similar framework, whereby a "monopoly agreement" can be inferred when "consistent actions" without "reasonable explanation" follow upon "communications of intent or exchange of information among the undertakings." In that event, the Sections respectfully recommend two changes to Articles 2 and 3. First, Article 3 should make clear that the existence of "consistent actions" is not, by itself, sufficient to infer a monopoly agreement. Instead, Article 3 should state that all three conditions ("consistent actions," "communications of intent or exchange of information," and no "reasonable explanation") usually must be present before the existence of a monopoly agreement can be inferred. Second, Article 2 should delete "other concerted actions" from the definition of a "monopoly agreement" and instead specify in Article 3 that a monopoly agreement, absent

unusual circumstances, may be inferred in situations where all three of the factors listed there are present.

b. Articles 6 and 10 – Pro-Competitive Joint Activities by Competitors

Agreements among competitors, particularly those achieved through a standard-setting process, may be pro-competitive. Article 6(5) of the Draft Monopoly Agreements Regulation prohibits competing undertakings from entering into agreements that restrict the development of new technology or new products, including agreements "to refuse to adopt new technical standards." Article 10(1) of the Draft Monopoly Agreements Regulation prohibits industry associations from organizing undertakings to enter into monopoly agreements by formulating and issuing "standards . . . that have the effect of eliminating or restricting competition." The Sections are concerned that, absent clarification, ambiguities in both provisions may result in legitimate standard-setting activity being treated as an unlawful monopoly agreement. This would reduce efficient and pro-competitive standard-setting activity, and thereby harm Chinese consumers and hamper China's economic growth.

Standard-setting creates efficiency by promoting interoperability across products that is crucial to many technology and other industries. Standardization generally enhances consumer welfare by reducing costs, facilitating innovation, and enabling the creation of useful new products and services.[4] The nature of standard-setting usually involves the adoption of one standard and the rejection of alternative proposed standards that have been determined to be less suitable. In some instances, standard-setting may lead to the rejection of a new standard in favor of an existing standard, or no standard at all. When accomplished through a standard-setting organization, standard-setting is a form of agreement among business operators. This activity inherently restricts competition at one level, by selecting one standard over others, while facilitating competition among business operators using the standard. So long as the standard-setting process is transparent and follows certain well-recognized procedures widely understood to be fair, it is rarely if ever found to be anticompetitive.[5]

Therefore the Sections suggest that SAIC make clear that nothing in the Draft Monopoly Agreements Regulation is intended to discourage legitimate standard-setting activity. Furthermore, SAIC should clarify that such activity, if covered at all by Chapter 2 of the AML, will normally be exempt under Article 15 of the AML.

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[4] *See FTC/DOJ Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, available at* http://www.ftc.gov/opp/intellect/index.htm; *see also Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property, by* Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *available at* http://www.justice.gov/atr/public/speeches/220972.htm#N_7_.

[5] The Sections recognize that in very rare circumstances, a standard-setting process can be misused to restrict competition. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 817 F.2d 938 (2d Cir. 1987), *aff'd*, 486 U.S. 392 (1988) (finding antitrust liability where company had misused standard setting process to prevent modification of electrical safety standard that would allow use of competing type of electrical conduit).

c. Article 11 – Penalties for Violations

Article 11 addresses the consequences that might flow from a violation of Articles 4 to 10 of the Draft Monopoly Agreements Regulation. Clarification is needed with respect to several aspects of Article 11 to ensure fairness and reasonableness and to confirm that those consequences are firmly based in the underlying offenses.

The authority in Article 11 to impose penalties for violations of the Monopoly Agreements Regulation does not draw any specific distinction between conduct which is clearly declared illegal (Articles 4 to 7) and conduct which can be found to be illegal only after an extensive antitrust analysis (Articles 8 and 9). While Article 11 does direct the authorities to take into account "the nature, the details, [and] the seriousness" of the illegal activities, the threat of severe penalties for violations under Articles 8 and 9 might deter parties from entering into agreements that the authorities would want to encourage for the benefit of Chinese consumers and China's economy. Accordingly, Article 11 should limit the authorities' power to impose penalties to only those situations specified in Articles 4 to 7. With regard to Articles 8 and 9, the power to confiscate illegal gains and to order the agreement stopped, as well as the private remedies available under Article 50 of the AML, provides protection against unlawful monopoly agreements.

The fine imposed for a prohibited monopoly agreement is based on "sales revenue in the previous fiscal year." There is no definition of which sales revenue is included in the calculation. This can lead to arbitrary, unfair and unreasonable outcomes if the relevant sales revenues were "all revenues" of an involved company and not limited to revenues related to the monopoly agreement. For example, if the fine is based on *all* revenues of the *entire* company, a company found to be the dominant producer in the market and responsible for organizing and directing the wrongful monopoly agreement, and whose only business is that involved in such agreement will have its fine capped at 10% of its sales. In contrast, a much larger multi-division company, only one of whose many divisions is involved as a relatively minor participant in the wrongdoing, could be required to pay a far higher fine than the more responsible dominant firm if the fine is based on all revenues of the entire company. A broad-based business facing even a minimum fine of 1% of its total sales revenues may pay a larger fine, even if it had a minimal presence in the market affected by the monopoly agreement and its participation in the monopoly agreement was minor, if its overall sales are large relative to its sales in the monopolized market.

Illustration:

> Company A makes only the affected product with annual sales of $500 million, has 50% of the relevant market and is the lead actor in the monopoly agreement. Its *maximum* fine is $50 million whether all revenues are considered or only revenues in the affected market are considered.
>
> Company B is a global conglomerate with total annual sales of $5 billion and sales of $10 million in the relevant market and a minor role in the monopoly agreement. Its *minimum* fine is

> $50 million if the penalty is based on all revenues; but its *maximum* fine is $1 million if the penalty is based on revenues in the relevant market.

Linking the fines to the revenues affected by the monopoly agreement prevents this type of arbitrary, unfair and unreasonable outcome. Accordingly, the Sections recommend that Article 11 be modified to limit the relevant "sales revenue in the previous fiscal year" to "sales revenue directly obtained in the relevant product and geographic market in China affected by the violation . . . .".

While the first section of Article 11 provides for penalties where a monopoly agreement has been reached and implemented and where a monopoly agreement has been reached but not yet implemented, the last sentence of Article 11 appears to provide for a remedy in a third set of circumstances, that in which a monopoly agreement may have been attempted but not yet reached. The AML prohibits only actual agreements. Yet, Article 11 would permit enforcement action against collusive conduct that has not led to "the conclusion" of a monopoly agreement, and thus has not led to an actual offense. The Sections suggest that this sentence be deleted. In the event that SAIC intends only to provide for a mechanism to caution businesses and trade associations against conduct that appears to have the potential of leading to a monopoly agreement, and not to define a new offense under the AML, the Sections suggest that clarification of this intent would be helpful in providing guidance to businesses and their counselors regarding compliance under the AML.

d. Articles 12 and 13 – Leniency Program

The Sections welcome the clarification the Draft Monopoly Agreement Regulation provides that the benefits of the leniency program apply only to monetary sanctions (*i.e.*, confiscation of illegal gains and fines). However, the Sections note that the Draft Anti-Monopoly Agreement Regulation substantially revises the leniency program proposed in the 2009 draft regulation, in several ways that will likely make the program significantly less effective. Moreover, in light of the significant possibility that a particular monopoly agreement may be subject to enforcement action by both SAIC and the National Development and Reform Commission ("NDRC"), it would be helpful if the Monopoly Agreement Regulation provides some guidance on how leniency applications will be treated in such situations.

First, the 2009 draft provided 50% and 30% reductions in penalties applied to the second and third applicants, respectively; by contrast, the Draft Anti-Monopoly Agreement Regulation provides only that the first applicant "shall" receive immunity from penalties, while later leniency applicants "may" receive reductions in penalties imposed by SAIC (and its local agencies) in its discretion, based on the time sequence of reporting, the importance of the information provided, relevant circumstances regarding the formation and implementation of the monopoly agreement and the level of cooperation provided to the investigation (Article 13). Second, it seems that leniency may be extended to an unlimited number of applicants, instead of only the first three, as was apparently provided in the 2009 draft.

Unpredictability and uncertainty may impair the leniency program's effectiveness in motivating companies to apply for leniency. A reliable and predictable leniency program would give voluntary reporters sufficient incentive *ex ante* to cooperate with SAIC throughout the investigation and prosecution. For an effective leniency program, reduction of fines should be made as predictable, reliable and verifiable as possible. If potential leniency applicants anticipate that they may not receive penalty exemptions *ex post*, they will have far less incentive to report and cooperate with the investigation authorities in the first instance.[6]

The Sections therefore respectfully suggest the following clarifications in the Draft Anti-Monopoly Agreements Regulation to ensure an effective leniency program:

(1) Article 13 should indicate that only participants in cartels are entitled to apply for leniency relating to the cartel.

(2) Article 13 should clearly explain the requirements to qualify for leniency. It would be helpful to identify the circumstances under which SAIC (and its local agencies) can exercise its discretion to deny leniency if such requirements are fulfilled. These circumstances should be limited to the minimum necessary. In addition, guidance would be welcome as to the status of applications which are found to be ineligible for leniency by the SAIC but which may be eligible for leniency by the NDRC.

(3) It is important to clarify whether a limited number of companies involved in the same cartel case can benefit from the leniency program. The Sections also suggest a range of percentage of reductions in penalties for the second and third qualified leniency applicants, so that potential applicants will have some certainty and be more motivated to seek leniency as soon as possible. In addition, a system to more firmly establish the order of applicants making applications, and thus the priority of applicants' eligibility for leniency would be useful.

II. Draft Abuse of Dominance Regulation

a. General Comment

The Sections remain concerned that overbroad prohibitions on market conduct by dominant undertakings may actually dampen competition and innovation. Undertakings may be penalized for being successful innovators, or they may choose not to innovate because of the fear of penalties. At the least, the Sections respectfully suggest that a provision be included in the Abuse of Dominance Regulation expressly providing that conduct by an undertaking with dominant market power will not be prohibited under the AML unless it has an anticompetitive impact that is not outweighed by efficiencies or other pro-competitive effects.[7] This would be consistent with Article 6 of the AML.

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[6] See, May 2009 Comments at pp. 6-8, 27-31.

[7] *See*, May 2009 Comments at pp. 8-9, 31-32.

b. Article 8 – Justifications/Burden of Proof

Article 8 of the Draft Abuse of Dominance Regulation describes the factors that will be considered in assessing whether the conduct described in Articles 4 through 7 violates the AML in a specific case. This Article is an important addition to the Regulation because it provides needed clarity and transparency regarding the justifications that business undertakings may offer for their conduct. Article 8(2) is particularly important because it calls for a consideration of whether the conduct at issue eliminates or restricts competition and harms consumers. As the Sections explained in their May 2009 Comments, only conduct that eliminates or substantially restricts competition and harms consumers should be viewed as a prohibited abuse of a dominant market position under the AML.[8] As the May 2009 Comments explain, the Sections believe that the limitation contained in AML Article 6 – that abuses of a dominant market position are prohibited only where they eliminate or restrict competition – is crucially important to ensure that AML enforcement is focused on harm to *competition* itself, and to consumers, rather than harm to individual firms that is a wholly normal result of free-flowing competition in the marketplace. This is especially true because the types of conduct listed in Articles 4 through 7 of the Draft Regulation often do not threaten competition nor harm consumers, even when practiced by a firm with a dominant market position. In fact, such practices can often be pro-competitive, and reflect vigorous competition that results in lower prices to consumers.

Although Article 8 is an important positive addition, the Sections offer comments on several aspects of that provision that raise possible concerns. As a general matter, Article 8, in conjunction with Articles 4 through 7, appears to impose the burden on an undertaking to justify its conduct, by making the specified conduct unlawful unless the business provides a justification. This may force businesses to devote valuable time and resources to justify business conduct that is pro-competitive or benign. The Sections identified a similar concern with respect to Articles 9 and 10 of the 2009 Draft Regulation.[9] Under U.S. antitrust law, the burden is placed on the government to show that the conduct is unlawful and anticompetitive, an approach also taken by numerous other competition law jurisdictions around the world. Although a business may be obligated to present evidence in its defense, the government must be able to make an initial showing both that the conduct by a dominant firm was of a type that is unlawful and that it had an anticompetitive effect.

In addition, Article 8 establishes three factors that are to be considered in determining whether conduct is justified. The Article does not explain, however, how these factors are to be balanced or the weight each factor carries. It is troubling that Article 8(2) makes the elimination or restriction of competition only one of the three factors, so that it is possible for conduct that does not eliminate or restrict competition nonetheless to be found in violation of the AML. Under U.S. law, if the conduct does not eliminate or restrict competition, it would not violate the antitrust laws. In addition, consistent with the AML, Article 8(3) identifies "social public interests" and "economic development" as further factors to be considered in determining whether conduct is justified. As a general matter, U.S. antitrust law

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[8] *See* May 2009 Comments, at § III.A (p. 32).

[9] See *id.* at §§ III.F-G (pp. 36-37).

does not take into account considerations of social public interests, as that factor calls for judgments that are typically incapable of proper assessment using the analytic tools available to antitrust enforcers. Moreover, such a factor may be difficult to evaluate consistently and transparently, in a way that provides proper guidance to businesses in determining whether their conduct may violate the AML. Similarly, the effect on economic development would not be examined by U.S. antitrust enforcers, except to the extent that the conduct being evaluated may create direct benefits for long-run consumer welfare. Long-run consumer welfare, however, is much narrower than the term "economic development."[10]

The Sections therefore recommend that SAIC revise or clarify Article 8 in several respects. First, we suggest that SAIC revise Article 8 to make it clear that SAIC must establish that anticompetitive effects outweigh proffered justifications in order to find a violation. Second, the Sections suggest that SAIC revise Article 8 to explain more fully how the factors in that Article will be considered in evaluating whether there is a justification for conduct. In particular, the Sections recommend that only conduct that unreasonably restrict competition may be found to be in violation of the AML. Third, if SAIC retains Article 8(3), the Sections suggest that Article 8(3) be clarified to explain how, if at all, "social public interests" and "economic development" will be evaluated and balanced in relation to competitive effects in determining whether conduct is justified.

c. Article 3 – Definition of Dominant Market Position

The AML defines a "dominant market position" as a "market position in which an undertaking has the ability in the relevant market to control the price or quantity of products, or other transactional terms regarding products, or to impede or affect other undertakings' ability to enter the relevant market." The Draft Abuse of Dominance Regulation appears to expand the 2009 Draft Regulation's definition of the AML test, the "ability to impede or affect other undertakings' ability to enter the relevant market".

Article 3 of the Draft Abuse of Dominance Regulation provides that the "ability to impede or affect other undertakings' ability to enter the relevant market" refers to "the ability to exclude other undertakings from entering the relevant market or to delay the entry of other undertakings into the relevant market in a reasonable time, or to *increase* the costs of entry into the relevant market by other undertakings such that they can enter the market but *it is difficult* for them to effectively compete there." (Emphasis added.) Under the 2009 Draft Regulation, an undertaking would be considered dominant only if it has the power to "*significantly*" increase other companies' costs of entry such that the other undertakings "*cannot*" effectively compete with existing competitors (instead of simply making it more difficult to compete).

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[10] The Sections discussed these concerns at pages 2, and 7-15 of their July 15, 2003 Joint Submission on the Proposed Anti-Monopoly Law of the People's Republic of China, available at http://www.abanet.org/intlaw/committees/business_regulation/antitrust/abaprcatfinalcombo.pdf. A copy of the July 2003 Submission is appended for convenience of reference. They also discussed these questions at pages 5-8, of their May 19, 2005 Joint Submission on the Proposed Anti-Monopoly Law of the People's Republic of China (2005 Comments), available at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/abaprc2005fin.pdf. A copy of the May 2005 Submission is appended for convenience of reference.

The Sections suggest clarification on whether these language changes are intended to broaden the definition of "dominant market position", and thereby expand the circumstances under which an undertaking could be found to hold a dominant market position.

The Sections reiterate their concerns that care needs to be taken to analyze barriers to entry. Conduct such as the development of a superior product or more efficient production methods may sometimes result in an increase of entry difficulty but not because of diminished competition. Such conduct does not necessarily suggest a dominant market position, nor is it indicative of an abuse of market dominance.[11]

d. Article 4 – Refusals to Deal and Essential Facilities

In the May 2009 Comments, the Sections pointed out that refusals to deal are commonplace in the economy and are, in most circumstances, pro-competitive or competitively neutral even when the refusal is by a dominant firm.[12] This is particularly true when the counter-party is not a competitor, in which case the dominant firm generally has a strong incentive to enter into the most efficient business relationships. For the economy to operate smoothly, companies must be free to choose the business relationships into which they enter and to adjust those relationships if business circumstances change, without being concerned about incurring antitrust liability.

Article 4 appears to place the burden on the dominant firm to justify its every action with respect to each of its counter-parties. This will reduce the efficiency of China's economy, both because dominant firms will be deterred from entering into relationships with some counter-parties for fear of being locked into such relationships even if the counter-party later performs poorly and because, as discussed in connection with Article 8, dominant firms will be forced to devote valuable time and resources to justifying pro-competitive actions. For these reasons, the Sections respectfully recommend that Articles 4(1)-4(4) be deleted.

With regard to Article 4(5), the Sections respectfully submit that Article 4(5) sets too low a standard for finding that a facility is "essential." With this low standard, competitors of a dominant firm will have the incentive to bring complaints to SAIC rather than invest in their own facilities. Moreover, dominant firms will have a reduced incentive to invest in their own facilities for fear that they will later have to provide access to free-riding competitors. In the experience of the Sections' members, a facility is rarely truly essential. Recognizing these concerns, the United States Supreme Court has made it clear that it will treat essential facilities claims with great skepticism (see *Verizon v. Trinko* 540 U.S. 398 (2004)), and the European Commission has set forth specific and stringent conditions under which an essential facilities argument will be considered.[13]

For these reasons, the Sections respectfully recommend that Article 4(5) adopt substantially more stringent conditions for a facility to be deemed "essential." Currently, Article

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[11] *See*, May 2009 Comments at pp. 9, 33.

[12] *See*, May 2009 Comments at pp. 10, 35-36. *See also* 2005 Comments at pp. 3-4, 18-19.

[13] *See* May 2009 Comments at pp. 10, 36. *See also* 2005 Comments at pp. 3-4, 20-21.

4(5) cites three factors that will be "considered": (1) the "feasibility" of the counter-party duplicating the facility, (2) the "extent of reliance" of the counter-party on the facility to "operate effectively," and (3) the effect on the dominant firm of providing access. The Sections recommend that Article 4(5) be strengthened to require that *all* of the following conditions be present before a facility is deemed to be "essential": (1) it is not economically feasible for any other undertaking (not just the counter-party) to build a facility that would allow the undertaking to compete in the relevant market, (2) there is no other economically feasible way other than access to the dominant firm's facility for any other undertaking (not just the counter-party) to compete in the relevant market, (3) competition will be enhanced (either through more competition for existing products or through the provision of new products) if the counter-party is given access, and (4) providing access would not harm the dominant firm's ability to compete in the relevant market.

e. Article 6 – Tie-Ins and Bundling

Article 6 appears to be in substantial part a revision of Article 10 of the 2009 Draft Abuse of Dominance Regulation. The Sections continue to have the concerns expressed in their May 2009 Comments over the presumption of anticompetitive effects from tie-in sales and bundled discounts created in the old Article 10.[14] We have additional concerns on Article 6(1), which has added some factors for determining the presence of prohibited tying and bundling, and on Articles 6 (2), (3) and (4), which have specified some types of terms as prohibited "unreasonable restrictions".

Article 6(1) prohibits tying and bundling that "goes against transaction practice or consumption habits, or is in disregard of the functions of different products". Transaction practice is an evolving concept that changes from time to time and from industry to industry. Tying or bundling may well be a new transaction practice and an innovative business strategy that lowers cost, increases price competition, or responds to consumer preference. Similarly, in different areas and for different products, different consumers can have different consumption habits. A consumption habit that is not considered common by one group of consumers may well be viewed as common by another. For example, not long ago, McDonald's and other major fast food chains in the U.S. introduced toys or music CDs in the kids' meal combinations. Perhaps bundling toys and CDs to fast food was not a usual transaction practice at the time, not all kids wanted the particular types of toys or CDs included in the bundle, and toys and CDs have different functions than food. Nevertheless, the practice was not considered to negatively affect competition or to constitute a violation of U.S. antitrust law. It was simply another form of competition among fast food restaurants. Mixed bundling that allows separate purchases of individual products in the bundle is even less likely to affect competition negatively, and often has pro-competitive justifications.

Articles 6(2)-(4) prohibit imposing unreasonable restrictions on contract terms, payment methods, transportation and delivery methods, methods of providing services, sales regions, sales targets, after-sale services, and conditions that are irrelevant to the subject of the transaction. There are numerous commonly used restrictions that have ample and normal

[14] *See* May 2009 Comments at pp. 10-11, 37.

business justifications. Terms of contract are commonly negotiated in business transactions and can include very complex conditions that are often restrictive in nature. Most of the time, such restrictions are meant to safeguard and facilitate business transactions instead of impeding competition. Many of the restrictions have efficiency or pro-competitive justifications. For example, in order to prevent franchisees from free riding and to preserve franchise value, a franchisor may mandate the use of particular equipment and the purchase of some inputs from particular accredited sources, or adopt common hours of operation, or even price controls. In order to provide strong incentives to a franchisee or to a local distributor, the franchisor or the manufacturer of a branded product sometimes gives the franchisee or the distributor an exclusive and restricted territory. This practice may reduce intrabrand competition inside and outside that territory, while increasing interbrand competition, by providing incentives for the franchisee or the local distributor to maintain product and service quality.

The Sections recognize that such restrictions imposed by a firm with a dominant position in the relevant market may be anticompetitive, but believe that this risk does not warrant shifting the burden of proof or imposing a presumption of illegality for restrictions on certain types of transaction terms. This is especially the case given that the Draft Abuse of Dominance Regulation does not specify what kinds of restrictions on these transaction terms would be considered "unreasonable." Instead, it is better to make clear that such transaction terms are prohibited only where they are found, after consideration of their asserted pro-competitive effects, to be anticompetitive. Thus, the Sections respectfully again recommend a revision as follows:[15]

> "A business operator possessing a dominant market position is prohibited from conducting tie-in sales, or attaching other conditions to transactions, where the overall effect of the tie-in sales or other conditions was demonstrated to be anticompetitive."

f. Article 7 – Anti-Discrimination

Article 7 of the Draft Abuse of Dominance Regulation prohibits dominant undertakings, without justifiable reasons, from implementing discriminatory terms on different transaction counter-parties that are in the same position. The discriminatory terms that Article 7 prohibits include "different transaction volume, varieties, and quality grades", "different payment terms and different delivery methods", and "different after-sale service conditions".

The Sections explained in their May 2009 Comments that transaction terms for different purchasers for the same or similar products may differ for legitimate and pro-competitive reasons.[16] Discrimination in itself is not harmful to consumers. The U.S. experience has shown that prohibitions on discriminatory treatment have led to higher prices for consumers by limiting discounting.[17] It has also led to inefficient product differentiation that

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[15] *See* May 2009 Comments at pp. 11, 37.

[16] *See* May 2009 Comments at pp. 37-38.

[17] *Id.* (citing Robinson-Patman Act; Antitrust Modernization Commission, Report and Recommendations, Chap IV.A).

allows businesses to sell these inefficiently differentiated products to different customers while remaining in compliance with the Robinson-Patman Act.[18]

Article 7 also appears to expand the types of specific discriminatory conduct that are prohibited. Specifically, Article 7(4) identifies several types of post-sale service conditions that may be bases for prohibited discrimination that did not appear in Article 11 of the 2009 Draft Regulation. In addition, Article 7(2) has added differing quantity discounts as a form of prohibited discrimination. As they do for all forms of differential terms of dealing with different kinds of customers, businesses often have legitimate, pro-competitive reasons for providing different quantity discounts or different after-sale service to different purchasers. Expanding the scope of prohibited discrimination is likely to cause businesses to avoid engaging in what is often pro-competitive, efficient conduct that ultimately benefits consumers in the form of lower prices and improved product variety or quality.

The Sections therefore suggest that Article 7 be deleted. If Article 7 is retained, it should be clarified to apply only to conduct that is discriminatory and also harms consumers or has anti-competitive effects, consistent with the Sections' comments on Article 8 above. In addition, if Article 7 is retained, the Sections recommend use of the analytical framework set forth in the Sections' May 2009 Comments.[19]

g. Article 12 – Presumption of Dominance

Article 12 of the Draft Abuse of Dominance Regulation is helpful to the extent it confirms that an undertaking may rebut the market share-based presumptions of dominance that arise under Article 19 of the AML, by demonstrating, in accordance with the factors listed in Article 10 of the Draft Regulation, that it lacks the power to control pricing or other terms or to impede market entry. The Sections believe that Article 12 could provide greater guidance with respect to the presumptions that arise under Article 19(2) and (3) of the AML, which apply, respectively, where the aggregate market shares of two undertakings in a relevant market exceed two-thirds, or the aggregate market shares of three undertakings exceed three-fourths.

The Sections have previously expressed their concerns about presumptions of dominance based on market shares alone, including presumptions based on the collective shares of multiple firms in a market, no one of which would be viewed as dominant based on its individual market position.[20] It is important that any such presumptions may be rebutted under Article 12 of the Draft Regulation. Article 12 in its current form could be interpreted to mean that an undertaking that is presumed to hold a dominant position under any of the market share thresholds in Article 19 of the AML may rebut that presumption by showing that in fact it individually lacks the power to control pricing, output or market entry.[21] If that is in fact the

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[18] *Id.*

[19] *Id.*

[20] *See* May 2009 Comments at pp. 34-35, and fn. 35.

[21] The Sections note, however, that Article 11 of the Draft Regulation provides that "The presumption of dominant market positions shall be carried out in accordance with provisions under Article 19(1) and Article 19(2) of the AML." It is unclear why Article 11 does not also refer to Article 19(3) of the AML. In any event, the Sections

intent, then it would be very helpful to revise Article 12 so that it expressly states that any undertaking may rebut the presumptions that arise under AML Article 19(1), 19(2) or 19(3) by showing that it individually lacks the ability to control the market.[22]

III. Draft Abuse of Administrative Powers Regulation

The Draft Abuse of Administrative Powers Regulation provides SAIC's first substantive rules dealing with the abuse of administrative power. The AML prohibits the abuse of administrative power to eliminate or restrict competition. When such an abuse occurs, however, it is up to the superior authority supervising the authority accused of the violation to correct the situation. The Anti-Monopoly Enforcement Authorities may only propose the remedial actions to be taken. Clarifications to Article 5 and Article 7 of the Draft Abuse of Administrative Powers Regulation may assist better understanding of how SAIC will implement these aspects of the AML.

Article 5 states that it is not an acceptable defense for an undertaking to argue that administrative authorities or organizations administering public affairs authorized by the law and regulation "compelled," or "disguisedly compelled" it to engage in anti-competitive conduct. First of all, the Sections suggest that the meaning of "disguisedly compelled" be clarified. Secondly, while compelling and disguisedly compelling administrative measures will not excuse an undertaking's anti-competitive conduct, it should be clarified whether SAIC will consider these circumstances as a mitigating factor. Likewise, it is unclear how SAIC will interact with the relevant administrative authorities/organizations to avoid putting undertakings in a situation where they are compelled or disguisedly compelled by the authorities to engage in illegal conduct and yet are subject to AML penalties for that conduct.

The first paragraph of Article 7 empowers SAIC (and its local agencies) to "stop" undertakings' anti-competitive behavior that is conducted according to administrative "decisions." This seems to suggest that there are no additional sanctions at this stage. The second paragraph of Article 7 provides that if the anti-competitive administrative restriction, authorization or rules are ended or are ordered ended but the undertakings in question still continue their behavior in accordance with those administrative measures, then "severe" sanctions will be imposed on those undertakings under the Monopoly Agreements Regulation and Abuse of Dominance Regulation. Article 7 thus seems to reflect a policy that undertakings will be penalized only when they continue the anti-competitive conduct after the administrative measures that ostensibly compelled the conduct have been ended or ordered ended. The Sections believe that this approach is the equitable one, and suggest that Article 7 be clarified to make it clear that the conduct of the undertakings in compliance with administrative measures shall not be penalized. At the least, the Sections suggest that SAIC clarify what additional sanctions may be imposed when stopping the undertakings' conduct under the first paragraph of Article 7, *e.g.*,

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believe the Abuse of Dominance Regulation should make it clear that any presumptions of dominance arising from AML Article 19 may be rebutted by making the showings described in Article 12 of the Draft Regulation.

[22] Alternatively, the Abuse of Dominance Regulation could provide that undertakings which meet the combined market share thresholds in AML Article 19(2) or 19(3) may rebut the presumption of dominance by demonstrating that they are not acting jointly with the other undertakings in the market.

whether the undertakings will be put on observation for a certain period to ensure that they do not later engage in anti-competitive conduct.

Finally, clarification would be helpful regarding the interplay of Article 5 and Article 7. If the intent is that, while Article 5 provides that administrative compulsion is not a defense, Article 7 provides the remedies that may be imposed depending on the circumstances of the compulsion, it would be helpful to state that intent expressly in the Draft Abuse of Administrative Powers Regulation.

CONCLUSION

The Sections hope these suggestions are helpful to SAIC and would be pleased to offer any further assistance that may be useful as SAIC finalizes the Regulations. The Sections recognize the substantial work that SAIC has accomplished in developing the Draft Regulations, and appreciate SAIC's consideration of our comments and those of others as it continues with its mission to implement and enforce the AML.

APPENDICES

Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the SAIC Draft Regulations on the Prohibition of Acts of Monopoly Agreements and of Abuse of Dominant Market Position, May 29, 2009

Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China, May 19, 2005

Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China, July 15, 2003

美国律师公会反托拉斯法部和国际法部就国家工商行政管理总局《关于禁止垄断协议行为的有关规定》（征求意见稿）和《关于禁止滥用市场支配地位行为的有关规定》（征求意见稿）之评论意见

2009 年 5 月 29 日

本文所述观点仅为上述部门共同提交，未经美国律师公会之代表大会或理事会的批准，因此不应被视为代表美国律师公会的政策立场。

美国律师公会（简称“ABA”）下属反托拉斯法部和国际法部（统称“两部门”）[1]谨此就国家工商行政管理总局（简称“工商总局”）于 2009 年 4 月 27 日公布的《关于禁止垄断协议行为的有关规定》（征求意见稿）和《关于禁止滥用市场支配地位行为的有关规定》（征求意见稿）（统称“规定意见稿”）相关内容呈递其评论意见[2]。两部门对为执行反垄断法而拟的《规定意见稿》中所反映出的工商总局的相当多的思考和努力表示赞赏。同时，两部门藉此机会提出如下评论意见，希望有助于最终规定的完成。在适当时，两部门愿意提供补充意见，或与工商总局进行相关磋商。两部门所呈交之评论意见反映了其在美国法律方面的专业知识与经验，同时也反映了其对国际反垄断法、竞争法的熟谙，以及其对诸如滥用市场支配地位等反垄断问题分析中所蕴涵的经济学专业知识的了解。

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[1] 负责起草该评论意见的工作组成员包括：Matthew I. Bachrack, 陈懿华, 邓飞, S. Beth Farmer, Francis Fryscak, John D. Graubert, H. Stephen Harris, Jr., 黄存真, Paul Jones, Gregory K. Leonard, Abbott B. Lipsky, Jr., James R. Modrall, William R. Vigdor,以及孙速。同时，David Ernst, Mark D. Whitener 和 Mike Yeh 也提供了宝贵意见。张一哲为起草工作提供了协助。本意见书中所阐述的观点并不必然代表上述工作组成员所属之专业机构的意见或立场。

[2] 《规定意见稿》是在工商总局网站内发布的公开征求意见稿，其链接地址为：http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/t20090427_37769.html。两部门就《规定意见稿》的评论意见基于非官方译文。

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概要

总体评论

鉴于欧盟(及其此方面的主要前身，欧洲经济共同体，在此一并称作欧盟)和美国的经验，两部门针对管制反竞争行为提供一些总体观察。欧盟和美国都曾试图以规则制止反竞争行为，而这些规则强调管理上的简易，依据行为的形式特征对行为进行归类，使得不需竞争分析即可迅速判断行为是否合法。然而每一次尝试都不令人满意，最终这两个法律体系都远离这种形式化模式，而采用了强调消费者福利最大化为广泛目标和使用经济分析来确定最有可能达到此目标的执法模式。

在协议方面，在任何有相当规模的现代经济体中，协议普遍存在，且是生产活动的基本组织中的一个重要元素。任何公共管制的体系都必须发展出迅速将注意力集中在少数可能产生反竞争影响或潜在影响的协议上的实际可行的方法。执法机构还要发展出实际可行的工具，能以合理、客观、有效率的方式区分损害竞争的协议和更多的有利处有效益或至少中性或对竞争影响无关紧要的协议。在进行多种尝试以改良之后，欧盟最终发布了 1/2003 号规定，广泛改革其对限制性行为进行公共管制的方式(及欧盟竞争政策执行的其它方面)。

欧盟在执行其对限制性协议管制的体系时面临的第二个基本现实是使用形式特征作为确定合法与否的主要标准产生了一系列不令人满意的管制影响。欧盟最终确立以增进经济福利、特别是消费者福利的政策目标(及欧洲特有的创立共同市场的目标)作为评定限制性协议的合法性的关键标准，并将经济分析运用于评定某些协议或某类协议增进还是阻碍这一目标。

美国将反垄断规则用于限制性协议的经历演化过程与欧盟的经历类似。最早的谢尔曼法案的司法先例面对同样的现实：协议对美国经济很重要。合理原则被采用，允许在对一系列市场情况的分析基础上，以协议的根本趋势是限制还是增进竞争和消费者福利及经济进步来进行对协议的区分。正如欧盟，美国法院和政府执法机构在面对依据形式和法律特征谴责协议的反垄断规则所造成的有害后果后，改变了方法。消费者福利作为反垄断价值被放在更看重的位置，所有协议(事实上包括其它交易和行为，如单方面行为)都以此为标准进行测度。

经济分析使得欧盟和美国的反垄断执法者将最积极的调查和救济工具使用在卡特尔行为上。同样原因，这些机构认真审查其它横向协议，并对此类交易的有利竞争的影响高度敏感。因此，对限制性协议的公共管制原则应是保护竞争而非竞争者的原则牢固地体现在欧盟、美国及许多其它司法区域的反托拉斯和竞争规则的方式方法中。

由于中国独特的情况，很难预测欧美经验在《规定意见稿》上是否也会被证明是正确的，但两部门谨建议工商总局在考察对《规定意见稿》的建议性改动时，

考虑下面这些基本原则：

1. 对协议和其它商业行为的本质性考察评估应以保持竞争市场以促进经济进步和消费者福利的基本政策目标为指导依据。

2. 应该使用经济分析来考察评估特定协议和行为的趋势是促进还是阻碍这种基本政策目标。

关于禁止垄断协议行为的有关规定（征求意见稿）（简称“垄断协议规定意见稿”）

合理的竞争政策对竞争对手之间的协议和纯粹的寡头垄断做出区分，前者属于禁止反竞争协议所管辖的范畴，而后者属于单方决定的自然结果而且法律无法给出切实的救济措施。当行为可能只是单方寡头行为却被推定为“默契”协议会妨碍经营者基于商业原因根据市场情况做出反应的能力。因此两部门建议删除第三条第三款，并对第四条作如下修改以明确可以证明存在被禁止协议或决定的证据类型：

> “经营者达成被禁止协议或决定的最有力证据是证明经营者进行过明确的交流并通过此交流而达成该协议的直接证据。如缺少该直接证据，但如果(1)经营者之间存在实质上并行一致的行为，（2）至少一个经营者没有合理的商业理由使其单独从事该行为，并且（3）有其他间接证据证明经营者间存在协议，而不仅仅是互相依赖，仍可推断协议存在。”

否则，两部门建议删除第三条第三款和第四条，因为，意见稿的规定可能很难适用，而且可能达到与预期相反的目的。

两部门担心虽然第五条第三款认为有关新技术或新产品限制的协议可能导致反竞争损害是正确的，但该第五条第三款过于宽泛的解释可能同时会禁止促进技术创新的很多类型的协议。两部门建议明确采取灵活和具体问题具体分析的方式来评估该等协议（尤其是在合营企业、技术许可中排他性和回授条款的情况中），这样可以更好地阻止反竞争协议，同时又允许有益的协议存在。

作为“垄断协议”的一类，第六条第一款禁止“在招投标活动中招标人与投标人达成”协议，表面上看来其意在解决的问题不属于典型的反垄断问题。两部门建议，如保留第六条第一款，那么就应当明确招标者在安排招标时应当有一定的余地，只要这些规则对投标人都是透明的，那么第六条第一款无须涉及。否则，规定就会成为服务于那些未中标人利益的工具，这些未中标人希望攻击招标方在如何安排投标程序方面的合理选择。《垄断协议规定意见稿》第六条第二款禁止了经营者“无正当理由”与交易相对人达成协议，“约定交易相对人只能在特定的区域市场内从事经营活动”。这类区域限制在美国法中很少受到审查，而且无数经销和特许

经营协议都引入这些限制作为供应关系的主要特征。

两部门认为除了竞争者固定销售价格、限定产量或分割市场的协议，反垄断法应该允许经营者向相关当局证明一项协议增加竞争并提高效率的可能性超过损害到竞争的威胁，因此可以不被禁止。目前意见稿的第七条要求经营者“证明”所达成协议符合《反垄断法》第十五条规定因此不应当被禁止。如工商总局能就经营者协议符合《反垄断法》第十五条规定必须满足的标准作出进一步指导，《垄断协议规定》就能更好地鼓励竞争并实现《反垄断法》的目标。两部门建议，第七条规定竞争对手之间的协议如果不涉及固定价格，限定产量或分割市场的，协议各方证明协议与实现《反垄断法》第十五条规定目标之一合理相关，并且符合第十五条“不会严重限制相关市场的竞争，并且能够使消费者分享由此产生的利益”要求的，将在《反垄断法》第十五条下享受豁免适用。工商总局还可考虑在第七条中设立安全港，如协议未涉及固定价格，限定产量或分割市场的，在安全港内如无特殊情况工商总局将不会就该协议提出异议。安全港的使用反映了竞争者合作通常有利于促进竞争的事实。

虽然某些行业协会从事反竞争行为或为其提供便利，多数行业协会能够发挥很多有利的职能，而且行业协会的存在本身不能作为垄断协议存在的证据。第八条宽泛的禁止可能会妨害有益的协会活动，并限制标准制定组织或共同研发活动中的促进竞争的行为。两部门认为第八条应当仅适用于行业协会活动涉及第五条和第六条规定的被禁止垄断协议的情况。此外，第八条第三款应更谨慎地区分行业协会本身的活动和协会成员的行为，同时鼓励行业协会制定执行阻止和禁止反竞争行为的程序和政策。

对于工商总局和“省、自治区、直辖市工商行政管理局（以下简称“省级工商行政管理局”）”的相关职能，两部门建议解释第九条“全国范围内有重大影响的”的含义，尤其是当涉及外方时。两部门建议《垄断协议规定》在第十条中明确，对于主要发生在一个行政区域内同时在全国范围内有重大影响的协议，工商总局将保留其管辖权。特别是，对于有涉外因素的重大案件，工商总局可能要明确保留其管辖权。不论工商总局授权省级工商行政管理局的范围如何，两部门建议第十条规定省级工商行政管理局的调查和处罚受国家工商行政管理总局的监督，以确保《反垄断法》在全国范围执行的一致性和连贯性。

两部门欢迎《垄断协议规定意见稿》纳入第十二条和第十三条规定的配合调查宽大处理的条款。宽大处理的安排在阻止垄断协议，以及激励经营者主动终止参与这些协议并向执法机关进行报告两个方面都有实效。任何有效和解安排都需要提供充分的激励措施以鼓励各方寻求宽大处理。为此，两部门谨提出有效宽大处理安排的四个必要条件，并鼓励工商总局制定满足这四个条件的安排。安排必须在程序上透明、有宽大或显著的和解让步、法律上的确定性以及保护保密性和特权。两部门建议在《垄断协议规定》中规定以下方面的额外说明使宽大处理安排收到实效：

1. 第十二条应明确可以申请宽大处理安排的垄断协议类型。两部门建议第十二条和第十三条明确指出宽大处理安排仅适用于卡特尔。工商总局应当同时在《垄断协议规定》中明确与价格无关的横向和纵向垄断协议根据《反垄断法》第四十六条规定处罚的计算方法。两部门还建议，第十二条和第十三条应明确宽大处理是否限于根据《反垄断法》对垄断协议的起诉还是也包括对非《反垄断法》行为的起诉（例如，一般欺诈行为），或关于垄断协议的私人诉讼。

2. 第十二条应明确可以宽大处理的确切情形。两部门建议以下条件作为第十二条和第十三条规定以外的宽大处理的补充条件：工商总局尚未从任何其他来源获悉相关信息；宽大处理申请人及时停止参与协议；申请人的报告必须完整和真实；并且申请人必须在整个调查和任何起诉过程中继续与工商总局配合。

3. 第十二条规定工商总局“可以”减轻对后来举报的公司的处罚。明确第十二条规定的工商总局可以行使的自由裁量权将在第十三条规定的情形下按第十三条的规定行使，将很有助益。第十三条规定对第一个主动报告的申请人进行最大幅度的宽大处理，因此，两部门建议工商总局建立确定申请人报告顺序的体制，由此确定他们取得宽大处理的优先顺序。透明和可以预见的宽大处理程序至少与明确规定的宽大处理考虑事项同等重要。

4. 第十二条和第十三条都使用了“免除或者减轻处罚”。根据《反垄断法》第四十六条，该“处罚”如果是经济处罚，可包括没收违法所得和罚款。两部门建议工商总局明确免除或减轻是否仅适用于罚款，或者也适用于没收违法所得。

5. 第十二条和第十三条提及的“重要证据”和“有关情况”可能包括保密商业信息。两部门建议这些条款明确规定在申请宽大处理期间披露的任何商业秘密都将予以保密。

6. 由于工商总局和国家发展和改革委员会（“发改委”）在《反垄断法》实施中的管辖权不同，因此，对于本规定和发改委在《反垄断法》项下可能采取的任何宽大处理安排，两个机构协调以确保一致很重要。

《反垄断法》第四十五条还规定在涉嫌违法的经营者承诺时可以中止调查，这有助于提高执法机构的效率并优化机构的资源配置。两部门建议工商总局在《垄断协议规定》条款中规定调查中止的条件和程序。以下方面可以作为出发点考虑：

1. 两部门建议工商总局定义承诺机制的适用范围。例如承诺机制并不适合用于卡特尔。

2. 两部门建议根据《反垄断法》第四十五条中止调查的决定应明确承诺必须履行的时间期限以及承诺履行后工商总局最终终止或继续调查的时间期限。工商总局还应明确在什么情况下工商总局应继续其调查，这些情况均应明确具体并有严格的定义。对于一项有效的暂缓调查的安排而言，在调查什么时候结束或者继续上具有法律确定性和可预见性十分重要。

3. 两部门建议《垄断协议规定》规定《反垄断法》第四十五条项下的承诺对于消除工商总局指出的具体反竞争问题而言是必要和相称的。

4. 和宽大处理安排一样，工商总局和发改委协调确保承诺/调查中止机制与发改委可能根据《反垄断法》采取的任何承诺机制保持一致是十分重要的。

关于禁止滥用市场支配地位行为的有关规定（征求意见稿）（简称“滥用支配地位规定意见稿”）

如何让针对占市场支配地位企业的行为规则不具有在必要地保护竞争之外的限制性，一直是所有竞争法机构面对的最困难和最有争议性的议题之一。两部门建议工商总局考虑采用一些对针对占市场支配地位企业的法规政策（《滥用支配地位规定意见稿》为一代表）具有一般适用性的概括原则。首先，两部门推荐适用的原则是除非占市场支配地位企业的行为至少要对竞争造成的损害威胁大于对竞争产生的有利影响，否则其行为不被认为构成滥用。其次，在相同的基础上，两部门还推荐适用以下原则：如果具有可证明的效率原因，占市场支配地位的企业行为（即使此行为具有产生某些重要排挤作用的可能性）应该被允许，并在被效率原因合理化的范围内被允许。有利于消费者的行为（例如加速了占市场支配地位企业的成长并同时淘汰竞争者的产品创新）如果受到处罚，可能会造成严重的经济停滞和对合理经济政策目标的直接破坏。

应该注意避免将第三条中对市场支配地位的定义和第二条中实质禁止具有市场支配地位的经营者滥用市场支配地位排除限制竞争混为一谈。完全合法的行为，例如发展高端产品或者发展更有效率的生产方法的行为可能会造成经营者获得高市场份额和/或市场进入壁垒，但其本身并不是对市场地位的滥用。分析市场进入壁垒应当谨慎。承担保护竞争者这种特殊义务，在竞争法原则下是得不到合理解释的。

第五条第四款表示 A 公司对 B 公司在交易上的依赖程度是对 B 公司具有支配地位的有效的表现因素。但是，这种情况的存在经常有合理的商业解释，而且支持或者驳斥对支配地位的认定需要有更多的因素加以考量。例如，特许经营合同允许特许经营人更迅速地成长，并且以被特许经营人收取剩余利润的方式激励被特许经营人充分努力发展业务。这样的合同本质上就要求被特许经营人只与特许经营人交易，而且合同的期限经常较长。也许一个被终止合同的被特许经营人难以找到另一个不同的供应商，但这个事实并不是对特许经营人在市场上具有支配地位与否的反映。商业交易中较小一方对较大一方的依赖并不必然表明较大一方具有市场支配地位，发生在这两方之间的争议也经常是普通的合同争议。而且，供应商和经销商有长时间的大规模的交易历史并不必然意味着交易一方转向另一方的竞争者会困难。

两部门之前对以市场份额为基础推定出具有市场支配地位表示过担忧，两部门对《滥用支配地位规定意见稿》第六条中的市场份额标准有同样的担忧。第六条第二款和第三款的规定似乎是建立在集体支配地位的理论上，但只有经营者被认为进行了协同行为，考虑集体支配地位才有意义，而且在这种情况下，市场份额自身并不能充分推定出支配地位的存在。为推翻第六条第二款和第三款下推定出的支配地位，经营者在任何情况下都不应该被要求证明没有单个经营者具有突出的市场地位，因为如果某单个经营者具有突出的市场地位，这个事实在一开始就否认了第六条第二款和第三款下的推定所基于的原理。第七条应该更明确指出，证明第七条第一款、第二款、或者第三款中任何一款就应该足以推翻市场支配地位的推定。

第八条处理的是极具难度和争议性的议题：拒绝交易，包括相关联的“必要设施”理论。运转正常的市场经济必然会使经营者决定交易对象的能力和寻求经营者认为对自己有利的交易条件的能力成为必需。尤其在知识产权方面，美国反托拉斯机构在 2007 年 4 月的《反托拉斯执法与知识产权的报告》中明确指出：“对单纯的单方面、无条件地拒绝许可专利行为赋予反托拉斯法下的责任不会在专利权和反托拉斯保护的互动中起到任何有意义的作用。”如果第八条解读为对经营者决定提供产品、服务的交易条件的能力加以一般性的限制，那么第八条将会引发很多没有效率和没有成效的行为。在最低程度上，必须对构成拒绝交易进行严格认定，而且严谨规定拒绝交易责任的前提条件。只有当对竞争造成了可以证明的和不可避免的损害（而不是简单的对个别竞争者的伤害）而且不存在合理的商业理由的时候，才会产生责任。第八条第一段中第二句话似乎是排除在“在同等的交易条件下，拒绝、削减、限定或中断与交易相对人进行交易”的情况下查究任何正当理由的可能性，而且表明此种交易的变化在任何情况下都不会被证明正当，两部门谨推荐将此句话予以删除。就“必要设施”理论而言，两部门认为鼓励经营活动在先剥夺经营者通过经营而得的利益在后会产生消极后果。就两部门在美国的经验来讲，经常会发生的情况是要求对“必要设施”强迫分享者低估了竞争者对设施的创新能力，而这种创新能力可以给消费者带来利益。所以，这个理论应该在清楚表达的和严谨阐述的条件下被极度严格地运用。

第九条禁止具有市场支配地位的经营者“没有正当理由”地进行排他交易，对此两部门有两种担忧。第一，在何种“正当理由”下具有市场支配地位的经营者才可以进行排他交易没有被清楚地阐释。第二，似乎存在没有根据的对损害竞争作用的推定，使得证明责任归于经营者，经营者需要证明排他交易可以被正当化。因此，两部门建议删除第九条，或者作如下修改：

> “具有市场支配地位的经营者限定交易相对人只能与其进行交易或者限定交易相对人只能与其指定的经营者进行交易，并且此种限制在权衡之后被证明是损害竞争的，那么此种限制应该被禁止。”

第十条禁止具有市场支配地位的经营者“没有正当理由”地搭售商品。两部门对第十条有类似于对第九条的担忧。另外，两部门对禁止“混合型捆绑”的第十条第三款也有担忧。所谓“混合型捆绑”，就是商品既被单独销售，又被组合销售，而单独销售时商品的价格“较高，并导致或可能导致相关市场的竞争者被排斥或被迫退出市场，或阻碍其他经营者进入该市场”。即使可能会淘汰竞争者，混合型捆绑也可以促进竞争。所以，两部门建议第十条被完全删除，或者作如下修改：

> “具有市场支配地位的经营者搭售商品或者在交易时附加其他交易条件，并且此种搭售或者其他条件在权衡之后被证明是损害竞争的，那么此种搭售或者附加条件应该被禁止。”

《滥用支配地位规定意见稿》的第十一条禁止具有市场支配地位的经营者没有正当理由，在同等交易中，对条件相同的交易相对人实行差别待遇。对相同或者相似的产品的不同购买者采用的交易条件可能会因为许多合理的和促进竞争的原因而不同。差别待遇本身并不会有损消费者。而且，由于反差别待遇法限制了竞争的形式，反差别待遇法倾向于保护竞争者而不是消费者。因此，两部门建议第十一条被删除。如果第一十条需要保留，两部门建议其清楚表明只禁止对消费者具有或者可能具有损害竞争作用的差别待遇，而不是概括地禁止差别待遇。

对于《滥用支配地位规定意见稿》第十四条和第十五条涉及的工商总局和“省级工商行政管理局”的相关职能，两部门有对《垄断协议规定意见稿》第九条和第十条相同的担忧和建议，并谨请参考对《垄断协议规定意见稿》中相关议题的讨论。

与《垄断协议规定》相关，《反垄断法》第四十五条还规定在涉嫌违法的经营者承诺时可以中止调查的可能性，这种可能性应该也适用于对滥用市场支配地位的调查。承诺基础上的中止调查可以成为解决针对被控滥用但在《反垄断法》下比较模棱两可的行为的调查的一种方式。因此，两部门建议工商总局在《滥用支配地位规定》中也对中止调查的条件和程序作出规定，并谨请参考对《垄断协议规定意见稿》中相关议题的讨论。

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE SAIC DRAFT REGULATIONS ON THE PROHIBITION OF ACTS OF MONOPOLY AGREEMENTS AND OF ABUSE OF DOMINANT MARKET POSITION

May 29, 2009

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA")[1] respectfully submit these comments on the Regulation on the Prohibition of Acts of Monopoly Agreements (Comment Draft) ("Draft Monopoly Agreements Regulation") and the Regulation on the Prohibition of Acts of Abuse of Dominant Market Position (Comment Draft) ("Draft Abuse of Dominance Regulation") of China's State Administration for Industry and Commerce ("SAIC") published for comment on April 27, 2009.[2] The Sections appreciate the substantial thought and effort of SAIC reflected in the Draft Regulations to implement the Anti-Monopoly Law ("AML") and take the opportunity to offer these comments in the hope that they may assist in the completion of final regulations. The Sections are available to provide additional comments, or to participate in consultations with SAIC, as appropriate. The Sections' comments reflect their expertise and experience with U.S. law and their familiarity with antitrust/competition law internationally, as well as expertise in the economics underlying the analysis of antitrust issues such as the abuse of dominant market position.

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[1] The members of the Working Group that drafted these comments are Matthew I. Bachrack, Yee Wah Chin, Fei Deng, S. Beth Farmer, Francis Fryscak, John D. Graubert, H. Stephen Harris, Jr., Cunzhen Huang, Paul Jones, Gregory K. Leonard, Abbott B. Lipsky, Jr., James R. Modrall, William R. Vigdor, and Su Sun, with comments from David Ernst, Mark D. Whitener and Mike Yeh and assistance from Yizhe Zhang. The views stated in these comments do not necessarily reflect the views or opinions of the professional organizations with which the members of this Working Group are affiliated.

[2] The Draft Regulations were published for public consultation on SAIC's website at http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/t20090427_37769.html. The Sections' comments on the Draft Regulations are based on unofficial translations.

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EXECUTIVE SUMMARY

General Comments

In light especially of the experience of the European Union (and its main predecessor institution in this regard, the European Economic Community – both will be referred to herein as the EU) and the United States, the Sections offer some general observations regarding efforts to regulate anticompetitive conduct. Both the EU and the U.S. attempted to proscribe anticompetitive conduct by resorting to rules that emphasized administrative simplicity, categorizing conduct according to formal characteristics which allowed their legality to be determined quickly and without competitive analysis. In each case the attempt was unsatisfactory, and each system eventually moved away from this formalistic approach to a new approach focusing on the broad objective of maximizing consumer welfare and employing economic analysis to identify enforcement approaches most likely to advance that objective.

In the area of agreements, in any modern economy of significant size, agreements are a ubiquitous, critical element in the basic fabric of productive activity. Any system of public control must develop practical means to focus quickly on the limited number of agreements likely to produce an anticompetitive impact or potential impact. The enforcement authority must also develop practical tools that can distinguish in a reasonable, objective and efficient manner between the fraction of agreements that may be competitively damaging, and the broader and more numerous range of agreements that are helpful and productive or at least neutral or otherwise inconsequential in their competitive effect. After much experimentation with other approaches to ameliorate the situation, the EU ultimately issued Regulation 1/2003, broadly reforming (among other aspects of EU competition-policy implementation) its approach to public control of restrictive conduct.

The second fundamental reality that confronted the EU during implementation of its system for control of restrictive agreements was that use of the formal characteristics as the primary criteria for determining legality produced a variety of unsatisfactory regulatory effects. The EU ultimately enshrined the policy objective of advancing economic well-being and especially consumer welfare (in addition to the

European-specific objective of creating a common market) as the key criterion for assessing the legality of restrictive agreements, and to employ economic analysis in the process of assessing the tendency of agreements, or classes of agreements, to advance or impede that objective.

The U.S. experience of applying antitrust rules to restrictive agreements evolved in ways analogous to the experience of the EU. The earliest Sherman Act judicial precedents confronted the same realities about the importance of agreements to the U.S. economy. The rule of reason was adopted, allowing agreements to be distinguished according to their fundamental tendency to restrain or advance competition and thus consumer welfare and economic progress, based on an analysis of a variety of market circumstances. Like the EU, the U.S. courts and government enforcement agencies, when confronted with the adverse consequences of antitrust rules that condemned agreements according to their formal and/or legal characteristics, shifted approach. Consumer welfare was placed in the preferred position as the antitrust value against which all agreements (and indeed all other transactions and conduct, including unilateral conduct) would be measured.

Economic analysis persuaded antitrust enforcers in the EU and the U.S. to orient their most aggressive investigative and remedial tools on cartel behavior. For the same reason those agencies scrutinize other horizontal agreements with heightened sensitivity to the procompetitive impact of such transactions. Thus, the principle that public control of restrictive agreements should protect competition rather than competitors has become firmly embodied in the antitrust and competition-rule approaches of the EU, the U.S., and many other jurisdictions.

While China's unique circumstances make it difficult to predict that the lessons of EU and U.S. experience will also prove true with regard to the Draft Regulations, the Sections respectfully suggest, however, that SAIC consider these basic tenets in assessing suggested adjustments to the Draft Monopoly Agreement and Abuse of Dominance Regulations:

1. Substantive assessment of agreements and other business conduct should be guided by the basic policy objective of maintaining competitive markets to promote economic progress and consumer welfare.

2. Economic analysis should be used to assess the tendency of particular agreements and conduct to promote or inhibit such basic policy objectives.

Draft Monopoly Agreements Regulation

Sound competition policy distinguishes agreements among rivals – which prohibitions on anticompetitive agreements may reach – from mere oligopoly –which the law cannot practically remedy and is the natural consequence of unilateral decision-making. Inferring a "tacit" agreement when the conduct may merely reflect unilateral

oligopoly behavior accordingly can chill a business's ability to respond to market conditions according to its business incentives. Therefore, the Sections suggest deleting Article 3(3) and revising Article 4 to clarify the types of evidence that may demonstrate the existence of prohibited agreements or decisions, to:

> "The best evidence that business operators reached a prohibited agreement or decision is direct evidence that the business operators communicated explicitly and, through that communication, reached such an agreement. In the absence of such direct evidence, an agreement might be inferred if (1) the business operators exhibited substantially parallel behavior, (2) at least one of the business operators does not have legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, *and* (3) there is additional circumstantial evidence supporting the existence of an agreement as distinguished from mere interdependence."

Otherwise, the Sections suggest that both Articles 3(3) and 4 be deleted because, as drafted, they may be difficult to apply and counterproductive.

The Sections are concerned that, although Article 5(3) correctly targets agreements, related to restrictions on new technologies or products, which may result in anticompetitive harm, an overly broad interpretation of Article 5(3) could also prohibit many types of agreements that may instead promote technological innovation. The Sections suggest that expressly adopting a flexible and fact-specific approach to the evaluation of such agreements, especially in the context of joint ventures and exclusive and grant back terms in technology licenses, can better serve the goals of both discouraging anticompetitive agreements while at the same time allowing beneficial agreements.

Article 6(1) prohibits, as a class of "monopoly agreement," any agreement which the "tenderer reaches with a bidder during bidding activities," and apparently addresses a concern that is not classically an antitrust problem. The Sections suggest that, if Article 6(1) is retained, it should be made clear that a tenderer should have leeway in structuring its solicitation of bids and that, so long as those rules are transparent to the bidders, Article 6(1) should not be implicated. Otherwise, the regulation could become a mechanism to serve the interests of unsuccessful bidders wishing to attack the buyer for its legitimate choices in deciding how to structure the bid process. Article 6(2) of the Draft Monopoly Agreement Regulation prohibits business operators from reaching an agreement with a counterparty that "without justified reasons, restricts the business operations of such transaction counterparty to a specific regional market only." Such territorial restrictions rarely attract scrutiny under U.S. law, and countless distribution and franchise agreements have incorporated them as a key feature of the supply relationship.

The Sections believe that, with the exception of agreements by competitors to fix their sale prices, limit output, or allocate markets, antitrust laws should allow business operators to demonstrate to the appropriate authorities that an agreement may increase competition and improve efficiencies more than it threatens to impair

competition and therefore should not be prohibited. As currently drafted, Article 7 requires business operators to "prove" that an agreement conforms to AML Article 15 and is therefore not prohibited. The Monopoly Agreements Regulation would better foster competition and the goals of the AML if SAIC were to provide further guidance as to the standard that business operators must satisfy for an agreement to conform to Article 15 of the AML. The Sections suggest that Article 7 provide that agreements among competitors that do not involve price fixing, limiting output or allocating markets will be exempt under Article 15 of the AML if the parties to the agreement provide evidence that the agreement is reasonably related to achieving one of the goals articulated in Article 15 of the AML and "will not substantially restrict competition in the relevant market and will enable consumers to share in the benefits derived therefrom" as required by Article 15. SAIC might also consider establishing safe harbors in Article 7, in cases of agreements that do not involve price fixing, or output or market allocation, where, absent extraordinary circumstances, SAIC will not challenge an agreement. The use of safe harbors reflects the fact that competitor collaborations are often procompetitive.

While some industry associations have engaged in or facilitated anticompetitive conduct, most also serve many useful functions and the mere existence of an industry association is not evidence of a monopoly agreement. The broad prohibitions in Article 8 may act as a deterrent to beneficial association activities and might restrict the pro-competitive behavior of standard setting bodies or research and development collaborations. The Sections suggest that Article 8 should apply only when the trade association's activities relate to monopoly agreements prohibited under Articles 5 and 6. In addition, Article 8(3) should more carefully draw a distinction between activities of the industry associations themselves on the one hand, and conduct of the associations' members on the other, while encouraging industry associations to have processes and policies that deter and prohibit anti-competitive conduct.

With respect to the relative roles of the SAIC and "the industry and commerce administrative authorities in the governments of provinces, autonomous regions as well as municipalities directly under the central government (hereinafter 'Provincial SAIC')", the Sections suggest that the phrase in Article 9, "having a significant nationwide impact," be clarified, particularly with respect to foreign parties. The Sections suggest that the Monopoly Agreements Regulation make it clear in Article 10 that SAIC would exercise its discretion to retain jurisdiction where an agreement may both occur principally within one administrative region and have significant nationwide impact. In particular, the SAIC may want to expressly reserve jurisdiction over major cases involving a foreign element. Regardless of the extent of authorization by SAIC to Provincial SAICs, the Sections suggest that Article 10 provide that investigations and sanctions by Provincial SAICs will be subject to SAIC oversight, to ensure consistency and coherence in the enforcement of the AML nationwide.

The Sections welcome the inclusion of leniency provisions for cooperation that are set forth in Articles 12 and 13 of the Draft Monopoly Agreements Regulation. Leniency programs are effective both in deterring monopoly agreements and providing incentives for business operators to voluntarily terminate their participation in these agreements and report to the enforcement authority. The fundamental requirement of any

effective settlement program is that it provides sufficient incentives to encourage the parties to seek leniency. To that end, the Sections respectfully suggest four criteria that are essential for an effective leniency program and encourage the SAIC to establish a program that meets these four criteria. The program must have procedural transparency, generous or significant settlement discounts, legal certainty and the protection of confidentiality and privilege. The Sections suggest that additional clarification in the Draft Monopoly Agreements Regulation in the following areas would enable an effective leniency program:

(1) Article 12 should specify which types of monopoly agreements are entitled to apply for leniency policy. The Sections suggest that Articles 12 and 13 expressly indicate that the leniency policy is applicable only to cartels. The SAIC should at the same time clarify in the Monopoly Agreements Regulations the methods by which penalties under AML Article 46 will be determined for non-pricing related horizontal monopoly agreements and vertical monopoly agreements. The Sections also suggest that Articles 12 and 13 clarify whether the leniency would be limited to prosecutions under the AML of monopoly agreements or whether the leniency would also include non-AML prosecutions for the conduct (for example, general fraud), or private litigation concerning the monopoly agreement.

(2) Article 12 should clarify the exact circumstances under which leniency will be available. The Sections recommend the following conditions as requirements for leniency in addition to the requirements of Articles 12 and 13: that the SAIC had not received the relevant information from any other source; the leniency applicant promptly halted its participation in the agreement; the applicant's report must be complete and truthful; and the applicant must continue to cooperate with the SAIC throughout the investigation and any prosecution.

(3) Article 12 provides that the SAIC "may" reduce penalties for subsequent firms that report. It would be helpful to clarify that the discretion that the SAIC may exercise under Article 12, will be exercised as set forth in Article 13 in the circumstances described in Article 13. Article 13 provides the greatest leniency to the first applicant to make a voluntary report, so the Sections recommend that the SAIC establish a system to identify the applicants in the order that they make their reports and therefore the priority of their eligibility for leniency. A transparent and predictable leniency process is at least as important as clearly articulated leniency considerations.

(4) Both Article 12 and Article 13 use the phrase of "immunity or reduction of penalties". Under Article 46 of the AML, such "penalties", if they are monetary, could include proceeds confiscated and fines. The Sections recommend SAIC make it clear whether the immunity or reduction applies not only to fines, but also to proceeds confiscated.

(5) The "important evidence" and "relevant information" referred to in Articles 12 and 13 may include confidential business information. The Sections recommend that these articles clarify that any business secrets disclosed during an application for leniency will also be kept confidential.

(6) Given the differing jurisdictions of the SAIC and the National Development and Reform Commission ("NDRC") in the implementation of the AML, it is important for the two authorities to coordinate to ensure consistency with any leniency program that the NDRC may adopt under the AML.

Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders, which enhances the enforcement authority's efficiency and the optimization of allocation of the authority's resources. The Sections suggest that SAIC include in the Monopoly Agreements Regulation provisions setting forth the conditions and processes under which prosecution will be suspended. The following aspects could be taken as a starting point:

(1) The Sections suggest that SAIC define the applicable scope of the commitments mechanism. For example, the commitments mechanism is inappropriate for cartels.

(2) The Sections recommend that the decision to suspend the investigation under AML Article 45 specify both the time limit in which commitments must be fulfilled and the time limit following fulfillment in which SAIC is obliged to finally terminate or continue the investigation. SAIC should also clarify under what circumstances SAIC would continue its investigation, and these circumstances should be specific and narrowly defined. It is important for an effective deferred prosecution program to have legal certainty and predictability as to when prosecution will be terminated or resumed.

(3) The Sections suggest that the Monopoly Agreements Regulations provide that commitments under AML Article 45 be necessary and proportionate to remove specific anti-competitive concerns identified by SAIC.

(4) As with the leniency program, it is important for the SAIC and NDRC to coordinate to ensure consistency with any commitments mechanism that the NDRC may adopt under the AML.

Draft Abuse of Dominance Regulation

Formulating mandates for dominant-firm conduct that are no more restrictive than necessary to protect competition is among the most difficult and controversial tasks facing any competition authority. The Sections recommend to SAIC that it consider certain broad principles of general applicability to the dominant-firm

mandates represented by the Draft Abuse of Dominance Regulation. First, the Sections commend the principle that dominant-firm conduct should not be regarded as abusive unless at a minimum such conduct threatens to harm competition more than it benefits competition. Second, on the same basis the Sections also commend the principle that dominant-firm conduct – even if it carries the potential for some material exclusionary effect – should be permitted if and to the extent justified by demonstrable reasons of efficiency. Punishing behavior that benefits consumers, such as a product innovation that accelerates the growth of a dominant firm at the expense of competitors, could result in severe economic stagnation and direct obstruction of sound competition policy objectives.

Care needs to be taken to avoid conflating the definition of a dominant market position in Article 3 with the substantive prohibition in Article 2 against an undertaking that possesses a dominant market position from abusing that position to exclude or restrict competition. Perfectly legal conduct such as the development of a superior product or more efficient production methods that may result in an undertaking obtaining a large market share and/or the creation of entry barriers, is not itself an abuse of the market position. Caution is required in analyzing barriers to entry. There is no justification under antitrust principles for imposing special duties to protect competitors.

Article 5(4) suggests that the extent to which Company A relies on Company B in doing business is a valid indicator of dominance held by Company B. However, there are often legitimate business justifications for such situations, and there are more factors that need to be considered to support or refute any conclusion of dominance. For example, a franchising arrangement allows a franchisor to grow faster and also gives a franchisee the incentive to make sufficient efforts because it receives the residual profits. Such a relationship will naturally require that a franchisee deal exclusively with the franchisor, and the term of the contract is often long. It may be difficult for a terminated franchisee to find a different supplier, but this is not a reflection of the franchisor's dominance in a market. Reliance of the smaller party on the bigger one in a business relationship does not necessarily reflect a dominant market position held by the bigger party, and disputes between the two parties are often ordinary contract disputes. Moreover, the fact that a supplier and a distributor have had a long history of engagement with a large business volume between them does not necessarily mean it is difficult for one of them to turn to competitors of the other.

The Sections' previously expressed concerns regarding market-share based standards for reaching a presumption on dominance apply with equal force to the market-share based standards of Article 6 of the Draft Abuse of Dominance Regulation. Market shares alone are insufficient to presume dominance under the conditions of Article 6(2) and 6(3), which appear to be based on joint dominance and to make sense only if the undertakings were assumed to be engaging in coordinated conduct. In any event, to rebut a presumption of dominance under Articles 6(2) or 6(3), businesses should not be required to show that no individual competitor has a prominent market position because, if one business had a prominent market position, that fact would undermine the rationale for the presumption of dominance under Articles 6(2) or 6(3) in the first place. Demonstrating any of Article 7(1), 7(2) or 7(3) should be sufficient to rebut any

presumption of dominant market position, and Article 7 should be clarified to make that clear.

Article 8 deals with the extremely difficult and controversial subject of refusals to deal, including the related "essential facilities" doctrine. A functioning market economy necessarily entails the ability of undertakings to decide whom to do business with, and to seek to do business on whatever terms they believe are advantageous for them. Particularly with respect to intellectual property, the U.S. antitrust enforcement agencies made clear in their April 2007 Report on Antitrust Enforcement and Intellectual Property Rights that "antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections." If read to impose a general limitation on the ability of undertakings to decide on what terms to offer their products and services, Article 8 will cause much inefficient and unproductive behavior. At a minimum, careful qualifications or pre-conditions for liability for refusal to deal are indispensable. Liability should only arise when there is demonstrable and unavoidable damage to the competitive process, not simply injury to individual competitors, and an absence of business justification. The Sections respectfully urge deletion of the second sentence of the first paragraph of Article 8 that appears to preclude any inquiry into business justification in cases of "refusing, reducing, limiting, or ceasing transactions with a counterparty under the same transaction conditions" and that suggests a rule that such changes can never be justified. With respect to the "essential facilities" doctrine, the Sections believe that it would be counterproductive to encourage entrepreneurial activity but then strip the successful undertaking of the benefit of that activity. In the Sections' experience in the United States, it has often been the case that those advocating forced sharing of an "essential" facility have underestimated the ability of determined competitors to innovate around the facility, with resulting benefits to consumers. This doctrine should therefore be applied with the utmost caution, and under clearly expressed and carefully developed conditions.

The Sections have two concerns with Article 9, which prohibits a company with a dominant market position from engaging in exclusive dealing "where no justified reasons exist." First, the "justified reasons" under which it would be acceptable for a company with a dominant market position to engage in exclusive dealing are not specified. Second, there appears to be an unwarranted presumption of anticompetitive effect, with the burden of proof shifted to the company to prove that exclusive dealing is justified. Accordingly, the Sections suggest deleting Article 9 or revising it as follows:

> "A business operator possessing a dominant market position is prohibited from constraining transaction counterparties to engage in transactions only with itself or only with its designated business operators, where the constraint is demonstrated on balance to be anticompetitive."

The Sections' concerns with Article 10, which prohibits a business with dominant market position from engaging in tie-in sales "where no justified reasons exist," are similar to those with Article 9. The Sections have additional concerns about Article 10(3), which prohibits "mixed bundling" where products are offered on a standalone basis as well as bundled together when the price of the products on a standalone basis is

"relatively high, causing competitors in the relevant market to be excluded from or forced to exit the market, or encumbering the entry to such market by other business operators." Mixed bundling can be procompetitive even if it excludes competitors. Accordingly, the Sections recommend that Article 10 be deleted in its entirety, or revised as follows:

> "A business operator possessing a dominant market position is prohibited from conducting tie-in sales, or attaching other conditions to transactions, where the tie-in sales or other conditions is demonstrated on balance to be anticompetitive."

Article 11 of the Draft Abuse of Dominance Regulation prohibits dominant undertakings, without justifiable reasons, from implementing discriminatory terms in equivalent transactions on counterparties of equal conditions. Transactional terms to different purchasers for the same or similar products could differ for many legitimate and pro-competitive reasons. Discrimination alone is not harmful to consumers. Moreover, anti-discrimination laws have a tendency to protect competitors rather than consumers, as they limit forms of competition. Therefore, the Sections suggest that Article 11 be deleted. If Article 11 is retained, the Sections suggest that it clearly prohibits only discriminatory terms with actual or likely harmful/anti-competitive effect to consumers, rather than discriminatory terms generally.

With respect to the relative roles of the SAIC and the Provincial SAICs in Articles 14 and 15 of the Draft Abuse of Dominance Regulation, the Sections have the same concerns and suggestions as with Articles 9 and 10 of the Draft Monopoly Agreements Regulation and respectfully refer to the discussion of the Draft Monopoly Agreements Regulation on this subject.

As noted in connection with the Monopoly Agreements Regulation, Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders, which appears to include investigations of abuse of dominant market position. The commitments mechanism would be a means of resolving investigations involving conduct that is alleged to be abusive yet often ambiguous under the AML. Therefore, the Sections suggest that SAIC also include in the Abuse of Dominance Regulation provisions setting forth the conditions and processes under which prosecution will be suspended, and respectfully refer to the discussion of the Draft Monopoly Agreements Regulation on this subject.

COMMENTS

I. General Comments

SAIC is familiar with other jurisdictions that have implemented legal and administrative control of anticompetitive conduct, similar to the steps that SAIC is now taking as a major part of the implementation of China's new AML. While the circumstances of the contemporary Chinese economy are unique, certain patterns of

experience with regard to such programs have been observed in other jurisdictions, even though implemented at different times and under substantially different circumstances. Accordingly, the Sections respectfully offer several reflections based on this experience with the initial design and implementation of public policy controls on anticompetitive conduct. SAIC may wish to consider whether such patterns might also arise in the case of implementing the Draft Regulations, and to evaluate whether potential adjustments to the Draft Regulations may be appropriate in light of this experience.

SAIC is also aware that two significant previous examples of implementation of public control of anticompetitive conduct are provided by the experience of the EU and the United States. The EU controls, embodied in Article 85 of the 1957 Treaty of Rome (now Article 81 of the EU Treaty and henceforth referred to as such), were the subject of early legislation and took the primary form of administrative mechanisms applied by Directorate-General IV (now the Directorate General for Competition or DG Comp and henceforth referred to as such). Under these provisions decisions were made by or under the direct authority of the European Commission (or "Commission") and ultimately subject to judicial review. They were first implemented in 1962 and have evolved in significant ways down to the present day.

Public control of anticompetitive agreements in the U.S. has been enforced primarily through litigation in the federal courts. The system implemented pursuant to the Sherman Act of 1890 allowed criminal and civil cases to be brought by the Department of Justice, as well as civil claims brought by private parties injured or threatened with injury from antitrust-law violations. All such claims were litigated before the federal courts.[3] In 1914 the U.S. added the option of administrative control of restrictive agreements by creating the Federal Trade Commission, whose decisions were also subject to judicial review. Although it has been strengthened and modified substantially in a variety of different ways, this same basic U.S. enforcement framework is still in place. Judicial litigation is still the dominant mode of antitrust enforcement in the U.S. where anticompetitive conduct is concerned.

Public control of anticompetitive agreements in both the European Union and the U.S. was initiated – although at different times and in strikingly different ways – by adopting enforcement modalities that forced each jurisdiction to confront several fundamental practical realities. Each system was fundamentally shaped, each in its own distinct way, by the necessity of responding to challenges posed by attempting to apply such public control in the face of those practical realities. In basic outline, each jurisdiction attempted to control anticompetitive conduct by resorting to rules that emphasized administrative simplicity, categorizing conduct according to formal characteristics which allowed their legality to be determined quickly and without competitive analysis. In each case the attempt was unsatisfactory, and each system eventually moved away from formal categorization to a new approach focusing on the broad objective of maximizing consumer welfare and employing sound economically-based analysis in order to identify enforcement approaches most likely to advance that

[3] Individual U.S. States have generally adopted similar enforcement approaches within their own court systems.

objective. This section of the Sections' Comments briefly traces at a general level both the European and American antitrust experiences in this regard.

The first reality is that in any modern economy of significant size, agreements are a ubiquitous, critical element in the basic fabric of productive activity. Agreements in such an economy are so numerous, diverse, dynamic and pervasive that no system of public control can possibly hope to scrutinize any significant fraction of them. When one considers all the purchase and supply agreements for goods and services of every description, as well as licenses, franchises, leaseholds, agencies, *etc.* that are found in every sector and at every level throughout any modern economy, it becomes immediately apparent that any system of public control must develop practical means to focus quickly on the extremely limited number of agreements likely to contain any verifiable anticompetitive impact or potential impact. Public authority must also develop practical regulatory instruments that can distinguish in a reasonable, objective and efficient manner between the tiny fraction of agreements that may be competitively damaging, and the much broader and more numerous range of agreements that are helpful and productive or at least neutral or otherwise inconsequential in their competitive effect.

The EU confronted this reality shortly after it adopted the "exemption system" that originally implemented its rules on restrictive agreements. That system provided powerful incentives for business enterprises to notify to the Commission each specific agreement that contained any *prima facie* restriction on trade within the EU under Article 81(1), even if on further analysis under the Treaty criteria of Article 81(3) the agreement might be deemed consistent with EU law. Absent notification, parties were on notice that agreements violating Article 81(1) would not only be regarded as void *ab initio,* but could expose the parties to substantial administrative fines for the period when the agreement was in effect prior to notification. When first implemented in 1962, this regulatory structure caused the Commission to be inundated by tens of thousands of such notifications filed on behalf of business enterprises wishing to avoid exposure to liability for significant fines. This overwhelming response to the implementation of Article 81 confirmed the ubiquity of agreements within the European market and quickly rendered the original vision of the exemption system essentially unworkable. This is especially noteworthy considering that when first implemented in 1962 the system applied only to the original six EU Member States and to an economy much smaller and less developed than the twenty-seven member EU that is now subject to the EU rules on restrictive agreements.

The EU implemented a variety of new mechanisms to cope with this flood of exemption applications. It provided an option for parties to an agreement to apply for and receive "negative clearance" – a preliminary determination of *prima facie* compliance with Article 81, rather than a formal exemption decision following in-depth review -- and it enacted a number of "block exemption" regulations in an effort to exclude innocuous agreements from the need for notification and review. The block exemptions defined broad categories of agreements by a variety of criteria including their formal content and legal characteristics and declared certain subcategories "exempt" from condemnation under the applicable standard of Article 81. These block exemptions

attempted to eliminate the need for negative clearance or full exemption decisions with respect to specific agreements.

Despite the adoption of many innovations in the effort to resolve the enormous backlog of notifications, the system never functioned in a satisfactory manner. It was criticized sharply by scholars and practitioners and was replaced as a result of the lengthy but ultimately successful process of "modernization" that culminated in the issuance of Regulation 1/2003, broadly reforming (among other aspects of EU competition-policy implementation) the EU approach to public control of restrictive agreements.

The second fundamental reality that confronted the EU during implementation of its system for control of restrictive agreements was that use of formal characteristics of agreements as the primary criteria for determining legality produced a variety of unsatisfactory regulatory effects. There are simply too many varieties of agreements to permit harmful agreements to be distinguished from beneficial or inconsequential agreements on the basis of such criteria. In order to identify agreements that are potentially harmful, it became essential to adopt legal tests that gave explicit recognition to specifically identified regulatory objectives.

As part of its effort to improve the effectiveness of its implementing legislation and regulations under Article 81, the EU decided ultimately to enshrine the policy objective of advancing economic well-being and especially consumer welfare as the key criterion for assessing the legality of restrictive agreements, and to employ economic analysis in the process of assessing the tendency of agreements to advance or impede that objective. (The EU has also fashioned its mandates regarding restrictive agreements to reflect the distinct EU Treaty objective of market integration, although the prescriptions indicated by the two objectives differ with regard to a limited class of agreements – as, for example, in the case of absolute territorial restrictions following Member State borders.) Emphasizing the consumer welfare criterion and applying economic analysis has a number of desirable substantive and administrative impacts on government mandates regarding restrictive agreements. First, this approach allows the identification and review of agreements to be guided with greater overall reliability toward agreements (and classes of agreements) more likely to threaten economic progress and consumer welfare and away from agreements that are helpful or innocuous in the pursuit of such goals. Thus, for example, economic analysis establishes that vertical agreements can restrict competition in ways that impede consumer welfare in only certain situations. By focusing primarily on agreements that occur in such situations, enforcement resources can be utilized more effectively, and unintended results – of both Type I (condemnation of a beneficial or innocuous arrangement) and Type II (failure to condemn a harmful arrangement) – can be reduced significantly.

Economic analysis, confirmed by study of a wide variety of market circumstances over a long period of time, also demonstrates that while horizontal agreements contain somewhat greater possibilities for competitive harm, the most serious anticompetitive potential arises with regard to a limited class of agreements. These involve collective restrictions on key elements of competition by individual firms – such

as price, output, capacity or market allocation – where the parties make no other genuine attempt to engage in functional cooperation or other forms of productive integration that create any possibility of economic progress or competitive benefit (such as cost reduction, enhanced innovation, new market entry and the like). Accordingly, antitrust enforcers in the EU and the U.S. have oriented their most aggressive investigative and remedial tools on such cartel behavior. For the same reason those agencies scrutinize other horizontal agreements – agreements occurring within transactions that have a principal purpose consistent with economic progress and consumer welfare, such as R&D joint ventures, joint procurement arrangements or other joint investments in production or distribution facilities – for their overall competitive effects.

Similarly, application of the consumer welfare criterion implies that public control of restrictive agreements should protect competition rather than competitors has become firmly embodied in the antitrust and competition-rule approaches of the EU, the U.S., and many other jurisdictions. As stated in a leading U.S. judicial decision,

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. *See, e.g., Brunswick Corp. v. Pueblo Bowl O Mat, Inc.*, 429 U.S. 477, 488 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116-117 (1986); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Spectrum Sports v. McQuillan, 506 U.S. 447, 458 (1993).

The U.S. experience of applying antitrust rules to restrictive agreements evolved in ways closely analogous to the experience of the EU. The earliest Sherman Act precedents confronted the same realities about the importance of agreements to the U.S. economy that formed the basis for the eventual reform of the EU "exemption system". The courts recognized that the Sherman Act's blanket prohibition on agreements that "restrain" trade would be far too sweeping – and might actually obstruct legitimate commerce – if literally interpreted to prohibit all contractual restraints, since virtually all contracts involve some element of restraint upon the parties. Accordingly, in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Supreme Court introduced the "rule of reason" as the basic criterion for assessing the legality of agreements. The rule of reason allowed agreements to be distinguished according to their fundamental tendency to restrain or advance competition and thus consumer welfare and economic progress, based on an analysis of a variety of market circumstances.

Over the 119-year history of Sherman Act enforcement, judicial and Executive Branch views of restrictive agreements have varied considerably, but the Sections focus here on what they believe is the most relevant aspect of that history for purposes of SAIC's implementation of the Draft Regulations. In a period of vigorous

antitrust enforcement originating in the mid-20th century, U.S. enforcement agencies and courts began increasingly to adopt *per se* rules, condemning certain agreements based on their legal and formal characteristics, much as the EU did in the course of implementing Article 81. Originally confined primarily to that limited set of agreements among competitors having especially pernicious effects on competition (price-fixing, reduction or allocation of capacity and/or output, customer or market allocation and the like, without other elements of collaboration that might increase productivity or advance consumer welfare), *per se* rules were extended to a variety of vertical practices in the 1950's, 60's and early 70's. Indeed in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *all* vertical agreements involving any restriction on the purchaser's resale of the product – as to price, territory of resale, or customer – were summarily condemned as *per se* illegal, without regard to competitive impact or relevant market circumstances.

Similar patterns of judicial interpretation and government policy became evident with respect to horizontal agreements in such cases as *United States v. Topco Associates*, 405 U.S. 596 (1972). The Supreme Court in *Topco* accepted the government's argument to condemn a joint venture as a *per se* illegal horizontal restriction despite its evident procompetitive merit, fearing that consideration of individual market circumstances and potential consumer benefits in assessing such ventures would "leave courts free to ramble through the wilds of economic theory . . .." *Id.* at 612 n.10.

Like the EU, however, the U.S. courts and government enforcement agencies, when confronted with the adverse consequences of antitrust rules that condemned agreements according to their formal and/or legal characteristics, quickly shifted their approach. In *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Supreme Court reversed course, placing vertical agreements (other than vertical agreements concerning resale prices and tying) back within the traditional rule of reason category. The necessary relationship between economic analysis and the antitrust assessment of such agreements was clearly established at the same time: "[D]eparture from the rule of reason standard must be based upon demonstrable economic effect, rather than -- as in [United States v. Arnold &] Schwinn -- upon formalistic line drawing . . .." *Id.* at 58-59. Thus consumer welfare was placed in the preferred position as the antitrust value against which all agreements (and indeed all other transactions and conduct, including unilateral conduct) would be measured. *Reiter v. Sonotone Corp.*, 422 U.S. 330 (1979). Similarly, certain horizontal agreements were allowed to be justified in light of their consumer welfare effects. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), was the first Supreme Court decision that clearly authorized horizontal agreements to be assessed in this manner, bringing to a close the era of broad and indiscriminate application of the *per se* rule.[4]

In sum, the main experiences of the EU and U.S. with formulation and implementation of government mandates involving agreements among business

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[4] This extensive (and somewhat complex) history is described and explained in detail in the recent decision of the U.S. Federal Trade Commission, *In re PolyGram Holding, Inc.*, Docket No. 9298 (FTC) (available at http://www.ftc.gov/os/2003/07/polygramopinion.pdf), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

enterprises contain striking parallels, despite the significant differences in the nature, timing and circumstances of the two. In both cases a system of evaluating such agreements was developed with a heavy emphasis on administrative convenience and simplicity, using classifications based on the legal form of such agreements as the main criteria for substantive assessment. In both cases these systems, although originally designed for ease of application, proved unworkable and contrary to the interests of consumers. The system that emerged grounds competition-law principles in economic analysis, and selects legal tests (whether rules of *per se* illegality, broad standards such as the "full" Rule of Reason, or approaches that employ presumptions) by how well they advance the ultimate objective of consumer welfare.

The unique circumstances of present-day China make it difficult to predict that the lessons of EU and U.S. experience will also prove true with regard to the Draft Regulations. The Sections respectfully suggest, however, that SAIC consider these basic tenets in assessing suggested adjustments to the current Drafts:

1. Substantive assessment of agreements among business enterprises and other business conduct should be guided by the basic policy objective of maintaining competitive markets to promote economic progress and consumer welfare.

2. Economic analysis should be used to assess the tendency of particular agreements and conduct to promote or inhibit such basic policy objectives.

II. Draft Monopoly Agreements Regulation

A. Determining the Existence of a Prohibited Agreement (Articles 3 and 4)

In Article 3(3) of the Draft Monopoly Agreements Regulation, prohibited acts are defined to include "acts of collaboration, including tacit or coordinated acts among business operators even though there are no express agreements or decisions reached, either written or oral." Article 4 states that the "degree of consistency in the acts of business operators" and "identical or similar acts without legitimate reasons" will be considered "in conjunction with the market structure and market fluctuation situations" in determining whether companies have participated in "acts of collaboration" under Article 3(3).

Sound competition policy distinguishes agreements among rivals – which prohibitions on anticompetitive agreements may reach – from mere oligopoly – which the law cannot practically remedy and is the natural consequence of unilateral decision-making. For the reasons discussed below, the Sections believe that "tacit" agreements generally cannot be distinguished from unilateral oligopoly behavior, and trying to do so creates insurmountable practical difficulties. The Sections therefore suggest the deletion of Article 3(3) and some revisions to Article 4 to clarify the types of evidence that may demonstrate the existence of prohibited agreements or decisions. The Sections suggest

that Article 4 require more than "consistent" or "identical" acts by businesses as proof of an agreement. Otherwise, the Sections suggest that both Articles 3(3) and 4 be deleted because, as drafted, they will be difficult to apply and may deter normal and often pro-competitive business activity.

In an oligopolistic industry, businesses may engage in several different types of behavior that lead to similar market outcomes, but have different legal consequences. First, businesses may enter into an express agreement to fix prices, reduce output, allocate markets, *etc.* Second, they may reach a "tacit" agreement to achieve the same purpose. Third, each business may act individually and unilaterally, while at the same time recognizing the interdependence between itself and its rivals. A business recognizing this interdependence will choose its competitive strategies taking into account the responses and expected responses of its rivals; it would be irrational for the business to do otherwise.[5] The market outcomes under this type of "interdependent oligopoly behavior" may be similar to the market outcomes that would result from an agreement.[6]

It is therefore important to recognize the need to be cautious in inferring the existence of "tacit" agreements, especially in an oligopoly market. First, inferring the existence of "tacit" agreements too readily would chill an undertaking's ability to respond to market conditions according to its business incentives.[7] For example, suppose a company sells a product in both Shandong and Hebei provinces in competition with a rival. The rival then chooses to withdraw from Shandong province and sell only in Hebei. The demand for the company's product in Shandong would likely increase as customers there looked for an alternative source of supply. If the company shifted some of its sales from Hebei to Shandong to meet the increased demand in Shandong, it could be accused of entering into a "tacit" "market division" agreement with its rival. Yet, by shifting its sales, the company would have been responding to market conditions unilaterally according to its business incentives. If the company instead maintained its sales in Hebei and did not shift any sales in Shandong because it feared being accused of entering into a "tacit" agreement, it would be acting against its best interests and against the signals provided by market conditions. Antitrust policy should not ask a company to

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[5] This was recognized by economists and legal scholars as early as the 1960s, *see* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 665-66 (1962) ("[T]he rational oligopolist is behaving in exactly the same way as is the rational seller in a competitively structured industry; he is simply taking another factor [the reactions of competitors] into account…which he has to take into account because the situation in which he finds himself puts it there").

[6] *See, e.g.*, *Brooke Group v. Brown & Williamson*, 509 U.S. 209, 227 (1993) (companies acting unilaterally might set "their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions").

[7] That is not to say that antitrust agencies have no role to play in preventing "tacit" agreements. In merger reviews, an antitrust authority should block mergers that would increase the likelihood of coordinated interaction (including "tacit" or express agreements). *See* OECD COMPETITION COMMITTEE, OLIGOPOLY 34 (1999) ("Merger review is the most direct and probably effective measure that competition agencies can apply to reduce the probability of coordinated interaction" in addition to "rigorous enforcement against explicit collusion").

make unilateral decisions that are not in its best interests, taking into account market conditions.

Second, it is typically difficult to distinguish between a "tacit" agreement and "interdependent oligopoly behavior" that does not involve an agreement, because the observable market outcomes from the two types of behavior are often identical. There is a substantial risk of "false positives," where the authority finds incorrectly that businesses have entered into a "tacit" agreement when in fact the businesses were engaged in unilateral behavior, though recognizing their interdependence.

Mere oligopoly behavior is not subject to antitrust enforcement under United States law.[8] United States courts have recognized that it would be counter-productive for antitrust policy to require businesses to ignore market conditions, including the actions and reactions of their rivals, while choosing their competitive strategies. Because a "tacit" agreement is virtually indistinguishable from lawful interdependent oligopoly behavior, United States law condemns only express agreements among oligopolists.[9]

The "degree of consistency in the acts of business operators" and "identical or similar acts" specified in Article 4 — often referred to as "parallel behavior" in United States law — will often occur even in the absence of an agreement simply because, especially in oligopolistic industries, companies recognize their interdependence and act accordingly even if there is no agreement. Moreover, since any action taken by one company in a competitive or oligopolistic industry is often profitable for the other companies as well, "parallel" behavior will often occur in such industries where no agreement is in place.[10] For example, if one company realizes that its promotional activity has not been effective and therefore reduces its promotions, other companies may re-examine their own promotional activity and decide to reduce their promotions also.

Because parallel behavior can arise with or without an agreement, evidence of parallel behavior by itself is not a useful indicator of whether there was an

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[8] *See, e.g., Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d. 478, 484 (1st. Cir 1988) ("Courts have noted that that Sherman Act prohibits *agreements*, and they have almost uniformly held, at least in the pricing area, that…individual pricing actions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act," emphasis in original); Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L. J. 719, 779 (2004) ("Interdependence is normal and innocent in oligopoly…Rational oligopolists typically monitor rivals closely and react to their price changes or other strategic moves. There is nothing even remotely suspicious about such actions" (footnote omitted)).

[9] *See Brooke Group*, *supra* note 6, at 227 ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level").

[10] *See, e.g., Clamp-All*, *supra* note 8, at 484 ("A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader").

agreement.[11] For that reason, under United States law, a court may not infer that an agreement existed solely on the basis of parallel behavior.[12] Instead, there must be both parallel behavior and one or more pieces of circumstantial evidence that support an agreement as opposed to oligopoly behavior, or competition.[13] Therefore, the Sections suggest that Article 4 be revised as follows:

> "The best evidence that business operators reached a prohibited agreement or decision is direct evidence that the business operators communicated explicitly and, through that communication, reached such an agreement. In the absence of such direct evidence, an agreement might be inferred if (1) the business operators exhibited substantially parallel behavior, (2) at least one of the business operators does not have legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, *and* (3) there is additional circumstantial evidence supporting the existence of an agreement as distinguished from mere interdependence."

B. Prohibited Agreements (Articles 5 and 6)

Article 5 of the Draft Monopoly Agreements Regulation prohibits business operators in competition with each other from entering into certain types of agreements which are classified as "monopoly agreements." These include, in Article 5(3), those agreements "that restrict the purchase of new technology, new equipment, or restrict the development of new technology or products, including restricting the investment in or development or use of new technology, new equipment or new products, or restricting the leasing of new equipment".

Although Article 5(3) correctly targets agreements, related to restrictions on new technologies or products, which may result in anticompetitive harm, an overly broad interpretation of Article 5(3) could also reach many types of agreements that may instead promote technological innovation.

One example of where a broad reading of Article 5(3) could invalidate procompetitive agreements (as well as discourage companies from entering into such

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[11] *See, e.g.*, OECD COMPETITION COMMITTEE, *supra* note 7, at 7 ("evidence of parallel conduct is not and should not be considered sufficient proof of [express agreement]").

[12] *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (parallel conduct is equally consistent with "a wide swatch of rational and competitive business strategy unilaterally prompted by common perceptions of the market" as it is with express agreement); *Id.* at 1966 ("Without more, parallel conduct does not suggest conspiracy [*i.e.*, express agreement]").

[13] *See Matsushita v. Zenith*, 475 U.S. 574 (1986) ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy…[a plaintiff] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently"); *see* also OECD COMPETITION COMMITTEE, *supra* note 7, at 8 ("To convince courts that parallel behaviour has arisen through some sort of agreement rather than merely resulting from oligopolistic interdependence, competition authorities must usually demonstrate that something more has occurred, *i.e.*, establish the existence of one or more 'plus factors'").

agreements for fear of having them invalidated) relates to joint ventures. The types of agreements noted in Article 5(3), especially those restricting the development of, or investment in, new technology, often play an essential role in the formation of joint ventures by ensuring that the joint venture participants will be actively committed to their joint enterprise.

Although restrictions in a joint venture which limit its participants' abilities to compete with the venture (*e.g.*, by pursuing/promoting alternative technology to that being developed by the joint venture) are an important factor to consider in determining whether the joint venture is, on balance, anticompetitive, such restrictions are just one of a series of factors that the U.S. antitrust enforcers consider in evaluating such joint venture relationships.[14] With the exception of a small set of agreements among competitors which are so plainly anticompetitive that they deserve *per se* (*i.e.*, automatic) invalidation, all others are subject to a rule of reason analysis which entails a fact-specific and "flexible" inquiry, including presumptions where appropriate.[15] The Sections suggest that adopting this more flexible and fact-specific approach, and making this approach explicit in the Monopoly Agreements Regulation so as not to chill procompetitive agreements, can better serve the goals of both discouraging anticompetitive agreements while at the same time making more room for beneficial agreements.

The risk of a broad reading of Article 5(3) extends beyond the joint venture context and could similarly result in having a chilling effect on other common and often procompetitive practices, especially in the area of intellectual property licensing. For example, the grant of an exclusive license (exclusive even to the grantor) could directly restrict the use or development of a new technology – as the licensor will have ceded its entire rights to that technology to its exclusive licensee. As with the analysis of joint ventures above, it's certainly the case that the grant of an exclusive technology license to one's competitor *may* be anticompetitive, but the Sections suggest that Article 5(3) require that the license's actual competitive effect be evaluated and that there be no blanket prohibition on the granting of exclusive licenses to new technology (even to one's competitors). Otherwise, Article 5(3) could stand in the way of this commonplace type of licensing and harm innovation when, for example, the licensee has better resources and skills to fully exploit the technology or where numerous other competitors exist and can provide an effective competitive constraint on the licensee.

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[14] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) [hereafter, *U.S. Competitor Collaboration Guidelines*] *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, § 3.34 ("The Agencies are likely to focus on six factors: (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (b) the extent to which participants retain independent control of assets necessary to compete; (c) the nature and extent of participants' financial interests in the collaboration or in each other; (d) the control of the collaboration's competitively significant decision making; (e) the likelihood of anticompetitive information sharing; and (f) the duration of the collaboration.").

[15] *U.S. Competitor Collaboration Guidelines* § 1.2.

Also at risk under a broad reading of Article 5(3) are "grantback" licenses in which a licensor provides its technology but with a commitment from the licensee(s) that it will receive licenses back from the licensees for technological improvements. As with other types of licensing practices, a grantback may raise competitive issues but also may be procompetitive.[16] Because a general prohibition on agreements that "restrict the development of new technology" could be read to automatically reach grantbacks (as such licenses can affect the incentives of the licensee to develop the licensed technology since it knows that it will then be obligated to share the benefits of its technological improvements with the licensor), the Sections suggest that the Monopoly Agreement Regulation expressly state that Article 5(3) will be applied by carefully examining the competitive effects that a proposed agreement (licensing or otherwise) is likely to have, rather than implying that its legality turns on whether any of the enumerated restrictions are present, without considering whether those restrictions play a part in what can be demonstrated to be a procompetitive arrangement.

Article 6(1) prohibits, as a class of "monopoly agreement" any agreement in which the "tenderer reaches an agreement with a bidder during bidding activities, including disclosing bidding information to other bidders, assisting the bidder to withdraw or change the bidding documents, and colluding with bidders on matters other than quotations."

Given that this provision directs its focus on the tenderer (the party putting the bid process into motion), there appears to be little anticompetitive motivation for the activities prohibited here – such as providing a bidder with secret information, giving it an advantage over other bidders, *etc.* Such activities would harm the buyer, by preventing it from receiving the best bid. While there might be a "bad actor" from within the buyer's organization with his/her own incentives to undertake the prohibited conduct and favor a particular bidder (*e.g.*, in return for unlawful personal payments or other items of value from a bidder), that is not classically an antitrust problem (absent, for example, price regulation at one level of the market), so it may be helpful to clarify what antitrust-related harm Article 6(1) seeks to reach. Such conduct is likely unlawful under non-antitrust laws that deal directly with what may be mostly an issue of corruption (*e.g.*, laws relating to government procurement, commercial bribery statutes, *etc.*).

If Article 6(1) is retained, it should be made clear that a tenderer should have considerable leeway in structuring its solicitation of bids[17] and that, so long as those rules are transparent to the bidders, Article 6(1) should not be implicated. Otherwise, a regulation meant to target corrupt actions so as to protect the buyer's interest in getting

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[16] *U.S. Competitor Collaboration Guidelines* § 5.6 ("Grantbacks can have procompetitive effects, especially if they are nonexclusive. Such arrangements provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both promote innovation in the first place and promote the subsequent licensing of the results of the innovation.").

[17] *See, e.g., Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004) (holding that Blue Cross's practice of inviting bids and choosing which one it would accept did not constitute "bid rigging" and was not subject to automatic invalidation as an antitrust violation).

the benefit of a fair process could instead be turned into a mechanism to serve the interests of unsuccessful bidders wishing to attack the buyer for its legitimate choices in deciding how to structure the bid process.

Article 6(2) of the Draft Monopoly Agreement Regulation prohibits business operators from reaching an agreement with a counterparty that "without justified reasons, restricts the business operations of such transaction counterparty to a specific regional market only." Although the inclusion of a justification as a defense is an important safeguard, providing additional guidance on what kinds of reasons could supply the necessary level of justification would make the provision even more useful.

In particular, there are a large variety of "vertical" relationships between parties upstream and downstream in a distribution chain (*e.g.*, a manufacturer and a distributor) that commonly impose territorial restrictions on the downstream participant. Although not automatically lawful in the United States, such territorial restrictions are routinely upheld unless the party imposing them has significant interbrand market share,[18] or where the claimed business justifications are not borne out by the facts.[19] This approach is one that the United States came to after much thought and evolution in both its case law and academic thinking about the effects of such restrictions. As noted above, such territorial restraints were, for a time, deemed to be automatically unlawful.[20] However, a recognition of the need to look beyond the mere fact that the restriction was being put on a downstream party led to the rejection of a *per se* rule of illegality[21] and evolved into the current system in which it is the rare vertical territorial restraint that is found to be unlawful.[22]

C Exemptions (Article 7)

Article 7 provides that "Where the business operator is able to prove that the agreement reached conforms to the provisions of Article 15 of the Anti-Monopoly Law, Articles 5 and 6 of this Regulation shall not be applicable."

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[18] Absent a party's having significant interbrand market share it appears to be far less likely that its imposition of territorial restrictions on a downstream party would have any anticompetitive effects (and it is more likely that the party is simply trying to use these territorial limitations to more effectively compete at the interbrand level). *See, e.g.*, *Murrow Furniture Galleries v. Thomasville Furniture Indus.*, 889 F.2d 524, 529 (4th Cir. 1989).

[19] *See, e.g.*, *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1077-81 (2d Cir. 1980).

[20] *See* Section I above; *United States v. Arnold, Schwinn & Co.*, 388 U.S. at 380.

[21] *See Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. at 58-59.

[22] This result was foreshadowed by the decision in *Continental T.V. v. GTE Sylvania,* which recognized that companies often looked to impose territorial restrictions in order to motivate resellers. These incentives would help ensure that the resellers were willing to use the necessary resources to adequately market the product (something a reseller would be more likely to undertake knowing that it was going to be protected from intrabrand competition after having made those investments in the brand). *Id.* at 55.

The Sections believe that, with the exception of agreements by competitors to fix their sale prices, set output or allocate markets, antitrust laws should allow business operators to demonstrate to the appropriate courts or antitrust enforcement authorities that an agreement may increase competition and improve efficiencies and therefore should not be prohibited. The Sections appreciate that Article 7 is designed to allow business operators to demonstrate the inapplicability of Articles 5 and 6 of the Monopoly Agreement Regulation. As currently drafted, Article 7 requires business operators to "prove" that an agreement conforms to AML Article 15. However, it is unclear how SAIC would apply this standard in practice. The Sections believe that the Monopoly Agreement Regulation would better foster competition and the goals of the AML if SAIC were to provide businesses with further guidance as to the standard that they must satisfy for an agreement to conform to Article 15 of the AML.

The Sections believe that, in situations other than horizontal price fixing and allocation of markets, adopting a standard that is too exacting would place unreasonable burdens on businesses and potentially chill pro-competitive conduct. Businesses that cannot meet a high standard are unlikely to experiment with or engage in potentially pro-competitive collaborations or joint ventures. The Sections suggest that SAIC adopt a standard that strikes an appropriate balance. On one hand, the standard should not be so lax that anticompetitive conduct would be difficult for SAIC to prosecute. On the other hand, the standard should not be so exacting so as to discourage business operators from experimenting with legitimate pro-competitive joint ventures and collaborations. The standard should not chill the very innovation the AML seeks to promote.

The Sections suggest that Article 7 of the Monopoly Agreements Regulation provide that an agreement that does not involve price fixing, or output or market allocation, will be exempt under Article 15 of the AML if the parties to the agreement provide evidence that the agreement is reasonably related to achieving one of the goals articulated in Article 15 of the AML and that the agreement's posited pro-consumer efficiencies outweigh potential anticompetitive effects. In particular, Article 7 might provide that an agreement that is not of the types described in Article 5(1), (2), (5) or Article 6(1), would be exempt under AML Article 15 if the parties demonstrate that the agreement is reasonably related to achieving one of the goals set forth in Article 15 and "will not substantially restrict competition in the relevant market and will enable consumers to share in the benefits derived therefrom" as required by Article 15 and is on balance procompetitive.

This is the standard typically applied by U.S. antitrust enforcement agencies.[23] The U.S. enforcement agencies have also clarified that "reasonably

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[23] *Id*., at 8 (the agencies will not challenge an agreement as *per se* illegal if the agreement is "reasonably related to the integration and reasonably necessary to achieve its precompetitive benefits."); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, at 71 (1996), 4 Trade Reg. Rep. (CCH) ¶ 13,153 ("Where competitors economically integrate in a joint venture, however, such agreement, if reasonably necessary to accomplish the procompetitive benefits of the integration, are analyzed under the rule of reason".).

necessary" does not mean that the agreement is essential to achieving the procompetitive benefits of the agreement. The agencies generally consider only whether "practical, significantly less restrictive means were reasonably available when the agreement was entered into . . . ."[24] More generally, in the United States, a rule of reason analysis considers "the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[25] United States courts generally will consider "the business, the history of the restraint, and the reasons why it was imposed."[26] While not all restraints require an elaborate inquiry,[27] the rule of reason analysis typically involves an analysis of markets, concentration, entry, competitive effects and efficiencies.

The application of the reasonableness standard prevents the application of the *per se* rule to potentially pro-competitive conduct and ensures that parties to an agreement may experiment with collaborations that are designed to achieve efficiencies. In addition, it provides sufficient flexibility to SAIC to investigate agreements that may be anticompetitive.

The Sections suggest that SAIC also consider establishing safe harbors where, absent extraordinary circumstances, SAIC will not challenge an agreement between competitors that does not involve price fixing, or output or market allocation. The U.S. agencies have adopted two safe harbors where, absent extraordinary circumstances, they will not challenge competitor collaborations that do not involve price fixing or market allocation outside the scope of the collaboration. The first safe harbor is where the participants collectively account for no more than twenty percent of the relevant market affected by the agreement.[28] The second safe harbor is where there are three or more independently controlled research efforts that are a close substitute for the R&D activity of the proposed agreement.[29] The use of safe harbors reflects the fact that competitor collaborations are often procompetitive. The safe harbors encourage such collaborations by minimizing uncertainty and potential transaction costs. SAIC might consider similar safe harbors in Article 7 of the Monopoly Agreement Regulation, where agreements are not of the types described in Article 5(1), (2), (5) or Article 6(1).

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[24] *U.S. Competitor Collaboration Guidelines*, *supra* note 14, at 9; *see also id*. at 24 ("the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.").

[25] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 49.

[26] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

[27] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-64 (1986) (not applying an elaborate inquiry where a "quick look" revealed the agreement was a direct restraint on output).

[28] *U.S. Competitor Collaboration Guidelines*, *supra* note 14, at 24.

[29] *Id*. at 27.

D. Industry Associations (Article 8)

Given the history of industry associations' involvement in anticompetitive conduct, Article 8 is an important part of the Monopoly Agreement Regulation. However, the current draft may chill the typically pro-competitive conduct that most industry associations were formed to undertake. Moreover, the mere existence of an industry association is not evidence of a monopoly agreement.

For example, it is often useful for members of an industry to gather for the purpose of developing industry-wide positions on political, environmental, or other issues. The broad prohibitions in draft Article 8 may deter such behavior. Article 8 also might restrict the pro-competitive behavior of standard setting bodies or research and development collaborations.

To avoid overstatement of the applicable prohibitions of Article 8, it might be worth emphasizing in the introductory paragraph that industry associations are not prohibited by Article 8 or the Monopoly Agreements Regulation generally, and that Article 8 applies only when the trade association's activities relate to monopoly agreements prohibited under Articles 5 and 6.

In addition, Article 8(3) should more carefully draw a distinction between activities of the industry associations themselves on the one hand, and conduct of the associations' members on the other. If an association's members take advantage of meetings organized by the industry association to engage in anti-competitive conduct, the association should not bear responsibility absent other factors. For example, the Sections recognize that an industry association cannot disassociate itself from its members' actions if it takes action to facilitate them. As such, it is useful to encourage industry associations to have processes and policies that deter and prohibit anti-competitive conduct.

E. Monopoly Agreements with Nationwide Impact and Provincial SAICs (Articles 9 and 10)

Article 9 of the Draft Monopoly Agreements Regulation provides that "SAIC is responsible for the investigation and sanction of acts of monopoly agreement…which have a significant nationwide impact." Article 10 indicates that SAIC may exercise its discretion to authorize "'Provincial SAICs' to investigate and sanction…monopoly agreements…which occur within such Provincial SAIC's administrative region…[or] across the borders of provinces, autonomous regions or municipalities directly under the central government, while the principal place of such acts is within such Provincial SAIC's administrative region."

The Sections suggest that the phrase "having a significant nationwide impact" be clarified, particularly with respect to foreign parties. Clarity as to when an agreement may be subject to Provincial SAIC review or to SAIC review may assist parties in determining from whom to seek informal consultation and guidance when

entering into agreements that may raise issues under the AML and lighten the SAIC's enforcement burden.

It is possible that an agreement may both occur principally within one administrative region and have significant nationwide impact. In such cases, the Sections suggest that the Monopoly Agreements Regulation makes it clear in Article 10 that SAIC would exercise its discretion to retain jurisdiction. In particular, the SAIC may wish to expressly reserve jurisdiction over major cases involving a foreign element. It would retain jurisdiction over the investigation and sanction of monopoly agreements that have a foreign element, as such actions may affect foreign investment generally and not just the local area. Such an approach may ensure effective enforcement of the AML in cases of nationwide impact. It may also relieve Provincial SAICs of the burden of potentially investigating and sanctioning business arrangements that another provincial authority may have initially approved in furtherance of other provincial goals.

Similarly, the Sections also suggest that SAIC may wish to retain control over domestic matters affecting several provinces, but which may not have a direct nationwide impact. China is a very large country and there may be several regional markets for the goods in question, such as the north-east provinces of Heilongjiang, Jilin and Liaoning; or the coastal provinces of Jiangsu, Shanghai and Zhejiang. In the latter case the agreements or abuses of dominant position may only affect three of China's provinces, autonomous areas and municipal areas, but they may have a significant impact on the Chinese economy as these areas have well-developed economies. Therefore, the SAIC may wish to clarify in Article 10 that it will retain jurisdiction over agreements having an effect in more than one province, autonomous region, or directly administered municipality.

Regardless of the extent of authorization by SAIC to Provincial SAICs, the Sections suggest that Article 10 provide that investigations and sanctions by Provincial SAICs will be subject to SAIC oversight, to ensure consistency and coherence in the enforcement of the AML nationwide. This is especially important as the Provincial SAICs will need to develop expertise in implementing the AML and the Monopoly Agreements Regulation.

F. Leniency and Deferred Prosecution (Articles 12 and 13)

The Sections welcome the inclusion of leniency provisions for cooperation that are set forth in Articles 12 and 13 of the Draft Monopoly Agreements Regulation. The Sections understand that these articles implement Article 46 of the AML, providing for legal liability and authorizing the Anti-Monopoly Law Enforcement Authority to give "mitigated punishment or ... exempt from punishment" those business operators that "voluntarily report the conditions on reaching the monopoly agreements and provide important evidence."

The International Competition Network's Good Practices guidelines indicate an effective leniency program may be beneficial to enforcement.[30] Many jurisdictions, including the EU and U.S., have adopted leniency programs as part of their cartel enforcement.[31] The Sections believe that leniency programs are effective both in deterring monopoly agreements and providing incentives for business operators to voluntarily terminate their participation in these agreements and report to the enforcement authority.[32]

AML Article 46 and Articles 12 and 13 of the Draft Monopoly Agreements Regulation are consistent with the ICN guidelines and the practice of other jurisdictions in providing immunity for business operators that voluntarily report "relevant information" and provide "important evidence." The Sections fully support efforts to establish a transparent and consistent process for sentencing and leniency in cartel cases. The fundamental requirement of any effective settlement program is that it provides sufficient incentives to encourage the parties to seek leniency. To that end, the Sections respectfully suggest four criteria that are essential for an effective leniency program and encourage the SAIC to establish a program that meets these four criteria. The program must have procedural transparency, generous or significant settlement discounts, legal certainty and the protection of confidentiality and privilege. Transparency, legal certainty, generous settlement discounts and confidentiality are necessary criteria for making the leniency program attractive to potential defendants, corporate and individual.

Therefore, the Sections suggest that additional clarification in the Draft Monopoly Agreements Regulation in the following areas would enable an effective leniency program:

> (1) Article 12 should specify which types of monopoly agreements are entitled to apply for leniency policy. As experienced in the EU, since cartels are generally highly secretive and evidence of their existence is not easy to find, a leniency policy is established to encourage undertakings to disclose inside evidence of cartels. In addition, except for cartels, other types of conduct that may violate competition laws generally are open and/or often have precompetitive effects.
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> Therefore, the Sections suggest that Articles 12 and 13 expressly indicate that the leniency policy is not applicable to all horizontal monopoly agreements, but only to cartels. Also consistent with EC and

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[30] Anti-Cartel Enforcement Manual: Drafting and Implementing an Effective Leniency Program, April 2006, available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FINALFormattedChapter2-modres.pdf.

[31] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT; Department of Justice, Antitrust Division, Corporate Leniency Policy (08/10/1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm.

[32] Michele Polo and Massimo Motta, Leniency Programs, *Issues in Competition Law and Policy* 2219 (ABA Section of Antitrust Law 2008).

U.S. policies, the Sections suggest that a leniency policy should not be applied to vertical monopoly agreements. However, the Sections suggest that the SAIC at the same time clarify in the Monopoly Agreements Regulations the methods by which penalties under AML Article 46 will be determined for non-pricing related horizontal monopoly agreements and vertical monopoly agreements. The Sections suggest that penalties under AML Article 46 for such monopoly agreements should be at the minimum of the range provided in AML Article 46.

The Sections also suggest that Articles 12 and 13 clarify whether the leniency would be limited to prosecutions under the AML of monopoly agreements or whether the leniency would also include non-AML prosecutions for the conduct (for example, general fraud), or private litigation concerning the monopoly agreement.

(2) Article 12 should clarify the exact circumstances under which leniency will be available. For example, the U.S. Department of Justice policy lists six conditions required for leniency to be granted before a criminal investigation has begun and seven alternative conditions for businesses that do not meet the first set of conditions.

The Sections recommend the following conditions as requirements for leniency in addition to the requirements of Articles 12 and 13: the SAIC had not received the relevant information from any other source; the leniency applicant promptly halted its participation in the agreement; the applicant's report must be complete and truthful; and the applicant must continue to cooperate with the SAIC throughout the investigation and any prosecution.

(3) Article 12 provides that the SAIC "may" reduce penalties for subsequent leniency applicant that report, but does not identify the circumstances under which the SAIC will exercise its discretion. It would be helpful to clarify that the discretion that the SAIC may exercise under Article 12, will be exercised as set forth in Article 13 in the circumstances described in Article 13. Including a list of the factors that SAIC will apply would provide clarity for businesses.

Article 13 provides the greatest leniency to the first applicant to make a voluntary report, so the Sections recommend that the SAIC establish a system to identify the applicants in the order that they make their reports and therefore the priority of their eligibility for leniency. The effect that multiple leniency applications would have on the leniency process should be clearly expressed to give prospective leniency applicants more clarity and predictability of outcome. A transparent and predictable leniency process is at least as important as clearly articulated leniency considerations.

(4) Both Article 12 and Article 13 use the phrase of "immunity or reduction of penalties". In accordance with Article 46 of the AML, such "penalties", if they are monetary, could include proceeds confiscated and fines. The Sections recommend SAIC make it clear whether the immunity or reduction applies not only to fines, but also to proceeds confiscated.

(5) The "important evidence" and "relevant information" referred to in Articles 12 and 13 may include confidential business information. The Sections appreciate that Article 40 of the AML provides that the "Law Enforcement Authority and its functionaries shall keep confidential the business secrets they have access to during the process of law enforcement." The Sections recommend that the Monopoly Agreements Regulation clarify that any business secrets disclosed during an application for leniency will also be kept confidential.

(6) Given the differing jurisdictions of the SAIC and the NDRC in the implementation of the AML, it is important for the two authorities to coordinate to ensure consistency with any leniency program that the NDRC may adopt under the AML.

The Sections note that Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders. The commitments mechanism enhances the enforcement authority's efficiency and the optimization of allocation of the authority's resources, while enabling undertakings to avoid an adverse decision and possible penalties. The Sections suggest that SAIC include in the Monopoly Agreements Regulation provisions setting forth the conditions and processes under which prosecution will be suspended. The following aspects could be taken as a starting point:

(1) The Sections suggest that SAIC define the applicable scope of the commitments mechanism. For example, the commitments mechanism is inappropriate for cartels.

(2) The Sections also recommend that the decision to suspend the investigation under AML Article 45 specify both the time limit in which commitments must fully be implemented and the time limit following fulfillment of the commitments in which SAIC is obliged to finally terminate or continue the investigation. Since Article 45 of the AML provides that SAIC has discretion to decide whether or not to proceed with the investigation after commitments are fulfilled, the Sections also suggest SAIC clarify under what circumstances SAIC would continue its investigation, and that these circumstances be specific and narrowly defined. It is important for an effective deferred prosecution program to have legal certainty and predictability as to when prosecution will be terminated or resumed.

(3) The Sections suggest that the Monopoly Agreements Regulation provide that commitments under AML Article 45 be necessary and proportionate to remove specific anti-competitive concerns identified by SAIC.

(4) As with the leniency program, it is important for the SAIC and NDRC to coordinate to ensure consistency with any commitments mechanism that the NDRC may adopt under the AML.

III. Draft Abuse of Dominance Regulation

A. General Comments

The experience of other jurisdictions that have applied government mandates to unilateral conduct by dominant firms clearly reveals a number of difficult issues. A list of the most basic of these issues would include at least the following:

First, the most fundamental idea of market competition is to encourage individual businesses to use their own resources and creativity to succeed and grow in the market. The most basic concept of competition is that each business seeks to improve its own market position by offering lower prices, or by innovating to reduce costs, discover and implement superior business methods, or provide improved products and services desired by customers. The imposition of over-restrictive mandates on unilateral conduct by a firm that succeeds in this effort and thereby becomes a market leader discourages or even punishes this desirable competitive behavior. This has the potential to threaten the most basic forms of economic creativity and the most basic sources of growth and prosperity in a modern economy.

Second, legal restrictions on dominant firm conduct must sensitively balance the benefits and costs of clear rules (which provide notice to firms engaging in market conduct) and more case-specific standards (which permit a more detailed analysis of conduct's competitive effects, but at the cost of clarity). Legal tests that produce excessive caution by dominant firms can reduce economic creativity as well as prosperity and growth.

Formulating mandates for dominant-firm conduct that are no more restrictive than necessary to protect competition is among the most difficult and controversial tasks facing any competition authority. Given the constant evolution of markets, firms and business practices, it has proven impossible to state any specific criteria that will lead to proper enforcement standards in every situation. Even jurisdictions with long and substantial enforcement experience struggle with questions about how to define and enforce rules that govern a wide variety of specific competitive practices. In the EU, for example, long-standing debate over proper standards under EU Treaty Article 82, the abuse-of-dominance prohibition, led to a years-long process of

study and to the recent adoption of Article 82 Guidelines.[33] The U.S. federal antitrust agencies recently engaged in a year-long series of joint hearings on the subject of single-firm conduct standards under Section 2 of the Sherman Act, the principal U.S. mandate governing firms with monopoly power. A number of specific issues remain unresolved, however.[34]

The Sections have participated in these and other efforts to guide policy and practice with regard to dominant-firm mandates. With great appreciation of the vast scholarship and research on these and other key policy questions, and with the benefit of guidance from lawyers, economists and businesspeople with extensive experience of such mandates not only in the U.S. but in scores of other jurisdictions throughout the world, the Sections recommend to SAIC that it consider certain broad principles of general applicability to the dominant-firm mandates represented by the Draft Abuse of Dominance Regulation.

First, the Sections commend the principle that dominant-firm conduct should not be regarded as abusive unless at a minimum such conduct threatens to harm competition more than it benefits competition. Second, on the same basis the Sections also commend the principle that dominant-firm conduct – even if it carries the potential for some material exclusionary effect – should be permitted if and to the extent justified by demonstrable reasons of efficiency. Punishing clearly pro-competitive behavior, such as a product innovation, could result in severe economic stagnation and direct obstruction of sound competition policy objectives.

In light of the substantial harms to consumers that flow from wrongly condemning conduct as abusive, the Sections encourage the SAIC to devote resources to clarifying the circumstances that constitute an abuse of dominance. For example, in the U.S., allegations of predatory pricing must meet cost-based tests; refusals to deal are unlawful only in narrow circumstances; yet other conduct is tested by many courts for reasonableness. The applicable legal tests seek to minimize both Type I and Type II errors. The Sections encourage SAIC to study the experience of the U.S. courts and agencies, the experience of the EU and other leading jurisdictions, as well as the teachings of leading antitrust scholars, and to identify the applicable standards when doing so is practical.

B. Definitions (Article 3)

Article 3 of the Draft Abuse of Dominance Regulation defines the "ability to block or impair other undertakings' ability to enter the relevant market" to be "the ability to exclude or delay entry into the relevant market by other undertakings in reasonable time or increase considerably the costs of entry into the relevant market by

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[33] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, available at http://ec.europa.eu/competition/antitrust/art82/index.html

34 Much of the extensive record of these hearings, containing widely diverse viewpoints on numerous distinct issues, can be accessed through http://www.ftc.gov/os/sectiontwohearings/index.shtm.

other undertakings such that they cannot effectively compete with the incumbent undertakings."

Care needs to be taken to avoid conflating this definition of a dominant market position with the substantive prohibition in Article 2 against an undertaking that possesses a dominant market position from abusing that position to exclude or restrict competition. Generally legal conduct such as the development of a superior product or more efficient production methods that may result in an undertaking obtaining a large market share and/or the creation of entry barriers, is not itself an abuse of the market position.

In addition, caution is required in analyzing barriers to entry. For example, a relevant market should not be intentionally or unintentionally defined to be a particular "segment" served by the market leader. Just because the leader develops a superior product does not mean necessarily that insurmountable barriers are erected to competition in the broader "relevant market".

C. Degree of Reliance by Other Business Operators (Article 5(4))

Article 5(4) suggests that the extent to which Company A relies on Company B in doing business is a valid indicator of dominance held by Company B – for example, if Company B is Company A's largest supplier or customer – and such reliance is reflected by the business volume and the term of the business relationship between the two companies, and the difficulty in turning to other alternative business partners.

While these factors are important to consider in assessing whether a firm has dominant market position, it is also important to note that there are often legitimate business justifications that lead to such observations, and there are more factors that need to be considered to support or refute any conclusion of dominance.

For example, a common business format both in the U.S. and in China is franchising. A franchising arrangement allows a franchisor to grow faster and also gives a franchisee the incentive to make sufficient efforts because it receives the residual profits. Such a relationship will naturally require that a franchisee deal exclusively with the franchisor, and the term of the contract is often long, often well over ten years in the U.S. To avoid moral hazard from the franchisees, a franchisor holds the power to terminate a franchise contract or not renew it if the franchisee does not perform to desired standards. In such a situation, it may be difficult for a terminated franchisee to find a different supplier, but this is not a reflection of the franchisor's dominance in the relevant market. Similarly, a large customer may stop dealing with a small supplier for quality reasons. Such reliance of the smaller party on the bigger one in a business relationship does not necessarily reflect a dominant market position held by the bigger party, and disputes between the two parties are often ordinary contract disputes that do not have the merits to be brought under antitrust law. It is also important to note that the fact that a supplier and a distributor have had a long history of engagement with a large business volume between them does not necessarily mean it is difficult for one of them to turn to competitors of the other.

D. Presumptions of Dominance (Articles 6 and 7)

The Sections have previously expressed their concern regarding market-share based standards for reaching a presumption on dominance.[35] These concerns apply with equal force to the market-share based standards of Article 6 of the Draft Abuse of Dominance Regulation. The first concern is that market shares alone are insufficient to presume dominance under the conditions of Article 6(2) and 6(3), which presume dominant market position where "the aggregate market share of two business operators reaches two-thirds of the relevant market; or… the aggregate market share of three business operators reaches three-quarters of the relevant market". When Articles 6(2) or 6(3) apply, none of the companies individually would be presumed to be dominant under Article 6(1). Thus, the presumption of dominance under Articles 6(2) and 6(3) appears to be based on joint dominance, which would seem to make sense only if the companies were assumed to be engaging in coordinated conduct. Yet, coordinated conduct is generally less likely when companies are "asymmetric" in terms of cost, market share, products, *etc.*[36] If "an individual business operator possesses a prominent market position compared with the other business operators," the companies are necessarily asymmetric and coordination and joint dominance is less likely in that case.

For example, two companies whose individual market shares were each less than 50 percent, but whose combined market share was greater than 66.7 percent would not be presumed to be dominant individually under Article 6(1), but would be presumed to be dominant under Article 6(2). This would seem to make sense only if the two companies are engaging in coordinated conduct (either through agreement or interdependence). Yet, Article 6(2) does not require any proof that the companies are coordinating, or even that market conditions and the companies' incentives make coordination likely. The second concern is that a simple market share-based standard for reaching a presumption of dominance shifts the burden of proof to the business to prove it is not dominant, which is inconsistent with international practice.

Article 7 provides that a presumption of dominant market position based on Article 6(2) or 6(3) may be rebutted if meaningful competition is demonstrated between those satisfying the conditions of Articles 6(2) or 6(3) and "no individual business operator possesses a prominent market position compared with the other

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[35] *See* Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China at 3, 15-16 (May 19, 2005), available at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/abaprc2005fin.pdf, and Proposed Revisions to Selected Articles of the April 8, 2005 Revised Draft of the Anti-Monopoly Law of the People's Republic of China, in Supplementation of the Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law, on the Proposed Law, dated May 19, 2005, submitted to Mr. Wu Zhenguo of MOFCOM at 3-4, July 29, 2005, available in English at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/jointcomments05supplement.pdf and in Chinese at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/jointcommentsPRCchinese.pdf.

[36] *See, e.g.*, Dennis Carlton & Jeffrey Perloff, MODERN INDUSTRIAL ORGANIZATION (4th Ed., 2005), at 135.

business operators". To rebut a presumption of dominance under Articles 6(2) or 6(3), businesses should not be required to show that no individual competitor has a prominent market position because, if one business had a prominent market position, that fact would undermine the rationale for the presumption of dominance under Articles 6(2) or 6(3) in the first place. Rebuttal of the presumption of (joint) dominance should not require proof of a fact that would itself make joint dominance less likely to exist.

In all events, the Section believe that demonstrating any of Article 7(1), 7(2) or 7(3) should be sufficient to rebut any presumption of dominant market position, and that Article 7 should be clarified to make that clear. At the least, it should be unnecessary to demonstrate all three factors listed in Article 7 in order to rebut a presumption of dominant market position.

E. Refusals to Deal and Essential Facilities (Article 8)

Article 8 deals with the extremely difficult and controversial subject of refusals to deal, including the related "essential facilities" doctrine. The difficulty in this area in general stems, in part, from the recognition that a functioning market economy necessarily entails the ability of undertakings to decide whom to do business with, and to seek to do business on whatever terms they believe are advantageous for them. It is very difficult to impose objective criteria on the millions of business decisions made every day in the ordinary course of business (and to decide whether the terms of these transactions are "reasonable"). It is also generally counter-productive to encourage undertakings to take risks and spend capital to develop new products or methods of doing business, but then tell them they must give the fruits of that effort to competitors who did not do that work.

In the United States, the Supreme Court described in *Aspen Skiing*[37] a particular set of circumstances in which a change in business dealings was found to be anticompetitive. The Court has since described that case as at "the outer limit" of U.S. antitrust law, and made clear that as a general principle even dominant firms are not obligated to assist rivals or to offer business terms that preserve the profit level desired by rivals. Particularly with respect to intellectual property, the U.S. antitrust enforcement agencies made clear in their April 2007 Report on Antitrust Enforcement and Intellectual Property Rights that "antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections."[38] Similarly, in the EU, the European Commission has expended considerable effort to develop appropriate guidelines for the application of its abuse of dominance law to refusals to deal, and has generally acknowledged that a seller has the ability to decide whether to do business with particular firms and on what terms, unless a refusal to deal has a demonstrated adverse effect on competition.

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[37] *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. 585 (1985).

[38] U.S. DOJ & FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition at 32 (April 2007), available at http://www.ftc.gov/reports/innovation/p040101promoting innovationandcompetitionrpt0704.pdf.

Article 8 raises concerns. If read to impose a general limitation on the ability of undertakings to decide on what terms to offer their products and services, this provision could cause much inefficient and unproductive behavior. Indeed, if it becomes a matter of potential liability to make any changes in a business relationship in the future, undertakings will be deterred from doing business in the first place. At an extreme, if this provision prevents changes in prices, supply or other terms from one contract to the next, an undertaking may be put in an untenable position if, for reasons outside its control, changes in demand or supply in the market make it virtually impossible to continue to supply all customers on pre-existing terms. A business would have no guide to decide who to supply if it becomes unable to maintain the same level of production or distribution. This compelled perpetual "freeze" in business relations goes well beyond any legal requirement anywhere in the world that the Sections are aware of, and is not required by Article 17 of the AML.

At a minimum, therefore, careful qualifications or pre-conditions for liability for refusal to deal are indispensable. Liability should only arise when there is demonstrable and unavoidable damage to the competitive process, not simply injury to individual competitors, and an absence of business justification. In this light, it is helpful that Article 8 would apply only "where no justified reasons exist." More explanation of what a "justified reason" might be would of course be even more helpful. But the second sentence of the first paragraph of Article 8 appears to preclude any inquiry into business justification in cases of "refusing, reducing, limiting, or ceasing transactions with a counterparty under the same transaction conditions." To the extent this sentence suggests a rule that such changes can never be justified, the Sections respectfully urge that it be deleted.

With respect to the "essential facilities" doctrine, which is the subject of the second paragraph of Article 8, again the U.S. Supreme Court has not endorsed this theory. In the EU, the courts and DG Comp have articulated a number of limitations on the doctrine to assure that it is applied only in the most egregious circumstances. If the language of Article 8 is intended to follow, for example, the requirement in the EU that the product or service in question be "indispensable" for competition, that is a helpful limitation and could be made more explicit. The Sections respectfully suggest the SAIC consider the other requirements for this theory in the EU, including the requirements that effective competition will be eliminated without forced sharing, that others seeking access cannot replicate the facility, and that forced sharing will facilitate providing a new product or service. In the Sections' experience in the United States, it has often been the case that those advocating forced sharing of an "essential" facility have underestimated the ability of determined competitors to innovate around the facility, with resulting benefits to consumers. This doctrine should therefore be applied with the utmost caution, and under clearly expressed and carefully developed conditions.

F. Exclusive Dealing (Article 9)

Article 9 prohibits a company with a dominant market position from engaging in exclusive dealing ("constraining transaction counterparties to engage in transactions only with itself or only with its designated business operators") "where no

justified reasons exist." The Sections have two concerns with Article 9. First, the "justified reasons" under which it would be acceptable for a business with a dominant market position to engage in exclusive dealing are not specified. Second, there appears to be an unwarranted presumption of anticompetitive effect, with the burden of proof shifted to the company to prove that exclusive dealing is justified. Although exclusive dealing by a dominant firm can cause anticompetitive effects, it also can be procompetitive. Accordingly, the Sections recommend that Article 9 be deleted, or revised as follows:

> "A business operator possessing a dominant market position is prohibited from constraining transaction counterparties to engage in transactions only with itself or only with its designated business operators, where the constraint is demonstrated on balance to be anticompetitive."

G. Tying and Bundling (Article 10)

Article 10 prohibits a company with dominant market position from engaging in tie-in sales "where no justified reasons exist." The Sections' concerns with Article 10 are similar to those with Article 9. The "justified reasons" that would allow a company to practice tie-in sales are not specified in Article 10 and there appears to be an unwarranted presumption of anticompetitive effect, which shifts the burden of proof to the company. Because tie-in sales, like exclusive dealing, can be procompetitive overall,[39] even when practiced by a dominant firm, the presumption of anticompetitive effect and burden shifting is unwarranted.

The Sections have additional concerns about Article 10(3). Article 10(3) addresses "mixed bundling" where products are offered on a standalone basis as well as bundled together. Under Article 10(3), mixed bundling is prohibited when the price of the products on a standalone basis is "relatively high, causing competitors in the relevant market to be excluded from or forced to exit the market, or encumbering the entry to such market by other business operators." Mixed bundling can be procompetitive overall even if it impedes competitors.[40] Accordingly, the Sections recommend that Article 10 be deleted in its entirety, or revised as follows:

> "A business operator possessing a dominant market position is prohibited from conducting tie-in sales, or attaching other conditions to transactions, where the tie-in sales or other conditions is demonstrated on balance to be anticompetitive."

H. Anti-Discrimination (Article 11)

Article 11 of the Draft Abuse of Dominance Regulation prohibits dominant undertakings, without justifiable reasons, from implementing discriminatory

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[39] *See, e.g.*, Dennis W. Carlton & Michael Waldman, *Tying*, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (W.D. Collins, ed., 2008).

[40] *See, e.g.*, Gregory K. Leonard, *The Competitive Effects of Bundled Discounts*, in ECONOMICS OF ANTITRUST: COMPLEX ISSUES IN A DYNAMIC ECONOMY (L. Wu, ed., 2007).

terms in equivalent transactions on counterparties of equal conditions. "Transactional terms" are defined to include transaction volume, quality and grade, payment terms, delivery terms, and post-sales services. Article 11 further defines "equivalent transactions" as transactions conducted with respect to the same or similar commodities under the same or similar transaction conditions such as transaction volume during the same or similar time period.

Transactional terms to different purchasers for the same or similar products could differ for many legitimate and pro-competitive reasons. Discrimination alone is not harmful to consumers. Moreover, anti-discrimination laws have a tendency to protect competitors rather than consumers, as they place a limit on the forms of competition. As the international competition community has come to realize, the rule of reason and an economics-based approach (including effects-based analysis and taking into account pro-competitive justifications) should be the default standard to apply to any competitive assessment of an alleged abusive practice.

In the U.S., the Robinson-Patman Act, which prohibits discriminatory treatment, has had "the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would.[41] The Robinson-Patman Act "was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices."[42] Moreover, "many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs — and thus increase costs to consumers — but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective."[43]

Therefore, the Sections suggest that Article 11 be deleted.[44] If Article 11 is retained, the Sections suggest that it should make clear that its target is discriminatory terms with actual or likely harmful/anti-competitive effect to consumers, rather than discriminatory terms generally. It is important to prohibit only that conduct which on balance harms consumers and to avoid deterring precompetitive conduct.

The Sections suggest a general analytical framework for the necessary fact-specific study to determine whether an abuse has occurred.

First of all, "equivalent transactions" have to be confirmed from the outset. Article 11 rightly takes the following factors into account in determining whether

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[41] Antitrust Modernization Commission, Report and Recommendations ("AMC Report") Chap. IV.A at 311 (April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter4.pdf.

[42] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 14.6a1 (3d ed. 2005).

[43] AMC Report, Chap. IV.A at 311.

[44] The Antitrust Modernization Commission recommended the repeal of the Robinson-Patman Act in its entirety. AMC Report, Chap. IV.A at 312.

the transactions are equivalent: (1) similar or the same commodities; (2) similar or the same commercial context of the compared transactions; and (3) proximity in time.

Secondly, in order for discriminatory terms to constitute an abuse, the dominant firm needs to apply dissimilar transactional terms to equivalent transactions, or apply the same/similar transactional terms to non-equivalent transactions.[45] The latter situation should be included in Article 11.

Furthermore, an abuse could only exist if imposing discriminatory terms places some transactional counterparties at a competitive disadvantage. This is the most important step in the analytical framework, and Article 11 should add this factor to its "discriminatory terms" assessment.

Finally, to complete the analysis, there should be an inquiry as to whether any pro-competitive justification applies, otherwise the analysis could lead to anti-competitive outcomes. The Sections welcome the reference in Article 11 to the possibility of pro-competitive justifications and suggest that details be added regarding the types of justifications that would be found acceptable. As a general rule, a justification could be based either on the ground that discriminatory terms are indispensable and proportionate, or on the ground that efficiencies are such that no net harm to consumers is likely to arise.[46]

I. Abuse of Dominance with Nationwide Impact and Provincial SAICs (Articles 14 and 15)

Articles 14 and 15 of the Draft Abuse of Dominance Regulation are substantively identical to Articles 9 and 10 of the Draft Monopoly Agreements Regulation. The Sections have the same concerns and suggestions regarding Articles 14 and 15 as with Articles 9 and 10 and respectfully refer to the discussion in Section II.E above.

J. Deferred Prosecution

As noted in connection with the Monopoly Agreements Regulation, Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders, which appears to include investigations of abuse of dominant market position. Particularly in the abuse of dominance context, where conduct often is ambiguous in its legality under the AML, the commitments mechanism enhances the enforcement authority's efficiency and the optimization of allocation of the authority's resources, while enabling undertakings to avoid an adverse decision and possible penalties. Therefore, the Sections suggest that

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[45] *See* Robert O'Donoghue and A. Jorge Padilla, "*The Law and Economics of Article 82 EC*", Hart Publishing, 2006, p. 567.

[46] *See* Communication from the Commission, "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*", pp. 12-13.

SAIC also include in the Abuse of Dominance Regulation provisions setting forth the conditions and processes under which prosecution will be suspended, and respectfully refer to the discussion in Section II.F above as to specific recommendations.

CONCLUSION

The Sections hope these suggestions are helpful and would be pleased to offer any further assistance that may be helpful as SAIC finalizes the Regulations. The Sections recognize the substantial work that SAIC has accomplished in developing the Draft Regulations, and appreciate SAIC's consideration of our comments and those of others as it continues with its mission to implement and enforce the AML.

美国律师公会反托拉斯法部、知识产权部和国际法部
对中华人民共和国所拟议的反垄断法的共同建议*

美国律师公会反托拉斯法部、知识产权部和国际法部（以下合称“三部门”）藉此机会对中华人民共和国所拟议的反垄断法提供意见和建议。本文所陈述之内容代表了三部门的共同观点，但未经美国律师公会之会员代表大会或理事会的批准，因此不应被视为代表美国律师公会的政策。

三部门现有会员一共逾 40,000 律师，大部分会员在美国执业，但其中很多人曾经或目前仍在美国国外,包括中华人民共和国,生活及工作。三部门会员对于美国及世界各地的竞争法的实行和知识产权法有着深厚的专业知识。我们的成员包括工商企业法律部门的律师、法学院的教师以及私人执业的及在政府任职的律师。此外，许多非美国律师是积极参与三部门工作的准会员，并向三部门的工作贡献了他们的专业经验和远见卓识。三部门在本文中提供的意见，是本会成员在美国反托拉斯法、知识产权法和国际商法领域经验的结晶。我们希望这些意见能有助于中国制定反垄断法并建立完善，严明，便于公正实施的竞争法体系。

反托拉斯法部与国际法及惯例部曾于 2003 年 7 月 15 日就反垄断法的制定提交了共同建议(下称“2003 年 7 月共同建议”)，该建议重点讨论了 2002 年的送审稿[1]。本建议书则是作为 2003 年 7 月共同建议的补充，着重于讨论 2005 年 4 月 8 日的反垄断法修改稿中与 2002 年的送审稿有所不同的条款[2]。

概要

2005 年 4 月 8 日修改稿恰如其分地强调了竞争行为的性质和影响，而非经营者的状态，同时相对保护消费者而言,也减弱了对经营者的保护。这些修改更加符合国际竞争政策公认准则和现代经济理论。同样，采用“严重性”标准以确定垄断，在相关市场的定义中引入产品市场的概念，这些都使该拟议法律更符合广为接受的竞争法原则[3]。

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* 起草本意见书的工作组成员是：Adam F. Bobrow, Yee Wah Chin, Michael E. Burke, Nathan G. Bush, Ilene Knable Gotts, H. Stephen Harris, Jr., William J. Kolasky, Maria D.H. Lin, Abbott B. Lipsky, Jr., W. Todd Miller, James A. Murray, 和 Lester Ross.

1 作为本建议书的附件以供参考，我们附加了 2003 年 7 月共同建议，及它的主要内容以及概述部分的翻译。2003 年 7 月共同建议的完整版（包括所有附件）可以在以下链接找到：http://www.abanet.org/antitrust/comments/2003/jointsubmission.pdf

2 本建议书是基于 2005 年 4 月 8 日的反垄断法修改稿的非正式翻译稿。

3 正如 2003 年 7 月共同建议中第 2，6 页所指出的，各国竞争法差异很大，各有长短。2005 年 4

三部门对一些地方仍有保留，其中最重要的总结如下：

1. 持续使用“公平”竞争和“高”“低”定价的概念仍有异于竞争政策和现代经济理论的公认准则，使得运用法律惩罚积极竞争成为可能，这与竞争法的公认目的直接冲突。将这些概念写进法律有以下风险：反垄断主管机构可能成为价格管制者，这一角色与经济的高效运作是背道而驰的，是北美和欧洲所有成熟的竞争管理机构都力图避免的。

2. 本拟议法律允许地理范围广泛的法律执行，有可能成为外国公司与中国交易或在中国投资的障碍。要解决这一问题并使拟议的法律更符合国际竞争法准则，第二条中应加入“严重性”标准以界定对中国竞争的影响是否达到法律规定的程度。

3. 第二章（禁止垄断协议）仍有数问题。

a. 第 8 条应该仅适用于竞争者之间严重限制或消除竞争的协议。正如 2003 年 7 月共同建议中提出的[4]，卖方和买方之间的协议很少可能造成竞争的问题。

b. 由于 2003 年 7 月共同建议中阐明的原因[5]，2005 年 4 月 8 日修改稿删除个别豁免条款,这是一个重大进步。然而，对于修改稿中保留的集体豁免条款，法律中应清楚说明竞争者之间协议和买卖双方之间协议的区别对待。集体豁免应该范围更窄，定义更精确，期限更明确[6]。我们认为，拟议法律中加了以下要求，并更符合公认的竞争政策准则：反竞争协议不得豁免，除非(1)消费者受益，(2)协议为实现消费者得益所必需，及(3)竞争不会被消除。此外，集体豁免应该要求在对竞争的潜在伤害和有利于竞争的可能得益两方面进行权衡。

4. 三部门仍对第三章（禁止滥用市场支配地位）中数条款有问题：

a. 第 15 条中的共享垄断概念与通行准则相违背。美国和欧盟都不认

月 8 日的修改稿与 2002 年送审稿相比，似乎更大程度地基于欧盟和德国竞争法。诚恳地说，三部门认为其中有些法律未臻完善，这从欧盟法律和程序近来进行的大规模改革，而且德国正在缩减其反拖拉斯基本禁令的豁免范围也可推断出。此外，这些法律的某些其它条款从技术上来讲有效存续了很长时间但实际上很少（如果曾经有的话）得到执行。例如，据三部门所知，欧盟委员会起诉某个案子从来不是只根据某位经营者收取了高价，而是要求有市场竞争受到损害的证据。

[4] 2003 年 7 月共同建议中第 4，17-20 页。

[5] 2003 年 7 月共同建议中第 6 页。

[6] 在没有个别豁免程序的情况下，谨慎制定集体豁免条款尤为重要，因为协议各方可能一直都在执行协议直到有人提出质疑，而协议又被发现不具豁免条件。

同共享垄断的概念。虽然欧盟和德国法有“共同主导”的概念，两法律都要求垄断者协调行动的进一步证据方可认定共同主导。

b. 第 15 条中仅以依据市场份额认定市场统治力与通行准则相违背。此外，美国，欧盟和德国法律均认为，证明竞争者可轻易进入和扩大市场，或者买方力量均衡，均可驳斥依据市场份额认定主导地位的推定。第 15 条如包括市场进入的障碍、竞争者的重新定位和买方的均衡力量，并对这些因素更充分考虑，以此来认定市场统治力是否确实存在，将使拟议法律更符合国际竞争法准则。

c. 对于 2005 年 4 月 8 日修改稿中明显引入的“必需设施原则”，尤其是这一原则与禁止不合理拒绝交易条款，以及与知识产权法交界的某些条款的相互联系和制约，我们非常关注。目前拟定的“必需设施原则”可能妨碍经营者投资和创新，进而对竞争和消费者有害。

5. 在第 4 章（经营者集中）中，第 24 条合并控制条款中的申报标准应予澄清以保证只有与中国充分相关的交易需要申报，而且只使用客观上可以量化的标准来决定是否申报。 而且，第 27 条中的最初等待期应缩短，从而更符合其它主要竞争法体系所使用的期限。合并控制条款应进一步修改以更符合国际竞争网络 ICN 所推荐的最佳作法[7]，具体领域包括申报要求所适用的交易方和交易，申报所需提供的信息，提早终止等待期的授权，违反合并控制法规的惩罚。拟议法律应明确采用 ICN 在法律的无差别适用，合并评估过程的透明程度，确保过程公正的基本程序方面的指导原则。如采用的合并控制条款与其它主要司法辖区的法律和程序不一致，将成为跨国公司投资中国的障碍。而且，正如反垄断法的其他方面，第 30 条中禁止经营者集中的标准应是经营者集中会***严重***“排除或者限制市场竞争”。

6. 第 5 章旨在消除行政垄断，这是拟议法律中非常积极正确的一面。然而，什么行为构成行政垄断应有更准确的定义，并应明确指出国有企业受此法律管辖。此外，明确授权反垄断主管机构对行政垄断执行本法将会保证中国的竞争市场得到建立和保护。

7. 指定国务院直接领导下的独立、唯一执法部门将会有助于本法律得到最好的制定和实施，减少竞争法事项上因为司法管辖范围重叠而导致决策不一致的风险[8]。本法律应制定条款保护正当法律程序权利并为竞争政策的实行创造严格，一致和透明的程序，包括反垄断主管机构决议的发布和对该主管机构决议提出申诉的明确

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[7] ICN 对于合并申报的指导原则和推荐措施可以在以下链接找到：
http://www.internationalcompetitionnetwork.org/guidingprinciples.html

[8] 2003 年 7 月共同建议中第 4，5，26 页。

过程。通过对法律运用提供清楚的指导，执法的透明性将使公众和经营者共同受益[9]。其它含有竞争管制内容的法律和规定应同反垄断法一致。外国投资者并购境内企业暂行规定应该在反垄断法生效时予以撤消。

8. 关于第 7 章（法律责任），首先，根据我们的经验，对违反法律的行为采取强制令比罚款能更好地保护竞争。第二，需要进一步澄清哪些活动将受到犯罪指控，私营企业和个人通过什么程序可以向违法者要求双倍赔偿。

9. 拟议法律的条款在反垄断法和知识产权法的交界处还有许多问题，尤其是未能定义什么行为构成知识产权滥用而且违反了反垄断法，在第 22 条中引入非常宽泛的必需设施概念，第 19 条中的“竞争中处于不利”语言，以及第 16 条中的“不公平”定价条款。

[9] 2003 年 7 月共同建议中第 4 页。

Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China[*]

The Section of Antitrust Law, the Section of Intellectual Property Law and the Section of International Law of the American Bar Association (collectively, the "Sections") take this opportunity to submit comments on the proposed Anti-Monopoly Law of the People's Republic of China. The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

The combined membership of the three Sections includes over 40,000 lawyers. Most of the members are based in the United States of America, but a substantial number have lived and worked abroad, including in the PRC, and some do so currently. Members of the Sections have substantial expertise with competition law enforcement and intellectual property (IP) rights laws in the United States and around the world. Our membership includes lawyers in the law departments of businesses and the faculties of law schools, as well as in private practice and in government. In addition, many non-U.S. attorneys are active as Associate Members in the Sections, and have contributed their expertise and insights to the Sections' work. These Comments offer the perspective of the Sections, based on our members' experience in the United States in the fields of antitrust, IP rights and international business law. The Sections hope that these comments will assist the development of the Anti-Monopoly Law of China, and a competition law regime that is well-conceived, well-drafted and ready for implementation on a fair and impartial basis.

The Section of Antitrust Law and the Section of International Law and Practice submitted joint comments dated July 15, 2003 ("July 2003 Joint Comments") regarding the development of the Anti-Monopoly Law, which focused primarily on a 2002 draft of the proposed law.[1] These Comments are intended as a supplement to the July 2003 Joint Comments and focus on provisions of the Revised Draft of the Anti-Monopoly Law, dated April 8, 2005, that differ from the draft discussed in the July 2003 Joint

[*] The members of the Working Group that drafted these comments are Adam F. Bobrow, Yee Wah Chin, Michael E. Burke, Nathan G. Bush, Ilene Knable Gotts, H. Stephen Harris, Jr., William J. Kolasky, Maria C.H. Lin, Abbott B. Lipsky, Jr., W. Todd Miller, James A. Murray, and Lester Ross.

[1] A copy of the July 2003 Joint Comments, with a translation of its Executive Summary and without appendices, is annexed for convenience of reference as an appendix to these Comments. A complete copy of the July 2003 Joint Comments, with appendices, may be found at http://www.abanet.org/antitrust/comments/2003/jointsubmission.pdf

Comments.[2]

Executive Summary

The April 8, 2005 Revised Draft appropriately reflects a greater focus on the nature and effect of monopolistic conduct, rather than the status of an undertaking, and reduces the focus on the protection of undertakings, as opposed to the protection of consumers. These revisions conform more closely to accepted international norms of competition policy and modern economic theory. Similarly, the adoption of a standard of "substantiality" and the inclusion of a product market concept to the definition of relevant market also make the proposed law more consistent with widely accepted tenets of competition law.[3]

The Sections continue to have concerns in a number of areas, the most important of which are summarized below.

1. The continued use of the concepts of "fair" competition and "high" or "low" pricing remains inconsistent with accepted norms of competition policy and modern economic theory, and raise the prospect of the use of the law to punish aggressive competition, directly contrary to the accepted purpose of competition laws. The inclusion of these concepts creates a risk that the Anti-Monopoly Authority may become a price regulator, a role that is antithetical to the efficient functioning of an economy and that is eschewed by all mature competition authorities in both North America and Europe.

2. The geographically expansive enforcement permitted by the proposed law is likely to discourage foreign companies from trading with, or investing in, China. To address this concern and to bring the proposed law into closer conformity with international competition law norms, Article 2 should be revised to include a standard of "substantiality" for the required effect on competition in the PRC.

3. Chapter 2 (Prohibiting Monopoly Agreements) continues to raise a number of concerns.

a. Article 8 should be revised to apply only to agreements between

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[2] Our comments on based on an unofficial translation of the April 8, 2005 Revised Draft.

[3] As noted in the July 2003 Joint Comments (at 2, 6), competition laws vary substantially, and each has strengths and weaknesses. The April 8, 2005 Revised Draft appears to be based on European Union and German competition law to a greater extent than the 2002 draft. Respectfully, the Sections submit that some of these laws are not optimal, as can be inferred from the recent sweeping reforms of EU law and procedures, and Germany's narrowing of the exemptions from its basic antitrust prohibitions. Moreover, some other features of these laws that have been technically in force for a long time were rarely, if ever, enforced. For example, to the Sections' knowledge, the European Commission has never prosecuted a case based solely on an undertaking charging high prices, but instead requires some proof that competition in the market has been harmed.

competitors that substantially restrict or eliminate competition. As discussed in the July 2003 Joint Comments,[4] agreements between sellers and buyers are much less likely to raise competition concerns.

b. For the reasons stated in the July 2003 Joint Comments,[5] the omission of individual exemptions in the April 8, 2005 Revised Draft represents a substantial improvement in the draft law. However, for the block exemptions that are retained, the law should provide a clear distinction in treatment between agreements involving competitors and agreements involving sellers and buyers. The block exemptions should be narrower, more precisely defined and definite in duration.[6] We believe that the proposed law is more consistent with accepted competition policy norms as a result of the inclusion of the requirements that anticompetitive agreements cannot be exempted unless: (1) consumers benefit; (2) the agreements are necessary to achieve the benefits; and (3) competition will not be eliminated. In addition, the block exemptions should require the balancing of the potential harm to competition against the claimed pro-competitive benefits.

4. The Sections also continue to be concerned about several features of Chapter 3 (Prohibition of Abuse of Dominant Market Position)

a. The inclusion in Article 15 of the concept of shared monopolies is contrary to prevailing norms. Neither U.S. nor EU law recognizes the concept of shared monopoly. While EU and German law have a concept of "collective dominance," both require additional evidence of coordinated conduct in order to find collective dominance.

b. The inclusion in Article 15 of the presumptions of market power based solely on market shares is contrary to prevailing norms. Moreover, U.S., EU and German law all recognize that any presumption of dominance based on market shares should be rebuttable by a showing of ease of entry and expansion by rivals or of countervailing buyer power. A fuller consideration of entry barriers, repositioning of competitors and countervailing buyer power in determining the actual presence of market power would, if included in Article 15, conform the proposed law to international competition law norms.

c. The apparent introduction of the Essential Facilities Doctrine in Article 22 of the April 8, 2005 Revised Draft raises substantial concern, especially when coupled with the provisions prohibiting unreasonable refusals to

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[4] July 2003 Joint Comments at 4, 17-20.

[5] *Id*. at 6.

[6] Carefully drawn block exemptions may be particularly important in the absence of the individual exemption process, because parties may operate under agreements until they are challenged and the agreements are found not to be eligible for exemption.

deal and relating to the interaction with IP rights laws. The Essential Facilities Doctrine provision, as currently drafted, has the potential to discourage investment and innovation by undertakings and therefore could harm competition and consumers.

5. In Chapter 4 (Control of Concentrations), notification thresholds in the merger control provisions in Article 24 should be clarified to ensure that only transactions with sufficient connection to China will be notified and only objectively quantifiable criteria will determine the need for notification. Also, the initial waiting period in Article 27 should be shortened to conform more closely to periods used by other major competition law regimes. The merger control provisions should be further revised so that they are more consistent with the best practices recommended by the International Competition Network (ICN),[7] particularly in the areas of the parties and transactions subject to the notification requirement, the information required to be provided in the notification, the authorization of early termination of the waiting period, and the remedies for violations of the merger control regime. The guiding principles of the ICN in the areas of non-discriminatory application of the law, the transparency of the merger review process, and fundamental safeguards to ensure fair process, should be expressly adopted in the proposed law. To the extent that the merger control provisions adopted are inconsistent with the law and procedures applied in other major jurisdictions, multinational companies may be discouraged from investing in China. Moreover, as in other areas of the Anti-Monopoly Law, it should be *substantial* "elimination or restriction of market competition" that results in prohibition of a concentration under Article 30.

6. Chapter 5, seeking to eliminate administrative monopolies, is an extremely positive aspect of the proposed law. What constitutes an act of administrative monopolization, however, should be more precisely defined, and state-owned enterprises should be expressly made subject to the law. In addition, expressly authorizing the Anti-Monopoly Authority to enforce the law against administrative monopolies will ensure the creation and preservation of competitive markets in China.

7. Designation of a single enforcement agency, that is independent and directly under the supervision of the State Council, would help ensure optimal development and enforcement of the law, and reduce the risk of inconsistent decisions resulting from the proposed overlapping jurisdiction over competition law matters.[8] The law should include provisions to protect due process rights and foster rigorous, consistent and transparent procedures for the enforcement of competition policy, including the publication of the Anti-Monopoly Authority's decisions and a clear process for appeals from the Authority's decisions. Transparency is beneficial both to the public interest and

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[7] The ICN Guiding Principles and Recommended Practices for Merger Notification may be found at http://www.internationalcompetitionnetwork.org/guidingprinciples.html

[8] July 2003 Joint Comments at 4-5, 26.

undertakings by providing guidance regarding the application of the law.[9] Other laws and regulations with competition regulation aspects should be conformed to the Anti-Monopoly Law. The Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors should be revoked when the Anti-Monopoly Law becomes effective.

8. As to Chapter 7 (Legal Liabilities), first, based on our experience, competition may be better protected by greater reliance on injunctions, and less on monetary penalties for violations of the law. Second, more clarity is needed with regard to the types of activity that will be prosecuted criminally, and with regard to the procedures by which private parties may seek double damages from violators.

9. The provisions of the proposed law relating to the interaction between the Anti-Monopoly Law and IP rights law continue to raise many concerns, heightened by the failure to define what may constitute an "abuse" of IP rights that may constitute a violation of the Anti-Monopoly Law, the introduction of a very broad essential facilities concept in Article 22, the "competitive disadvantage" language in Article 19, and the "unfair" pricing provisions of Article 16.

Specific Comments

I Chapter 1 (General Provisions)

Article 1

The statement of objectives in the April 8, 2005 Revised Draft of Article 1 is a material improvement over the 2002 draft. The first identified purpose – originally "prohibiting monopoly" – has been changed to "prohibiting monopolistic activities." This brings the proposed law into conformity with the prevailing international norm for competition laws. It properly recognizes that monopoly – the status of being the only supplier of a particular product or service – often results from highly advantageous behavior (providing new products or services that correctly anticipate the needs of consumers, inventing and implementing new production methods that conserve resources, or finding and adopting ways to distribute products to where they are needed most). By focusing instead on "monopolistic activities," the proposed law properly creates scope for recognition of the distinction between desirable and undesirable behavior, and permits prohibition of the latter without restricting the former. The third identified purpose – originally "protecting the legal rights of business operators and consumers" – has been changed to "protecting the legitimate rights of consumers," and similarly brings the proposed law into conformity with the prevailing international norm, which recognizes that competition rules should be used to protect consumers and the competitive process, not competitors.[10]

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[9] *Id*. at 4.

[10] *Id*. at 7-8, 10-11.

Several of the other objectives listed in the April 8, 2005 Revised Draft, however, may complicate using the law in a way that will be of maximum benefit to the PRC:

"Fair competition." The April 8, 2005 Revised Draft Article 1 omits the objective stated in the earlier draft of "safeguarding *fair* competition" but retains it in other provisions such as Articles 5 and 35. Our experience has shown that the term "fair" can have surprisingly unintended and counterproductive consequences. Defining either the concept or the specific methods of "fair competition" has proven elusive in the competition rule regimes of other jurisdictions, including those jurisdictions with extensive historical experience with competition law regimes. Inefficient business undertakings with relatively inferior competitive skills sometimes assert that competition is "unfair" because they find it hard to compete with other, more efficient undertakings. Affording legal recognition to demands for "fair competition" is likely, therefore, to result in distortions of the market, with adverse results for the competitive process, consumers, the economy, and society at large.[11]

"Healthy development of the socialist market economy." Article 1 retains the objective to "ensure the healthy development of the socialist market economy". The Sections had previously provided comments regarding this phrase.[12] Because of its generality, use of this phrase has the potential to create ambiguity in the interpretation and application of the Law, and may even produce conflict with other objectives of the Law if regarded as a source of operational rules used to determine the legality of specific marketplace conduct in particular cases. The aspirational goal of promoting "healthy development of the socialist market economy" would be best served by focusing the Anti-Monopoly Law on specific operational objectives, such as prohibition of activities that substantially and unreasonably restrict the competitive process.[13] Other jurisdictions with competition enforcement regimes have recognized the legitimacy of such ultimate aspirational goals, while ensuring that the more immediate objective of preventing significant harm to the competitive process constitutes the primary or even exclusive source of decisional criteria for specific cases.

Article 2

Article 2 provides for application of the Law to activity outside the territory of the PRC that violates the law "and *limits or affects* market competition within the territory of the PRC." There is general consensus among developed competition enforcement regimes around the world that application of the laws of a particular sovereign authority to conduct occurring outside the territorial limits of that authority requires at least a

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11 *Id*. at 7, 9.

12 *Id*. at 9, n. 9.

13 *Id*. at 8-9.

"substantial" or "appreciable" anticompetitive effect within such territorial limits. This consensus is reflected in numerous statutes, and in resolutions of multilateral bodies concerned with competition policy. While Article 2 takes a step in this direction by incorporating the requirement of a limitation or effect on market competition in the domestic territory of the PRC, it lacks the other key element of "substantiality" or "appreciability" that is common to the comparable jurisdictional prerequisites found in other competition law regimes.

Today, multiple jurisdictions often assert authority to regulate a single specific course of conduct, under their respective competition laws. This has become especially common with regard to structural transactions (mergers, acquisitions, concentrations, formation of joint ventures), coordination among independent enterprises, and dominant-firm conduct involving the enormous yet still-growing category of multinational enterprises. This often results in multiple compliance burdens and has occasionally led to outright conflict between different competition authorities seeking inconsistent remedies with regard to the same transaction or other conduct. As a result, the overwhelming majority of competition enforcement regimes around the world agree that their domestic law should not be applied to conduct outside their sovereign territory where the conduct has little or no domestic effect. There are many acceptable formulations of this principle; we note only as one example that the U.S. generally limits antitrust law jurisdiction over foreign conduct to instances in which the effect of that conduct on U.S. commerce is "substantial, direct and reasonably foreseeable." A similar limiting principle should be incorporated into Article 2.[14]

Article 3

Article 3 of the current draft Law omits any overall reference to adverse effects on the interests of "business operators." As discussed above in connection with Article 1, this is a clear improvement from the standpoint of improving the alignment between the Law's objectives and the implementation of a competition law regime that safeguards the operation of the market.

References to "interests of consumers" and the "public interest" remain, however, in Article 3. If interpreted to represent objectives distinct from that of preserving the competitive process, these terms have the potential to introduce a degree of uncertainty into the law. Again, such uncertainty is likely to chill investment in, and trade with, China. Standing apart from the reference to activities that "eliminate or limit competition," they imply, contrary to accepted competition norms, that activities that benefit, or do not harm, competition, nevertheless may be condemned if they "damage the interests of consumers, or endanger the public interest."[15]

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[14] *See id*. at 7.

[15] *Id*. at 9.

The Sections respectfully submit that these potential complications can be avoided if monopolistic conduct is defined in terms of activities that adversely and substantially restrict competition. All competition enforcement regimes agree that activities that unreasonably restrict competition are likely to damage consumers and the public. To avoid the risk (and companies' perception of the possibility) that the law may be used to attack conduct that helps, or at least does not harm, competition, the law should omit broad concepts of consumer or public harm that are not derived in a transparent and direct fashion from analysis of the effects of conduct and practices on the competitive process.

Finally, the concept of monopolistic conduct is defined without reference to any requirement of a "substantial" or "appreciable" adverse effect on competition. Such a requirement is common to most competition enforcement regimes around the world, as it clarifies that trivial or insubstantial restraints do not justify invocation of the significant legal procedures and enforcement apparatus typical of competition law enforcement. If such enforcement mechanisms may be triggered by conduct having only temporary or minimal market impact, excessive administrative burdens and unregulated bureaucratic discretion may become an independent source of interference with legitimate competitive processes and thereby frustrate the broader purposes of the law.[16] As a related drafting point, we recommend that Article 3 be conformed to Article 8 by adding to paragraph (i) the phrase "that eliminate or substantially restrict competition."

The stated goals of Article 3, to address "abuse of administrative power" to "eliminate or restrict competition," is a positive and important one,[17] that is reinforced by the stated goals of Article 5 that all levels of government should "adopt measures to create favorable environments and conditions for fair competition," and of Article 7 (Social Supervision) that "government agencies and their staff shall not support or cover up for monopolistic conduct."

Article 4

The substitution of the definition of "undertaking" for the previous concept of "business operator" in Article 4 is a marked improvement. The variety of entities that engage in competitive activity is ever-expanding as the economic and other needs of society evolve, and the limitations of a more confined or static definition are evident. Similarly, the current definition of "relevant market," formerly "specific market," contained in Article 4 is more consistent with the terms used by most competition law regimes, in that a "relevant market" comprises a specific set of products and/or services, and a geographic area, with certain defined competitive characteristics. Inclusion of these concepts is supported by an extensive history of enforcement agency and judicial discussions of the relevant market concept, based on a widely-shared academic literature

16 *Id*. at 7.

17 *Id*. at 10.

examining the concept from both legal and economic perspectives.[18]

Article 5

This provision (as well as Article 57, which requires public entities to avoid violations of the Law) obligates government entities to support the competition objectives of the Law, and is important. The potential ambiguity and conflict that may arise through use of the term "fair" in the specific context of the competition enforcement regime envisioned by this Law remains a concern, however, as noted in the July 2003 Joint Comments.[19]

Article 6

Centralization of competition policy and enforcement authority in a single body directly under the State Council provides multiple advantages. First, it facilitates the development of the highly specialized and technically proficient staff required by competition enforcement. Second, it elevates the Authority just below the State Council, enhancing the prestige of the Authority relative to other government departments and the administrative monopolies it may have to investigate. Third, it promises greater insulation from the conflicting bureaucratic interests that tend to generate parochial and inconsistent outcomes.[20]

II Chapter 2 (Prohibiting Monopoly Agreements)

Many of the changes to Chapter 2 are positive developments. The following suggestions would further improve the draft legislation by facilitating compliance by undertakings, transparency of enforcement, and greater consistency with international best practices.

Article 8

Article 8 (Prohibiting Monopoly Agreements) contains a general prohibition on monopolistic agreements, subject to two specific broad exceptions, as well as a list of specific exempting criteria provided in Article 9. The April 8, 2005 Revised Draft contains several clear improvements, including replacement of the term "business operators" with the more flexible "undertakings," and refinement of the standard of competitive effect from "exclude or limit" to "eliminating or restricting." As noted in our

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18 *See id*. at 3, 12.

19 *Id*. at 7.

20 *Id*. at 4-5, 26.

comments to Article 3 and in the July 2003 Joint Comments,[21] Article 8 should be revised to limit this general prohibition to agreements that will "substantially" or "appreciably" restrict competition, to bring the proposed law into closer conformity with international competition policy norms.

Article 8 lists seven types of agreements that appear to be prohibited so long as they involve 10% or greater market shares of a product. *Per se* prohibition of the types of agreements identified in paragraphs (i)-(v) and (vii) would be an acceptable approach, but only if the prohibition is strictly limited to agreements between competitors when acting as competitors, and is expressly not applicable to agreements between competitors when they are acting as buyer and seller of some product or service or as participants in a *bona fide* joint venture effort. As discussed in the July 2003 Joint Comments,[22] agreements involving a seller and a buyer that involve such restrictions may have pro-competitive effects, regardless of whether the buyer and seller are also competitors. Such agreements between participants to a *bona fide* joint venture also may have pro-competitive effects, since they facilitate the sharing of resources by limiting the opportunity for the participants to free-ride on the shared resources. This may be particularly true in the case of paragraph (iv), relating to the purchase of technology or facilities and the development of new products or technologies.[23] In contrast, in the experience of competition law enforcement in the United States, such agreements almost invariably have anticompetitive effects on the market if competitors engage in them not as buyer and seller or *bona fide* joint venturers, regardless of the market shares involved.[24]

As to paragraph (vi) regarding agreements that "limit resale price," such agreements arise only between sellers and buyers. The paragraph would therefore be clearer if it were moved to the end of the list or placed in a separate article. Moreover, both the U.S. and the EU do not treat as *per se* illegal such agreements that establish a *maximum* resale price; agreements between sellers and buyers that establish a *minimum* resale price are commonly prohibited.

Therefore, the Sections suggest that Article 8 be clarified to apply paragraphs (i)-(v) and (vii) to agreements involving competitors acting as such, to limit paragraph (iv) to prohibit only agreements that "expressly preclude without valid reasons the purchase of

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[21] *Id.* at 7, 15.

[22] *Id.* at 14-15.

[23] Paragraph (iv) also raises concerns because, unlike paragraphs (i)-(iii), (v), which address agreements that effectively preclude competition between the parties, paragraph (iv) deals with agreements which only "limit" the purchase or development of technology. In cases of licenses of IP or technology, where the licensor is the seller and the licensee is the buyer of the IP or technology, and in cases of joint ventures to develop new products or technologies, such restrictions may facilitate the transfer and development of technologies by reducing free-riding. It is only where the restrictions are not reasonably related to the subject matter of the agreement, and impose greater restrictions on competition than the efficiencies which the agreements enable, that competition concerns should be raised.

[24] July 2003 Joint Comments at 3-4.

new technology or new facilities, or the development of, new products or new technologies,"[25] and to move paragraph (vi) either to the end of the list or in its own article. In particular, paragraphs (iv) and (vi) should be clarified to prohibit only restrictions that have an unreasonable adverse effect on competition in a relevant market.[26] Such a clarification is especially important if paragraph (vi) applies to all agreements that limit resale price, and is not limited to agreements that establish *minimum* resale prices.

The exemption in Article 8 of "any agreement by which the product is covered having a share of less than 10% in the relevant market during the valid period of the agreement," should be clarified to limit its application to agreements between sellers and buyers. The lack of distinction in Article 8 between agreements involving a seller and a buyer and agreements involving competing sellers may result in the prohibition of agreements between sellers and buyers that may have pro-competitive effects. Therefore, the exemption of agreements between sellers and buyers involving less than 10% of the relevant market will be beneficial because these agreements are unlikely to have anti-competitive effects. In fact, the market share threshold for the exemption should be increased to 30% for agreements between sellers and buyers, which is the threshold that the EC has adopted for its block exemption of vertical restraints. The exemption, however, would be potentially problematic if it were applied to agreements between competitors. With the exception of agreements to "limit resale price" in Article 8(vi), which arise in the context of agreements between buyers and sellers rather than in agreements between competitors, the other agreements prohibited by Article 8 are types of conduct which, in the experience of competition law enforcement in the United States, almost invariably have anticompetitive effects on the market if competitors engaged in them, regardless of the market shares involved.

Article 8 also creates an exemption to "the conduct of limiting resale prices in issuing and distributing publications." It is unclear why there should be an exemption that is specific to an industry. Competition law principles should generally apply equally to all sectors of the economy, with no industry being exempt from competition law, unless there are major counterbalancing policies such as national security that may, in some circumstances, outweigh the objective of fostering competition in a particular sector of the economy.

Finally, the interaction of the exemptions in Article 8 with Article 10 raises concerns, as we discuss below regarding Article 10.

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[25] This clarification would ensure that only agreements with restrictions which are not reasonably related to the legitimate purpose of the agreements and restrict competition more than the efficiencies created by the agreements, will be prohibited. It is especially important if no distinction is made in the prohibitions between agreements between competitors acting as competitors and agreements between buyers and sellers and between joint venturers.

[26] This is also consistent with the Sections' recommendation regarding Article 12, that only "substantial" or "appreciable" restrictions of competition resulting from an abuse of dominant market position be prohibited. *See also* July 2003 Joint Comments at 3, 4, 14-20.

Article 9

Article 9 provides five blanket exemptions to Article 8. The Sections believe that these exemptions will serve a valuable function in enabling the Anti-Monopoly Authority to exempt those agreements that may benefit consumers and economic welfare generally. We are concerned, however, that Article 9, as written, does not provide any mechanism for balancing the potential anticompetitive harm of a particular agreement against its potential benefits.

The deletion of the exemption for joint action "to promote the rationalization of production operations, division of labor or the development of specialization," is a welcome development for the reasons stated in the July 2003 Joint Comments.[27] Likewise, the inclusion in Article 9 of the requirement that agreements are exempt from the prohibitions in Article 8 only if they "can enable consumers to share impartially the interests derived from the agreements, are necessary for achieving the objectives and will not entirely eliminate the competition in relevant markets," is beneficial, also for the reasons stated in the July 2003 Joint Comments.[28] Unless agreements of the types identified in Article 8 (i)-(v), (vii) have at least those three attributes, they may benefit only the parties to them, and injure the economy and consumer welfare, and should not be exempt. Article 9 should be revised to require balancing of the potential anticompetitive harm of a particular agreement against its potential benefits.

Article 9 includes in subsection (ii) an exemption for "agreements to cope with economic depression," and in subsection (iv) an exemption for "agreements to enhance the competitiveness of exports in global markets." With respect to these exemptions, there remain the general concerns relating to exemptions that are expressed in the July 2003 Joint Comments.[29] The exemption of Article 9(iv) should be clarified to provide that it would not apply if the agreements will adversely affect competition in the market within China. While joint export trade arrangements are commonly exempted from competition laws, the U.S. and other jurisdictions with competition law regimes generally do not exempt any export arrangements that have an adverse impact on domestic competition, and joint export trade arrangements exemptions remain controversial among some antitrust experts.

Finally, the interaction of Article 9 with Article 10 raises concerns, as we discuss below regarding Article 10.

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27 *Id*. at 22.

28 *Id*. at 9-10, 21-22.

29 *Id*. at 9-10, 22-23.

Article 10

Article 10 has no analogue in the 2002 draft and raises concerns. Article 10 provides that:

> "Any interested party or consumer may report to the Anti-Monopoly Authority any monopoly agreement that falls within the scope of Article 8 and is not covered by Article 9.
>
> "The Anti-Monopoly Authority will, upon request of the above-mentioned report or ex officio, initiate investigations in monopoly agreements that fall within the scope of Article 8 and are not covered by Article 9."

As noted in the July 2003 Joint Comments,[30] the European Union has abandoned its system of individual exemptions while retaining a system of block exemptions that it is modifying to bring closer to the U.S. approach. Germany is apparently also abolishing its notification system. It appears that the April 8, 2005 Revised Draft has abandoned the individual exemptions process of earlier drafts and adopted fully a block exemption approach, with Article 10 intended to ameliorate the adverse competitive effects that may occur in specific instances.

First, the elimination of an individual exemption system is consistent with procedures followed in other jurisdictions. The EU's experience has demonstrated that an individual exemption system imposes overwhelming and unjustifiable burdens on both the parties to agreements and the enforcement authority that must review and determine the status of each individual exemption application. While such an individual exemption system may have the benefits of providing the competition enforcement authority initially with valuable experience in evaluating many different types of agreements, and may foster a culture of competition in the economy, these benefits can be achieved in other ways that are less onerous to all involved.

However, if only block exemptions are provided, then they must be carefully established. The July 2003 Joint Comments[31] set forth the Sections' concerns regarding the broadly-drawn, indefinite duration block exemptions such as those in Article 8 and 9.[32] Moreover, whether the requirements of Article 9, that exempt agreements must "enable consumers to share impartially the interests derived from the agreements, [be] necessary for achieving the objectives and will not entirely eliminate the competition in

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30 *Id*. at 6, 29.

31 *Id*. at 21-22.

32 With the availability of the general exemption in Article 11, there should be little concern that specific block exemptions are too narrow and will not exempt agreements that might appropriately be exempt. As to Article 11, the Sections remain concerned for the reasons set forth in the July 2003 Joint Comments, at 2, 8-10, 23.

relevant markets," are satisfied, can only be determined on a fact-specific, case-by-case basis. Therefore, under Article 10, parties may simply act on the basis that their agreements satisfy the requirements of Articles 9 and 11, and their agreements will be effective unless and until the Anti-Monopoly Authority somehow becomes aware of the agreements, investigates, and determines that Articles 9 and 11 have in fact not been satisfied. In these circumstances, the practical effect may be that the prohibitions of Article 8 are ineffective generally, and will be applied only in specific circumstances where, after a challenge, the parties cannot demonstrate that they satisfy the requirements of Articles 9 and 11.

III Chapter 3 (Prohibition of Abuse of Dominant Market Position)

The current version of Chapter 3 is a marked improvement over the 2002 draft.[33] The Sections continue, however, to have a number of fundamental concerns with several of its provisions.

Article 12

The current version of Article 12 (succeeding Article 14 in the 2002 draft) contains significant improvements. The reference to "business operator" has been changed to the more flexible "undertaking," the competitive effect test has been refined and the ambiguous and troublesome concept of activities that "obstruct the activities of other business operators" has been eliminated. The need for further limitation of prohibited conduct to instances of "substantial" or "appreciable" restrictions of competition, as noted in the July 2003 Joint Comments[34] and in our comments on Article 3, remain unaddressed.

Article 13

Article 13 appears to incorporate the concept of a shared monopoly. There is little analytical support in economics for such a concept, and it is not part of U.S. or European competition law.[35] If there is a market in which only a few undertakings are active, and those competitors act to restrict competition, the prohibitions in Article 8 against joint action that injure competition are sufficient to address the situation and more

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[33] *Id*. at 11-12.

[34] *Id*. at 7, 15-16, 18.

[35] *See*, *e.g.*, Timothy J. Muris, "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy," Milton Handler Annual Antitrust Review (New York, New York, December 10, 2002) at nn. 68, 69, http://www.ftc.gov/speeches/muris/handler.htm; Charles A. James, "Antitrust in the Early 21st Century: Core Values and Convergence," Antitrust Policy in the 21st Century (Brussels, Belgium, May 15, 2002) at III.B.1.a, http://www.usdoj.gov/atr/public/speeches/11148.htm

consistent with the majority of competition laws. The EU concept of "collective dominance" is considerably narrower and requires concerted action by the undertakings involved, as does the U.S. concept of "conspiracy to monopolize."

Article 14

As Article 14 properly recognizes, many factors should be considered to determine whether an undertaking has or shares a dominant market position, including one additional factor that was in the 2002 draft list of relevant factors – the ability of other firms to enter the market or to expand their output.[36] Ease of entry and expansion by other undertakings will make it difficult for a firm, even one with a high market share, to exercise market power. While this concept is arguably contained within paragraph (ii) (ability to affect price) or paragraph (vi) (access to relevant market by other undertakings, perhaps including those outside the market) of Article 14, this additional factor is important enough to be identified as a separate factor. Other factors that should be included in the analysis include the ability of competitors to reposition themselves in the market, and the existence of countervailing buyer power.

Article 14 also appears to be missing a time element. The factors in Article 14 should be considered over a period of time sufficient to evaluate their competitive effect, not just a few days or months. An undertaking may have a short-term ability to alter price or output in a market; such an undertaking should not, however, be viewed as having a "dominant position" if such short-term effects are subject to reasonably quick responses by consumers or other undertakings that ultimately constrain such power. Therefore, a new paragraph incorporating as a factor "the duration and trend of such factors," should be added to the end of Article 14.

It is unclear how the factors in paragraph (iv) of "financial status and technical conditions of the undertaking" and paragraph (v) of "association with other undertakings" will be considered in determining whether an undertaking has a dominant market position. Financial status does not indicate the presence or absence of dominant market position. In fact, assuming that a strong financial status reflects a dominant market position may discourage undertakings that operate on sound financial principles. Would the existence of associations with other undertakings indicate that there may be a dominant market position? At minimum, clarification of how these factors will be used in analysis is needed, to provide helpful guidance to the Anti-Monopoly Authority and undertakings regarding when a dominant market position will be found.

Article 15

Article 15 raises several basic concerns. First and most fundamentally, market share is only one of many indicators of market power, and there is no one market share

[36] July 2003 Joint Comments at 11-12.

threshold above which market dominance can be assumed automatically.[37] Application of this single indicator without consideration of others will lead to incorrect conclusions regarding market power, which will result in unnecessary and counterproductive enforcement actions.[38] Therefore, Article 15 should be deleted entirely, or at least revised to indicate that (a) the presumptions may be adopted in a particular situation only after consideration of evidence relating to other factors, including those identified in Article 14, and (b) market shares alone are insufficient in determining dominant market position.

Second, paragraphs (ii) and (iii) of Article 15 establish a complex structure for presuming shared monopoly (or joint dominance). As noted in our comment to Article 13 above, this concept is overbroad and other tools of the proposed law, including those in Article 8, are more than adequate to address any concerns in this area. Economic analysis has shown that a small number of strong firms can result in quite competitive market behavior in particular circumstances.[39] Therefore, presuming that stricter rules should apply when the combined shares of several firms exceed any particular level risks unnecessary interference with competitive market outcomes. Ironically, including paragraphs (ii) and (iii) can enable the successful growth of the second and third largest undertakings in a market to trigger stricter rules for the leading firm in that market, than when the second and third undertakings are less successful. Moreover, there is no support in economic theory for the particular thresholds proposed. While the proposed exemption from paragraph (iii) for undertakings with less than a 10% share may provide some relief for some undertakings, the exemption does not apply broadly enough to ameliorate the underlying concerns. Therefore, even if Article 15 is retained with the provision that the presumptions based on market share are rebuttable, paragraphs (ii) and (iii)[40] should be eliminated from Article 15.

Article 16

As discussed in the July 2003 Joint Comments,[41] as a general rule, the United States and most other competition law regimes do not prohibit the fact of monopoly as such. Efforts to attain a monopoly position by aggressively innovating, promoting,

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37 *Id*. at 11-12, 15.

38 *See id*.

39 *Id*. at 12.

40 When the test in (iii) is met but the tests in paragraphs (i) and (ii) of Article 15 are not met, the market situation may be three firms with market shares of about 45%, 20%, and 11%, respectively. In such a situation, it will be somewhat unusual for any one undertaking to be dominant or perhaps even for all three undertakings to coordinate their competitive conduct (in which case, in any event, the prohibitions of Article 8 would apply). Hence, especially in the case of paragraph (iii), the use of a presumption, even a rebuttable one, would be unnecessary.

41 July 2003 Joint Comments at 3, 14, 16.

buying inputs and selling a product or service are strongly encouraged. Indeed, the United States Supreme Court has recently reaffirmed that the ability to charge monopoly prices is lawful, and is an important, positive element of the free-market system.[42] The opportunity to charge monopoly prices – at least for a short period – attracts investment and innovation in the first place, by inducing risk-taking that produces innovation and economic growth. Those high prices ultimately attract more aggressive competitors that stimulate competition and erode a monopolist's position. Lower costs of inputs contribute to that same set of beneficial incentives to the competitive process.[43] The prohibition of such conduct would require a competition authority to act as a price regulator, a role that is antithetical to an efficiently functioning market system, and likely to harm competition and, ultimately, consumers.

Some jurisdictions, notably the EU, recognize in theory[44] and in some mostly dated decisions the concept that a dominant position may be exploited by charging high prices or paying low prices. However, there apparently have been no EU prosecutions of such violations where there were no other elements present, such as proof of a decrease in competition caused by the pricing. Moreover, new prosecutions of such conduct would appear to be inconsistent with an apparent trend in the EU towards greater reliance on economic analysis and observed competitive effects.

Therefore, Article 16 should be deleted. If it is retained, then, consistent with the July 2003 Joint Comments, the term "unfair" should be clearly defined, as discussed in the July 2003 Joint Comments.[45]

The use of the term "unfair" appears inconsistent with the focus of most competition laws – safeguarding competition. The term arguably reflects political and other considerations, including the well-being of rival business owners. These concerns may be inconsistent with the goal of prohibiting activities that exclude or limit competition and maximizing consumer welfare. It is generally accepted in competition law policy that the only definition of a "fair" price that is consistent with the goal of long-term consumer welfare is the price that results from free competition. As used in the April 8, 2005 Revised Draft, however, the term seems to imply that there is an appropriate value for products other than the prices set by a competitive process, inviting regulatory interference with ordinary business processes that is likely to raise costs to consumers over time and that is antithetical to an efficient market. Given the dominant market positions of the undertakings that would be under review under Article 16, there

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[42] *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). A copy of this decision may be found at http://www.supremecourtus.gov/opinions/03pdf/02-682.pdf

[43] *See* July 2003 Joint Comments at 3, 16.

[44] *See, e.g.*, Kurt Stockmann & Alberto Pera, Building Competition Policy in China: An EU Approach at 4.2 (2005).

[45] *See* July 2003 Joint Comments at 7, 14, 16.

may be a tendency to consider as "too high" (or "too low") any price (or cost) that a complaining undertaking speculates would have occurred in the absence of some market power. Prices that are higher (or costs that are lower) than some amount negotiated by others or in other circumstances should not be deemed either "unfair" or anticompetitive.

The term "unfair" is also ambiguous and subjective. Undertakings need clear rules and objective criteria so that they may plan and conduct their business in an efficient manner. Undertakings must conform their business practices to the competition laws of all countries in which they do business. Accordingly, ambiguous laws that allow for subjective enforcement in any jurisdiction create tremendous difficulties for undertakings that desire to ensure proper legal compliance.

Article 17

Predatory prices may in certain circumstances have adverse effects on competition. However, for the reasons discussed in the July 2003 Joint Comments,[46] the Sections suggest that an appropriate measure of "cost" be identified and that "prices below cost" be prohibited only if they are proven to have an anticompetitive effect on the market. Otherwise, the law may chill price competition and low prices that benefit consumers.

Article 18

For the reasons discussed in the July 2003 Joint Comments,[47] Article 18 remains a concern and should be deleted or at least clarified to define what would be considered "equivalent trading partners," to require some actual adverse effect on competition before a violation may be found, and to permit the granting of different terms to customers to meet a competing offer.

Article 19

Article 19 of the April 8, 2005 draft, defining the prohibition against refusals to deal, is comparable to Article 20 of the October 2002 draft that was the subject of the July 2003 Joint Comments. As noted in the July 2003 Joint Comments,[48] "[t]he basic rule in U.S. antitrust law is that most competitive activity is permissible unless it is shown to have an unreasonably restrictive effect on competition in the particular circumstances." Article 19 has sought to take this point into account by qualifying the

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46 *Id*. at 9, 14, 16-17.

47 *Id*. at 14, 19.

48 *Id*. at 3.

prohibition against refusals to sell with the language "so as to put the purchasers at a competitive disadvantage or harm the legitimate interests of consumers." The first qualification, however, remains inconsistent with U.S. antitrust law[49] and international competition law norms, which do not interfere with a seller's decisions of which parties to deal with unless the refusal has a demonstrated effect of creating or maintaining a monopoly, and thereby harming consumer welfare. Obligating a dominant seller to sell to all willing resellers is unlikely to protect consumers' legitimate interests, because, for example, a willing reseller may be unqualified to provide facilities or services desired by consumers or necessary to the efficient distribution of the products and may instead "free ride" on efforts by others. The language, "put the purchasers at a competitive disadvantage or," therefore, should be deleted from Article 19.

Article 20

Although the proposed law benefits from the increased clarity of Article 20, including its reference to practices that "eliminate or restrict competition," the closing phrase "with other undertakings" might mean that an effect on competition in the market as a whole (as opposed to on competition by individual undertakings) is not required for conduct to be prohibited. By deleting those three extraneous words, "with other undertakings," Article 20 would be clarified to permit exclusive transactions that do not have an anticompetitive effect and may provide important benefits. For example, short-term supply contracts can assure supply, enable longer-term planning with greater certainty on the basis of known costs, and obviate the expense and risk of storage. Exclusive dealing can be a form of partial vertical integration that provides efficiencies, and allows a firm to avoid the costs and risks that would be incurred through full vertical integration.[50]

Article 21

The reference to "eliminate or restrict competition" in Article 21 is an important clarification,[51] but the continued inclusion of the vague phrase, "subject in nature or in business practice," remains a concern. The deletion of that phrase would substantially increase the transparency of the meaning of Article 21, and increase compliance and consistency of enforcement.

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[49] *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (holding that, in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the right of a seller to exercise its independent discretion as to which parties with which it will deal). A copy of this decision may be found at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=250&page=300

[50] July 2003 Joint Comments at 20.

[51] *Id*. at 19-20.

Article 22

Article 22 had no analogue in the October 2002 draft, and introduces for the first time in the proposed law the concept often referred to as the "Essential Facilities Doctrine." There is disagreement among developed competition law regimes and prominent antitrust commentators on whether such a doctrine is consistent with proper competition law goals, and, if it is, how such a doctrine should be formulated.[52] A recent U.S. Supreme Court decision, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[53] discussed risks to competition posed by any broad application of the Essential Facilities Doctrine. In *Trinko*, the Court observed that, although "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate [Section 2 of the Sherman Act]," such a prohibition is an exception to the normal right to refuse to deal with other firms, under the *Colgate* rule. The Court therefore noted that it has "been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[54] The Court found that the specific refusal to deal in *Trinko* did not constitute a violation of U.S. antitrust law under the narrow exceptions to the *Colgate* rule that had been recognized. The Court also noted that it has neither recognized nor repudiated the Essential Facilities Doctrine.[55]

Those United States Circuit Courts of Appeal that have recognized the Essential Facilities Doctrine have applied it very narrowly, and have sought to tailor specific criteria that must be proven before access to a competitor's facilities may be compelled. These criteria include:

(1) proof of harm to competition from the refusal to deal, which is a fundamental element of any monopolization claim;

(2) control of the essential facility by a monopolist;

(3) a competitor's inability practically or reasonably to duplicate the essential facility (not just that it would be costly for it to do so)

(4) the denial of the use of the facility to a competitor; and

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52 *See, e.g.*, P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989). *See generally* W. Blumenthal, *Compulsory Access under the Antitrust Laws*, ABA, Advanced Antitrust Counseling Workshop (1998). Copies of these materials are annexed as Appendices to these Comments for ease of reference.

53 504 U.S. 398 (2004).

54 *Id*. at 408.

55 *Id*. at 410-11.

(5) the feasibility of providing the facility to competitors.[56]

Accordingly, Article 22 should be deleted from the proposed law. If Article 22 is retained, it should be revised to require a showing that the competitor seeking access cannot practically or reasonably duplicate the facility. Such a requirement should be added to bring this provision into closer conformity with accepted competition policy. The Sections also believe that Article 22 should be revised to require that the party seeking access demonstrate that access would further the legitimate interests of consumers. Finally, it should be made clear that the Essential Facilities Doctrine does not apply to IP rights at all or only in extraordinarily limited circumstances.[57]

IV Chapter 4 (Control of Concentrations)

Many of the changes that have been made to Articles 23-31 of the proposed legislation are highly desirable. Specifically, for the reasons discussed in the July 2003 Joint Comments,[58] the clarification of the criteria triggering filing (Articles 23-25), the greater transparency in decision-making (Article 29), and the shortening of the initial waiting period (Article 27) are each important improvements that will aid businesses in complying with the legislation.

Notwithstanding beneficial revisions, concerns remain with regard to the exemption provided in Article 30, as discussed in the July 2003 Joint Comments.[59] Further changes are also needed to Articles 24, 26, 27, 31 and 48 so that the proposed

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[56] *See* ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS 278-86 (5th ed. 2002). *See also id.* at 451-54 (addressing restraints on access imposed by joint venture parents).

[57] Though the European Court of Justice has in "exceptional circumstances" compelled access to IP rights under Article 82 of the EC Treaty, it has set forth strict limitations on the circumstances in which a compulsory license may be required. In Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, 2004 ECJ CELEX LEXIS 166 (Apr. 29, 2004), the ECJ held that the following criteria were prerequisites to compelled access: (1) that the IP right be indispensable to compete in the market, and there must not be any feasible alternatives; (2) the party seeking access must show that there is an upstream market for the supply of the IP right that is indispensable; (3) the party seeking access must intend to supply a market different from that on which the current seller is operating, or must demonstrate that it intends to sell a new product (even if on the same market) for which demand exists; and (4) that the refusal to license is such as to exclude all competition on the secondary market. The Sections believe that such exceptional, limited circumstances do not warrant the draconian remedy of the Essential Facilities Doctrine, and that such conduct can be addressed by other means. In fact, in the *IMS* case, the crucial issue of whether there was a need to obtain access to the IP rights involved was resolved by a German national court ruling that no IP rights were infringed by the party seeking access. In other words, there was no competitive need for the IP rights that the party was seeking because that party's business did not infringe on those IP rights.

[58] July 2003 Joint Comments at 12-13.

[59] *Id*. at 22-23.

legislation will be consistent with the recommended best practices that have been approved by the members of the International Competition Network ("ICN").[60] The ICN Merger Working Group has developed Guiding Principles and Recommended Practices for Merger Notification that have been approved by all members of the ICN.[61] While these guiding principles and recommended practices are nonbinding, they reflect a consensus of the international competition enforcement community as to the best practices in this area. Numerous jurisdictions have conformed, and continue to conform, their merger review systems to the ICN Recommended Practices. In order to promote international convergence and to reduce unnecessary burden on undertakings operating globally, the Sections urge that China seek to conform both its legislation and its implementation to the ICN Guiding Principles and Recommended Practices to the maximum extent possible consistent with China's unique requirements.

Article 24

As drafted, the first approach of Article 24 would require notification if any one party to the transaction has China-wide assets or sales above RMB 3 billion or a market share within China above 20%. This provision is inconsistent with the ICN Recommended Practices in two respects.[62]

First, ICN Recommended Practice I recommends that jurisdictions require notification only if either (i) the acquired party has, or (ii) in the case of a joint venture, two or more parties have, activities within that jurisdiction exceeding an appropriate threshold of materiality. To conform the first approach of Article 24 to this ICN Recommended Practice, it should be revised to require that the assets or sales of the acquired company or, in a case of a joint venture, of two or more parties to the concentration, exceed whatever threshold is established. In addition, in order to conform the proposed legislation to the ICN Recommended Practice, the test should be based solely on the assets or sales of undertakings who have control of the particular undertaking rather than any undertaking having "affiliate relationships." It is also important that the test of control be clearly specified and based on objective indicia, such as voting or economic interests in the undertaking.

Second, in its Recommended Practice II, ICN recommends that notification thresholds be based exclusively on objectively quantifiable criteria, such as assets and sales, and expressly recommends against market share-based tests since they are more

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[60] The International Competition Network is a network of competition authorities from countries around that world that have enacted competition laws. The ICN currently has almost 80 members.

[61] The ICN Guiding Principles and Recommended Practices for Merger Notification may be found at http://www.internationalcompetitionnetwork.org/guidingprinciples.html

[62] *See also* July 2003 Joint Comments at 29-30.

judgmental[63] and therefore far more difficult to apply in practice. Market shares cannot be determined unless a relevant market and its size are determined; however, the relevant market and its size are often the ultimate critical issues that the parties frequently will not know at the time notification is made. As drafted, the market share tests are also unlikely to be efficient in identifying concentrations that may have adverse effects on competition. For example, paragraph (2) would require notification if one party has 20% in a market and the other parties have no presence in that market at all, and the parties are active in another market in which their combined share is under 25%. To conform the first approach of Article 24 to the ICN Recommended Practices, subsections (3) and (4) of the first approach Article 24 should, therefore, be deleted.

The Sections suggest that the second approach in Article 24 should be adopted, because the State Council will then have the opportunity to study the issue thoroughly before establishing the thresholds, and will have the ability, without invoking the burdensome process of amending the law, to adjust the thresholds from time to time according to experience, "economic developments and market situations." However, if the second approach in Article 24 is adopted, the Sections suggest that it be revised to expressly instruct the State Council to establish thresholds according to ICN Recommended Practices, particularly those that recommend against using market shares as notification thresholds and that recommend thresholds relating to the activities of the parties within China.[64]

Articles 26, 28

ICN Recommended Practice V focuses on the information required to be included in the initial notification, recommending that the initial notification should be limited to the information needed to determine whether the transaction exceeds jurisdictional thresholds and whether the transaction raises competitive issues meriting further investigation. ICN further recommends that the initial notification requirements not impose unnecessary burdens on parties to transactions that do not present material competitive concerns.

Article 26 as drafted seems inconsistent with these recommendations and to impose unnecessarily burdensome information requirements on parties to transactions that do not raise material competition issues. To reduce any unnecessary burden, the Sections recommend that the information required to be provided by paragraphs (4), (5), and (6) be limited to products for which there is some overlap between the parties or to transactions that the Anti-Monopoly Authority determines, based on its initial review,

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[63] This is particularly the case with paragraph (1), since it may be very difficult to allocate the value of a transaction geographically, especially if the assets are intangibles such as IP rights.

[64] The Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors are inconsistent with ICN Recommended Practices in these, and other, respects. As discussed with respect to Articles 45 and 55, the Interim Provisions should be revoked when the Anti-Monopoly Law takes effect.

may present material competitive concerns.[65]

While the concept of supplementation of notification provided in Article 28 is appropriate, the application of Article 28 to the information requirements of Article 26, as currently drafted, would be onerous and unlikely to result consistently in providing the Anti-Monopoly Authority with useful information.

Article 27

Shortening the initial review period in Article 27 to 45 days is generally consistent with ICN Recommended Practice IV, which requires that merger reviews be completed within a reasonable period of time. However, most merger control regimes have an initial waiting period of 30 days, and the imposition of a 45-day initial review period may complicate the review of transactions that are subject to multi-jurisdictional review.[66] Moreover, 45 days may still be an unreasonably long period for transactions that are time-sensitive and that do not raise any material competition issue. ICN recommends, therefore, that merger review systems incorporate procedures for expedited review and clearance of notified transactions that do not raise material competitive concerns.[67] Accordingly, Article 27 should be amended to authorize a decision permitting the consummation of the concentration in less than 45 working days if the Anti-Monopoly Authority determines that the notified transaction does not raise material competitive concerns.

Article 30

Article 30 provides for prohibition of concentrations that "may lead to creation or strengthening of dominant market positions as well as elimination or restriction of market competition." As in other areas of the proposed law, the Sections submit that there should be a "substantiality" standard before a concentration is prohibited. Therefore, we suggest that the word "substantial" be added to Article 30, so that concentrations are prohibited that "may lead to creation or strengthening of dominant market positions as well as *substantial* elimination or restriction of market competition."

Article 31

ICN Recommended Practice IX recognizes that it is critical that business secrets and other confidential information received from merging parties and third parties in

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65 July 2003 Joint Comments at 29.

66 *Id.* at 17, 29.

67 Recommended Practice IV.B.

connection with the merger review process be given appropriate confidentiality protections. This requires that confidential information submitted by merging parties and third parties not be used except in connection with the competition agency's review of the merger and other authorized law enforcement purposes.[68] It also requires that confidential information not be disclosed outside the competition agency except for the purposes of allowing the agency to discharge its merger review mandate effectively.[69] For these reasons, and those discussed in the July 2003 Joint Comments,[70] Articles 41 (Confidentiality) and 53 (Responsibilities of the Enforcer) are important provisions. However, Article 31, which appears to require consultation with the governing departments of related industries, could substantially nullify the protective intent and effects of Article 41 and will likely undercut the independence of the Anti-Monopoly Authority.[71] For these reasons, Article 31 should be eliminated.

Implementation

Whatever legislation is ultimately enacted, it is critical to the continued smooth development of the PRC's economic and legal system that this legislation be implemented in a manner that is consistent with the guiding principles for merger review that were promulgated by the ICN at its first annual conference in Naples, Italy in September 2002. The following ICN guiding principles are particularly important in this respect.

> First, *merger laws should be applied on a non-discriminatory basis.* In an increasingly global economy, analysis of the competitive effects of a transaction and the decision to challenge or to refrain from challenging a transaction should be made without regard to the nationality of the parties to the transaction or the nationality of those who may support or oppose it.[72]
>
> Second, *the process of merger review should be transparent.* Parties are entitled to know the manner in which competition authorities will review transactions and the standards that the competition authorities, including any relevant courts and tribunals, will apply in deciding whether to block or challenge a transaction.[73]

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68 Recommended Practice IX, Comment 3.

69 *Id.*

70 July 2003 Joint Comments at 27-28, 30-31.

71 *See id.* at 4, 5, 26-28. This may be a particular danger if the consultation is not made part of the public record.

72 *Id.* at 28-29.

73 *Id.* at 17, 27-28.

> Third, *appropriate safeguards should be available to assure that the process of review is fundamentally fair*. Parties should have a reasonable opportunity to address concerns that the competition authorities may have about a transaction and should be entitled to an impartial and timely resolution of disputed issues.[74]

The Sections assume that Articles 42-44 (Right to be Heard; Publication of Decisions; Judicial Review) will apply to merger review. In all events, the Anti-Monopoly Law should require the Anti-Monopoly Authority to take these three ICN principles into account in its practices and to consider issuing regulations that incorporate these principles. In addition, the regulations and practices followed by the Anti-Monopoly Authority should incorporate applicable legal privileges and related confidentiality doctrines. Third parties should also be allowed to express their views during the review process and, wherever possible, the Anti-Monopoly Authority should seek to work cooperatively and collaboratively with the enforcement agencies of other jurisdictions reviewing the transaction so as to avoid inconsistency and conflict in the adopted outcomes, and to maintain the confidentiality of information submitted, except where parties voluntarily waive confidentiality.

V Chapter 5 (Prohibition of Administrative Monopolies)

The prohibition of "Administrative Monopoly" is a significant and challenging objective of the draft law, since it implicates the relationships between government departments and authorities at different levels of the government of the PRC. The prohibition properly recognizes that anticompetitive conduct by governmental entities is a substantial threat to competition and may undermine the foundation of sound competition policy.

Articles 32-35

Articles 32-35 prohibit various acts of "administrative monopoly." The relevant penalty provisions, Articles 49-50, distinguish Articles 32-34 from Article 35. Article 49 suggests that Articles 32-34 target "specific acts of administrative monopoly" while Article 50 targets "general" acts of administrative monopoly.

Articles 32-34 prohibit "the Government and its subordinate departments" from "abusing their administrative power" for specific anticompetitive purposes. The draft law does not, however, define the term "abuse of administrative power." Distinguishing "abuse of administrative power" from "legitimate use of administrative power" may complicate enforcement of Articles 32-34. As currently drafted, Articles 32-34 may require the Anti-Monopoly Authority of the State Council to define and apply the

[74] *Id.* at 27-28.

ambiguous concept of "abuse." The prohibitions in Articles 32-34 may be clarified by combining them into one provision and specifically defining prohibited conduct and eliminating the term "abuse" in the following manner:

> "No government, government department, or government employee may, through formal or informal use of administrative power, (1) require undertakings or individuals to purchase commodities from an undertaking designated by a government, government department, or government employee; (2) restrict access by undertakings to markets for commodities or restrict the free flow of commodities between regions; or (3) compel undertakings to engage in conduct otherwise prohibited under this law. This article does not apply to government action taken in accordance with the specific authorization of other laws and regulations, consistent with Article 55 of this law."

Under this formulation, the Anti-Monopoly Authority of the State Council would (1) determine whether the challenged administrative conduct results in any of the three listed anticompetitive effects, and (2) determine whether the challenged conduct was "in accordance with the specific authorization of other laws and regulations." The second step thus focuses directly on the legal basis and purpose of the government department's administrative authority. This formulation may address the same concerns as the prohibitions on "abuse of administrative authority" while avoiding the ambiguous concept of "abuse."

Article 35 addresses the enactment of anticompetitive regulations by government authorities. It prohibits "rules with provisions eliminating or restricting competition in violation of laws and administrative regulations so as to prevent the establishment of a unified and orderly national market and of a fair competition environment." As drafted, Article 35 only prohibits anticompetitive rules that "violate" other existing "laws and administrative regulations." Article 35 thus permits new rules which "prevent the establishment of a unified and orderly national market and of a fair competition environment" if the new rules do not violate any existing laws or administrative regulations. Article 35 might be strengthened by prohibiting all anticompetitive measures unless expressly permitted by existing laws or regulations in the following way:

> "No government, government department, or government employee may promulgate rules with provisions which limit or eliminate competition with the purpose or effect of impeding the establishment of a unified and orderly national market and of a competitive environment. This article does not apply to government action taken in accordance with the specific authorization of other laws and regulations, consistent with Article 55 of this law."

Under this formulation, the Anti-Monopoly Authority of the State Council would (1) determine whether the challenged rule limits or eliminates competition, (2) determine whether the purpose or actual effects of the challenged rule are adverse to competition,

and (3) determine whether the challenged rule is "in accordance with the specific authorization of other laws and regulations." The third step thus focuses directly on the legal basis and purpose of the government department's new rule.

In effect, these suggested revisions to Articles 32-35 require government entities to demonstrate that any anticompetitive administrative action or rulemaking comports with the purposes and restrictions of the laws which they seek to enforce.[75]

Applicability to State-Owned Enterprises

The legislation would benefit from the inclusion of the following provisions: (1) "this law applies equally to enterprises owned in whole or in part by a government entity or government department and to other enterprises"; and (2) "evidence of specific benefit to an enterprise owned in whole or in part by a government entity shall not constitute a general benefit to the public interest." These provisions would confirm that anticompetitive agreements or transactions would not automatically qualify for a "public interest" exception under Articles 11 and 30 merely because they benefit a state-owned enterprise.[76]

VI Chapter 6 (Anti-Monopoly Authority)

In addition to the discussion in the July 2003 Joint Comments regarding the provisions relating to the implementation of the Anti-Monopoly Law and the role of the Anti-Monopoly Authority,[77] we respectfully submit the following additional thoughts regarding some of the provisions that have been revised or added in the April 8, 2005 Revised Draft. We offer the following comments in the interest of assuring that the Anti-Monopoly Authority can function as effectively as possible.

Articles 36, 38-42

The enforcement of competition law requires very rigorous yet transparent procedures to produce outcomes that are perceived to be, as well as actually are, fundamentally fair. The ICN provides guidelines and assistance with respect to investigation techniques and other matters in accordance with international standards. The Sections believe the Anti-Monopoly Authority should be given sufficient time and resources to assemble and train a sufficiently large and capable staff, with expertise in economics and law in particular, to set policies and conduct investigations in a professionally fair and efficient manner. The Authority should also publish its detailed

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75 *Id.* at 24-25.

76 *Id.* at 24.

77 *See id.* at 24-28, particularly relating to the need for protection of due process rights.

procedures, whether in the form of implementing regulations or otherwise, in draft form well before their targeted effective date to allow sufficient time for comments and refinement.[78]

Article 37

For the reasons discussed in the July 2003 Joint Comments,[79] establishment of local branches in a national unified network under the central guidance of the Anti-Monopoly Authority would be an appropriate infrastructure. However, the proposed law should clarify the specific role of local branches at the provincial level under Article 37. Unless the role of the local branches is clearly established, dispersing such personnel around the country risks dilution of the Authority's capabilities as well as increased potential for undue influence by administrative monopolies and other local interests, as well as creating the potential for inconsistent and possibly incoherent applications of the law. In most circumstances, the demanding responsibilities of the Authority will likely require centralization of personnel, especially if resources are limited.

Article 43

The requirement in Article 43 that the Anti-Monopoly Authority publish its decisions is a highly beneficial provision, where there is a determination that the law has been violated or that a concentration should be prohibited or permitted only upon conditions. Such transparency is crucial to ensure the orderly development of the law, and to facilitate the understanding by undertakings of what is prohibited and what is permitted under the law. However, Article 43 should be clarified to specify that the decisions must also include the reasoning for the decisions, so that the full benefits of transparency may be obtained.[80]

Article 44

The Supreme People's Court may need to publish opinions on the manner of conduct of appeals from decisions by the Authority. Recognizing that such opinions more closely resemble regulations than judgments, the Supreme People's Court should consider publication of its opinions in draft form to allow adequate opportunity for comment and refinement.[81] In addition, a special division should be established within the People's Court, to focus exclusively on matters arising under the Anti-Monopoly

78 *Id.* at 4, 25-28.

79 *Id.* at 4, 26-27.

80 *Id.* at 27-28.

81 *Id*.

Law. Such a special division will likely foster a more rapid and orderly development of a body of judicial expertise and opinion in applying the Anti-Monopoly Law.[82]

Article 45

The provision in Article 45, for enforcement of laws and regulations with anti-monopoly aspects by other bodies enforcing other laws, raises serious concerns, including principally inconsistent enforcement and a lowering of the prestige of the Authority and general respect for competition law. These risks are exacerbated by Article 55, which excludes from the Anti-Monopoly Law any conduct taken according to other laws and regulations. Though such other bodies are to be barred from issuing decisions without the consent of the Anti-Monopoly Authority,[83] it may be very difficult for the Authority to assert itself against other governmental agencies, especially during the period in which competition law and the Authority are being established. For these reasons, a concerted effort should be made to conform other laws and regulations to the Anti-Monopoly Law to reduce the potential for conflict between other bodies and the Authority. For example, the Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors should be revoked when the Anti-Monopoly Law takes effect.[84]

VII Chapter 7 (Legal Liabilities)

The Sections are encouraged by the increased focus on injunctive relief to remedy loss of competition resulting from prohibited conduct, and the greater amount of compensation available to parties injured by prohibited conduct is helpful and generally consistent with the approaches of other jurisdictions.[85] We note a few areas where additional clarity and adjustment would be beneficial.

Articles 46-48

Additional specific language has been added to this chapter of the law in the articles dealing with legal liability for monopoly agreements, abuse of dominant market position, and agreements to limit competition (Articles 46-48 in the current draft and Articles 44-46 in the October 2002 draft), specifying the actions the Authority will take to end the violations and subordinating the imposition of retrospective penalties. This

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82 *Id.* at 28.

83 If such concurrent jurisdiction is retained, then it is important to retain this requirement that the Anti-Monopoly Authority's consent be obtained. *See*, *id.* at 26-27.

84 This is especially important since the Interim Provisions appear inconsistent with the proposed Anti-Monopoly Law in several respects. *Id*. at 32-33.

85 *Id.* at 5.

permits the Authority to focus on maintaining and, where necessary, restoring competition rather than penalizing individual actors, which is beneficial for the reasons stated in the July 2003 Joint Comments.[86] These provisions should be revised to clarify the circumstances under which the Authority would use financial penalties or criminal penalties to discourage egregious violations, such as price fixing and bid rigging among competitors, where the incentive for individual profit from collusion requires a substantial offset from potential penalties.

Article 48

Article 48 provides penalties against unauthorized concentrations, and would make unwinding the transaction mandatory for failure to notify a transaction or to comply with any of the obligations prescribed by the Anti-Monopoly Authority. This provision is more draconian than necessary and should be amended to authorize the Authority to require that the transaction be unwound but not make it mandatory that it does so. This is because there may be situations where a concentration that was not notified is not anticompetitive and may even be pro-competitive. In such a situation, the failure to notify should not automatically result in the unwinding of the transaction. The Sections suggest that, instead, a minimum fine be required for the failure to notify a transaction. The unwinding of a transaction would be an appropriate remedy for a transaction that the Anti-Monopoly Authority determines has an adverse effect on competition in the market.[87]

Articles 49-50

Articles 49 and 50 list potential responses by the Anti-Monopoly Authority to acts of "administrative monopoly" by government entities in violation of Articles 32-35. These articles implicate the complicated relationships among Chinese governmental entities. Clarification of Articles 49 and 50, however, to address and avoid potential conflicts between government entities, would be helpful.

Article 49 provides that, in the event of a specific administrative act in violation of Articles 32-34, the Anti-Monopoly Authority of the State Council may "order the relevant government and its subordinate departments to revoke the specific act." Article 49 does not explain how the Anti-Monopoly Authority may respond if a government entity fails to comply with an order of the Anti-Monopoly Authority. Article 49 should expressly state whether a specific administrative act in violation of Articles 32-24 remains valid if the government authority fails to comply with an order of the Anti-Monopoly Authority to revoke the act.

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86 *Id*. at 30.

87 *See* also *id.* at 30.

Article 50 provides that, in the event that a government authority promulgates anticompetitive rules in violation of Article 35, the Anti-Monopoly Authority "may advise the competent authority to take measures pursuant to legally established procedures." This appears to mean that the Anti-Monopoly Authority may recommend the revision or revocation of the anticompetitive rule to the government entity that promulgated the anticompetitive rule. Article 50 should clearly explain how the Anti-Monopoly Authority may respond to the refusal by a government entity to revise or revoke an anticompetitive rule following a recommendation by the Anti-Monopoly Authority.

Article 51

Article 51 outlines penalties, including administrative orders and fines, for "persons under investigation" which obstruct the investigation by the Anti-Monopoly Authority. Article 51 should explain more precisely how this provision may apply to government entities or government employees that obstruct investigations of alleged violations of Articles 32-35.

As pointed out in the July 2003 Joint Comments,[88] the penalization of all but the most blatant examples of anticompetitive behavior does not increase or restore competition as effectively as provisions for injunctive relief leading to divestiture and restitution, including the power to enjoin conduct before it injures competition. However, as also noted in the July 2003 Joint Comments,[89] exactly the opposite is true when seeking to maintain the Authority's investigative and disciplinary powers. In the case of individual actors seeking to avoid the reach of the Authority, it should be unambiguous that those actions will result in criminal prosecution. Article 51 continues to prescribe the imposition of a significant fine in the event of a failure to cooperate with the Authority but still does not specifically provide for criminal penalties. If Article 51 is revised to specifically provide for criminal penalties, then, to avoid unnecessary prosecutions, additional clarification of what materials are subject to Article 51 and could trigger liability would be desirable.

Article 52

Article 52 appropriately provides for compensation to those whose rights and interests have been injured by violations of the law. However, the procedure by which injured parties may seek and obtain this compensation is left unclear. Presumably, since no compensation claim may be commenced until after the Anti-Monopoly Authority has confirmed a finding of monopolistic conduct, an injured party must complain to the Anti-Monopoly Authority regarding the conduct, obtain a decision of monopolistic conduct

[88] *Id.* at 30.

[89] *Id.* at 30-31.

and then seek compensation in a People's Court. It would be helpful to clarify these issues.

Article 53

The prohibition and penalties in Article 53 against activities by officials of the Authority are important indications that the government understands the sensitivities inherent in an Anti-Monopoly Law. Violations of this provision would always merit consideration under the criminal law as serious violations of the trust placed in a public official and because the more formal proceeding under the criminal law would enable a complete investigation of the violations. Transparency in any such criminal proceedings, as in the activities of the Authority itself, would help ensure the efficacy and reliability of the Authority's activities.

VIII Chapter 8 (Supplementary Articles)

Article 54

This provision indicates that certain data on which the Authority shall rely will be self-generated or obtained from other government sources. The current draft would establish a presumption in favor of such data and may not allow respondents the opportunity to present opposing data in an adversarial proceeding, or may deem such contrasting data as lacking in probative value. The Authority should not establish a presumption in favor of public data, particularly with respect to a concept so difficult to apply as market share.

Article 55

The proposed law provides in Article 55 that it "is not applicable to any conduct which is taken according to other laws and regulations."

The July 2003 Joint Comments addresses the issue of interaction with other laws, including, specifically, the Interim Provisions for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, and the IP rights laws.[90] We also discuss in Section III of these Comments the Sections' additional concerns regarding the potential interaction of the proposed Anti-Monopoly Law with the IP rights laws. With respect to Article 55, we are concerned that a situation is created in which all other laws may take precedence over the Anti-Monopoly Act, which we hope is not the intent. Thus, as discussed in Section VI of these Comments relating to Article 45, we recommend that other laws and regulations be conformed to the Anti-Monopoly Law, and the Interim Provisions for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors be revoked when

[90] *Id.* at 31-33.

the Anti-Monopoly Law takes effect.

Article 56

Article 56 addresses the "exemption of the exercise of intellectual property rights," is based on the article of the same number in the October 2002 draft, and was discussed at length in Section VIII of the July 2003 Joint Comments.[91] The deletion of the language, "other laws protecting intellectual property rights," from the first sentence exempting such laws from the applicability of the Anti-Monopoly Law raises concerns. The language should be restored, to ensure that treaty rights and regulations regarding IP are not nullified by the Anti-Monopoly Law.[92]

This provision, as drafted, may not be consistent with treaty rights and obligations and may also be used to nullify IP rights and discourage innovation. The continued absence of any definition of what conduct may be regarded as an "abuse" of IP rights raises serious concerns that a simple refusal to license another entity to use IP rights may be regarded as an abuse.[93] Those concerns are heightened by the introduction of Article 22 and the "competitive disadvantage" language in Article 19, discussed above. Taken together, these provisions appear to increase the likelihood that the law may be applied to obligate owners of IP rights to license those rights to all competitors. Again, any such broad compulsory access to IP rights would undermine the incentive for innovation and harm, rather than serve, consumers' interests in new and improved products and services. In this way, these provisions may violate treaty rights and obligations and are inconsistent with the internationally accepted pre-eminent goal of competition law.

For the reasons discussed in the July 2003 Joint Comments,[94] the Anti-Monopoly Law should not address the interface between the IP rights laws and the Anti-Monopoly Law. If the relationship between these two areas of law is to be addressed, however, the Sections again recommend that the following phrase be added to the end of the second sentence of Article 56: ", provided that the unilateral exercise of the right to exclude, inherent in the ownership of intellectual property, shall not constitute an abuse."

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91 *Id.* at 5, 31-32.

92 Such rights would include rights under the Regulations on the Protection of Computer Software and other regulations, as well as rights under international treaties, including the Paris Convention for the Protection of Industrial Property, the Madrid Agreement for the International Registration of Marks, the Berne Convention for the Protection of Literary and Musical Works, the Universal Copyright Convention, the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, the Patent Cooperation Treaty, and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

93 Moreover, if Article 56 in fact means that any abuse of the exercise of IP rights is also automatically a violation of the Anti-Monopoly Law, then the Sections have even greater concern regarding the actual application of this provision.

94 July 2003 Joint Comments at 31-32.

Article 57

Article 57 has no clear counterpart in the 2002 draft and is a welcome addition to clarify the applicability of the Law to "non-profit entities" including "industrial associations" and "public institutions." Read in conjunction with Article 5, Article 57 appears to provide an important and supportive element to the proposed PRC competition enforcement regime – namely, obligations upon government institutions to foster competition and avoid acts that restrict competition within the PRC.

Conclusion

The Sections continue to support the enactment of a well-conceived and well-drafted competition law in the People's Republic of China. We hope that this submission is useful. We would be pleased to respond to any questions regarding these Comments, or to provide any additional comments or information that may be of assistance.

May 19, 2005

APPENDICES

Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China (July 15, 2003), without appendices, with translation of the Executive Summary

P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989)

W. Blumenthal, *Compulsory Access under the Antitrust Laws*, ABA, Advanced Antitrust Counseling Workshop (1998)

美国律师公会反托拉斯法部、国际法及惯例部
共同对于中华人民共和国所拟议的反垄断法提供的
意见和建议*

美国律师公会反托拉斯法部、与国际法及惯例部（以下合称“两部门”）藉此机会对中华人民共和国所议的反垄断法提供意见和建议。本文所陈述之内容代表了两部门的共同观点，但未获得美国律师公会之会员代表大会或理事会的认同，因此不应被视为代表美国律师公会的政策。

两部门现有会员逾20,000律师，大部分会员以美国为基地，但其中很多人曾在美国国外生活及工作，而目前在美国国外者，仍有相当数目。两部门对于美国及世界各地的竞争法之施行有着深厚的专业知识。本会的成员包括工商企业法律部门的律师、法学院的教师以及私人执业的及在政府任职的律师。此外，许多非美国律师是积极参与两部门工作的准会员，并贡献他们的专识和洞见于两部门的工作。由于商业的全球化进度加速和美国竞争法的长久历史，两部门的成员非常熟谙对于范围广泛的经济活动中，特别是对跨国企业的活动在竞争上可能发生的影响进行法律的和经济的分析。本文意见的视角，是以美国在反托拉斯法和国际商法领域的经验为基础。这些意见是来自于本会成员作为美国律师的执业经验并基于对于类似问题的美国反托拉斯法和惯例的历史发展以及我们对于国外竞争法体制的比较研究。我们希望并企望这些意见能有助于中华人民共和国反垄断法的圆满发展。

两部门支持保护在市场领域内积极竞争行为。对于所拟议的反垄断法明示要建立一个全面的竞争法体制，我们深感鼓舞。然而，我们也认识到，一部竞争法如果未能精心勾勒、悉心起草，则其效果可能适得其反，这样一部法可能反而又增添了一层政府对市场的干预，惩罚创新和其他生产效益好的商业行为，并妨碍经济进步，而不是服务于竞争政策的目的。因此，我们提供我们的建议，希望有助于一套经精心勾勒、悉心起草的竞争法体制的进一步发展。

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* 起草本意见书的工作组成员是：为国际法及惯例部 Yee Wah Chin，Robert Lindquist 和 James A. Murray，为反托拉斯法部 Nathan G. Bush， H. Stephen Harris, Jr. 和 Paul F. Brinkman，并经 Michael H. Byowitz，Lester Ross，Robert S. Thorpe 和 James M. Zimmerman 为国际法及惯例部以及 Abbott B. Lipsky, Jr. 为反托拉斯法部加以评议。

以下概述概括了两部门认为一部反垄断法订定之前应需先深思熟考虑的一些问题。概述之后，我们阐述了两部门对于拟议的反垄断法之总体的和具体的意见。我们的意见所根据的是两部门备有的非官方英文译本。

概述

两部门承认竞争法有不同的模式，各有其优点和缺点。我们的意见是基于我们对美国模式的熟识和观察其它模式实践的经验。美国模式之下，焦点落在市场行为的实际影响，而非为不同类型的行为的预设后果而制定法规。按拟议中之法律似乎在相当程度上借鉴了欧盟原来采取的模式。原始欧盟的体系很大程度上依赖于广设禁律和事先考核 (pre-clearance) 程序。就我们几十年的观察而言，欧盟的方法已经被证明徒然繁重，并可能无法达到其预期目的。事实上，欧盟当前已经步离了先前广设的禁律并废除了事先考核手续，正在调整其促进竞争行为的各种措施，使其逐渐接近美国模式。

美国反托拉斯法之主旨，是以通过保护竞争来促进消费者的福利。我们所谓“消费者的福利”是指所有实体的福利，包括所有购用和消费产品和服务的政府部门及工商企业经营者，而不仅仅局限于个人。而且，在此意义上“福利”并非政府的资助或补帖。两部门之审视“福利”，既着眼于可为购买者获得的品质、价格和选择，同时着眼于资源的有效配置以满足购买者的需求。美国反托拉斯法通过保护竞争的进行而寻求实现提高消费者福利的目的，而不是单独保护某一竞争者或竞争团体（本国或国外）的利益。保护竞争的进行可以确保销售者以低于非竞争状态下的价格向购买者提供其所需商品及服务。反之，若仅保护单独的或集团的竞争者（无论本国或者外国）利益使其免受竞争，则会减低他们基于价格和品质上相竞争的动机。因此，尽管两部门也承认有理由保护国民经济和公共利益，并在某些情况下对经营者加以保护，但是我们认为这些其他问题不该在竞争法上加以考虑，如果要保护这些利益，必须审慎考虑其是否必需保护和该种保护的成本，并应主要由其它法律关注。

两部门认为，拟议的反垄断法中所使用的一些关键性概念之定义应该和既有通行的国际用法保持一致，并且能够在实践中应用。例如，通常都认为垄断是一种地位，而非一种行为。在美国，成为一个垄断者本身并不违法，因为一个经营者以其出众的产品、低廉的价格和辛勤的工作而超群出众成为独占者并非违法，但是为了获得或者维持其垄断地位而从事不正当的垄断行为可能属于违法。类似的，两部门注意到普遍采用的“市场”之定义下的“市场”应是指“购买者购买或将考虑用以替代之的一组产品（或服务），以及经营者及其竞争者可以销售此种产品（或服

务）的地域”。我们也建议对一些重要概念进行界定，诸如“控制”，虽然拟议的法律中有所提及，但却未能给出定义以阐明其立法意图和适用范围。

美国反托拉斯法的基本规则允许大部分的竞争性行动，除非有迹象表明这些行动在特定情况下对竞争造成了不合理的限制。因此，美国大部分的竞争行为，是以论理裁定加以判断。根据此一原则，一项活动必须事实上对竞争显示出实质性的限制才构成违法行为。另一方面，基于以往的经验，美国通常也承认某些特定类型的竞争活动几乎总是对竞争有不合理的限制。判断这些类型的行为则适用本质推定原则，即只要参与实施了这些类型的活动就违反了美国反托拉斯法，而无需对这些活动的实际影响加以证明。本质推定原则下之违法包括竞争者通过合同预先安排订价[1]、协议划分市场、操纵投标等。我们建议在所拟法中对分别由本质推定原则和理论裁定原则的不法行动应有更清晰的区分。此外，美国有一基本的竞争政策，就是企业经营者之定价，可以廉贵任意，除非在订价低于成本[2]的特殊情况下。如果价格很高，购买者就不会购买；如果购买者宁愿用高价购买，卖家的利润就很高，那么其它竞争者就会受此吸引用更低价格的同类产品来抢占市场。如果价格很低并且没有利润可言，那么竞争者就会被逐出市场，这种情况下如果低价销售的经营者不能在以后将价格提高到可以挽回所有先前损失的程度，则消费者的福利仍不会因此受到损害；购买者将会享受到低价的好处，之后的高价仍无法消除低价带来的收益。

关于在销售者和购买者之间的限制，美国的经验认为，除非一方占据了市场的支配地位，否则这样的限制将不会起到什么损害竞争的作用。即使一方占据市场支配地位，垂直的限制也不一定产生不合理限制竞争的情况。事实上，这种限制常有助于竞争或对竞争有中立性。因此，在美国，除转售价格之外，垂直的限制是以论理裁定而被予以评估的，如果不存在一方占市场支配地位，垂直限制是可以接受的，但是如果存在一方占据市场支配地位并且导致了对竞争有不合理的限制，那么垂直限制则不被允许。对于这些限制，应以其“不利竞争”的后果与其“有利竞争”的效果互相衡量，而判定其为“不利”抑或“有利”于竞争。

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[1] 此处所指“预先安排定价”是指竞争者之间达成的关于其同协议中之一方或多方对第三者独立出售其所生产之物品或提供之服务所预先订定的价格的协议。根据美国法律（以及本意见中所使用的），竞争者互相买卖所协议或联合生产或联合服务的协议之价格，不在此限。

[2] 关于此处“成本”之义意，看下文第二节，关于第十八条之讨论。

和欧盟不同，美国的反托拉斯法没有一套整批豁免的体制。[3] 两部门承认，在欧盟型式的制度下，因为有广泛的禁制，必须有这样一些豁免的规定。然而，我们也担心豁免的规定如未经仔细精确的订拟，则未免过于宽泛，反而使拟议之反垄断法的禁止条款失去其效力。

两部门很高兴地见到拟议的反垄断法之着重禁止“行政性垄断”，同时将国有企业和其他企业在拟议的反垄断法下同为平等待遇的商业经营者的基本原则明文订立于拟议的反垄断法中。美国和欧盟的作法都是如此。

两部门充分赞同设立一个单一的执法机关负责执行所拟议的法律。单一的机关负有推行竞争的使命，可在此复杂体制内促进机构专业知识的发展，且可避免多个执法机构实施法律不同部分的混乱。并且，若无单一负责的执法机构，常会有单一情况涉及法律之若干部分而因此需要多个执法部门参预其事。[4] 按拟议之反垄断法，国务院反垄断主管机关授权发布具体规则及实施细则，我们为该规定深感鼓舞。这样的规则和指南，如经深入研究和审议且有实质机会经公众评议而后发布，将会成为实施竞争法最有效的途径，因为竞争法涉及的经济上和产业组织方面许多复杂问题尚不适合在立法中规定。两部门也支持国务院反垄断主管机关设立派出机构，因为这样可以确保全国执法的一致。执法的一致性对于实现所拟议法律之目的非常重要。

我们建议拟议之反垄断法应明白地确定国务院反垄断主管机关有权要求其他政府部门充分支持反垄断的政策目标。促进市场竞争，需要坚固的基础设施并要得到其他政府机关和社会大众的大力支持。授予国务院反垄断主管机关提倡竞争的任务，对发展该基础设施和支持很重要。我们同时敦促拟议之法律能明确保障国务院反垄断主管机关的独立性。在美国，联邦反托拉斯法的执法机构大多不受外界干扰，所以能够独立地推行竞争的政策目标。两部门建议，具体规定明定其行政程序及确保其实施的正当程序，将大大增加反垄断法的有效实施。成功的竞争政策推行框架需要复杂的规则和设施和对于法纪及经济问题的专业知识。需要有能够有效、及时、客观地实施所有实体、程序和救济性标准的优越法律体制。事实上两部门认

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[3] 反托拉斯法对某些产业诸如保险业等特定行业有特定的法定免除情况，使其豁免于反托拉斯法若干方面的规范。但是这些只是例外情况，适用范围也很严紧。而且，在大多数免责情况下，为了避免其滥用市场权力，免责的行业也必须受到其他法规的约束。

[4] 看下文注释28，关于美国司法部反托拉斯同联邦商业委员会对反托拉斯案件之同时兼有反托拉斯的管辖权。

为，若无上述社会、机构和程序上的支持以及基础设施，一部竞争法机构的引入可能反而会挫伤创新和其它生产效益好的商业行为，并妨碍竞争法旨在推动的经济进步。

在美国，除本质推定违法之外，对反托拉斯法违法行为的法律救济主要着力于恢复或保持市场中的竞争秩序，并不在于惩罚那些违法者。在我们看来，这是实现竞争政策目标、促进消费者福利和提高效率的最有效途径。因此，两部门建议拟议之法律可扩大并明确授权于国务院反垄断主管机关使其能够取得法院之禁制命令以对付不利竞争的企业集中或其它违反竞争之违法行为于其发生之前，并能以没收财产的权力和其它救济措施来治理违法行为于其发生之后。我们同时建议，对于妨碍调查者和采取不当行为的政府官员的处罚措施，应明确订立。这将有助于反垄断法的推行。

最后，两部门承认，拟议之反垄断法和其它法律，诸如知识产权法、《外国投资者并购境内企业暂行规定》等法律法规之间如何协调，问题非常复杂，我们建议对此进行更深入的研究。我们还想特别建议，为了避免世界贸易组织中有关非歧视原则和国民待遇原则所可能招致的复杂问题，所有针对企业集中的竞争政策之审核应只在拟议中的反垄断法范围之内着眼，不必问其是否涉及外国投资者。两部门建议不应鼓励在对并购问题加以审议时考虑任何非竞争政策因素，如要考虑，则应在竞争法之外的法律中加以考虑，诸如暂行规定，而暂行规定应明确规定消除任何对竞争因素的考虑。

Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China[*]

The Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association (collectively, the "Sections") take this opportunity to submit comments on the proposed Anti-Monopoly Law of the People's Republic of China. The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

The membership of the Sections includes over 20,000 lawyers. Most of the members are based in the United States of America, but a substantial number have lived and worked abroad, and some do so currently. Members of the Sections have substantial expertise with competition law enforcement in the United States and around the world. Our membership includes lawyers in the law departments of businesses and the faculties of law schools, as well as in private practice and in government. In addition, many non-U.S. attorneys are active as Associate Members in the Sections, and have contributed their expertise and insights to the Sections' work. Given the increasingly global nature of business and the long history of competition law in the United States, members of the Sections have substantial familiarity with legal and economic analyses of the potential competitive effects of the full range of economic activity, particularly trans-national business activity. These Comments offer a perspective based upon the experience in the United States in the fields of antitrust and international business law. The Sections hope and intend that these comments, from our members' experience as U.S. practitioners and grounded in the historical development of U.S. antitrust law and practice regarding similar issues and in our comparative knowledge of competition law regimes abroad, will assist the final development of the Anti-Monopoly Law of the People's Republic of China.

The Sections support the protection of vigorous competition in the market place. We particularly are encouraged by the express intent in the proposed law to provide for a comprehensive competition law regime. However, we recognize that a competition law that is not well-conceived and/or well-drafted may be counterproductive. Such a law may instead add another layer of state intervention in markets, punish innovation and other productive business conduct, and retard economic progress, rather than serve

[*] The members of the Working Group that drafted these comments are Yee Wah Chin, Robert Lindquist, and James A. Murray for the Section of International Law and Practice and Nathan G. Bush, H. Stephen Harris, Jr. and Paul F. Brinkman, for the Section of Antitrust Law, with comments from Michael H. Byowitz, Lester Ross, Robert S. Thorpe, and James M. Zimmerman for the Section of International Law and Practice, and Abbott B. Lipsky, Jr. for the Section of Antitrust Law.

competition policy goals. Therefore, we offer our comments in hopes that they may assist in the further development of a competition law regime that is well-conceived and well-drafted.

The issues that the Sections believe bear further consideration before an Anti-Monopoly Law is enacted are summarized in the Executive Summary, below. Following the Executive Summary, we set out the Sections' general and specific comments on the proposed Anti-Monopoly Law. Our comments are based on unofficial English translations that the Sections had prepared.

Executive Summary

The Sections recognize that there are different models of competition laws, and that they each have strengths and weaknesses. We comment based on our familiarity with the U.S. model and our observations of the experience with other models. Under the U.S. model, the focus is on the actual effects of market place conduct rather than on a set of rules that assume what the effects are of different types of conduct. The proposed law appears to be based in significant part on the original model adopted in the European Community. The original EC system relied significantly on broad prohibitions and pre-clearance procedures. Our observation over several decades is that the EC approach has proven quite burdensome and may not have achieved the goals expected. In fact, the EC has moved away from broad prohibitions, and has repudiated and eliminated the pre-clearance process, adjusting its competition enforcement processes to be closer to the U.S. model.

The primary concern of U.S. antitrust law is the enhancement of consumer welfare by protecting competition. By "consumer welfare," we mean the welfare of all entities, including governmental entities and business operators, not just individuals, that purchase and consume products and services. "Welfare" in this context does not mean a government subsidy or benefit. The Sections view "welfare" from the perspective of the quality, prices and choices available to buyers, and the efficient allocation of resources to satisfy the demands of buyers. The U.S. antitrust laws seek to achieve this goal of advancing consumer welfare by protecting the process of competition, not the interests of a single competitor or groups of competitors (domestic or foreign). Protecting the process of competition ensures that sellers will offer to buyers the goods and services that buyers want, at lower prices than if the process is not competitive. In contrast, protecting a single competitor or groups of competitors (whether domestic or foreign) from competition will lower their motivation to compete on the basis of price and quality. Therefore, while the Sections recognize that there are reasons to protect the national economy and the public interest, and, in some cases, business operators, we do not believe that these other interests are appropriate considerations in a competition law, but should be made the primary focus of other laws if they are to be protected, and only with careful consideration of the need for and costs of such protection.

The Sections believe that the definitions of key concepts in the proposed law should be consistent with pre-existing common international usage and be capable of practical application. For example, it is generally recognized that monopoly is a status and not a type of conduct. In the U.S., being a monopolist is not an offense, because a business operator may become dominant by virtue of a superior product, low prices and hard work, while engaging in improper monopolistic behavior in order to achieve or maintain a monopoly may be an offense. Similarly, the Sections note that commonly adopted definitions of "market" consider a "market" to be "a group of products (or services) that buyers do or would consider substitutes for each other, and the geographic area in which such products (or services) are sold by specific business operators and their competitors." We also suggest that definitions be provided to some important concepts, such as "control," that are mentioned but not defined, to clarify the intent and scope of the proposed law.

The basic rule in U.S. antitrust law is that most competitive activity is permissible unless it is shown to have an unreasonably restrictive effect on competition in the particular circumstances. Therefore, most competitive conduct in the U.S. is judged under the Rule of Reason, under which the activity must be demonstrated to actually have a substantial restraint on competition in order to be an offense. On the other hand, based upon experience, it is recognized in the U.S. that certain types of competitive activity almost always are unreasonably restrictive of competition. Those types of activity are judged under the Per Se Rule, which provides that the mere engagement in those activities is a violation of U.S. antitrust laws, without need for any demonstration of the actual effects of those activities. Per se violations include agreements among competitors regarding price fixing,[1] market division and bid rigging. The Sections suggest that such a differentiation be made more clearly in the proposed law, between per se offensive activities and activities that are subject to the Rule of Reason. In addition, a basic competition policy in the U.S. is that a business operator may charge any price, high or low, with the partial exception of the rare occasions when the price is below cost.[2] If the prices are high, then buyers may refuse to buy; if buyers buy at those high prices and the profit margins are great, then competitors would be attracted to enter the market by offering similar products at lower prices. If prices are low and unprofitable, and competitors are driven out of the market, there may still not be any injury to consumer welfare if the low-pricing seller cannot later raise prices long enough to recoup all the past losses; buyers would have had the benefit of low prices and the later high prices would still not erase the benefit of the low prices.

[1] "Price fixing," as used herein, refers to agreements among competitors regarding the price at which one of more of them will sell independently produced products or services to third parties. Under U.S. law (and as used in these comments), "price fixing" does not include: agreements among competitors regarding transactions between the competitors or the prices for sales between themselves; or agreements to jointly produce products or services.

[2] See the discussion of the meaning of "cost" in this context, in the discussion of Article 18, at Section II, below.

With respect to restraints between sellers and buyers, the U.S. experience is that these restraints are likely to have little anticompetitive effect unless one of the parties has a dominant market position. And even when there is a dominant market position, it is not always the case that a vertical restraint will result in an unreasonable restraint on competition. In fact, such restraints are often pro-competitive or competitively neutral. Therefore, in the U.S., except in the case of resale prices, vertical restraints are evaluated under the Rule of Reason; they are acceptable if there is no dominant market position, and may be unacceptable if there is a dominant market position and an unreasonable restriction on competition has resulted. The anticompetitive effects of the restraint are identified and balanced against its pro-competitive efficiency effects to determine whether the net effect of the restraint is anticompetitive or pro-competitive.

Unlike in the EC, the U.S. does not have a system of block exemptions to its antitrust laws.[3] The Sections recognize that, under an EC-type system, it is necessary to have exemptions to the broad prohibitions. However, we are concerned that exemptions not carefully and precisely drafted may be so broad as to have the effect of nullifying the prohibitions in the proposed law.

The Sections are encouraged by the emphasis on the prohibition of "administrative monopoly" and urge that the fundamental principle be expressly adopted in the proposed law, that state-owned enterprises and other enterprises are treated equally as business operators under the proposed law. This is the approach in both the U.S. and the EC.

The Sections fully support the creation of a single enforcement agency dedicated to the implementation of the proposed law. Having one agency with the competition policy mandate will foster the development of institutional expertise in this very complex area and will avoid the confusion that may arise from having multiple enforcement bodies enforcing different parts of the law. Otherwise, it will not be uncommon that a single situation involves several parts of the law and thus require the participation of more than one agency in that situation.[4] We are encouraged by the authorization to the Anti-Monopoly Management Body of the State Council to issue rules and regulations in accordance with the proposed law. Such rules and guidelines, if issued after due study and consideration, and after a meaningful opportunity for public comment, may be the most effective way to implement a competition law, because competition law involves complex questions of economics and industrial organization that are not readily addressed in legislation. The Sections also support the establishment of dispatch offices by the Anti-Monopoly Management Body of the State Council, because that will help ensure national consistency, which will be very important in achieving the goals of the proposed law.

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[3] There are some specific statutory exemptions for certain industries, such as insurance, from aspects of the antitrust laws, but these are exceptions and are narrowly applied. Moreover, in most cases of such exemptions, the exempt sectors are subject to other regulations to prevent abuse of market power.

[4] See footnote 28 below regarding the concurrent antitrust jurisdiction in the U.S. of the Antitrust Division of the Department of Justice and the Federal Trade Commission.

We suggest that the proposed law be clarified to ensure that the Anti-Monopoly Management Body of the State Council has the authority to advocate competition policy goals to other governmental entities. Creating market competition requires substantial infrastructure and support from other governmental institutions and the society at large. A competition advocacy mission for the Anti-Monopoly Management Body of the State Council is important in developing this infrastructure and support. We also urge that the proposed law be clarified to protect the independence of the Anti-Monopoly Management Body of the State Council. In the U.S. the federal antitrust enforcement agencies are largely insulated from outside influences and so can pursue the goals of competition policy with independence. The Sections suggest that effective implementation of the proposed law will be significantly enhanced by clarifying the administrative procedures and due process safeguards that will apply. A successful competition policy enforcement framework requires very complex rules and institutions, and expertise in a variety of legal disciplines and economic subjects. It requires a sophisticated legal system that can enforce effectively and in a timely and objective manner all substantive, procedural and remedial standards. In fact, the Sections believe that, a competition law regime introduced without this societal, institutional and procedural support and infrastructure may lead instead to the chilling of innovation and other productive business conduct, and the retarding of the economic progress that competition law is intended to foster.

In the U.S., remedies for violations are focused on restoring or preserving competition in the market place, and, except in the case of per se violations, not on punishment of the violators. In our view, that is the most effective way of achieving the goals of competition policy to promote consumer welfare and efficiency. Therefore, the Sections suggest that the proposed law be extended and clarified to authorize the Anti-Monopoly Management Body of the State Council to obtain cease and desist orders against anticompetitive concentrations or other violations before they occur and to seek divestitures or other relief to cure violations after they occur. We also suggest that clarification would be helpful regarding the penalties that may apply to those investigated parties who obstruct investigations and those governmental personnel who take improper actions.

Finally, the Sections recognize that the balance between the proposed law and other laws, such as the intellectual property rights laws and the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, is complex and respectfully suggest that this balance be further studied. In particular, we respectfully suggest that, in order to avoid complications under the WTO obligations of non-discrimination and national treatment, the competition policy review of all concentrations be made only under the proposed law, regardless of whether the concentration involves a foreign investor. The Sections respectfully suggest that any consideration of non-competition policy factors in reviews of mergers and acquisitions should be discouraged and, if undertaken at all, should be considered under laws outside the competition law such as the Provisional Rules, while the Provisional Rules should be clarified to eliminate any consideration of competition factors.

General Comments

The Sections note that the proposed law appears to have adopted the original European Community model of competition law, in that it incorporates broad prohibitions while providing for specific exemptions and authorizing the enforcement body to issue individual exemptions upon application. This can be compared with the U.S. approach, in which market place conduct is assumed to be competitive and therefore not in violation of the U.S. antitrust laws, unless the conduct is shown to be anti-competitive, either by the evidence in the specific situation, or by the accumulation of experience with similar activities over time. We require business operators in the U.S. to know the law and comply with the law, but we do not have a pre-clearance system because the U.S. does not have a proscriptive approach and we believe that the costs of such a system exceed its benefits.

Our observations of the experience in the EC over the last 40 years is that the original EC approach has resulted in a "block exemption" system that the European Commission is now apparently attempting to modify to bring it closer to the U.S. approach. This can be seen in the evolution of the various block exemptions that the Commission has issued. From a model for block exemptions in which only narrowly specified conduct, in very specific market circumstances, is permitted, the EC has moved toward a model of block exemptions in which some conduct are always permitted, some are permitted unless certain circumstances are present, and some conduct are always prohibited.

Similarly, the EC's experience with individual exemptions has also proven instructive. Essentially, the EC has found that individual exemptions require a tremendous amount of governmental resources to process, while offering little benefit in preventing anticompetitive conduct. Therefore, the EC has enacted a regulation that eliminates the individual exemption system effective May 1, 2004.[5]

In short, while the Sections recognize that the EC model may have the apparent initial advantage of clarity and certainty, it may not be a model that is optimal in the longer term. The Sections believe that the U.S. model, which focuses on the actual effect of marketplace conduct rather than relying on a set of prescriptive rules, may be the more flexible and optimal model in the longer term.

Accepting that the proposed law is based on the original EC model, the Sections have the following specific comments.

[5] Council Reg. (EC) 01/2003 (2003), Art. 43(1).

Specific Comments

I Stated Policy Objectives of the Proposed Law (Articles 1, 2, 3, 8, 29, 30)

Articles 1 (Objectives), 3 ("Monopoly"), 29 (Conditions for Disapproval) and 30 (Special Approval) of the proposed law, together with the second part of article 8 (Prohibiting Monopoly Agreements), contain provisions that outline the policy objectives of the proposed law.

The Sections generally support the expressed goals of "prohibiting monopoly, safeguarding fair competition" (Article 1). We suggest, however, that the proposed law be clarified to provide that it is monopolistic conduct that achieves or maintains a monopoly that is offensive, and not a monopoly that may have resulted from superior products, low prices and hard work. We also suggest that the word "fair" be deleted from Article 1, so that "safeguarding competition" is the expressed goal, because in common usage "fair competition" refers to consumer protection concerns that we further discuss later in this Section of these Comments.[6]

The Sections also agree that a competition law should guard against activities that "eliminate or limit competition" (Articles 3 and 29). We suggest, however, that it is desirable to clarify by adding a substantiality threshold and by specifying that it is the exclusion (and not just elimination) and limiting of competition that is offensive, so that the goal is to prohibit activities that "substantially exclude or limit competition" and that activities that may have insignificant effects are not covered. This is especially important in the context of the applicable area of the proposed law set forth in Article 2 (Applicable Area), to clarify that activities outside the territory of the People's Republic of China will not be under the jurisdiction of the proposed law unless they substantially exclude or limit competition within the People's Republic.[7]

These goals expressed in the proposed law relating to monopoly and competition are consistent with the goals of increasing efficiency and enhancing consumer welfare that the Sections believe should be the goals of competition policy. The central objectives of U.S. antitrust law are economic: maximization of consumer welfare, economic efficiency and productivity growth. By "consumer welfare," we mean the welfare of all entities, including governmental entities and business operators, not just individuals, that purchase and consume products. We also distinguish "consumer welfare" from "consumer protection"; we view "welfare" from the perspective of the quality, prices and choices available and the most efficient allocation of scarce resources to satisfy demand, while "protection" in the U.S. in the legal context is directed against unfair, deceptive or fraudulent practices that distort consumers' ability to choose freely

[6] In this connection, the Sections also suggest that the word "competition" be consistently substituted for the phrase "fair competition" throughout the proposed law, for clarification and to avoid confusion.

[7] In this connection, we also suggest that the phrase "substantially exclude or limit competition" be used consistently throughout the proposed law, without including variants such as "limit market competition" or "affect market competition" that may create confusion.

and knowledgeably among various product and service options in the marketplace. Fraud is the most egregious example of such unfair competition.

The U.S. antitrust laws seek to achieve these goals of efficiency and consumer welfare by protecting the *process* of competition. By protecting the process of competition in the economy, the market is then most likely to protect consumers by creating consumer choice. Sellers will respond in such circumstances by competing for consumers' business by offering lower prices and the goods and services that buyers want. This approach is to be distinguished from the protection of *individual* or groups of competitors (whether domestic or foreign). If individual or groups of competitors are protected from the effects of competition, the result will be a diminution of incentives to compete on the basis of price and quality, and buyers will have less choice and pay higher prices. The goals identified in Articles 1, 3, and 29 of "prohibiting monopoly, safeguarding fair competition" and guarding against activities that "eliminate or limit competition" are generally consistent with protecting the process of competition.

Recently, the Section of Antitrust Law submitted to the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission a "Report on Antitrust Policy Objectives" ("Report").[8] This Report surveyed the major policy objectives that have been asserted as underlying competition laws around the world, focusing on the strengths and weaknesses of these objectives. The Report makes several recommendations in light of these advantages and disadvantages. In particular, the Report concludes that (1) economic analysis is a critical and necessary element of antitrust law application and enforcement, and (2) the promotion of competition in terms of efficiencies is the antitrust objective most suited to economic analysis, and is a fundamental and necessary competition law objective. (Report at pp. 1-2, 40-41.) The goals identified in Articles 1, 3, and 29 of "prohibiting monopoly, safeguarding fair competition" and guarding against activities that "eliminate or limit competition" are also generally consistent with the objectives identified in the Report as necessary and fundamental to a competition law regime, and are susceptible to rigorous economic analysis.

However, the Sections note that Article 1 also states that the proposed law is for the purpose of "protecting the legal rights of business operators and consumers, and the public interest, and to ensure the healthy development of the socialist market economy." Article 3 also condemns activities that "damage the interests of other business operators or consumers, or endanger the public interest", including activities in which "governments and their subordinate departments abuse their administrative power." Similarly, Article 29 disapproves of concentrations that hinder "the healthy development of the national economy" or "damage the public interest." Consistent with Article 29, Article 30 permits anticompetitive concentrations that are "advantageous to the national economy and the public interest." In addition, the second section of Article 8 permits exemption from the prohibitions against joint activity, when the joint activity may "stop

[8] A copy of the Report is annexed for convenience of reference as an appendix to these Comments. It is also posted on the website of the Section of Antitrust Law, at http://www.abanet.org/antitrust/home.html.

seriously decreasing sales volumes or obvious production surplus", or "benefit national economic development and the public interest."

The Sections recognize that there are reasons to protect consumers, the national economy and the public interest, and, in some cases, business operators.[9] However, as explained in the Report, while these are objectives that have been incorporated in some competition law regimes, they do not lend themselves to economic analysis and reflect social and political objectives that, if pursued, are best sought through either (a) separate legislation or established rules rather than as factors to be considered in individual antitrust cases, or (b) an analysis that is clearly distinct from the economic analysis required by the objective of promoting competition. (Report at pp. 2, 41.) In particular, the precise analytical tools that are available to consider efficiencies are not available for considering the interests of business operators in order to promote competition.

Moreover, as we note above, the consideration of rival business operators may reflect social and political considerations that are not necessarily consistent or coherent with the consumer welfare or efficiencies objectives, and so should be applied with caution. (Report at pp. 2, 41.) Competition is a process that produces winners and losers. The experience in the U.S. and other countries with market economies and established competition law regimes is that it is usually better to permit the competitive process to occur unimpeded rather than to favor some business operators over others, even when some business operators may appear more deserving than others. Specifically considering the interests of rival business operators creates the risk of such favoritism.

In fact, under U.S. law, we do not view practices that damage the interests of other business operators as necessarily bad. For example, a business operator who becomes so efficient that it can sell its products at lower prices than another business operator will damage the interests of the other business operator. We see this as a good development for consumers. While it may be a bad situation for the less efficient business operator, in the long run it will give that business operator and others incentives to do a better job at offering what consumers want at prices they are willing to pay. The logical result of completely successful competition would be that consumers would buy only from the competitor that sells the best product for less money, and the competitor that sells the worse product for more would go out of business and thus be eliminated. This is not a bad result for the overall efficiency of the economy and for consumer welfare.

Similarly, under U.S. law, we do not allow competitors to justify anticompetitive agreements on the grounds that the agreements are needed to stop seriously decreasing sales volumes or production surpluses. If business operators are allowed to do this, then buyers will pay artificially high prices when the market conditions should allow them to take advantage of lower prices. Instead, business operators should be subject to normal

[9] The undefined concept of "socialist market economy" has no connection to the concept of a competitive economy, which is the goal of competition policy, and creates the potential for excessive administrative discretion.

market incentives to become more efficient in the way they manage their production and inventories. The Sections observe that, while other jurisdictions do permit "crisis cartels", the trend is away from such exemptions.

We also recognize that abuse of administrative power by government entities is highly undesirable. In the context of competition policy and in light of the specific provisions elsewhere in the proposed law, the abuse of administrative power by government entities for anticompetitive ends is an appropriate area of concern.

Therefore, the Sections urge that the proposed Anti-Monopoly Law not incorporate the goals of protecting business operators, consumers, the national economy the socialist market economy, and the public interest, and urge that these other goals can be clearly pursued, if it is deemed essential to do so, carefully through separate means that neither disrupt market signals nor confuse the basic rules for marketplace conduct. For example, if there is a concern with business operators who fail and their employees, rather than protecting them from competition and enabling them to subsist, it would be better to let them fail in their current enterprises and to provide training or assistance for them to enter into other businesses or occupations. With respect to the goal of prohibiting abuse of administrative power by government entities, we suggest that the proposed law be clarified in Article 3 to specify that it is the abuse of administrative power in order to achieve anticompetitive goals that is the concern of the law.

The Sections urge that the goals of the proposed law be purely those of prohibiting monopolistic behavior, safeguarding competition, and prohibiting activities that substantially exclude or limit competition. By doing so, the proposed law would promote economic efficiency and consumer welfare, which the Sections believe should be the goals of competition policy.

II Definitions of Key Concepts (Articles 3, 4, 15, 16, 25)

The Sections are concerned that some of the definitions in the proposed law do not appear to have a recognizable connection to pre-existing common usage and may be subject to interpretations inconsistent with accepted international norms in competition policy. Other proposed definitions may not be susceptible to practical application. Still others may not further antitrust policy goals. And in other areas of the proposed law, some key concepts are not defined.

Nearly 100 nations now have competition laws. Multinational businesses must conform their practices to the competition laws of all countries in which they do business. Inconsistent laws, and inconsistent applications of competition laws, accordingly, hamper trade and investment. To counter this problem, many competition authorities have recognized the need for convergence in their approach to competition laws. Many nations, including the United States, use very general approaches in their statutes to describe complex concepts such as the definition of a monopoly, of a relevant market, and of dominant market position. Depending on the nation's legal system, more specific

content can be added to these concepts through case law (as in common law countries such as the United States) or regulation (as in civil law nations). In either case, there is a growing recognition that the definitions should follow generally accepted world practice.

It is generally accepted in both the field of economics and competition law regimes, for example, that a "monopoly" is not a type of conduct, but a status in which one entity has the ability to set its prices and output without the need to take into account the competitive reaction from other firms. However, the definition of "monopoly" in Article 3 ("Monopoly"), covers both actions and status, and includes collective actions among business operators. Moreover, the great majority of competition laws permits an entity to have monopoly power if it has been obtained lawfully, and punish only the wrongful exercise of such monopoly power through proscribed types of exclusionary conduct, such as attempts to monopolize and monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, under U.S. antitrust law. It would be overly broad to include within "monopoly" all "agreements, contracts or other collective actions among business operators." Such a definition would appear to prohibit as a monopoly every contract between business operators. On the other hand, collective activity that may arise to conspiracy to monopolize is prohibited in the U.S. under Section 2 of the Sherman Act, even though it has relatively rarely been found.

The Sections respectfully submit that perhaps the intent in Article 3 is to define "monopolistic market behavior". If that is the case, then if the title of Article 3 is clarified to become "Monopolistic market behavior" and the title of Chapter 2 is clarified to become "Prohibiting monopolistic agreements, contracts or other collective actions among business operators," the language of the proposed law in those respects becomes much clearer without any further revisions. Moreover, with these clarifications, in light of the detailed provisions regarding "dominant market position", it may not be necessary to have a separate definition of "monopoly."

Similarly, the definition of "dominant market position" in Articles 15 ("Dominant Market Position") and 16 (Presumption of Dominant Market Position) covers both status and conduct, and is inconsistent with generally accepted world practice, impractical to apply and lacking in basis in generally accepted economic theory.

The Sections submit that the better approach would be to define both "monopoly" (if a definition is desired) and "dominant market position" solely in terms of status, in terms of whether a business operator has monopoly or dominant market power in a particular market, and then to specify what exclusionary or other conduct by such an operator would constitute a violation of the law. Monopoly power is considered to exist in the U.S. when a business operator can control prices or exclude competition in a relevant market. It can be proven in the U.S. by direct evidence of control over prices in the relevant market and/or the actual exclusion of competition from the relevant market. More often, market power is inferred from facts such as the business operator's share of the market and the existence of barriers of entry into that market. Therefore, in the U.S., market share is only one indicator of market power, and there is no one market share threshold above which market dominance will be assumed. The U.S. courts have

generally found that monopoly power exists when a business operator holds over 70% of the relevant market, while they have rarely found monopoly power to exist when a business operator holds less than 50% of a relevant market.

The definitions of concepts such as "monopoly" and "dominant market position" in terms of only status, and not conduct, is consistent with the U.S. view that the status itself may be unobjectionable. For example, a business operator that sells the best product, or possesses a patent for the most efficient process, or develops the most widely recognized and respected trademark for a particular type of product, may attract a large share of all buyers of such product, or may license the patented process technology on an exclusive basis to major manufacturers in the market, and thereby achieve a high market share. Such a market share that is achieved by providing a better product or process at a price that buyers or licensees are willing to pay is the reward for good business behavior. On the other hand, a business operator that burns down the factories of all competitors, and thereby becomes the only source of a product, achieved a monopoly improperly. Similarly, the fact that a market may have only a few competitors, each of whom has a substantial market share, is not proof that there has been a lack of competition. Such markets may in fact be fiercely competitive. Nonetheless, it may also be particularly easy to collude in such markets to eliminate competition among the market participants. Therefore, the focus in the U.S. is on the conduct of the business operator, taking into consideration the market power of the business operator as one factor in the situation.

Even more fundamentally, the definition of "specific market" in Article 4 (Definitions of "business operator" and "specific market") does not appear to have a connection to concepts that are commonly used to define economic markets. It appears to define a market in purely geographic terms, without reference to the product dimension of a market. The Sections suggest replacing this definition with one that more clearly includes generally accepted concepts of substitutability and elasticity of demand. For example, it would clarify the proposed law as consistent with generally accepted economics principles to define a "specific market" to be "a group of products (or services) that buyers do or would consider substitutes for each other, and the geographic area in which such products (or services) are sold by specific business operators and their competitors."[10]

In some cases, such as in the definition in Article 25 (The Meaning of "Enterprise Concentration") of "enterprise concentration", the effect may be both over-inclusive and under-inclusive. For example, the definition is under-inclusive since it doesn't appear to

[10] The 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines state that a "market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test." While the Sections understand that the drafters of the proposed law are aware of and have copies of these Guidelines, a copy of these Guidelines is annexed for ease of reference for others who may read these Comments. They are also available at http://www.usdoj.gov/atr/public/guidelines/hmg.htm

cover situations where an enterprise that produces different products sells the assets that manufacture some of those products but retains the manufacturing capability to produce other products. It may be over-inclusive in that any agency relationship may be said to involve a controlling and controlled relationship with respect to the subject of that agency. It would also be helpful to have clarification as to what types of joint ventures may constitute a concentration that is subject to competition analysis. In this connection, the EC Merger Regulation, which includes detailed definitions of concentrations and joint ventures that are concentrations, may be helpful. The U.S. Department of Justice/Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors also discuss formal and informal joint ventures that may be concentrations for competition law purposes.

The Sections also note that the term "enterprise", which is a key concept in Chapter 4 (Control of Enterprise Concentration), is not defined. In any event, the Sections do not see a need to distinguish between "business operator" as defined in Article 4 and "enterprise" as used in Chapter 4, and suggest that the same term be used in both contexts instead of two different terms. The Sections believe that whatever term is used, it should be made clear that, in Article 4, Chapter 4 and in all other sections of the law, the concept encompasses all forms of economic actors, including individuals, partnerships, cooperatives, corporations, professional or trade associations, and enterprises owned in whole or in part by a government unit, as is the case with the meaning of "person" in Sections 1 and 2 of the Sherman Act, as interpreted by the U.S. courts. Therefore, we suggest that the word "enterprise" be replaced by "business operator" and that the definition of "business operator" in Article 4 be clarified, to be "any natural or legal person, governmental body or association that engages in product production and sales or provision of services (hereafter "products" include "services") or acts for the benefit of any other that does engage in product production and sales or provision of services."

Similarly, the key concept of "control" in the context of concentrations and dominant market position is not defined. The Sections suggest that a possible definition of "control" is "(1) holding 50% or more of the outstanding voting securities of an issuer, (2) in the case of an entity that has no outstanding voting securities, 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 assets of the entity, or (3) having the contractual power to designate 50% or more of the directors of a corporation, or, in the case of unincorporated entities, of individuals exercising similar functions."[11] Such a definition, or a similar one, that focuses on the economic reality of control, would clarify when entities are affiliated, or when one or multiple entities are involved.

The term "distributor" is a key concept in Articles 23 (Prohibition Against Exclusivity) and 24 (Prohibition Against Fixing Re-Sale Price) that is not defined in the proposed law. We believe that the prohibitions in Articles 23 and 24 should apply to all

[11] This suggested definition is based on the definition used by the U.S. Department of Justice and Federal Trade Commission in their premerger notification regulations. 16 C.F.R. §801.1(b).

supplier-customer (or "vertical") transactions involving the resale of products, such as the sale of products by a business operator to other business operators that resell to other business operators or to the ultimate end-user or consumer. Therefore, the Sections suggest that the term "distributor" is not needed, and that the term "reseller" instead can be used with clarity. Similarly, we note that Article 22 (Prohibition against imposing sales or unreasonable transaction terms) contains the term "trading partner" which is not defined, and that the phrase "suppliers and customers" can be used instead with clarity.

The Sections note that Article 17 (Prohibition Against Setting Monopolistic High Prices) prohibits selling "at a price higher than the normal value". The Sections have concerns about this prohibition, as explained in Section III of these Comments. In any event, there is no definition of what is "normal value." Moreover, while the Sections recognize that "normal value" or "fair value" is a concept used in trade law (to determine whether goods have been dumped), we do not consider such a concept appropriate in the context of competition law, because it implies that there is an appropriate value for products other than the price set by the competitive process. We also discuss this concern in Section III below.

Similarly, Article 18 (Prohibition Against Setting Predatory Prices) prohibits selling of products "at prices below cost", without providing any definition of "cost". The Sections believe that it will be important to have some standard of "cost", perhaps in guidelines to be issued by the Anti-Monopoly Management Body of the State Council. In particular, the Sections believe that the better view, from the standpoint of efficiency in the economy and consumer welfare, is that "cost" in this context should refer (1) only to the costs of the seller that is charging the "prices below cost", and (2) only to variable costs, and not total costs that include both fixed and variable costs.[12] Moreover, as discussed in Section III below, the Sections do not see pricing below cost as a problem for competition unless the low-pricing business operator is likely to recoup its lost profits eventually.

III Prohibitions of the Proposed Law (Articles 8, 14, 17-24, 29)

In the U.S., only anticompetitive agreements that unreasonably injure competition are prohibited. However, it can be very difficult and costly to prove or disprove in specific cases that a practice injures competition, or that there are effects on competition. Some types of conduct are so universally likely to injure competition that the costs of requiring that injury to competition be proved in each specific case of those types of

[12] So long as a seller can sell at a price above its variable costs, it is economically prudent to do so, even if that price is not above its total costs, because that incremental income will cover the cost of making that extra sale and will contribute some funds towards covering the fixed costs. For example, if an airplane is about to fly with only a few passengers, and will incur the costs of the pilot and other crew for the plane, then it is worthwhile to sell tickets for additional passengers at any price that is equal to or greater than the cost of the extra fuel needed to fly the extra weight of those passengers, because that extra income will provide some additional funds to cover the costs of the crew, which is fixed regardless of the number of passengers in the plane.

conduct outweigh the benefits from requiring that demonstration. These include activities among competitors such as price fixing, market division agreements, and bid rigging. In the United States, we do not require proof of injury to competition for such conduct before concluding that an offense has been committed. To prove a violation it is enough to show that the conduct took place. This is known as the Per Se Rule. In the case of other conduct, in which the benefits of the conduct could outweigh the injury it causes, in the U.S., the net injury to competition must be proved. This is known as the Rule of Reason. In the U.S. system, the Per Se Rule applies only to those cases that are in our experience unambiguously injurious to competition in almost all cases, and to apply the Rule of Reason in all other cases.

The Sections support the basic prohibitions against horizontal restraints (or restraints among competitors) in Article 8 (Prohibiting Monopoly Agreements). The conduct proscribed in subparagraphs (i) through (v) in Article 8 are activities that are generally recognized to have anticompetitive impact without significant mitigating benefits, regardless of the market position of the actors. Those activities can be *presumed* to result in unreasonably excluding or limiting competition, and are subject to the Per Se Rule in the United States. However, because the unlawfulness of these types of restraints does not depend on the market position of the actors, we suggest that the use of the term "Monopoly Agreement" may be confusing. In lieu of this language, we suggest the use of the term "Prohibited Agreements."

As to the prohibitions in subparagraphs (vi) and (vii), because the generally accepted purpose of such prohibitions is to prevent only joint conduct that substantially adversely affects competition, we suggest that the prohibitions against "jointly hindering transactions" in subparagraph (vi) and against "other agreements with the effect of limiting competition" in subparagraph (vii) be clarified, to make clear that those types of activities are not prohibited unless their *actual* demonstrated effect is the substantial exclusion or limiting of competition.

With respect to the prohibition against abuse of a dominant market position, the Sections are concerned about the definition of "dominant market position" in Articles 15 and 16, as detailed in Section II of these Comments. Moreover, we recognize that a dominant market position or a high degree of concentration in a market does not always mean that there is a lack of competitive pressures in that market, and suggest that the proposed law make it clear that the existence of a dominant market position or high market concentration may be necessary for the exercise of market power, but is not sufficient to lead to a conclusion that market power exists. Market shares and concentration measures are only starting points for the analysis of the competitive implications of a situation and a course of conduct; a detailed analysis is still needed to determine what is the actual state of competition in the market.

In addition, the Sections believe that the prohibition against "obstructing the activities of other business operators" in Article 14 (Prohibition Against Abusing a Dominant Market Position) is overbroad in the context of a competition law and unnecessary in light of the prohibitions against "eliminating or limiting competition" in

that article. If there are activities that may be considered to be only "obstructing the activities of other business operators" but not "eliminating or limiting competition", then as we explained in Section I of these Comments, the Sections do not believe that these activities are objectionable from a competition policy perspective and believe that, if it is deemed essential to deal with them, these activities should be addressed in another law.

Similarly, we have concerns about the prohibition against monopolistic high prices in Article 17 (Prohibition Against Setting Monopolistic High Prices). In addition to the Sections' concern about the concept of "normal value", expressed in Section II of these Comments, we believe that an enterprise, even a lawfully acquired monopoly, should be permitted under competition policy to charge the highest prices that it can obtain. Prices that are higher than some "normal value" are not necessarily anticompetitive in and of themselves. A seller may be able to impose high prices because it offers a better quality product and therefore achieved a monopoly. If such prices result in very high profit margins, then competitors that are efficient will be encouraged to enter the market and attract business by charging lower prices than the high-priced enterprise. In that case, it may be expected that market prices will fall. Therefore, in the short term, high prices may be a good thing, because they will attract new competitors to the market. If high prices persist over time, however, they may be symptoms of anticompetitive conditions that should be addressed by competition law. If new competitors do not enter the market, it could mean that the monopolist is preventing competition through an abuse of dominance or anticompetitive agreement. In that case, it would be important to remedy the abusive or anticompetitive conduct that prevent competition. In the U.S. system, attacking persistent high prices directly would be considered treating only a symptom, similar to treating a fever with ice packs: it might alleviate the symptoms in the short run, but it will do little to cure the disease.

In contrast, the Sections recognize that predatory pricing by a business operator with a dominant market position may have anticompetitive effects and drive out competition. However, as we note in Section II, it is important to define what is "below cost" pricing that is predatory and prohibited by Article 18 (Prohibition Against Predatory Prices). The Sections also point out that such "below cost" pricing should be prohibited only if it actually has an anticompetitive effect on the marketplace. Under U.S. competition law, it is not necessarily objectionable when a competitor sells products below cost in order to eliminate a competitor. There are many good reasons why a seller might price products below cost in order to compete vigorously in the market. Most of these reasons benefit consumers through lower prices. For example, a seller might price a new product at a low price to persuade buyers to try it. If there is no anticompetitive impact as a result of such pricing, then the result of the low prices is that purchasers benefit from them and consumer welfare has in fact increased, so that a goal of competition policy is achieved.

In the U.S., we have concluded that only in a very specific type of situation does predatory pricing injure consumers, and only in that case do we view it as illegal. Courts in the U.S. have developed a test to determine whether "below cost" pricing is anticompetitive: if the entity charging the "below cost" prices cannot reasonably expect

in the foreseeable future to be able to charge high enough prices for a long enough time period to recoup the losses from the "below cost" prices, then there has been no anticompetitive pricing, but if a business operator can reduce its prices below cost for long enough to drive another business operator out of the market, and then to raise and maintain its prices high enough, and for long enough, to recoup its lost profits, then there has been anticompetitive pricing. If a new (or the old) competitor will react to any later high prices by entering (or re-entering) the market at a lower price, and thus eliminating the possibility that the "predator" will be able to recoup profits lost from the time when it was charging low prices, then the "below cost" pricing is not considered anticompetitive. Only when the "predator" can prevent this competition do we see pricing below cost as a problem for competition. The Sections recognize, of course, that the determination of what is "cost" is crucial, and that, if a "predator" can reliably prevent competition from entering the market after prices rise, then there is a problem for competition.

We discuss the prohibitions in Articles 19 through 24 in Section IV below, regarding vertical issues.

Finally, the Sections support the prohibition in Article 29 (Conditions for Disapproval) against concentrations that "eliminate or limit market competition". However, we suggest that a standard be included in the proposed law under which concentrations will be reviewed. The Sections believe that it is very useful to identify the criteria by which mergers are to be judged. There has been significant international debate over the proper criteria for the approval or disapproval of a merger. There are two principal standards in use. In the U.S. and some other jurisdictions, mergers that substantially lessen competition are illegal. In the EC and some other jurisdictions, mergers that create or extend a dominant position are prohibited. In the U.S., the method of applying the statutory "substantially lessen competition" criterion is articulated in detail and is widely publicized. In deciding this issue in the U.S., efficiencies that may come about specifically as a result of a concentration are also considered and balanced against the potential anticompetitive effects of that concentration. In addition, the Sections urge the deletion in Article 29 of the prohibitions against concentrations that "hinder the healthy development of the national economy" or "damage the public interest", for the reasons set forth in Section I of these Comments.

IV "Vertical" Issues (Articles 19-24)

The overall approach of the proposed law limits the scope of the vertical restraint prohibitions in Articles 19 (Prohibition Against Discriminatory Treatment), 20 (Prohibition Against Refusing to Deal), 21 (Prohibition Against Forced Transactions), 22 (Prohibition Against Imposing Sales or Unreasonable Transaction Terms), 23 (Prohibition Against Exclusivity), and 24 (Prohibition Against Fixing Re-Sale Price) to business operators in a "dominant market position."

As the Sections stated earlier in these Comments (in Section II), the definition of "dominant market position" in Articles 15 and 16 should be based on an assessment of

market power. If "dominant market position" is defined in that manner, then the Sections feel that the limitation of the prohibitions on vertical restraints to situations of dominant market position is an appropriate one for competition policy. This is because, if the prohibitions in Articles 19 through 24 apply only where a "dominant market position" (appropriately defined) exists, then they are likely to apply only where the *actual* demonstrated effect of those types of activities is the unreasonable exclusion or limiting of competition. The European Commission has studied these issues relating to vertical restraints, and invited comments to its Green Paper on Vertical Restraints. As the Sections noted to the European Commission in their Comments on the EC Green Paper,[13] the experience of the members of the Sections has been that, where there is sufficient inter-brand competition and the parties lack market power, vertical restraints can actually have pro-competitive or at worst neutral competitive effects. In general, such restraints are included in business arrangements in order to provide sufficient economic incentives to induce dealers and distributors to invest in and promote products and services without having their efforts undermined by free riders.

Nonetheless, because it is the actual effect on competition of the activities that is crucial, the fact that a business operator with dominant market power has engaged in the specific activities does not lead necessarily to the conclusion that the activity should be prohibited. The existence of dominant market power is an important factor, but not the only factor, in the U.S., in determining whether a vertical agreement is improper. As the Sections also noted to the European Commission, even where the firm enjoys a relatively large market share (in excess of 40%), "there can be strong inter-brand competition and vertical restraints can be pro-competitive." After a dominant market position is found, the next step in the U.S. is the analysis of whether the particular vertical restraint by the firm in the dominant market position actually restrains competition. Therefore, the Sections suggest that the proposed law clarify that a vertical agreement of the specified types with a business operator that has dominant market power will be prohibited only if the agreement will have the effect of substantially excluding or limiting competition in a market. For example, the following phrase should be added in each of Articles 19 through 24: "where the effect of this practice actually restrains competition."

The definition of "business operator" in Article 4 indicates that the word "products" as used in the proposed law also refers to "services." The Sections agree that there is no analytical economic distinction between products and services, and, in particular, assume that the restrictions in Articles 19 through 24 relating to vertical relationships refer to both products and services.

The Sections offer the following specific suggestions regarding the prohibitions with respect to vertical restraints.

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[13] *See*, the Sections' Comments on the EC Green Paper on Vertical Restraints in EC Competition Policy, a copy of which is annexed as an appendix to these Comments. Those Comments are also posted on the website of the Section of Antitrust Law, at http://www.abanet.org/antitrust/ecvert.html.

It is not clear to us why the term "trading partners" is used in Article 19, whereas the term "purchaser" is used in Article 20 on refusals to deal; we presume that the prohibition against discriminatory treatment is addressing discriminatory treatment of purchasers. As drafted, the prohibition addresses discriminatory treatment of purchasers who are "identically qualified." The latter term offers ambiguity; for example, are two purchasers with the same credit rating identically qualified for the same price where Purchaser A is purchasing 100 units and Purchaser B is purchasing 1,000 units? We presume at least an intent in the proposed law also to address situations where dissimilar quantities are purchased or other costs of doing business differ. Accordingly, we suggest the following clarification of Article 19:

> *A business operator who is in a dominant market position shall not discriminate between purchasers who are identically qualified, who are purchasing identical quantities and for whom the cost of doing business with is identical, by offering them products at discriminatory prices or other transaction terms where the effect of this practice actually restrains competition. However, a business operator may offer differing prices or other transaction terms to a customer in order to meet the offer to that customer of a competitor of the business operator.*

Articles 21 and 22 both set forth prohibitions against abuse of a dominant market position, and appear duplicative of each other. Moreover, in setting forth these prohibitions against abuse of a dominant market position, they do not appear to add anything to the generalized prohibition against abuse of dominant market position set forth in Article 14, unless these articles are intended to reach conduct that does not "eliminate or limit competition" but has other effects. If the intent is to reach conduct with only other effects, then the Sections do not believe that they are objectionable competitive activities and suggest that conduct with those other effects should be reached, if at all, by another law, and not by a law with the goal of ensuring competition in the market place.

In particular, unreasonable transaction terms are not necessarily anticompetitive. A seller may be able to impose allegedly unreasonable transaction terms because it has a superior product. In that case, the high profits it may earn from imposing such unreasonable terms will attract new competitors to the market who may provide substitute products at lower prices, and it may be expected that unreasonable terms will then give way to more competitive ones. If unreasonable transaction terms persist over time, however, these terms may be symptoms of anticompetitive conditions. If new competitors do not enter the market, it could be that the monopolist is preventing competition through an abuse of dominance or anticompetitive agreement. Then it may be necessary for a competition authority to act to remedy the abusive or anticompetitive conduct. In the U.S. system, attacking the unreasonable transaction terms directly would be treating the symptom but not addressing the disease.

Perhaps the intent was to address the practice of tying by a dominant firm, that is, conditioning the sale of a product in which the business operator holds a dominant market

position to the sale of a product in which the business operator does not hold such a position. This practice, under certain circumstances of market power, is addressed by other competition law regimes including that of the United States. If this is the intent of the proposed law, then the Sections suggest combining Articles 21 and 22 into one article that provides that "A business operator in a dominant market position for one product shall not condition the sale of that product to the purchase of another, separate product, where the effect of this practice actually restrains competition."

As stated in Section II of these Comments, the Sections believe that the prohibitions in Articles 23 and 24 should apply to all supplier-customer (or "vertical") transactions involving the resale of products, and suggest that the proposed law define "distributor" accordingly if that term is retained in the proposed law.

Also, Article 23 addresses the practice of requiring purchases exclusively from a business operator in a dominant position. If the concern is about the abuse of exclusivity by a business operator in a dominant position, then there is also concern regarding the mirror image activity of requiring exclusive sales by the sellers, that of the practice of appointing exclusive distributorships in situations of market dominance. This practice is addressed, for example, by the EC Vertical Restraints Guidelines, as well as by U.S. antitrust law. Accordingly, the Sections suggest that Article 23 be clarified as follows:

> *A business operator who is in a dominant market position shall not require its customers who resell its products to re-sell only its products in a specific territory and not to sell the products of other business operators where the effect of this practice actually restrains competition. Exclusive distributorships, in which a business operator agrees not to appoint another reseller for its products in a specific territory, shall not be established where either party to the exclusive distributorship is in a dominant market position and where the effect of this practice actually restrains competition.*

The Sections have no comment on the approach in Article 24 of outlawing the practice of resale price maintenance only in situations of dominance, subject to our Comments (in Section II) about the concept of dominance.

V Exemptions to the Prohibitions (Articles 8, 30)

The proposed law creates five exemptions in Article 8 (Prohibiting Monopoly Agreement) for otherwise-prohibited "contracts, agreements, or other collective conduct" that "exclude or limit competition." It also provides in Article 30 (Special Approval) that concentrations that are anticompetitive may be approved if they are "advantageous to the national economy and the public interest."

The first four exemptions in Article 8 directly authorize certain kinds of activity and appear to be intended to function as "block exemptions" do in the European

Community. The fifth "catch-all" exemption authorizes "other activities that may eliminate or limit competition, but benefit national economic development and the public interest." We understand that otherwise anti-competitive practices will be permitted if they match the description of one of the four specific "block exemptions" or are determined to benefit "national economic development and the public interest" through review under Articles 8 or 30 of the specific arrangement by the Anti-Monopoly Management Body of the State Council or the People's Court.

The Sections recognize that, under the original EC model, block exemptions are necessary in order for the law not to have the effect of prohibiting most normal economic activity. However, the proposed block exemptions appear to be extremely broad in scope, with parameters that are not clear and that may be difficult to apply in practice. As a result, they have the potential to nullify the prohibitions of the proposed law, and therefore render the law ineffective. The Sections suggest that exemptions be very narrowly and specifically drawn, to avoid the risk that the exemptions could render the prohibitions meaningless.

Other jurisdictions normally confine "block exemptions" or "safe harbors" for otherwise possibly anticompetitive activity to specific types of circumstances where the activity almost certainly results in substantial improvements in efficiency or consumer welfare with only minimal anticompetitive risks. Block exemptions frequently limit the market share of the parties, the duration of the activity, and the terms and conditions of the activity that are eligible for the exemption.[14] In many jurisdictions, as in the proposed law, arrangements that do not qualify for a block exemption may still be permitted based on a specific evaluation of their likely effects.[15]

For example, the European Community's block exemption for cooperation between competitors in research and development applies only in narrow circumstances.[16] That block exemption is inapplicable if the cooperating parties' combined market share exceeds 25% of the market for products capable of being improved or replaced through the cooperation.[17] It applies only to specific agreement terms that are "directly related to or necessary" to carrying out the research and

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[14] *See, for example,* Guidelines on the Applicability of Article 81(3) of the EC Treaty to horizontal cooperation agreements, 2001 O.J. (C 3) 2 ("EC Horizontal Agreement Guidelines"); Commission Notice: Guidelines on Vertical Restraints 2000 (C 291) 1 ("EC Vertical Restraint Guidelines"); Commission Regulation on the application of Article 81(3) of the Treaty to categories of research and development agreements, 2000 O.J. (L 304) 7 ("EC R&D Regulation"); Commission Regulation on the application of Article 81(3) of the Treaty to categories of specialization agreements, 2000 O.J. (L 304) 3 ("EC Specialization Regulation").

[15] *See, e.g.,* EC Horizontal Agreement Guidelines at ¶37 (explaining relationship between block exemptions and individual exemptions); DOJ/FTC 1995 Antitrust Guidelines for the Licensing of Intellectual Property; DOJ/FTC 2000 Antitrust Guidelines for Collaborations Among Competitors.

[16] *See* EC R&D Regulation.

[17] *See* EC R&D Regulation, Art. 4, ¶2.

development program.[18] The block exemption requires both parties to retain certain rights to conduct other research efforts and to exploit the results of those independent efforts.[19] It applies for the first five years after the "fruits" of the research and development are marketed (but may continue to apply until the parties' combined share of the relevant market exceeds 25%).[20] The block exemption does not apply to arrangements that include certain "black-listed," or prohibited restrictions, such as restrictions on the parties' right to conduct separate research efforts or agreements to fix prices, reduce output, or allocate customers and markets.[21] A cooperative research and development venture that does not satisfy these conditions does not qualify for the block exemption. However, it may still be legal under EC competition law.[22] In those cases, the competition authorities will examine the specific competitive impact and efficiency gains of the cooperation.[23]

The four block exemptions of the proposed law are so broadly drafted that they will likely result in the exemption of many anticompetitive arrangements that are not likely to appreciably improve efficiency or consumer welfare. The proposed block exemptions apparently consider only the intent of the parties to the joint action, not the actual or likely effect of those actions. Therefore, under this standard, the block exemptions may allow many anti-competitive practices that do not improve efficiency or consumer welfare. In addition, for example, contracts between competitors to "upgrade product quality," "improve efficiency," or "adapt to market changes" that would be permitted under subparagraphs (i), (ii) and (iii) might also include terms setting prices, refusing to deal with certain customers, or allocating markets in a manner detrimental to consumer welfare and efficiency.

In particular, the Sections recommend that there be no block exemptions for joint efforts to manage sudden market shifts ("crisis cartels") or to rationalize production, labor, and specialization ("rationalization cartels") such as are provided in subparagraphs (iii) and (iv). Crisis and rationalization cartels entail high anticompetitive risks, because competitors must agree to common restrictions on output, price, or market division. Other jurisdictions have found that crisis and rationalization cartels are better addressed on a case-by-case basis, instead of through block exemptions. Even more fundamentally, as we stated in Section I of these Comments, the goals of "stopping seriously decreasing sales volumes or obvious production surplus" reflect social and political objectives, not

[18] *See* EC R&D Regulation, Art. 1, ¶2.

[19] *See* EC R&D Regulation, Art. 3.

[20] *See* EC R&D Regulation, Art. 4, ¶1, ¶3.

[21] *See* EC R&D Regulation, Art. 5.

[22] *See* EC Horizontal Agreement Guidelines at ¶55 (explaining that "most R&D agreements" are not prohibited by Article 81(1) of the EC Treaty).

[23] *See* EC Horizontal Agreement Guidelines at ¶¶ 39-77 (describing case by case evaluation of cooperation in research and development).

competition enhancement, that may be questionable and that are best sought through other means, if at all.

This is particularly true of the fifth, "catch-all", exemption, and the exemption in Article 30 – to permit transactions that "benefit national economic development and the public interest" and "the national economy and the public interest." As the Sections urge in Section I of these Comments, the goals of national economic development and the public interest should be sought through other means.

If these exemptions are retained in the proposed law, the Sections urge that the law include a "sunset" or "expiration date" for them. At the least, the expiration of the block exemptions would present an opportunity to issue new exemptions, if any, based on experience. For example, when the European Community's original block exemptions for research and development and specialization expired in 2000, the EC replaced them with block exemptions that drew on the experience with the earlier block exemptions.

The proposed law implies in Article 11 (Approval of the Agreement) that approvals of agreements by the Anti-Monopoly Management Body of the State Council will only be valid for a specific period of time. However, since the proposed law does not state a specific period, we assume that the intent is for the Anti-Monopoly Management Body of the State Council to specify the validity period when issuing an approval. If that is the intent, then it is unclear how long an approval remains valid if it results from the Anti-Monopoly Management Body of the State Council's decision not to respond to an application within 60 days.

Finally, the proposed law establishes a process for business operators to seek determinations from the Anti-Monopoly Management Body of the State Council that a specific agreement or arrangement falls within one of the exemptions. The Sections suggest that the proposed law should clarify: (a) whether the business operator's decision to apply for a permit is optional or mandatory; and (b) whether the Body's approval or failure to respond within 60 days provides a complete defense against subsequent charges of violating the proposed law.

VI Administrative Monopolies (Articles 3, 7, 31-35, 47, 48)

The Sections commend the devotion of an entire chapter (Chapter 5, Articles 31-35) of the proposed law to the prohibition of "administrative monopoly." We strongly agree with the stated goals of Article 3 to address government entities that "abuse their administrative power" (subject to the limitation of that goal to anticompetitive action by government entities, as stated in Section I of these Comments) and of Article 7 (Social Supervision) that "government organizations and their staff shall not support or cover up monopoly." Efforts by provincial and municipal officials and agencies to protect local companies from non-local competition penalize efficient firms (both domestic and foreign), prolong inefficient use of resources, and detract from consumer welfare throughout the People's Republic of China. Chinese consumers and Chinese business

operators that are not state-owned will be the primary beneficiaries of the proposed law's restrictions on "administrative monopoly."

The Sections urge that the basic principle should be that state-owned enterprises and other enterprises are treated equally as business operators under the proposed law. Therefore we suggest in Section II of these Comments that the definition of "business operator" be clarified to include state-owned enterprises. We recognize that, in the People's Republic of China, as in other jurisdictions, the state may own and operate monopolistic firms in industries such as utilities and transportation under specific exemptions from competition laws. However, many enterprises that are owned and operated, in whole or in part, by provincial or local governments, are engaged in ordinary commercial sectors (e.g., consumer goods manufacturing). These state-owned enterprises compete with private ventures for customers and capital. Overall efficiency and consumer welfare that may benefit from this competition will be jeopardized if such state-owned enterprises enjoy special protection from competition. Specifically, competition would suffer if anti-competitive practices are viewed as promoting "public interest" whenever state-owned enterprises benefit. Therefore, for example, enterprises owned by European Community member states are subject to EC competition law to the extent that they engage in commercial activities.

Thus, the Sections recommend that an express provision be included in the proposed law, stating that "this law applies equally to enterprises owned in part or in whole by any government unit and to other enterprises, unless there is a specific exemption under another law of equal or greater standing," and that "evidence of a specific benefit to a enterprise owned in whole or in part by any government unit shall not constitute evidence of a general benefit to the public interest."

Article 33 (Department, Industry Monopoly) sets forth the general prohibition that "the government and its subsidiary departments shall not abuse their administrative power." The Sections suggest that this article should therefore be the first article in Chapter 5, with what are now Articles 31 (Forced Purchase) and 32 (Regional Monopoly) following, setting forth specific conduct that falls within the general prohibition. We suggest also that Article 35 (Prohibited Overreaching Administrative Conduct) be clarified by substituting the word "effect" for "content", since it is the effect of the regulations that is crucial.

In all events, the Sections agree that the restrictions against anticompetitive abuse of administrative power in the proposed law should be consistently and vigorously enforced. The authority of the Anti-Monopoly Management Body of the State Council under Articles 47 (Penalty for Departmentally Created Monopolies) and 48 (Penalty for Forced Purchase, Regional Monopoly, Forced Joint Activities etc.) to compel government agencies to cease violations of Articles 31 through 35 will be essential to the successful achievement of the goals of the proposed law. Therefore, the Sections suggest that the proposed law be clarified to:

-- explicitly authorize the Anti-Monopoly Management Body of the State

Council to notify appropriate "superior organisations" of violations of Article 33 by subsidiary government agencies;

-- explicitly authorize private entities and individuals to file complaints for violations of the proposed law by government agencies with the Anti-Monopoly Management Body of the State Council for investigation and to file petitions as well as with the People's Court, or with a specialized court for competition law matters as suggested in Section VII below; and

-- as we suggest in Section VII below, place original jurisdiction over lawsuits involving violations of Articles 31 through 35 in a specialized court with specific jurisdiction over matters arising under the proposed law, perhaps the same People's Courts identified in the Supreme People's Court's recent regulation concerning administrative litigation involving international trade disputes.[24]

VII Implementation and Remedies (Articles 6, 7, 9-13, 26-30, 36-55, 57)

The Sections support the authorization in Article 57 (Issuance of Detailed Rules and Regulations) to the Anti-Monopoly Management Body of the State Council to issue "detailed rules and regulations in accordance with this law." We agree that, for a competition law system to succeed, business operators must understand the differences between clearly prohibited conduct, clearly permitted conduct, and questionable conduct that may require legal review. Because competition law involves complex questions of economics and industrial organization, competition authorities should provide clear guidance on the proper application of legal and economic principles. On the other hand, legislation is generally not the best vehicle for providing such detailed guidance. Thus, competition authorities in the U.S. and the EU have issued guidelines explaining the application of competition laws, regulations, and principles in various situations.[25]

In this connection, the Sections suggest that, effective antitrust guidelines should (1) be consistent with law, (2) fill in the interstices of the law in ways that enhance understanding of the law, (3) be fully specified and not abstract, (4) strike a balance between simplicity and flexibility, (5) be sufficiently operational to be of practical use, and (6) fairly portray government enforcement policy.[26] We also recognize that

[24] See Supreme People's Court of China, Regulation on several issues concerning the trial of administrative cases in relation to international trade (August 28, 2002).

[25] *See, e.g.,* Guidelines on the Applicability of Article 81(3) of the EC Treaty to horizontal cooperation agreements, 2001 O.J. (C 3) 2 ("EC Horizontal Agreement Guidelines"); Commission Notice: Guidelines on Vertical Restraints 2000 (C 291) 1 ("EC Vertical Restraint Guidelines"); U.S. Dep't of Justice & Federal Trade Commission, *1992 Horizontal Merger Guidelines* (revised, 1997); U.S. Dep't of Justice & Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) (available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf).

[26] *See*, W. Blumenthal, *"Clear Agency Guidelines: Lessons from 1982"*, 68 Antitrust L.J. 5 (2000), a copy of which is annexed for ease of reference.

guidelines would be most useful and most likely to have these six attributes when they are developed with the benefit of experience and analysis of actual situations and the application of the law to those situations. Therefore, the Sections also urge the Anti-Monopoly Management Body of the State Council to proceed with deliberation in developing guidelines under the proposed law.

The Sections are also pleased to see the provision in Article 43 (Establishment of Dispatch Offices) for the Anti-Monopoly Management Body of the State Council to establish dispatch offices. It is important that there be nationwide consistency in the enforcement of competition law, particularly in the areas of abuse of administrative monopolies and state action that favors local enterprises against non-local enterprises. A national unified network of regional offices under the central guidance of the Anti-Monopoly Management Body of the State Council will help ensure national consistency. In fact, significantly in part for this reason, the Sections fully support the creation of a single enforcement agency dedicated to the implementation of the proposed law.[27] Having one agency with the competition policy mandate will foster the development of institutional expertise in this very complex area and will avoid the confusion and inconsistency that may arise from having multiple enforcement bodies that are authorized to enforce different parts of the law. Otherwise, it will not be uncommon that a single situation may involve several parts of the law and may thus require the participation of more than one agency in that situation.[28] The Sections also believe that the independence of the Anti-Monopoly Management Body of the State Council is very important, to ensure that the goals of the proposed law will be achieved and not compromised by other influences. For example, in the U.S., the Commissioners of the Federal Trade Commission are appointed for terms of seven years and may not be removed except for malfeasance.[29]

In order for the Anti-Monopoly Management Body of the State Council to be more effective in pursuing the goals of competition law, the Sections suggest that the proposed law be clarified in Article 37 (Responsibility), to include in the "other anti-monopoly matters" responsibility of the Body the responsibility to advocate competition policy and goals, both to the public and to other governmental organizations. The ability of the Anti-Monopoly Management Body of the State Council to fulfill this competition

[27] Presumably, the organization of the Anti-Monopoly Management Body of the State Council, and the method of appointment, terms of service and status of the members of the Body, along with the independence of the Body from improper influence, would have to be established in separate legislation.

[28] While in the U.S., the Antitrust Division of the Department of Justice and the Federal Trade Commission have concurrent jurisdiction over the antitrust laws (with criminal prosecutions reserved to the Department of Justice), this dual enforcement system has been the subject of continuing debate. Moreover, under the system that has evolved in the U.S., one agency will take full jurisdiction over an antitrust matter, regardless of which aspects of the antitrust law are involved, so that there is little likelihood that both agencies will be involved in the same matter.

[29] While the Assistant Attorney General in charge of Antitrust of the U.S. Department of Justice is a political appointee who serves at the pleasure of the President, the tradition of the Antitrust Division of the Department of the Justice has been to pursue the goals of competition policy without regard to politics.

advocacy responsibility can be facilitated by requiring other governmental organizations, such as those regulating specific industries, to consult with the Body before proposing legislation or regulations that could affect competition. The proposed law might also provide that the approval of the Anti-Monopoly Management Body of the State Council must be obtained before certain types of action can be taken by other governmental agencies. Such a competition advocacy mission can be fulfilled throughout China through the dispatch offices.

The Sections suggest such a mission for the dispatch offices because they recognize that creating market competition will not be a goal that the Anti-Monopoly Management Body of the State Council can achieve on its own, even with the establishment of a national network of dispatch offices to enforce the law. Recently, the Sections submitted to the U.S. Trade Representative Comments and Recommendations on the Competition Elements of the Doha Declaration, observing that creating market competition requires substantial infrastructure and support from other governmental institutions and the society at large. In particular, we believe that it is necessary to have (i) general security and stability sufficient to permit the creation and maintenance of a market system, (ii) broad support from all sectors for having market competition be the organizing principle for substantial sectors of the economy, and (iii) economic infrastructure that includes, at minimum, a functional financial system, a functional system of property rights and their definition, protection and transfer, a functional system of enforcing commercial arrangements, and a functional system for creating and governing common business organizations such as corporations, partnerships and cooperatives.[30] In fact, the Sections believe that, introducing a competition law regime before these preconditions exist may lead to substantial adverse effects such as the chilling of innovation and other productive business conduct, and the retarding of the economic progress that competition law is intended to foster.[31]

Similarly, the Sections assume that the specifics of the processes for investigations, adjudications and appeals are set forth in another statute addressing administrative procedures, or the Anti-Monopoly Management Body of the State Council will be authorized to develop and publish these procedures. We recognize that a competition policy enforcement framework involves the creation and maintenance of very complex rules and institutions, and expertise in a variety of legal disciplines such as competition law, administrative law, appellate law, and procedural and evidentiary rules, and in economic subjects such as industrial organization theory and econometrics. It requires a sophisticated legal system that can enforce effectively and in a timely and objective manner all substantive, procedural and remedial standards. The Sections submit that, such a legal system, as it is applied in a competition framework, should have, at least, the attributes of transparency in substance and in process, adequate protection of

[30] *See*, ABA Sections of Antitrust Law and International Law & Practice, Comments and Recommendations on the Competition Elements of the Doha Declaration, III.A.2.(i)-(iii). A copy of these Comments and Recommendations are annexed for ease of reference. They are also available at http://www.abanet.org/antitrust/comments/doha.doc.

[31] *See*, Comments and Recommendations on the Competition Elements of the Doha Declaration, III.A.

confidentiality, processes for petitioning the enforcement agencies for action, independent and competent investigating and enforcement agencies, objective and critical evidentiary rules, checks and balances to ensure timely, thorough, independent and balanced investigations and prosecutions, full and timely disclosure to targets of investigations of the allegations and the bases for the allegations of violations, full and timely opportunity for targets of investigations to respond to such allegations, remedies that are appropriate to the offense, and judgments that are subject to neutral and timely review.[32] In fact, in this area, the Sections suggest that the EC model of having a specialized court, the European Court of First Instance, review competition law cases is one worth considering. In any event, we are pleased that the proposed law particularly recognizes in Articles 41 (Announcement of Results) and 42 (Obligations) the importance of the Anti-Monopoly Management Body of the State Council maintaining the confidentiality of commercial confidential information that it or its staff may obtain in the course of carrying out their duties.

More fundamentally, the Sections suggest that effective implementation of the proposed law may be enhanced by clarifying that the governmental personnel who have the responsibility for investigating and prosecuting violations are to be separate from the governmental personnel who adjudicate violations.[33] In this connection, the Sections are pleased that the proposed law recognizes in Article 38 (Investigative Powers) that different investigative powers may require different levels of procedural, due process, safeguards. For example, the power to "send officers to the residences, business locations or other locations of the business operator to carry out investigations" is a power that the Anti-Monopoly Management Body of the State Council can exercise under its own authority, while searches can be executed only "pursuant to authority by the people's court." However, we suggest that the proposed law be clarified to provide that the sealing or attachment of items or evidence, and the freezing of bank accounts by the Body, also be subject to the authority of the people's court. The requirement to seek the authorization of the people's court may help ensure that due process is observed and that the Anti-Monopoly Management Body of the State Council has fully established a basis for such major actions. In fact, as noted above, a specialized court for competition law matters may ensure competent and knowledgeable resolutions of these issues. The legitimacy of the actions of the Body may be further enhanced by an additional requirement in Article 41 that not only results of adjudications, but also the reasons for the results, must be announced, so long as the confidentiality of commercial confidential information obtained during the course of the Body carrying out its duties is maintained.

The enforcement of the proposed law may also implicate the People's Republic of China's WTO accession commitments in certain instances. The non-discrimination and

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[32] *See*, Comments and Recommendations on the Competition Elements of the Doha Declaration, III.A.2.(iv).

[33] For example, in the U.S., the Federal Trade Commission has investigative, prosecutorial and adjudicative authority. However, the personnel within the FTC who have adjudicative responsibilities are designated Administrative Law Judges who are in a separate section within the agency, and are not accountable to the personnel who have direct investigative and prosecutorial responsibilities.

national treatment provisions of the GATT, GATS, and TRIPS agreements provide for transparent and uniform enforcement (or non-enforcement) of the competition laws against all participants (domestic and foreign) in the economy.[34] The Sections therefore suggest that a provision be included in the proposed law to state expressly that there will be transparent and uniform enforcement and there will not be selective or discriminatory enforcement of the competition laws. Such a provision would be consistent with and complement the prohibitions in Chapter 5 against administrative monopoly, particularly the prohibition in Article 32 against regional monopoly.

In addition, the Sections are concerned regarding the particulars of some of the provisions of the proposed law in this area. For example, the individual exemption process set forth in Articles 9 through 13 is reminiscent of the process under Article 81(3) of the EC Treaty. We recognize that there can be real benefits for a system that could provide clarity by giving businesses the opportunity, on a voluntary basis, to seek guidance from the competition authority in cases where the legality of the conduct might be in doubt. However, the experience in the EC over the last 30 years suggests that such a mechanism is not optimal, and in fact the EC has eliminated the individual exemption system as of May 1, 2004.[35] Instead, the focus has been on developing additional refined block exemptions, such as for vertical restraints and intellectual property licenses.

The potentially open-ended review period provided in Article 28 (Approval of Applications) for concentrations may also be unworkable. Delays of concentrations often mean the demise of the transaction. Such a potentially open-ended review period offers the possibility that an enforcement agency may effectively prohibit a transaction merely by prolonging the investigation, without any need to complete an investigation or issue a finding that the concentration is anticompetitive that may then be reviewed by the People's Court, or by a specialized court for competition law matters. We suggest that the law clarify that a review period may be extended only once, and for no longer than 30 days beyond the 90 days already provided. The types of "special circumstances", such as a preliminary finding of areas of competition concern and the need to obtain information from third parties, that would justify an extension, should also be identified. In addition, it would be beneficial to clarify whether any approval is ex post or ex ante. Moreover, the Sections suggest that Article 27 (Content of the Application) not require the application to discuss "the effect the concentration may have on the national economy and public interest" because, as we discuss in Section III, we believe that a competition law should not consider whether concentrations "hinder the healthy development of the national economy" or "damage the public interest", for the reasons set forth in Section I of these Comments.

Although the proposed law states that it applies to behavior outside the territory of the People's Republic that violates the law and limits or affects market competition within the territory of the People's Republic, the Sections suggest that it would be helpful

[34] *See* GATT, Art. III; GATS, Art. VIII ("Monopolies and Exclusive Service Suppliers") & XVII ("national Treatment"); TRIPS, Art. 3&4.

[35] Council Regulation (EC) 1/2003, Art. 43(1).

to expressly state that the provisions in the proposed law relating to the "control of enterprise concentrations" apply to: (i) concentrations between foreign enterprises where one or both enterprises have manufacturing facilities, other assets, or substantial sales in, or into, the People's Republic of China; and (ii) concentrations among foreign enterprises' subsidiaries within the People's Republic of China. Further, while the proposed law also provides for penalties for unauthorized concentrations where a concentration that violated the law was carried out without prior approval, the Sections suggest that the proposed law expressly state that advance notice or approval is required prior to consummation of a concentration covered by the law, and that post-consummation approval is not contemplated.

Finally, the most important result of the application of a competition law is the restoration or maintenance of competition in the economy. The punishment of violators of the law is, except in the case of unambiguously anticompetitive behavior, secondary to remedying the effects of the conduct that violated the law. Consequently, in the U.S., the focus is on prospective remedies that restore competition such as injunctions, divestiture, and restitution. Only in those cases where clear-cut anticompetitive behavior (such as price-fixing and bid-rigging among competitors) must be firmly deterred do we resort to retrospective, punitive sanctions such as fines and imprisonment. No such penalties are sought or imposed in other cases in modern times in the United States. Therefore, the Sections suggest that the proposed law be extended and clarified to provide, for example, that penalties are appropriate only in cases where the Per Se Rule applies and the actual competitive effect of the improper conduct is not relevant, and that the Anti-Monopoly Management Body of the State Council is authorized to obtain injunctive relief to stop anticompetitive concentrations or other violations before they occur and to seek divestiture or other remedies to cure anticompetitive concentrations or other violations after they occurred. The proposed law should also be clarified in Article 52 (Enforcement of the Decision) to authorize the Body to seek enforcement of any orders that the Body may issue or obtain to cease and desist from violations of the law.

This reserve regarding penalties for anticompetitive conduct is distinguished from our view regarding penalties for violations such as improper disclosure by government personnel of confidential information or destruction of relevant materials by investigated persons. The Sections suggest that the proposed law be clarified in Article 51 (Penalty for Activities of Investigated Persons) to include criminal penalties that can apply in the case of destruction of relevant materials, unless such penalties are already established in another statute. However, we also urge that the proposed law also clarify what are "relevant materials" and the circumstances in which destruction of such materials may result in criminal penalties. Some situations may require lighter penalties than others, and the proposed law should also be clarified in that respect. In the case of improper actions by government personnel, for example, the Sections agree that administrative punishment and criminal penalty may be appropriate. We assume that the nature of administrative punishments (including compensation for any losses) that can be imposed, and when they will be imposed, are set forth in another statute addressing administrative procedures, or the Anti-Monopoly Management Body of the State Council will be authorized to develop and publish these procedures. The Sections suggest, in any event,

that it will be helpful to clarify in the proposed law the circumstances in which violations of the duties of confidentiality in Articles 41 and 42 become criminal offenses under Article 54 (Penalty for Failure to Fulfill Responsibility to Maintain Confidentiality).

VIII Interaction with Other Laws (Article 56; Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors)

Article 56 (Conduct Relating to the Exercise of Intellectual Property Rights) raises the implications of some major interactions between other laws and the proposed competition law. The Sections believe these interactions merit further review.

In particular, the second sentence of Article 56 may have the unintended effects of nullifying the laws protecting intellectual property and discouraging innovation. The second sentence of this article may be read as removing intellectual property rights law protection if the mere exercise of an intellectual property right is somehow deemed an "abuse" and either actually *or* potentially either eliminates *or* "over-broadly" limits competition. Since the proposed law does not provide any guidance as to what constitutes "abuse", then, unless the intellectual property rights laws establish what constitutes "abuse", there is the potential that "abuse" may cover instances where an intellectual property rights holder simply refuses to license another entity to use what the intellectual property rights holder has rights to use exclusively under the intellectual property rights laws. Such a result would likely have an adverse impact on innovation while not necessarily promote a competitive marketplace.

Proposals regarding limitations under competition law on the exercise of intellectual property rights have triggered substantial debates among commentators, courts and enforcement agencies of several jurisdictions[36] and have generally been more specific than the language proposed in the second sentence of Article 56. The Sections believe that it is unnecessary at this time to address the interface between intellectual property rights and competition laws. However, if the proposed law is to address that interface, the Sections respectfully suggest that the following phrase be added to the end of the second sentence of Article 56: ", provided that the unilateral exercise of the right to exclude, inherent in the ownership of intellectual property, shall not constitute an abuse." As the Sections noted earlier in these Comments (in Section II), the offense of monopolization under U.S. law requires both the possession of monopoly power and "the

[36] In fact, the U.S. antitrust enforcement agencies have issued substantial guidelines focused on just one particular aspect of the interface between intellectual property rights law and competition law. *See* 1995 DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property. *See also, generally*, Hovenkamp, Janis and Lemley, *IP and Antitrust, An Analysis of Antitrust Principles Applied to Intellectual Property Law* §13.1 - §13.4 (2003); Joint Comments of ABA Sections of Antitrust Law, International Law & Practice, and Intellectual Property Law on the [European] Commission Evaluation Report on the Transfer of Technology Block Exemption Regulation No. 240/96 at 9 ("Issues continue to arise in this area, there is substantial litigation, and continued debate, as reflected in cases … as well as the ongoing hearings being conducted jointly by the [U.S. FTC and DOJ] …"); Comments of the ABA Section of Antitrust Law on the U.S. Department of Justice Antitrust Division and Federal Trade Commission Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (June 28, 2002).

willful acquisition . . . of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." It is not sufficient to demonstrate that a firm obtained monopoly position if it did so through "superior skill, foresight and industry." While it is often appropriate to scrutinize carefully the conduct of a firm with monopoly power to assure that its conduct will not lead to higher prices, lower output, poorer quality, and less innovation, it is recognized that a firm that competes through lower prices, higher output, better quality or more innovation may well thereby achieve, maintain or even extend monopoly power. It is fundamental under U.S. antitrust law that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[37]

In addition, Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors recently became effective. The stated goals of the Provisional Rules are to "encourage and regulate investments by foreigners in China, introduce foreign advanced technology and management experience, raise the level of utilization of foreign investment, realize the reasonable allocation of resources, secure employment and maintain fair competition and the economic security of the State." These Rules require certain acquisitions of businesses in the People's Republic by foreign enterprises to be subject to review for various considerations, including whether the transactions may "exclude or restrict competition," or may lead to "over-concentration."

To the extent these Provisional Rules establish different standards for considering the competition implications of an acquisition by foreign investors than the standards that will be applied under the proposed law to all acquisitions within the People's Republic, WTO obligations of non-discriminatory and national treatment may be implicated. In addition, for the reasons stated in Section I, we believe that the Provisional Rules take into consideration factors that are not appropriate. Therefore, the Sections respectfully suggest that the better course would be to provide that competition policy reviews of all acquisitions (whether by domestic or by foreign investors) are to be conducted only under the authority of the proposed law, and to revise the Provisional Rules to delete consideration of competition factors in the review of transactions under those Rules. The Provisional Rules will then apply only non-competition policy considerations to acquisitions by foreign investors, such as "employment," the "community economic order or community public interest," and the "economic security of the State".[38]

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[37] *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966); *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945). As noted earlier (footnote 3), there are also certain monopolies that are specifically permitted by law in the United States. However, in those cases, those sectors are subject to active governmental supervision to ensure that there is no abuse of market power. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

[38] However, the Sections note that there are already other statutes and regulations that address non-competition policy considerations in acquisitions by foreign investors. Therefore, setting aside the wisdom of these non-competition policy considerations, in this case, at best, the Provisional Rules are redundant of existing law, and, at worst, they create requirements inconsistent with existing law that will further burden foreign investors.

This bifurcation is the approach used in Canada and the United States.[39] In Canada, the Investment Canada Act applies to foreign investments various non-competition policy considerations. Canada's Competition Act, enforced by the Competition Bureau of Industry Canada, is applied to all commercial activity, including concentrations, in Canada, regardless of the nationality of the parties. Similarly, in the U.S., the Exon-Florio Act applies national security considerations to foreign investments in the U.S., while the Clayton Act applies competition policy to all concentrations in the U.S., regardless of the nationality of the parties.

Such a centralization of competition review of concentrations will avoid the complications of having potentially different competition policy standards being applied by different agencies to concentrations involving foreign investors than to concentrations involving only domestic parties. It will avoid the potential of some transactions being required to satisfy the disparate competition policy standards of two different laws. Finally, it will also facilitate the evaluation of the consumer welfare and efficiency effects of transactions under competition policy without the complications of attempting in one analysis to include such diverse factors as national security and employment opportunities that are not susceptible to economic analysis in the same way that investigations of consumer welfare and efficiency effects are.

Conclusion

In sum, the Sections believe that the enactment of a competition law is generally a positive development. Some aspects of the proposed Anti-Monopoly Law, however, would benefit from further consideration. We hope that this submission is useful. We would be pleased to respond to any questions regarding these Comments, or to provide any additional comments or information that may be of assistance.

July 15, 2003

APPENDICES

ABA Antitrust Section Report on Antitrust Policy Objectives

1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines

[39] The Sections do not comment on the wisdom of laws such as the Investment Canada Act and the Exon-Florio Act, but refer to them only as examples of the bifurcated approach that should be adopted, if non-competition policy considerations are included in the review of foreign investments.

ABA Sections of Antitrust Law and International Law & Practice Comments on the EC Green Paper on Vertical Restraints in EC Competition Policy

W. Blumenthal, *"Clear Agency Guidelines: Lessons from 1982"*, 68 Antitrust L.J. 5 (2000)

ABA Sections of Antitrust Law and International Law & Practice Comments and Recommendations on the Competition Elements of the Doha Declaration

ESSENTIAL FACILITIES: AN EPITHET IN NEED OF LIMITING PRINCIPLES

PHILLIP AREEDA*

I. INTRODUCTION

There is much talk these days, particularly in the context of deregulated industries, about the so-called essential facilities doctrine[1]—"so-called" because most Supreme Court cases invoked in support do not speak of it and can be explained without reference to it. Indeed, the cases support the doctrine only by implication and in highly qualified ways. You will not find any case that provides a consistent rationale for the doctrine or that explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share it with a rival. It is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are.

As with most instances of judging by catch-phrase, the law evolves in three stages: (1) An extreme case arises to which a court responds. (2) The language of that response is then applied—often mechanically, sometimes cleverly—to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of its language, with little regard to policy. (3) Such expansions ultimately become ridiculous, and the process of cutting back begins.

Essential facilities is now in the expansionary second phase, which needs to be brought back to antitrust policy. With that in mind, I will review briefly the cases usually relied upon, beginning with multifirm combinations.

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[1] *See, e.g., The Cutting Edge of Antitrust: Lessons from Deregulation*, 57 ANTITRUST L.J. 695 (1988).

II. MULTIFIRM COMBINATIONS

The essential facilities notion is usually traced to the *Terminal Railroad* combination case.[2] The Terminal Railroad Association controlled passages into and out of St. Louis, which was an important railroad junction. This monopoly facility was then acquired by a combination of some, but not all, of the railroads transiting St. Louis. This combination of railroads did not create anything; it merely acquired an existing facility. The combination was then in position to use the pre-existing monopoly to exclude or disadvantage competitors needing to pass through St. Louis. Recognizing that the combination had obtained a monopoly through joint purchase, the Supreme Court wisely concluded that the most efficient remedy was to admit nonmember competitors to the consortium.[3]

Associated Press[4] was a more doubtful case. Some 1,200 newspapers created the Associated Press. Each member was given access to news generated by other members. For example, the Chicago newspaper obtained news reports from the Associated Press member in New York. In addition, the Associated Press had its own staff to generate news. The combination achieved important economies of scale. The members collectively could support a reporter in Istanbul or a staff of economic experts to analyze antitrust decisions for the benefit of readers. The basic rationale for the venture was to achieve economies of scale, which goal the addition of members served. The Associated Press welcomed new members, unless the applicant competed with an incumbent. Although the rules varied over the years, existing members essentially were allowed to block the admission of competitors, but not anyone else.

The Supreme Court held it a violation of the Sherman Act for the Associated Press to discriminate against competitors in its admissions policy. The remedy was to enjoin this discrimination, but the Court was very careful *not* to say that the Associated Press had to admit everyone. The Court's rationale was not stated with any clarity. Justice Black wrote for himself and three others as if the Associated Press were the Fashion Originators' Guild—a group of dress designers who combined for the express purpose of destroying rivals they considered copiers, by boycotting the textile makers or dealers that dealt with copiers.[5] That kind of boycott and "forbidden private government" language in *Fashion Originators' Guild* was totally inappropriate to describe a new and highly productive venture that simply chose not to admit the whole world.

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[2] United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

[3] *Id.* at 411–12.

[4] Associated Press v. United States, 326 U.S. 1 (1945).

[5] Fashion Originators Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941).

Justice Douglas, who joined in the opinion, wrote separately to highlight the fact that the Court was not requiring the Associated Press to admit anybody, but was simply banning its practice of discriminating against competitors.[6] The fifth Justice necessary to the majority[7] was Frankfurter, who alone felt obliged to offer a rationale for interfering with the Associated Press's admission policy. His rationale, the only one that supports an essential facility notion, was either ignored or expressly put aside by every other Justice. Justice Frankfurter compared the Associated Press to a public utility, a business infused with the public interest that was required to serve all.[8] Yet Justice Frankfurter's public utility concept was exceedingly limited: what infused the Associated Press with the public interest was the need for the maximum flow of information and opinion to preserve our democracy and our Constitution.[9]

Imagine the torment Justice Frankfurter would feel to see his free-press public utility concept invoked in support of a rock impresario seeking admission to the local auditorium;[10] a teletype machine marketer complaining that its competitor will not sell machines for it;[11] a ski resort complaining that a rival resort will not engage in joint marketing with it;[12] a maker of "muscle building" food supplements demanding that a body building magazine accept its ads;[13] a paper retailer complaining that other paper retailers will not admit it to their wholesale buying co-op;[14] an anesthesiologist insisting that the local hospital, using in-house anesthesiologists, allow him to perform anesthesiological services as well;[15] or the would-be oil seller, who has no storage tanks of his own,

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[6] Associated Press v. United States, 326 U.S. 1, 23–25 (1945) (Douglas, J., concurring).

[7] Justices Roberts, Murphy, and Chief Justice Stone dissented. Justice Jackson did not sit.

[8] Associated Press v. United States, 326 U.S. 1, 28–29 (1945) (Frankfurter, J., concurring).

[9] In response to criticism that the Court's decree turned the Associated Press into a public ntility, Justice Frankfurter wrote: "The relation of such restraints upon access to news and the relation of such access to the function of a free press in our democratic society must not be obscured by the specialized notions that have gathered around the legal concept of a 'public utility.' " *Id.* at 29.

[10] Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024 (7th Cir.), *cert. denied,* 109 S. Ct. 261 (1988).

[11] Olympia Equip. Leasiug Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied,* 107 S. Ct. 1574 (1987).

[12] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[13] Twin Laboratories, Inc. v. Weider Health & Fitness Corp., 720 F. Supp. 31 (S.D.N.Y. 1989).

[14] Northwest Wholesale Starioners, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

[15] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

demanding to use those of an incumbent seller[16]—to say nothing of Berkey, who wants to know the results of Kodak's research before Kodak markets its own innovations.[17] We have moved a long way from Justice Frankfurter's narrow concept of the extraordinary circumstances in which intervention is essential to protect the Republic.

Let me summarize the apparent black letter law. Whatever *Associated Press* held, it is often said to stand for more or less the following propositions, with the vague terms emphasized: (1) whenever competitors jointly create a *useful facility*, (2) that is essential to the *competitive vitality of rivals*, (3) and (perhaps) essential to the *competitive vitality of the market*, (4) and admission of rivals is *consistent* with the *legitimate* purposes of the venture, then (5) the collaborators must admit rivals on *relatively equal* terms.

III. SINGLE FIRM CONDUCT

Even if *Associated Press* stands for these five propositions, it cannot automatically govern *unilateral* denial of an essential facility for several reasons.[18] First, and most obvious, concerted action is exceptional, whereas unilateral action is omnipresent. Innumerable firms engage in unilateral action every day. We have to be very wary about examining the decisions of each of those firms in our economy, particularly when anything one has that another wants may be called an "essential facility." Nor can we take any comfort from the suggestion that the essential facilities doctrine will apply only to true monopolies, which are rare. A cursory review of the "essential facilities" cases[19] denies such consolation.

Second, concerted exclusion is much easier to remedy, particularly when an outsider, who is willing to invest on an equal basis, seeks admission at the time the joint venture is created. In these cases it is relatively easy to define the terms under which others should be admitted. Even when admission is sought at a later time, we may be able to define equivalent terms, although it is difficult to quantify the degree of risk the original venturers bore and give it a dollar value.

Third, admission to a joint venture is a one-time remedy that does not require day-to-day control. Admission to a group such as the Associated Press does not require the rationing of an existing resource or entail any new investment. Adding to a group, moreover, is less likely to impair

[16] Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528 (S.D. Fla. 1989).

[17] Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1063 (1980).

[18] For a general discussion of the significance of concerted action, *see* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 736.1d (1988 Supp.).

[19] *See* notes 10–17, *supra*.

efficiencies by chilling desirable activities. Requiring the Associated Press collaborators to admit others at the outset would chill the combination only if its purpose were indeed to exclude rivals.[20]

Finally, the combination itself might be evidence of essentiality. Allowing the competitors to combine in the first place indicates that the proposed venture is both important and beyond the individual capacity of the collaborators. No such inference can be drawn from the activities of single firms.[21]

A. ESSENTIAL FACILITIES AND SECTION 2 CONDUCT

The essential facilities concept, applied to a single firm, must heed the conduct requirement—not just market power—necessary to constitute monopolization under Section 2 of the Sherman Act. The formula the Supreme Court has most recently used is the "willful acquisition or maintenance" of monopoly power.[22] Obviously, that language cannot be taken literally. The example I usually give to illustrate this is the person who climbs to his rooftop and (without the advice of counsel) shouts to the world, "I crave monopoly." He explains: "I have instructed my inventors to invent, my engineers to cut costs, my marketers to discover the public taste, all to the end that I should build a better mousetrap, the world beat a path to my door, my competitors expire, and I have a monopoly." If all that transpires, he certainly would have willfully acquired monopoly power in the ordinary meaning of those words. It is obvious, however, that such conduct is precisely what antitrust policy tries to encourage. Unless the law condemns every monopolist simply because he is a monopolist in order to "reshuffle" the market, it cannot condemn the person I have described, no matter how willfully—in the lay sense—he has acquired monopoly power.

"Willfully acquire or maintain monopoly power," is Justice Douglas's language in *Grinnell,* but even he immediately added, "as contrasted with monopoly achieved as a result of historical accident, business acumen, or

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[20] If the original collaborators would not want a local competitor to reproduce the reports of its crosstown rival, such local free riding could be prevented without excluding rivals entirely.

[21] These distinctions do not mean that a monopolist should never be required to deal. MCI Communications Co. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied,* 464 U.S. 891 (1983), which rests on the essential facilities notion, is probably correct. In *MCI,* the plaintiff providing long distance telephone service alleged that AT&T obstructed its connection to local exchanges, contrary to federal regulatory policy in the communications field. In these circumstances, the Seventh Circuit held that a monopolist must, when feasible, make its essential facility available to a competitor who is unable to duplicate it. 708 F.2d at 1133.

[22] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

the like."[23] It is perfectly clear that the concept of monopolization requires some element of impropriety; it has to be monopoly power coupled not with building the better mousetrap, but monopoly power coupled with some impropriety in its achievement or maintenance.

The impropriety is usually found in conduct that excludes rivals. The phrase most often used is "exclusionary conduct"—"monopoly power plus exclusionary conduct."[24] But that adds little help, because, in the lay sense, almost anything can be said to exclude. If I build a better mousetrap that deprives you of customers, you might say I have excluded you from the market. Of course, you have an equal opportunity to invent a better mousetrap of your own. Yet, where the market is a natural monopoly—that is to say, it will only sustain one producer of optimum, low-cost size—the first person to build an optimum sized plant is likely to be the last person in that market.

It is important to contrast the concept of impropriety in acquiring or maintaining monopoly power with the concept of abusing monopoly power. By way of illustration, the Treaty of Rome, which governs the European Economic Community, has a structure similar to the Sherman Act. Article 85 addresses agreements in restraint of trade, as does Section 1 of the Sherman Act.[25] Article 86 parallels Section 2 of the Sherman Act somewhat, but it is really quite different.[26] It focuses on the *abuse* of a

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[23] *Id.* at 571.

[24] *See, e.g.*, Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979).

[25] Article 85 provides, inter alia:

(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
  (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  (b) limit or control production, markets, technical development, or investments;
  (c) share markets or sources of supply;
  (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  (e) make the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[26] Article 86 provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist iu:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical developmeut to the prejudice of consumers;

dominant position, whereas Section 2, as applied, focuses on the manner in which a firm acquires, expands, or maintains monopoly power. It is no violation of Section 2 for a monopolist to charge a monopoly price. If the monopoly was not improperly obtained or maintained, then exploiting the monopoly—to charge whatever monopoly price the market will bear—does not violate the statute.[27] We will see that the legality of monopoly pricing has important implications for the essential facilities concept.

B. *GRIFFITH, OTTER TAIL,* AND *ASPEN*

Three Supreme Court monopoly cases are frequently cited to support the essential facilities concept, though none uses that phrase. *Griffith*[28] did not involve an alleged essential facility,[29] but certain language in the opinion (as in so many others) has come to live a life of its own, quite apart from the circumstances, facts, or reasoning, behind it. In *Griffith,* the Court said that a monopolist may not use its power "to foreclose competition or "to gain a competitive advantage" in any market.[30] This language, literally construed, would condemn the monopolist who refuses to make his product or facility available to a competitor. The words in *Griffith* do not compel such a result;[31] it would be strange indeed to regard those words as such vast legislative pronouncements from a case that did not address essential facilities.

Otter Tail[32] is more relevant, though it rested on nothing more than the *Griffith* formula. In *Otter Tail,* the plaintiffs were municipalities that wanted to provide local distribution of electric power to their residents. The municipalities asked Otter Tail either to sell electricity wholesale or to wheel (i.e., carry) electricity purchased from another supplier over

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[27] *See, e.g.,* Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979) (possession of monopoly power not in itself unlawful, and the successful firm "does not violate § 2 simply by reaping the competitive rewards"), *cert. denied,* 444 U.S. 1093 (1980); *see also* Continental Cablevision of Am. v. American Elec. Power, 715 F.2d 1115, 1120–21 (6th Cir. 1983) (high prices are lawful even for a monopolist); *see generally* 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 710 (1978).

[28] United States v. Griffith, 334 U.S. 100 (1948).

[29] *Griffith* addressed a movie exhibitor's use of buying power in a market in which it had a monopoly to compel distributors to give it preferential rights in towns where the market was competitive.

[30] United States v. Griffith, 334 U.S. 100, 107 (1948).

[31] *See* 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 610, 727c (1978).

[32] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

Otter Tail's lines. Otter Tail refused because it wished to keep itself in, and the municipalities out of, the local distribution business.

The Supreme Court held that Otter Tail's refusal to supply or wheel power to the municipalities violated Section 2 of the Sherman Act.[33] Far from establishing any general duty to deal, however, *Otter Tail* is very limited. Not only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers.[34] Very importantly, there was already in place a regulatory agency that supervised prices and terms of dealings with local distributors. Thus, the Court could airily require Otter Tail to deal but never burden itself with the administrative details, because the Federal Power Commission had the statutory authority and presumed expertness to regulate the prices and terms of dealing. *Otter Tail* is thus quite narrow.

The third case is *Aspen*.[35] It is odd to treat *Aspen* as a monopoly case, because the Aspen Skiing Company (Ski) was not a monopoly.[36] But the issue had not been properly preserved on appeal, and the Supreme Court treated Ski, which owned three mountaius in Aspen, Colorado, as a monopolist. The fourth mountain in Aspen was owned by the plaintiff, Aspen Highlands (Highlands). For some years, Ski and Highlands had offered a six-day lift ticket that allowed use of all four mountaius. Six one-day tickets cost $132, while the "ski week" ticket for the same number of days was $114—a fourteen percent discount.[37] This is important because most skiers come to Aspen from afar and stay for a week. Ski stopped offering the four-mountain ticket with Highlauds, presumably because Ski concluded that skiers would prefer six days on three mountains to six days on Highlands' one mountain. Highlands lost some business, although its competitive vitality was never in doubt.[38]

Highlands won a jury verdict, which the Court of Appeals for the Tenth Circuit upheld on two grounds: (1) a multimountain ticket was an

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[33] *Id.* at 377.

[34] Although it is not completely clear from the decision, it appears that transmission (wheeling) charges and wholesale prices were regulated by the Federal Power Commission, the predecessor of the Federal Energy Regulatory Commission. Retail charges to consumers were regulated, if at all, by local authorities in Miunesota. If Otter Tail wheels or sells power wholesale, regulators will force it to charge less than the monopoly price. If Otter Tail is in the retail distribution business, which is not very effectively regulated, it can charge monopoly prices. Thus, in the peculiar circumstances of *Otter Tail,* a duty to deal may benefit consumers.

[35] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[36] *See* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 518.1h (1989 Supp.).

[37] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 594 n.15 (1985).

[38] One of the curiosities in the case is that while Highlands sought damages for lost profits, it asserted vigorously that its one mountain was just as good as the defendant's

essential facility that Ski was obliged to share, and (2) there was sufficient evidence to support the jury finding that Ski intended to create or maintain a monopoly.[39]

In affirming, the Supreme Court did not mention the Tenth Circuit's essential facilities rationale, except to say it was not going to address it.[40] Instead, the Court focused solely on the propriety of the jury instruction. The instruction was similar in style to that in *Berkey*.[41] Berkey alleged that Kodak was a monopolist that acted improperly by introducing a new camera system without predisclosing the results of its research to Berkey. Berkey also claimed that Kodak was guilty of monopolization because it would not sell photofinishing paper without the Kodak name on the back. The jury instructions in *Berkey* and *Aspen* both charged that the defendant had no absolute duty to deal with the plaintiffs in the manner they desired, but if the jury found that the defendant acted "*with exclusionary or anticompetitive purpose or effect*," then it may find for the plaintiff. The Supreme Court approved such language in *Aspen*.

This language has serious and questionable implications. Assume, for example, a patent monopolist refuses to allow another to use its patent. The jury is told the patent monopolist has no absolute duty to let the plaintiff use the patent, but if it declines with an exclusionary purpose, then it violates the Sherman Act. Or suppose a monopoly newspaper sells through its own employees because distributors charge too much. The plaintiff wants to be in the distribution business and claims that while there is no absolute duty to supply it with newspapers, if the purpose of the refusal is to eliminate competition in the newspaper distribution business (which of course it is), then the jury should find the newspaper guilty of monopolization.

Or, suppose the defendant has a warehouse, a research laboratory, a dock, a refinery, or storage tanks, that are not fully occupied. The plaintiff wants to use the facility. The judge instructs the jury that the defendant has no absolute duty to let the plaintiff use the warehouse or laboratory or other facility, but if the defendant declines in order to improve its competitive position relative to the plaintiff's (that is to say, to exclude the plaintiff in some sense) then the defendant is guilty. Of course, the reason any business declines to share the fruits of its labor with competi-

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three. If that is true, what does it say about "essentiality"? Neither the Supreme Court nor, apparently, the jury even noted this.

[39] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520–22 (10th Cir. 1984).

[40] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611 n.44 (1985).

[41] Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1090 (1980).

tors is because it wants to win in the marketplace. Did the *Aspen* Court hold that is enough to support a monopolization verdict?

There are several reasons *Aspen* should not be read to go that far. First, the *Aspen* facts were peculiar in two ways. The Court made much of Ski's cessation of cooperation. Its previous activity had implied, at least to the Court, that cooperation was both efficient and entirely practical. It may not have been wise for the Court to do that, because one of the consequences will be that lawyers will advise their clients not to cooperate with a rival; once you start, the Sherman Act may be read as an antidivorce statute. In addition, the vice of Ski's conduct, in my view, was not that it refused to cooperate with Highlands, but that it engaged in a form of "quasi-exclusive dealing." Suppose Ski offered the $114 discount ticket to skiers only on the condition that they not ski at Highlands. If we truly thought Ski were a monopolist, we would be troubled indeed. Of course, the practical effect of the six-day discounted ticket might well be the same.

Second, the conduct in some of the hypotheticals raised here is generally regarded as absolutely privileged. For example, in *SCM*[42] the Second Circuit held that, under general patent principles, a patent monopolist is absolutely privileged to keep its invention to itself. Similarly, the Second Circuit held in *Berkey* that the innovator was not obliged to predisclose its developments to its rival, notwithstanding *Aspen*-like jury instructions.[43]

Even in the peculiar circumstances of *Aspen,* the Court was explicit that the defendant's conduct would be redeemed by a legitimate business purpose.[44] There are two quite different kinds of legitimate business justifications that I call "micro level" and "macro level." Legitimate business purpose at the micro level focuses on the circumstances of the particular case. For example, if AT&T had been able to show that connecting MCI would have dangerously increased the electricity load such that a consumer picking up the phone would be electrocuted, I am quite certain AT&T would have prevailed. If Highlands had insisted on fifty percent of the revenues of a joint ticket although it attracted only twenty-five percent of the skiers, it is perfectly clear that Ski would not have to agree to such an arrangement.

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[42] SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982).

[43] Likewise, in Olympia Eqnip. Leasing v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied,* 480 U.S. 934 (1987), the conrt held that the defendant was not obliged to use its own personnel to sell a rival's products.

[44] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–10 (1985).

In addition, any essential facilities doctrine must recognize macro level or class justifications. These legitimate business purposes are not personal to any particular defendant, but are propositions of general policy. For example, the justification for refusing to share a research laboratory does not focus on the practical infeasibility of letting another use the laboratory, but on the general concern that the defendant never would have built a laboratory of that size and character in the first place if he had known that he would be required to share it. Required sharing discourages building facilities such as this, even though they benefit consumers.

The *Olympia*[45] case further demonstrates the need for general policy limitations. Surprisingly, some lawyers have criticized the Seventh Circuit in *Olympia* for departing from *Aspen*. *Olympia* involved the teletype business. In the beginning, Western Union not only maintained the wires and the network, but also provided the teletype machines. It decided to phase out the machine portion of its business, and its salesmen began selling other companies' machines. Indeed, Western Union apparently had a commission structure that made it more profitable for its salesmen to sell the plaintiff's machines than Western Union's machines. Not surprisingly, the plaintiff prospered. Western Union then changed its commission structure and disposed of more of its machines and sold fewer of the plaintiff's.

The court was willing to make the general policy decision that a business is not obliged to peddle its rival's products. Once that policy decision is made, there is nothing left for the jury to do. Likewise, the court in *Berkey* held there is no duty to predisclose one's inventions, because predisclosure would reduce the returns from and therefore the incentives for innovation. The duty to sell another's products and the duty to predisclose would chill desirable activity and therefore the courts determined, as a matter of law, there is no duty to share.

These are policy decisions that should be made by judges, not juries. Ad hoc policy decisions by juries provide no guidance to business actors, subject similar firms or markets to different rules, and lodge national economic policy in unqualified hands. Deciding whether inventions, labs, or a sales force must be shared with rivals and how the economy is to be run is not the stuff of juries. To the extent that these matters are to be governed by the law rather than by business persons and the market, judges, not juries, must decide what kinds of facilities one is entitled to keep for oneself.

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[45] Olympia Equip. Leasing v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

IV. CONCLUSION

I conclude by offering six principles that should limit application of the essential facilities concept.

(1) There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional.[46]

(2) A single firm's facility, as distinct from that of a combination, is "essential" only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace. "Critical to the plaintiff's competitive vitality" means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available.

(3) No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely (a) when it would chill desirable activity; (b) the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for the monopolist or shares the monopolist's gains;[47] or (d) when the monopolist already has the usual privilege of charging the monopoly price for its resources.[48]

(4) Even when all these conditions are satisfied, denial of access is never per se unlawful; legitimate business purpose always saves the defendant. What constitutes legitimacy is a question of law for the courts. Although the defendant bears the burden of coming forward with a legitimate business purpose, the plaintiff bears the burden of persuading the tribunal that any such claim is unjustified.

(5) The defendant's intention is seldom illuminating, because every firm that denies its facilities to rivals does so to limit competition with itself and increase its profits. Any instruction on intention must ask whether the defendant had an intention to exclude by *improper* means.

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[46] The trouble with both the general jury instruction ("if you find it exclnsionary, you can condemn") and the essential facilities notion is that they start with the assumption that all bnsiness assets are subject to sharing. Do we really want to assume that everything we have is up for grabs?

[47] *See* Mid-South Grizzlies v. National Football Leagne, 720 F.2d 772 (3d Cir. 1983), *cert. denied,* 467 U.S. 1215 (1984). In *Grizzlies,* a would-be entrant into the football business demanded entry to a league, alleging that the leagne was an essential facility. Adding another team in a different city to the league is not going to increase competition or lower prices. All it would do is allow one more person to share the television revenues.

[48] For example, the monopoly newspaper in town can charge the monopoly price whether or not another distributes it. An independent distributor of the newspaper is not going to limit the newspaper's ability to control the output and the wholesale price.

To get ahead in the marketplace is not itself the kind of intention that contaminates conduct.[49]

(6) No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency. Remedies may be practical (a) when admission to a consortium is at stake, especially at the outset, (b) when divestiture is otherwise appropriate and effective, or (c) when, as in *Otter Tail,* a regulatory agency already exists to control the terms of dealing. However, the availability of a remedy is not reason to grant one. Compulsory sharing should remain exceptional.

[49] But the articulation of the instruction—"do you find the defendant had an intention to exclude by *improper* means"—highlights the fact that the jury is being asked to make a policy decision as to which resources a monopolist is entitled to keep to itself.

COMPULSORY ACCESS UNDER THE ANTITRUST LAWS

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This outline summarizes the state of the law under the "compulsory access" doctrine, also known at times as the "essential facility" doctrine or "bottleneck monopoly" doctrine. To oversimplify for the moment, the doctrine provides that "facilities [that] cannot practicably be duplicated by would-be competitors" must be "shared on fair terms" by "those in possession of them." A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES 67 (2d ed. 1970). This principle, however, is in tension with a countervailing principle that traces to the Supreme Court's famous dictum in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), where the Court stated that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Reconciling the compulsory access doctrine and the *Colgate* doctrine presents one of the most difficult policy quandaries in the field of antitrust: under what circumstances must a competitor, having prevailed over its rivals in the marketplace, be compelled by operation of law to share the fruits of its efforts in order to restore those rivals to a position of competitive equivalence or, at least, viability?

The considerations the govern resolution of the policy dilemma were described by an Assistant Attorney General for Antitrust in explaining his

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[*] This outline is the lineal descendant of an outline that the author originally prepared for a National Institute sponsored by the ABA Antitrust Section in October 1989. *See Compulsory Access to ATM Networks*, in THE CUTTING EDGE OF ANTITRUST: EXCLUSIONARY PRACTICES (1989). The remarks delivered at the National Institute were revised and published as *Three Vexing Issues under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 ANTITRUST L.J. 855 (1989). The author remains grateful to Bennett Rushkoff for conducting the research reflected in the original outline and article and to Donald I. Baker and Karen L. Grimm for various thoughts and passages reflected in the original outline. The author gratefully acknowledges the work of Peter M. Todaro in updating the outline to reflect developments over the past decade and in broadening the scope of the outline for general application.

decision several years earlier to initiate a compulsory access suit by the U.S. Department of Justice:

> where one competitor comes up with a new idea, other competitors must use their own resources to come up with a competing idea. They must not be permitted to "hitch a ride" with him. In other words, the compulsory access rule is a second-best solution from the standpoint of competition. It should therefore be confined to situations where there is a genuine bottleneck monopoly -- to the situation of overriding scale economies [or] high risks. Otherwise, the compulsory access rule can become an insurance policy for laggards. . . .
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> . . . Any finding of bottleneck or essential facility should be made only after a long-run look at the situation. A firm or limited joint venture that develops something new may indeed have a short-term monopoly over that new thing. But is it truly a long-run monopoly, based on scale economies or other controlling factors? Or can it be invented around and competed against? If it can, we should not apply the compulsory access rule to it. Individual firms or limited joint ventures generally engage in innovation because they expect to improve their position vis-a-vis their competitors. If they are told in advance, *as a matter of law*, that they are going to have to grant compulsory access to their competitors anytime they achieve a really significant success, then the law has blunted their incentive to innovate. . . .

NORMAN PENNEY & DONALD I. BAKER, THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS ¶ 18.05[2], at 18-27-29 (1st ed. 1980) (footnote omitted) (describing decision to file *United States v. Rocky Mountain Automated Clearing House Ass'n*, No. 77-391 (D. Colo. dismissed Nov. 17, 1977), and *United States v. California Automated Clearing House Ass'n*, No. 77-1643-LTZ (C.D. Cal. dismissed Oct. 28, 1977)). Similarly, Judge Posner has expressed concern over the proliferation of the compulsory access doctrine and has cautioned against requiring every monopolist to share its facilities:

> . . . The suggestion that the price of being "best" is to be brought under the regulatory aegis of antitrust law and stripped of your power to decide whom to do business with does not identify an interest that the antitrust laws protect. "The successful competitor,

> having been urged to compete, must not be turned upon when he wins."

Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945)).

The decisions that seek to apply the doctrine have yielded as muddled a jurisprudence as one finds in the antitrust field. The author of the leading multivolume treatise in the field has characterized the "so-called essential facilities doctrine . . . [a]s less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are." *See* Philip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1989). This outline cannot hope to resolve the muddle, but perhaps it can clarify the sources of confusion and dispute. Part I provides general background on the historical evolution of the doctrine through 1980. Part II reviews the major cases under the doctrine over in the last two decades and discusses certain distinctions in applying the doctrine as between unilateral and concerted action. Part III address the meaning of "essential" as used by courts. Part IV examines access issues: who may gain access to an essential facility, the terms of access, and justifications for not providing access.

I. HISTORICAL FOUNDATION

The standards governing compulsory access to an essential facility have evolved through three related lines of cases -- traditional group boycott cases, joint venture essential facility cases, and single-firm bottleneck monopoly cases. (Depending on one's reading of the pertinent authority, one might group the cases into different lines. For useful discussions offering alternative classifications, see Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749 (1995), and Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987).) This part of the outline reviews the leading cases through 1980 that form the foundation of the essential facility doctrine.

A. Traditional Group Boycott Cases

Group boycotts (also known as "concerted refusals to deal") refer to agreements among two or more firms at the same level of market structure to refuse to deal with particular suppliers or customers, often for the purpose of disciplining or disadvantaging a competitor. Certain group boycotts are characterized as per se unlawful; but for reasons set forth below, this characterization is often problematic, particularly when used to circumvent the otherwise stringent elements of the essential facility doctrine. Nonetheless, a firm denied access to a joint venture among some of its competitors will often seek to portray its exclusion as an unlawful group boycott.

1. The Early Leading Cases

In *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), the Supreme Court held that concerted refusals among retailers to deal with wholesalers who sold directly to customers were unlawful under an unreasonableness standard. The Court explained that the retailers' exercise of their combined market power to coerce the wholesalers was the essence of the violation. *Id.* at 611-12. In *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), the Court similarly held that concerted refusals among textile and garment manufacturers to deal with stores that sold "style pirated" garments and with other manufacturers that sold to such stores were unlawful. The Court explained that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates [Section 1 of the Sherman Act].'" *Id.* at 465-66 (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899)). For other group boycott cases of the same era, see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 102 n.584 (4th ed. 1997) (collecting authority).

2. Cases of the Per Se Era

During the late 1940s and through the 1950s, the Supreme Court stated in dicta that group boycotts were per se violations of the antitrust laws. *See id.* at 102-03. The first case to so hold was *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), in which the plaintiff, a retailer of household appliances, alleged that a competing retailer had conspired with appliance manufacturers either not to sell to the plaintiff or to sell to it only on discriminatory and unfavorable terms. The defendants moved for summary judgment on grounds that their conduct was not unreasonable, for numerous other retailers competed in the area, and plaintiff had not alleged any effect on the price, quantity, or quality of household appliances. Rejecting these arguments, the Court wrote that the alleged boycott could be condemned regardless of its effect:

> Group boycotts . . . have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily stimulate competition they were banned.

Id. at 212 (citations omitted) (quoting *Fashion Originators' Guild*, 312 U.S. at 466). The Court again applied the per se rule in *Silver v. New York Stock Exchange*, discussed *infra* at part I.B.3, and in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), in which a trade association of automobile dealers had persuaded General Motors to bar certain dealers from selling to discount outlets. In striking down this "classic conspiracy" to "eliminate a class of competitors," *id.* at 140, the Court wrote that "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct," *id.* at 146.

3. The Dubious Vitality of Per Se Characterization

Although the Supreme Court has continued to indicate that group boycotts fall within the categories of restraints that

are per se unlawful, *see* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 103 n.591 (4th ed. 1997), the Court limited the reach of the per se rule in *Northwest Wholesale*, discussed *infra* at part II.C. Even earlier, however, the Court had recognized that "boycotts are not a unitary phenomenon," *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978) (quoting PHILIP E. AREEDA, ANTITRUST ANALYSIS 381 (2d ed. 1974)), and that prior decisions of the Court "reflect a marked lack of uniformity in defining the [per se] term," 438 U.S. at 543. The Court in *Northwest Wholesale*, 472 U.S. at 294, and two courts of appeals, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1366 (5th Cir. 1980); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distrib., Inc.*, 637 F.2d 1376, 1382-83 (9th Cir.), have quoted Professor Sullivan for the proposition that "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine," LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83, at 229-30 (1977). Reviewing authority, one prominent commentary concluded: "[T]he circumstances in which a concerted refusal to deal constitutes a per se unlawful group boycott have not always been clearly defined." ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 101-02 (4th ed. 1997).

B. Joint Venture Essential Facility Cases

A parallel line of cases (involving substantially fewer decisions than the group boycott line) addresses the circumstances under which competitors may demand compulsory access to joint venture essential facilities. The leading decisions through 1980 are reviewed below.

1. *Terminal Railroad*

A concept akin to the essential facility doctrine was first applied under the federal antitrust laws in *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912), in which the government filed suit against 38 corporate and individual defendants challenging their "unification of substantially every terminal facility by which the [rail] traffic of St. Louis is served," *id.* at 394, into a single terminal company owned by multiple railroad companies. The

record indicated that rail access to St. Louis required use of either of two bridges spanning the Mississippi River and connecting the city with the Illinois shore. The two bridges, originally owned independently, had come under the control of the venture; and certain geographic and topographic factors assured that "it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company," *id.* at 397. The Court noted with "utmost significance" that the terminal company was not an independent entity that dealt impartially with each of the railroads in the area; it contrasted this structure with a company that "was in law and fact the agent of all." *Id.* at 398. The Court emphasized that "in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals." *Id.* at 405. The circumstances in St. Louis, however, were "most extraordinary": "The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities." *Id.* Accordingly, on the facts before it, the Court held that the combination of terminal facilities was unlawful. *Id.* at 409. As to remedy, the Court rejected the government's proposal of dissolving the combination and instead provided (1) for the future admission of railroads to the combination upon terms that would place the "applying company upon a plane of equality . . . with the present proprietary companies" and (2) for the future use of the venture's facilities by nonmember railroads upon terms that would "place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *Id.* at 411.

2. *Associated Press*

The principles set forth in *Terminal Railroad* were followed in ensuing years in cases involving local towing facilities in several Great Lakes ports, *see United States v. Great Lakes Towing Co.*, 208 F. 733 (D. Ohio 1913), 217 F. 656 (D. Ohio 1914), *appeal dismissed*, 245 U.S. 675 (1917); a fish market, *see United States v. New England Fish Exch.*, 258 F. 732 (D. Mass. 1919); and a sponge market, *see United States v. Tarpon Sponge Exch.*, 142 F.2d 125 (5th Cir. 1944). The next significant development in the evolution of the essential facility doctrine, however, came with *Associated Press v. United States*, 326 U.S. 1 (1945), in which the government challenged provisions in AP's By-Laws prohibiting members from selling news to nonmembers and granting each member the power to block its nonmember competitors from membership. In assessing the effect of the restrictions, the Court quoted the district court's finding that "[i]t is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting all of the news of the world, or any substantial part thereof; aside from the administrative and organization difficulties thereof, the financial cost is so great that no single newspaper acting alone could sustain it." *Id.* at 13 n.10. The Court observed that "[i]nability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers." *Id.* at 13. Rejecting the contention that other news agencies were available to service nonmember publishers, the Court wrote that "the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from [ ] condemnation. . . ." *Id.* at 17. Elsewhere, the Court dismissed the fact "that AP had not yet achieved a complete monopoly" as "wholly irrelevant." *Id.* at 13. The Sherman Act, the Court wrote, was "specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete." *Id.* at 15. The Court specifically denied that "we reach our conclusion by application of the 'public utility' concept to the newspaper business. . . . We merely hold that arrangements or combinations designed to stifle

competition cannot be immunized by adopting a membership device accomplishing that purpose." *Id.* at 19. The Court affirmed the decree entered below subject to an interpretation requiring AP news "to be furnished to competitors of old [AP] members without discrimination through By-Laws controlling membership, or otherwise." *Id.* at 21. Curiously, the opinion did not cite *Terminal Railroad*; it relied more heavily on boycott authority such as *Eastern States Lumber* and *Fashion Originators' Guild*. (*Terminal Railroad* was relied upon by a concurrence.) Nonetheless, *Associated Press* has been widely regarded as providing "a clear guide" to the application of the Sherman Act to the foreclosure of scarce facilities: "[F]or refusal of entry into an association to constitute illegal restraint of trade there must be some important facility -- sometimes a virtual 'bottleneck' -- in the association's control, such that, by keeping it exclusive to themselves, the members of the association impose a real handicap on would-be competitors. This handicap need not be fatal; the facility need not be 'indispensable': it is enough that the association's exclusive hold on the scarce resource confers significant competitive advantages on members as against outsiders." A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES 68 (2d ed. 1970) (footnote omitted). The principles set forth in *Associated Press* in conjunction with *Terminal Railroad* were rapidly followed in cases involving a tobacco market, *see American Fed'n of Tobacco Growers v. Neal*, 183 F.2d 869 (4th Cir. 1950), and a produce exchange building, *see Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir. 1952).

3. *Silver*

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Supreme Court considered whether the Exchange was liable to a nonmember broker-dealer for injury suffered when the Exchange, pursuant to its rules, ordered members to discontinue private direct telephone wire connections with the nonmember without notice, explanation, or hearing. The Court began its analysis by observing that the challenged conduct plainly would have given rise to per se liability under the Sherman Act, had it occurred in an unregulated context. Citing *Fashion Originators' Guild*, *Associated Press*, *Klor's*, and *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), the Court stated: "[t]he concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market." *Id.* at 347. In light of the institutional characteristics of trading in over-the-counter securities, the Court wrote, a private wire connection was "essential," and denial of access to such connections would substantially hamper an over-the-counter dealer in its crucial endeavors. *Id.* at 348. The Court next turned to whether the Exchange's actions had been exempted from the antitrust laws under the Securities Exchange Act of 1934 or whether the actions might be regarded as justified self-regulation. The Court answered both questions in the negative, *see id.* at 357-67, in part because the lack of adequate procedural safeguards indicated that the Exchange had exceeded the scope of its self-regulatory authority, *id.* at 365. The Court did not specify a remedy, instead remanding the case for further proceedings. *Id.* at 367.

C. Single Firm Bottleneck Monopoly Cases

A third line of cases (also involving substantially fewer decisions than the group boycott line) addresses the circumstances under which competitors may demand compulsory access to a bottleneck monopoly owned and operated by a single firm. The leading decisions through 1980 are reviewed below.

1. *Otter Tail*

The Supreme Court applied an essential facility analysis to a single firm monopoly in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). Otter Tail, a wholesaler and retailer of electric power, distributed at retail to 465 towns in three states (91% of the towns in its service area) under ten- to twenty-year franchises granted by the individual municipalities. Within each municipality, the distribution of electric power was a natural monopoly, and any competition present was "generally between Otter Tail and a prospective or existing municipal system." *Id.* at 370-71. Prospective municipal systems could not purchase wholesale power without access to existing transmission lines. For some of the municipalities in Otter Tail's service area, however, all such lines belonged to Otter Tail, which "refused to sell the new systems energy at wholesale and refused to agree to wheel power from other suppliers of wholesale energy." *Id.* at 371. The Court accepted the district court's determination that Otter Tail had "'a strategic dominance in the transmission of power in most of its service area' and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." *Id.* at 377. The Court also noted that "no engineering factors . . . prevented Otter Tail from selling power at wholesale to those towns that wanted municipal plants or wheeling the power." *Id.* at 378. Relying on *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), and its progeny, *see* 410 U.S. at 377, for the principle that "[u]se of monopoly power 'to destroy threatened competition'" constitutes an attempt to monopolize, the Court affirmed the district court's remedial decree, which enjoined Otter Tail from "[r]efusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in [its service area]" or refusing to use its transmission lines to wheel electric power. *Id.* at 375. Although such a decree would normally burden a court with ongoing responsibilities, one commentary has observed that "[t]he availability of the Federal Power Commission's rate-setting and investigatory authority may have persuaded the *Otter Tail* Court to affirm the issuance of a decree which

under other circumstances might have been too difficult to enforce" because of the price supervision required by an order to sell or wheel power. Note, *Refusals To Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720, 1725 (1974) (footnote omitted). (The ICC similarly had been available following the Court's decree in *Terminal Railroad*.)

2. *Grand Caillou*

In *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *aff'd in part and rev'd in part sub nom. LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966), the Commission ordered five members of a Louisiana family engaged in the production of canned shrimp and in the development and distribution of patented shrimp peeling machinery to cease and desist from "[d]iscriminating between lessees of such machinery by charging higher rental or use rates to any lessee than are charged to any other lessee," *id.* at 870. The record showed that the machinery was leased subject to a fee schedule based the average size of the shrimp processed; the effect was that shrimp canneries in the Northwest were charged twice the average rate as canneries on the Gulf Coast, due to the different characteristics of their respective shrimp harvests. *Id.* at 836-37. Analogizing the Northwest canneries to "a drowning man," the Commission found that the "discriminatory high peeling rate" had no justification and had been the "principal difficulty" that the Northwest canneries faced in competing with the Gulf Coast canneries. During the course of its opinion, the Commission found that the effect of the peeling machinery "was to obsolete hand picking as an economically feasible method of processing in the canning industry. It became absolutely necessary to install and utilize the machines. . . ." *Id.* at 833. The Commission did not cite essential facility cases, however, and its logic, while largely unstated, appears to have been based on a price discrimination theory. A separate opinion by Commissioner Elman relied on *Terminal Railroad* and *Associated Press* for the proposition that firms possessing monopoly power are subject "to some of the obligations of fair and equal treatment borne by publicly regulated utilities." *Id.* at 868. Observing that the respondents' fee structure was "not dictated by efficiency" and "may well result in the destruction of a substantial

segment of the shrimp canning industry," Elman wrote that the "right of a monopolist to exploit his monopoly . . . does not, in my opinion, include the right to destroy or cripple a major segment of industry." *Id.* at 868-69. The *Grand Caillou* opinion has been criticized by one commentary as "show[ing] no awareness of the considerations bearing on the wisdom of requiring an integrated monopolist to deal with his rivals." 3 PHILIP E. AREEDA & DONALD I. TURNER, ANTITRUST LAW ¶ 729d, at 239 (1978).

3. *Hecht*

In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), a group of promoters who had unsuccessfully sought an American Football League franchise for Washington, D.C. brought suit challenging a restrictive covenant in the thirty-year lease pursuant to which the District of Columbia Armory Board leased Robert F. Kennedy Stadium to the Washington Redskins. The covenant at issue provided that "at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins." 570 F.2d at 985 n.2. Among other issues addressed by the court of appeals was the applicability of the essential facility doctrine to RFK Stadium. In holding that the district court had erred in failing to instruct the jury as to the elements of an essential facility in accordance with the promoters' request, the court of appeals observed that:

> To be "essential" a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Necessarily, this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately.

Id. at 992-93 (footnotes omitted). The court held that the district court would have been "substantially correct" to have given the instruction that

> if the jury found (1) that use of RFK stadium was essential to the operation of a professional football team in Washington; (2) that such stadium facilities could not practicably be duplicated by potential competitors; (3) that another team could use RFK stadium in the Redskins' absence without interfering with the Redskins' use; and (4) that the restrictive covenant in the lease prevented equitable sharing of the stadium by potential competitors, then the jury must find the restrictive covenant to constitute a contract in unreasonable restraint of trade.

Id. at 993. The court rejected defendants' argument that the jury should have been permitted to find the restrictive covenant "reasonable": "The garden-variety restrictive covenant does not violate § 1 unless it unreasonably restrains trade; when the restrictive covenant covers an essential facility, however, all possible competition is by definition excluded and the restraint is thus unreasonable *per se* -- provided, of course, that the facility can be shared practically." *Id.* at 993 n.45. This quotation appears partly responsible for the courts' occasional characterization of the essential facility doctrine as a per se rule. *See, e.g.*, *Venture Tech., Inc. v. National Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78,167 (W.D.N.Y. 1981) (jury instruction on essential facility doctrine referred to as a "per se charge"), *rev'd on other grounds*, 685 F.2d 41 (2d Cir. 1982). *But see* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.2f (Supp. 1988) (essential facility doctrine "is not a 'per se' rule in any sense").

II. THE INCOMPLETE CONVERGENCE OF THE THREE LINES

The three lines of cases discussed in the preceding part I -- traditional group boycott cases, joint venture essential facility cases, and single-firm bottleneck monopoly cases -- have long borrowed authority from one another. Beginning in 1980, however, the three lines converged dramatically, so that the legal standards governing group boycotts ancillary to legitimate integration, access to joint venture facilities, and access to single-firm bottlenecks grew largely similar (although some courts still make important distinctions). The discussion below reviews the leading developments since 1980.

A. *MCI Communications*

The opinion in *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), was rendered on appeal from a judgment entered on a jury verdict finding AT&T liable for numerous types of misconduct, including the alleged refusal by AT&T to provide MCI with interconnections to local circuits necessary for MCI to provide telephone customers with its long distance service. In finding that a jury could have concluded that the refusal constituted an act of monopolization, the court of appeals assessed the challenged conduct under the essential facility doctrine. Citing *Hecht*, *Otter Tail*, and *Terminal Railroad*, among other authority, the court wrote:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

708 F.2d at 1132-33. The court's rationale for applying the doctrine to single-firm conduct was that "a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market to another." *Id.* at 1132. Since its holding, *MCI* has provided the most frequently cited formulation of the essential facility doctrine, and it has been widely applied by federal courts. *See, e.g., City of Anaheim v. S. Cal. Edison* Co., 955 F.2d 1373, 1380 (9th Cir. 1992); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991); *Delaware & Hudson Rwy. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990); *McKenzie v. Mercy Hosp. of Independence*, 854 F.2d 365, 369 (10th Cir. 1988); *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976, 983 (9th Cir. 1988); *Flip Side Prods., Inc. v. Jam Prods., Ltd.*, 843 F.2d 1024, 1032 (7th Cir. 1988); *Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501, 1537 (N.D. Ill. 1988). One commentator has generalized the elements of the MCI test to yield the following four elements for "imposing an obligation to make a facility available to competitors":

1. Control of the facility by a monopolist or a group of competitors with monopoly power.

2. The foreclosed competitor's inability practically or reasonably to duplicate the facility or its economic function.

3. The denial of the use of the facility or the imposition of restrictive terms . . . with the consequence of substantial harm to competition in a relevant market in which the monopolist competes (or would be forced to compete) with the plaintiff(s) absent the practice.

4. The absence of a "valid business reason."

William B. Tye, *Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine*, 8 ENERGY L.J. 337, 346 (1987). Tye's fourth element reflects the Supreme Court's analysis in *Aspen*, *infra*, which appears to have extended *MCI* is narrower inquiry into the feasibility of providing access.

B. *Aspen*

The Tenth Circuit and Supreme Court opinions in *Aspen Highlands Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985), were rendered on appeal from a judgment entered on a jury verdict finding the operator of three downhill skiing facilities at Aspen liable under a monopolization theory for discontinuing participation in a joint marketing program (offering multiday, multimountain lift tickets) with the operator of a fourth facility. The defendant assigned error in the denial of its motions for a directed verdict and for judgment n.o.v. The two opinions on appeal considered the circumstances under which a firm with monopoly power must deal with a competitor.

1. The Tenth Circuit Opinion

The court of appeals affirmed based on "two conceptually similar lines of cases which impose a duty to deal upon a monopolist." 738 F.2d at 1519 (quoting *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 855 (6th Cir. 1979). First, citing *Terminal Railroad* and *Gamco* and adopting the

elements identified in *MCI* as necessary to establish liability under the essential facility doctrine, the court concluded that proof sufficient to sustain a jury verdict as to each element had been presented. 738 F.2d at 1520-21. Second, the court held that the plaintiff had presented sufficient evidence for the jury to conclude that the defendant acted with the intent to create or maintain a monopoly. *Id*. at 1521-22. As the court explained,

> in various contexts courts have employed an intent test under which a "business is free to deal with whomever it pleases so long as it has no 'purpose to create or maintain a monopoly.'" *Byars, supra*, 609 F.2d at 855 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see also MCI, supra*, 708 F.2d at 1148. "These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility is 'essential.'" *MCI, supra*, 708 F.2d at 1148 (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (newspaper publisher enjoined from refusing to accept advertisements from customers who advertised with competing radio station); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (permissible for jury to infer that defendant's refusal to sell to plaintiffs was in pursuance of purpose to monopolize)).

738 F.2d at 1519 (citations omitted in part). The court

> decline[d] to adopt a narrow rule that would immunize an *unintegrated* monopolist from antitrust liability for refusing a competitor access to an essential facility. . . . Vertical integration is not essential to finding a violation of the antitrust laws for refusal to deal under an intent test. We believe that it is also apparent that no bright line can be drawn between the bottleneck and intent cases.

Id. at 1518 n.11 (emphasis added). The court explained that the overlap of the essential facility doctrine and the intent test is "apparent upon examination" of *Otter Tail*. *Id*. at 1520 n.13 (quoting *Byars*, 609 F.2d at 857). The court also identified two other cases "discussing a duty to deal

but not distinguishing between the essential facilities doctrine and the intent test," 738 F.2d at 1520 n.13 (citing *Home Placement Serv. v. Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982); *Mid-Texas Communs. Sys., Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1387-88 & n.12 (5th Cir.) ("While in theory there exist differences between the two approaches, in practice the theories are similar")).

2. The Supreme Court Opinion

The Supreme Court affirmed the court of appeals based solely on that court's second theory, the intent test. The Court specifically found "it unnecessary to consider the possible relevance of the 'essential facilities' doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose." 472 U.S. at 611 n.44. Nonetheless, in assessing whether the defendant had "any purpose to create or maintain a monopoly," *id.* at 602 (quoting *Lorain Journal*), the Court observed that the challenged conduct, while "an important change in the character of the market," was not necessarily anticompetitive or exclusionary, *id.* at 604. "The question whether (defendant's) conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [plaintiff]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605. The Court proceeded to observe that the challenged conduct reduced consumer convenience and flexibility, impaired the plaintiff's ability to compete (in part because "the development of a new distribution system . . . proved prohibitively expensive"), and lacked business justification. *Id.* at 605-10. The various factors identified by the Court likely would have been adequate to make out the four essential facility elements identified in *MCI*.

3. Although affirmed on appeal, the district court's jury instructions have been sharply criticized by commentators. Those instructions included the following interrogatory: "Do you find by a preponderance of the evidence that the defendants willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for

> anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident?" 472 U.S. at 597 n.21. Areeda and Hovenkamp observe that these instructions might condemn "[v]irtually any act of a monopolist" and, through a series of illustrative examples, suggest that certain refusals by a monopolist to deal with competitors should not be condemned, even if motivated in part by an "anticompetitive or exclusionary" purpose. *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.1g (Supp. 1988).

C. *Northwest Wholesale*

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Supreme Court considered the application of group boycott doctrine to the expulsion of a member from a wholesale purchasing cooperative without notice, explanation, or hearing. The case was presented on appeal from the Ninth Circuit, which had relied on *Silver*, *supra* part I.B.3, in holding that expulsion from a cooperative venture was per se unlawful unless adequate procedural safeguards were afforded. *See* 472 U.S. at 291-92. The Court reversed. It distinguished *Silver*'s characterization of collective refusal to deal as per se unlawful in the absence of implied repeal on the ground that "the New York Stock Exchange occupied such a dominant position in the securities trading markets that the boycott would devastate the nonmember." *Id.* at 291. The Court also limited the significance attached to adequate procedural protections in *Silver* to circumstances impliedly repealing the antitrust laws to accommodate an alternative regulatory scheme. *Id.* at 292-93. The Court explained:

> "Group boycotts" are often listed among the classes of economic activity that merit per se invalidation under § 1. Exactly what types of activity fall within the forbidden category is, however, far from certain. . . .
>
> Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive

> struggle." In these cases, the boycott often cut[s] off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market.

Id. at 293-94 (citations omitted). The Court also observed that the act of expulsion did not necessarily imply anticompetitive purpose or effect:

> Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. . . . Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have anticompetitive effect is not warranted. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis.

Id. at 296-97 (citations and footnote omitted). The Court did note, however, that "a concerted refusal to deal . . . on substantially equal terms . . . might justify *per se* invalidation if it placed a competing firm at a severe competitive disadvantage." *Id.* at 295-96 n.6. The Court also noted that a rule-of-reason analysis might appropriately inquire into the cooperative's motive for expelling a member: "If [the cooperative's] action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices, an inference of anticompetitive animus might be appropriate." *Id.* at 296 n.7.

D. *Kodak*

In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Supreme Court considered a manufacturer's policies limiting the availability of replacement parts for its equipment to independent service organizations (ISOs), thus hindering the ISOs' ability to compete with the manufacturer in servicing its equipment. The Court affirmed a decision of the Ninth Circuit, which had reversed and remanded a district court's entry of summary judgment for the manufacturer after truncated discovery. Although the case focused largely on the ISOs' allegations that Kodak's practices constituted an unlawful tying arrangement in violation of Section 1 of the Sherman Act,

the Court also considered allegations of monopolization and attempted monopolization in violation of Section 2. As to the first element of a monopolization claim, possession of monopoly power, the Court concluded that the ISOs' "evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market," *id.* at 481, was sufficient to survive summary judgment. The Court disagreed with Kodak's contention "that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. . . . Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed only of those companies that service Kodak machines." *Id.* at 481-82 (citation omitted). As to the second element of a monopolization claim, willful use of monopoly power, the Court again concluded that the ISOs had presented sufficient evidence. Citing *Aspen Skiing* among other authority, the Court wrote:

> If Kodak adopted its parts and service policies as part of a scheme of willful acquisition of monopoly power, it will have violated § 2.
>
> . . . [R]espondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether "valid business reasons" can explain Kodak's actions.

Id. at 483 (citations and notes omitted). Although Kodak had identified three putative justifications for its actions, factual questions about the validity and sufficiency of each made summary judgment inappropriate. *Id.* As to the first two justifications -- (1) promotion of interbrand competition by allowing Kodak to enhance its quality of service and (2) improvement of asset management by reducing Kodak's inventory costs -- the Court found triable issues of fact. *Id.* at 483-85. As to the third justification -- prevention of free-riding on Kodak's capital investment in equipment, parts, and service -- the Court was harsher:

> Kodak does not dispute that respondents invest substantially in the service market, with training of repair

> workers and investment in parts inventory. Instead, according to Kodak, the ISO's are free-riding because they have failed to enter the equipment and parts market. This understanding of free-riding has no support in our case law.

Id. at 485 (note omitted). For a free-riding argument to be applicable, the Court wrote, "the ISO's would have to be relying on Kodak's investment in the service market; that, however, is not Kodak's argument." *Id.* at 485 n.33.

E. Recent Cases Distinguishing Between Coordinated and Unilateral Action

Although *MCI, Northwest Wholesale*, and their progeny have unified the application of the essential facility doctrine in single firm and multiple firm settings, some recent cases make clear that courts do still distinguish between unilateral and coordinated actions even in essential facility cases.

1. In *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), rival airlines claimed that American Airlines and United Airlines each individually violated Section 2 by denying access to their respective computer reservation systems. The court of appeals affirmed the summary judgment in favor of American and United. The court made clear that the antitrust analysis of unilateral conduct is fundamentally distinct from that of concerted actions by multiple firms. "*Griffith, Associated Press*, and *Terminal Railroad* are of limited value because each case involved a *combination* in restraint of trade, not single firm conduct. Under the Sherman Act, combinations and individual firms are treated quite differently." *Id.* at 542. The court continued by quoting Areeda:

> > [*Associated Press*] cannot automatically govern unilateral denial of an essential facility for several reasons. First, and most obvious, concerted action is exceptional, whereas *unilateral* action is omnipresent. Innumerable firms engage in unilateral action every day. We have to be very wary about examining the decisions of each of those firms in our economy . . . . Second, concerted exclusion is much easier to remedy, particularly when an outsider, who is willing to invest on an equal basis, seeks admission at the time the joint venture is created. . . . Third, admission to a joint

> venture is a one-time remedy that does not require [the exertion of] day-to-day control [by the courts].

Id. (quoting Philip E. Areeda, *Essential Facilities: An Epithet In Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 844-45 (1990)) (emphasis added by court). The court characterized *Otter Tail* as the "sole Supreme Court case involving a single firm's control of an 'essential facility'" and argued that its application should be limited because it "was an extreme case" in which "[g]iven the difficulty of duplicating Otter Tail's facilities, [the] refusal did more than merely impose some handicap on potential competitors; it eliminated all possibility of competition in the downstream market. *Id.* at 543.

2. In *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), the court found that a monopolist manufacturer's unilateral refusal to license diagnostic software to an ISO was not unlawful. Distinguishing between joint and single-firm conduct, the court wrote: "Despite the theoretical possibility, there have been relatively few cases in which a unilateral refusal to deal has formed the basis of a successful Section 2 claim. Several of the cases commonly cited for a supposed duty to deal were actually cases of joint conduct in which some competitors joined to frustrate others." *Id.* at 1183 (citing *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912)). The court identified *Otter Tail* as the case prior to *Aspen Skiing* "that probably came closest to condemning a true unilateral refusal to deal," *id.* at 1183, but it distinguished *Otter Tail* on grounds that the capital-intensive public utility facility at issue in the case "could not effectively be duplicated and occupied a distinct separate market," *id.*, and that "the Supreme Court laid considerable emphasis on supported findings in the district court 'that Otter Tail's refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position'," *id.* (quoting *Otter Tail*, 410 U.S. at 378). As to *Aspen Skiing*, the court offered two alternative readings -- "It is not entirely clear whether the Court in *Aspen Skiing* merely intended to create a category of refusal-to-deal cases different from the essential facilities category or whether the Court was inviting the application of more general principles of antitrust analysis to unilateral refusals to

deal." *Id.* Based on the parties' positions, the court assumed that *Aspen* did not create a separate category of refusal-to-deal cases.

F. Effects of the Convergence

1. *Northwest Wholesale* has resulted in the substantial unification of essential facility doctrine and group boycott doctrine, at least as to "boycotts" ancillary to legitimate integration. Numerous courts have read *Northwest Wholesale* to mandate rule-of-reason analysis of alleged boycotts unless the boycotting party "possesses market power or exclusive access to an element essential to effective competition." *See, e.g.*, *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1030 (9th Cir. 1988); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii*, 810 F.2d 869, 878 (9th Cir. 1987); *Richards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1333 (9th Cir. 1986); *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 355 (5th Cir. 1986); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679, 693 (E.D. Mich. 1988); *American Floral Servs. v. Florists Transworld Delivery Ass'n*, 633 F. Supp. 201, 221-22 (N.D. Ill. 1986); *cf. Rothery Storage & Van Co. v. Allied Van Lines*, 792 F.2d 210 (D.C. Cir. 1986) (stating that *Northwest Wholesale* required that group boycotts ancillary to economic integration be judged according to purpose and effect).

   a. In *SCFC ILC, Inc. v. Visa USA, Inc.,* the court observed that the Supreme Court has rejected per se treatment of joint venture cases consistently. 36 F.3d 958, 964 (10th Cir. 1994) (citing *Broadcast Music, Inc,. v. Columbia Broad., Inc.*, 441 U.S. 1 (1979) and *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), in addition to *Northwest Wholesale*). "[T]he [Supreme] Court directs us instead to look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation; whether it has the effect of decreasing output; and whether it affects price." *Id.*

   b. Some courts have held that even if market power or exclusive access is involved, group boycotts are properly analyzed under the rule of reason. In *Carleton*

v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926, 933 (D. Vt. 1991), the court held that even if a group boycott (expulsion from a Dairy Herd Improvement Association) denies access to "essential facilities" (official lactation testing and record keeping) "*per se* invalidation [is not justified] where other 'surrounding circumstances' suggest, as here, that the challenged conduct should be weighed under the rule of reason." The court observed that *Northwest Wholesale* "says only the 'market power or exclusive' access is a necessary precondition before expulsion from a cooperative should be deemed per se unreasonable. Neither market power nor exclusive access is a sufficient condition. . . ." *Id.* *See also Wilk v. American Med. Ass'n*, 895 F.2d 352, 359 (7th Cir. 1990) (using a rule of reason analysis to evaluate a group boycott in the context of a learned profession where the "nature and extent of the restraint's anticompetitive effect was too uncertain to warrant *per se* treatment"). *But see Wigod v. Chicago Mercantile Exch.*, 981 F.2d 1510, 1517 (7th Cir. 1992) (holding a per se analysis was appropriate in group boycott case where the defendant "is a monopolistic market that wields great control over who may be a member").

c. One unintended consequence of *Northwest Wholesale* may be increased (or at least newly recognized) exposure facing limited-access joint ventures that are not essential, but that nonetheless possess market power. Consider a joint venture of narrow scope among one-third of the participants in a well-defined market. The venture probably is not essential, for it presumably could be duplicated with membership drawn from the other two-thirds of market participants. Yet its share might be sufficiently great to support a finding of market power. Under the "market power or exclusive access" standard set forth in *Northwest Wholesale*, a court might characterize the exclusion of a competitor from the venture as a per se unlawful group boycott. Such a result would be unfortunate indeed. Joint ventures often seek to restrict participation for legitimate competitive reasons. Where efficient scale can be attained with only limited

industry participation, such restrictions are desirable because they enable the development of multiple, competing ventures and are more likely to yield an efficient market outcome. A rule requiring that competitors be granted access to a non-essential venture would have at least three adverse policy implications. First, it might undermine the development of multiple competing ventures, since competitors would have the incentive to free ride on an existing successful venture, rather than to suffer the risk associated with organizing their own. Second, in markets with a limited number of optimally sized ventures, the ventures' members might lack adequate incentive to compete vigorously; for if they were to succeed and acquire market power, they would be compelled to grant competitors access to the fruits of their efforts. Third, where an optimally sized venture would involve a large fraction of market participants, members of a particular venture might choose to operate at a suboptimal scale for fear that an efficiently sized venture would lead to compulsory access.

d. The severity of the foregoing policy dilemma depends largely on the nature of the per se condemnation still sanctioned by *Northwest Wholesale*. Notwithstanding occasional perceptions to the contrary, a per se standard and a rule of reason standard are not analytically distinct analyses, but rather alternative points along a spectrum. *See* Timothy Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859 (1989). The term "per se unlawful" is best understood to mean that the reasonableness inquiry may be truncated without completely analyzing all justifications for the challenged conduct or balancing the justifications against the likely anticompetitive effects. *Id*. Yet how early the analytical process may be truncated in a particular instance is far from settled. *See, e.g.*, 7 PHILIP E. AREEDA, ANTITRUST LAW ch. 15 (1986). In some decisions "per se unlawful" has meant that the court is not permitted to entertain or assess the defendant's proffered justifications for the challenged conduct, regardless of whether the defendant has market power. *Id*. (This is clearly not the meaning in *Northwest*

Wholesale, which requires a market power showing before a per se characterization may be invoked. *See Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1030 n.9 (9th Cir. 1988) (noting that *Northwest Wholesale* "seems to suggest that the facts be developed as in a rule of reason case . . . in order to determine whether the conduct is per se illegal").) In other decisions the term has meant that the court is not required to entertain the defendant's justifications if the plaintiff has first established that the defendant has market power or perhaps that the challenged conduct had an anticompetitive effect. 7 PHILIP E. AREEDA, ANTITRUST LAW ch. 15 (1986). In still other decisions the term has meant that the court has considered the defendant's justifications, but has not found them convincing and therefore is not required to balance the procompetitive aspects of the justifications against the anticompetitive aspects of the challenged conduct. *Id.*

2. *Kodak* has resulted in the substantial convergence of essential facility doctrine and tying arrangement doctrine, at least in the context of refusals to deal in a critical component that the supplier markets with other products. Where an "essential facility" is marketed as a component of a product bundle, competing suppliers of the other components may seek access not under an essential facility theory, but under a tying arrangement theory.

    a. *Kodak* revives a line of cases that traces, ironically, to conduct involving the same defendant a half-century earlier. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), the Supreme Court upheld a finding of monopolization arising from Kodak's refusal to sell photographic supplies at wholesale prices to a retailer that had refused to sell its business to Kodak, which at the time was seeking to integrate into retail distribution. The Court held that the refusal to deal was "in pursuance of a purpose to monopolize." *Id.* at 375. The line of cases continued with *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), in which the Court ruled that a newspaper publisher violated Section 2 by refusing to accept advertisements from customers that also advertised on

radio stations, which competed with the newspaper for advertising revenues. The 1992 *Kodak (ITS)* decision does not cite either *Southern Photo* or *Lorain Journal*, but it relies on *Aspen Skiing*, which in turn relies heavily on *Lorain Journal*. For a thoughtful discussion of *Southern Photo* and *Lorain Journal*, see Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749 (1995).

b. The use of a tying theory as an access mechanism in lieu of an essential facility theory is illustrated by the pending action by the U.S. Department of Justice against Microsoft Corp. The Department alleges that Microsoft's bundling of its Internet browser with its operating system and that its contractual provisions barring OEMs from offering competing browsers more prominently than the Microsoft browser are unlawful practices. Complaint ¶¶ 130-41, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998). The Department seeks to enjoin Microsoft from bundling its browser with its operating system, unless it also bundles the most current version of the most popular competing browser, Netscape, and permits OEMs to delete the Microsoft browser. Prayer for Relief ¶ 2.e. Although the Department contends that Microsoft has monopoly power in operating systems, it does not characterize the Microsoft operating system as an essential facility, and its complaint does not rely on the essential facility doctrine. Instead, the Department frames its allegations in terms of mainstream exclusive dealing, tying, monopolization, and attempted monopolization theories.

3. When courts do not distinguish between the standards governing compulsory access to joint venture essential facilities and those governing compulsory access to single-firm bottleneck monopolies, they are able to defer resolution of an especially vexing issue: when should an enterprise owned by many members of an industry be treated as a single entity for antitrust purposes? (Corporations, after all, are not typically treated as conspiracies among their shareholders. *But cf. Bascom Food Prods. Corp. v. Reese*

Finer Foods, Inc., 715 F. Supp. 616, 632 (D.N.J. 1989) (analyzing a food distribution corporation's refusal to supply a grocer as a horizontal group boycott among the grocers who were shareholders in the corporation). Little authority addresses the issue directly. For one thoughtful treatment, see 7 PHILIP E. AREEDA, ANTITRUST LAW ¶ 1478, at 349 (1986) ("The 'single-entity' answer seems appropriate for venture activities not governing the members' conduct, while the 'continuing conspiracy' answer seems wise for rule-making activities and for those developments which could make continued collaboration unreasonable for the future"). To the extent that an enterprise may fairly be characterized as a joint venture rather than a single entity, however, there is some question as to whether it *ought* to be subject to the same compulsory access standards as a single-firm bottleneck monopoly. *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.1d, at 661 (Supp. 1988) ("Without necessarily precluding the imposition of a duty to deal upon a monopolist in some circumstances, there are several reasons for doing so less readily than in the combination cases like *Terminal* and *AP*").

4. The various policy implications of *MCI*, *Aspen*, and *Northwest Wholesale* have been debated at length in the literature. *See, e.g.*, Allen Kezsbom & Alan Goldman, *Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1; Philip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989); William Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as an Illustration*, 58 ANTITRUST L.J. 855 (1989); Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance after Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015 (1986); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986); James R. Ratner, *Should There Be an Essential Facility Doctrine?*, 21 U. CAL. DAVIS L. REV. 327 (1988); Arthur H. Travers, Jr., *Does a Monopolist Have a Duty to Deal with Its Rivals? Some Thoughts on the Aspen Skiing-Case*, 57 U. COLO. L. REV. 727 (1986); William B. Tye, *Competitive Access: A Comparative Industry Approach to the*

Essential Facility Doctrine, 8 ENERGY L.J. 337 (1987); Spencer W. Waller, *The "New" Law of Monopolization: An Examination of MCI Communications Corp. v. American Telephone & Telegraph Co.*, 32 DE PAUL L. REV. 595 (1983); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987); Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 VA. L. REV. 1069 (1988); Casenote, *The Grinnell Test of Monopolization Sounds a False Alarm: Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 28 B.C. L. Rev. 415 (1987); *see also* Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441 (1983).

III. ESSENTIALITY ISSUES

This part of the outline considers several questions that relate to whether a facility may be considered essential. First, is the facility part of a category that is so competitively significant that denial of access inflicts a severe handicap? Second, is the facility sufficiently dominant in the provision of its category of service so as to be viewed as unique, at least in a static sense? Third, can the facility be practically duplicated, at least to a degree that can be viewed as a tolerable check on the exercise of its dominance? While not the same, these questions are akin to the more conventional antitrust issues of market definition, market share (or perhaps short-run market power) measurement, and entry assessment. And the questions are related to each other, in that they all inquire into sources of limitation on the market power of any particular facility.

A. Availability of Substitutes

1. In order to gain access to an essential facility, the plaintiff must show more than competitive disadvantage, the plaintiff must demonstrate that denial of access is a "severe handicap" to competition. Courts hold that where a plaintiff is already competing successfully without access there is no reason to compel access.

    a. A facility cannot be essential if alternative types of facilities available to an excluded competitor would enable that competitor to compete effectively. *See*

SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 972 (10th Cir. 1994) (credit card association not essential where plaintiff already competes vigorously in the market without membership); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539 (4th Cir. 1991) (defendant's offer to provide railroad service over alternative route could be a reasonable alternative); *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991) (pipeline was not an essential facility where competitors could connect with other pipelines); *McKenzie v. Mercy Hosp. of Independence, Kan.*, 854 F.2d 365, 370-71 (10th Cir. 1988) (hospital facilities not essential to physician's practice); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987) (information services "not a competitive advantage"); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986) (list containing names of competing suppliers not needed in order for new supplier to inform consumers of its existence); *Arbitron v. Phoenix Broad. Corp.*, 1997-2 Trade Cas. (CCH) ¶ 71,957, at 80,667 (S.D.N.Y. 1997) (facility not "essential if most market participants do business without it"); *Futurevision Cable Sys. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 774-75 (S.D. Miss. 1992) (programming not essential where plaintiff had successfully entered the relevant markets and obtained high market shares even without the programming sought); *Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501, 1539 (N.D. Ill. 1988) (concert and artist program not essential to effective competition in sale of concert grand pianos); *Beverage Management v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1157 (S.D. Ohio 1986) (retailer's feature advertisements "not the *only* way for a soft drink bottler . . . to arouse interest in its products"); *Florida Cities v. Florida Power & Light Co.*, 525 F. Supp. 1000, 1004-05 (S.D. Fla. 1981) (access to nuclear power facilities not essential since other types of electricity production were available to plaintiff); *cf. Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 665 F. Supp. 1493, 1537 (S.D. Fla. 1987) (basis for inferring that natural gas, "as opposed to any type of gas," was essential), *aff'd*, No. 87-6108 (11th Cir. Aug. 10, 1989).

b. In *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990), the court held that a nutritional supplement producer failed to demonstrate that defendant-competitor's magazines were facilities essential to the nutritional supplement business. Adopting a narrow construction of the word "essential," the court stated:

> A leading antitrust commentator would limit the analysis to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." Most of the successful essential facility claims fall within the categories stated by this commentator. In cases finding liability in other categories, however, the facility in question was more than dominant; it was effectively the only one in town.

Id. at 569 (quoting PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 736.2 (Supp. 1988)) (citations omitted). Where plaintiff's products were "not only continuing to grow more profitable but were continuing to increase their market share relative to [defendant]'s products," a "severe handicap" required to compel access to an essential facility was not established. *Id.* at 569.

2. As a policy matter, courts and commentators have recognized that the invocation of the essential facility doctrine must be limited in order to preserve proper competitive incentives and to discourage "free riders." In *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) (J. Posner), the court found that compulsory access to a physician-owned clinic was not warranted for an HMO where the clinic "[did] not control 100 percent -- or even 50 percent -- of any properly defined market." The court criticized the proliferation of the essential facility doctrine and warned that *Terminal Railroad* and its progeny should not be read to require every monopolist to share its facilities. *Id*. at 1412. Judge Posner wrote:

> Had the terminal facilities been owned by a firm unaffiliated with any railroad, the firm could have charged whatever prices it wanted, including prices that discriminated against some of the users (monopolists frequently price discriminate), because the antitrust laws do not regulate the prices of natural monopolists. A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of "monopolizing" in violation of the Sherman Act, and can therefore charge any price that it wants, for the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute.
>
> And the charging of a high price is, so far as potential competitors are concerned, an attracting rather than an excluding practice. Consumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors, as required by *Terminal Railroad Ass'n*. . . .

Id. at 1412-13 (citations omitted). *See also* authority cited at *supra* introduction and part II.F.4 and *infra* parts IV.C.2-3. In a pre-*Kodak* ISO case, the Fourth Circuit held that a manufacturer may legally refuse to sell parts to an ISO from its local depot. *Abcor Corp. v. AM Int'l Inc.*, 916 F.2d 924, 929-30 (4th Cir. 1990). The court found that the manufacturer's interest in preventing "free riding" on its inventory program was a legitimate justification for the restraint. The court noted that the parts were still available to the ISO in a remote location. *But cf. Kodak, supra* part II.D (rejecting prevention of free-riding as justification).

3. Although decisions applying the essential facility doctrine seldom undertake express, formal analyses of market definition, certain authority supports the proposition that product and geographic markets in which the plaintiff competes must be defined before the court can properly assess whether access to a facility is essential to the plaintiff's competitive position. *See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995); *Consul. Ltd. v. Transco Energy Co.*, 805 F.2d 490, 493-94 & n.11 (4th Cir. 1986); *Laurel Sand &*

Gravel, Inc. v. CSX Transp., Inc., 704 F. Supp. 1309, 1323 (D. Md. 1989) (market definition issue could not be disposed of on summary judgment), *aff'd*, 924 F.2d 539 (4th Cir. 1991); *City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517, 1531-32 (D. Kan. 1988) ("relevant market" must be proven in every essential facility case); *cf. United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1372 & n.39 (5th Cir. 1980) (market definition necessary, but may be resolved through truncated analysis).

B. Assessment of Dominance

Even if a competitor would be severely handicapped by a denial of access to a given facility, it cannot compel access to the facility unless the facility or the firm that controls the facility was sufficiently dominant to warrant antitrust intervention.

1. A plaintiff must present evidence that the particular facility to which it seeks access is the only one that would permit it to compete without a "severe handicap." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977) (stadium sought was only stadium in D.C. metropolitan area suitable for exhibition of professional football games). *See Twin Lab. v. Weider Health & Fitness*, 900 F.2d 566, 568-70 (2d Cir. 1990) (advertisement in muscle magazines not essential for nutritional supplement); *Flip Side Prod., Inc. v. Jam Prod., Ltd.*, 843 F.2d 1024, 1033-34 (7th Cir. 1988) (arena-level facility not essential for promotion of concerts since alternative facility available); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986) (stadium sought was only stadium in Chicago area suitable for exhibition of professional basketball); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377-78 (7th Cir. 1986) (no right to promotional assistance from competitor's salesmen); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373-74 (5th Cir. 1980) (evaluating competitive impact of broker's exclusion from multiple listing service); *Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.*, 846 F. Supp. 488, 498 (W.D. Va. 1994) (denial of access must "inflict[] a 'severe handicap' that threaten[s] to eliminate competition in the market"); *Registered Physical Therapists v. Intermountain Health Care*, 1988-2 Trade Cas. (CCH) ¶ 68,233, at 59,486-87 (D. Utah 1988) (office location in

medical tower not essential for physical therapists to compete); *Interface Group., Inc. v. Gordon Publications, Inc.*, 562 F. Supp. 1235, 124243 (D. Mass. 1983) (trade show not essential facility "given that there are many other shows"); *Robinson v. Magovern*, 521 F. Supp. 842, 913 (W.D. Pa. 1981) (surgical facilities available at five other hospitals located in sixteen-county geographic market), *aff'd*, 688 F.2d 824 (3d Cir. 1982); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973) (suspension from golf association was "tantamount to total exclusion from the market of professional golf").

2. The facility need not be "indispensable" to be essential. *Hecht*, 570 F.2d at 992; *Fishman*, 807 F.2d at 539; *Intergraph Corp. v. Intel Corp.*, No. CV-97-N-3023-NE, 1998 WL 180606, at *18 (N.D. Ala. April 10, 1998); *TCA Bldg. Co. v. Northwestern Resources* Co., 873 F. Supp 29, 39 (S.D. Tex. 1995); *see Associated Press v. United States*, 326 U.S. 1, 18 (1945) (rejecting "indispensability" test). *But cf. Colonial Penn Group, Inc. v. American Ass'n of Retired Persons*, 698 F. Supp. 69, 73 (E.D. Pa. 1988) ("facility is only essential where it is vital to competitive viability").
3. The Seventh Circuit has held that in the absence of collusion, a single alternative facility under the control of a competitor of the defendant is sufficient to preclude a finding of essentiality, even if the plaintiff does not have access to the alternative facility. *Flip Side Prod.*, 843 F.2d at 1034. *But see Associated Press*, 326 U.S. at 17 (existence of other facilities does not save exclusion from condemnation). *Flip Side Productions* and *Associated Press* may be reconcilable: in *Flip Side Productions* the excluded competitor would have been capable of using only one facility at a time, whereas in *Associated Press* the excluded competitors would have benefitted from using multiple news agencies simultaneously.

4. One court concluded that "[a] facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) (airline's control of one reservation system posed no danger of airline monopolizing market for air transportation); *see also In re*

Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1455 (C.D. Cal. 1988). *Cf. MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983) ("monopolist's control . . . can extend monopoly power from one stage of production to another"); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.* 704 F. Supp. 1309, 1323 (D. Md. 1989) (may require monopolist to transact business with another firm only if "purpose and effect of (denying access) is to maintain or extend its monopoly"), *aff'd*, 924 F.2d 539 (4th Cir. 1991). The *Alaska Airlines* court also observed that *MCI* "seem[s] to contemplate a second condition that must be satisfied for a facility to be considered 'essential' in addition to the power to eliminate competition: The power to eliminate competition must not be momentary, but must be at least relatively permanent." 948 F.2d at 544 n.11.

C. Feasibility of Duplication

1. Under the standard formulation of the elements of the essential facility doctrine, the plaintiff must also show that duplication of the facility would be "economically infeasible." *Hecht v. Pro Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977). In *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), the court found that the defendant's pipeline was not an essential facility because competitors could connect with other pipelines or construct new pipelines. The court recognized that in some cases, firms are found liable for monopolization by denying access to a facility essential to competitors. *Id.* at 1482. Citing *MCI*, the court stated that "[i]n essential facilities cases, however, liability hinges on the feasibility of competitors developing competing facilities and of the owner providing access to the facility." *Id. See Twin Lab. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) ("[a]s the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible"); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir.) (not "economically feasible" for long distance service competitor to duplicate local distribution facilities); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 540 (7th Cir. 1986)

(stadium not duplicable without unreasonable expenditure in light of transaction to be facilitated); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1521 (10th Cir. 1984) (difficulty of developing another ski area in Aspen), *aff'd on other grounds*, 472 U.S. 585 (1985); *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484, 487 (1st Cir.) (additional expense of developing and using alternative site would "extract a monopolist's advantage"); *American Fed'n of Tobacco Growers v. Neal*, 183 F.2d 869, 871 (4th Cir. 1950) (plaintiff unable to conduct independent tobacco auctions in its own warehouse); *TCA Bldg. Co. v. Northwestern Resources Co.*, 873 F. Supp. 29, 39 (S.D. Tex. 1995) (private roads not essential for marketing lignite coal where public highways available); *cf. Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501, 1540-41 (N.D. Ill. 1988) (piano manufacturer could develop its own resource comparable to technicians employed by dealers of a competitor).

2. One commentary has proposed: "The test [of feasibility of duplication] should be whether duplication of the facility is a standard cost of entry for the particular market and line of business -- that is, the customary start-up costs for the endeavor and locale." Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441, 465 (1983) (footnote omitted). For example, the cost of building a new stadium is not one of the customary start-up costs for the promoter of a professional football team. *Id.* Another commentary observes that an assessment of feasibility of duplication raises three major issues: (i) barriers to entry, (ii) economies of scale, and (iii) magnitude of sunk costs. William E. Tye, *Competitive Access: A Comparative Industry Approach to the Essential Facility* Doctrine, 8 ENERGY L.J. 337, 363 (1987). (Other commentators might subsume scale economies and sunk costs under the broader category of entry barriers.)

IV. ACCESS ISSUES

This part of the outline considers several questions that relate to the circumstances compulsory access is warranted to a facility, assuming that the facility has been characterized as essential for

certain purposes. First, what limitations, if any, govern the scope of the classes that may legitimately seek access? Second, under what terms must access be provided? Third, what justifications, if any, may be advanced as a basis for denying access?

A. Scope of Classes Permitted Mandatory Access

1. Access to an essential facility need not be provided to one who "is not an actual or potential competitor" of the combination or monopolist in control of the facility. *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987); *see Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976, 983 (9th Cir. 1988); *Garshman v. Universal Resources Holding Inc.*, 824 F.2d 223, 230 (3d Cir. 1987) ; *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376-77 (7th Cir. 1986); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 926-27 (2d Cir. 1980); *cf. Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 787 (3d Cir. 1983) (admitting Memphis football team to league would not result in additional competition). *But see Intergraph Corp. v. Intel Corp.*, No. CV-97-N-3023-NE, 1998 WL 180606, at *18-*19 (N.D. Ala. April 10, 1998) (compulsory access granted to non-competitor customer).

2. Although the plaintiff must compete with the defendant in some sense, this standard is often applied loosely. In *Sunshine Cellular v. Vanguard Cellular Systems*, 810 F. Supp. 486, 498 (S.D.N.Y. 1992), the court denied the defendant's motion to dismiss finding that a cellular telephone service provider had properly alleged an essential facility claim against an adjacent provider who refused to enter into a roaming agreement. The court recognized that the parties did not provide cellular service in the same geographic area but found that plaintiff's claim was still valid. *Id.* "Although it is true that plaintiff and defendant must be 'competitors' for defendant's act to be considered anticompetitive, the parties do not have to be engaged in head-to-head competition." *Id.* "[Plaintiff] and [defendant] are 'competitors' because they are in the same line of business, and [defendant]'s alleged refusal to deal or denial of an essential facility is for the purpose of enhancing [defendant]'s power in the relevant market of providing

cellular service in [the defendant's geographic service area]. *Id.*; *see also Venture Tech., Inc. v. National Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78,169 (W.D.N.Y. 1981) (essential facility doctrine applies even if controller of facility is not "in direct competition with the person being excluded"), *rev'd on other grounds*, 685 F.2d 41 (2d Cir. 1982); *cf. City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517, 1532-33 (D. Kan. 1988) (finding of "some degree" of competition for direct sale customers sufficient).

3. In *Intergraph Corp. v. Intel Corp.*, No. CV-97-N-3023-NE, 1998 WL 180606, at *18-*19 (N.D. Ala. April 10, 1998), the court granted a preliminary injunction forcing Intel (a monopolist computer chip maker) to supply its chips and essential technical information to Intergraph (a computer maker who purchased chips from Intel). In extending the availability of the essential facilities doctrine from competitors to consumers the court noted that "[c]ourts have held that the antitrust laws protect customers and purchasers in cases when a monopolist refuses to deal in order to control a downstream market or frustrate litigation." *Id.* at *18 (citing *Image Technical Serv. v. Eastman Kodak Co.*, 125 F.3d 1195, 1211 (9th Cir. 1997), and *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 726 (3d Cir. 1962)). "The antitrust laws impose on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms." *Id.* Compulsory access was warranted "because [the chips] are not available from alternative source and cannot feasibly be duplicated, and because competitors cannot effectively compete in the relevant markets without access to them. Moreover, Intel has no legitimate business reason to refuse to deal with Intergraph. Intergraph has been a loyal and beneficial customer of Intel." *Id.* at *19.

B. Terms of Access

1. If the defendant has offered the plaintiff access at a particular price, the plaintiff must show that the price offered was "unreasonable and amounted to a denial of access." *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.* 704 F. Supp. 1309, 1323 (D. Md. 1989) (rate reasonable in comparison with variable cost figures), *aff'd*, 924 F.2d 539

(4th Cir. 1991); *see Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (where plaintiff was overcharged but not denied use of a facility, relief is not warranted under the essential facility doctrine); *City of College Station, Tex. v. City of Bryan, Tex.*, 932 F. Supp. 877, 888 (S.D. Tex. 1996) ("when the reasonableness of a rate is at issue, the reasonableness standard of the access factor cannot be read to mean that the courts will secure a better deal for an antitrust plaintiff"); *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 665 F. Supp. 1493, 1534 (S.D. Fla. 1987) ("gross disparity" between cost-based "reasonable price" and offer price amounted to refusal to deal), *aff'd*, No. 87-6108 (11th Cir. Aug. 10, 1989); *cf. Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cas. (CCH) ¶ 63,526, at 76,808-15 (N.D.N.Y. 1980) (electric utility justified in refusing to provide wheeling, subtransformation, and delivery services on terms demanded by municipality). In *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647-49 (10th Cir. 1992), the court held that where a natural gas pipeline company canceled a program allowing cities to pay for the transport of gas purchased from third parties, the provision of pipeline company gas to the plaintiffs at FERC-approved prices provided reasonable access to the facility. A concerted refusal to deal with a competitor on terms "substantially equal" to those enjoyed by a venture's members may be treated as a refusal to deal "if it placed [the] competing firm at a severe competitive disadvantage." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-96 n.6 (1985); *cf. Pope v. Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 266-67 (N.D. Miss. 1988) (no showing that membership dues schedule was discriminatory or unreasonable), *aff'd*, 872 F.2d 127 (5th Cir. 1989).

2. The difficulties associated with assessing terms of access reappear with the legally distinct phase of framing relief. In some instances the decision to issue an injunction may turn on the relative ease of specifying the terms under which compulsory access will be ordered. Where a monopolist does not provide any other firm with access to its facility, "the difficulty of setting a price at which the monopolist must deal might well justify withholding relief

altogether." *Byars v. Bluff City News Co.*, 609 F.2d 843, 864 (6th Cir. 1979). By contrast, where access is provided to some competitors, "a court could simply order the owners of a unique facility to treat all customers on equal terms." *Id.* at 863; *see Associated Press v. United States*, 326 U.S. 1, 21 (1945) (decree entered to prevent discrimination). For a brief discussion of the administrability issues raised by orders to deal, including the problem of determining a price for access, see PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.2h (Supp. 1988).

C. Justifications for Exclusion

1. Courts generally permit denial of access to an essential facility to certain competitors if a reasonable business justification exists for doing so and the effect of the restraint on consumers is nonexistent or positive.

   a. In *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992), the court denied two cities compulsory access to a high voltage electric line controlled by a utility. The court reasoned that even "[i]f the Pacific Intertie [a high voltage powerline running from the Pacific Northwest to Southern California] were an essential facility, [the utility] could still deny access if it had legitimate business reasons for that denial." *Id.* at 1381. The court found that the utility's desire to keep the limited capacity it had on the Pacific Intertie available to transport inexpensive power for its entire customer-base rather just selected municipalities was a legitimate justification for the denial. *Id.* The court distinguished *MCI* "where the capacity is not being used" and *Otter Tail* "where the sole reason for the denial of access is to maintain a monopoly" from the facts at hand where the utility "can use its own facility in full." *Id.*

   b. In *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), the Tenth Circuit (reversing a jury verdict entered by the district court) held that the exclusion of issuers of competitive credit cards from the Visa joint venture was not illegal. The court focused on the business justification for the joint venture and the rule

at issue ("Rule 206" which prohibited membership by an applicant which directly or indirectly issues Discover, American Express or other cards deemed competitive by Visa's Board of Directors). For Section 1 claims, "the focus of the procompetitive justifications for the business practice is the consumer. To be judged anticompetitive, the agreement must actually or potentially harm consumers." *Id.* at 965. The court outlined a two step analysis for evaluating the practices of joint ventures under the rule of reason: (1) determine whether the joint venture has market power in the relevant market and (2) evaluate the procompetitive aspects of the restraint. *Id.* at 965. The court found that Visa did not have market power and that the rule, by preventing free riding by rivals, is "reasonably necessary" for Visa's successful operation. *Id.* The court observed that its assessment of the effect on competition must include an "appreciation that the horizontal restraint may be essential to create the product in the first instance. That understanding properly values the proprietary rights and incentives for innovation embodied by the joint venture as well as concerns about free riding." *Id.* at 969. The court concluded that "'selectivity in the membership of a joint venture often enhances a joint venture's procompetitive potential. Forcing joint ventures to open membership to all competitors . . . would decrease the incentives to form joint ventures.'" *Id.* at 972 n.20 (quoting JUSTICE DEPARTMENT INTERNATIONAL ANTITRUST ENFORCEMENT POLICY 42 (Nov. 10, 1988) (CCH Supp.))

c. In *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994), the court held that a manufacturer unilaterally may refuse to license copyrighted diagnostic software to an ISO. "In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not." *Id.* at 1183. Although such conduct may be termed exclusionary, "an

> author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." *Id.* at 1187.

2. Courts have found that "reasonable criteria of selection" are justified where there are "finite limitations" to the number of competitors that can share the facility. *Gamco. Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir. 1952) (physical limitations of building); *see Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165, 172 & n.9 (9th Cir. 1986) (upholding reasonable restrictions on number of tournament golf professionals).

   a. In *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), the court rejected plaintiff's claim that the defendant's reasons for denying access were irrelevant; instead, the court emphasized that

      > to be liable for monopolizing an essential facility, providing access to the facility must have been feasible for the owner. This . . . prerequisite to essential facility liability suggests that essential facilities cases are no different conceptually than cases involving other monopolization theories, because it reintroduces "intent" (a.k.a. "business justification") back into the monopolization equation and excuses refusals to provide access justified by the owner's legitimate business concerns.

      Id. at 1483. While a monopolist can not wrongfully harm competition, the court wrote, there is no duty to help competitors:

      > Monopolists needn't acquiesce to every demand placed upon them by competitors or customers; a monopolist's duties are negative -- to refrain from anticompetitive conduct --rather than affirmative -- to promote competition. Just as the monopolist has no duty to deter the sale of its own equipment by promoting that of a competitor so too it has no

> duty to incur contractual liability itself by excusing its customers from their contractual obligations.

Id. at 1484 (citations omitted).

b. Whether access to the facility in question is "technically and economically feasible" is treated by some courts as an independent element in establishing liability under the essential facility doctrine. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir. 1983); *cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) ("no engineering factors that prevented [utility company] from selling power at wholesale . . . or wheeling the power); *City of Groton v. Connecticut Power & Light Co.*, 662 F.2d 921, 932-33 (2d Cir. 1981) (refusal to wheel power valid because utility lacked transmission capacity); *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cas. (CCH) ¶ 63,526, at 76,812-14 (N.D.N.Y. 1980) (refusal to wheel power based on sound engineering and economic justifications); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp. 1309, 1323-24 (D. Md. 1989) (not feasible to provide shortline railroad with access to defendant's tracks), *aff'd*, 924 F.2d 539 (4th Cir. 1991).

3. In *City of College Station v. City of Bryan*, 932 F. Supp. 877 (S.D. Tex. 1996), the court listed a number of acceptable justifications for denial of access:

> While the requirement that the monopolist have a "legitimate business reason" cannot be satisfied by the motive of preventing erosion of its monopolistic position, the courts have found a monopolist's goals of discouraging free riding, enhancing its image, or ensuring low costs for its customers to be legitimate business motivations.

Id. at 888.

4. The courts generally place the burden on the defendants to "come forward with some business justification." *Gamco*, 194 F.2d at 489; *see Data Gen. Corp. v. Grumman Sys.*

Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) (monopolist may rebut evidence of exclusionary conduct "by establishing a valid business justification"); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 648 (10th Cir. 1994); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1031 (9th Cir. 1988) (defendant has burden of "putting forward a plausible, justifiable explanation for its conduct"). "The conjunction of power and motive to exclude [a competitor from the market together] with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." *Gamco*, 194 F.2d at 488. *Cf. Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986) ("[c]onjoined with other evidence, lack of business justification may indicate probable anticompetitive effect").

5. To withstand scrutiny, the criteria for selection or exclusion of participants must appear reasonable and not intended to further anticompetitive purposes. *See Deesen*, 358 F.2d at 170-71 (golf association's tournament entry rules, by maintaining high quality of competition, fostered rather than destroyed competition); *American Fed'n of Tobacco Growers v. Neal*, 183 F.2d 869, 872-74 (4th Cir. 1950) (cannot "exclude an outsider merely because he has [a competitive] advantage in taxes or construction costs"); *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 130 (5th Cir. 1989) ("[i]f properly administered, membership requirements serve pro-competitive purposes"); *Moore v. Boating Indus. Ass'n*, 819 F.2d 693, 710-13 (7th Cir. 1987) (whether defendants had anticompetitive purpose in encouraging compliance with safety laws was jury issue); *Mid-Texas Communications Sys., Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1389 (5th Cir. 1980) (refusal to interconnect proper if based "on articulable concerns of regulatory policy"); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679, 694 (E.D. Mich. 1988) (expulsion of physicians who disagree with cost containment philosophy can be procompetitive); *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 115 (E.D.N.Y. 1988) (defendants "articulated a valid pro-competitive reason" for limiting MLS membership to members of board of realtors). In the case of exclusion from membership in an association,

the criteria should not only "have legitimate justifications in the competitive needs of the association itself" but should be "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375 (5th Cir. 1980) (evaluating membership criteria of multiple listing service); *accord*, *Pope*, 695 F. Supp. 253, 266-67 (N.D. Miss. 1988), *aff'd*, 872 F.2d 127 (5th Cir. 1989); *cf. Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1066 (C.D. Cal. 1971) (overbreadth of rule and lack of "even the most rudimentary hearing" made per se illegal the exclusion of players under a "four-year college rule").

6. Although the lack of procedural safeguards does not compel a finding of illegality, the determination as to the justification for exclusion may be influenced by the adequacy of the procedures by which membership criteria are applied. *See Moore v. Boating Indus. Ass'n*, 819 F.2d 693, 710-13 (7th Cir. 1987) ("arbitrary and unreasonable" conduct not a violation in absence of anticompetitive purpose); *Brant v. United States Polo Ass'n*, 631 F. Supp. 71, 78 (S.D. Fla. 1986) (no lack of procedural due process from which anti- competitive intent could be inferred); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1268 (N.D. Ga, 1973) (termination per se illegal if based upon "completely unfettered, subjective and discretionary determination of an exclusionary sanction by a tribunal wholly composed of competitors"); *cf. Silver v. New York Stock Exch.*, 373 U.S. 341, 361-66 (1963) (need for procedural safeguards).

7. Where a court has otherwise found a duty to deal, the absence of an business or efficiency justification for a refusal to deal by a firm possessing market power has led to a characterization of the refusal as exclusionary or predatory. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985) (no efficiency justification for pattern of conduct); *High Tech. Careers v. San Jose Mercury News*, 996 F. 2d 987, 990 (9th Cir. 1993) ("monopolist can refuse to deal with its competitors only if there are legitimate competitive reasons for the refusal"); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368-69 (9th Cir. 1988) (economic inefficiency a sufficient

justification for refusing to produce propane); *Home Placement Serv. v. Providence Journal Co.*, 682 F.2d 274, 277-78, 281 (1st Cir. 1982) (no legitimate business reason supported newspaper's refusal to run competitor's ads).

8. One commentary has suggested allowing only "three narrowly drawn defenses": (1) the limited capacity of the capacity of the facility, (2) the inability or unwillingness of the foreclosed party to bear monopolist's cost in providing access, and (3) interference with the monopolist's service of other customers. Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441, 474-77 (1983).

美国律师公会反托拉斯法部和国际法部就国家工商行政管理总局《关于禁止垄断协议行为的有关规定》（征求意见稿）和《关于禁止滥用市场支配地位行为的有关规定》（征求意见稿）之评论意见

2009 年 5 月 29 日

本文所述观点仅为上述部门共同提交，未经美国律师公会之代表大会或理事会的批准，因此不应被视为代表美国律师公会的政策立场。

美国律师公会（简称“ABA”）下属反托拉斯法部和国际法部（统称“两部门”）[1]谨此就国家工商行政管理总局（简称“工商总局”）于 2009 年 4 月 27 日公布的《关于禁止垄断协议行为的有关规定》（征求意见稿）和《关于禁止滥用市场支配地位行为的有关规定》（征求意见稿）（统称“规定意见稿”）相关内容呈递其评论意见[2]。两部门对为执行反垄断法而拟的《规定意见稿》中所反映出的工商总局的相当多的思考和努力表示赞赏。同时，两部门藉此机会提出如下评论意见，希望有助于最终规定的完成。在适当时，两部门愿意提供补充意见，或与工商总局进行相关磋商。两部门所呈交之评论意见反映了其在美国法律方面的专业知识与经验，同时也反映了其对国际反垄断法、竞争法的熟谙，以及其对诸如滥用市场支配地位等反垄断问题分析中所蕴涵的经济学专业知识的了解。

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[1] 负责起草该评论意见的工作组成员包括：Matthew I. Bachrack, 陈懿华, 邓飞, S. Beth Farmer, Francis Fryscak, John D. Graubert, H. Stephen Harris, Jr., 黄存真, Paul Jones, Gregory K. Leonard, Abbott B. Lipsky, Jr., James R. Modrall, William R. Vigdor,以及孙速。同时，David Ernst, Mark D. Whitener 和 Mike Yeh 也提供了宝贵意见。张一哲为起草工作提供了协助。本意见书中所阐述的观点并不必然代表上述工作组成员所属之专业机构的意见或立场。

[2] 《规定意见稿》是在工商总局网站内发布的公开征求意见稿，其链接地址为：http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/t20090427_37769.html。两部门就《规定意见稿》的评论意见基于非官方译文。

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概要

总体评论

鉴于欧盟(及其此方面的主要前身，欧洲经济共同体，在此一并称作欧盟)和美国的经验，两部门针对管制反竞争行为提供一些总体观察。欧盟和美国都曾试图以规则制止反竞争行为，而这些规则强调管理上的简易，依据行为的形式特征对行为进行归类，使得不需竞争分析即可迅速判断行为是否合法。然而每一次尝试都不令人满意，最终这两个法律体系都远离这种形式化模式，而采用了强调消费者福利最大化为广泛目标和使用经济分析来确定最有可能达到此目标的执法模式。

在协议方面，在任何有相当规模的现代经济体中，协议普遍存在，且是生产活动的基本组织中的一个重要元素。任何公共管制的体系都必须发展出迅速将注意力集中在少数可能产生反竞争影响或潜在影响的协议上的实际可行的方法。执法机构还要发展出实际可行的工具，能以合理、客观、有效率的方式区分损害竞争的协议和更多的有利处有效益或至少中性或对竞争影响无关紧要的协议。在进行多种尝试以改良之后，欧盟最终发布了 1/2003 号规定，广泛改革其对限制性行为进行公共管制的方式(及欧盟竞争政策执行的其它方面)。

欧盟在执行其对限制性协议管制的体系时面临的第二个基本现实是使用形式特征作为确定合法与否的主要标准产生了一系列不令人满意的管制影响。欧盟最终确立以增进经济福利、特别是消费者福利的政策目标(及欧洲特有的创立共同市场的目标)作为评定限制性协议的合法性的关键标准，并将经济分析运用于评定某些协议或某类协议增进还是阻碍这一目标。

美国将反垄断规则用于限制性协议的经历演化过程与欧盟的经历类似。最早的谢尔曼法案的司法先例面对同样的现实：协议对美国经济很重要。合理原则被采用，允许在对一系列市场情况的分析基础上，以协议的根本趋势是限制还是增进竞争和消费者福利及经济进步来进行对协议的区分。正如欧盟，美国法院和政府执法机构在面对依据形式和法律特征谴责协议的反垄断规则所造成的有害后果后，改变了方法。消费者福利作为反垄断价值被放在更看重的位置，所有协议(事实上包括其它交易和行为，如单方面行为)都以此为标准进行测度。

经济分析使得欧盟和美国的反垄断执法者将最积极的调查和救济工具使用在卡特尔行为上。同样原因，这些机构认真审查其它横向协议，并对此类交易的有利竞争的影响高度敏感。因此，对限制性协议的公共管制原则应是保护竞争而非竞争者的原则牢固地体现在欧盟、美国及许多其它司法区域的反托拉斯和竞争规则的方式方法中。

由于中国独特的情况，很难预测欧美经验在《规定意见稿》上是否也会被证明是正确的，但两部门谨建议工商总局在考察对《规定意见稿》的建议性改动时，

考虑下面这些基本原则：

1. 对协议和其它商业行为的本质性考察评估应以保持竞争市场以促进经济进步和消费者福利的基本政策目标为指导依据。

2. 应该使用经济分析来考察评估特定协议和行为的趋势是促进还是阻碍这种基本政策目标。

关于禁止垄断协议行为的有关规定（征求意见稿）（简称“垄断协议规定意见稿”）

合理的竞争政策对竞争对手之间的协议和纯粹的寡头垄断做出区分，前者属于禁止反竞争协议所管辖的范畴，而后者属于单方决定的自然结果而且法律无法给出切实的救济措施。当行为可能只是单方寡头行为却被推定为“默契”协议会妨碍经营者基于商业原因根据市场情况做出反应的能力。因此两部门建议删除第三条第三款，并对第四条作如下修改以明确可以证明存在被禁止协议或决定的证据类型：

> “经营者达成被禁止协议或决定的最有力证据是证明经营者进行过明确的交流并通过此交流而达成该协议的直接证据。如缺少该直接证据，但如果(1)经营者之间存在实质上并行一致的行为，（2）至少一个经营者没有合理的商业理由使其单独从事该行为，并且（3）有其他间接证据证明经营者间存在协议，而不仅仅是互相依赖，仍可推断协议存在。”

否则，两部门建议删除第三条第三款和第四条，因为，意见稿的规定可能很难适用，而且可能达到与预期相反的目的。

两部门担心虽然第五条第三款认为有关新技术或新产品限制的协议可能导致反竞争损害是正确的，但该第五条第三款过于宽泛的解释可能同时会禁止促进技术创新的很多类型的协议。两部门建议明确采取灵活和具体问题具体分析的方式来评估该等协议（尤其是在合营企业、技术许可中排他性和回授条款的情况中），这样可以更好地阻止反竞争协议，同时又允许有益的协议存在。

作为“垄断协议”的一类，第六条第一款禁止“在招投标活动中招标人与投标人达成”协议，表面上看来其意在解决的问题不属于典型的反垄断问题。两部门建议，如保留第六条第一款，那么就应当明确招标者在安排招标时应当有一定的余地，只要这些规则对投标人都是透明的，那么第六条第一款无须涉及。否则，规定就会成为服务于那些未中标人利益的工具，这些未中标人希望攻击招标方在如何安排投标程序方面的合理选择。《垄断协议规定意见稿》第六条第二款禁止了经营者“无正当理由”与交易相对人达成协议，“约定交易相对人只能在特定的区域市场内从事经营活动”。这类区域限制在美国法中很少受到审查，而且无数经销和特许

经营协议都引入这些限制作为供应关系的主要特征。

两部门认为除了竞争者固定销售价格、限定产量或分割市场的协议，反垄断法应该允许经营者向相关当局证明一项协议增加竞争并提高效率的可能性超过损害到竞争的威胁，因此可以不被禁止。目前意见稿的第七条要求经营者“证明”所达成协议符合《反垄断法》第十五条规定因此不应当被禁止。如工商总局能就经营者协议符合《反垄断法》第十五条规定必须满足的标准作出进一步指导，《垄断协议规定》就能更好地鼓励竞争并实现《反垄断法》的目标。两部门建议，第七条规定竞争对手之间的协议如果不涉及固定价格，限定产量或分割市场的，协议各方证明协议与实现《反垄断法》第十五条规定目标之一合理相关，并且符合第十五条“不会严重限制相关市场的竞争，并且能够使消费者分享由此产生的利益”要求的，将在《反垄断法》第十五条下享受豁免适用。工商总局还可考虑在第七条中设立安全港，如协议未涉及固定价格，限定产量或分割市场的，在安全港内如无特殊情况工商总局将不会就该协议提出异议。安全港的使用反映了竞争者合作通常有利于促进竞争的事实。

虽然某些行业协会从事反竞争行为或为其提供便利，多数行业协会能够发挥很多有利的职能，而且行业协会的存在本身不能作为垄断协议存在的证据。第八条宽泛的禁止可能会妨害有益的协会活动，并限制标准制定组织或共同研发活动中的促进竞争的行为。两部门认为第八条应当仅适用于行业协会活动涉及第五条和第六条规定的被禁止垄断协议的情况。此外，第八条第三款应更谨慎地区分行业协会本身的活动和协会成员的行为，同时鼓励行业协会制定执行阻止和禁止反竞争行为的程序和政策。

对于工商总局和“省、自治区、直辖市工商行政管理局（以下简称“省级工商行政管理局”）”的相关职能，两部门建议解释第九条“全国范围内有重大影响的”的含义，尤其是当涉及外方时。两部门建议《垄断协议规定》在第十条中明确，对于主要发生在一个行政区域内同时在全国范围内有重大影响的协议，工商总局将保留其管辖权。特别是，对于有涉外因素的重大案件，工商总局可能要明确保留其管辖权。不论工商总局授权省级工商行政管理局的范围如何，两部门建议第十条规定省级工商行政管理局的调查和处罚受国家工商行政管理总局的监督，以确保《反垄断法》在全国范围执行的一致性和连贯性。

两部门欢迎《垄断协议规定意见稿》纳入第十二条和第十三条规定的配合调查宽大处理的条款。宽大处理的安排在阻止垄断协议，以及激励经营者主动终止参与这些协议并向执法机关进行报告两个方面都有实效。任何有效和解安排都需要提供充分的激励措施以鼓励各方寻求宽大处理。为此，两部门谨提出有效宽大处理安排的四个必要条件，并鼓励工商总局制定满足这四个条件的安排。安排必须在程序上透明、有宽大或显著的和解让步、法律上的确定性以及保护保密性和特权。两部门建议在《垄断协议规定》中规定以下方面的额外说明使宽大处理安排收到实效：

1. 第十二条应明确可以申请宽大处理安排的垄断协议类型。两部门建议第十二条和第十三条明确指出宽大处理安排仅适用于卡特尔。工商总局应当同时在《垄断协议规定》中明确与价格无关的横向和纵向垄断协议根据《反垄断法》第四十六条规定处罚的计算方法。两部门还建议，第十二条和第十三条应明确宽大处理是否限于根据《反垄断法》对垄断协议的起诉还是也包括对非《反垄断法》行为的起诉（例如，一般欺诈行为），或关于垄断协议的私人诉讼。

2. 第十二条应明确可以宽大处理的确切情形。两部门建议以下条件作为第十二条和第十三条规定以外的宽大处理的补充条件：工商总局尚未从任何其他来源获悉相关信息；宽大处理申请人及时停止参与协议；申请人的报告必须完整和真实；并且申请人必须在整个调查和任何起诉过程中继续与工商总局配合。

3. 第十二条规定工商总局“可以”减轻对后来举报的公司的处罚。明确第十二条规定的工商总局可以行使的自由裁量权将在第十三条规定的情形下按第十三条的规定行使，将很有助益。第十三条规定对第一个主动报告的申请人进行最大幅度的宽大处理，因此，两部门建议工商总局建立确定申请人报告顺序的体制，由此确定他们取得宽大处理的优先顺序。透明和可以预见的宽大处理程序至少与明确规定的宽大处理考虑事项同等重要。

4. 第十二条和第十三条都使用了“免除或者减轻处罚”。根据《反垄断法》第四十六条，该“处罚”如果是经济处罚，可包括没收违法所得和罚款。两部门建议工商总局明确免除或减轻是否仅适用于罚款，或者也适用于没收违法所得。

5. 第十二条和第十三条提及的“重要证据”和“有关情况”可能包括保密商业信息。两部门建议这些条款明确规定在申请宽大处理期间披露的任何商业秘密都将予以保密。

6. 由于工商总局和国家发展和改革委员会（“发改委”）在《反垄断法》实施中的管辖权不同，因此，对于本规定和发改委在《反垄断法》项下可能采取的任何宽大处理安排，两个机构协调以确保一致很重要。

《反垄断法》第四十五条还规定在涉嫌违法的经营者承诺时可以中止调查，这有助于提高执法机构的效率并优化机构的资源配置。两部门建议工商总局在《垄断协议规定》条款中规定调查中止的条件和程序。以下方面可以作为出发点考虑：

1. 两部门建议工商总局定义承诺机制的适用范围。例如承诺机制并不适合用于卡特尔。

2. 两部门建议根据《反垄断法》第四十五条中止调查的决定应明确承诺必须履行的时间期限以及承诺履行后工商总局最终终止或继续调查的时间期限。工商总局还应明确在什么情况下工商总局应继续其调查，这些情况均应明确具体并有严格的定义。对于一项有效的暂缓调查的安排而言，在调查什么时候结束或者继续上具有法律确定性和可预见性十分重要。

3. 两部门建议《垄断协议规定》规定《反垄断法》第四十五条项下的承诺对于消除工商总局指出的具体反竞争问题而言是必要和相称的。

4. 和宽大处理安排一样，工商总局和发改委协调确保承诺/调查中止机制与发改委可能根据《反垄断法》采取的任何承诺机制保持一致是十分重要的。

关于禁止滥用市场支配地位行为的有关规定（征求意见稿）（简称“滥用支配地位规定意见稿”）

如何让针对占市场支配地位企业的行为规则不具有在必要地保护竞争之外的限制性，一直是所有竞争法机构面对的最困难和最有争议性的议题之一。两部门建议工商总局考虑采用一些对针对占市场支配地位企业的法规政策（《滥用支配地位规定意见稿》为一代表）具有一般适用性的概括原则。首先，两部门推荐适用的原则是除非占市场支配地位企业的行为至少要对竞争造成的损害威胁大于对竞争产生的有利影响，否则其行为不被认为构成滥用。其次，在相同的基础上，两部门还推荐适用以下原则：如果具有可证明的效率原因，占市场支配地位的企业行为（即使此行为具有产生某些重要排挤作用的可能性）应该被允许，并在被效率原因合理化的范围内被允许。有利于消费者的行为（例如加速了占市场支配地位企业的成长并同时淘汰竞争者的产品创新）如果受到处罚，可能会造成严重的经济停滞和对合理经济政策目标的直接破坏。

应该注意避免将第三条中对市场支配地位的定义和第二条中实质禁止具有市场支配地位的经营者滥用市场支配地位排除限制竞争混为一谈。完全合法的行为，例如发展高端产品或者发展更有效率的生产方法的行为可能会造成经营者获得高市场份额和/或市场进入壁垒，但其本身并不是对市场地位的滥用。分析市场进入壁垒应当谨慎。承担保护竞争者这种特殊义务，在竞争法原则下是得不到合理解释的。

第五条第四款表示 A 公司对 B 公司在交易上的依赖程度是对 B 公司具有支配地位的有效的表现因素。但是，这种情况的存在经常有合理的商业解释，而且支持或者驳斥对支配地位的认定需要有更多的因素加以考量。例如，特许经营合同允许特许经营人更迅速地成长，并且以被特许经营人收取剩余利润的方式激励被特许经营人充分努力发展业务。这样的合同本质上就要求被特许经营人只与特许经营人交易，而且合同的期限经常较长。也许一个被终止合同的被特许经营人难以找到另一个不同的供应商，但这个事实并不是对特许经营人在市场上具有支配地位与否的反映。商业交易中较小一方对较大一方的依赖并不必然表明较大一方具有市场支配地位，发生在这两方之间的争议也经常是普通的合同争议。而且，供应商和经销商有长时间的大规模的交易历史并不必然意味着交易一方转向另一方的竞争者会困难。

两部门之前对以市场份额为基础推定出具有市场支配地位表示过担忧，两部门对《滥用支配地位规定意见稿》第六条中的市场份额标准有同样的担忧。第六条第二款和第三款的规定似乎是建立在集体支配地位的理论上，但只有经营者被认为进行了协同行为，考虑集体支配地位才有意义，而且在这种情况下，市场份额自身并不能充分推定出支配地位的存在。为推翻第六条第二款和第三款下推定出的支配地位，经营者在任何情况下都不应该被要求证明没有单个经营者具有突出的市场地位，因为如果某单个经营者具有突出的市场地位，这个事实在一开始就否认了第六条第二款和第三款下的推定所基于的原理。第七条应该更明确指出，证明第七条第一款、第二款、或者第三款中任何一款就应该足以推翻市场支配地位的推定。

第八条处理的是极具难度和争议性的议题：拒绝交易，包括相关联的“必要设施”理论。运转正常的市场经济必然会使经营者决定交易对象的能力和寻求经营者认为对自己有利的交易条件的能力成为必需。尤其在知识产权方面，美国反托拉斯机构在 2007 年 4 月的《反托拉斯执法与知识产权的报告》中明确指出：“对单纯的单方面、无条件地拒绝许可专利行为赋予反托拉斯法下的责任不会在专利权和反托拉斯保护的互动中起到任何有意义的作用。”如果第八条解读为对经营者决定提供产品、服务的交易条件的能力加以一般性的限制，那么第八条将会引发很多没有效率和没有成效的行为。在最低程度上，必须对构成拒绝交易进行严格认定，而且严谨规定拒绝交易责任的前提条件。只有当对竞争造成了可以证明的和不可避免的损害（而不是简单的对个别竞争者的伤害）而且不存在合理的商业理由的时候，才会产生责任。第八条第一段中第二句话似乎是排除在“在同等的交易条件下，拒绝、削减、限定或中断与交易相对人进行交易”的情况下查究任何正当理由的可能性，而且表明此种交易的变化在任何情况下都不会被证明正当，两部门谨推荐将此句话予以删除。就“必要设施”理论而言，两部门认为鼓励经营活动在先剥夺经营者通过经营而得的利益在后会产生消极后果。就两部门在美国的经验来讲，经常会发生的情况是要求对“必要设施”强迫分享者低估了竞争者对设施的创新能力，而这种创新能力可以给消费者带来利益。所以，这个理论应该在清楚表达的和严谨阐述的条件下被极度严格地运用。

第九条禁止具有市场支配地位的经营者“没有正当理由”地进行排他交易，对此两部门有两种担忧。第一，在何种“正当理由”下具有市场支配地位的经营者才可以进行排他交易没有被清楚地阐释。第二，似乎存在没有根据的对损害竞争作用的推定，使得证明责任归于经营者，经营者需要证明排他交易可以被正当化。因此，两部门建议删除第九条，或者作如下修改：

> “具有市场支配地位的经营者限定交易相对人只能与其进行交易或者限定交易相对人只能与其指定的经营者进行交易，并且此种限制在权衡之后被证明是损害竞争的，那么此种限制应该被禁止。”

第十条禁止具有市场支配地位的经营者“没有正当理由”地搭售商品。两部门对第十条有类似于对第九条的担忧。另外，两部门对禁止“混合型捆绑”的第十条第三款也有担忧。所谓“混合型捆绑”，就是商品既被单独销售，又被组合销售，而单独销售时商品的价格“较高，并导致或可能导致相关市场的竞争者被排斥或被迫退出市场，或阻碍其他经营者进入该市场”。即使可能会淘汰竞争者，混合型捆绑也可以促进竞争。所以，两部门建议第十条被完全删除，或者作如下修改：

> “具有市场支配地位的经营者搭售商品或者在交易时附加其他交易条件，并且此种搭售或者其他条件在权衡之后被证明是损害竞争的，那么此种搭售或者附加条件应该被禁止。”

《滥用支配地位规定意见稿》的第十一条禁止具有市场支配地位的经营者没有正当理由，在同等交易中，对条件相同的交易相对人实行差别待遇。对相同或者相似的产品的不同购买者采用的交易条件可能会因为许多合理的和促进竞争的原因而不同。差别待遇本身并不会有损消费者。而且，由于反差别待遇法限制了竞争的形式，反差别待遇法倾向于保护竞争者而不是消费者。因此，两部门建议第十一条被删除。如果第一十条需要保留，两部门建议其清楚表明只禁止对消费者具有或者可能具有损害竞争作用的差别待遇，而不是概括地禁止差别待遇。

对于《滥用支配地位规定意见稿》第十四条和第十五条涉及的工商总局和“省级工商行政管理局”的相关职能，两部门有对《垄断协议规定意见稿》第九条和第十条相同的担忧和建议，并谨请参考对《垄断协议规定意见稿》中相关议题的讨论。

与《垄断协议规定》相关，《反垄断法》第四十五条还规定在涉嫌违法的经营者承诺时可以中止调查的可能性，这种可能性应该也适用于对滥用市场支配地位的调查。承诺基础上的中止调查可以成为解决针对被控滥用但在《反垄断法》下比较模棱两可的行为的调查的一种方式。因此，两部门建议工商总局在《滥用支配地位规定》中也对中止调查的条件和程序作出规定，并谨请参考对《垄断协议规定意见稿》中相关议题的讨论。

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE SAIC DRAFT REGULATIONS ON THE PROHIBITION OF ACTS OF MONOPOLY AGREEMENTS AND OF ABUSE OF DOMINANT MARKET POSITION

May 29, 2009

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA")[1] respectfully submit these comments on the Regulation on the Prohibition of Acts of Monopoly Agreements (Comment Draft) ("Draft Monopoly Agreements Regulation") and the Regulation on the Prohibition of Acts of Abuse of Dominant Market Position (Comment Draft) ("Draft Abuse of Dominance Regulation") of China's State Administration for Industry and Commerce ("SAIC") published for comment on April 27, 2009.[2] The Sections appreciate the substantial thought and effort of SAIC reflected in the Draft Regulations to implement the Anti-Monopoly Law ("AML") and take the opportunity to offer these comments in the hope that they may assist in the completion of final regulations. The Sections are available to provide additional comments, or to participate in consultations with SAIC, as appropriate. The Sections' comments reflect their expertise and experience with U.S. law and their familiarity with antitrust/competition law internationally, as well as expertise in the economics underlying the analysis of antitrust issues such as the abuse of dominant market position.

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[1] The members of the Working Group that drafted these comments are Matthew I. Bachrack, Yee Wah Chin, Fei Deng, S. Beth Farmer, Francis Fryscak, John D. Graubert, H. Stephen Harris, Jr., Cunzhen Huang, Paul Jones, Gregory K. Leonard, Abbott B. Lipsky, Jr., James R. Modrall, William R. Vigdor, and Su Sun, with comments from David Ernst, Mark D. Whitener and Mike Yeh and assistance from Yizhe Zhang. The views stated in these comments do not necessarily reflect the views or opinions of the professional organizations with which the members of this Working Group are affiliated.

[2] The Draft Regulations were published for public consultation on SAIC's website at http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/t20090427_37769.html. The Sections' comments on the Draft Regulations are based on unofficial translations.

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EXECUTIVE SUMMARY

General Comments

In light especially of the experience of the European Union (and its main predecessor institution in this regard, the European Economic Community – both will be referred to herein as the EU) and the United States, the Sections offer some general observations regarding efforts to regulate anticompetitive conduct. Both the EU and the U.S. attempted to proscribe anticompetitive conduct by resorting to rules that emphasized administrative simplicity, categorizing conduct according to formal characteristics which allowed their legality to be determined quickly and without competitive analysis. In each case the attempt was unsatisfactory, and each system eventually moved away from this formalistic approach to a new approach focusing on the broad objective of maximizing consumer welfare and employing economic analysis to identify enforcement approaches most likely to advance that objective.

In the area of agreements, in any modern economy of significant size, agreements are a ubiquitous, critical element in the basic fabric of productive activity. Any system of public control must develop practical means to focus quickly on the limited number of agreements likely to produce an anticompetitive impact or potential impact. The enforcement authority must also develop practical tools that can distinguish in a reasonable, objective and efficient manner between the fraction of agreements that may be competitively damaging, and the broader and more numerous range of agreements that are helpful and productive or at least neutral or otherwise inconsequential in their competitive effect. After much experimentation with other approaches to ameliorate the situation, the EU ultimately issued Regulation 1/2003, broadly reforming (among other aspects of EU competition-policy implementation) its approach to public control of restrictive conduct.

The second fundamental reality that confronted the EU during implementation of its system for control of restrictive agreements was that use of the formal characteristics as the primary criteria for determining legality produced a variety of unsatisfactory regulatory effects. The EU ultimately enshrined the policy objective of advancing economic well-being and especially consumer welfare (in addition to the

European-specific objective of creating a common market) as the key criterion for assessing the legality of restrictive agreements, and to employ economic analysis in the process of assessing the tendency of agreements, or classes of agreements, to advance or impede that objective.

The U.S. experience of applying antitrust rules to restrictive agreements evolved in ways analogous to the experience of the EU. The earliest Sherman Act judicial precedents confronted the same realities about the importance of agreements to the U.S. economy. The rule of reason was adopted, allowing agreements to be distinguished according to their fundamental tendency to restrain or advance competition and thus consumer welfare and economic progress, based on an analysis of a variety of market circumstances. Like the EU, the U.S. courts and government enforcement agencies, when confronted with the adverse consequences of antitrust rules that condemned agreements according to their formal and/or legal characteristics, shifted approach. Consumer welfare was placed in the preferred position as the antitrust value against which all agreements (and indeed all other transactions and conduct, including unilateral conduct) would be measured.

Economic analysis persuaded antitrust enforcers in the EU and the U.S. to orient their most aggressive investigative and remedial tools on cartel behavior. For the same reason those agencies scrutinize other horizontal agreements with heightened sensitivity to the procompetitive impact of such transactions. Thus, the principle that public control of restrictive agreements should protect competition rather than competitors has become firmly embodied in the antitrust and competition-rule approaches of the EU, the U.S., and many other jurisdictions.

While China's unique circumstances make it difficult to predict that the lessons of EU and U.S. experience will also prove true with regard to the Draft Regulations, the Sections respectfully suggest, however, that SAIC consider these basic tenets in assessing suggested adjustments to the Draft Monopoly Agreement and Abuse of Dominance Regulations:

1. Substantive assessment of agreements and other business conduct should be guided by the basic policy objective of maintaining competitive markets to promote economic progress and consumer welfare.

2. Economic analysis should be used to assess the tendency of particular agreements and conduct to promote or inhibit such basic policy objectives.

Draft Monopoly Agreements Regulation

Sound competition policy distinguishes agreements among rivals – which prohibitions on anticompetitive agreements may reach – from mere oligopoly –which the law cannot practically remedy and is the natural consequence of unilateral decision-making. Inferring a "tacit" agreement when the conduct may merely reflect unilateral

oligopoly behavior accordingly can chill a business's ability to respond to market conditions according to its business incentives. Therefore, the Sections suggest deleting Article 3(3) and revising Article 4 to clarify the types of evidence that may demonstrate the existence of prohibited agreements or decisions, to:

> "The best evidence that business operators reached a prohibited agreement or decision is direct evidence that the business operators communicated explicitly and, through that communication, reached such an agreement. In the absence of such direct evidence, an agreement might be inferred if (1) the business operators exhibited substantially parallel behavior, (2) at least one of the business operators does not have legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, *and* (3) there is additional circumstantial evidence supporting the existence of an agreement as distinguished from mere interdependence."

Otherwise, the Sections suggest that both Articles 3(3) and 4 be deleted because, as drafted, they may be difficult to apply and counterproductive.

The Sections are concerned that, although Article 5(3) correctly targets agreements, related to restrictions on new technologies or products, which may result in anticompetitive harm, an overly broad interpretation of Article 5(3) could also prohibit many types of agreements that may instead promote technological innovation. The Sections suggest that expressly adopting a flexible and fact-specific approach to the evaluation of such agreements, especially in the context of joint ventures and exclusive and grant back terms in technology licenses, can better serve the goals of both discouraging anticompetitive agreements while at the same time allowing beneficial agreements.

Article 6(1) prohibits, as a class of "monopoly agreement," any agreement which the "tenderer reaches with a bidder during bidding activities," and apparently addresses a concern that is not classically an antitrust problem. The Sections suggest that, if Article 6(1) is retained, it should be made clear that a tenderer should have leeway in structuring its solicitation of bids and that, so long as those rules are transparent to the bidders, Article 6(1) should not be implicated. Otherwise, the regulation could become a mechanism to serve the interests of unsuccessful bidders wishing to attack the buyer for its legitimate choices in deciding how to structure the bid process. Article 6(2) of the Draft Monopoly Agreement Regulation prohibits business operators from reaching an agreement with a counterparty that "without justified reasons, restricts the business operations of such transaction counterparty to a specific regional market only." Such territorial restrictions rarely attract scrutiny under U.S. law, and countless distribution and franchise agreements have incorporated them as a key feature of the supply relationship.

The Sections believe that, with the exception of agreements by competitors to fix their sale prices, limit output, or allocate markets, antitrust laws should allow business operators to demonstrate to the appropriate authorities that an agreement may increase competition and improve efficiencies more than it threatens to impair

competition and therefore should not be prohibited. As currently drafted, Article 7 requires business operators to "prove" that an agreement conforms to AML Article 15 and is therefore not prohibited. The Monopoly Agreements Regulation would better foster competition and the goals of the AML if SAIC were to provide further guidance as to the standard that business operators must satisfy for an agreement to conform to Article 15 of the AML. The Sections suggest that Article 7 provide that agreements among competitors that do not involve price fixing, limiting output or allocating markets will be exempt under Article 15 of the AML if the parties to the agreement provide evidence that the agreement is reasonably related to achieving one of the goals articulated in Article 15 of the AML and "will not substantially restrict competition in the relevant market and will enable consumers to share in the benefits derived therefrom" as required by Article 15. SAIC might also consider establishing safe harbors in Article 7, in cases of agreements that do not involve price fixing, or output or market allocation, where, absent extraordinary circumstances, SAIC will not challenge an agreement. The use of safe harbors reflects the fact that competitor collaborations are often procompetitive.

While some industry associations have engaged in or facilitated anticompetitive conduct, most also serve many useful functions and the mere existence of an industry association is not evidence of a monopoly agreement. The broad prohibitions in Article 8 may act as a deterrent to beneficial association activities and might restrict the pro-competitive behavior of standard setting bodies or research and development collaborations. The Sections suggest that Article 8 should apply only when the trade association's activities relate to monopoly agreements prohibited under Articles 5 and 6. In addition, Article 8(3) should more carefully draw a distinction between activities of the industry associations themselves on the one hand, and conduct of the associations' members on the other, while encouraging industry associations to have processes and policies that deter and prohibit anti-competitive conduct.

With respect to the relative roles of the SAIC and "the industry and commerce administrative authorities in the governments of provinces, autonomous regions as well as municipalities directly under the central government (hereinafter 'Provincial SAIC')", the Sections suggest that the phrase in Article 9, "having a significant nationwide impact," be clarified, particularly with respect to foreign parties. The Sections suggest that the Monopoly Agreements Regulation make it clear in Article 10 that SAIC would exercise its discretion to retain jurisdiction where an agreement may both occur principally within one administrative region and have significant nationwide impact. In particular, the SAIC may want to expressly reserve jurisdiction over major cases involving a foreign element. Regardless of the extent of authorization by SAIC to Provincial SAICs, the Sections suggest that Article 10 provide that investigations and sanctions by Provincial SAICs will be subject to SAIC oversight, to ensure consistency and coherence in the enforcement of the AML nationwide.

The Sections welcome the inclusion of leniency provisions for cooperation that are set forth in Articles 12 and 13 of the Draft Monopoly Agreements Regulation. Leniency programs are effective both in deterring monopoly agreements and providing incentives for business operators to voluntarily terminate their participation in these agreements and report to the enforcement authority. The fundamental requirement of any

effective settlement program is that it provides sufficient incentives to encourage the parties to seek leniency. To that end, the Sections respectfully suggest four criteria that are essential for an effective leniency program and encourage the SAIC to establish a program that meets these four criteria. The program must have procedural transparency, generous or significant settlement discounts, legal certainty and the protection of confidentiality and privilege. The Sections suggest that additional clarification in the Draft Monopoly Agreements Regulation in the following areas would enable an effective leniency program:

(1) Article 12 should specify which types of monopoly agreements are entitled to apply for leniency policy. The Sections suggest that Articles 12 and 13 expressly indicate that the leniency policy is applicable only to cartels. The SAIC should at the same time clarify in the Monopoly Agreements Regulations the methods by which penalties under AML Article 46 will be determined for non-pricing related horizontal monopoly agreements and vertical monopoly agreements. The Sections also suggest that Articles 12 and 13 clarify whether the leniency would be limited to prosecutions under the AML of monopoly agreements or whether the leniency would also include non-AML prosecutions for the conduct (for example, general fraud), or private litigation concerning the monopoly agreement.

(2) Article 12 should clarify the exact circumstances under which leniency will be available. The Sections recommend the following conditions as requirements for leniency in addition to the requirements of Articles 12 and 13: that the SAIC had not received the relevant information from any other source; the leniency applicant promptly halted its participation in the agreement; the applicant's report must be complete and truthful; and the applicant must continue to cooperate with the SAIC throughout the investigation and any prosecution.

(3) Article 12 provides that the SAIC "may" reduce penalties for subsequent firms that report. It would be helpful to clarify that the discretion that the SAIC may exercise under Article 12, will be exercised as set forth in Article 13 in the circumstances described in Article 13. Article 13 provides the greatest leniency to the first applicant to make a voluntary report, so the Sections recommend that the SAIC establish a system to identify the applicants in the order that they make their reports and therefore the priority of their eligibility for leniency. A transparent and predictable leniency process is at least as important as clearly articulated leniency considerations.

(4) Both Article 12 and Article 13 use the phrase of "immunity or reduction of penalties". Under Article 46 of the AML, such "penalties", if they are monetary, could include proceeds confiscated and fines. The Sections recommend SAIC make it clear whether the immunity or reduction applies not only to fines, but also to proceeds confiscated.

(5) The "important evidence" and "relevant information" referred to in Articles 12 and 13 may include confidential business information. The Sections recommend that these articles clarify that any business secrets disclosed during an application for leniency will also be kept confidential.

(6) Given the differing jurisdictions of the SAIC and the National Development and Reform Commission ("NDRC") in the implementation of the AML, it is important for the two authorities to coordinate to ensure consistency with any leniency program that the NDRC may adopt under the AML.

Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders, which enhances the enforcement authority's efficiency and the optimization of allocation of the authority's resources. The Sections suggest that SAIC include in the Monopoly Agreements Regulation provisions setting forth the conditions and processes under which prosecution will be suspended. The following aspects could be taken as a starting point:

(1) The Sections suggest that SAIC define the applicable scope of the commitments mechanism. For example, the commitments mechanism is inappropriate for cartels.

(2) The Sections recommend that the decision to suspend the investigation under AML Article 45 specify both the time limit in which commitments must be fulfilled and the time limit following fulfillment in which SAIC is obliged to finally terminate or continue the investigation. SAIC should also clarify under what circumstances SAIC would continue its investigation, and these circumstances should be specific and narrowly defined. It is important for an effective deferred prosecution program to have legal certainty and predictability as to when prosecution will be terminated or resumed.

(3) The Sections suggest that the Monopoly Agreements Regulations provide that commitments under AML Article 45 be necessary and proportionate to remove specific anti-competitive concerns identified by SAIC.

(4) As with the leniency program, it is important for the SAIC and NDRC to coordinate to ensure consistency with any commitments mechanism that the NDRC may adopt under the AML.

Draft Abuse of Dominance Regulation

Formulating mandates for dominant-firm conduct that are no more restrictive than necessary to protect competition is among the most difficult and controversial tasks facing any competition authority. The Sections recommend to SAIC that it consider certain broad principles of general applicability to the dominant-firm

mandates represented by the Draft Abuse of Dominance Regulation. First, the Sections commend the principle that dominant-firm conduct should not be regarded as abusive unless at a minimum such conduct threatens to harm competition more than it benefits competition. Second, on the same basis the Sections also commend the principle that dominant-firm conduct – even if it carries the potential for some material exclusionary effect – should be permitted if and to the extent justified by demonstrable reasons of efficiency. Punishing behavior that benefits consumers, such as a product innovation that accelerates the growth of a dominant firm at the expense of competitors, could result in severe economic stagnation and direct obstruction of sound competition policy objectives.

Care needs to be taken to avoid conflating the definition of a dominant market position in Article 3 with the substantive prohibition in Article 2 against an undertaking that possesses a dominant market position from abusing that position to exclude or restrict competition. Perfectly legal conduct such as the development of a superior product or more efficient production methods that may result in an undertaking obtaining a large market share and/or the creation of entry barriers, is not itself an abuse of the market position. Caution is required in analyzing barriers to entry. There is no justification under antitrust principles for imposing special duties to protect competitors.

Article 5(4) suggests that the extent to which Company A relies on Company B in doing business is a valid indicator of dominance held by Company B. However, there are often legitimate business justifications for such situations, and there are more factors that need to be considered to support or refute any conclusion of dominance. For example, a franchising arrangement allows a franchisor to grow faster and also gives a franchisee the incentive to make sufficient efforts because it receives the residual profits. Such a relationship will naturally require that a franchisee deal exclusively with the franchisor, and the term of the contract is often long. It may be difficult for a terminated franchisee to find a different supplier, but this is not a reflection of the franchisor's dominance in a market. Reliance of the smaller party on the bigger one in a business relationship does not necessarily reflect a dominant market position held by the bigger party, and disputes between the two parties are often ordinary contract disputes. Moreover, the fact that a supplier and a distributor have had a long history of engagement with a large business volume between them does not necessarily mean it is difficult for one of them to turn to competitors of the other.

The Sections' previously expressed concerns regarding market-share based standards for reaching a presumption on dominance apply with equal force to the market-share based standards of Article 6 of the Draft Abuse of Dominance Regulation. Market shares alone are insufficient to presume dominance under the conditions of Article 6(2) and 6(3), which appear to be based on joint dominance and to make sense only if the undertakings were assumed to be engaging in coordinated conduct. In any event, to rebut a presumption of dominance under Articles 6(2) or 6(3), businesses should not be required to show that no individual competitor has a prominent market position because, if one business had a prominent market position, that fact would undermine the rationale for the presumption of dominance under Articles 6(2) or 6(3) in the first place. Demonstrating any of Article 7(1), 7(2) or 7(3) should be sufficient to rebut any

presumption of dominant market position, and Article 7 should be clarified to make that clear.

Article 8 deals with the extremely difficult and controversial subject of refusals to deal, including the related "essential facilities" doctrine. A functioning market economy necessarily entails the ability of undertakings to decide whom to do business with, and to seek to do business on whatever terms they believe are advantageous for them. Particularly with respect to intellectual property, the U.S. antitrust enforcement agencies made clear in their April 2007 Report on Antitrust Enforcement and Intellectual Property Rights that "antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections." If read to impose a general limitation on the ability of undertakings to decide on what terms to offer their products and services, Article 8 will cause much inefficient and unproductive behavior. At a minimum, careful qualifications or pre-conditions for liability for refusal to deal are indispensable. Liability should only arise when there is demonstrable and unavoidable damage to the competitive process, not simply injury to individual competitors, and an absence of business justification. The Sections respectfully urge deletion of the second sentence of the first paragraph of Article 8 that appears to preclude any inquiry into business justification in cases of "refusing, reducing, limiting, or ceasing transactions with a counterparty under the same transaction conditions" and that suggests a rule that such changes can never be justified. With respect to the "essential facilities" doctrine, the Sections believe that it would be counterproductive to encourage entrepreneurial activity but then strip the successful undertaking of the benefit of that activity. In the Sections' experience in the United States, it has often been the case that those advocating forced sharing of an "essential" facility have underestimated the ability of determined competitors to innovate around the facility, with resulting benefits to consumers. This doctrine should therefore be applied with the utmost caution, and under clearly expressed and carefully developed conditions.

The Sections have two concerns with Article 9, which prohibits a company with a dominant market position from engaging in exclusive dealing "where no justified reasons exist." First, the "justified reasons" under which it would be acceptable for a company with a dominant market position to engage in exclusive dealing are not specified. Second, there appears to be an unwarranted presumption of anticompetitive effect, with the burden of proof shifted to the company to prove that exclusive dealing is justified. Accordingly, the Sections suggest deleting Article 9 or revising it as follows:

> "A business operator possessing a dominant market position is prohibited from constraining transaction counterparties to engage in transactions only with itself or only with its designated business operators, where the constraint is demonstrated on balance to be anticompetitive."

The Sections' concerns with Article 10, which prohibits a business with dominant market position from engaging in tie-in sales "where no justified reasons exist," are similar to those with Article 9. The Sections have additional concerns about Article 10(3), which prohibits "mixed bundling" where products are offered on a standalone basis as well as bundled together when the price of the products on a standalone basis is

"relatively high, causing competitors in the relevant market to be excluded from or forced to exit the market, or encumbering the entry to such market by other business operators." Mixed bundling can be procompetitive even if it excludes competitors. Accordingly, the Sections recommend that Article 10 be deleted in its entirety, or revised as follows:

> "A business operator possessing a dominant market position is prohibited from conducting tie-in sales, or attaching other conditions to transactions, where the tie-in sales or other conditions is demonstrated on balance to be anticompetitive."

Article 11 of the Draft Abuse of Dominance Regulation prohibits dominant undertakings, without justifiable reasons, from implementing discriminatory terms in equivalent transactions on counterparties of equal conditions. Transactional terms to different purchasers for the same or similar products could differ for many legitimate and pro-competitive reasons. Discrimination alone is not harmful to consumers. Moreover, anti-discrimination laws have a tendency to protect competitors rather than consumers, as they limit forms of competition. Therefore, the Sections suggest that Article 11 be deleted. If Article 11 is retained, the Sections suggest that it clearly prohibits only discriminatory terms with actual or likely harmful/anti-competitive effect to consumers, rather than discriminatory terms generally.

With respect to the relative roles of the SAIC and the Provincial SAICs in Articles 14 and 15 of the Draft Abuse of Dominance Regulation, the Sections have the same concerns and suggestions as with Articles 9 and 10 of the Draft Monopoly Agreements Regulation and respectfully refer to the discussion of the Draft Monopoly Agreements Regulation on this subject.

As noted in connection with the Monopoly Agreements Regulation, Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders, which appears to include investigations of abuse of dominant market position. The commitments mechanism would be a means of resolving investigations involving conduct that is alleged to be abusive yet often ambiguous under the AML. Therefore, the Sections suggest that SAIC also include in the Abuse of Dominance Regulation provisions setting forth the conditions and processes under which prosecution will be suspended, and respectfully refer to the discussion of the Draft Monopoly Agreements Regulation on this subject.

COMMENTS

I. General Comments

SAIC is familiar with other jurisdictions that have implemented legal and administrative control of anticompetitive conduct, similar to the steps that SAIC is now taking as a major part of the implementation of China's new AML. While the circumstances of the contemporary Chinese economy are unique, certain patterns of

experience with regard to such programs have been observed in other jurisdictions, even though implemented at different times and under substantially different circumstances. Accordingly, the Sections respectfully offer several reflections based on this experience with the initial design and implementation of public policy controls on anticompetitive conduct. SAIC may wish to consider whether such patterns might also arise in the case of implementing the Draft Regulations, and to evaluate whether potential adjustments to the Draft Regulations may be appropriate in light of this experience.

SAIC is also aware that two significant previous examples of implementation of public control of anticompetitive conduct are provided by the experience of the EU and the United States. The EU controls, embodied in Article 85 of the 1957 Treaty of Rome (now Article 81 of the EU Treaty and henceforth referred to as such), were the subject of early legislation and took the primary form of administrative mechanisms applied by Directorate-General IV (now the Directorate General for Competition or DG Comp and henceforth referred to as such). Under these provisions decisions were made by or under the direct authority of the European Commission (or "Commission") and ultimately subject to judicial review. They were first implemented in 1962 and have evolved in significant ways down to the present day.

Public control of anticompetitive agreements in the U.S. has been enforced primarily through litigation in the federal courts. The system implemented pursuant to the Sherman Act of 1890 allowed criminal and civil cases to be brought by the Department of Justice, as well as civil claims brought by private parties injured or threatened with injury from antitrust-law violations. All such claims were litigated before the federal courts.[3] In 1914 the U.S. added the option of administrative control of restrictive agreements by creating the Federal Trade Commission, whose decisions were also subject to judicial review. Although it has been strengthened and modified substantially in a variety of different ways, this same basic U.S. enforcement framework is still in place. Judicial litigation is still the dominant mode of antitrust enforcement in the U.S. where anticompetitive conduct is concerned.

Public control of anticompetitive agreements in both the European Union and the U.S. was initiated – although at different times and in strikingly different ways – by adopting enforcement modalities that forced each jurisdiction to confront several fundamental practical realities. Each system was fundamentally shaped, each in its own distinct way, by the necessity of responding to challenges posed by attempting to apply such public control in the face of those practical realities. In basic outline, each jurisdiction attempted to control anticompetitive conduct by resorting to rules that emphasized administrative simplicity, categorizing conduct according to formal characteristics which allowed their legality to be determined quickly and without competitive analysis. In each case the attempt was unsatisfactory, and each system eventually moved away from formal categorization to a new approach focusing on the broad objective of maximizing consumer welfare and employing sound economically-based analysis in order to identify enforcement approaches most likely to advance that

[3] Individual U.S. States have generally adopted similar enforcement approaches within their own court systems.

objective. This section of the Sections' Comments briefly traces at a general level both the European and American antitrust experiences in this regard.

The first reality is that in any modern economy of significant size, agreements are a ubiquitous, critical element in the basic fabric of productive activity. Agreements in such an economy are so numerous, diverse, dynamic and pervasive that no system of public control can possibly hope to scrutinize any significant fraction of them. When one considers all the purchase and supply agreements for goods and services of every description, as well as licenses, franchises, leaseholds, agencies, *etc.* that are found in every sector and at every level throughout any modern economy, it becomes immediately apparent that any system of public control must develop practical means to focus quickly on the extremely limited number of agreements likely to contain any verifiable anticompetitive impact or potential impact. Public authority must also develop practical regulatory instruments that can distinguish in a reasonable, objective and efficient manner between the tiny fraction of agreements that may be competitively damaging, and the much broader and more numerous range of agreements that are helpful and productive or at least neutral or otherwise inconsequential in their competitive effect.

The EU confronted this reality shortly after it adopted the "exemption system" that originally implemented its rules on restrictive agreements. That system provided powerful incentives for business enterprises to notify to the Commission each specific agreement that contained any *prima facie* restriction on trade within the EU under Article 81(1), even if on further analysis under the Treaty criteria of Article 81(3) the agreement might be deemed consistent with EU law. Absent notification, parties were on notice that agreements violating Article 81(1) would not only be regarded as void *ab initio,* but could expose the parties to substantial administrative fines for the period when the agreement was in effect prior to notification. When first implemented in 1962, this regulatory structure caused the Commission to be inundated by tens of thousands of such notifications filed on behalf of business enterprises wishing to avoid exposure to liability for significant fines. This overwhelming response to the implementation of Article 81 confirmed the ubiquity of agreements within the European market and quickly rendered the original vision of the exemption system essentially unworkable. This is especially noteworthy considering that when first implemented in 1962 the system applied only to the original six EU Member States and to an economy much smaller and less developed than the twenty-seven member EU that is now subject to the EU rules on restrictive agreements.

The EU implemented a variety of new mechanisms to cope with this flood of exemption applications. It provided an option for parties to an agreement to apply for and receive "negative clearance" – a preliminary determination of *prima facie* compliance with Article 81, rather than a formal exemption decision following in-depth review -- and it enacted a number of "block exemption" regulations in an effort to exclude innocuous agreements from the need for notification and review. The block exemptions defined broad categories of agreements by a variety of criteria including their formal content and legal characteristics and declared certain subcategories "exempt" from condemnation under the applicable standard of Article 81. These block exemptions

attempted to eliminate the need for negative clearance or full exemption decisions with respect to specific agreements.

Despite the adoption of many innovations in the effort to resolve the enormous backlog of notifications, the system never functioned in a satisfactory manner. It was criticized sharply by scholars and practitioners and was replaced as a result of the lengthy but ultimately successful process of "modernization" that culminated in the issuance of Regulation 1/2003, broadly reforming (among other aspects of EU competition-policy implementation) the EU approach to public control of restrictive agreements.

The second fundamental reality that confronted the EU during implementation of its system for control of restrictive agreements was that use of formal characteristics of agreements as the primary criteria for determining legality produced a variety of unsatisfactory regulatory effects. There are simply too many varieties of agreements to permit harmful agreements to be distinguished from beneficial or inconsequential agreements on the basis of such criteria. In order to identify agreements that are potentially harmful, it became essential to adopt legal tests that gave explicit recognition to specifically identified regulatory objectives.

As part of its effort to improve the effectiveness of its implementing legislation and regulations under Article 81, the EU decided ultimately to enshrine the policy objective of advancing economic well-being and especially consumer welfare as the key criterion for assessing the legality of restrictive agreements, and to employ economic analysis in the process of assessing the tendency of agreements to advance or impede that objective. (The EU has also fashioned its mandates regarding restrictive agreements to reflect the distinct EU Treaty objective of market integration, although the prescriptions indicated by the two objectives differ with regard to a limited class of agreements – as, for example, in the case of absolute territorial restrictions following Member State borders.) Emphasizing the consumer welfare criterion and applying economic analysis has a number of desirable substantive and administrative impacts on government mandates regarding restrictive agreements. First, this approach allows the identification and review of agreements to be guided with greater overall reliability toward agreements (and classes of agreements) more likely to threaten economic progress and consumer welfare and away from agreements that are helpful or innocuous in the pursuit of such goals. Thus, for example, economic analysis establishes that vertical agreements can restrict competition in ways that impede consumer welfare in only certain situations. By focusing primarily on agreements that occur in such situations, enforcement resources can be utilized more effectively, and unintended results – of both Type I (condemnation of a beneficial or innocuous arrangement) and Type II (failure to condemn a harmful arrangement) – can be reduced significantly.

Economic analysis, confirmed by study of a wide variety of market circumstances over a long period of time, also demonstrates that while horizontal agreements contain somewhat greater possibilities for competitive harm, the most serious anticompetitive potential arises with regard to a limited class of agreements. These involve collective restrictions on key elements of competition by individual firms – such

as price, output, capacity or market allocation – where the parties make no other genuine attempt to engage in functional cooperation or other forms of productive integration that create any possibility of economic progress or competitive benefit (such as cost reduction, enhanced innovation, new market entry and the like). Accordingly, antitrust enforcers in the EU and the U.S. have oriented their most aggressive investigative and remedial tools on such cartel behavior. For the same reason those agencies scrutinize other horizontal agreements – agreements occurring within transactions that have a principal purpose consistent with economic progress and consumer welfare, such as R&D joint ventures, joint procurement arrangements or other joint investments in production or distribution facilities – for their overall competitive effects.

Similarly, application of the consumer welfare criterion implies that public control of restrictive agreements should protect competition rather than competitors has become firmly embodied in the antitrust and competition-rule approaches of the EU, the U.S., and many other jurisdictions. As stated in a leading U.S. judicial decision,

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. *See, e.g., Brunswick Corp. v. Pueblo Bowl O Mat, Inc.*, 429 U.S. 477, 488 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116-117 (1986); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Spectrum Sports v. McQuillan, 506 U.S. 447, 458 (1993).

The U.S. experience of applying antitrust rules to restrictive agreements evolved in ways closely analogous to the experience of the EU. The earliest Sherman Act precedents confronted the same realities about the importance of agreements to the U.S. economy that formed the basis for the eventual reform of the EU "exemption system". The courts recognized that the Sherman Act's blanket prohibition on agreements that "restrain" trade would be far too sweeping – and might actually obstruct legitimate commerce – if literally interpreted to prohibit all contractual restraints, since virtually all contracts involve some element of restraint upon the parties. Accordingly, in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Supreme Court introduced the "rule of reason" as the basic criterion for assessing the legality of agreements. The rule of reason allowed agreements to be distinguished according to their fundamental tendency to restrain or advance competition and thus consumer welfare and economic progress, based on an analysis of a variety of market circumstances.

Over the 119-year history of Sherman Act enforcement, judicial and Executive Branch views of restrictive agreements have varied considerably, but the Sections focus here on what they believe is the most relevant aspect of that history for purposes of SAIC's implementation of the Draft Regulations. In a period of vigorous

antitrust enforcement originating in the mid-20th century, U.S. enforcement agencies and courts began increasingly to adopt *per se* rules, condemning certain agreements based on their legal and formal characteristics, much as the EU did in the course of implementing Article 81. Originally confined primarily to that limited set of agreements among competitors having especially pernicious effects on competition (price-fixing, reduction or allocation of capacity and/or output, customer or market allocation and the like, without other elements of collaboration that might increase productivity or advance consumer welfare), *per se* rules were extended to a variety of vertical practices in the 1950's, 60's and early 70's. Indeed in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *all* vertical agreements involving any restriction on the purchaser's resale of the product – as to price, territory of resale, or customer – were summarily condemned as *per se* illegal, without regard to competitive impact or relevant market circumstances.

Similar patterns of judicial interpretation and government policy became evident with respect to horizontal agreements in such cases as *United States v. Topco Associates*, 405 U.S. 596 (1972). The Supreme Court in *Topco* accepted the government's argument to condemn a joint venture as a *per se* illegal horizontal restriction despite its evident procompetitive merit, fearing that consideration of individual market circumstances and potential consumer benefits in assessing such ventures would "leave courts free to ramble through the wilds of economic theory . . .." *Id.* at 612 n.10.

Like the EU, however, the U.S. courts and government enforcement agencies, when confronted with the adverse consequences of antitrust rules that condemned agreements according to their formal and/or legal characteristics, quickly shifted their approach. In *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Supreme Court reversed course, placing vertical agreements (other than vertical agreements concerning resale prices and tying) back within the traditional rule of reason category. The necessary relationship between economic analysis and the antitrust assessment of such agreements was clearly established at the same time: "[D]eparture from the rule of reason standard must be based upon demonstrable economic effect, rather than -- as in [United States v. Arnold &] Schwinn -- upon formalistic line drawing . . .." *Id.* at 58-59. Thus consumer welfare was placed in the preferred position as the antitrust value against which all agreements (and indeed all other transactions and conduct, including unilateral conduct) would be measured. *Reiter v. Sonotone Corp.*, 422 U.S. 330 (1979). Similarly, certain horizontal agreements were allowed to be justified in light of their consumer welfare effects. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), was the first Supreme Court decision that clearly authorized horizontal agreements to be assessed in this manner, bringing to a close the era of broad and indiscriminate application of the *per se* rule.[4]

In sum, the main experiences of the EU and U.S. with formulation and implementation of government mandates involving agreements among business

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[4] This extensive (and somewhat complex) history is described and explained in detail in the recent decision of the U.S. Federal Trade Commission, *In re PolyGram Holding, Inc.*, Docket No. 9298 (FTC) (available at http://www.ftc.gov/os/2003/07/polygramopinion.pdf), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

enterprises contain striking parallels, despite the significant differences in the nature, timing and circumstances of the two. In both cases a system of evaluating such agreements was developed with a heavy emphasis on administrative convenience and simplicity, using classifications based on the legal form of such agreements as the main criteria for substantive assessment. In both cases these systems, although originally designed for ease of application, proved unworkable and contrary to the interests of consumers. The system that emerged grounds competition-law principles in economic analysis, and selects legal tests (whether rules of *per se* illegality, broad standards such as the "full" Rule of Reason, or approaches that employ presumptions) by how well they advance the ultimate objective of consumer welfare.

The unique circumstances of present-day China make it difficult to predict that the lessons of EU and U.S. experience will also prove true with regard to the Draft Regulations. The Sections respectfully suggest, however, that SAIC consider these basic tenets in assessing suggested adjustments to the current Drafts:

1. Substantive assessment of agreements among business enterprises and other business conduct should be guided by the basic policy objective of maintaining competitive markets to promote economic progress and consumer welfare.

2. Economic analysis should be used to assess the tendency of particular agreements and conduct to promote or inhibit such basic policy objectives.

II. Draft Monopoly Agreements Regulation

A. Determining the Existence of a Prohibited Agreement (Articles 3 and 4)

In Article 3(3) of the Draft Monopoly Agreements Regulation, prohibited acts are defined to include "acts of collaboration, including tacit or coordinated acts among business operators even though there are no express agreements or decisions reached, either written or oral." Article 4 states that the "degree of consistency in the acts of business operators" and "identical or similar acts without legitimate reasons" will be considered "in conjunction with the market structure and market fluctuation situations" in determining whether companies have participated in "acts of collaboration" under Article 3(3).

Sound competition policy distinguishes agreements among rivals – which prohibitions on anticompetitive agreements may reach – from mere oligopoly – which the law cannot practically remedy and is the natural consequence of unilateral decision-making. For the reasons discussed below, the Sections believe that "tacit" agreements generally cannot be distinguished from unilateral oligopoly behavior, and trying to do so creates insurmountable practical difficulties. The Sections therefore suggest the deletion of Article 3(3) and some revisions to Article 4 to clarify the types of evidence that may demonstrate the existence of prohibited agreements or decisions. The Sections suggest

that Article 4 require more than "consistent" or "identical" acts by businesses as proof of an agreement. Otherwise, the Sections suggest that both Articles 3(3) and 4 be deleted because, as drafted, they will be difficult to apply and may deter normal and often pro-competitive business activity.

In an oligopolistic industry, businesses may engage in several different types of behavior that lead to similar market outcomes, but have different legal consequences. First, businesses may enter into an express agreement to fix prices, reduce output, allocate markets, *etc.* Second, they may reach a "tacit" agreement to achieve the same purpose. Third, each business may act individually and unilaterally, while at the same time recognizing the interdependence between itself and its rivals. A business recognizing this interdependence will choose its competitive strategies taking into account the responses and expected responses of its rivals; it would be irrational for the business to do otherwise.[5] The market outcomes under this type of "interdependent oligopoly behavior" may be similar to the market outcomes that would result from an agreement.[6]

It is therefore important to recognize the need to be cautious in inferring the existence of "tacit" agreements, especially in an oligopoly market. First, inferring the existence of "tacit" agreements too readily would chill an undertaking's ability to respond to market conditions according to its business incentives.[7] For example, suppose a company sells a product in both Shandong and Hebei provinces in competition with a rival. The rival then chooses to withdraw from Shandong province and sell only in Hebei. The demand for the company's product in Shandong would likely increase as customers there looked for an alternative source of supply. If the company shifted some of its sales from Hebei to Shandong to meet the increased demand in Shandong, it could be accused of entering into a "tacit" "market division" agreement with its rival. Yet, by shifting its sales, the company would have been responding to market conditions unilaterally according to its business incentives. If the company instead maintained its sales in Hebei and did not shift any sales in Shandong because it feared being accused of entering into a "tacit" agreement, it would be acting against its best interests and against the signals provided by market conditions. Antitrust policy should not ask a company to

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[5] This was recognized by economists and legal scholars as early as the 1960s, *see* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 665-66 (1962) ("[T]he rational oligopolist is behaving in exactly the same way as is the rational seller in a competitively structured industry; he is simply taking another factor [the reactions of competitors] into account…which he has to take into account because the situation in which he finds himself puts it there").

[6] *See, e.g.*, *Brooke Group v. Brown & Williamson*, 509 U.S. 209, 227 (1993) (companies acting unilaterally might set "their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions").

[7] That is not to say that antitrust agencies have no role to play in preventing "tacit" agreements. In merger reviews, an antitrust authority should block mergers that would increase the likelihood of coordinated interaction (including "tacit" or express agreements). *See* OECD COMPETITION COMMITTEE, OLIGOPOLY 34 (1999) ("Merger review is the most direct and probably effective measure that competition agencies can apply to reduce the probability of coordinated interaction" in addition to "rigorous enforcement against explicit collusion").

make unilateral decisions that are not in its best interests, taking into account market conditions.

Second, it is typically difficult to distinguish between a "tacit" agreement and "interdependent oligopoly behavior" that does not involve an agreement, because the observable market outcomes from the two types of behavior are often identical. There is a substantial risk of "false positives," where the authority finds incorrectly that businesses have entered into a "tacit" agreement when in fact the businesses were engaged in unilateral behavior, though recognizing their interdependence.

Mere oligopoly behavior is not subject to antitrust enforcement under United States law.[8] United States courts have recognized that it would be counter-productive for antitrust policy to require businesses to ignore market conditions, including the actions and reactions of their rivals, while choosing their competitive strategies. Because a "tacit" agreement is virtually indistinguishable from lawful interdependent oligopoly behavior, United States law condemns only express agreements among oligopolists.[9]

The "degree of consistency in the acts of business operators" and "identical or similar acts" specified in Article 4 — often referred to as "parallel behavior" in United States law — will often occur even in the absence of an agreement simply because, especially in oligopolistic industries, companies recognize their interdependence and act accordingly even if there is no agreement. Moreover, since any action taken by one company in a competitive or oligopolistic industry is often profitable for the other companies as well, "parallel" behavior will often occur in such industries where no agreement is in place.[10] For example, if one company realizes that its promotional activity has not been effective and therefore reduces its promotions, other companies may re-examine their own promotional activity and decide to reduce their promotions also.

Because parallel behavior can arise with or without an agreement, evidence of parallel behavior by itself is not a useful indicator of whether there was an

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[8] *See, e.g., Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d. 478, 484 (1st. Cir 1988) ("Courts have noted that that Sherman Act prohibits *agreements*, and they have almost uniformly held, at least in the pricing area, that…individual pricing actions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act," emphasis in original); Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L. J. 719, 779 (2004) ("Interdependence is normal and innocent in oligopoly…Rational oligopolists typically monitor rivals closely and react to their price changes or other strategic moves. There is nothing even remotely suspicious about such actions" (footnote omitted)).

[9] *See Brooke Group*, *supra* note 6, at 227 ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level").

[10] *See, e.g., Clamp-All*, *supra* note 8, at 484 ("A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader").

agreement.[11] For that reason, under United States law, a court may not infer that an agreement existed solely on the basis of parallel behavior.[12] Instead, there must be both parallel behavior and one or more pieces of circumstantial evidence that support an agreement as opposed to oligopoly behavior, or competition.[13] Therefore, the Sections suggest that Article 4 be revised as follows:

> "The best evidence that business operators reached a prohibited agreement or decision is direct evidence that the business operators communicated explicitly and, through that communication, reached such an agreement. In the absence of such direct evidence, an agreement might be inferred if (1) the business operators exhibited substantially parallel behavior, (2) at least one of the business operators does not have legitimate business reasons that rationally would lead it to engage independently in the challenged conduct, *and* (3) there is additional circumstantial evidence supporting the existence of an agreement as distinguished from mere interdependence."

B. Prohibited Agreements (Articles 5 and 6)

Article 5 of the Draft Monopoly Agreements Regulation prohibits business operators in competition with each other from entering into certain types of agreements which are classified as "monopoly agreements." These include, in Article 5(3), those agreements "that restrict the purchase of new technology, new equipment, or restrict the development of new technology or products, including restricting the investment in or development or use of new technology, new equipment or new products, or restricting the leasing of new equipment".

Although Article 5(3) correctly targets agreements, related to restrictions on new technologies or products, which may result in anticompetitive harm, an overly broad interpretation of Article 5(3) could also reach many types of agreements that may instead promote technological innovation.

One example of where a broad reading of Article 5(3) could invalidate procompetitive agreements (as well as discourage companies from entering into such

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[11] *See, e.g.*, OECD COMPETITION COMMITTEE, *supra* note 7, at 7 ("evidence of parallel conduct is not and should not be considered sufficient proof of [express agreement]").

[12] *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (parallel conduct is equally consistent with "a wide swatch of rational and competitive business strategy unilaterally prompted by common perceptions of the market" as it is with express agreement); *Id.* at 1966 ("Without more, parallel conduct does not suggest conspiracy [*i.e.*, express agreement]").

[13] *See Matsushita v. Zenith*, 475 U.S. 574 (1986) ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy…[a plaintiff] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently"); *see* also OECD COMPETITION COMMITTEE, *supra* note 7, at 8 ("To convince courts that parallel behaviour has arisen through some sort of agreement rather than merely resulting from oligopolistic interdependence, competition authorities must usually demonstrate that something more has occurred, *i.e.*, establish the existence of one or more 'plus factors'").

agreements for fear of having them invalidated) relates to joint ventures. The types of agreements noted in Article 5(3), especially those restricting the development of, or investment in, new technology, often play an essential role in the formation of joint ventures by ensuring that the joint venture participants will be actively committed to their joint enterprise.

Although restrictions in a joint venture which limit its participants' abilities to compete with the venture (*e.g.*, by pursuing/promoting alternative technology to that being developed by the joint venture) are an important factor to consider in determining whether the joint venture is, on balance, anticompetitive, such restrictions are just one of a series of factors that the U.S. antitrust enforcers consider in evaluating such joint venture relationships.[14] With the exception of a small set of agreements among competitors which are so plainly anticompetitive that they deserve *per se* (*i.e.*, automatic) invalidation, all others are subject to a rule of reason analysis which entails a fact-specific and "flexible" inquiry, including presumptions where appropriate.[15] The Sections suggest that adopting this more flexible and fact-specific approach, and making this approach explicit in the Monopoly Agreements Regulation so as not to chill procompetitive agreements, can better serve the goals of both discouraging anticompetitive agreements while at the same time making more room for beneficial agreements.

The risk of a broad reading of Article 5(3) extends beyond the joint venture context and could similarly result in having a chilling effect on other common and often procompetitive practices, especially in the area of intellectual property licensing. For example, the grant of an exclusive license (exclusive even to the grantor) could directly restrict the use or development of a new technology – as the licensor will have ceded its entire rights to that technology to its exclusive licensee. As with the analysis of joint ventures above, it's certainly the case that the grant of an exclusive technology license to one's competitor *may* be anticompetitive, but the Sections suggest that Article 5(3) require that the license's actual competitive effect be evaluated and that there be no blanket prohibition on the granting of exclusive licenses to new technology (even to one's competitors). Otherwise, Article 5(3) could stand in the way of this commonplace type of licensing and harm innovation when, for example, the licensee has better resources and skills to fully exploit the technology or where numerous other competitors exist and can provide an effective competitive constraint on the licensee.

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[14] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) [hereafter, *U.S. Competitor Collaboration Guidelines*] *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, § 3.34 ("The Agencies are likely to focus on six factors: (a) the extent to which the relevant agreement is non-exclusive in that participants are likely to continue to compete independently outside the collaboration in the market in which the collaboration operates; (b) the extent to which participants retain independent control of assets necessary to compete; (c) the nature and extent of participants' financial interests in the collaboration or in each other; (d) the control of the collaboration's competitively significant decision making; (e) the likelihood of anticompetitive information sharing; and (f) the duration of the collaboration.").

[15] *U.S. Competitor Collaboration Guidelines* § 1.2.

Also at risk under a broad reading of Article 5(3) are "grantback" licenses in which a licensor provides its technology but with a commitment from the licensee(s) that it will receive licenses back from the licensees for technological improvements. As with other types of licensing practices, a grantback may raise competitive issues but also may be procompetitive.[16] Because a general prohibition on agreements that "restrict the development of new technology" could be read to automatically reach grantbacks (as such licenses can affect the incentives of the licensee to develop the licensed technology since it knows that it will then be obligated to share the benefits of its technological improvements with the licensor), the Sections suggest that the Monopoly Agreement Regulation expressly state that Article 5(3) will be applied by carefully examining the competitive effects that a proposed agreement (licensing or otherwise) is likely to have, rather than implying that its legality turns on whether any of the enumerated restrictions are present, without considering whether those restrictions play a part in what can be demonstrated to be a procompetitive arrangement.

Article 6(1) prohibits, as a class of "monopoly agreement" any agreement in which the "tenderer reaches an agreement with a bidder during bidding activities, including disclosing bidding information to other bidders, assisting the bidder to withdraw or change the bidding documents, and colluding with bidders on matters other than quotations."

Given that this provision directs its focus on the tenderer (the party putting the bid process into motion), there appears to be little anticompetitive motivation for the activities prohibited here – such as providing a bidder with secret information, giving it an advantage over other bidders, *etc.* Such activities would harm the buyer, by preventing it from receiving the best bid. While there might be a "bad actor" from within the buyer's organization with his/her own incentives to undertake the prohibited conduct and favor a particular bidder (*e.g.*, in return for unlawful personal payments or other items of value from a bidder), that is not classically an antitrust problem (absent, for example, price regulation at one level of the market), so it may be helpful to clarify what antitrust-related harm Article 6(1) seeks to reach. Such conduct is likely unlawful under non-antitrust laws that deal directly with what may be mostly an issue of corruption (*e.g.*, laws relating to government procurement, commercial bribery statutes, *etc.*).

If Article 6(1) is retained, it should be made clear that a tenderer should have considerable leeway in structuring its solicitation of bids[17] and that, so long as those rules are transparent to the bidders, Article 6(1) should not be implicated. Otherwise, a regulation meant to target corrupt actions so as to protect the buyer's interest in getting

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[16] *U.S. Competitor Collaboration Guidelines* § 5.6 ("Grantbacks can have procompetitive effects, especially if they are nonexclusive. Such arrangements provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both promote innovation in the first place and promote the subsequent licensing of the results of the innovation.").

[17] *See, e.g., Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004) (holding that Blue Cross's practice of inviting bids and choosing which one it would accept did not constitute "bid rigging" and was not subject to automatic invalidation as an antitrust violation).

the benefit of a fair process could instead be turned into a mechanism to serve the interests of unsuccessful bidders wishing to attack the buyer for its legitimate choices in deciding how to structure the bid process.

Article 6(2) of the Draft Monopoly Agreement Regulation prohibits business operators from reaching an agreement with a counterparty that "without justified reasons, restricts the business operations of such transaction counterparty to a specific regional market only." Although the inclusion of a justification as a defense is an important safeguard, providing additional guidance on what kinds of reasons could supply the necessary level of justification would make the provision even more useful.

In particular, there are a large variety of "vertical" relationships between parties upstream and downstream in a distribution chain (*e.g.*, a manufacturer and a distributor) that commonly impose territorial restrictions on the downstream participant. Although not automatically lawful in the United States, such territorial restrictions are routinely upheld unless the party imposing them has significant interbrand market share,[18] or where the claimed business justifications are not borne out by the facts.[19] This approach is one that the United States came to after much thought and evolution in both its case law and academic thinking about the effects of such restrictions. As noted above, such territorial restraints were, for a time, deemed to be automatically unlawful.[20] However, a recognition of the need to look beyond the mere fact that the restriction was being put on a downstream party led to the rejection of a *per se* rule of illegality[21] and evolved into the current system in which it is the rare vertical territorial restraint that is found to be unlawful.[22]

C Exemptions (Article 7)

Article 7 provides that "Where the business operator is able to prove that the agreement reached conforms to the provisions of Article 15 of the Anti-Monopoly Law, Articles 5 and 6 of this Regulation shall not be applicable."

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[18] Absent a party's having significant interbrand market share it appears to be far less likely that its imposition of territorial restrictions on a downstream party would have any anticompetitive effects (and it is more likely that the party is simply trying to use these territorial limitations to more effectively compete at the interbrand level). *See, e.g.*, *Murrow Furniture Galleries v. Thomasville Furniture Indus.*, 889 F.2d 524, 529 (4th Cir. 1989).

[19] *See, e.g.*, *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1077-81 (2d Cir. 1980).

[20] *See* Section I above; *United States v. Arnold, Schwinn & Co.*, 388 U.S. at 380.

[21] *See Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. at 58-59.

[22] This result was foreshadowed by the decision in *Continental T.V. v. GTE Sylvania,* which recognized that companies often looked to impose territorial restrictions in order to motivate resellers. These incentives would help ensure that the resellers were willing to use the necessary resources to adequately market the product (something a reseller would be more likely to undertake knowing that it was going to be protected from intrabrand competition after having made those investments in the brand). *Id.* at 55.

The Sections believe that, with the exception of agreements by competitors to fix their sale prices, set output or allocate markets, antitrust laws should allow business operators to demonstrate to the appropriate courts or antitrust enforcement authorities that an agreement may increase competition and improve efficiencies and therefore should not be prohibited. The Sections appreciate that Article 7 is designed to allow business operators to demonstrate the inapplicability of Articles 5 and 6 of the Monopoly Agreement Regulation. As currently drafted, Article 7 requires business operators to "prove" that an agreement conforms to AML Article 15. However, it is unclear how SAIC would apply this standard in practice. The Sections believe that the Monopoly Agreement Regulation would better foster competition and the goals of the AML if SAIC were to provide businesses with further guidance as to the standard that they must satisfy for an agreement to conform to Article 15 of the AML.

The Sections believe that, in situations other than horizontal price fixing and allocation of markets, adopting a standard that is too exacting would place unreasonable burdens on businesses and potentially chill pro-competitive conduct. Businesses that cannot meet a high standard are unlikely to experiment with or engage in potentially pro-competitive collaborations or joint ventures. The Sections suggest that SAIC adopt a standard that strikes an appropriate balance. On one hand, the standard should not be so lax that anticompetitive conduct would be difficult for SAIC to prosecute. On the other hand, the standard should not be so exacting so as to discourage business operators from experimenting with legitimate pro-competitive joint ventures and collaborations. The standard should not chill the very innovation the AML seeks to promote.

The Sections suggest that Article 7 of the Monopoly Agreements Regulation provide that an agreement that does not involve price fixing, or output or market allocation, will be exempt under Article 15 of the AML if the parties to the agreement provide evidence that the agreement is reasonably related to achieving one of the goals articulated in Article 15 of the AML and that the agreement's posited pro-consumer efficiencies outweigh potential anticompetitive effects. In particular, Article 7 might provide that an agreement that is not of the types described in Article 5(1), (2), (5) or Article 6(1), would be exempt under AML Article 15 if the parties demonstrate that the agreement is reasonably related to achieving one of the goals set forth in Article 15 and "will not substantially restrict competition in the relevant market and will enable consumers to share in the benefits derived therefrom" as required by Article 15 and is on balance procompetitive.

This is the standard typically applied by U.S. antitrust enforcement agencies.[23] The U.S. enforcement agencies have also clarified that "reasonably

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[23] *Id*., at 8 (the agencies will not challenge an agreement as *per se* illegal if the agreement is "reasonably related to the integration and reasonably necessary to achieve its precompetitive benefits."); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, at 71 (1996), 4 Trade Reg. Rep. (CCH) ¶ 13,153 ("Where competitors economically integrate in a joint venture, however, such agreement, if reasonably necessary to accomplish the procompetitive benefits of the integration, are analyzed under the rule of reason".).

necessary" does not mean that the agreement is essential to achieving the procompetitive benefits of the agreement. The agencies generally consider only whether "practical, significantly less restrictive means were reasonably available when the agreement was entered into . . . ."[24] More generally, in the United States, a rule of reason analysis considers "the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[25] United States courts generally will consider "the business, the history of the restraint, and the reasons why it was imposed."[26] While not all restraints require an elaborate inquiry,[27] the rule of reason analysis typically involves an analysis of markets, concentration, entry, competitive effects and efficiencies.

The application of the reasonableness standard prevents the application of the *per se* rule to potentially pro-competitive conduct and ensures that parties to an agreement may experiment with collaborations that are designed to achieve efficiencies. In addition, it provides sufficient flexibility to SAIC to investigate agreements that may be anticompetitive.

The Sections suggest that SAIC also consider establishing safe harbors where, absent extraordinary circumstances, SAIC will not challenge an agreement between competitors that does not involve price fixing, or output or market allocation. The U.S. agencies have adopted two safe harbors where, absent extraordinary circumstances, they will not challenge competitor collaborations that do not involve price fixing or market allocation outside the scope of the collaboration. The first safe harbor is where the participants collectively account for no more than twenty percent of the relevant market affected by the agreement.[28] The second safe harbor is where there are three or more independently controlled research efforts that are a close substitute for the R&D activity of the proposed agreement.[29] The use of safe harbors reflects the fact that competitor collaborations are often procompetitive. The safe harbors encourage such collaborations by minimizing uncertainty and potential transaction costs. SAIC might consider similar safe harbors in Article 7 of the Monopoly Agreement Regulation, where agreements are not of the types described in Article 5(1), (2), (5) or Article 6(1).

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[24] *U.S. Competitor Collaboration Guidelines*, *supra* note 14, at 9; *see also id*. at 24 ("the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities.").

[25] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 49.

[26] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

[27] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-64 (1986) (not applying an elaborate inquiry where a "quick look" revealed the agreement was a direct restraint on output).

[28] *U.S. Competitor Collaboration Guidelines*, *supra* note 14, at 24.

[29] *Id*. at 27.

D. Industry Associations (Article 8)

Given the history of industry associations' involvement in anticompetitive conduct, Article 8 is an important part of the Monopoly Agreement Regulation. However, the current draft may chill the typically pro-competitive conduct that most industry associations were formed to undertake. Moreover, the mere existence of an industry association is not evidence of a monopoly agreement.

For example, it is often useful for members of an industry to gather for the purpose of developing industry-wide positions on political, environmental, or other issues. The broad prohibitions in draft Article 8 may deter such behavior. Article 8 also might restrict the pro-competitive behavior of standard setting bodies or research and development collaborations.

To avoid overstatement of the applicable prohibitions of Article 8, it might be worth emphasizing in the introductory paragraph that industry associations are not prohibited by Article 8 or the Monopoly Agreements Regulation generally, and that Article 8 applies only when the trade association's activities relate to monopoly agreements prohibited under Articles 5 and 6.

In addition, Article 8(3) should more carefully draw a distinction between activities of the industry associations themselves on the one hand, and conduct of the associations' members on the other. If an association's members take advantage of meetings organized by the industry association to engage in anti-competitive conduct, the association should not bear responsibility absent other factors. For example, the Sections recognize that an industry association cannot disassociate itself from its members' actions if it takes action to facilitate them. As such, it is useful to encourage industry associations to have processes and policies that deter and prohibit anti-competitive conduct.

E. Monopoly Agreements with Nationwide Impact and Provincial SAICs (Articles 9 and 10)

Article 9 of the Draft Monopoly Agreements Regulation provides that "SAIC is responsible for the investigation and sanction of acts of monopoly agreement…which have a significant nationwide impact." Article 10 indicates that SAIC may exercise its discretion to authorize "'Provincial SAICs' to investigate and sanction…monopoly agreements…which occur within such Provincial SAIC's administrative region…[or] across the borders of provinces, autonomous regions or municipalities directly under the central government, while the principal place of such acts is within such Provincial SAIC's administrative region."

The Sections suggest that the phrase "having a significant nationwide impact" be clarified, particularly with respect to foreign parties. Clarity as to when an agreement may be subject to Provincial SAIC review or to SAIC review may assist parties in determining from whom to seek informal consultation and guidance when

entering into agreements that may raise issues under the AML and lighten the SAIC's enforcement burden.

It is possible that an agreement may both occur principally within one administrative region and have significant nationwide impact. In such cases, the Sections suggest that the Monopoly Agreements Regulation makes it clear in Article 10 that SAIC would exercise its discretion to retain jurisdiction. In particular, the SAIC may wish to expressly reserve jurisdiction over major cases involving a foreign element. It would retain jurisdiction over the investigation and sanction of monopoly agreements that have a foreign element, as such actions may affect foreign investment generally and not just the local area. Such an approach may ensure effective enforcement of the AML in cases of nationwide impact. It may also relieve Provincial SAICs of the burden of potentially investigating and sanctioning business arrangements that another provincial authority may have initially approved in furtherance of other provincial goals.

Similarly, the Sections also suggest that SAIC may wish to retain control over domestic matters affecting several provinces, but which may not have a direct nationwide impact. China is a very large country and there may be several regional markets for the goods in question, such as the north-east provinces of Heilongjiang, Jilin and Liaoning; or the coastal provinces of Jiangsu, Shanghai and Zhejiang. In the latter case the agreements or abuses of dominant position may only affect three of China's provinces, autonomous areas and municipal areas, but they may have a significant impact on the Chinese economy as these areas have well-developed economies. Therefore, the SAIC may wish to clarify in Article 10 that it will retain jurisdiction over agreements having an effect in more than one province, autonomous region, or directly administered municipality.

Regardless of the extent of authorization by SAIC to Provincial SAICs, the Sections suggest that Article 10 provide that investigations and sanctions by Provincial SAICs will be subject to SAIC oversight, to ensure consistency and coherence in the enforcement of the AML nationwide. This is especially important as the Provincial SAICs will need to develop expertise in implementing the AML and the Monopoly Agreements Regulation.

F. Leniency and Deferred Prosecution (Articles 12 and 13)

The Sections welcome the inclusion of leniency provisions for cooperation that are set forth in Articles 12 and 13 of the Draft Monopoly Agreements Regulation. The Sections understand that these articles implement Article 46 of the AML, providing for legal liability and authorizing the Anti-Monopoly Law Enforcement Authority to give "mitigated punishment or ... exempt from punishment" those business operators that "voluntarily report the conditions on reaching the monopoly agreements and provide important evidence."

The International Competition Network's Good Practices guidelines indicate an effective leniency program may be beneficial to enforcement.[30] Many jurisdictions, including the EU and U.S., have adopted leniency programs as part of their cartel enforcement.[31] The Sections believe that leniency programs are effective both in deterring monopoly agreements and providing incentives for business operators to voluntarily terminate their participation in these agreements and report to the enforcement authority.[32]

AML Article 46 and Articles 12 and 13 of the Draft Monopoly Agreements Regulation are consistent with the ICN guidelines and the practice of other jurisdictions in providing immunity for business operators that voluntarily report "relevant information" and provide "important evidence." The Sections fully support efforts to establish a transparent and consistent process for sentencing and leniency in cartel cases. The fundamental requirement of any effective settlement program is that it provides sufficient incentives to encourage the parties to seek leniency. To that end, the Sections respectfully suggest four criteria that are essential for an effective leniency program and encourage the SAIC to establish a program that meets these four criteria. The program must have procedural transparency, generous or significant settlement discounts, legal certainty and the protection of confidentiality and privilege. Transparency, legal certainty, generous settlement discounts and confidentiality are necessary criteria for making the leniency program attractive to potential defendants, corporate and individual.

Therefore, the Sections suggest that additional clarification in the Draft Monopoly Agreements Regulation in the following areas would enable an effective leniency program:

> (1) Article 12 should specify which types of monopoly agreements are entitled to apply for leniency policy. As experienced in the EU, since cartels are generally highly secretive and evidence of their existence is not easy to find, a leniency policy is established to encourage undertakings to disclose inside evidence of cartels. In addition, except for cartels, other types of conduct that may violate competition laws generally are open and/or often have precompetitive effects.
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> Therefore, the Sections suggest that Articles 12 and 13 expressly indicate that the leniency policy is not applicable to all horizontal monopoly agreements, but only to cartels. Also consistent with EC and

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[30] Anti-Cartel Enforcement Manual: Drafting and Implementing an Effective Leniency Program, April 2006, available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FINALFormattedChapter2-modres.pdf.

[31] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT; Department of Justice, Antitrust Division, Corporate Leniency Policy (08/10/1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm.

[32] Michele Polo and Massimo Motta, Leniency Programs, *Issues in Competition Law and Policy* 2219 (ABA Section of Antitrust Law 2008).

U.S. policies, the Sections suggest that a leniency policy should not be applied to vertical monopoly agreements. However, the Sections suggest that the SAIC at the same time clarify in the Monopoly Agreements Regulations the methods by which penalties under AML Article 46 will be determined for non-pricing related horizontal monopoly agreements and vertical monopoly agreements. The Sections suggest that penalties under AML Article 46 for such monopoly agreements should be at the minimum of the range provided in AML Article 46.

The Sections also suggest that Articles 12 and 13 clarify whether the leniency would be limited to prosecutions under the AML of monopoly agreements or whether the leniency would also include non-AML prosecutions for the conduct (for example, general fraud), or private litigation concerning the monopoly agreement.

(2) Article 12 should clarify the exact circumstances under which leniency will be available. For example, the U.S. Department of Justice policy lists six conditions required for leniency to be granted before a criminal investigation has begun and seven alternative conditions for businesses that do not meet the first set of conditions.

The Sections recommend the following conditions as requirements for leniency in addition to the requirements of Articles 12 and 13: the SAIC had not received the relevant information from any other source; the leniency applicant promptly halted its participation in the agreement; the applicant's report must be complete and truthful; and the applicant must continue to cooperate with the SAIC throughout the investigation and any prosecution.

(3) Article 12 provides that the SAIC "may" reduce penalties for subsequent leniency applicant that report, but does not identify the circumstances under which the SAIC will exercise its discretion. It would be helpful to clarify that the discretion that the SAIC may exercise under Article 12, will be exercised as set forth in Article 13 in the circumstances described in Article 13. Including a list of the factors that SAIC will apply would provide clarity for businesses.

Article 13 provides the greatest leniency to the first applicant to make a voluntary report, so the Sections recommend that the SAIC establish a system to identify the applicants in the order that they make their reports and therefore the priority of their eligibility for leniency. The effect that multiple leniency applications would have on the leniency process should be clearly expressed to give prospective leniency applicants more clarity and predictability of outcome. A transparent and predictable leniency process is at least as important as clearly articulated leniency considerations.

(4) Both Article 12 and Article 13 use the phrase of "immunity or reduction of penalties". In accordance with Article 46 of the AML, such "penalties", if they are monetary, could include proceeds confiscated and fines. The Sections recommend SAIC make it clear whether the immunity or reduction applies not only to fines, but also to proceeds confiscated.

(5) The "important evidence" and "relevant information" referred to in Articles 12 and 13 may include confidential business information. The Sections appreciate that Article 40 of the AML provides that the "Law Enforcement Authority and its functionaries shall keep confidential the business secrets they have access to during the process of law enforcement." The Sections recommend that the Monopoly Agreements Regulation clarify that any business secrets disclosed during an application for leniency will also be kept confidential.

(6) Given the differing jurisdictions of the SAIC and the NDRC in the implementation of the AML, it is important for the two authorities to coordinate to ensure consistency with any leniency program that the NDRC may adopt under the AML.

The Sections note that Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders. The commitments mechanism enhances the enforcement authority's efficiency and the optimization of allocation of the authority's resources, while enabling undertakings to avoid an adverse decision and possible penalties. The Sections suggest that SAIC include in the Monopoly Agreements Regulation provisions setting forth the conditions and processes under which prosecution will be suspended. The following aspects could be taken as a starting point:

(1) The Sections suggest that SAIC define the applicable scope of the commitments mechanism. For example, the commitments mechanism is inappropriate for cartels.

(2) The Sections also recommend that the decision to suspend the investigation under AML Article 45 specify both the time limit in which commitments must fully be implemented and the time limit following fulfillment of the commitments in which SAIC is obliged to finally terminate or continue the investigation. Since Article 45 of the AML provides that SAIC has discretion to decide whether or not to proceed with the investigation after commitments are fulfilled, the Sections also suggest SAIC clarify under what circumstances SAIC would continue its investigation, and that these circumstances be specific and narrowly defined. It is important for an effective deferred prosecution program to have legal certainty and predictability as to when prosecution will be terminated or resumed.

(3) The Sections suggest that the Monopoly Agreements Regulation provide that commitments under AML Article 45 be necessary and proportionate to remove specific anti-competitive concerns identified by SAIC.

(4) As with the leniency program, it is important for the SAIC and NDRC to coordinate to ensure consistency with any commitments mechanism that the NDRC may adopt under the AML.

III. Draft Abuse of Dominance Regulation

A. General Comments

The experience of other jurisdictions that have applied government mandates to unilateral conduct by dominant firms clearly reveals a number of difficult issues. A list of the most basic of these issues would include at least the following:

First, the most fundamental idea of market competition is to encourage individual businesses to use their own resources and creativity to succeed and grow in the market. The most basic concept of competition is that each business seeks to improve its own market position by offering lower prices, or by innovating to reduce costs, discover and implement superior business methods, or provide improved products and services desired by customers. The imposition of over-restrictive mandates on unilateral conduct by a firm that succeeds in this effort and thereby becomes a market leader discourages or even punishes this desirable competitive behavior. This has the potential to threaten the most basic forms of economic creativity and the most basic sources of growth and prosperity in a modern economy.

Second, legal restrictions on dominant firm conduct must sensitively balance the benefits and costs of clear rules (which provide notice to firms engaging in market conduct) and more case-specific standards (which permit a more detailed analysis of conduct's competitive effects, but at the cost of clarity). Legal tests that produce excessive caution by dominant firms can reduce economic creativity as well as prosperity and growth.

Formulating mandates for dominant-firm conduct that are no more restrictive than necessary to protect competition is among the most difficult and controversial tasks facing any competition authority. Given the constant evolution of markets, firms and business practices, it has proven impossible to state any specific criteria that will lead to proper enforcement standards in every situation. Even jurisdictions with long and substantial enforcement experience struggle with questions about how to define and enforce rules that govern a wide variety of specific competitive practices. In the EU, for example, long-standing debate over proper standards under EU Treaty Article 82, the abuse-of-dominance prohibition, led to a years-long process of

study and to the recent adoption of Article 82 Guidelines.[33] The U.S. federal antitrust agencies recently engaged in a year-long series of joint hearings on the subject of single-firm conduct standards under Section 2 of the Sherman Act, the principal U.S. mandate governing firms with monopoly power. A number of specific issues remain unresolved, however.[34]

The Sections have participated in these and other efforts to guide policy and practice with regard to dominant-firm mandates. With great appreciation of the vast scholarship and research on these and other key policy questions, and with the benefit of guidance from lawyers, economists and businesspeople with extensive experience of such mandates not only in the U.S. but in scores of other jurisdictions throughout the world, the Sections recommend to SAIC that it consider certain broad principles of general applicability to the dominant-firm mandates represented by the Draft Abuse of Dominance Regulation.

First, the Sections commend the principle that dominant-firm conduct should not be regarded as abusive unless at a minimum such conduct threatens to harm competition more than it benefits competition. Second, on the same basis the Sections also commend the principle that dominant-firm conduct – even if it carries the potential for some material exclusionary effect – should be permitted if and to the extent justified by demonstrable reasons of efficiency. Punishing clearly pro-competitive behavior, such as a product innovation, could result in severe economic stagnation and direct obstruction of sound competition policy objectives.

In light of the substantial harms to consumers that flow from wrongly condemning conduct as abusive, the Sections encourage the SAIC to devote resources to clarifying the circumstances that constitute an abuse of dominance. For example, in the U.S., allegations of predatory pricing must meet cost-based tests; refusals to deal are unlawful only in narrow circumstances; yet other conduct is tested by many courts for reasonableness. The applicable legal tests seek to minimize both Type I and Type II errors. The Sections encourage SAIC to study the experience of the U.S. courts and agencies, the experience of the EU and other leading jurisdictions, as well as the teachings of leading antitrust scholars, and to identify the applicable standards when doing so is practical.

B. Definitions (Article 3)

Article 3 of the Draft Abuse of Dominance Regulation defines the "ability to block or impair other undertakings' ability to enter the relevant market" to be "the ability to exclude or delay entry into the relevant market by other undertakings in reasonable time or increase considerably the costs of entry into the relevant market by

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[33] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, available at http://ec.europa.eu/competition/antitrust/art82/index.html

34 Much of the extensive record of these hearings, containing widely diverse viewpoints on numerous distinct issues, can be accessed through http://www.ftc.gov/os/sectiontwohearings/index.shtm.

other undertakings such that they cannot effectively compete with the incumbent undertakings."

Care needs to be taken to avoid conflating this definition of a dominant market position with the substantive prohibition in Article 2 against an undertaking that possesses a dominant market position from abusing that position to exclude or restrict competition. Generally legal conduct such as the development of a superior product or more efficient production methods that may result in an undertaking obtaining a large market share and/or the creation of entry barriers, is not itself an abuse of the market position.

In addition, caution is required in analyzing barriers to entry. For example, a relevant market should not be intentionally or unintentionally defined to be a particular "segment" served by the market leader. Just because the leader develops a superior product does not mean necessarily that insurmountable barriers are erected to competition in the broader "relevant market".

C. Degree of Reliance by Other Business Operators (Article 5(4))

Article 5(4) suggests that the extent to which Company A relies on Company B in doing business is a valid indicator of dominance held by Company B – for example, if Company B is Company A's largest supplier or customer – and such reliance is reflected by the business volume and the term of the business relationship between the two companies, and the difficulty in turning to other alternative business partners.

While these factors are important to consider in assessing whether a firm has dominant market position, it is also important to note that there are often legitimate business justifications that lead to such observations, and there are more factors that need to be considered to support or refute any conclusion of dominance.

For example, a common business format both in the U.S. and in China is franchising. A franchising arrangement allows a franchisor to grow faster and also gives a franchisee the incentive to make sufficient efforts because it receives the residual profits. Such a relationship will naturally require that a franchisee deal exclusively with the franchisor, and the term of the contract is often long, often well over ten years in the U.S. To avoid moral hazard from the franchisees, a franchisor holds the power to terminate a franchise contract or not renew it if the franchisee does not perform to desired standards. In such a situation, it may be difficult for a terminated franchisee to find a different supplier, but this is not a reflection of the franchisor's dominance in the relevant market. Similarly, a large customer may stop dealing with a small supplier for quality reasons. Such reliance of the smaller party on the bigger one in a business relationship does not necessarily reflect a dominant market position held by the bigger party, and disputes between the two parties are often ordinary contract disputes that do not have the merits to be brought under antitrust law. It is also important to note that the fact that a supplier and a distributor have had a long history of engagement with a large business volume between them does not necessarily mean it is difficult for one of them to turn to competitors of the other.

D. Presumptions of Dominance (Articles 6 and 7)

The Sections have previously expressed their concern regarding market-share based standards for reaching a presumption on dominance.[35] These concerns apply with equal force to the market-share based standards of Article 6 of the Draft Abuse of Dominance Regulation. The first concern is that market shares alone are insufficient to presume dominance under the conditions of Article 6(2) and 6(3), which presume dominant market position where "the aggregate market share of two business operators reaches two-thirds of the relevant market; or… the aggregate market share of three business operators reaches three-quarters of the relevant market". When Articles 6(2) or 6(3) apply, none of the companies individually would be presumed to be dominant under Article 6(1). Thus, the presumption of dominance under Articles 6(2) and 6(3) appears to be based on joint dominance, which would seem to make sense only if the companies were assumed to be engaging in coordinated conduct. Yet, coordinated conduct is generally less likely when companies are "asymmetric" in terms of cost, market share, products, *etc.*[36] If "an individual business operator possesses a prominent market position compared with the other business operators," the companies are necessarily asymmetric and coordination and joint dominance is less likely in that case.

For example, two companies whose individual market shares were each less than 50 percent, but whose combined market share was greater than 66.7 percent would not be presumed to be dominant individually under Article 6(1), but would be presumed to be dominant under Article 6(2). This would seem to make sense only if the two companies are engaging in coordinated conduct (either through agreement or interdependence). Yet, Article 6(2) does not require any proof that the companies are coordinating, or even that market conditions and the companies' incentives make coordination likely. The second concern is that a simple market share-based standard for reaching a presumption of dominance shifts the burden of proof to the business to prove it is not dominant, which is inconsistent with international practice.

Article 7 provides that a presumption of dominant market position based on Article 6(2) or 6(3) may be rebutted if meaningful competition is demonstrated between those satisfying the conditions of Articles 6(2) or 6(3) and "no individual business operator possesses a prominent market position compared with the other

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[35] *See* Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China at 3, 15-16 (May 19, 2005), available at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/abaprc2005fin.pdf, and Proposed Revisions to Selected Articles of the April 8, 2005 Revised Draft of the Anti-Monopoly Law of the People's Republic of China, in Supplementation of the Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law, on the Proposed Law, dated May 19, 2005, submitted to Mr. Wu Zhenguo of MOFCOM at 3-4, July 29, 2005, available in English at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/jointcomments05supplement.pdf and in Chinese at http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/jointcommentsPRCchinese.pdf.

[36] *See, e.g.*, Dennis Carlton & Jeffrey Perloff, MODERN INDUSTRIAL ORGANIZATION (4th Ed., 2005), at 135.

business operators". To rebut a presumption of dominance under Articles 6(2) or 6(3), businesses should not be required to show that no individual competitor has a prominent market position because, if one business had a prominent market position, that fact would undermine the rationale for the presumption of dominance under Articles 6(2) or 6(3) in the first place. Rebuttal of the presumption of (joint) dominance should not require proof of a fact that would itself make joint dominance less likely to exist.

In all events, the Section believe that demonstrating any of Article 7(1), 7(2) or 7(3) should be sufficient to rebut any presumption of dominant market position, and that Article 7 should be clarified to make that clear. At the least, it should be unnecessary to demonstrate all three factors listed in Article 7 in order to rebut a presumption of dominant market position.

E. Refusals to Deal and Essential Facilities (Article 8)

Article 8 deals with the extremely difficult and controversial subject of refusals to deal, including the related "essential facilities" doctrine. The difficulty in this area in general stems, in part, from the recognition that a functioning market economy necessarily entails the ability of undertakings to decide whom to do business with, and to seek to do business on whatever terms they believe are advantageous for them. It is very difficult to impose objective criteria on the millions of business decisions made every day in the ordinary course of business (and to decide whether the terms of these transactions are "reasonable"). It is also generally counter-productive to encourage undertakings to take risks and spend capital to develop new products or methods of doing business, but then tell them they must give the fruits of that effort to competitors who did not do that work.

In the United States, the Supreme Court described in *Aspen Skiing*[37] a particular set of circumstances in which a change in business dealings was found to be anticompetitive. The Court has since described that case as at "the outer limit" of U.S. antitrust law, and made clear that as a general principle even dominant firms are not obligated to assist rivals or to offer business terms that preserve the profit level desired by rivals. Particularly with respect to intellectual property, the U.S. antitrust enforcement agencies made clear in their April 2007 Report on Antitrust Enforcement and Intellectual Property Rights that "antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections."[38] Similarly, in the EU, the European Commission has expended considerable effort to develop appropriate guidelines for the application of its abuse of dominance law to refusals to deal, and has generally acknowledged that a seller has the ability to decide whether to do business with particular firms and on what terms, unless a refusal to deal has a demonstrated adverse effect on competition.

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[37] *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. 585 (1985).

[38] U.S. DOJ & FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition at 32 (April 2007), available at http://www.ftc.gov/reports/innovation/p040101promoting innovationandcompetitionrpt0704.pdf.

Article 8 raises concerns. If read to impose a general limitation on the ability of undertakings to decide on what terms to offer their products and services, this provision could cause much inefficient and unproductive behavior. Indeed, if it becomes a matter of potential liability to make any changes in a business relationship in the future, undertakings will be deterred from doing business in the first place. At an extreme, if this provision prevents changes in prices, supply or other terms from one contract to the next, an undertaking may be put in an untenable position if, for reasons outside its control, changes in demand or supply in the market make it virtually impossible to continue to supply all customers on pre-existing terms. A business would have no guide to decide who to supply if it becomes unable to maintain the same level of production or distribution. This compelled perpetual "freeze" in business relations goes well beyond any legal requirement anywhere in the world that the Sections are aware of, and is not required by Article 17 of the AML.

At a minimum, therefore, careful qualifications or pre-conditions for liability for refusal to deal are indispensable. Liability should only arise when there is demonstrable and unavoidable damage to the competitive process, not simply injury to individual competitors, and an absence of business justification. In this light, it is helpful that Article 8 would apply only "where no justified reasons exist." More explanation of what a "justified reason" might be would of course be even more helpful. But the second sentence of the first paragraph of Article 8 appears to preclude any inquiry into business justification in cases of "refusing, reducing, limiting, or ceasing transactions with a counterparty under the same transaction conditions." To the extent this sentence suggests a rule that such changes can never be justified, the Sections respectfully urge that it be deleted.

With respect to the "essential facilities" doctrine, which is the subject of the second paragraph of Article 8, again the U.S. Supreme Court has not endorsed this theory. In the EU, the courts and DG Comp have articulated a number of limitations on the doctrine to assure that it is applied only in the most egregious circumstances. If the language of Article 8 is intended to follow, for example, the requirement in the EU that the product or service in question be "indispensable" for competition, that is a helpful limitation and could be made more explicit. The Sections respectfully suggest the SAIC consider the other requirements for this theory in the EU, including the requirements that effective competition will be eliminated without forced sharing, that others seeking access cannot replicate the facility, and that forced sharing will facilitate providing a new product or service. In the Sections' experience in the United States, it has often been the case that those advocating forced sharing of an "essential" facility have underestimated the ability of determined competitors to innovate around the facility, with resulting benefits to consumers. This doctrine should therefore be applied with the utmost caution, and under clearly expressed and carefully developed conditions.

F. Exclusive Dealing (Article 9)

Article 9 prohibits a company with a dominant market position from engaging in exclusive dealing ("constraining transaction counterparties to engage in transactions only with itself or only with its designated business operators") "where no

justified reasons exist." The Sections have two concerns with Article 9. First, the "justified reasons" under which it would be acceptable for a business with a dominant market position to engage in exclusive dealing are not specified. Second, there appears to be an unwarranted presumption of anticompetitive effect, with the burden of proof shifted to the company to prove that exclusive dealing is justified. Although exclusive dealing by a dominant firm can cause anticompetitive effects, it also can be procompetitive. Accordingly, the Sections recommend that Article 9 be deleted, or revised as follows:

> "A business operator possessing a dominant market position is prohibited from constraining transaction counterparties to engage in transactions only with itself or only with its designated business operators, where the constraint is demonstrated on balance to be anticompetitive."

G. Tying and Bundling (Article 10)

Article 10 prohibits a company with dominant market position from engaging in tie-in sales "where no justified reasons exist." The Sections' concerns with Article 10 are similar to those with Article 9. The "justified reasons" that would allow a company to practice tie-in sales are not specified in Article 10 and there appears to be an unwarranted presumption of anticompetitive effect, which shifts the burden of proof to the company. Because tie-in sales, like exclusive dealing, can be procompetitive overall,[39] even when practiced by a dominant firm, the presumption of anticompetitive effect and burden shifting is unwarranted.

The Sections have additional concerns about Article 10(3). Article 10(3) addresses "mixed bundling" where products are offered on a standalone basis as well as bundled together. Under Article 10(3), mixed bundling is prohibited when the price of the products on a standalone basis is "relatively high, causing competitors in the relevant market to be excluded from or forced to exit the market, or encumbering the entry to such market by other business operators." Mixed bundling can be procompetitive overall even if it impedes competitors.[40] Accordingly, the Sections recommend that Article 10 be deleted in its entirety, or revised as follows:

> "A business operator possessing a dominant market position is prohibited from conducting tie-in sales, or attaching other conditions to transactions, where the tie-in sales or other conditions is demonstrated on balance to be anticompetitive."

H. Anti-Discrimination (Article 11)

Article 11 of the Draft Abuse of Dominance Regulation prohibits dominant undertakings, without justifiable reasons, from implementing discriminatory

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[39] *See, e.g.*, Dennis W. Carlton & Michael Waldman, *Tying*, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY (W.D. Collins, ed., 2008).

[40] *See, e.g.*, Gregory K. Leonard, *The Competitive Effects of Bundled Discounts*, in ECONOMICS OF ANTITRUST: COMPLEX ISSUES IN A DYNAMIC ECONOMY (L. Wu, ed., 2007).

terms in equivalent transactions on counterparties of equal conditions. "Transactional terms" are defined to include transaction volume, quality and grade, payment terms, delivery terms, and post-sales services. Article 11 further defines "equivalent transactions" as transactions conducted with respect to the same or similar commodities under the same or similar transaction conditions such as transaction volume during the same or similar time period.

Transactional terms to different purchasers for the same or similar products could differ for many legitimate and pro-competitive reasons. Discrimination alone is not harmful to consumers. Moreover, anti-discrimination laws have a tendency to protect competitors rather than consumers, as they place a limit on the forms of competition. As the international competition community has come to realize, the rule of reason and an economics-based approach (including effects-based analysis and taking into account pro-competitive justifications) should be the default standard to apply to any competitive assessment of an alleged abusive practice.

In the U.S., the Robinson-Patman Act, which prohibits discriminatory treatment, has had "the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would.[41] The Robinson-Patman Act "was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices."[42] Moreover, "many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs — and thus increase costs to consumers — but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective."[43]

Therefore, the Sections suggest that Article 11 be deleted.[44] If Article 11 is retained, the Sections suggest that it should make clear that its target is discriminatory terms with actual or likely harmful/anti-competitive effect to consumers, rather than discriminatory terms generally. It is important to prohibit only that conduct which on balance harms consumers and to avoid deterring precompetitive conduct.

The Sections suggest a general analytical framework for the necessary fact-specific study to determine whether an abuse has occurred.

First of all, "equivalent transactions" have to be confirmed from the outset. Article 11 rightly takes the following factors into account in determining whether

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[41] Antitrust Modernization Commission, Report and Recommendations ("AMC Report") Chap. IV.A at 311 (April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter4.pdf.

[42] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 14.6a1 (3d ed. 2005).

[43] AMC Report, Chap. IV.A at 311.

[44] The Antitrust Modernization Commission recommended the repeal of the Robinson-Patman Act in its entirety. AMC Report, Chap. IV.A at 312.

the transactions are equivalent: (1) similar or the same commodities; (2) similar or the same commercial context of the compared transactions; and (3) proximity in time.

Secondly, in order for discriminatory terms to constitute an abuse, the dominant firm needs to apply dissimilar transactional terms to equivalent transactions, or apply the same/similar transactional terms to non-equivalent transactions.[45] The latter situation should be included in Article 11.

Furthermore, an abuse could only exist if imposing discriminatory terms places some transactional counterparties at a competitive disadvantage. This is the most important step in the analytical framework, and Article 11 should add this factor to its "discriminatory terms" assessment.

Finally, to complete the analysis, there should be an inquiry as to whether any pro-competitive justification applies, otherwise the analysis could lead to anti-competitive outcomes. The Sections welcome the reference in Article 11 to the possibility of pro-competitive justifications and suggest that details be added regarding the types of justifications that would be found acceptable. As a general rule, a justification could be based either on the ground that discriminatory terms are indispensable and proportionate, or on the ground that efficiencies are such that no net harm to consumers is likely to arise.[46]

I. Abuse of Dominance with Nationwide Impact and Provincial SAICs (Articles 14 and 15)

Articles 14 and 15 of the Draft Abuse of Dominance Regulation are substantively identical to Articles 9 and 10 of the Draft Monopoly Agreements Regulation. The Sections have the same concerns and suggestions regarding Articles 14 and 15 as with Articles 9 and 10 and respectfully refer to the discussion in Section II.E above.

J. Deferred Prosecution

As noted in connection with the Monopoly Agreements Regulation, Article 45 of the AML also provides the possibility of suspension of an investigation on the condition of commitments undertaken by suspected offenders, which appears to include investigations of abuse of dominant market position. Particularly in the abuse of dominance context, where conduct often is ambiguous in its legality under the AML, the commitments mechanism enhances the enforcement authority's efficiency and the optimization of allocation of the authority's resources, while enabling undertakings to avoid an adverse decision and possible penalties. Therefore, the Sections suggest that

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[45] *See* Robert O'Donoghue and A. Jorge Padilla, "*The Law and Economics of Article 82 EC*", Hart Publishing, 2006, p. 567.

[46] *See* Communication from the Commission, "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*", pp. 12-13.

SAIC also include in the Abuse of Dominance Regulation provisions setting forth the conditions and processes under which prosecution will be suspended, and respectfully refer to the discussion in Section II.F above as to specific recommendations.

CONCLUSION

The Sections hope these suggestions are helpful and would be pleased to offer any further assistance that may be helpful as SAIC finalizes the Regulations. The Sections recognize the substantial work that SAIC has accomplished in developing the Draft Regulations, and appreciate SAIC's consideration of our comments and those of others as it continues with its mission to implement and enforce the AML.

美国律师公会反托拉斯法部、知识产权部和国际法部
对中华人民共和国所拟议的反垄断法的共同建议*

美国律师公会反托拉斯法部、知识产权部和国际法部（以下合称“三部门”）藉此机会对中华人民共和国所拟议的反垄断法提供意见和建议。本文所陈述之内容代表了三部门的共同观点，但未经美国律师公会之会员代表大会或理事会的批准，因此不应被视为代表美国律师公会的政策。

三部门现有会员一共逾 40,000 律师，大部分会员在美国执业，但其中很多人曾经或目前仍在美国国外,包括中华人民共和国,生活及工作。三部门会员对于美国及世界各地的竞争法的实行和知识产权法有着深厚的专业知识。我们的成员包括工商企业法律部门的律师、法学院的教师以及私人执业的及在政府任职的律师。此外，许多非美国律师是积极参与三部门工作的准会员，并向三部门的工作贡献了他们的专业经验和远见卓识。三部门在本文中提供的意见，是本会成员在美国反托拉斯法、知识产权法和国际商法领域经验的结晶。我们希望这些意见能有助于中国制定反垄断法并建立完善，严明，便于公正实施的竞争法体系。

反托拉斯法部与国际法及惯例部曾于 2003 年 7 月 15 日就反垄断法的制定提交了共同建议(下称“2003 年 7 月共同建议”)，该建议重点讨论了 2002 年的送审稿[1]。本建议书则是作为 2003 年 7 月共同建议的补充，着重于讨论 2005 年 4 月 8 日的反垄断法修改稿中与 2002 年的送审稿有所不同的条款[2]。

概要

2005 年 4 月 8 日修改稿恰如其分地强调了竞争行为的性质和影响，而非经营者的状态，同时相对保护消费者而言,也减弱了对经营者的保护。这些修改更加符合国际竞争政策公认准则和现代经济理论。同样，采用“严重性”标准以确定垄断，在相关市场的定义中引入产品市场的概念，这些都使该拟议法律更符合广为接受的竞争法原则[3]。

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1 作为本建议书的附件以供参考，我们附加了 2003 年 7 月共同建议，及它的主要内容以及概述部分的翻译。2003 年 7 月共同建议的完整版（包括所有附件）可以在以下链接找到：http://www.abanet.org/antitrust/comments/2003/jointsubmission.pdf

2 本建议书是基于 2005 年 4 月 8 日的反垄断法修改稿的非正式翻译稿。

3 正如 2003 年 7 月共同建议中第 2，6 页所指出的，各国竞争法差异很大，各有长短。2005 年 4

三部门对一些地方仍有保留，其中最重要的总结如下：

1. 持续使用“公平”竞争和“高”“低”定价的概念仍有异于竞争政策和现代经济理论的公认准则，使得运用法律惩罚积极竞争成为可能，这与竞争法的公认目的直接冲突。将这些概念写进法律有以下风险：反垄断主管机构可能成为价格管制者，这一角色与经济的高效运作是背道而驰的，是北美和欧洲所有成熟的竞争管理机构都力图避免的。

2. 本拟议法律允许地理范围广泛的法律执行，有可能成为外国公司与中国交易或在中国投资的障碍。要解决这一问题并使拟议的法律更符合国际竞争法准则，第二条中应加入“严重性”标准以界定对中国竞争的影响是否达到法律规定的程度。

3. 第二章（禁止垄断协议）仍有数问题。

a. 第 8 条应该仅适用于竞争者之间严重限制或消除竞争的协议。正如 2003 年 7 月共同建议中提出的[4]，卖方和买方之间的协议很少可能造成竞争的问题。

b. 由于 2003 年 7 月共同建议中阐明的原因[5]，2005 年 4 月 8 日修改稿删除个别豁免条款,这是一个重大进步。然而，对于修改稿中保留的集体豁免条款，法律中应清楚说明竞争者之间协议和买卖双方之间协议的区别对待。集体豁免应该范围更窄，定义更精确，期限更明确[6]。我们认为，拟议法律中加了以下要求，并更符合公认的竞争政策准则：反竞争协议不得豁免，除非(1)消费者受益，(2)协议为实现消费者得益所必需，及(3)竞争不会被消除。此外，集体豁免应该要求在对竞争的潜在伤害和有利于竞争的可能得益两方面进行权衡。

4. 三部门仍对第三章（禁止滥用市场支配地位）中数条款有问题：

a. 第 15 条中的共享垄断概念与通行准则相违背。美国和欧盟都不认

月 8 日的修改稿与 2002 年送审稿相比，似乎更大程度地基于欧盟和德国竞争法。诚恳地说，三部门认为其中有些法律未臻完善，这从欧盟法律和程序近来进行的大规模改革，而且德国正在缩减其反拖拉斯基本禁令的豁免范围也可推断出。此外，这些法律的某些其它条款从技术上来讲有效存续了很长时间但实际上很少（如果曾经有的话）得到执行。例如，据三部门所知，欧盟委员会起诉某个案子从来不是只根据某位经营者收取了高价，而是要求有市场竞争受到损害的证据。

[4] 2003 年 7 月共同建议中第 4，17-20 页。

[5] 2003 年 7 月共同建议中第 6 页。

[6] 在没有个别豁免程序的情况下，谨慎制定集体豁免条款尤为重要，因为协议各方可能一直都在执行协议直到有人提出质疑，而协议又被发现不具豁免条件。

同共享垄断的概念。虽然欧盟和德国法有“共同主导”的概念，两法律都要求垄断者协调行动的进一步证据方可认定共同主导。

b. 第 15 条中仅以依据市场份额认定市场统治力与通行准则相违背。此外，美国，欧盟和德国法律均认为，证明竞争者可轻易进入和扩大市场，或者买方力量均衡，均可驳斥依据市场份额认定主导地位的推定。第 15 条如包括市场进入的障碍、竞争者的重新定位和买方的均衡力量，并对这些因素更充分考虑，以此来认定市场统治力是否确实存在，将使拟议法律更符合国际竞争法准则。

c. 对于 2005 年 4 月 8 日修改稿中明显引入的“必需设施原则”，尤其是这一原则与禁止不合理拒绝交易条款，以及与知识产权法交界的某些条款的相互联系和制约，我们非常关注。目前拟定的“必需设施原则”可能妨碍经营者投资和创新，进而对竞争和消费者有害。

5. 在第 4 章（经营者集中）中，第 24 条合并控制条款中的申报标准应予澄清以保证只有与中国充分相关的交易需要申报，而且只使用客观上可以量化的标准来决定是否申报。 而且，第 27 条中的最初等待期应缩短，从而更符合其它主要竞争法体系所使用的期限。合并控制条款应进一步修改以更符合国际竞争网络 ICN 所推荐的最佳作法[7]，具体领域包括申报要求所适用的交易方和交易，申报所需提供的信息，提早终止等待期的授权，违反合并控制法规的惩罚。拟议法律应明确采用 ICN 在法律的无差别适用，合并评估过程的透明程度，确保过程公正的基本程序方面的指导原则。如采用的合并控制条款与其它主要司法辖区的法律和程序不一致，将成为跨国公司投资中国的障碍。而且，正如反垄断法的其他方面，第 30 条中禁止经营者集中的标准应是经营者集中会***严重***“排除或者限制市场竞争”。

6. 第 5 章旨在消除行政垄断，这是拟议法律中非常积极正确的一面。然而，什么行为构成行政垄断应有更准确的定义，并应明确指出国有企业受此法律管辖。此外，明确授权反垄断主管机构对行政垄断执行本法将会保证中国的竞争市场得到建立和保护。

7. 指定国务院直接领导下的独立、唯一执法部门将会有助于本法律得到最好的制定和实施，减少竞争法事项上因为司法管辖范围重叠而导致决策不一致的风险[8]。本法律应制定条款保护正当法律程序权利并为竞争政策的实行创造严格，一致和透明的程序，包括反垄断主管机构决议的发布和对该主管机构决议提出申诉的明确

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[7] ICN 对于合并申报的指导原则和推荐措施可以在以下链接找到：
http://www.internationalcompetitionnetwork.org/guidingprinciples.html

[8] 2003 年 7 月共同建议中第 4，5，26 页。

过程。通过对法律运用提供清楚的指导，执法的透明性将使公众和经营者共同受益[9]。其它含有竞争管制内容的法律和规定应同反垄断法一致。外国投资者并购境内企业暂行规定应该在反垄断法生效时予以撤消。

8. 关于第 7 章（法律责任），首先，根据我们的经验，对违反法律的行为采取强制令比罚款能更好地保护竞争。第二，需要进一步澄清哪些活动将受到犯罪指控，私营企业和个人通过什么程序可以向违法者要求双倍赔偿。

9. 拟议法律的条款在反垄断法和知识产权法的交界处还有许多问题，尤其是未能定义什么行为构成知识产权滥用而且违反了反垄断法，在第 22 条中引入非常宽泛的必需设施概念，第 19 条中的“竞争中处于不利”语言，以及第 16 条中的“不公平”定价条款。

[9] 2003 年 7 月共同建议中第 4 页。

Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China[*]

The Section of Antitrust Law, the Section of Intellectual Property Law and the Section of International Law of the American Bar Association (collectively, the "Sections") take this opportunity to submit comments on the proposed Anti-Monopoly Law of the People's Republic of China. The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

The combined membership of the three Sections includes over 40,000 lawyers. Most of the members are based in the United States of America, but a substantial number have lived and worked abroad, including in the PRC, and some do so currently. Members of the Sections have substantial expertise with competition law enforcement and intellectual property (IP) rights laws in the United States and around the world. Our membership includes lawyers in the law departments of businesses and the faculties of law schools, as well as in private practice and in government. In addition, many non-U.S. attorneys are active as Associate Members in the Sections, and have contributed their expertise and insights to the Sections' work. These Comments offer the perspective of the Sections, based on our members' experience in the United States in the fields of antitrust, IP rights and international business law. The Sections hope that these comments will assist the development of the Anti-Monopoly Law of China, and a competition law regime that is well-conceived, well-drafted and ready for implementation on a fair and impartial basis.

The Section of Antitrust Law and the Section of International Law and Practice submitted joint comments dated July 15, 2003 ("July 2003 Joint Comments") regarding the development of the Anti-Monopoly Law, which focused primarily on a 2002 draft of the proposed law.[1] These Comments are intended as a supplement to the July 2003 Joint Comments and focus on provisions of the Revised Draft of the Anti-Monopoly Law, dated April 8, 2005, that differ from the draft discussed in the July 2003 Joint

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[*] The members of the Working Group that drafted these comments are Adam F. Bobrow, Yee Wah Chin, Michael E. Burke, Nathan G. Bush, Ilene Knable Gotts, H. Stephen Harris, Jr., William J. Kolasky, Maria C.H. Lin, Abbott B. Lipsky, Jr., W. Todd Miller, James A. Murray, and Lester Ross.

[1] A copy of the July 2003 Joint Comments, with a translation of its Executive Summary and without appendices, is annexed for convenience of reference as an appendix to these Comments. A complete copy of the July 2003 Joint Comments, with appendices, may be found at http://www.abanet.org/antitrust/comments/2003/jointsubmission.pdf

Comments.[2]

Executive Summary

The April 8, 2005 Revised Draft appropriately reflects a greater focus on the nature and effect of monopolistic conduct, rather than the status of an undertaking, and reduces the focus on the protection of undertakings, as opposed to the protection of consumers. These revisions conform more closely to accepted international norms of competition policy and modern economic theory. Similarly, the adoption of a standard of "substantiality" and the inclusion of a product market concept to the definition of relevant market also make the proposed law more consistent with widely accepted tenets of competition law.[3]

The Sections continue to have concerns in a number of areas, the most important of which are summarized below.

1. The continued use of the concepts of "fair" competition and "high" or "low" pricing remains inconsistent with accepted norms of competition policy and modern economic theory, and raise the prospect of the use of the law to punish aggressive competition, directly contrary to the accepted purpose of competition laws. The inclusion of these concepts creates a risk that the Anti-Monopoly Authority may become a price regulator, a role that is antithetical to the efficient functioning of an economy and that is eschewed by all mature competition authorities in both North America and Europe.

2. The geographically expansive enforcement permitted by the proposed law is likely to discourage foreign companies from trading with, or investing in, China. To address this concern and to bring the proposed law into closer conformity with international competition law norms, Article 2 should be revised to include a standard of "substantiality" for the required effect on competition in the PRC.

3. Chapter 2 (Prohibiting Monopoly Agreements) continues to raise a number of concerns.

   a. Article 8 should be revised to apply only to agreements between

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[2] Our comments on based on an unofficial translation of the April 8, 2005 Revised Draft.

[3] As noted in the July 2003 Joint Comments (at 2, 6), competition laws vary substantially, and each has strengths and weaknesses. The April 8, 2005 Revised Draft appears to be based on European Union and German competition law to a greater extent than the 2002 draft. Respectfully, the Sections submit that some of these laws are not optimal, as can be inferred from the recent sweeping reforms of EU law and procedures, and Germany's narrowing of the exemptions from its basic antitrust prohibitions. Moreover, some other features of these laws that have been technically in force for a long time were rarely, if ever, enforced. For example, to the Sections' knowledge, the European Commission has never prosecuted a case based solely on an undertaking charging high prices, but instead requires some proof that competition in the market has been harmed.

competitors that substantially restrict or eliminate competition. As discussed in the July 2003 Joint Comments,[4] agreements between sellers and buyers are much less likely to raise competition concerns.

b. For the reasons stated in the July 2003 Joint Comments,[5] the omission of individual exemptions in the April 8, 2005 Revised Draft represents a substantial improvement in the draft law. However, for the block exemptions that are retained, the law should provide a clear distinction in treatment between agreements involving competitors and agreements involving sellers and buyers. The block exemptions should be narrower, more precisely defined and definite in duration.[6] We believe that the proposed law is more consistent with accepted competition policy norms as a result of the inclusion of the requirements that anticompetitive agreements cannot be exempted unless: (1) consumers benefit; (2) the agreements are necessary to achieve the benefits; and (3) competition will not be eliminated. In addition, the block exemptions should require the balancing of the potential harm to competition against the claimed pro-competitive benefits.

4. The Sections also continue to be concerned about several features of Chapter 3 (Prohibition of Abuse of Dominant Market Position)

a. The inclusion in Article 15 of the concept of shared monopolies is contrary to prevailing norms. Neither U.S. nor EU law recognizes the concept of shared monopoly. While EU and German law have a concept of "collective dominance," both require additional evidence of coordinated conduct in order to find collective dominance.

b. The inclusion in Article 15 of the presumptions of market power based solely on market shares is contrary to prevailing norms. Moreover, U.S., EU and German law all recognize that any presumption of dominance based on market shares should be rebuttable by a showing of ease of entry and expansion by rivals or of countervailing buyer power. A fuller consideration of entry barriers, repositioning of competitors and countervailing buyer power in determining the actual presence of market power would, if included in Article 15, conform the proposed law to international competition law norms.

c. The apparent introduction of the Essential Facilities Doctrine in Article 22 of the April 8, 2005 Revised Draft raises substantial concern, especially when coupled with the provisions prohibiting unreasonable refusals to

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[4] July 2003 Joint Comments at 4, 17-20.

[5] *Id*. at 6.

[6] Carefully drawn block exemptions may be particularly important in the absence of the individual exemption process, because parties may operate under agreements until they are challenged and the agreements are found not to be eligible for exemption.

deal and relating to the interaction with IP rights laws. The Essential Facilities Doctrine provision, as currently drafted, has the potential to discourage investment and innovation by undertakings and therefore could harm competition and consumers.

5. In Chapter 4 (Control of Concentrations), notification thresholds in the merger control provisions in Article 24 should be clarified to ensure that only transactions with sufficient connection to China will be notified and only objectively quantifiable criteria will determine the need for notification. Also, the initial waiting period in Article 27 should be shortened to conform more closely to periods used by other major competition law regimes. The merger control provisions should be further revised so that they are more consistent with the best practices recommended by the International Competition Network (ICN),[7] particularly in the areas of the parties and transactions subject to the notification requirement, the information required to be provided in the notification, the authorization of early termination of the waiting period, and the remedies for violations of the merger control regime. The guiding principles of the ICN in the areas of non-discriminatory application of the law, the transparency of the merger review process, and fundamental safeguards to ensure fair process, should be expressly adopted in the proposed law. To the extent that the merger control provisions adopted are inconsistent with the law and procedures applied in other major jurisdictions, multinational companies may be discouraged from investing in China. Moreover, as in other areas of the Anti-Monopoly Law, it should be *substantial* "elimination or restriction of market competition" that results in prohibition of a concentration under Article 30.

6. Chapter 5, seeking to eliminate administrative monopolies, is an extremely positive aspect of the proposed law. What constitutes an act of administrative monopolization, however, should be more precisely defined, and state-owned enterprises should be expressly made subject to the law. In addition, expressly authorizing the Anti-Monopoly Authority to enforce the law against administrative monopolies will ensure the creation and preservation of competitive markets in China.

7. Designation of a single enforcement agency, that is independent and directly under the supervision of the State Council, would help ensure optimal development and enforcement of the law, and reduce the risk of inconsistent decisions resulting from the proposed overlapping jurisdiction over competition law matters.[8] The law should include provisions to protect due process rights and foster rigorous, consistent and transparent procedures for the enforcement of competition policy, including the publication of the Anti-Monopoly Authority's decisions and a clear process for appeals from the Authority's decisions. Transparency is beneficial both to the public interest and

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[7] The ICN Guiding Principles and Recommended Practices for Merger Notification may be found at http://www.internationalcompetitionnetwork.org/guidingprinciples.html

[8] July 2003 Joint Comments at 4-5, 26.

undertakings by providing guidance regarding the application of the law.[9] Other laws and regulations with competition regulation aspects should be conformed to the Anti-Monopoly Law. The Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors should be revoked when the Anti-Monopoly Law becomes effective.

8. As to Chapter 7 (Legal Liabilities), first, based on our experience, competition may be better protected by greater reliance on injunctions, and less on monetary penalties for violations of the law. Second, more clarity is needed with regard to the types of activity that will be prosecuted criminally, and with regard to the procedures by which private parties may seek double damages from violators.

9. The provisions of the proposed law relating to the interaction between the Anti-Monopoly Law and IP rights law continue to raise many concerns, heightened by the failure to define what may constitute an "abuse" of IP rights that may constitute a violation of the Anti-Monopoly Law, the introduction of a very broad essential facilities concept in Article 22, the "competitive disadvantage" language in Article 19, and the "unfair" pricing provisions of Article 16.

Specific Comments

I Chapter 1 (General Provisions)

Article 1

The statement of objectives in the April 8, 2005 Revised Draft of Article 1 is a material improvement over the 2002 draft. The first identified purpose – originally "prohibiting monopoly" – has been changed to "prohibiting monopolistic activities." This brings the proposed law into conformity with the prevailing international norm for competition laws. It properly recognizes that monopoly – the status of being the only supplier of a particular product or service – often results from highly advantageous behavior (providing new products or services that correctly anticipate the needs of consumers, inventing and implementing new production methods that conserve resources, or finding and adopting ways to distribute products to where they are needed most). By focusing instead on "monopolistic activities," the proposed law properly creates scope for recognition of the distinction between desirable and undesirable behavior, and permits prohibition of the latter without restricting the former. The third identified purpose – originally "protecting the legal rights of business operators and consumers" – has been changed to "protecting the legitimate rights of consumers," and similarly brings the proposed law into conformity with the prevailing international norm, which recognizes that competition rules should be used to protect consumers and the competitive process, not competitors.[10]

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[9] *Id*. at 4.

[10] *Id*. at 7-8, 10-11.

Several of the other objectives listed in the April 8, 2005 Revised Draft, however, may complicate using the law in a way that will be of maximum benefit to the PRC:

"Fair competition." The April 8, 2005 Revised Draft Article 1 omits the objective stated in the earlier draft of "safeguarding *fair* competition" but retains it in other provisions such as Articles 5 and 35. Our experience has shown that the term "fair" can have surprisingly unintended and counterproductive consequences. Defining either the concept or the specific methods of "fair competition" has proven elusive in the competition rule regimes of other jurisdictions, including those jurisdictions with extensive historical experience with competition law regimes. Inefficient business undertakings with relatively inferior competitive skills sometimes assert that competition is "unfair" because they find it hard to compete with other, more efficient undertakings. Affording legal recognition to demands for "fair competition" is likely, therefore, to result in distortions of the market, with adverse results for the competitive process, consumers, the economy, and society at large.[11]

"Healthy development of the socialist market economy." Article 1 retains the objective to "ensure the healthy development of the socialist market economy". The Sections had previously provided comments regarding this phrase.[12] Because of its generality, use of this phrase has the potential to create ambiguity in the interpretation and application of the Law, and may even produce conflict with other objectives of the Law if regarded as a source of operational rules used to determine the legality of specific marketplace conduct in particular cases. The aspirational goal of promoting "healthy development of the socialist market economy" would be best served by focusing the Anti-Monopoly Law on specific operational objectives, such as prohibition of activities that substantially and unreasonably restrict the competitive process.[13] Other jurisdictions with competition enforcement regimes have recognized the legitimacy of such ultimate aspirational goals, while ensuring that the more immediate objective of preventing significant harm to the competitive process constitutes the primary or even exclusive source of decisional criteria for specific cases.

Article 2

Article 2 provides for application of the Law to activity outside the territory of the PRC that violates the law "and *limits or affects* market competition within the territory of the PRC." There is general consensus among developed competition enforcement regimes around the world that application of the laws of a particular sovereign authority to conduct occurring outside the territorial limits of that authority requires at least a

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11 *Id*. at 7, 9.

12 *Id*. at 9, n. 9.

13 *Id*. at 8-9.

"substantial" or "appreciable" anticompetitive effect within such territorial limits. This consensus is reflected in numerous statutes, and in resolutions of multilateral bodies concerned with competition policy. While Article 2 takes a step in this direction by incorporating the requirement of a limitation or effect on market competition in the domestic territory of the PRC, it lacks the other key element of "substantiality" or "appreciability" that is common to the comparable jurisdictional prerequisites found in other competition law regimes.

Today, multiple jurisdictions often assert authority to regulate a single specific course of conduct, under their respective competition laws. This has become especially common with regard to structural transactions (mergers, acquisitions, concentrations, formation of joint ventures), coordination among independent enterprises, and dominant-firm conduct involving the enormous yet still-growing category of multinational enterprises. This often results in multiple compliance burdens and has occasionally led to outright conflict between different competition authorities seeking inconsistent remedies with regard to the same transaction or other conduct. As a result, the overwhelming majority of competition enforcement regimes around the world agree that their domestic law should not be applied to conduct outside their sovereign territory where the conduct has little or no domestic effect. There are many acceptable formulations of this principle; we note only as one example that the U.S. generally limits antitrust law jurisdiction over foreign conduct to instances in which the effect of that conduct on U.S. commerce is "substantial, direct and reasonably foreseeable." A similar limiting principle should be incorporated into Article 2.[14]

Article 3

Article 3 of the current draft Law omits any overall reference to adverse effects on the interests of "business operators." As discussed above in connection with Article 1, this is a clear improvement from the standpoint of improving the alignment between the Law's objectives and the implementation of a competition law regime that safeguards the operation of the market.

References to "interests of consumers" and the "public interest" remain, however, in Article 3. If interpreted to represent objectives distinct from that of preserving the competitive process, these terms have the potential to introduce a degree of uncertainty into the law. Again, such uncertainty is likely to chill investment in, and trade with, China. Standing apart from the reference to activities that "eliminate or limit competition," they imply, contrary to accepted competition norms, that activities that benefit, or do not harm, competition, nevertheless may be condemned if they "damage the interests of consumers, or endanger the public interest."[15]

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[14] *See id*. at 7.

[15] *Id*. at 9.

The Sections respectfully submit that these potential complications can be avoided if monopolistic conduct is defined in terms of activities that adversely and substantially restrict competition. All competition enforcement regimes agree that activities that unreasonably restrict competition are likely to damage consumers and the public. To avoid the risk (and companies' perception of the possibility) that the law may be used to attack conduct that helps, or at least does not harm, competition, the law should omit broad concepts of consumer or public harm that are not derived in a transparent and direct fashion from analysis of the effects of conduct and practices on the competitive process.

Finally, the concept of monopolistic conduct is defined without reference to any requirement of a "substantial" or "appreciable" adverse effect on competition. Such a requirement is common to most competition enforcement regimes around the world, as it clarifies that trivial or insubstantial restraints do not justify invocation of the significant legal procedures and enforcement apparatus typical of competition law enforcement. If such enforcement mechanisms may be triggered by conduct having only temporary or minimal market impact, excessive administrative burdens and unregulated bureaucratic discretion may become an independent source of interference with legitimate competitive processes and thereby frustrate the broader purposes of the law.[16] As a related drafting point, we recommend that Article 3 be conformed to Article 8 by adding to paragraph (i) the phrase "that eliminate or substantially restrict competition."

The stated goals of Article 3, to address "abuse of administrative power" to "eliminate or restrict competition," is a positive and important one,[17] that is reinforced by the stated goals of Article 5 that all levels of government should "adopt measures to create favorable environments and conditions for fair competition," and of Article 7 (Social Supervision) that "government agencies and their staff shall not support or cover up for monopolistic conduct."

Article 4

The substitution of the definition of "undertaking" for the previous concept of "business operator" in Article 4 is a marked improvement. The variety of entities that engage in competitive activity is ever-expanding as the economic and other needs of society evolve, and the limitations of a more confined or static definition are evident. Similarly, the current definition of "relevant market," formerly "specific market," contained in Article 4 is more consistent with the terms used by most competition law regimes, in that a "relevant market" comprises a specific set of products and/or services, and a geographic area, with certain defined competitive characteristics. Inclusion of these concepts is supported by an extensive history of enforcement agency and judicial discussions of the relevant market concept, based on a widely-shared academic literature

[16] *Id*. at 7.

[17] *Id*. at 10.

examining the concept from both legal and economic perspectives.[18]

Article 5

This provision (as well as Article 57, which requires public entities to avoid violations of the Law) obligates government entities to support the competition objectives of the Law, and is important. The potential ambiguity and conflict that may arise through use of the term "fair" in the specific context of the competition enforcement regime envisioned by this Law remains a concern, however, as noted in the July 2003 Joint Comments.[19]

Article 6

Centralization of competition policy and enforcement authority in a single body directly under the State Council provides multiple advantages. First, it facilitates the development of the highly specialized and technically proficient staff required by competition enforcement. Second, it elevates the Authority just below the State Council, enhancing the prestige of the Authority relative to other government departments and the administrative monopolies it may have to investigate. Third, it promises greater insulation from the conflicting bureaucratic interests that tend to generate parochial and inconsistent outcomes.[20]

II Chapter 2 (Prohibiting Monopoly Agreements)

Many of the changes to Chapter 2 are positive developments. The following suggestions would further improve the draft legislation by facilitating compliance by undertakings, transparency of enforcement, and greater consistency with international best practices.

Article 8

Article 8 (Prohibiting Monopoly Agreements) contains a general prohibition on monopolistic agreements, subject to two specific broad exceptions, as well as a list of specific exempting criteria provided in Article 9. The April 8, 2005 Revised Draft contains several clear improvements, including replacement of the term "business operators" with the more flexible "undertakings," and refinement of the standard of competitive effect from "exclude or limit" to "eliminating or restricting." As noted in our

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18 *See id*. at 3, 12.

19 *Id*. at 7.

20 *Id*. at 4-5, 26.

comments to Article 3 and in the July 2003 Joint Comments,[21] Article 8 should be revised to limit this general prohibition to agreements that will "substantially" or "appreciably" restrict competition, to bring the proposed law into closer conformity with international competition policy norms.

Article 8 lists seven types of agreements that appear to be prohibited so long as they involve 10% or greater market shares of a product. *Per se* prohibition of the types of agreements identified in paragraphs (i)-(v) and (vii) would be an acceptable approach, but only if the prohibition is strictly limited to agreements between competitors when acting as competitors, and is expressly not applicable to agreements between competitors when they are acting as buyer and seller of some product or service or as participants in a *bona fide* joint venture effort. As discussed in the July 2003 Joint Comments,[22] agreements involving a seller and a buyer that involve such restrictions may have pro-competitive effects, regardless of whether the buyer and seller are also competitors. Such agreements between participants to a *bona fide* joint venture also may have pro-competitive effects, since they facilitate the sharing of resources by limiting the opportunity for the participants to free-ride on the shared resources. This may be particularly true in the case of paragraph (iv), relating to the purchase of technology or facilities and the development of new products or technologies.[23] In contrast, in the experience of competition law enforcement in the United States, such agreements almost invariably have anticompetitive effects on the market if competitors engage in them not as buyer and seller or *bona fide* joint venturers, regardless of the market shares involved.[24]

As to paragraph (vi) regarding agreements that "limit resale price," such agreements arise only between sellers and buyers. The paragraph would therefore be clearer if it were moved to the end of the list or placed in a separate article. Moreover, both the U.S. and the EU do not treat as *per se* illegal such agreements that establish a *maximum* resale price; agreements between sellers and buyers that establish a *minimum* resale price are commonly prohibited.

Therefore, the Sections suggest that Article 8 be clarified to apply paragraphs (i)-(v) and (vii) to agreements involving competitors acting as such, to limit paragraph (iv) to prohibit only agreements that "expressly preclude without valid reasons the purchase of

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[21] *Id*. at 7, 15.

[22] *Id*. at 14-15.

[23] Paragraph (iv) also raises concerns because, unlike paragraphs (i)-(iii), (v), which address agreements that effectively preclude competition between the parties, paragraph (iv) deals with agreements which only "limit" the purchase or development of technology. In cases of licenses of IP or technology, where the licensor is the seller and the licensee is the buyer of the IP or technology, and in cases of joint ventures to develop new products or technologies, such restrictions may facilitate the transfer and development of technologies by reducing free-riding. It is only where the restrictions are not reasonably related to the subject matter of the agreement, and impose greater restrictions on competition than the efficiencies which the agreements enable, that competition concerns should be raised.

[24] July 2003 Joint Comments at 3-4.

new technology or new facilities, or the development of, new products or new technologies,"[25] and to move paragraph (vi) either to the end of the list or in its own article. In particular, paragraphs (iv) and (vi) should be clarified to prohibit only restrictions that have an unreasonable adverse effect on competition in a relevant market.[26] Such a clarification is especially important if paragraph (vi) applies to all agreements that limit resale price, and is not limited to agreements that establish *minimum* resale prices.

The exemption in Article 8 of "any agreement by which the product is covered having a share of less than 10% in the relevant market during the valid period of the agreement," should be clarified to limit its application to agreements between sellers and buyers. The lack of distinction in Article 8 between agreements involving a seller and a buyer and agreements involving competing sellers may result in the prohibition of agreements between sellers and buyers that may have pro-competitive effects. Therefore, the exemption of agreements between sellers and buyers involving less than 10% of the relevant market will be beneficial because these agreements are unlikely to have anti-competitive effects. In fact, the market share threshold for the exemption should be increased to 30% for agreements between sellers and buyers, which is the threshold that the EC has adopted for its block exemption of vertical restraints. The exemption, however, would be potentially problematic if it were applied to agreements between competitors. With the exception of agreements to "limit resale price" in Article 8(vi), which arise in the context of agreements between buyers and sellers rather than in agreements between competitors, the other agreements prohibited by Article 8 are types of conduct which, in the experience of competition law enforcement in the United States, almost invariably have anticompetitive effects on the market if competitors engaged in them, regardless of the market shares involved.

Article 8 also creates an exemption to "the conduct of limiting resale prices in issuing and distributing publications." It is unclear why there should be an exemption that is specific to an industry. Competition law principles should generally apply equally to all sectors of the economy, with no industry being exempt from competition law, unless there are major counterbalancing policies such as national security that may, in some circumstances, outweigh the objective of fostering competition in a particular sector of the economy.

Finally, the interaction of the exemptions in Article 8 with Article 10 raises concerns, as we discuss below regarding Article 10.

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[25] This clarification would ensure that only agreements with restrictions which are not reasonably related to the legitimate purpose of the agreements and restrict competition more than the efficiencies created by the agreements, will be prohibited. It is especially important if no distinction is made in the prohibitions between agreements between competitors acting as competitors and agreements between buyers and sellers and between joint venturers.

[26] This is also consistent with the Sections' recommendation regarding Article 12, that only "substantial" or "appreciable" restrictions of competition resulting from an abuse of dominant market position be prohibited. *See also* July 2003 Joint Comments at 3, 4, 14-20.

Article 9

Article 9 provides five blanket exemptions to Article 8. The Sections believe that these exemptions will serve a valuable function in enabling the Anti-Monopoly Authority to exempt those agreements that may benefit consumers and economic welfare generally. We are concerned, however, that Article 9, as written, does not provide any mechanism for balancing the potential anticompetitive harm of a particular agreement against its potential benefits.

The deletion of the exemption for joint action "to promote the rationalization of production operations, division of labor or the development of specialization," is a welcome development for the reasons stated in the July 2003 Joint Comments.[27] Likewise, the inclusion in Article 9 of the requirement that agreements are exempt from the prohibitions in Article 8 only if they "can enable consumers to share impartially the interests derived from the agreements, are necessary for achieving the objectives and will not entirely eliminate the competition in relevant markets," is beneficial, also for the reasons stated in the July 2003 Joint Comments.[28] Unless agreements of the types identified in Article 8 (i)-(v), (vii) have at least those three attributes, they may benefit only the parties to them, and injure the economy and consumer welfare, and should not be exempt. Article 9 should be revised to require balancing of the potential anticompetitive harm of a particular agreement against its potential benefits.

Article 9 includes in subsection (ii) an exemption for "agreements to cope with economic depression," and in subsection (iv) an exemption for "agreements to enhance the competitiveness of exports in global markets." With respect to these exemptions, there remain the general concerns relating to exemptions that are expressed in the July 2003 Joint Comments.[29] The exemption of Article 9(iv) should be clarified to provide that it would not apply if the agreements will adversely affect competition in the market within China. While joint export trade arrangements are commonly exempted from competition laws, the U.S. and other jurisdictions with competition law regimes generally do not exempt any export arrangements that have an adverse impact on domestic competition, and joint export trade arrangements exemptions remain controversial among some antitrust experts.

Finally, the interaction of Article 9 with Article 10 raises concerns, as we discuss below regarding Article 10.

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27 *Id*. at 22.

28 *Id*. at 9-10, 21-22.

29 *Id*. at 9-10, 22-23.

Article 10

Article 10 has no analogue in the 2002 draft and raises concerns. Article 10 provides that:

> "Any interested party or consumer may report to the Anti-Monopoly Authority any monopoly agreement that falls within the scope of Article 8 and is not covered by Article 9.
>
> "The Anti-Monopoly Authority will, upon request of the above-mentioned report or ex officio, initiate investigations in monopoly agreements that fall within the scope of Article 8 and are not covered by Article 9."

As noted in the July 2003 Joint Comments,[30] the European Union has abandoned its system of individual exemptions while retaining a system of block exemptions that it is modifying to bring closer to the U.S. approach. Germany is apparently also abolishing its notification system. It appears that the April 8, 2005 Revised Draft has abandoned the individual exemptions process of earlier drafts and adopted fully a block exemption approach, with Article 10 intended to ameliorate the adverse competitive effects that may occur in specific instances.

First, the elimination of an individual exemption system is consistent with procedures followed in other jurisdictions. The EU's experience has demonstrated that an individual exemption system imposes overwhelming and unjustifiable burdens on both the parties to agreements and the enforcement authority that must review and determine the status of each individual exemption application. While such an individual exemption system may have the benefits of providing the competition enforcement authority initially with valuable experience in evaluating many different types of agreements, and may foster a culture of competition in the economy, these benefits can be achieved in other ways that are less onerous to all involved.

However, if only block exemptions are provided, then they must be carefully established. The July 2003 Joint Comments[31] set forth the Sections' concerns regarding the broadly-drawn, indefinite duration block exemptions such as those in Article 8 and 9.[32] Moreover, whether the requirements of Article 9, that exempt agreements must "enable consumers to share impartially the interests derived from the agreements, [be] necessary for achieving the objectives and will not entirely eliminate the competition in

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30 *Id*. at 6, 29.

31 *Id*. at 21-22.

32 With the availability of the general exemption in Article 11, there should be little concern that specific block exemptions are too narrow and will not exempt agreements that might appropriately be exempt. As to Article 11, the Sections remain concerned for the reasons set forth in the July 2003 Joint Comments, at 2, 8-10, 23.

relevant markets," are satisfied, can only be determined on a fact-specific, case-by-case basis. Therefore, under Article 10, parties may simply act on the basis that their agreements satisfy the requirements of Articles 9 and 11, and their agreements will be effective unless and until the Anti-Monopoly Authority somehow becomes aware of the agreements, investigates, and determines that Articles 9 and 11 have in fact not been satisfied. In these circumstances, the practical effect may be that the prohibitions of Article 8 are ineffective generally, and will be applied only in specific circumstances where, after a challenge, the parties cannot demonstrate that they satisfy the requirements of Articles 9 and 11.

III Chapter 3 (Prohibition of Abuse of Dominant Market Position)

The current version of Chapter 3 is a marked improvement over the 2002 draft.[33] The Sections continue, however, to have a number of fundamental concerns with several of its provisions.

Article 12

The current version of Article 12 (succeeding Article 14 in the 2002 draft) contains significant improvements. The reference to "business operator" has been changed to the more flexible "undertaking," the competitive effect test has been refined and the ambiguous and troublesome concept of activities that "obstruct the activities of other business operators" has been eliminated. The need for further limitation of prohibited conduct to instances of "substantial" or "appreciable" restrictions of competition, as noted in the July 2003 Joint Comments[34] and in our comments on Article 3, remain unaddressed.

Article 13

Article 13 appears to incorporate the concept of a shared monopoly. There is little analytical support in economics for such a concept, and it is not part of U.S. or European competition law.[35] If there is a market in which only a few undertakings are active, and those competitors act to restrict competition, the prohibitions in Article 8 against joint action that injure competition are sufficient to address the situation and more

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33 *Id*. at 11-12.

34 *Id*. at 7, 15-16, 18.

35 *See*, *e.g.*, Timothy J. Muris, "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy," Milton Handler Annual Antitrust Review (New York, New York, December 10, 2002) at nn. 68, 69, http://www.ftc.gov/speeches/muris/handler.htm; Charles A. James, "Antitrust in the Early 21st Century: Core Values and Convergence," Antitrust Policy in the 21st Century (Brussels, Belgium, May 15, 2002) at III.B.1.a, http://www.usdoj.gov/atr/public/speeches/11148.htm

consistent with the majority of competition laws. The EU concept of "collective dominance" is considerably narrower and requires concerted action by the undertakings involved, as does the U.S. concept of "conspiracy to monopolize."

Article 14

As Article 14 properly recognizes, many factors should be considered to determine whether an undertaking has or shares a dominant market position, including one additional factor that was in the 2002 draft list of relevant factors – the ability of other firms to enter the market or to expand their output.[36] Ease of entry and expansion by other undertakings will make it difficult for a firm, even one with a high market share, to exercise market power. While this concept is arguably contained within paragraph (ii) (ability to affect price) or paragraph (vi) (access to relevant market by other undertakings, perhaps including those outside the market) of Article 14, this additional factor is important enough to be identified as a separate factor. Other factors that should be included in the analysis include the ability of competitors to reposition themselves in the market, and the existence of countervailing buyer power.

Article 14 also appears to be missing a time element. The factors in Article 14 should be considered over a period of time sufficient to evaluate their competitive effect, not just a few days or months. An undertaking may have a short-term ability to alter price or output in a market; such an undertaking should not, however, be viewed as having a "dominant position" if such short-term effects are subject to reasonably quick responses by consumers or other undertakings that ultimately constrain such power. Therefore, a new paragraph incorporating as a factor "the duration and trend of such factors," should be added to the end of Article 14.

It is unclear how the factors in paragraph (iv) of "financial status and technical conditions of the undertaking" and paragraph (v) of "association with other undertakings" will be considered in determining whether an undertaking has a dominant market position. Financial status does not indicate the presence or absence of dominant market position. In fact, assuming that a strong financial status reflects a dominant market position may discourage undertakings that operate on sound financial principles. Would the existence of associations with other undertakings indicate that there may be a dominant market position? At minimum, clarification of how these factors will be used in analysis is needed, to provide helpful guidance to the Anti-Monopoly Authority and undertakings regarding when a dominant market position will be found.

Article 15

Article 15 raises several basic concerns. First and most fundamentally, market share is only one of many indicators of market power, and there is no one market share

[36] July 2003 Joint Comments at 11-12.

threshold above which market dominance can be assumed automatically.[37] Application of this single indicator without consideration of others will lead to incorrect conclusions regarding market power, which will result in unnecessary and counterproductive enforcement actions.[38] Therefore, Article 15 should be deleted entirely, or at least revised to indicate that (a) the presumptions may be adopted in a particular situation only after consideration of evidence relating to other factors, including those identified in Article 14, and (b) market shares alone are insufficient in determining dominant market position.

Second, paragraphs (ii) and (iii) of Article 15 establish a complex structure for presuming shared monopoly (or joint dominance). As noted in our comment to Article 13 above, this concept is overbroad and other tools of the proposed law, including those in Article 8, are more than adequate to address any concerns in this area. Economic analysis has shown that a small number of strong firms can result in quite competitive market behavior in particular circumstances.[39] Therefore, presuming that stricter rules should apply when the combined shares of several firms exceed any particular level risks unnecessary interference with competitive market outcomes. Ironically, including paragraphs (ii) and (iii) can enable the successful growth of the second and third largest undertakings in a market to trigger stricter rules for the leading firm in that market, than when the second and third undertakings are less successful. Moreover, there is no support in economic theory for the particular thresholds proposed. While the proposed exemption from paragraph (iii) for undertakings with less than a 10% share may provide some relief for some undertakings, the exemption does not apply broadly enough to ameliorate the underlying concerns. Therefore, even if Article 15 is retained with the provision that the presumptions based on market share are rebuttable, paragraphs (ii) and (iii)[40] should be eliminated from Article 15.

Article 16

As discussed in the July 2003 Joint Comments,[41] as a general rule, the United States and most other competition law regimes do not prohibit the fact of monopoly as such. Efforts to attain a monopoly position by aggressively innovating, promoting,

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37 *Id*. at 11-12, 15.

38 *See id*.

39 *Id*. at 12.

40 When the test in (iii) is met but the tests in paragraphs (i) and (ii) of Article 15 are not met, the market situation may be three firms with market shares of about 45%, 20%, and 11%, respectively. In such a situation, it will be somewhat unusual for any one undertaking to be dominant or perhaps even for all three undertakings to coordinate their competitive conduct (in which case, in any event, the prohibitions of Article 8 would apply). Hence, especially in the case of paragraph (iii), the use of a presumption, even a rebuttable one, would be unnecessary.

41 July 2003 Joint Comments at 3, 14, 16.

buying inputs and selling a product or service are strongly encouraged. Indeed, the United States Supreme Court has recently reaffirmed that the ability to charge monopoly prices is lawful, and is an important, positive element of the free-market system.[42] The opportunity to charge monopoly prices – at least for a short period – attracts investment and innovation in the first place, by inducing risk-taking that produces innovation and economic growth. Those high prices ultimately attract more aggressive competitors that stimulate competition and erode a monopolist's position. Lower costs of inputs contribute to that same set of beneficial incentives to the competitive process.[43] The prohibition of such conduct would require a competition authority to act as a price regulator, a role that is antithetical to an efficiently functioning market system, and likely to harm competition and, ultimately, consumers.

Some jurisdictions, notably the EU, recognize in theory[44] and in some mostly dated decisions the concept that a dominant position may be exploited by charging high prices or paying low prices. However, there apparently have been no EU prosecutions of such violations where there were no other elements present, such as proof of a decrease in competition caused by the pricing. Moreover, new prosecutions of such conduct would appear to be inconsistent with an apparent trend in the EU towards greater reliance on economic analysis and observed competitive effects.

Therefore, Article 16 should be deleted. If it is retained, then, consistent with the July 2003 Joint Comments, the term "unfair" should be clearly defined, as discussed in the July 2003 Joint Comments.[45]

The use of the term "unfair" appears inconsistent with the focus of most competition laws – safeguarding competition. The term arguably reflects political and other considerations, including the well-being of rival business owners. These concerns may be inconsistent with the goal of prohibiting activities that exclude or limit competition and maximizing consumer welfare. It is generally accepted in competition law policy that the only definition of a "fair" price that is consistent with the goal of long-term consumer welfare is the price that results from free competition. As used in the April 8, 2005 Revised Draft, however, the term seems to imply that there is an appropriate value for products other than the prices set by a competitive process, inviting regulatory interference with ordinary business processes that is likely to raise costs to consumers over time and that is antithetical to an efficient market. Given the dominant market positions of the undertakings that would be under review under Article 16, there

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42 *See*, *e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). A copy of this decision may be found at http://www.supremecourtus.gov/opinions/03pdf/02-682.pdf

43 *See* July 2003 Joint Comments at 3, 16.

44 *See*, *e.g.*, Kurt Stockmann & Alberto Pera, Building Competition Policy in China: An EU Approach at 4.2 (2005).

45 *See* July 2003 Joint Comments at 7, 14, 16.

may be a tendency to consider as "too high" (or "too low") any price (or cost) that a complaining undertaking speculates would have occurred in the absence of some market power. Prices that are higher (or costs that are lower) than some amount negotiated by others or in other circumstances should not be deemed either "unfair" or anticompetitive.

The term "unfair" is also ambiguous and subjective. Undertakings need clear rules and objective criteria so that they may plan and conduct their business in an efficient manner. Undertakings must conform their business practices to the competition laws of all countries in which they do business. Accordingly, ambiguous laws that allow for subjective enforcement in any jurisdiction create tremendous difficulties for undertakings that desire to ensure proper legal compliance.

Article 17

Predatory prices may in certain circumstances have adverse effects on competition. However, for the reasons discussed in the July 2003 Joint Comments,[46] the Sections suggest that an appropriate measure of "cost" be identified and that "prices below cost" be prohibited only if they are proven to have an anticompetitive effect on the market. Otherwise, the law may chill price competition and low prices that benefit consumers.

Article 18

For the reasons discussed in the July 2003 Joint Comments,[47] Article 18 remains a concern and should be deleted or at least clarified to define what would be considered "equivalent trading partners," to require some actual adverse effect on competition before a violation may be found, and to permit the granting of different terms to customers to meet a competing offer.

Article 19

Article 19 of the April 8, 2005 draft, defining the prohibition against refusals to deal, is comparable to Article 20 of the October 2002 draft that was the subject of the July 2003 Joint Comments. As noted in the July 2003 Joint Comments,[48] "[t]he basic rule in U.S. antitrust law is that most competitive activity is permissible unless it is shown to have an unreasonably restrictive effect on competition in the particular circumstances." Article 19 has sought to take this point into account by qualifying the

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46 *Id*. at 9, 14, 16-17.

47 *Id*. at 14, 19.

48 *Id*. at 3.

prohibition against refusals to sell with the language "so as to put the purchasers at a competitive disadvantage or harm the legitimate interests of consumers." The first qualification, however, remains inconsistent with U.S. antitrust law[49] and international competition law norms, which do not interfere with a seller's decisions of which parties to deal with unless the refusal has a demonstrated effect of creating or maintaining a monopoly, and thereby harming consumer welfare. Obligating a dominant seller to sell to all willing resellers is unlikely to protect consumers' legitimate interests, because, for example, a willing reseller may be unqualified to provide facilities or services desired by consumers or necessary to the efficient distribution of the products and may instead "free ride" on efforts by others. The language, "put the purchasers at a competitive disadvantage or," therefore, should be deleted from Article 19.

Article 20

Although the proposed law benefits from the increased clarity of Article 20, including its reference to practices that "eliminate or restrict competition," the closing phrase "with other undertakings" might mean that an effect on competition in the market as a whole (as opposed to on competition by individual undertakings) is not required for conduct to be prohibited. By deleting those three extraneous words, "with other undertakings," Article 20 would be clarified to permit exclusive transactions that do not have an anticompetitive effect and may provide important benefits. For example, short-term supply contracts can assure supply, enable longer-term planning with greater certainty on the basis of known costs, and obviate the expense and risk of storage. Exclusive dealing can be a form of partial vertical integration that provides efficiencies, and allows a firm to avoid the costs and risks that would be incurred through full vertical integration.[50]

Article 21

The reference to "eliminate or restrict competition" in Article 21 is an important clarification,[51] but the continued inclusion of the vague phrase, "subject in nature or in business practice," remains a concern. The deletion of that phrase would substantially increase the transparency of the meaning of Article 21, and increase compliance and consistency of enforcement.

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[49] *See United States v. Colgate & Co*., 250 U.S. 300, 307 (1919) (holding that, in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the right of a seller to exercise its independent discretion as to which parties with which it will deal). A copy of this decision may be found at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=250&page=300

[50] July 2003 Joint Comments at 20.

[51] *Id*. at 19-20.

Article 22

Article 22 had no analogue in the October 2002 draft, and introduces for the first time in the proposed law the concept often referred to as the "Essential Facilities Doctrine." There is disagreement among developed competition law regimes and prominent antitrust commentators on whether such a doctrine is consistent with proper competition law goals, and, if it is, how such a doctrine should be formulated.[52] A recent U.S. Supreme Court decision, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[53] discussed risks to competition posed by any broad application of the Essential Facilities Doctrine. In *Trinko*, the Court observed that, although "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate [Section 2 of the Sherman Act]," such a prohibition is an exception to the normal right to refuse to deal with other firms, under the *Colgate* rule. The Court therefore noted that it has "been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[54] The Court found that the specific refusal to deal in *Trinko* did not constitute a violation of U.S. antitrust law under the narrow exceptions to the *Colgate* rule that had been recognized. The Court also noted that it has neither recognized nor repudiated the Essential Facilities Doctrine.[55]

Those United States Circuit Courts of Appeal that have recognized the Essential Facilities Doctrine have applied it very narrowly, and have sought to tailor specific criteria that must be proven before access to a competitor's facilities may be compelled. These criteria include:

(1) proof of harm to competition from the refusal to deal, which is a fundamental element of any monopolization claim;

(2) control of the essential facility by a monopolist;

(3) a competitor's inability practically or reasonably to duplicate the essential facility (not just that it would be costly for it to do so)

(4) the denial of the use of the facility to a competitor; and

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52 *See*, *e.g.*, P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989). *See generally* W. Blumenthal, *Compulsory Access under the Antitrust Laws*, ABA, Advanced Antitrust Counseling Workshop (1998). Copies of these materials are annexed as Appendices to these Comments for ease of reference.

53 504 U.S. 398 (2004).

54 *Id*. at 408.

55 *Id*. at 410-11.

(5) the feasibility of providing the facility to competitors.[56]

Accordingly, Article 22 should be deleted from the proposed law. If Article 22 is retained, it should be revised to require a showing that the competitor seeking access cannot practically or reasonably duplicate the facility. Such a requirement should be added to bring this provision into closer conformity with accepted competition policy. The Sections also believe that Article 22 should be revised to require that the party seeking access demonstrate that access would further the legitimate interests of consumers. Finally, it should be made clear that the Essential Facilities Doctrine does not apply to IP rights at all or only in extraordinarily limited circumstances.[57]

IV Chapter 4 (Control of Concentrations)

Many of the changes that have been made to Articles 23-31 of the proposed legislation are highly desirable. Specifically, for the reasons discussed in the July 2003 Joint Comments,[58] the clarification of the criteria triggering filing (Articles 23-25), the greater transparency in decision-making (Article 29), and the shortening of the initial waiting period (Article 27) are each important improvements that will aid businesses in complying with the legislation.

Notwithstanding beneficial revisions, concerns remain with regard to the exemption provided in Article 30, as discussed in the July 2003 Joint Comments.[59] Further changes are also needed to Articles 24, 26, 27, 31 and 48 so that the proposed

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[56] *See* ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS 278-86 (5th ed. 2002). *See also id.* at 451-54 (addressing restraints on access imposed by joint venture parents).

[57] Though the European Court of Justice has in "exceptional circumstances" compelled access to IP rights under Article 82 of the EC Treaty, it has set forth strict limitations on the circumstances in which a compulsory license may be required. In Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, 2004 ECJ CELEX LEXIS 166 (Apr. 29, 2004), the ECJ held that the following criteria were prerequisites to compelled access: (1) that the IP right be indispensable to compete in the market, and there must not be any feasible alternatives; (2) the party seeking access must show that there is an upstream market for the supply of the IP right that is indispensable; (3) the party seeking access must intend to supply a market different from that on which the current seller is operating, or must demonstrate that it intends to sell a new product (even if on the same market) for which demand exists; and (4) that the refusal to license is such as to exclude all competition on the secondary market. The Sections believe that such exceptional, limited circumstances do not warrant the draconian remedy of the Essential Facilities Doctrine, and that such conduct can be addressed by other means. In fact, in the *IMS* case, the crucial issue of whether there was a need to obtain access to the IP rights involved was resolved by a German national court ruling that no IP rights were infringed by the party seeking access. In other words, there was no competitive need for the IP rights that the party was seeking because that party's business did not infringe on those IP rights.

[58] July 2003 Joint Comments at 12-13.

[59] *Id*. at 22-23.

legislation will be consistent with the recommended best practices that have been approved by the members of the International Competition Network ("ICN").[60] The ICN Merger Working Group has developed Guiding Principles and Recommended Practices for Merger Notification that have been approved by all members of the ICN.[61] While these guiding principles and recommended practices are nonbinding, they reflect a consensus of the international competition enforcement community as to the best practices in this area. Numerous jurisdictions have conformed, and continue to conform, their merger review systems to the ICN Recommended Practices. In order to promote international convergence and to reduce unnecessary burden on undertakings operating globally, the Sections urge that China seek to conform both its legislation and its implementation to the ICN Guiding Principles and Recommended Practices to the maximum extent possible consistent with China's unique requirements.

Article 24

As drafted, the first approach of Article 24 would require notification if any one party to the transaction has China-wide assets or sales above RMB 3 billion or a market share within China above 20%. This provision is inconsistent with the ICN Recommended Practices in two respects.[62]

First, ICN Recommended Practice I recommends that jurisdictions require notification only if either (i) the acquired party has, or (ii) in the case of a joint venture, two or more parties have, activities within that jurisdiction exceeding an appropriate threshold of materiality. To conform the first approach of Article 24 to this ICN Recommended Practice, it should be revised to require that the assets or sales of the acquired company or, in a case of a joint venture, of two or more parties to the concentration, exceed whatever threshold is established. In addition, in order to conform the proposed legislation to the ICN Recommended Practice, the test should be based solely on the assets or sales of undertakings who have control of the particular undertaking rather than any undertaking having "affiliate relationships." It is also important that the test of control be clearly specified and based on objective indicia, such as voting or economic interests in the undertaking.

Second, in its Recommended Practice II, ICN recommends that notification thresholds be based exclusively on objectively quantifiable criteria, such as assets and sales, and expressly recommends against market share-based tests since they are more

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[60] The International Competition Network is a network of competition authorities from countries around that world that have enacted competition laws. The ICN currently has almost 80 members.

[61] The ICN Guiding Principles and Recommended Practices for Merger Notification may be found at http://www.internationalcompetitionnetwork.org/guidingprinciples.html

[62] *See also* July 2003 Joint Comments at 29-30.

judgmental[63] and therefore far more difficult to apply in practice. Market shares cannot be determined unless a relevant market and its size are determined; however, the relevant market and its size are often the ultimate critical issues that the parties frequently will not know at the time notification is made. As drafted, the market share tests are also unlikely to be efficient in identifying concentrations that may have adverse effects on competition. For example, paragraph (2) would require notification if one party has 20% in a market and the other parties have no presence in that market at all, and the parties are active in another market in which their combined share is under 25%. To conform the first approach of Article 24 to the ICN Recommended Practices, subsections (3) and (4) of the first approach Article 24 should, therefore, be deleted.

The Sections suggest that the second approach in Article 24 should be adopted, because the State Council will then have the opportunity to study the issue thoroughly before establishing the thresholds, and will have the ability, without invoking the burdensome process of amending the law, to adjust the thresholds from time to time according to experience, "economic developments and market situations." However, if the second approach in Article 24 is adopted, the Sections suggest that it be revised to expressly instruct the State Council to establish thresholds according to ICN Recommended Practices, particularly those that recommend against using market shares as notification thresholds and that recommend thresholds relating to the activities of the parties within China.[64]

Articles 26, 28

ICN Recommended Practice V focuses on the information required to be included in the initial notification, recommending that the initial notification should be limited to the information needed to determine whether the transaction exceeds jurisdictional thresholds and whether the transaction raises competitive issues meriting further investigation. ICN further recommends that the initial notification requirements not impose unnecessary burdens on parties to transactions that do not present material competitive concerns.

Article 26 as drafted seems inconsistent with these recommendations and to impose unnecessarily burdensome information requirements on parties to transactions that do not raise material competition issues. To reduce any unnecessary burden, the Sections recommend that the information required to be provided by paragraphs (4), (5), and (6) be limited to products for which there is some overlap between the parties or to transactions that the Anti-Monopoly Authority determines, based on its initial review,

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[63] This is particularly the case with paragraph (1), since it may be very difficult to allocate the value of a transaction geographically, especially if the assets are intangibles such as IP rights.

[64] The Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors are inconsistent with ICN Recommended Practices in these, and other, respects. As discussed with respect to Articles 45 and 55, the Interim Provisions should be revoked when the Anti-Monopoly Law takes effect.

may present material competitive concerns.[65]

While the concept of supplementation of notification provided in Article 28 is appropriate, the application of Article 28 to the information requirements of Article 26, as currently drafted, would be onerous and unlikely to result consistently in providing the Anti-Monopoly Authority with useful information.

Article 27

Shortening the initial review period in Article 27 to 45 days is generally consistent with ICN Recommended Practice IV, which requires that merger reviews be completed within a reasonable period of time. However, most merger control regimes have an initial waiting period of 30 days, and the imposition of a 45-day initial review period may complicate the review of transactions that are subject to multi-jurisdictional review.[66] Moreover, 45 days may still be an unreasonably long period for transactions that are time-sensitive and that do not raise any material competition issue. ICN recommends, therefore, that merger review systems incorporate procedures for expedited review and clearance of notified transactions that do not raise material competitive concerns.[67] Accordingly, Article 27 should be amended to authorize a decision permitting the consummation of the concentration in less than 45 working days if the Anti-Monopoly Authority determines that the notified transaction does not raise material competitive concerns.

Article 30

Article 30 provides for prohibition of concentrations that "may lead to creation or strengthening of dominant market positions as well as elimination or restriction of market competition." As in other areas of the proposed law, the Sections submit that there should be a "substantiality" standard before a concentration is prohibited. Therefore, we suggest that the word "substantial" be added to Article 30, so that concentrations are prohibited that "may lead to creation or strengthening of dominant market positions as well as *substantial* elimination or restriction of market competition."

Article 31

ICN Recommended Practice IX recognizes that it is critical that business secrets and other confidential information received from merging parties and third parties in

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65 July 2003 Joint Comments at 29.

66 *Id.* at 17, 29.

67 Recommended Practice IV.B.

connection with the merger review process be given appropriate confidentiality protections. This requires that confidential information submitted by merging parties and third parties not be used except in connection with the competition agency's review of the merger and other authorized law enforcement purposes.[68] It also requires that confidential information not be disclosed outside the competition agency except for the purposes of allowing the agency to discharge its merger review mandate effectively.[69] For these reasons, and those discussed in the July 2003 Joint Comments,[70] Articles 41 (Confidentiality) and 53 (Responsibilities of the Enforcer) are important provisions. However, Article 31, which appears to require consultation with the governing departments of related industries, could substantially nullify the protective intent and effects of Article 41 and will likely undercut the independence of the Anti-Monopoly Authority.[71] For these reasons, Article 31 should be eliminated.

Implementation

Whatever legislation is ultimately enacted, it is critical to the continued smooth development of the PRC's economic and legal system that this legislation be implemented in a manner that is consistent with the guiding principles for merger review that were promulgated by the ICN at its first annual conference in Naples, Italy in September 2002. The following ICN guiding principles are particularly important in this respect.

> First, *merger laws should be applied on a non-discriminatory basis.* In an increasingly global economy, analysis of the competitive effects of a transaction and the decision to challenge or to refrain from challenging a transaction should be made without regard to the nationality of the parties to the transaction or the nationality of those who may support or oppose it.[72]
>
> Second, *the process of merger review should be transparent.* Parties are entitled to know the manner in which competition authorities will review transactions and the standards that the competition authorities, including any relevant courts and tribunals, will apply in deciding whether to block or challenge a transaction.[73]

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68 Recommended Practice IX, Comment 3.

69 *Id.*

70 July 2003 Joint Comments at 27-28, 30-31.

71 *See id.* at 4, 5, 26-28. This may be a particular danger if the consultation is not made part of the public record.

72 *Id.* at 28-29.

73 *Id.* at 17, 27-28.

> Third, *appropriate safeguards should be available to assure that the process of review is fundamentally fair.* Parties should have a reasonable opportunity to address concerns that the competition authorities may have about a transaction and should be entitled to an impartial and timely resolution of disputed issues.[74]

The Sections assume that Articles 42-44 (Right to be Heard; Publication of Decisions; Judicial Review) will apply to merger review. In all events, the Anti-Monopoly Law should require the Anti-Monopoly Authority to take these three ICN principles into account in its practices and to consider issuing regulations that incorporate these principles. In addition, the regulations and practices followed by the Anti-Monopoly Authority should incorporate applicable legal privileges and related confidentiality doctrines. Third parties should also be allowed to express their views during the review process and, wherever possible, the Anti-Monopoly Authority should seek to work cooperatively and collaboratively with the enforcement agencies of other jurisdictions reviewing the transaction so as to avoid inconsistency and conflict in the adopted outcomes, and to maintain the confidentiality of information submitted, except where parties voluntarily waive confidentiality.

V Chapter 5 (Prohibition of Administrative Monopolies)

The prohibition of "Administrative Monopoly" is a significant and challenging objective of the draft law, since it implicates the relationships between government departments and authorities at different levels of the government of the PRC. The prohibition properly recognizes that anticompetitive conduct by governmental entities is a substantial threat to competition and may undermine the foundation of sound competition policy.

Articles 32-35

Articles 32-35 prohibit various acts of "administrative monopoly." The relevant penalty provisions, Articles 49-50, distinguish Articles 32-34 from Article 35. Article 49 suggests that Articles 32-34 target "specific acts of administrative monopoly" while Article 50 targets "general" acts of administrative monopoly.

Articles 32-34 prohibit "the Government and its subordinate departments" from "abusing their administrative power" for specific anticompetitive purposes. The draft law does not, however, define the term "abuse of administrative power." Distinguishing "abuse of administrative power" from "legitimate use of administrative power" may complicate enforcement of Articles 32-34. As currently drafted, Articles 32-34 may require the Anti-Monopoly Authority of the State Council to define and apply the

[74] *Id.* at 27-28.

ambiguous concept of "abuse." The prohibitions in Articles 32-34 may be clarified by combining them into one provision and specifically defining prohibited conduct and eliminating the term "abuse" in the following manner:

> "No government, government department, or government employee may, through formal or informal use of administrative power, (1) require undertakings or individuals to purchase commodities from an undertaking designated by a government, government department, or government employee; (2) restrict access by undertakings to markets for commodities or restrict the free flow of commodities between regions; or (3) compel undertakings to engage in conduct otherwise prohibited under this law. This article does not apply to government action taken in accordance with the specific authorization of other laws and regulations, consistent with Article 55 of this law."

Under this formulation, the Anti-Monopoly Authority of the State Council would (1) determine whether the challenged administrative conduct results in any of the three listed anticompetitive effects, and (2) determine whether the challenged conduct was "in accordance with the specific authorization of other laws and regulations." The second step thus focuses directly on the legal basis and purpose of the government department's administrative authority. This formulation may address the same concerns as the prohibitions on "abuse of administrative authority" while avoiding the ambiguous concept of "abuse."

Article 35 addresses the enactment of anticompetitive regulations by government authorities. It prohibits "rules with provisions eliminating or restricting competition in violation of laws and administrative regulations so as to prevent the establishment of a unified and orderly national market and of a fair competition environment." As drafted, Article 35 only prohibits anticompetitive rules that "violate" other existing "laws and administrative regulations." Article 35 thus permits new rules which "prevent the establishment of a unified and orderly national market and of a fair competition environment" if the new rules do not violate any existing laws or administrative regulations. Article 35 might be strengthened by prohibiting all anticompetitive measures unless expressly permitted by existing laws or regulations in the following way:

> "No government, government department, or government employee may promulgate rules with provisions which limit or eliminate competition with the purpose or effect of impeding the establishment of a unified and orderly national market and of a competitive environment. This article does not apply to government action taken in accordance with the specific authorization of other laws and regulations, consistent with Article 55 of this law."

Under this formulation, the Anti-Monopoly Authority of the State Council would (1) determine whether the challenged rule limits or eliminates competition, (2) determine whether the purpose or actual effects of the challenged rule are adverse to competition,

and (3) determine whether the challenged rule is "in accordance with the specific authorization of other laws and regulations." The third step thus focuses directly on the legal basis and purpose of the government department's new rule.

In effect, these suggested revisions to Articles 32-35 require government entities to demonstrate that any anticompetitive administrative action or rulemaking comports with the purposes and restrictions of the laws which they seek to enforce.[75]

Applicability to State-Owned Enterprises

The legislation would benefit from the inclusion of the following provisions: (1) "this law applies equally to enterprises owned in whole or in part by a government entity or government department and to other enterprises"; and (2) "evidence of specific benefit to an enterprise owned in whole or in part by a government entity shall not constitute a general benefit to the public interest." These provisions would confirm that anticompetitive agreements or transactions would not automatically qualify for a "public interest" exception under Articles 11 and 30 merely because they benefit a state-owned enterprise.[76]

VI Chapter 6 (Anti-Monopoly Authority)

In addition to the discussion in the July 2003 Joint Comments regarding the provisions relating to the implementation of the Anti-Monopoly Law and the role of the Anti-Monopoly Authority,[77] we respectfully submit the following additional thoughts regarding some of the provisions that have been revised or added in the April 8, 2005 Revised Draft. We offer the following comments in the interest of assuring that the Anti-Monopoly Authority can function as effectively as possible.

Articles 36, 38-42

The enforcement of competition law requires very rigorous yet transparent procedures to produce outcomes that are perceived to be, as well as actually are, fundamentally fair. The ICN provides guidelines and assistance with respect to investigation techniques and other matters in accordance with international standards. The Sections believe the Anti-Monopoly Authority should be given sufficient time and resources to assemble and train a sufficiently large and capable staff, with expertise in economics and law in particular, to set policies and conduct investigations in a professionally fair and efficient manner. The Authority should also publish its detailed

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75 *Id.* at 24-25.

76 *Id.* at 24.

77 *See id.* at 24-28, particularly relating to the need for protection of due process rights.

procedures, whether in the form of implementing regulations or otherwise, in draft form well before their targeted effective date to allow sufficient time for comments and refinement.[78]

Article 37

For the reasons discussed in the July 2003 Joint Comments,[79] establishment of local branches in a national unified network under the central guidance of the Anti-Monopoly Authority would be an appropriate infrastructure. However, the proposed law should clarify the specific role of local branches at the provincial level under Article 37. Unless the role of the local branches is clearly established, dispersing such personnel around the country risks dilution of the Authority's capabilities as well as increased potential for undue influence by administrative monopolies and other local interests, as well as creating the potential for inconsistent and possibly incoherent applications of the law. In most circumstances, the demanding responsibilities of the Authority will likely require centralization of personnel, especially if resources are limited.

Article 43

The requirement in Article 43 that the Anti-Monopoly Authority publish its decisions is a highly beneficial provision, where there is a determination that the law has been violated or that a concentration should be prohibited or permitted only upon conditions. Such transparency is crucial to ensure the orderly development of the law, and to facilitate the understanding by undertakings of what is prohibited and what is permitted under the law. However, Article 43 should be clarified to specify that the decisions must also include the reasoning for the decisions, so that the full benefits of transparency may be obtained.[80]

Article 44

The Supreme People's Court may need to publish opinions on the manner of conduct of appeals from decisions by the Authority. Recognizing that such opinions more closely resemble regulations than judgments, the Supreme People's Court should consider publication of its opinions in draft form to allow adequate opportunity for comment and refinement.[81] In addition, a special division should be established within the People's Court, to focus exclusively on matters arising under the Anti-Monopoly

78 *Id.* at 4, 25-28.

79 *Id.* at 4, 26-27.

80 *Id.* at 27-28.

81 *Id*.

Law. Such a special division will likely foster a more rapid and orderly development of a body of judicial expertise and opinion in applying the Anti-Monopoly Law.[82]

Article 45

The provision in Article 45, for enforcement of laws and regulations with anti-monopoly aspects by other bodies enforcing other laws, raises serious concerns, including principally inconsistent enforcement and a lowering of the prestige of the Authority and general respect for competition law. These risks are exacerbated by Article 55, which excludes from the Anti-Monopoly Law any conduct taken according to other laws and regulations. Though such other bodies are to be barred from issuing decisions without the consent of the Anti-Monopoly Authority,[83] it may be very difficult for the Authority to assert itself against other governmental agencies, especially during the period in which competition law and the Authority are being established. For these reasons, a concerted effort should be made to conform other laws and regulations to the Anti-Monopoly Law to reduce the potential for conflict between other bodies and the Authority. For example, the Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors should be revoked when the Anti-Monopoly Law takes effect.[84]

VII Chapter 7 (Legal Liabilities)

The Sections are encouraged by the increased focus on injunctive relief to remedy loss of competition resulting from prohibited conduct, and the greater amount of compensation available to parties injured by prohibited conduct is helpful and generally consistent with the approaches of other jurisdictions.[85] We note a few areas where additional clarity and adjustment would be beneficial.

Articles 46-48

Additional specific language has been added to this chapter of the law in the articles dealing with legal liability for monopoly agreements, abuse of dominant market position, and agreements to limit competition (Articles 46-48 in the current draft and Articles 44-46 in the October 2002 draft), specifying the actions the Authority will take to end the violations and subordinating the imposition of retrospective penalties. This

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82 *Id.* at 28.

83 If such concurrent jurisdiction is retained, then it is important to retain this requirement that the Anti-Monopoly Authority's consent be obtained. *See*, *id.* at 26-27.

84 This is especially important since the Interim Provisions appear inconsistent with the proposed Anti-Monopoly Law in several respects. *Id*. at 32-33.

85 *Id.* at 5.

permits the Authority to focus on maintaining and, where necessary, restoring competition rather than penalizing individual actors, which is beneficial for the reasons stated in the July 2003 Joint Comments.[86] These provisions should be revised to clarify the circumstances under which the Authority would use financial penalties or criminal penalties to discourage egregious violations, such as price fixing and bid rigging among competitors, where the incentive for individual profit from collusion requires a substantial offset from potential penalties.

Article 48

Article 48 provides penalties against unauthorized concentrations, and would make unwinding the transaction mandatory for failure to notify a transaction or to comply with any of the obligations prescribed by the Anti-Monopoly Authority. This provision is more draconian than necessary and should be amended to authorize the Authority to require that the transaction be unwound but not make it mandatory that it does so. This is because there may be situations where a concentration that was not notified is not anticompetitive and may even be pro-competitive. In such a situation, the failure to notify should not automatically result in the unwinding of the transaction. The Sections suggest that, instead, a minimum fine be required for the failure to notify a transaction. The unwinding of a transaction would be an appropriate remedy for a transaction that the Anti-Monopoly Authority determines has an adverse effect on competition in the market.[87]

Articles 49-50

Articles 49 and 50 list potential responses by the Anti-Monopoly Authority to acts of "administrative monopoly" by government entities in violation of Articles 32-35. These articles implicate the complicated relationships among Chinese governmental entities. Clarification of Articles 49 and 50, however, to address and avoid potential conflicts between government entities, would be helpful.

Article 49 provides that, in the event of a specific administrative act in violation of Articles 32-34, the Anti-Monopoly Authority of the State Council may "order the relevant government and its subordinate departments to revoke the specific act." Article 49 does not explain how the Anti-Monopoly Authority may respond if a government entity fails to comply with an order of the Anti-Monopoly Authority. Article 49 should expressly state whether a specific administrative act in violation of Articles 32-24 remains valid if the government authority fails to comply with an order of the Anti-Monopoly Authority to revoke the act.

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[86] *Id*. at 30.

[87] *See* also *id.* at 30.

Article 50 provides that, in the event that a government authority promulgates anticompetitive rules in violation of Article 35, the Anti-Monopoly Authority "may advise the competent authority to take measures pursuant to legally established procedures." This appears to mean that the Anti-Monopoly Authority may recommend the revision or revocation of the anticompetitive rule to the government entity that promulgated the anticompetitive rule. Article 50 should clearly explain how the Anti-Monopoly Authority may respond to the refusal by a government entity to revise or revoke an anticompetitive rule following a recommendation by the Anti-Monopoly Authority.

Article 51

Article 51 outlines penalties, including administrative orders and fines, for "persons under investigation" which obstruct the investigation by the Anti-Monopoly Authority. Article 51 should explain more precisely how this provision may apply to government entities or government employees that obstruct investigations of alleged violations of Articles 32-35.

As pointed out in the July 2003 Joint Comments,[88] the penalization of all but the most blatant examples of anticompetitive behavior does not increase or restore competition as effectively as provisions for injunctive relief leading to divestiture and restitution, including the power to enjoin conduct before it injures competition. However, as also noted in the July 2003 Joint Comments,[89] exactly the opposite is true when seeking to maintain the Authority's investigative and disciplinary powers. In the case of individual actors seeking to avoid the reach of the Authority, it should be unambiguous that those actions will result in criminal prosecution. Article 51 continues to prescribe the imposition of a significant fine in the event of a failure to cooperate with the Authority but still does not specifically provide for criminal penalties. If Article 51 is revised to specifically provide for criminal penalties, then, to avoid unnecessary prosecutions, additional clarification of what materials are subject to Article 51 and could trigger liability would be desirable.

Article 52

Article 52 appropriately provides for compensation to those whose rights and interests have been injured by violations of the law. However, the procedure by which injured parties may seek and obtain this compensation is left unclear. Presumably, since no compensation claim may be commenced until after the Anti-Monopoly Authority has confirmed a finding of monopolistic conduct, an injured party must complain to the Anti-Monopoly Authority regarding the conduct, obtain a decision of monopolistic conduct

[88] *Id.* at 30.

[89] *Id.* at 30-31.

and then seek compensation in a People's Court. It would be helpful to clarify these issues.

Article 53

The prohibition and penalties in Article 53 against activities by officials of the Authority are important indications that the government understands the sensitivities inherent in an Anti-Monopoly Law. Violations of this provision would always merit consideration under the criminal law as serious violations of the trust placed in a public official and because the more formal proceeding under the criminal law would enable a complete investigation of the violations. Transparency in any such criminal proceedings, as in the activities of the Authority itself, would help ensure the efficacy and reliability of the Authority's activities.

VIII Chapter 8 (Supplementary Articles)

Article 54

This provision indicates that certain data on which the Authority shall rely will be self-generated or obtained from other government sources. The current draft would establish a presumption in favor of such data and may not allow respondents the opportunity to present opposing data in an adversarial proceeding, or may deem such contrasting data as lacking in probative value. The Authority should not establish a presumption in favor of public data, particularly with respect to a concept so difficult to apply as market share.

Article 55

The proposed law provides in Article 55 that it "is not applicable to any conduct which is taken according to other laws and regulations."

The July 2003 Joint Comments addresses the issue of interaction with other laws, including, specifically, the Interim Provisions for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, and the IP rights laws.[90] We also discuss in Section III of these Comments the Sections' additional concerns regarding the potential interaction of the proposed Anti-Monopoly Law with the IP rights laws. With respect to Article 55, we are concerned that a situation is created in which all other laws may take precedence over the Anti-Monopoly Act, which we hope is not the intent. Thus, as discussed in Section VI of these Comments relating to Article 45, we recommend that other laws and regulations be conformed to the Anti-Monopoly Law, and the Interim Provisions for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors be revoked when

[90] *Id.* at 31-33.

the Anti-Monopoly Law takes effect.

Article 56

Article 56 addresses the "exemption of the exercise of intellectual property rights," is based on the article of the same number in the October 2002 draft, and was discussed at length in Section VIII of the July 2003 Joint Comments.[91] The deletion of the language, "other laws protecting intellectual property rights," from the first sentence exempting such laws from the applicability of the Anti-Monopoly Law raises concerns. The language should be restored, to ensure that treaty rights and regulations regarding IP are not nullified by the Anti-Monopoly Law.[92]

This provision, as drafted, may not be consistent with treaty rights and obligations and may also be used to nullify IP rights and discourage innovation. The continued absence of any definition of what conduct may be regarded as an "abuse" of IP rights raises serious concerns that a simple refusal to license another entity to use IP rights may be regarded as an abuse.[93] Those concerns are heightened by the introduction of Article 22 and the "competitive disadvantage" language in Article 19, discussed above. Taken together, these provisions appear to increase the likelihood that the law may be applied to obligate owners of IP rights to license those rights to all competitors. Again, any such broad compulsory access to IP rights would undermine the incentive for innovation and harm, rather than serve, consumers' interests in new and improved products and services. In this way, these provisions may violate treaty rights and obligations and are inconsistent with the internationally accepted pre-eminent goal of competition law.

For the reasons discussed in the July 2003 Joint Comments,[94] the Anti-Monopoly Law should not address the interface between the IP rights laws and the Anti-Monopoly Law. If the relationship between these two areas of law is to be addressed, however, the Sections again recommend that the following phrase be added to the end of the second sentence of Article 56: ", provided that the unilateral exercise of the right to exclude, inherent in the ownership of intellectual property, shall not constitute an abuse."

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91 *Id.* at 5, 31-32.

92 Such rights would include rights under the Regulations on the Protection of Computer Software and other regulations, as well as rights under international treaties, including the Paris Convention for the Protection of Industrial Property, the Madrid Agreement for the International Registration of Marks, the Berne Convention for the Protection of Literary and Musical Works, the Universal Copyright Convention, the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, the Patent Cooperation Treaty, and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

93 Moreover, if Article 56 in fact means that any abuse of the exercise of IP rights is also automatically a violation of the Anti-Monopoly Law, then the Sections have even greater concern regarding the actual application of this provision.

94 July 2003 Joint Comments at 31-32.

Article 57

Article 57 has no clear counterpart in the 2002 draft and is a welcome addition to clarify the applicability of the Law to "non-profit entities" including "industrial associations" and "public institutions." Read in conjunction with Article 5, Article 57 appears to provide an important and supportive element to the proposed PRC competition enforcement regime – namely, obligations upon government institutions to foster competition and avoid acts that restrict competition within the PRC.

Conclusion

The Sections continue to support the enactment of a well-conceived and well-drafted competition law in the People's Republic of China. We hope that this submission is useful. We would be pleased to respond to any questions regarding these Comments, or to provide any additional comments or information that may be of assistance.

May 19, 2005

APPENDICES

Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China (July 15, 2003), without appendices, with translation of the Executive Summary

P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989)

W. Blumenthal, *Compulsory Access under the Antitrust Laws*, ABA, Advanced Antitrust Counseling Workshop (1998)

美国律师公会反托拉斯法部、国际法及惯例部
共同对于中华人民共和国所拟议的反垄断法提供的
意见和建议*

美国律师公会反托拉斯法部、与国际法及惯例部（以下合称“两部门”）藉此机会对中华人民共和国所议的反垄断法提供意见和建议。本文所陈述之内容代表了两部门的共同观点，但未获得美国律师公会之会员代表大会或理事会的认同，因此不应被视为代表美国律师公会的政策。

两部门现有会员逾20,000律师，大部分会员以美国为基地，但其中很多人曾在美国国外生活及工作，而目前在美国国外者，仍有相当数目。两部门对于美国及世界各地的竞争法之施行有着深厚的专业知识。本会的成员包括工商企业法律部门的律师、法学院的教师以及私人执业的及在政府任职的律师。此外，许多非美国律师是积极参与两部门工作的准会员，并贡献他们的专识和洞见于两部门的工作。由于商业的全球化进度加速和美国竞争法的长久历史，两部门的成员非常熟谙对于范围广泛的经济活动中，特别是对跨国企业的活动在竞争上可能发生的影响进行法律的和经济的分析。本文意见的视角，是以美国在反托拉斯法和国际商法领域的经验为基础。这些意见是来自于本会成员作为美国律师的执业经验并基于对于类似问题的美国反托拉斯法和惯例的历史发展以及我们对于国外竞争法体制的比较研究。我们希望并企望这些意见能有助于中华人民共和国反垄断法的圆满发展。

两部门支持保护在市场领域内积极竞争行为。对于所拟议的反垄断法明示要建立一个全面的竞争法体制，我们深感鼓舞。然而，我们也认识到，一部竞争法如果未能精心勾勒、悉心起草，则其效果可能适得其反，这样一部法可能反而又增添了一层政府对市场的干预，惩罚创新和其他生产效益好的商业行为，并妨碍经济进步，而不是服务于竞争政策的目的。因此，我们提供我们的建议，希望有助于一套经精心勾勒、悉心起草的竞争法体制的进一步发展。

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* 起草本意见书的工作组成员是：为国际法及惯例部 Yee Wah Chin，Robert Lindquist 和 James A. Murray，为反托拉斯法部 Nathan G. Bush， H. Stephen Harris, Jr. 和 Paul F. Brinkman，并经 Michael H. Byowitz，Lester Ross，Robert S. Thorpe 和 James M. Zimmerman 为国际法及惯例部以及 Abbott B. Lipsky, Jr. 为反托拉斯法部加以评议。

以下概述概括了两部门认为一部反垄断法订定之前应需先深思熟考虑的一些问题。概述之后，我们阐述了两部门对于拟议的反垄断法之总体的和具体的意见。我们的意见所根据的是两部门备有的非官方英文译本。

概述

两部门承认竞争法有不同的模式，各有其优点和缺点。我们的意见是基于我们对美国模式的熟识和观察其它模式实践的经验。美国模式之下，焦点落在市场行为的实际影响，而非为不同类型的行为的预设后果而制定法规。按拟议中之法律似乎在相当程度上借鉴了欧盟原来采取的模式。原始欧盟的体系很大程度上依赖于广设禁律和事先考核 (pre-clearance) 程序。就我们几十年的观察而言，欧盟的方法已经被证明徒然繁重，并可能无法达到其预期目的。事实上，欧盟当前已经步离了先前广设的禁律并废除了事先考核手续，正在调整其促进竞争行为的各种措施，使其逐渐接近美国模式。

美国反托拉斯法之主旨，是以通过保护竞争来促进消费者的福利。我们所谓“消费者的福利”是指所有实体的福利，包括所有购用和消费产品和服务的政府部门及工商企业经营者，而不仅仅局限于个人。而且，在此意义上“福利”并非政府的资助或补帖。两部门之审视“福利”，既着眼于可为购买者获得的品质、价格和选择，同时着眼于资源的有效配置以满足购买者的需求。美国反托拉斯法通过保护竞争的进行而寻求实现提高消费者福利的目的，而不是单独保护某一竞争者或竞争团体（本国或国外）的利益。保护竞争的进行可以确保销售者以低于非竞争状态下的价格向购买者提供其所需商品及服务。反之，若仅保护单独的或集团的竞争者（无论本国或者外国）利益使其免受竞争，则会减低他们基于价格和品质上相竞争的动机。因此，尽管两部门也承认有理由保护国民经济和公共利益，并在某些情况下对经营者加以保护，但是我们认为这些其他问题不该在竞争法上加以考虑，如果要保护这些利益，必须审慎考虑其是否必需保护和该种保护的成本，并应主要由其它法律关注。

两部门认为，拟议的反垄断法中所使用的一些关键性概念之定义应该和既有通行的国际用法保持一致，并且能够在实践中应用。例如，通常都认为垄断是一种地位，而非一种行为。在美国，成为一个垄断者本身并不违法，因为一个经营者以其出众的产品、低廉的价格和辛勤的工作而超群出众成为独占者并非违法，但是为了获得或者维持其垄断地位而从事不正当的垄断行为可能属于违法。类似的，两部门注意到普遍采用的“市场”之定义下的“市场”应是指“购买者购买或将考虑用以替代之的一组产品（或服务），以及经营者及其竞争者可以销售此种产品（或服

务）的地域”。我们也建议对一些重要概念进行界定，诸如“控制”，虽然拟议的法律中有所提及，但却未能给出定义以阐明其立法意图和适用范围。

美国反托拉斯法的基本规则允许大部分的竞争性行动，除非有迹象表明这些行动在特定情况下对竞争造成了不合理的限制。因此，美国大部分的竞争行为，是以论理裁定加以判断。根据此一原则，一项活动必须事实上对竞争显示出实质性的限制才构成违法行为。另一方面，基于以往的经验，美国通常也承认某些特定类型的竞争活动几乎总是对竞争有不合理的限制。判断这些类型的行为则适用本质推定原则，即只要参与实施了这些类型的活动就违反了美国反托拉斯法，而无需对这些活动的实际影响加以证明。本质推定原则下之违法包括竞争者通过合同预先安排订价[1]、协议划分市场、操纵投标等。我们建议在所拟法中对分别由本质推定原则和理论裁定原则的不法行动应有更清晰的区分。此外，美国有一基本的竞争政策，就是企业经营者之定价，可以廉贵任意，除非在订价低于成本[2]的特殊情况下。如果价格很高，购买者就不会购买；如果购买者宁愿用高价购买，卖家的利润就很高，那么其它竞争者就会受此吸引用更低价格的同类产品来抢占市场。如果价格很低并且没有利润可言，那么竞争者就会被逐出市场，这种情况下如果低价销售的经营者不能在以后将价格提高到可以挽回所有先前损失的程度，则消费者的福利仍不会因此受到损害；购买者将会享受到低价的好处，之后的高价仍无法消除低价带来的收益。

关于在销售者和购买者之间的限制，美国的经验认为，除非一方占据了市场的支配地位，否则这样的限制将不会起到什么损害竞争的作用。即使一方占据市场支配地位，垂直的限制也不一定产生不合理限制竞争的情况。事实上，这种限制常有助于竞争或对竞争有中立性。因此，在美国，除转售价格之外，垂直的限制是以论理裁定而被予以评估的，如果不存在一方占市场支配地位，垂直限制是可以接受的，但是如果存在一方占据市场支配地位并且导致了对竞争有不合理的限制，那么垂直限制则不被允许。对于这些限制，应以其“不利竞争”的后果与其“有利竞争”的效果互相衡量，而判定其为“不利”抑或“有利”于竞争。

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[1] 此处所指“预先安排定价”是指竞争者之间达成的关于其同协议中之一方或多方对第三者独立出售其所生产之物品或提供之服务所预先订定的价格的协议。根据美国法律（以及本意见中所使用的），竞争者互相买卖所协议或联合生产或联合服务的协议之价格，不在此限。

[2] 关于此处“成本”之义意，看下文第二节，关于第十八条之讨论。

和欧盟不同，美国的反托拉斯法没有一套整批豁免的体制。[3] 两部门承认，在欧盟型式的制度下，因为有广泛的禁制，必须有这样一些豁免的规定。然而，我们也担心豁免的规定如未经仔细精确的订拟，则未免过于宽泛，反而使拟议之反垄断法的禁止条款失去其效力。

两部门很高兴地见到拟议的反垄断法之着重禁止“行政性垄断”，同时将国有企业和其他企业在拟议的反垄断法下同为平等待遇的商业经营者的基本原则明文订立于拟议的反垄断法中。美国和欧盟的作法都是如此。

两部门充分赞同设立一个单一的执法机关负责执行所拟议的法律。单一的机关负有推行竞争的使命，可在此复杂体制内促进机构专业知识的发展，且可避免多个执法机构实施法律不同部分的混乱。并且，若无单一负责的执法机构，常会有单一情况涉及法律之若干部分而因此需要多个执法部门参预其事。[4] 按拟议之反垄断法，国务院反垄断主管机关授权发布具体规则及实施细则，我们为该规定深感鼓舞。这样的规则和指南，如经深入研究和审议且有实质机会经公众评议而后发布，将会成为实施竞争法最有效的途径，因为竞争法涉及的经济上和产业组织方面许多复杂问题尚不适合在立法中规定。两部门也支持国务院反垄断主管机关设立派出机构，因为这样可以确保全国执法的一致。执法的一致性对于实现所拟议法律之目的非常重要。

我们建议拟议之反垄断法应明白地确定国务院反垄断主管机关有权要求其他政府部门充分支持反垄断的政策目标。促进市场竞争，需要坚固的基础设施并要得到其他政府机关和社会大众的大力支持。授予国务院反垄断主管机关提倡竞争的任务，对发展该基础设施和支持很重要。我们同时敦促拟议之法律能明确保障国务院反垄断主管机关的独立性。在美国，联邦反托拉斯法的执法机构大多不受外界干扰，所以能够独立地推行竞争的政策目标。两部门建议，具体规定明定其行政程序及确保其实施的正当程序，将大大增加反垄断法的有效实施。成功的竞争政策推行框架需要复杂的规则和设施和对于法纪及经济问题的专业知识。需要有能够有效、及时、客观地实施所有实体、程序和救济性标准的优越法律体制。事实上两部门认

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[3] 反托拉斯法对某些产业诸如保险业等特定行业有特定的法定免除情况，使其豁免于反托拉斯法若干方面的规范。但是这些只是例外情况，适用范围也很严紧。而且，在大多数免责情况下，为了避免其滥用市场权力，免责的行业也必须受到其他法规的约束。

[4] 看下文注释28，关于美国司法部反托拉斯同联邦商业委员会对反托拉斯案件之同时兼有反托拉斯的管辖权。

为，若无上述社会、机构和程序上的支持以及基础设施，一部竞争法机构的引入可能反而会挫伤创新和其它生产效益好的商业行为，并妨碍竞争法旨在推动的经济进步。

在美国，除本质推定违法之外，对反托拉斯法违法行为的法律救济主要着力于恢复或保持市场中的竞争秩序，并不在于惩罚那些违法者。在我们看来，这是实现竞争政策目标、促进消费者福利和提高效率的最有效途径。因此，两部门建议拟议之法律可扩大并明确授权于国务院反垄断主管机关使其能够取得法院之禁制命令以对付不利竞争的企业集中或其它违反竞争之违法行为于其发生之前，并能以没收财产的权力和其它救济措施来治理违法行为于其发生之后。我们同时建议，对于妨碍调查者和采取不当行为的政府官员的处罚措施，应明确订立。这将有助于反垄断法的推行。

最后，两部门承认，拟议之反垄断法和其它法律，诸如知识产权法、《外国投资者并购境内企业暂行规定》等法律法规之间如何协调，问题非常复杂，我们建议对此进行更深入的研究。我们还想特别建议，为了避免世界贸易组织中有关非歧视原则和国民待遇原则所可能招致的复杂问题，所有针对企业集中的竞争政策之审核应只在拟议中的反垄断法范围之内着眼，不必问其是否涉及外国投资者。两部门建议不应鼓励在对并购问题加以审议时考虑任何非竞争政策因素，如要考虑，则应在竞争法之外的法律中加以考虑，诸如暂行规定，而暂行规定应明确规定消除任何对竞争因素的考虑。

Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China[*]

The Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association (collectively, the "Sections") take this opportunity to submit comments on the proposed Anti-Monopoly Law of the People's Republic of China. The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

The membership of the Sections includes over 20,000 lawyers. Most of the members are based in the United States of America, but a substantial number have lived and worked abroad, and some do so currently. Members of the Sections have substantial expertise with competition law enforcement in the United States and around the world. Our membership includes lawyers in the law departments of businesses and the faculties of law schools, as well as in private practice and in government. In addition, many non-U.S. attorneys are active as Associate Members in the Sections, and have contributed their expertise and insights to the Sections' work. Given the increasingly global nature of business and the long history of competition law in the United States, members of the Sections have substantial familiarity with legal and economic analyses of the potential competitive effects of the full range of economic activity, particularly trans-national business activity. These Comments offer a perspective based upon the experience in the United States in the fields of antitrust and international business law. The Sections hope and intend that these comments, from our members' experience as U.S. practitioners and grounded in the historical development of U.S. antitrust law and practice regarding similar issues and in our comparative knowledge of competition law regimes abroad, will assist the final development of the Anti-Monopoly Law of the People's Republic of China.

The Sections support the protection of vigorous competition in the market place. We particularly are encouraged by the express intent in the proposed law to provide for a comprehensive competition law regime. However, we recognize that a competition law that is not well-conceived and/or well-drafted may be counterproductive. Such a law may instead add another layer of state intervention in markets, punish innovation and other productive business conduct, and retard economic progress, rather than serve

[*] The members of the Working Group that drafted these comments are Yee Wah Chin, Robert Lindquist, and James A. Murray for the Section of International Law and Practice and Nathan G. Bush, H. Stephen Harris, Jr. and Paul F. Brinkman, for the Section of Antitrust Law, with comments from Michael H. Byowitz, Lester Ross, Robert S. Thorpe, and James M. Zimmerman for the Section of International Law and Practice, and Abbott B. Lipsky, Jr. for the Section of Antitrust Law.

competition policy goals. Therefore, we offer our comments in hopes that they may assist in the further development of a competition law regime that is well-conceived and well-drafted.

The issues that the Sections believe bear further consideration before an Anti-Monopoly Law is enacted are summarized in the Executive Summary, below. Following the Executive Summary, we set out the Sections' general and specific comments on the proposed Anti-Monopoly Law. Our comments are based on unofficial English translations that the Sections had prepared.

Executive Summary

The Sections recognize that there are different models of competition laws, and that they each have strengths and weaknesses. We comment based on our familiarity with the U.S. model and our observations of the experience with other models. Under the U.S. model, the focus is on the actual effects of market place conduct rather than on a set of rules that assume what the effects are of different types of conduct. The proposed law appears to be based in significant part on the original model adopted in the European Community. The original EC system relied significantly on broad prohibitions and pre-clearance procedures. Our observation over several decades is that the EC approach has proven quite burdensome and may not have achieved the goals expected. In fact, the EC has moved away from broad prohibitions, and has repudiated and eliminated the pre-clearance process, adjusting its competition enforcement processes to be closer to the U.S. model.

The primary concern of U.S. antitrust law is the enhancement of consumer welfare by protecting competition. By "consumer welfare," we mean the welfare of all entities, including governmental entities and business operators, not just individuals, that purchase and consume products and services. "Welfare" in this context does not mean a government subsidy or benefit. The Sections view "welfare" from the perspective of the quality, prices and choices available to buyers, and the efficient allocation of resources to satisfy the demands of buyers. The U.S. antitrust laws seek to achieve this goal of advancing consumer welfare by protecting the process of competition, not the interests of a single competitor or groups of competitors (domestic or foreign). Protecting the process of competition ensures that sellers will offer to buyers the goods and services that buyers want, at lower prices than if the process is not competitive. In contrast, protecting a single competitor or groups of competitors (whether domestic or foreign) from competition will lower their motivation to compete on the basis of price and quality. Therefore, while the Sections recognize that there are reasons to protect the national economy and the public interest, and, in some cases, business operators, we do not believe that these other interests are appropriate considerations in a competition law, but should be made the primary focus of other laws if they are to be protected, and only with careful consideration of the need for and costs of such protection.

The Sections believe that the definitions of key concepts in the proposed law should be consistent with pre-existing common international usage and be capable of practical application. For example, it is generally recognized that monopoly is a status and not a type of conduct. In the U.S., being a monopolist is not an offense, because a business operator may become dominant by virtue of a superior product, low prices and hard work, while engaging in improper monopolistic behavior in order to achieve or maintain a monopoly may be an offense. Similarly, the Sections note that commonly adopted definitions of "market" consider a "market" to be "a group of products (or services) that buyers do or would consider substitutes for each other, and the geographic area in which such products (or services) are sold by specific business operators and their competitors." We also suggest that definitions be provided to some important concepts, such as "control," that are mentioned but not defined, to clarify the intent and scope of the proposed law.

The basic rule in U.S. antitrust law is that most competitive activity is permissible unless it is shown to have an unreasonably restrictive effect on competition in the particular circumstances. Therefore, most competitive conduct in the U.S. is judged under the Rule of Reason, under which the activity must be demonstrated to actually have a substantial restraint on competition in order to be an offense. On the other hand, based upon experience, it is recognized in the U.S. that certain types of competitive activity almost always are unreasonably restrictive of competition. Those types of activity are judged under the Per Se Rule, which provides that the mere engagement in those activities is a violation of U.S. antitrust laws, without need for any demonstration of the actual effects of those activities. Per se violations include agreements among competitors regarding price fixing,[1] market division and bid rigging. The Sections suggest that such a differentiation be made more clearly in the proposed law, between per se offensive activities and activities that are subject to the Rule of Reason. In addition, a basic competition policy in the U.S. is that a business operator may charge any price, high or low, with the partial exception of the rare occasions when the price is below cost.[2] If the prices are high, then buyers may refuse to buy; if buyers buy at those high prices and the profit margins are great, then competitors would be attracted to enter the market by offering similar products at lower prices. If prices are low and unprofitable, and competitors are driven out of the market, there may still not be any injury to consumer welfare if the low-pricing seller cannot later raise prices long enough to recoup all the past losses; buyers would have had the benefit of low prices and the later high prices would still not erase the benefit of the low prices.

[1] "Price fixing," as used herein, refers to agreements among competitors regarding the price at which one of more of them will sell independently produced products or services to third parties. Under U.S. law (and as used in these comments), "price fixing" does not include: agreements among competitors regarding transactions between the competitors or the prices for sales between themselves; or agreements to jointly produce products or services.

[2] See the discussion of the meaning of "cost" in this context, in the discussion of Article 18, at Section II, below.

With respect to restraints between sellers and buyers, the U.S. experience is that these restraints are likely to have little anticompetitive effect unless one of the parties has a dominant market position. And even when there is a dominant market position, it is not always the case that a vertical restraint will result in an unreasonable restraint on competition. In fact, such restraints are often pro-competitive or competitively neutral. Therefore, in the U.S., except in the case of resale prices, vertical restraints are evaluated under the Rule of Reason; they are acceptable if there is no dominant market position, and may be unacceptable if there is a dominant market position and an unreasonable restriction on competition has resulted. The anticompetitive effects of the restraint are identified and balanced against its pro-competitive efficiency effects to determine whether the net effect of the restraint is anticompetitive or pro-competitive.

Unlike in the EC, the U.S. does not have a system of block exemptions to its antitrust laws.[3] The Sections recognize that, under an EC-type system, it is necessary to have exemptions to the broad prohibitions. However, we are concerned that exemptions not carefully and precisely drafted may be so broad as to have the effect of nullifying the prohibitions in the proposed law.

The Sections are encouraged by the emphasis on the prohibition of "administrative monopoly" and urge that the fundamental principle be expressly adopted in the proposed law, that state-owned enterprises and other enterprises are treated equally as business operators under the proposed law. This is the approach in both the U.S. and the EC.

The Sections fully support the creation of a single enforcement agency dedicated to the implementation of the proposed law. Having one agency with the competition policy mandate will foster the development of institutional expertise in this very complex area and will avoid the confusion that may arise from having multiple enforcement bodies enforcing different parts of the law. Otherwise, it will not be uncommon that a single situation involves several parts of the law and thus require the participation of more than one agency in that situation.[4] We are encouraged by the authorization to the Anti-Monopoly Management Body of the State Council to issue rules and regulations in accordance with the proposed law. Such rules and guidelines, if issued after due study and consideration, and after a meaningful opportunity for public comment, may be the most effective way to implement a competition law, because competition law involves complex questions of economics and industrial organization that are not readily addressed in legislation. The Sections also support the establishment of dispatch offices by the Anti-Monopoly Management Body of the State Council, because that will help ensure national consistency, which will be very important in achieving the goals of the proposed law.

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[3] There are some specific statutory exemptions for certain industries, such as insurance, from aspects of the antitrust laws, but these are exceptions and are narrowly applied. Moreover, in most cases of such exemptions, the exempt sectors are subject to other regulations to prevent abuse of market power.

[4] See footnote 28 below regarding the concurrent antitrust jurisdiction in the U.S. of the Antitrust Division of the Department of Justice and the Federal Trade Commission.

We suggest that the proposed law be clarified to ensure that the Anti-Monopoly Management Body of the State Council has the authority to advocate competition policy goals to other governmental entities. Creating market competition requires substantial infrastructure and support from other governmental institutions and the society at large. A competition advocacy mission for the Anti-Monopoly Management Body of the State Council is important in developing this infrastructure and support. We also urge that the proposed law be clarified to protect the independence of the Anti-Monopoly Management Body of the State Council. In the U.S. the federal antitrust enforcement agencies are largely insulated from outside influences and so can pursue the goals of competition policy with independence. The Sections suggest that effective implementation of the proposed law will be significantly enhanced by clarifying the administrative procedures and due process safeguards that will apply. A successful competition policy enforcement framework requires very complex rules and institutions, and expertise in a variety of legal disciplines and economic subjects. It requires a sophisticated legal system that can enforce effectively and in a timely and objective manner all substantive, procedural and remedial standards. In fact, the Sections believe that, a competition law regime introduced without this societal, institutional and procedural support and infrastructure may lead instead to the chilling of innovation and other productive business conduct, and the retarding of the economic progress that competition law is intended to foster.

In the U.S., remedies for violations are focused on restoring or preserving competition in the market place, and, except in the case of per se violations, not on punishment of the violators. In our view, that is the most effective way of achieving the goals of competition policy to promote consumer welfare and efficiency. Therefore, the Sections suggest that the proposed law be extended and clarified to authorize the Anti-Monopoly Management Body of the State Council to obtain cease and desist orders against anticompetitive concentrations or other violations before they occur and to seek divestitures or other relief to cure violations after they occur. We also suggest that clarification would be helpful regarding the penalties that may apply to those investigated parties who obstruct investigations and those governmental personnel who take improper actions.

Finally, the Sections recognize that the balance between the proposed law and other laws, such as the intellectual property rights laws and the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, is complex and respectfully suggest that this balance be further studied. In particular, we respectfully suggest that, in order to avoid complications under the WTO obligations of non-discrimination and national treatment, the competition policy review of all concentrations be made only under the proposed law, regardless of whether the concentration involves a foreign investor. The Sections respectfully suggest that any consideration of non-competition policy factors in reviews of mergers and acquisitions should be discouraged and, if undertaken at all, should be considered under laws outside the competition law such as the Provisional Rules, while the Provisional Rules should be clarified to eliminate any consideration of competition factors.

General Comments

The Sections note that the proposed law appears to have adopted the original European Community model of competition law, in that it incorporates broad prohibitions while providing for specific exemptions and authorizing the enforcement body to issue individual exemptions upon application. This can be compared with the U.S. approach, in which market place conduct is assumed to be competitive and therefore not in violation of the U.S. antitrust laws, unless the conduct is shown to be anti-competitive, either by the evidence in the specific situation, or by the accumulation of experience with similar activities over time. We require business operators in the U.S. to know the law and comply with the law, but we do not have a pre-clearance system because the U.S. does not have a proscriptive approach and we believe that the costs of such a system exceed its benefits.

Our observations of the experience in the EC over the last 40 years is that the original EC approach has resulted in a "block exemption" system that the European Commission is now apparently attempting to modify to bring it closer to the U.S. approach. This can be seen in the evolution of the various block exemptions that the Commission has issued. From a model for block exemptions in which only narrowly specified conduct, in very specific market circumstances, is permitted, the EC has moved toward a model of block exemptions in which some conduct are always permitted, some are permitted unless certain circumstances are present, and some conduct are always prohibited.

Similarly, the EC's experience with individual exemptions has also proven instructive. Essentially, the EC has found that individual exemptions require a tremendous amount of governmental resources to process, while offering little benefit in preventing anticompetitive conduct. Therefore, the EC has enacted a regulation that eliminates the individual exemption system effective May 1, 2004.[5]

In short, while the Sections recognize that the EC model may have the apparent initial advantage of clarity and certainty, it may not be a model that is optimal in the longer term. The Sections believe that the U.S. model, which focuses on the actual effect of marketplace conduct rather than relying on a set of prescriptive rules, may be the more flexible and optimal model in the longer term.

Accepting that the proposed law is based on the original EC model, the Sections have the following specific comments.

[5] Council Reg. (EC) 01/2003 (2003), Art. 43(1).

Specific Comments

I Stated Policy Objectives of the Proposed Law (Articles 1, 2, 3, 8, 29, 30)

Articles 1 (Objectives), 3 ("Monopoly"), 29 (Conditions for Disapproval) and 30 (Special Approval) of the proposed law, together with the second part of article 8 (Prohibiting Monopoly Agreements), contain provisions that outline the policy objectives of the proposed law.

The Sections generally support the expressed goals of "prohibiting monopoly, safeguarding fair competition" (Article 1). We suggest, however, that the proposed law be clarified to provide that it is monopolistic conduct that achieves or maintains a monopoly that is offensive, and not a monopoly that may have resulted from superior products, low prices and hard work. We also suggest that the word "fair" be deleted from Article 1, so that "safeguarding competition" is the expressed goal, because in common usage "fair competition" refers to consumer protection concerns that we further discuss later in this Section of these Comments.[6]

The Sections also agree that a competition law should guard against activities that "eliminate or limit competition" (Articles 3 and 29). We suggest, however, that it is desirable to clarify by adding a substantiality threshold and by specifying that it is the exclusion (and not just elimination) and limiting of competition that is offensive, so that the goal is to prohibit activities that "substantially exclude or limit competition" and that activities that may have insignificant effects are not covered. This is especially important in the context of the applicable area of the proposed law set forth in Article 2 (Applicable Area), to clarify that activities outside the territory of the People's Republic of China will not be under the jurisdiction of the proposed law unless they substantially exclude or limit competition within the People's Republic.[7]

These goals expressed in the proposed law relating to monopoly and competition are consistent with the goals of increasing efficiency and enhancing consumer welfare that the Sections believe should be the goals of competition policy. The central objectives of U.S. antitrust law are economic: maximization of consumer welfare, economic efficiency and productivity growth. By "consumer welfare," we mean the welfare of all entities, including governmental entities and business operators, not just individuals, that purchase and consume products. We also distinguish "consumer welfare" from "consumer protection"; we view "welfare" from the perspective of the quality, prices and choices available and the most efficient allocation of scarce resources to satisfy demand, while "protection" in the U.S. in the legal context is directed against unfair, deceptive or fraudulent practices that distort consumers' ability to choose freely

[6] In this connection, the Sections also suggest that the word "competition" be consistently substituted for the phrase "fair competition" throughout the proposed law, for clarification and to avoid confusion.

[7] In this connection, we also suggest that the phrase "substantially exclude or limit competition" be used consistently throughout the proposed law, without including variants such as "limit market competition" or "affect market competition" that may create confusion.

and knowledgeably among various product and service options in the marketplace. Fraud is the most egregious example of such unfair competition.

The U.S. antitrust laws seek to achieve these goals of efficiency and consumer welfare by protecting the *process* of competition. By protecting the process of competition in the economy, the market is then most likely to protect consumers by creating consumer choice. Sellers will respond in such circumstances by competing for consumers' business by offering lower prices and the goods and services that buyers want. This approach is to be distinguished from the protection of *individual* or groups of competitors (whether domestic or foreign). If individual or groups of competitors are protected from the effects of competition, the result will be a diminution of incentives to compete on the basis of price and quality, and buyers will have less choice and pay higher prices. The goals identified in Articles 1, 3, and 29 of "prohibiting monopoly, safeguarding fair competition" and guarding against activities that "eliminate or limit competition" are generally consistent with protecting the process of competition.

Recently, the Section of Antitrust Law submitted to the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission a "Report on Antitrust Policy Objectives" ("Report").[8] This Report surveyed the major policy objectives that have been asserted as underlying competition laws around the world, focusing on the strengths and weaknesses of these objectives. The Report makes several recommendations in light of these advantages and disadvantages. In particular, the Report concludes that (1) economic analysis is a critical and necessary element of antitrust law application and enforcement, and (2) the promotion of competition in terms of efficiencies is the antitrust objective most suited to economic analysis, and is a fundamental and necessary competition law objective. (Report at pp. 1-2, 40-41.) The goals identified in Articles 1, 3, and 29 of "prohibiting monopoly, safeguarding fair competition" and guarding against activities that "eliminate or limit competition" are also generally consistent with the objectives identified in the Report as necessary and fundamental to a competition law regime, and are susceptible to rigorous economic analysis.

However, the Sections note that Article 1 also states that the proposed law is for the purpose of "protecting the legal rights of business operators and consumers, and the public interest, and to ensure the healthy development of the socialist market economy." Article 3 also condemns activities that "damage the interests of other business operators or consumers, or endanger the public interest", including activities in which "governments and their subordinate departments abuse their administrative power." Similarly, Article 29 disapproves of concentrations that hinder "the healthy development of the national economy" or "damage the public interest." Consistent with Article 29, Article 30 permits anticompetitive concentrations that are "advantageous to the national economy and the public interest." In addition, the second section of Article 8 permits exemption from the prohibitions against joint activity, when the joint activity may "stop

[8] A copy of the Report is annexed for convenience of reference as an appendix to these Comments. It is also posted on the website of the Section of Antitrust Law, at http://www.abanet.org/antitrust/home.html.

seriously decreasing sales volumes or obvious production surplus", or "benefit national economic development and the public interest."

The Sections recognize that there are reasons to protect consumers, the national economy and the public interest, and, in some cases, business operators.[9] However, as explained in the Report, while these are objectives that have been incorporated in some competition law regimes, they do not lend themselves to economic analysis and reflect social and political objectives that, if pursued, are best sought through either (a) separate legislation or established rules rather than as factors to be considered in individual antitrust cases, or (b) an analysis that is clearly distinct from the economic analysis required by the objective of promoting competition. (Report at pp. 2, 41.) In particular, the precise analytical tools that are available to consider efficiencies are not available for considering the interests of business operators in order to promote competition.

Moreover, as we note above, the consideration of rival business operators may reflect social and political considerations that are not necessarily consistent or coherent with the consumer welfare or efficiencies objectives, and so should be applied with caution. (Report at pp. 2, 41.) Competition is a process that produces winners and losers. The experience in the U.S. and other countries with market economies and established competition law regimes is that it is usually better to permit the competitive process to occur unimpeded rather than to favor some business operators over others, even when some business operators may appear more deserving than others. Specifically considering the interests of rival business operators creates the risk of such favoritism.

In fact, under U.S. law, we do not view practices that damage the interests of other business operators as necessarily bad. For example, a business operator who becomes so efficient that it can sell its products at lower prices than another business operator will damage the interests of the other business operator. We see this as a good development for consumers. While it may be a bad situation for the less efficient business operator, in the long run it will give that business operator and others incentives to do a better job at offering what consumers want at prices they are willing to pay. The logical result of completely successful competition would be that consumers would buy only from the competitor that sells the best product for less money, and the competitor that sells the worse product for more would go out of business and thus be eliminated. This is not a bad result for the overall efficiency of the economy and for consumer welfare.

Similarly, under U.S. law, we do not allow competitors to justify anticompetitive agreements on the grounds that the agreements are needed to stop seriously decreasing sales volumes or production surpluses. If business operators are allowed to do this, then buyers will pay artificially high prices when the market conditions should allow them to take advantage of lower prices. Instead, business operators should be subject to normal

[9] The undefined concept of "socialist market economy" has no connection to the concept of a competitive economy, which is the goal of competition policy, and creates the potential for excessive administrative discretion.

market incentives to become more efficient in the way they manage their production and inventories. The Sections observe that, while other jurisdictions do permit "crisis cartels", the trend is away from such exemptions.

We also recognize that abuse of administrative power by government entities is highly undesirable. In the context of competition policy and in light of the specific provisions elsewhere in the proposed law, the abuse of administrative power by government entities for anticompetitive ends is an appropriate area of concern.

Therefore, the Sections urge that the proposed Anti-Monopoly Law not incorporate the goals of protecting business operators, consumers, the national economy the socialist market economy, and the public interest, and urge that these other goals can be clearly pursued, if it is deemed essential to do so, carefully through separate means that neither disrupt market signals nor confuse the basic rules for marketplace conduct. For example, if there is a concern with business operators who fail and their employees, rather than protecting them from competition and enabling them to subsist, it would be better to let them fail in their current enterprises and to provide training or assistance for them to enter into other businesses or occupations. With respect to the goal of prohibiting abuse of administrative power by government entities, we suggest that the proposed law be clarified in Article 3 to specify that it is the abuse of administrative power in order to achieve anticompetitive goals that is the concern of the law.

The Sections urge that the goals of the proposed law be purely those of prohibiting monopolistic behavior, safeguarding competition, and prohibiting activities that substantially exclude or limit competition. By doing so, the proposed law would promote economic efficiency and consumer welfare, which the Sections believe should be the goals of competition policy.

II Definitions of Key Concepts (Articles 3, 4, 15, 16, 25)

The Sections are concerned that some of the definitions in the proposed law do not appear to have a recognizable connection to pre-existing common usage and may be subject to interpretations inconsistent with accepted international norms in competition policy. Other proposed definitions may not be susceptible to practical application. Still others may not further antitrust policy goals. And in other areas of the proposed law, some key concepts are not defined.

Nearly 100 nations now have competition laws. Multinational businesses must conform their practices to the competition laws of all countries in which they do business. Inconsistent laws, and inconsistent applications of competition laws, accordingly, hamper trade and investment. To counter this problem, many competition authorities have recognized the need for convergence in their approach to competition laws. Many nations, including the United States, use very general approaches in their statutes to describe complex concepts such as the definition of a monopoly, of a relevant market, and of dominant market position. Depending on the nation's legal system, more specific

content can be added to these concepts through case law (as in common law countries such as the United States) or regulation (as in civil law nations). In either case, there is a growing recognition that the definitions should follow generally accepted world practice.

It is generally accepted in both the field of economics and competition law regimes, for example, that a "monopoly" is not a type of conduct, but a status in which one entity has the ability to set its prices and output without the need to take into account the competitive reaction from other firms. However, the definition of "monopoly" in Article 3 ("Monopoly"), covers both actions and status, and includes collective actions among business operators. Moreover, the great majority of competition laws permits an entity to have monopoly power if it has been obtained lawfully, and punish only the wrongful exercise of such monopoly power through proscribed types of exclusionary conduct, such as attempts to monopolize and monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, under U.S. antitrust law. It would be overly broad to include within "monopoly" all "agreements, contracts or other collective actions among business operators." Such a definition would appear to prohibit as a monopoly every contract between business operators. On the other hand, collective activity that may arise to conspiracy to monopolize is prohibited in the U.S. under Section 2 of the Sherman Act, even though it has relatively rarely been found.

The Sections respectfully submit that perhaps the intent in Article 3 is to define "monopolistic market behavior". If that is the case, then if the title of Article 3 is clarified to become "Monopolistic market behavior" and the title of Chapter 2 is clarified to become "Prohibiting monopolistic agreements, contracts or other collective actions among business operators," the language of the proposed law in those respects becomes much clearer without any further revisions. Moreover, with these clarifications, in light of the detailed provisions regarding "dominant market position", it may not be necessary to have a separate definition of "monopoly."

Similarly, the definition of "dominant market position" in Articles 15 ("Dominant Market Position") and 16 (Presumption of Dominant Market Position) covers both status and conduct, and is inconsistent with generally accepted world practice, impractical to apply and lacking in basis in generally accepted economic theory.

The Sections submit that the better approach would be to define both "monopoly" (if a definition is desired) and "dominant market position" solely in terms of status, in terms of whether a business operator has monopoly or dominant market power in a particular market, and then to specify what exclusionary or other conduct by such an operator would constitute a violation of the law. Monopoly power is considered to exist in the U.S. when a business operator can control prices or exclude competition in a relevant market. It can be proven in the U.S. by direct evidence of control over prices in the relevant market and/or the actual exclusion of competition from the relevant market. More often, market power is inferred from facts such as the business operator's share of the market and the existence of barriers of entry into that market. Therefore, in the U.S., market share is only one indicator of market power, and there is no one market share threshold above which market dominance will be assumed. The U.S. courts have

generally found that monopoly power exists when a business operator holds over 70% of the relevant market, while they have rarely found monopoly power to exist when a business operator holds less than 50% of a relevant market.

The definitions of concepts such as "monopoly" and "dominant market position" in terms of only status, and not conduct, is consistent with the U.S. view that the status itself may be unobjectionable. For example, a business operator that sells the best product, or possesses a patent for the most efficient process, or develops the most widely recognized and respected trademark for a particular type of product, may attract a large share of all buyers of such product, or may license the patented process technology on an exclusive basis to major manufacturers in the market, and thereby achieve a high market share. Such a market share that is achieved by providing a better product or process at a price that buyers or licensees are willing to pay is the reward for good business behavior. On the other hand, a business operator that burns down the factories of all competitors, and thereby becomes the only source of a product, achieved a monopoly improperly. Similarly, the fact that a market may have only a few competitors, each of whom has a substantial market share, is not proof that there has been a lack of competition. Such markets may in fact be fiercely competitive. Nonetheless, it may also be particularly easy to collude in such markets to eliminate competition among the market participants. Therefore, the focus in the U.S. is on the conduct of the business operator, taking into consideration the market power of the business operator as one factor in the situation.

Even more fundamentally, the definition of "specific market" in Article 4 (Definitions of "business operator" and "specific market") does not appear to have a connection to concepts that are commonly used to define economic markets. It appears to define a market in purely geographic terms, without reference to the product dimension of a market. The Sections suggest replacing this definition with one that more clearly includes generally accepted concepts of substitutability and elasticity of demand. For example, it would clarify the proposed law as consistent with generally accepted economics principles to define a "specific market" to be "a group of products (or services) that buyers do or would consider substitutes for each other, and the geographic area in which such products (or services) are sold by specific business operators and their competitors."[10]

In some cases, such as in the definition in Article 25 (The Meaning of "Enterprise Concentration") of "enterprise concentration", the effect may be both over-inclusive and under-inclusive. For example, the definition is under-inclusive since it doesn't appear to

[10] The 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines state that a "market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test." While the Sections understand that the drafters of the proposed law are aware of and have copies of these Guidelines, a copy of these Guidelines is annexed for ease of reference for others who may read these Comments. They are also available at http://www.usdoj.gov/atr/public/guidelines/hmg.htm

cover situations where an enterprise that produces different products sells the assets that manufacture some of those products but retains the manufacturing capability to produce other products. It may be over-inclusive in that any agency relationship may be said to involve a controlling and controlled relationship with respect to the subject of that agency. It would also be helpful to have clarification as to what types of joint ventures may constitute a concentration that is subject to competition analysis. In this connection, the EC Merger Regulation, which includes detailed definitions of concentrations and joint ventures that are concentrations, may be helpful. The U.S. Department of Justice/Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors also discuss formal and informal joint ventures that may be concentrations for competition law purposes.

The Sections also note that the term "enterprise", which is a key concept in Chapter 4 (Control of Enterprise Concentration), is not defined. In any event, the Sections do not see a need to distinguish between "business operator" as defined in Article 4 and "enterprise" as used in Chapter 4, and suggest that the same term be used in both contexts instead of two different terms. The Sections believe that whatever term is used, it should be made clear that, in Article 4, Chapter 4 and in all other sections of the law, the concept encompasses all forms of economic actors, including individuals, partnerships, cooperatives, corporations, professional or trade associations, and enterprises owned in whole or in part by a government unit, as is the case with the meaning of "person" in Sections 1 and 2 of the Sherman Act, as interpreted by the U.S. courts. Therefore, we suggest that the word "enterprise" be replaced by "business operator" and that the definition of "business operator" in Article 4 be clarified, to be "any natural or legal person, governmental body or association that engages in product production and sales or provision of services (hereafter "products" include "services") or acts for the benefit of any other that does engage in product production and sales or provision of services."

Similarly, the key concept of "control" in the context of concentrations and dominant market position is not defined. The Sections suggest that a possible definition of "control" is "(1) holding 50% or more of the outstanding voting securities of an issuer, (2) in the case of an entity that has no outstanding voting securities, 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 assets of the entity, or (3) having the contractual power to designate 50% or more of the directors of a corporation, or, in the case of unincorporated entities, of individuals exercising similar functions."[11] Such a definition, or a similar one, that focuses on the economic reality of control, would clarify when entities are affiliated, or when one or multiple entities are involved.

The term "distributor" is a key concept in Articles 23 (Prohibition Against Exclusivity) and 24 (Prohibition Against Fixing Re-Sale Price) that is not defined in the proposed law. We believe that the prohibitions in Articles 23 and 24 should apply to all

[11] This suggested definition is based on the definition used by the U.S. Department of Justice and Federal Trade Commission in their premerger notification regulations. 16 C.F.R. §801.1(b).

supplier-customer (or "vertical") transactions involving the resale of products, such as the sale of products by a business operator to other business operators that resell to other business operators or to the ultimate end-user or consumer. Therefore, the Sections suggest that the term "distributor" is not needed, and that the term "reseller" instead can be used with clarity. Similarly, we note that Article 22 (Prohibition against imposing sales or unreasonable transaction terms) contains the term "trading partner" which is not defined, and that the phrase "suppliers and customers" can be used instead with clarity.

The Sections note that Article 17 (Prohibition Against Setting Monopolistic High Prices) prohibits selling "at a price higher than the normal value". The Sections have concerns about this prohibition, as explained in Section III of these Comments. In any event, there is no definition of what is "normal value." Moreover, while the Sections recognize that "normal value" or "fair value" is a concept used in trade law (to determine whether goods have been dumped), we do not consider such a concept appropriate in the context of competition law, because it implies that there is an appropriate value for products other than the price set by the competitive process. We also discuss this concern in Section III below.

Similarly, Article 18 (Prohibition Against Setting Predatory Prices) prohibits selling of products "at prices below cost", without providing any definition of "cost". The Sections believe that it will be important to have some standard of "cost", perhaps in guidelines to be issued by the Anti-Monopoly Management Body of the State Council. In particular, the Sections believe that the better view, from the standpoint of efficiency in the economy and consumer welfare, is that "cost" in this context should refer (1) only to the costs of the seller that is charging the "prices below cost", and (2) only to variable costs, and not total costs that include both fixed and variable costs.[12] Moreover, as discussed in Section III below, the Sections do not see pricing below cost as a problem for competition unless the low-pricing business operator is likely to recoup its lost profits eventually.

III Prohibitions of the Proposed Law (Articles 8, 14, 17-24, 29)

In the U.S., only anticompetitive agreements that unreasonably injure competition are prohibited. However, it can be very difficult and costly to prove or disprove in specific cases that a practice injures competition, or that there are effects on competition. Some types of conduct are so universally likely to injure competition that the costs of requiring that injury to competition be proved in each specific case of those types of

[12] So long as a seller can sell at a price above its variable costs, it is economically prudent to do so, even if that price is not above its total costs, because that incremental income will cover the cost of making that extra sale and will contribute some funds towards covering the fixed costs. For example, if an airplane is about to fly with only a few passengers, and will incur the costs of the pilot and other crew for the plane, then it is worthwhile to sell tickets for additional passengers at any price that is equal to or greater than the cost of the extra fuel needed to fly the extra weight of those passengers, because that extra income will provide some additional funds to cover the costs of the crew, which is fixed regardless of the number of passengers in the plane.

conduct outweigh the benefits from requiring that demonstration. These include activities among competitors such as price fixing, market division agreements, and bid rigging. In the United States, we do not require proof of injury to competition for such conduct before concluding that an offense has been committed. To prove a violation it is enough to show that the conduct took place. This is known as the Per Se Rule. In the case of other conduct, in which the benefits of the conduct could outweigh the injury it causes, in the U.S., the net injury to competition must be proved. This is known as the Rule of Reason. In the U.S. system, the Per Se Rule applies only to those cases that are in our experience unambiguously injurious to competition in almost all cases, and to apply the Rule of Reason in all other cases.

The Sections support the basic prohibitions against horizontal restraints (or restraints among competitors) in Article 8 (Prohibiting Monopoly Agreements). The conduct proscribed in subparagraphs (i) through (v) in Article 8 are activities that are generally recognized to have anticompetitive impact without significant mitigating benefits, regardless of the market position of the actors. Those activities can be *presumed* to result in unreasonably excluding or limiting competition, and are subject to the Per Se Rule in the United States. However, because the unlawfulness of these types of restraints does not depend on the market position of the actors, we suggest that the use of the term "Monopoly Agreement" may be confusing. In lieu of this language, we suggest the use of the term "Prohibited Agreements."

As to the prohibitions in subparagraphs (vi) and (vii), because the generally accepted purpose of such prohibitions is to prevent only joint conduct that substantially adversely affects competition, we suggest that the prohibitions against "jointly hindering transactions" in subparagraph (vi) and against "other agreements with the effect of limiting competition" in subparagraph (vii) be clarified, to make clear that those types of activities are not prohibited unless their *actual* demonstrated effect is the substantial exclusion or limiting of competition.

With respect to the prohibition against abuse of a dominant market position, the Sections are concerned about the definition of "dominant market position" in Articles 15 and 16, as detailed in Section II of these Comments. Moreover, we recognize that a dominant market position or a high degree of concentration in a market does not always mean that there is a lack of competitive pressures in that market, and suggest that the proposed law make it clear that the existence of a dominant market position or high market concentration may be necessary for the exercise of market power, but is not sufficient to lead to a conclusion that market power exists. Market shares and concentration measures are only starting points for the analysis of the competitive implications of a situation and a course of conduct; a detailed analysis is still needed to determine what is the actual state of competition in the market.

In addition, the Sections believe that the prohibition against "obstructing the activities of other business operators" in Article 14 (Prohibition Against Abusing a Dominant Market Position) is overbroad in the context of a competition law and unnecessary in light of the prohibitions against "eliminating or limiting competition" in

that article. If there are activities that may be considered to be only "obstructing the activities of other business operators" but not "eliminating or limiting competition", then as we explained in Section I of these Comments, the Sections do not believe that these activities are objectionable from a competition policy perspective and believe that, if it is deemed essential to deal with them, these activities should be addressed in another law.

Similarly, we have concerns about the prohibition against monopolistic high prices in Article 17 (Prohibition Against Setting Monopolistic High Prices). In addition to the Sections' concern about the concept of "normal value", expressed in Section II of these Comments, we believe that an enterprise, even a lawfully acquired monopoly, should be permitted under competition policy to charge the highest prices that it can obtain. Prices that are higher than some "normal value" are not necessarily anticompetitive in and of themselves. A seller may be able to impose high prices because it offers a better quality product and therefore achieved a monopoly. If such prices result in very high profit margins, then competitors that are efficient will be encouraged to enter the market and attract business by charging lower prices than the high-priced enterprise. In that case, it may be expected that market prices will fall. Therefore, in the short term, high prices may be a good thing, because they will attract new competitors to the market. If high prices persist over time, however, they may be symptoms of anticompetitive conditions that should be addressed by competition law. If new competitors do not enter the market, it could mean that the monopolist is preventing competition through an abuse of dominance or anticompetitive agreement. In that case, it would be important to remedy the abusive or anticompetitive conduct that prevent competition. In the U.S. system, attacking persistent high prices directly would be considered treating only a symptom, similar to treating a fever with ice packs: it might alleviate the symptoms in the short run, but it will do little to cure the disease.

In contrast, the Sections recognize that predatory pricing by a business operator with a dominant market position may have anticompetitive effects and drive out competition. However, as we note in Section II, it is important to define what is "below cost" pricing that is predatory and prohibited by Article 18 (Prohibition Against Predatory Prices). The Sections also point out that such "below cost" pricing should be prohibited only if it actually has an anticompetitive effect on the marketplace. Under U.S. competition law, it is not necessarily objectionable when a competitor sells products below cost in order to eliminate a competitor. There are many good reasons why a seller might price products below cost in order to compete vigorously in the market. Most of these reasons benefit consumers through lower prices. For example, a seller might price a new product at a low price to persuade buyers to try it. If there is no anticompetitive impact as a result of such pricing, then the result of the low prices is that purchasers benefit from them and consumer welfare has in fact increased, so that a goal of competition policy is achieved.

In the U.S., we have concluded that only in a very specific type of situation does predatory pricing injure consumers, and only in that case do we view it as illegal. Courts in the U.S. have developed a test to determine whether "below cost" pricing is anticompetitive: if the entity charging the "below cost" prices cannot reasonably expect

in the foreseeable future to be able to charge high enough prices for a long enough time period to recoup the losses from the "below cost" prices, then there has been no anticompetitive pricing, but if a business operator can reduce its prices below cost for long enough to drive another business operator out of the market, and then to raise and maintain its prices high enough, and for long enough, to recoup its lost profits, then there has been anticompetitive pricing. If a new (or the old) competitor will react to any later high prices by entering (or re-entering) the market at a lower price, and thus eliminating the possibility that the "predator" will be able to recoup profits lost from the time when it was charging low prices, then the "below cost" pricing is not considered anticompetitive. Only when the "predator" can prevent this competition do we see pricing below cost as a problem for competition. The Sections recognize, of course, that the determination of what is "cost" is crucial, and that, if a "predator" can reliably prevent competition from entering the market after prices rise, then there is a problem for competition.

We discuss the prohibitions in Articles 19 through 24 in Section IV below, regarding vertical issues.

Finally, the Sections support the prohibition in Article 29 (Conditions for Disapproval) against concentrations that "eliminate or limit market competition". However, we suggest that a standard be included in the proposed law under which concentrations will be reviewed. The Sections believe that it is very useful to identify the criteria by which mergers are to be judged. There has been significant international debate over the proper criteria for the approval or disapproval of a merger. There are two principal standards in use. In the U.S. and some other jurisdictions, mergers that substantially lessen competition are illegal. In the EC and some other jurisdictions, mergers that create or extend a dominant position are prohibited. In the U.S., the method of applying the statutory "substantially lessen competition" criterion is articulated in detail and is widely publicized. In deciding this issue in the U.S., efficiencies that may come about specifically as a result of a concentration are also considered and balanced against the potential anticompetitive effects of that concentration. In addition, the Sections urge the deletion in Article 29 of the prohibitions against concentrations that "hinder the healthy development of the national economy" or "damage the public interest", for the reasons set forth in Section I of these Comments.

IV "Vertical" Issues (Articles 19-24)

The overall approach of the proposed law limits the scope of the vertical restraint prohibitions in Articles 19 (Prohibition Against Discriminatory Treatment), 20 (Prohibition Against Refusing to Deal), 21 (Prohibition Against Forced Transactions), 22 (Prohibition Against Imposing Sales or Unreasonable Transaction Terms), 23 (Prohibition Against Exclusivity), and 24 (Prohibition Against Fixing Re-Sale Price) to business operators in a "dominant market position."

As the Sections stated earlier in these Comments (in Section II), the definition of "dominant market position" in Articles 15 and 16 should be based on an assessment of

market power. If "dominant market position" is defined in that manner, then the Sections feel that the limitation of the prohibitions on vertical restraints to situations of dominant market position is an appropriate one for competition policy. This is because, if the prohibitions in Articles 19 through 24 apply only where a "dominant market position" (appropriately defined) exists, then they are likely to apply only where the *actual* demonstrated effect of those types of activities is the unreasonable exclusion or limiting of competition. The European Commission has studied these issues relating to vertical restraints, and invited comments to its Green Paper on Vertical Restraints. As the Sections noted to the European Commission in their Comments on the EC Green Paper,[13] the experience of the members of the Sections has been that, where there is sufficient inter-brand competition and the parties lack market power, vertical restraints can actually have pro-competitive or at worst neutral competitive effects. In general, such restraints are included in business arrangements in order to provide sufficient economic incentives to induce dealers and distributors to invest in and promote products and services without having their efforts undermined by free riders.

Nonetheless, because it is the actual effect on competition of the activities that is crucial, the fact that a business operator with dominant market power has engaged in the specific activities does not lead necessarily to the conclusion that the activity should be prohibited. The existence of dominant market power is an important factor, but not the only factor, in the U.S., in determining whether a vertical agreement is improper. As the Sections also noted to the European Commission, even where the firm enjoys a relatively large market share (in excess of 40%), "there can be strong inter-brand competition and vertical restraints can be pro-competitive." After a dominant market position is found, the next step in the U.S. is the analysis of whether the particular vertical restraint by the firm in the dominant market position actually restrains competition. Therefore, the Sections suggest that the proposed law clarify that a vertical agreement of the specified types with a business operator that has dominant market power will be prohibited only if the agreement will have the effect of substantially excluding or limiting competition in a market. For example, the following phrase should be added in each of Articles 19 through 24: "where the effect of this practice actually restrains competition."

The definition of "business operator" in Article 4 indicates that the word "products" as used in the proposed law also refers to "services." The Sections agree that there is no analytical economic distinction between products and services, and, in particular, assume that the restrictions in Articles 19 through 24 relating to vertical relationships refer to both products and services.

The Sections offer the following specific suggestions regarding the prohibitions with respect to vertical restraints.

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[13] *See*, the Sections' Comments on the EC Green Paper on Vertical Restraints in EC Competition Policy, a copy of which is annexed as an appendix to these Comments. Those Comments are also posted on the website of the Section of Antitrust Law, at http://www.abanet.org/antitrust/ecvert.html.

It is not clear to us why the term "trading partners" is used in Article 19, whereas the term "purchaser" is used in Article 20 on refusals to deal; we presume that the prohibition against discriminatory treatment is addressing discriminatory treatment of purchasers. As drafted, the prohibition addresses discriminatory treatment of purchasers who are "identically qualified." The latter term offers ambiguity; for example, are two purchasers with the same credit rating identically qualified for the same price where Purchaser A is purchasing 100 units and Purchaser B is purchasing 1,000 units? We presume at least an intent in the proposed law also to address situations where dissimilar quantities are purchased or other costs of doing business differ. Accordingly, we suggest the following clarification of Article 19:

> *A business operator who is in a dominant market position shall not discriminate between purchasers who are identically qualified, who are purchasing identical quantities and for whom the cost of doing business with is identical, by offering them products at discriminatory prices or other transaction terms where the effect of this practice actually restrains competition. However, a business operator may offer differing prices or other transaction terms to a customer in order to meet the offer to that customer of a competitor of the business operator.*

Articles 21 and 22 both set forth prohibitions against abuse of a dominant market position, and appear duplicative of each other. Moreover, in setting forth these prohibitions against abuse of a dominant market position, they do not appear to add anything to the generalized prohibition against abuse of dominant market position set forth in Article 14, unless these articles are intended to reach conduct that does not "eliminate or limit competition" but has other effects. If the intent is to reach conduct with only other effects, then the Sections do not believe that they are objectionable competitive activities and suggest that conduct with those other effects should be reached, if at all, by another law, and not by a law with the goal of ensuring competition in the market place.

In particular, unreasonable transaction terms are not necessarily anticompetitive. A seller may be able to impose allegedly unreasonable transaction terms because it has a superior product. In that case, the high profits it may earn from imposing such unreasonable terms will attract new competitors to the market who may provide substitute products at lower prices, and it may be expected that unreasonable terms will then give way to more competitive ones. If unreasonable transaction terms persist over time, however, these terms may be symptoms of anticompetitive conditions. If new competitors do not enter the market, it could be that the monopolist is preventing competition through an abuse of dominance or anticompetitive agreement. Then it may be necessary for a competition authority to act to remedy the abusive or anticompetitive conduct. In the U.S. system, attacking the unreasonable transaction terms directly would be treating the symptom but not addressing the disease.

Perhaps the intent was to address the practice of tying by a dominant firm, that is, conditioning the sale of a product in which the business operator holds a dominant market

position to the sale of a product in which the business operator does not hold such a position. This practice, under certain circumstances of market power, is addressed by other competition law regimes including that of the United States. If this is the intent of the proposed law, then the Sections suggest combining Articles 21 and 22 into one article that provides that "A business operator in a dominant market position for one product shall not condition the sale of that product to the purchase of another, separate product, where the effect of this practice actually restrains competition."

As stated in Section II of these Comments, the Sections believe that the prohibitions in Articles 23 and 24 should apply to all supplier-customer (or "vertical") transactions involving the resale of products, and suggest that the proposed law define "distributor" accordingly if that term is retained in the proposed law.

Also, Article 23 addresses the practice of requiring purchases exclusively from a business operator in a dominant position. If the concern is about the abuse of exclusivity by a business operator in a dominant position, then there is also concern regarding the mirror image activity of requiring exclusive sales by the sellers, that of the practice of appointing exclusive distributorships in situations of market dominance. This practice is addressed, for example, by the EC Vertical Restraints Guidelines, as well as by U.S. antitrust law. Accordingly, the Sections suggest that Article 23 be clarified as follows:

> *A business operator who is in a dominant market position shall not require its customers who resell its products to re-sell only its products in a specific territory and not to sell the products of other business operators where the effect of this practice actually restrains competition. Exclusive distributorships, in which a business operator agrees not to appoint another reseller for its products in a specific territory, shall not be established where either party to the exclusive distributorship is in a dominant market position and where the effect of this practice actually restrains competition.*

The Sections have no comment on the approach in Article 24 of outlawing the practice of resale price maintenance only in situations of dominance, subject to our Comments (in Section II) about the concept of dominance.

V Exemptions to the Prohibitions (Articles 8, 30)

The proposed law creates five exemptions in Article 8 (Prohibiting Monopoly Agreement) for otherwise-prohibited "contracts, agreements, or other collective conduct" that "exclude or limit competition." It also provides in Article 30 (Special Approval) that concentrations that are anticompetitive may be approved if they are "advantageous to the national economy and the public interest."

The first four exemptions in Article 8 directly authorize certain kinds of activity and appear to be intended to function as "block exemptions" do in the European

Community. The fifth "catch-all" exemption authorizes "other activities that may eliminate or limit competition, but benefit national economic development and the public interest." We understand that otherwise anti-competitive practices will be permitted if they match the description of one of the four specific "block exemptions" or are determined to benefit "national economic development and the public interest" through review under Articles 8 or 30 of the specific arrangement by the Anti-Monopoly Management Body of the State Council or the People's Court.

The Sections recognize that, under the original EC model, block exemptions are necessary in order for the law not to have the effect of prohibiting most normal economic activity. However, the proposed block exemptions appear to be extremely broad in scope, with parameters that are not clear and that may be difficult to apply in practice. As a result, they have the potential to nullify the prohibitions of the proposed law, and therefore render the law ineffective. The Sections suggest that exemptions be very narrowly and specifically drawn, to avoid the risk that the exemptions could render the prohibitions meaningless.

Other jurisdictions normally confine "block exemptions" or "safe harbors" for otherwise possibly anticompetitive activity to specific types of circumstances where the activity almost certainly results in substantial improvements in efficiency or consumer welfare with only minimal anticompetitive risks. Block exemptions frequently limit the market share of the parties, the duration of the activity, and the terms and conditions of the activity that are eligible for the exemption.[14] In many jurisdictions, as in the proposed law, arrangements that do not qualify for a block exemption may still be permitted based on a specific evaluation of their likely effects.[15]

For example, the European Community's block exemption for cooperation between competitors in research and development applies only in narrow circumstances.[16] That block exemption is inapplicable if the cooperating parties' combined market share exceeds 25% of the market for products capable of being improved or replaced through the cooperation.[17] It applies only to specific agreement terms that are "directly related to or necessary" to carrying out the research and

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[14] *See, for example,* Guidelines on the Applicability of Article 81(3) of the EC Treaty to horizontal cooperation agreements, 2001 O.J. (C 3) 2 ("EC Horizontal Agreement Guidelines"); Commission Notice: Guidelines on Vertical Restraints 2000 (C 291) 1 ("EC Vertical Restraint Guidelines"); Commission Regulation on the application of Article 81(3) of the Treaty to categories of research and development agreements, 2000 O.J. (L 304) 7 ("EC R&D Regulation"); Commission Regulation on the application of Article 81(3) of the Treaty to categories of specialization agreements, 2000 O.J. (L 304) 3 ("EC Specialization Regulation").

[15] *See, e.g.,* EC Horizontal Agreement Guidelines at ¶37 (explaining relationship between block exemptions and individual exemptions); DOJ/FTC 1995 Antitrust Guidelines for the Licensing of Intellectual Property; DOJ/FTC 2000 Antitrust Guidelines for Collaborations Among Competitors.

[16] *See* EC R&D Regulation.

[17] *See* EC R&D Regulation, Art. 4, ¶2.

development program.[18] The block exemption requires both parties to retain certain rights to conduct other research efforts and to exploit the results of those independent efforts.[19] It applies for the first five years after the "fruits" of the research and development are marketed (but may continue to apply until the parties' combined share of the relevant market exceeds 25%).[20] The block exemption does not apply to arrangements that include certain "black-listed," or prohibited restrictions, such as restrictions on the parties' right to conduct separate research efforts or agreements to fix prices, reduce output, or allocate customers and markets.[21] A cooperative research and development venture that does not satisfy these conditions does not qualify for the block exemption. However, it may still be legal under EC competition law.[22] In those cases, the competition authorities will examine the specific competitive impact and efficiency gains of the cooperation.[23]

The four block exemptions of the proposed law are so broadly drafted that they will likely result in the exemption of many anticompetitive arrangements that are not likely to appreciably improve efficiency or consumer welfare. The proposed block exemptions apparently consider only the intent of the parties to the joint action, not the actual or likely effect of those actions. Therefore, under this standard, the block exemptions may allow many anti-competitive practices that do not improve efficiency or consumer welfare. In addition, for example, contracts between competitors to "upgrade product quality," "improve efficiency," or "adapt to market changes" that would be permitted under subparagraphs (i), (ii) and (iii) might also include terms setting prices, refusing to deal with certain customers, or allocating markets in a manner detrimental to consumer welfare and efficiency.

In particular, the Sections recommend that there be no block exemptions for joint efforts to manage sudden market shifts ("crisis cartels") or to rationalize production, labor, and specialization ("rationalization cartels") such as are provided in subparagraphs (iii) and (iv). Crisis and rationalization cartels entail high anticompetitive risks, because competitors must agree to common restrictions on output, price, or market division. Other jurisdictions have found that crisis and rationalization cartels are better addressed on a case-by-case basis, instead of through block exemptions. Even more fundamentally, as we stated in Section I of these Comments, the goals of "stopping seriously decreasing sales volumes or obvious production surplus" reflect social and political objectives, not

[18] *See* EC R&D Regulation, Art. 1, ¶2.

[19] *See* EC R&D Regulation, Art. 3.

[20] *See* EC R&D Regulation, Art. 4, ¶1, ¶3.

[21] *See* EC R&D Regulation, Art. 5.

[22] *See* EC Horizontal Agreement Guidelines at ¶55 (explaining that "most R&D agreements" are not prohibited by Article 81(1) of the EC Treaty).

[23] *See* EC Horizontal Agreement Guidelines at ¶¶ 39-77 (describing case by case evaluation of cooperation in research and development).

competition enhancement, that may be questionable and that are best sought through other means, if at all.

This is particularly true of the fifth, "catch-all", exemption, and the exemption in Article 30 – to permit transactions that "benefit national economic development and the public interest" and "the national economy and the public interest." As the Sections urge in Section I of these Comments, the goals of national economic development and the public interest should be sought through other means.

If these exemptions are retained in the proposed law, the Sections urge that the law include a "sunset" or "expiration date" for them. At the least, the expiration of the block exemptions would present an opportunity to issue new exemptions, if any, based on experience. For example, when the European Community's original block exemptions for research and development and specialization expired in 2000, the EC replaced them with block exemptions that drew on the experience with the earlier block exemptions.

The proposed law implies in Article 11 (Approval of the Agreement) that approvals of agreements by the Anti-Monopoly Management Body of the State Council will only be valid for a specific period of time. However, since the proposed law does not state a specific period, we assume that the intent is for the Anti-Monopoly Management Body of the State Council to specify the validity period when issuing an approval. If that is the intent, then it is unclear how long an approval remains valid if it results from the Anti-Monopoly Management Body of the State Council's decision not to respond to an application within 60 days.

Finally, the proposed law establishes a process for business operators to seek determinations from the Anti-Monopoly Management Body of the State Council that a specific agreement or arrangement falls within one of the exemptions. The Sections suggest that the proposed law should clarify: (a) whether the business operator's decision to apply for a permit is optional or mandatory; and (b) whether the Body's approval or failure to respond within 60 days provides a complete defense against subsequent charges of violating the proposed law.

VI Administrative Monopolies (Articles 3, 7, 31-35, 47, 48)

The Sections commend the devotion of an entire chapter (Chapter 5, Articles 31-35) of the proposed law to the prohibition of "administrative monopoly." We strongly agree with the stated goals of Article 3 to address government entities that "abuse their administrative power" (subject to the limitation of that goal to anticompetitive action by government entities, as stated in Section I of these Comments) and of Article 7 (Social Supervision) that "government organizations and their staff shall not support or cover up monopoly." Efforts by provincial and municipal officials and agencies to protect local companies from non-local competition penalize efficient firms (both domestic and foreign), prolong inefficient use of resources, and detract from consumer welfare throughout the People's Republic of China. Chinese consumers and Chinese business

operators that are not state-owned will be the primary beneficiaries of the proposed law's restrictions on "administrative monopoly."

The Sections urge that the basic principle should be that state-owned enterprises and other enterprises are treated equally as business operators under the proposed law. Therefore we suggest in Section II of these Comments that the definition of "business operator" be clarified to include state-owned enterprises. We recognize that, in the People's Republic of China, as in other jurisdictions, the state may own and operate monopolistic firms in industries such as utilities and transportation under specific exemptions from competition laws. However, many enterprises that are owned and operated, in whole or in part, by provincial or local governments, are engaged in ordinary commercial sectors (e.g., consumer goods manufacturing). These state-owned enterprises compete with private ventures for customers and capital. Overall efficiency and consumer welfare that may benefit from this competition will be jeopardized if such state-owned enterprises enjoy special protection from competition. Specifically, competition would suffer if anti-competitive practices are viewed as promoting "public interest" whenever state-owned enterprises benefit. Therefore, for example, enterprises owned by European Community member states are subject to EC competition law to the extent that they engage in commercial activities.

Thus, the Sections recommend that an express provision be included in the proposed law, stating that "this law applies equally to enterprises owned in part or in whole by any government unit and to other enterprises, unless there is a specific exemption under another law of equal or greater standing," and that "evidence of a specific benefit to a enterprise owned in whole or in part by any government unit shall not constitute evidence of a general benefit to the public interest."

Article 33 (Department, Industry Monopoly) sets forth the general prohibition that "the government and its subsidiary departments shall not abuse their administrative power." The Sections suggest that this article should therefore be the first article in Chapter 5, with what are now Articles 31 (Forced Purchase) and 32 (Regional Monopoly) following, setting forth specific conduct that falls within the general prohibition. We suggest also that Article 35 (Prohibited Overreaching Administrative Conduct) be clarified by substituting the word "effect" for "content", since it is the effect of the regulations that is crucial.

In all events, the Sections agree that the restrictions against anticompetitive abuse of administrative power in the proposed law should be consistently and vigorously enforced. The authority of the Anti-Monopoly Management Body of the State Council under Articles 47 (Penalty for Departmentally Created Monopolies) and 48 (Penalty for Forced Purchase, Regional Monopoly, Forced Joint Activities etc.) to compel government agencies to cease violations of Articles 31 through 35 will be essential to the successful achievement of the goals of the proposed law. Therefore, the Sections suggest that the proposed law be clarified to:

-- explicitly authorize the Anti-Monopoly Management Body of the State

Council to notify appropriate "superior organisations" of violations of Article 33 by subsidiary government agencies;

-- explicitly authorize private entities and individuals to file complaints for violations of the proposed law by government agencies with the Anti-Monopoly Management Body of the State Council for investigation and to file petitions as well as with the People's Court, or with a specialized court for competition law matters as suggested in Section VII below; and

-- as we suggest in Section VII below, place original jurisdiction over lawsuits involving violations of Articles 31 through 35 in a specialized court with specific jurisdiction over matters arising under the proposed law, perhaps the same People's Courts identified in the Supreme People's Court's recent regulation concerning administrative litigation involving international trade disputes.[24]

VII Implementation and Remedies (Articles 6, 7, 9-13, 26-30, 36-55, 57)

The Sections support the authorization in Article 57 (Issuance of Detailed Rules and Regulations) to the Anti-Monopoly Management Body of the State Council to issue "detailed rules and regulations in accordance with this law." We agree that, for a competition law system to succeed, business operators must understand the differences between clearly prohibited conduct, clearly permitted conduct, and questionable conduct that may require legal review. Because competition law involves complex questions of economics and industrial organization, competition authorities should provide clear guidance on the proper application of legal and economic principles. On the other hand, legislation is generally not the best vehicle for providing such detailed guidance. Thus, competition authorities in the U.S. and the EU have issued guidelines explaining the application of competition laws, regulations, and principles in various situations.[25]

In this connection, the Sections suggest that, effective antitrust guidelines should (1) be consistent with law, (2) fill in the interstices of the law in ways that enhance understanding of the law, (3) be fully specified and not abstract, (4) strike a balance between simplicity and flexibility, (5) be sufficiently operational to be of practical use, and (6) fairly portray government enforcement policy.[26] We also recognize that

[24] See Supreme People's Court of China, Regulation on several issues concerning the trial of administrative cases in relation to international trade (August 28, 2002).

[25] *See, e.g.,* Guidelines on the Applicability of Article 81(3) of the EC Treaty to horizontal cooperation agreements, 2001 O.J. (C 3) 2 ("EC Horizontal Agreement Guidelines"); Commission Notice: Guidelines on Vertical Restraints 2000 (C 291) 1 ("EC Vertical Restraint Guidelines"); U.S. Dep't of Justice & Federal Trade Commission, *1992 Horizontal Merger Guidelines* (revised, 1997); U.S. Dep't of Justice & Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) (available at http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf).

[26] *See*, W. Blumenthal, *"Clear Agency Guidelines: Lessons from 1982"*, 68 Antitrust L.J. 5 (2000), a copy of which is annexed for ease of reference.

guidelines would be most useful and most likely to have these six attributes when they are developed with the benefit of experience and analysis of actual situations and the application of the law to those situations. Therefore, the Sections also urge the Anti-Monopoly Management Body of the State Council to proceed with deliberation in developing guidelines under the proposed law.

The Sections are also pleased to see the provision in Article 43 (Establishment of Dispatch Offices) for the Anti-Monopoly Management Body of the State Council to establish dispatch offices. It is important that there be nationwide consistency in the enforcement of competition law, particularly in the areas of abuse of administrative monopolies and state action that favors local enterprises against non-local enterprises. A national unified network of regional offices under the central guidance of the Anti-Monopoly Management Body of the State Council will help ensure national consistency. In fact, significantly in part for this reason, the Sections fully support the creation of a single enforcement agency dedicated to the implementation of the proposed law.[27] Having one agency with the competition policy mandate will foster the development of institutional expertise in this very complex area and will avoid the confusion and inconsistency that may arise from having multiple enforcement bodies that are authorized to enforce different parts of the law. Otherwise, it will not be uncommon that a single situation may involve several parts of the law and may thus require the participation of more than one agency in that situation.[28] The Sections also believe that the independence of the Anti-Monopoly Management Body of the State Council is very important, to ensure that the goals of the proposed law will be achieved and not compromised by other influences. For example, in the U.S., the Commissioners of the Federal Trade Commission are appointed for terms of seven years and may not be removed except for malfeasance.[29]

In order for the Anti-Monopoly Management Body of the State Council to be more effective in pursuing the goals of competition law, the Sections suggest that the proposed law be clarified in Article 37 (Responsibility), to include in the "other anti-monopoly matters" responsibility of the Body the responsibility to advocate competition policy and goals, both to the public and to other governmental organizations. The ability of the Anti-Monopoly Management Body of the State Council to fulfill this competition

[27] Presumably, the organization of the Anti-Monopoly Management Body of the State Council, and the method of appointment, terms of service and status of the members of the Body, along with the independence of the Body from improper influence, would have to be established in separate legislation.

[28] While in the U.S., the Antitrust Division of the Department of Justice and the Federal Trade Commission have concurrent jurisdiction over the antitrust laws (with criminal prosecutions reserved to the Department of Justice), this dual enforcement system has been the subject of continuing debate. Moreover, under the system that has evolved in the U.S., one agency will take full jurisdiction over an antitrust matter, regardless of which aspects of the antitrust law are involved, so that there is little likelihood that both agencies will be involved in the same matter.

[29] While the Assistant Attorney General in charge of Antitrust of the U.S. Department of Justice is a political appointee who serves at the pleasure of the President, the tradition of the Antitrust Division of the Department of the Justice has been to pursue the goals of competition policy without regard to politics.

advocacy responsibility can be facilitated by requiring other governmental organizations, such as those regulating specific industries, to consult with the Body before proposing legislation or regulations that could affect competition. The proposed law might also provide that the approval of the Anti-Monopoly Management Body of the State Council must be obtained before certain types of action can be taken by other governmental agencies. Such a competition advocacy mission can be fulfilled throughout China through the dispatch offices.

The Sections suggest such a mission for the dispatch offices because they recognize that creating market competition will not be a goal that the Anti-Monopoly Management Body of the State Council can achieve on its own, even with the establishment of a national network of dispatch offices to enforce the law. Recently, the Sections submitted to the U.S. Trade Representative Comments and Recommendations on the Competition Elements of the Doha Declaration, observing that creating market competition requires substantial infrastructure and support from other governmental institutions and the society at large. In particular, we believe that it is necessary to have (i) general security and stability sufficient to permit the creation and maintenance of a market system, (ii) broad support from all sectors for having market competition be the organizing principle for substantial sectors of the economy, and (iii) economic infrastructure that includes, at minimum, a functional financial system, a functional system of property rights and their definition, protection and transfer, a functional system of enforcing commercial arrangements, and a functional system for creating and governing common business organizations such as corporations, partnerships and cooperatives.[30] In fact, the Sections believe that, introducing a competition law regime before these preconditions exist may lead to substantial adverse effects such as the chilling of innovation and other productive business conduct, and the retarding of the economic progress that competition law is intended to foster.[31]

Similarly, the Sections assume that the specifics of the processes for investigations, adjudications and appeals are set forth in another statute addressing administrative procedures, or the Anti-Monopoly Management Body of the State Council will be authorized to develop and publish these procedures. We recognize that a competition policy enforcement framework involves the creation and maintenance of very complex rules and institutions, and expertise in a variety of legal disciplines such as competition law, administrative law, appellate law, and procedural and evidentiary rules, and in economic subjects such as industrial organization theory and econometrics. It requires a sophisticated legal system that can enforce effectively and in a timely and objective manner all substantive, procedural and remedial standards. The Sections submit that, such a legal system, as it is applied in a competition framework, should have, at least, the attributes of transparency in substance and in process, adequate protection of

[30] *See*, ABA Sections of Antitrust Law and International Law & Practice, Comments and Recommendations on the Competition Elements of the Doha Declaration, III.A.2.(i)-(iii). A copy of these Comments and Recommendations are annexed for ease of reference. They are also available at http://www.abanet.org/antitrust/comments/doha.doc.

[31] *See*, Comments and Recommendations on the Competition Elements of the Doha Declaration, III.A.

confidentiality, processes for petitioning the enforcement agencies for action, independent and competent investigating and enforcement agencies, objective and critical evidentiary rules, checks and balances to ensure timely, thorough, independent and balanced investigations and prosecutions, full and timely disclosure to targets of investigations of the allegations and the bases for the allegations of violations, full and timely opportunity for targets of investigations to respond to such allegations, remedies that are appropriate to the offense, and judgments that are subject to neutral and timely review.[32] In fact, in this area, the Sections suggest that the EC model of having a specialized court, the European Court of First Instance, review competition law cases is one worth considering. In any event, we are pleased that the proposed law particularly recognizes in Articles 41 (Announcement of Results) and 42 (Obligations) the importance of the Anti-Monopoly Management Body of the State Council maintaining the confidentiality of commercial confidential information that it or its staff may obtain in the course of carrying out their duties.

More fundamentally, the Sections suggest that effective implementation of the proposed law may be enhanced by clarifying that the governmental personnel who have the responsibility for investigating and prosecuting violations are to be separate from the governmental personnel who adjudicate violations.[33] In this connection, the Sections are pleased that the proposed law recognizes in Article 38 (Investigative Powers) that different investigative powers may require different levels of procedural, due process, safeguards. For example, the power to "send officers to the residences, business locations or other locations of the business operator to carry out investigations" is a power that the Anti-Monopoly Management Body of the State Council can exercise under its own authority, while searches can be executed only "pursuant to authority by the people's court." However, we suggest that the proposed law be clarified to provide that the sealing or attachment of items or evidence, and the freezing of bank accounts by the Body, also be subject to the authority of the people's court. The requirement to seek the authorization of the people's court may help ensure that due process is observed and that the Anti-Monopoly Management Body of the State Council has fully established a basis for such major actions. In fact, as noted above, a specialized court for competition law matters may ensure competent and knowledgeable resolutions of these issues. The legitimacy of the actions of the Body may be further enhanced by an additional requirement in Article 41 that not only results of adjudications, but also the reasons for the results, must be announced, so long as the confidentiality of commercial confidential information obtained during the course of the Body carrying out its duties is maintained.

The enforcement of the proposed law may also implicate the People's Republic of China's WTO accession commitments in certain instances. The non-discrimination and

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[32] *See*, Comments and Recommendations on the Competition Elements of the Doha Declaration, III.A.2.(iv).

[33] For example, in the U.S., the Federal Trade Commission has investigative, prosecutorial and adjudicative authority. However, the personnel within the FTC who have adjudicative responsibilities are designated Administrative Law Judges who are in a separate section within the agency, and are not accountable to the personnel who have direct investigative and prosecutorial responsibilities.

national treatment provisions of the GATT, GATS, and TRIPS agreements provide for transparent and uniform enforcement (or non-enforcement) of the competition laws against all participants (domestic and foreign) in the economy.[34] The Sections therefore suggest that a provision be included in the proposed law to state expressly that there will be transparent and uniform enforcement and there will not be selective or discriminatory enforcement of the competition laws. Such a provision would be consistent with and complement the prohibitions in Chapter 5 against administrative monopoly, particularly the prohibition in Article 32 against regional monopoly.

In addition, the Sections are concerned regarding the particulars of some of the provisions of the proposed law in this area. For example, the individual exemption process set forth in Articles 9 through 13 is reminiscent of the process under Article 81(3) of the EC Treaty. We recognize that there can be real benefits for a system that could provide clarity by giving businesses the opportunity, on a voluntary basis, to seek guidance from the competition authority in cases where the legality of the conduct might be in doubt. However, the experience in the EC over the last 30 years suggests that such a mechanism is not optimal, and in fact the EC has eliminated the individual exemption system as of May 1, 2004.[35] Instead, the focus has been on developing additional refined block exemptions, such as for vertical restraints and intellectual property licenses.

The potentially open-ended review period provided in Article 28 (Approval of Applications) for concentrations may also be unworkable. Delays of concentrations often mean the demise of the transaction. Such a potentially open-ended review period offers the possibility that an enforcement agency may effectively prohibit a transaction merely by prolonging the investigation, without any need to complete an investigation or issue a finding that the concentration is anticompetitive that may then be reviewed by the People's Court, or by a specialized court for competition law matters. We suggest that the law clarify that a review period may be extended only once, and for no longer than 30 days beyond the 90 days already provided. The types of "special circumstances", such as a preliminary finding of areas of competition concern and the need to obtain information from third parties, that would justify an extension, should also be identified. In addition, it would be beneficial to clarify whether any approval is ex post or ex ante. Moreover, the Sections suggest that Article 27 (Content of the Application) not require the application to discuss "the effect the concentration may have on the national economy and public interest" because, as we discuss in Section III, we believe that a competition law should not consider whether concentrations "hinder the healthy development of the national economy" or "damage the public interest", for the reasons set forth in Section I of these Comments.

Although the proposed law states that it applies to behavior outside the territory of the People's Republic that violates the law and limits or affects market competition within the territory of the People's Republic, the Sections suggest that it would be helpful

[34] *See* GATT, Art. III; GATS, Art. VIII ("Monopolies and Exclusive Service Suppliers") & XVII ("national Treatment"); TRIPS, Art. 3&4.

[35] Council Regulation (EC) 1/2003, Art. 43(1).

to expressly state that the provisions in the proposed law relating to the "control of enterprise concentrations" apply to: (i) concentrations between foreign enterprises where one or both enterprises have manufacturing facilities, other assets, or substantial sales in, or into, the People's Republic of China; and (ii) concentrations among foreign enterprises' subsidiaries within the People's Republic of China. Further, while the proposed law also provides for penalties for unauthorized concentrations where a concentration that violated the law was carried out without prior approval, the Sections suggest that the proposed law expressly state that advance notice or approval is required prior to consummation of a concentration covered by the law, and that post-consummation approval is not contemplated.

Finally, the most important result of the application of a competition law is the restoration or maintenance of competition in the economy. The punishment of violators of the law is, except in the case of unambiguously anticompetitive behavior, secondary to remedying the effects of the conduct that violated the law. Consequently, in the U.S., the focus is on prospective remedies that restore competition such as injunctions, divestiture, and restitution. Only in those cases where clear-cut anticompetitive behavior (such as price-fixing and bid-rigging among competitors) must be firmly deterred do we resort to retrospective, punitive sanctions such as fines and imprisonment. No such penalties are sought or imposed in other cases in modern times in the United States. Therefore, the Sections suggest that the proposed law be extended and clarified to provide, for example, that penalties are appropriate only in cases where the Per Se Rule applies and the actual competitive effect of the improper conduct is not relevant, and that the Anti-Monopoly Management Body of the State Council is authorized to obtain injunctive relief to stop anticompetitive concentrations or other violations before they occur and to seek divestiture or other remedies to cure anticompetitive concentrations or other violations after they occurred. The proposed law should also be clarified in Article 52 (Enforcement of the Decision) to authorize the Body to seek enforcement of any orders that the Body may issue or obtain to cease and desist from violations of the law.

This reserve regarding penalties for anticompetitive conduct is distinguished from our view regarding penalties for violations such as improper disclosure by government personnel of confidential information or destruction of relevant materials by investigated persons. The Sections suggest that the proposed law be clarified in Article 51 (Penalty for Activities of Investigated Persons) to include criminal penalties that can apply in the case of destruction of relevant materials, unless such penalties are already established in another statute. However, we also urge that the proposed law also clarify what are "relevant materials" and the circumstances in which destruction of such materials may result in criminal penalties. Some situations may require lighter penalties than others, and the proposed law should also be clarified in that respect. In the case of improper actions by government personnel, for example, the Sections agree that administrative punishment and criminal penalty may be appropriate. We assume that the nature of administrative punishments (including compensation for any losses) that can be imposed, and when they will be imposed, are set forth in another statute addressing administrative procedures, or the Anti-Monopoly Management Body of the State Council will be authorized to develop and publish these procedures. The Sections suggest, in any event,

that it will be helpful to clarify in the proposed law the circumstances in which violations of the duties of confidentiality in Articles 41 and 42 become criminal offenses under Article 54 (Penalty for Failure to Fulfill Responsibility to Maintain Confidentiality).

VIII Interaction with Other Laws (Article 56; Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors)

Article 56 (Conduct Relating to the Exercise of Intellectual Property Rights) raises the implications of some major interactions between other laws and the proposed competition law. The Sections believe these interactions merit further review.

In particular, the second sentence of Article 56 may have the unintended effects of nullifying the laws protecting intellectual property and discouraging innovation. The second sentence of this article may be read as removing intellectual property rights law protection if the mere exercise of an intellectual property right is somehow deemed an "abuse" and either actually *or* potentially either eliminates *or* "over-broadly" limits competition. Since the proposed law does not provide any guidance as to what constitutes "abuse", then, unless the intellectual property rights laws establish what constitutes "abuse", there is the potential that "abuse" may cover instances where an intellectual property rights holder simply refuses to license another entity to use what the intellectual property rights holder has rights to use exclusively under the intellectual property rights laws. Such a result would likely have an adverse impact on innovation while not necessarily promote a competitive marketplace.

Proposals regarding limitations under competition law on the exercise of intellectual property rights have triggered substantial debates among commentators, courts and enforcement agencies of several jurisdictions[36] and have generally been more specific than the language proposed in the second sentence of Article 56. The Sections believe that it is unnecessary at this time to address the interface between intellectual property rights and competition laws. However, if the proposed law is to address that interface, the Sections respectfully suggest that the following phrase be added to the end of the second sentence of Article 56: ", provided that the unilateral exercise of the right to exclude, inherent in the ownership of intellectual property, shall not constitute an abuse." As the Sections noted earlier in these Comments (in Section II), the offense of monopolization under U.S. law requires both the possession of monopoly power and "the

[36] In fact, the U.S. antitrust enforcement agencies have issued substantial guidelines focused on just one particular aspect of the interface between intellectual property rights law and competition law. *See* 1995 DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property. *See also, generally*, Hovenkamp, Janis and Lemley, *IP and Antitrust, An Analysis of Antitrust Principles Applied to Intellectual Property Law* §13.1 - §13.4 (2003); Joint Comments of ABA Sections of Antitrust Law, International Law & Practice, and Intellectual Property Law on the [European] Commission Evaluation Report on the Transfer of Technology Block Exemption Regulation No. 240/96 at 9 ("Issues continue to arise in this area, there is substantial litigation, and continued debate, as reflected in cases … as well as the ongoing hearings being conducted jointly by the [U.S. FTC and DOJ] …"); Comments of the ABA Section of Antitrust Law on the U.S. Department of Justice Antitrust Division and Federal Trade Commission Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (June 28, 2002).

willful acquisition . . . of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." It is not sufficient to demonstrate that a firm obtained monopoly position if it did so through "superior skill, foresight and industry." While it is often appropriate to scrutinize carefully the conduct of a firm with monopoly power to assure that its conduct will not lead to higher prices, lower output, poorer quality, and less innovation, it is recognized that a firm that competes through lower prices, higher output, better quality or more innovation may well thereby achieve, maintain or even extend monopoly power. It is fundamental under U.S. antitrust law that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[37]

In addition, Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors recently became effective. The stated goals of the Provisional Rules are to "encourage and regulate investments by foreigners in China, introduce foreign advanced technology and management experience, raise the level of utilization of foreign investment, realize the reasonable allocation of resources, secure employment and maintain fair competition and the economic security of the State." These Rules require certain acquisitions of businesses in the People's Republic by foreign enterprises to be subject to review for various considerations, including whether the transactions may "exclude or restrict competition," or may lead to "over-concentration."

To the extent these Provisional Rules establish different standards for considering the competition implications of an acquisition by foreign investors than the standards that will be applied under the proposed law to all acquisitions within the People's Republic, WTO obligations of non-discriminatory and national treatment may be implicated. In addition, for the reasons stated in Section I, we believe that the Provisional Rules take into consideration factors that are not appropriate. Therefore, the Sections respectfully suggest that the better course would be to provide that competition policy reviews of all acquisitions (whether by domestic or by foreign investors) are to be conducted only under the authority of the proposed law, and to revise the Provisional Rules to delete consideration of competition factors in the review of transactions under those Rules. The Provisional Rules will then apply only non-competition policy considerations to acquisitions by foreign investors, such as "employment," the "community economic order or community public interest," and the "economic security of the State".[38]

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[37] *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966); *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945). As noted earlier (footnote 3), there are also certain monopolies that are specifically permitted by law in the United States. However, in those cases, those sectors are subject to active governmental supervision to ensure that there is no abuse of market power. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

[38] However, the Sections note that there are already other statutes and regulations that address non-competition policy considerations in acquisitions by foreign investors. Therefore, setting aside the wisdom of these non-competition policy considerations, in this case, at best, the Provisional Rules are redundant of existing law, and, at worst, they create requirements inconsistent with existing law that will further burden foreign investors.

This bifurcation is the approach used in Canada and the United States.[39] In Canada, the Investment Canada Act applies to foreign investments various non-competition policy considerations. Canada's Competition Act, enforced by the Competition Bureau of Industry Canada, is applied to all commercial activity, including concentrations, in Canada, regardless of the nationality of the parties. Similarly, in the U.S., the Exon-Florio Act applies national security considerations to foreign investments in the U.S., while the Clayton Act applies competition policy to all concentrations in the U.S., regardless of the nationality of the parties.

Such a centralization of competition review of concentrations will avoid the complications of having potentially different competition policy standards being applied by different agencies to concentrations involving foreign investors than to concentrations involving only domestic parties. It will avoid the potential of some transactions being required to satisfy the disparate competition policy standards of two different laws. Finally, it will also facilitate the evaluation of the consumer welfare and efficiency effects of transactions under competition policy without the complications of attempting in one analysis to include such diverse factors as national security and employment opportunities that are not susceptible to economic analysis in the same way that investigations of consumer welfare and efficiency effects are.

Conclusion

In sum, the Sections believe that the enactment of a competition law is generally a positive development. Some aspects of the proposed Anti-Monopoly Law, however, would benefit from further consideration. We hope that this submission is useful. We would be pleased to respond to any questions regarding these Comments, or to provide any additional comments or information that may be of assistance.

July 15, 2003

APPENDICES

ABA Antitrust Section Report on Antitrust Policy Objectives

1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines

[39] The Sections do not comment on the wisdom of laws such as the Investment Canada Act and the Exon-Florio Act, but refer to them only as examples of the bifurcated approach that should be adopted, if non-competition policy considerations are included in the review of foreign investments.

ABA Sections of Antitrust Law and International Law & Practice Comments on the EC Green Paper on Vertical Restraints in EC Competition Policy

W. Blumenthal, *"Clear Agency Guidelines: Lessons from 1982"*, 68 Antitrust L.J. 5 (2000)

ABA Sections of Antitrust Law and International Law & Practice Comments and Recommendations on the Competition Elements of the Doha Declaration

ESSENTIAL FACILITIES: AN EPITHET IN NEED OF LIMITING PRINCIPLES

PHILLIP AREEDA*

I. INTRODUCTION

There is much talk these days, particularly in the context of deregulated industries, about the so-called essential facilities doctrine[1]—"so-called" because most Supreme Court cases invoked in support do not speak of it and can be explained without reference to it. Indeed, the cases support the doctrine only by implication and in highly qualified ways. You will not find any case that provides a consistent rationale for the doctrine or that explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share it with a rival. It is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are.

As with most instances of judging by catch-phrase, the law evolves in three stages: (1) An extreme case arises to which a court responds. (2) The language of that response is then applied—often mechanically, sometimes cleverly—to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of its language, with little regard to policy. (3) Such expansions ultimately become ridiculous, and the process of cutting back begins.

Essential facilities is now in the expansionary second phase, which needs to be brought back to antitrust policy. With that in mind, I will review briefly the cases usually relied upon, beginning with multifirm combinations.

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[1] *See, e.g., The Cutting Edge of Antitrust: Lessons from Deregulation*, 57 ANTITRUST L.J. 695 (1988).

II. MULTIFIRM COMBINATIONS

The essential facilities notion is usually traced to the *Terminal Railroad* combination case.[2] The Terminal Railroad Association controlled passages into and out of St. Louis, which was an important railroad junction. This monopoly facility was then acquired by a combination of some, but not all, of the railroads transiting St. Louis. This combination of railroads did not create anything; it merely acquired an existing facility. The combination was then in position to use the pre-existing monopoly to exclude or disadvantage competitors needing to pass through St. Louis. Recognizing that the combination had obtained a monopoly through joint purchase, the Supreme Court wisely concluded that the most efficient remedy was to admit nonmember competitors to the consortium.[3]

Associated Press[4] was a more doubtful case. Some 1,200 newspapers created the Associated Press. Each member was given access to news generated by other members. For example, the Chicago newspaper obtained news reports from the Associated Press member in New York. In addition, the Associated Press had its own staff to generate news. The combination achieved important economies of scale. The members collectively could support a reporter in Istanbul or a staff of economic experts to analyze antitrust decisions for the benefit of readers. The basic rationale for the venture was to achieve economies of scale, which goal the addition of members served. The Associated Press welcomed new members, unless the applicant competed with an incumbent. Although the rules varied over the years, existing members essentially were allowed to block the admission of competitors, but not anyone else.

The Supreme Court held it a violation of the Sherman Act for the Associated Press to discriminate against competitors in its admissions policy. The remedy was to enjoin this discrimination, but the Court was very careful *not* to say that the Associated Press had to admit everyone. The Court's rationale was not stated with any clarity. Justice Black wrote for himself and three others as if the Associated Press were the Fashion Originators' Guild—a group of dress designers who combined for the express purpose of destroying rivals they considered copiers, by boycotting the textile makers or dealers that dealt with copiers.[5] That kind of boycott and "forbidden private government" language in *Fashion Originators' Guild* was totally inappropriate to describe a new and highly productive venture that simply chose not to admit the whole world.

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[2] United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

[3] *Id.* at 411–12.

[4] Associated Press v. United States, 326 U.S. 1 (1945).

[5] Fashion Originators Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941).

Justice Douglas, who joined in the opinion, wrote separately to highlight the fact that the Court was not requiring the Associated Press to admit anybody, but was simply banning its practice of discriminating against competitors.[6] The fifth Justice necessary to the majority[7] was Frankfurter, who alone felt obliged to offer a rationale for interfering with the Associated Press's admission policy. His rationale, the only one that supports an essential facility notion, was either ignored or expressly put aside by every other Justice. Justice Frankfurter compared the Associated Press to a public utility, a business infused with the public interest that was required to serve all.[8] Yet Justice Frankfurter's public utility concept was exceedingly limited: what infused the Associated Press with the public interest was the need for the maximum flow of information and opinion to preserve our democracy and our Constitution.[9]

Imagine the torment Justice Frankfurter would feel to see his free-press public utility concept invoked in support of a rock impresario seeking admission to the local auditorium;[10] a teletype machine marketer complaining that its competitor will not sell machines for it;[11] a ski resort complaining that a rival resort will not engage in joint marketing with it;[12] a maker of "muscle building" food supplements demanding that a body building magazine accept its ads;[13] a paper retailer complaining that other paper retailers will not admit it to their wholesale buying co-op;[14] an anesthesiologist insisting that the local hospital, using in-house anesthesiologists, allow him to perform anesthesiological services as well;[15] or the would-be oil seller, who has no storage tanks of his own,

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[6] Associated Press v. United States, 326 U.S. 1, 23–25 (1945) (Douglas, J., concurring).

[7] Justices Roberts, Murphy, and Chief Justice Stone dissented. Justice Jackson did not sit.

[8] Associated Press v. United States, 326 U.S. 1, 28–29 (1945) (Frankfurter, J., concurring).

[9] In response to criticism that the Court's decree turned the Associated Press into a public utility, Justice Frankfurter wrote: "The relation of such restraints upon access to news and the relation of such access to the function of a free press in our democratic society must not be obscured by the specialized notions that have gathered around the legal concept of a 'public utility.' " *Id.* at 29.

[10] Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024 (7th Cir.), *cert. denied,* 109 S. Ct. 261 (1988).

[11] Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied,* 107 S. Ct. 1574 (1987).

[12] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[13] Twin Laboratories, Inc. v. Weider Health & Fitness Corp., 720 F. Supp. 31 (S.D.N.Y. 1989).

[14] Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

[15] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

demanding to use those of an incumbent seller[16]—to say nothing of Berkey, who wants to know the results of Kodak's research before Kodak markets its own innovations.[17] We have moved a long way from Justice Frankfurter's narrow concept of the extraordinary circumstances in which intervention is essential to protect the Republic.

Let me summarize the apparent black letter law. Whatever *Associated Press* held, it is often said to stand for more or less the following propositions, with the vague terms emphasized: (1) whenever competitors jointly create a *useful facility,* (2) that is essential to the *competitive vitality of rivals,* (3) and (perhaps) essential to the *competitive vitality of the market,* (4) and admission of rivals is *consistent* with the *legitimate* purposes of the venture, then (5) the collaborators must admit rivals on *relatively equal* terms.

III. SINGLE FIRM CONDUCT

Even if *Associated Press* stands for these five propositions, it cannot automatically govern *unilateral* denial of an essential facility for several reasons.[18] First, and most obvious, concerted action is exceptional, whereas unilateral action is omnipresent. Innumerable firms engage in unilateral action every day. We have to be very wary about examining the decisions of each of those firms in our economy, particularly when anything one has that another wants may be called an "essential facility." Nor can we take any comfort from the suggestion that the essential facilities doctrine will apply only to true monopolies, which are rare. A cursory review of the "essential facilities" cases[19] denies such consolation.

Second, concerted exclusion is much easier to remedy, particularly when an outsider, who is willing to invest on an equal basis, seeks admission at the time the joint venture is created. In these cases it is relatively easy to define the terms under which others should be admitted. Even when admission is sought at a later time, we may be able to define equivalent terms, although it is difficult to quantify the degree of risk the original venturers bore and give it a dollar value.

Third, admission to a joint venture is a one-time remedy that does not require day-to-day control. Admission to a group such as the Associated Press does not require the rationing of an existing resource or entail any new investment. Adding to a group, moreover, is less likely to impair

[16] Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528 (S.D. Fla. 1989).

[17] Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1063 (1980).

[18] For a general discussion of the significance of concerted action, *see* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 736.1d (1988 Supp.).

[19] *See* notes 10–17, *supra.*

efficiencies by chilling desirable activities. Requiring the Associated Press collaborators to admit others at the outset would chill the combination only if its purpose were indeed to exclude rivals.[20]

Finally, the combination itself might be evidence of essentiality. Allowing the competitors to combine in the first place indicates that the proposed venture is both important and beyond the individual capacity of the collaborators. No such inference can be drawn from the activities of single firms.[21]

A. Essential Facilities and Section 2 Conduct

The essential facilities concept, applied to a single firm, must heed the conduct requirement—not just market power—necessary to constitute monopolization under Section 2 of the Sherman Act. The formula the Supreme Court has most recently used is the "willful acquisition or maintenance" of monopoly power.[22] Obviously, that language cannot be taken literally. The example I usually give to illustrate this is the person who climbs to his rooftop and (without the advice of counsel) shouts to the world, "I crave monopoly." He explains: "I have instructed my inventors to invent, my engineers to cut costs, my marketers to discover the public taste, all to the end that I should build a better mousetrap, the world beat a path to my door, my competitors expire, and I have a monopoly." If all that transpires, he certainly would have willfully acquired monopoly power in the ordinary meaning of those words. It is obvious, however, that such conduct is precisely what antitrust policy tries to encourage. Unless the law condemns every monopolist simply because he is a monopolist in order to "reshuffle" the market, it cannot condemn the person I have described, no matter how willfully—in the lay sense—he has acquired monopoly power.

"Willfully acquire or maintain monopoly power," is Justice Douglas's language in *Grinnell,* but even he immediately added, "as contrasted with monopoly achieved as a result of historical accident, business acumen, or

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[20] If the original collaborators would not want a local competitor to reproduce the reports of its crosstown rival, such local free riding could be prevented without excluding rivals entirely.

[21] These distinctions do not mean that a monopolist should never be required to deal. MCI Communications Co. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied,* 464 U.S. 891 (1983), which rests on the essential facilities notion, is probably correct. In *MCI,* the plaintiff providing long distance telephone service alleged that AT&T obstructed its connection to local exchanges, contrary to federal regulatory policy in the communications field. In these circumstances, the Seventh Circuit held that a monopolist must, when feasible, make its essential facility available to a competitor who is unable to duplicate it. 708 F.2d at 1133.

[22] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

the like."[23] It is perfectly clear that the concept of monopolization requires some element of impropriety; it has to be monopoly power coupled not with building the better mousetrap, but monopoly power coupled with some impropriety in its achievement or maintenance.

The impropriety is usually found in conduct that excludes rivals. The phrase most often used is "exclusionary conduct"—"monopoly power plus exclusionary conduct."[24] But that adds little help, because, in the lay sense, almost anything can be said to exclude. If I build a better mousetrap that deprives you of customers, you might say I have excluded you from the market. Of course, you have an equal opportunity to invent a better mousetrap of your own. Yet, where the market is a natural monopoly—that is to say, it will only sustain one producer of optimum, low-cost size—the first person to build an optimum sized plant is likely to be the last person in that market.

It is important to contrast the concept of impropriety in acquiring or maintaining monopoly power with the concept of abusing monopoly power. By way of illustration, the Treaty of Rome, which governs the European Economic Community, has a structure similar to the Sherman Act. Article 85 addresses agreements in restraint of trade, as does Section 1 of the Sherman Act.[25] Article 86 parallels Section 2 of the Sherman Act somewhat, but it is really quite different.[26] It focuses on the *abuse* of a

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[23] *Id.* at 571.

[24] *See, e.g.*, Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979).

[25] Article 85 provides, inter alia:

(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investments;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[26] Article 86 provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;

dominant position, whereas Section 2, as applied, focuses on the manner in which a firm acquires, expands, or maintains monopoly power. It is no violation of Section 2 for a monopolist to charge a monopoly price. If the monopoly was not improperly obtained or maintained, then exploiting the monopoly—to charge whatever monopoly price the market will bear—does not violate the statute.[27] We will see that the legality of monopoly pricing has important implications for the essential facilities concept.

B. *GRIFFITH, OTTER TAIL,* AND *ASPEN*

Three Supreme Court monopoly cases are frequently cited to support the essential facilities concept, though none uses that phrase. *Griffith*[28] did not involve an alleged essential facility,[29] but certain language in the opinion (as in so many others) has come to live a life of its own, quite apart from the circumstances, facts, or reasoning, behind it. In *Griffith,* the Court said that a monopolist may not use its power "to foreclose competition or "to gain a competitive advantage" in any market.[30] This language, literally construed, would condemn the monopolist who refuses to make his product or facility available to a competitor. The words in *Griffith* do not compel such a result;[31] it would be strange indeed to regard those words as such vast legislative pronouncements from a case that did not address essential facilities.

Otter Tail[32] is more relevant, though it rested on nothing more than the *Griffith* formula. In *Otter Tail,* the plaintiffs were municipalities that wanted to provide local distribution of electric power to their residents. The municipalities asked Otter Tail either to sell electricity wholesale or to wheel (i.e., carry) electricity purchased from another supplier over

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[27] *See, e.g.,* Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979) (possession of monopoly power not in itself unlawful, and the successful firm "does not violate § 2 simply by reaping the competitive rewards"), *cert. denied,* 444 U.S. 1093 (1980); *see also* Continental Cablevision of Am. v. American Elec. Power, 715 F.2d 1115, 1120–21 (6th Cir. 1983) (high prices are lawful even for a monopolist); *see generally* 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 710 (1978).

[28] United States v. Griffith, 334 U.S. 100 (1948).

[29] *Griffith* addressed a movie exhibitor's use of buying power in a market in which it had a monopoly to compel distributors to give it preferential rights in towns where the market was competitive.

[30] United States v. Griffith, 334 U.S. 100, 107 (1948).

[31] *See* 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 610, 727c (1978).

[32] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

Otter Tail's lines. Otter Tail refused because it wished to keep itself in, and the municipalities out of, the local distribution business.

The Supreme Court held that Otter Tail's refusal to supply or wheel power to the municipalities violated Section 2 of the Sherman Act.[33] Far from establishing any general duty to deal, however, *Otter Tail* is very limited. Not only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers.[34] Very importantly, there was already in place a regulatory agency that supervised prices and terms of dealings with local distributors. Thus, the Court could airily require Otter Tail to deal but never burden itself with the administrative details, because the Federal Power Commission had the statutory authority and presumed expertness to regulate the prices and terms of dealing. *Otter Tail* is thus quite narrow.

The third case is *Aspen*.[35] It is odd to treat *Aspen* as a monopoly case, because the Aspen Skiing Company (Ski) was not a monopoly.[36] But the issue had not been properly preserved on appeal, and the Supreme Court treated Ski, which owned three mountains in Aspen, Colorado, as a monopolist. The fourth mountain in Aspen was owned by the plaintiff, Aspen Highlands (Highlands). For some years, Ski and Highlands had offered a six-day lift ticket that allowed use of all four mountains. Six one-day tickets cost $132, while the "ski week" ticket for the same number of days was $114—a fourteen percent discount.[37] This is important because most skiers come to Aspen from afar and stay for a week. Ski stopped offering the four-mountain ticket with Highlands, presumably because Ski concluded that skiers would prefer six days on three mountains to six days on Highlands' one mountain. Highlands lost some business, although its competitive vitality was never in doubt.[38]

Highlands won a jury verdict, which the Court of Appeals for the Tenth Circuit upheld on two grounds: (1) a multimountain ticket was an

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[33] *Id.* at 377.

[34] Although it is not completely clear from the decision, it appears that transmission (wheeling) charges and wholesale prices were regulated by the Federal Power Commission, the predecessor of the Federal Energy Regulatory Commission. Retail charges to consumers were regulated, if at all, by local authorities in Minnesota. If Otter Tail wheels or sells power wholesale, regulators will force it to charge less than the monopoly price. If Otter Tail is in the retail distribution business, which is not very effectively regulated, it can charge monopoly prices. Thus, in the peculiar circumstances of *Otter Tail*, a duty to deal may benefit consumers.

[35] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[36] *See* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 518.1h (1989 Supp.).

[37] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 594 n.15 (1985).

[38] One of the curiosities in the case is that while Highlands sought damages for lost profits, it asserted vigorously that its one mountain was just as good as the defendant's

essential facility that Ski was obliged to share, and (2) there was sufficient evidence to support the jury finding that Ski intended to create or maintain a monopoly.[39]

In affirming, the Supreme Court did not mention the Tenth Circuit's essential facilities rationale, except to say it was not going to address it.[40] Instead, the Court focused solely on the propriety of the jury instruction. The instruction was similar in style to that in *Berkey*.[41] Berkey alleged that Kodak was a monopolist that acted improperly by introducing a new camera system without predisclosing the results of its research to Berkey. Berkey also claimed that Kodak was guilty of monopolization because it would not sell photofinishing paper without the Kodak name on the back. The jury instructions in *Berkey* and *Aspen* both charged that the defendant had no absolute duty to deal with the plaintiffs in the manner they desired, but if the jury found that the defendant acted "*with exclusionary or anticompetitive purpose or effect,*" then it may find for the plaintiff. The Supreme Court approved such language in *Aspen*.

This language has serious and questionable implications. Assume, for example, a patent monopolist refuses to allow another to use its patent. The jury is told the patent monopolist has no absolute duty to let the plaintiff use the patent, but if it declines with an exclusionary purpose, then it violates the Sherman Act. Or suppose a monopoly newspaper sells through its own employees because distributors charge too much. The plaintiff wants to be in the distribution business and claims that while there is no absolute duty to supply it with newspapers, if the purpose of the refusal is to eliminate competition in the newspaper distribution business (which of course it is), then the jury should find the newspaper guilty of monopolization.

Or, suppose the defendant has a warehouse, a research laboratory, a dock, a refinery, or storage tanks, that are not fully occupied. The plaintiff wants to use the facility. The judge instructs the jury that the defendant has no absolute duty to let the plaintiff use the warehouse or laboratory or other facility, but if the defendant declines in order to improve its competitive position relative to the plaintiff's (that is to say, to exclude the plaintiff in some sense) then the defendant is guilty. Of course, the reason any business declines to share the fruits of its labor with competi-

three. If that is true, what does it say about "essentiality"? Neither the Supreme Court nor, apparently, the jury even noted this.

[39] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520–22 (10th Cir. 1984).

[40] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611 n.44 (1985).

[41] Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 444 U.S. 1090 (1980).

tors is because it wants to win in the marketplace. Did the *Aspen* Court hold that is enough to support a monopolization verdict?

There are several reasons *Aspen* should not be read to go that far. First, the *Aspen* facts were peculiar in two ways. The Court made much of Ski's cessation of cooperation. Its previous activity had implied, at least to the Court, that cooperation was both efficient and entirely practical. It may not have been wise for the Court to do that, because one of the consequences will be that lawyers will advise their clients not to cooperate with a rival; once you start, the Sherman Act may be read as an antidivorce statute. In addition, the vice of Ski's conduct, in my view, was not that it refused to cooperate with Highlands, but that it engaged in a form of "quasi-exclusive dealing." Suppose Ski offered the $114 discount ticket to skiers only on the condition that they not ski at Highlands. If we truly thought Ski were a monopolist, we would be troubled indeed. Of course, the practical effect of the six-day discounted ticket might well be the same.

Second, the conduct in some of the hypotheticals raised here is generally regarded as absolutely privileged. For example, in *SCM*[42] the Second Circuit held that, under general patent principles, a patent monopolist is absolutely privileged to keep its invention to itself. Similarly, the Second Circuit held in *Berkey* that the innovator was not obliged to predisclose its developments to its rival, notwithstanding *Aspen*-like jury instructions.[43]

Even in the peculiar circumstances of *Aspen,* the Court was explicit that the defendant's conduct would be redeemed by a legitimate business purpose.[44] There are two quite different kinds of legitimate business justifications that I call "micro level" and "macro level." Legitimate business purpose at the micro level focuses on the circumstances of the particular case. For example, if AT&T had been able to show that connecting MCI would have dangerously increased the electricity load such that a consumer picking up the phone would be electrocuted, I am quite certain AT&T would have prevailed. If Highlands had insisted on fifty percent of the revenues of a joint ticket although it attracted only twenty-five percent of the skiers, it is perfectly clear that Ski would not have to agree to such an arrangement.

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[42] SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982).

[43] Likewise, in Olympia Equip. Leasing v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied,* 480 U.S. 934 (1987), the court held that the defendant was not obliged to use its own personnel to sell a rival's products.

[44] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–10 (1985).

In addition, any essential facilities doctrine must recognize macro level or class justifications. These legitimate business purposes are not personal to any particular defendant, but are propositions of general policy. For example, the justification for refusing to share a research laboratory does not focus on the practical infeasibility of letting another use the laboratory, but on the general concern that the defendant never would have built a laboratory of that size and character in the first place if he had known that he would be required to share it. Required sharing discourages building facilities such as this, even though they benefit consumers.

The *Olympia*[45] case further demonstrates the need for general policy limitations. Surprisingly, some lawyers have criticized the Seventh Circuit in *Olympia* for departing from *Aspen*. *Olympia* involved the teletype business. In the beginning, Western Union not only maintained the wires and the network, but also provided the teletype machines. It decided to phase out the machine portion of its business, and its salesmen began selling other companies' machines. Indeed, Western Union apparently had a commission structure that made it more profitable for its salesmen to sell the plaintiff's machines than Western Union's machines. Not surprisingly, the plaintiff prospered. Western Union then changed its commission structure and disposed of more of its machines and sold fewer of the plaintiff's.

The court was willing to make the general policy decision that a business is not obliged to peddle its rival's products. Once that policy decision is made, there is nothing left for the jury to do. Likewise, the court in *Berkey* held there is no duty to predisclose one's inventions, because predisclosure would reduce the returns from and therefore the incentives for innovation. The duty to sell another's products and the duty to predisclose would chill desirable activity and therefore the courts determined, as a matter of law, there is no duty to share.

These are policy decisions that should be made by judges, not juries. Ad hoc policy decisions by juries provide no guidance to business actors, subject similar firms or markets to different rules, and lodge national economic policy in unqualified hands. Deciding whether inventions, labs, or a sales force must be shared with rivals and how the economy is to be run is not the stuff of juries. To the extent that these matters are to be governed by the law rather than by business persons and the market, judges, not juries, must decide what kinds of facilities one is entitled to keep for oneself.

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[45] Olympia Equip. Leasing v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

IV. CONCLUSION

I conclude by offering six principles that should limit application of the essential facilities concept.

(1) There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional.[46]

(2) A single firm's facility, as distinct from that of a combination, is "essential" only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace. "Critical to the plaintiff's competitive vitality" means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available.

(3) No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely (a) when it would chill desirable activity; (b) the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for the monopolist or shares the monopolist's gains;[47] or (d) when the monopolist already has the usual privilege of charging the monopoly price for its resources.[48]

(4) Even when all these conditions are satisfied, denial of access is never per se unlawful; legitimate business purpose always saves the defendant. What constitutes legitimacy is a question of law for the courts. Although the defendant bears the burden of coming forward with a legitimate business purpose, the plaintiff bears the burden of persuading the tribunal that any such claim is unjustified.

(5) The defendant's intention is seldom illuminating, because every firm that denies its facilities to rivals does so to limit competition with itself and increase its profits. Any instruction on intention must ask whether the defendant had an intention to exclude by *improper* means.

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[46] The trouble with both the general jury instruction ("if you find it exclusionary, you can condemn") and the essential facilities notion is that they start with the assumption that all business assets are subject to sharing. Do we really want to assume that everything we have is up for grabs?

[47] *See* Mid-South Grizzlies v. National Football League, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). In *Grizzlies*, a would-be entrant into the football business demanded entry to a league, alleging that the league was an essential facility. Adding another team in a different city to the league is not going to increase competition or lower prices. All it would do is allow one more person to share the television revenues.

[48] For example, the monopoly newspaper in town can charge the monopoly price whether or not another distributes it. An independent distributor of the newspaper is not going to limit the newspaper's ability to control the output and the wholesale price.

To get ahead in the marketplace is not itself the kind of intention that contaminates conduct.[49]

(6) No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency. Remedies may be practical (a) when admission to a consortium is at stake, especially at the outset, (b) when divestiture is otherwise appropriate and effective, or (c) when, as in *Otter Tail,* a regulatory agency already exists to control the terms of dealing. However, the availability of a remedy is not reason to grant one. Compulsory sharing should remain exceptional.

[49] But the articulation of the instruction—"do you find the defendant had an intention to exclude by *improper* means"—highlights the fact that the jury is being asked to make a policy decision as to which resources a monopolist is entitled to keep to itself.

COMPULSORY ACCESS UNDER THE ANTITRUST LAWS

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This outline summarizes the state of the law under the "compulsory access" doctrine, also known at times as the "essential facility" doctrine or "bottleneck monopoly" doctrine. To oversimplify for the moment, the doctrine provides that "facilities [that] cannot practicably be duplicated by would-be competitors" must be "shared on fair terms" by "those in possession of them." A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES 67 (2d ed. 1970). This principle, however, is in tension with a countervailing principle that traces to the Supreme Court's famous dictum in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), where the Court stated that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Reconciling the compulsory access doctrine and the *Colgate* doctrine presents one of the most difficult policy quandaries in the field of antitrust: under what circumstances must a competitor, having prevailed over its rivals in the marketplace, be compelled by operation of law to share the fruits of its efforts in order to restore those rivals to a position of competitive equivalence or, at least, viability?

The considerations the govern resolution of the policy dilemma were described by an Assistant Attorney General for Antitrust in explaining his

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[*] This outline is the lineal descendant of an outline that the author originally prepared for a National Institute sponsored by the ABA Antitrust Section in October 1989. *See Compulsory Access to ATM Networks*, in THE CUTTING EDGE OF ANTITRUST: EXCLUSIONARY PRACTICES (1989). The remarks delivered at the National Institute were revised and published as *Three Vexing Issues under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 ANTITRUST L.J. 855 (1989). The author remains grateful to Bennett Rushkoff for conducting the research reflected in the original outline and article and to Donald I. Baker and Karen L. Grimm for various thoughts and passages reflected in the original outline. The author gratefully acknowledges the work of Peter M. Todaro in updating the outline to reflect developments over the past decade and in broadening the scope of the outline for general application.

decision several years earlier to initiate a compulsory access suit by the U.S. Department of Justice:

> where one competitor comes up with a new idea, other competitors must use their own resources to come up with a competing idea. They must not be permitted to "hitch a ride" with him. In other words, the compulsory access rule is a second-best solution from the standpoint of competition. It should therefore be confined to situations where there is a genuine bottleneck monopoly -- to the situation of overriding scale economies [or] high risks. Otherwise, the compulsory access rule can become an insurance policy for laggards. . . .
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> . . . Any finding of bottleneck or essential facility should be made only after a long-run look at the situation. A firm or limited joint venture that develops something new may indeed have a short-term monopoly over that new thing. But is it truly a long-run monopoly, based on scale economies or other controlling factors? Or can it be invented around and competed against? If it can, we should not apply the compulsory access rule to it. Individual firms or limited joint ventures generally engage in innovation because they expect to improve their position vis-a-vis their competitors. If they are told in advance, *as a matter of law*, that they are going to have to grant compulsory access to their competitors anytime they achieve a really significant success, then the law has blunted their incentive to innovate. . . .

NORMAN PENNEY & DONALD I. BAKER, THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS ¶ 18.05[2], at 18-27-29 (1st ed. 1980) (footnote omitted) (describing decision to file *United States v. Rocky Mountain Automated Clearing House Ass'n*, No. 77-391 (D. Colo. dismissed Nov. 17, 1977), and *United States v. California Automated Clearing House Ass'n*, No. 77-1643-LTZ (C.D. Cal. dismissed Oct. 28, 1977)). Similarly, Judge Posner has expressed concern over the proliferation of the compulsory access doctrine and has cautioned against requiring every monopolist to share its facilities:

> . . . The suggestion that the price of being "best" is to be brought under the regulatory aegis of antitrust law and stripped of your power to decide whom to do business with does not identify an interest that the antitrust laws protect. "The successful competitor,

> having been urged to compete, must not be turned upon when he wins."

Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945)).

The decisions that seek to apply the doctrine have yielded as muddled a jurisprudence as one finds in the antitrust field. The author of the leading multivolume treatise in the field has characterized the "so-called essential facilities doctrine . . . [a]s less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are." *See* Philip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1989). This outline cannot hope to resolve the muddle, but perhaps it can clarify the sources of confusion and dispute. Part I provides general background on the historical evolution of the doctrine through 1980. Part II reviews the major cases under the doctrine over in the last two decades and discusses certain distinctions in applying the doctrine as between unilateral and concerted action. Part III address the meaning of "essential" as used by courts. Part IV examines access issues: who may gain access to an essential facility, the terms of access, and justifications for not providing access.

I. HISTORICAL FOUNDATION

The standards governing compulsory access to an essential facility have evolved through three related lines of cases -- traditional group boycott cases, joint venture essential facility cases, and single-firm bottleneck monopoly cases. (Depending on one's reading of the pertinent authority, one might group the cases into different lines. For useful discussions offering alternative classifications, see Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749 (1995), and Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987).) This part of the outline reviews the leading cases through 1980 that form the foundation of the essential facility doctrine.

A. Traditional Group Boycott Cases

Group boycotts (also known as "concerted refusals to deal") refer to agreements among two or more firms at the same level of market structure to refuse to deal with particular suppliers or customers, often for the purpose of disciplining or disadvantaging a competitor. Certain group boycotts are characterized as per se unlawful; but for reasons set forth below, this characterization is often problematic, particularly when used to circumvent the otherwise stringent elements of the essential facility doctrine. Nonetheless, a firm denied access to a joint venture among some of its competitors will often seek to portray its exclusion as an unlawful group boycott.

1. The Early Leading Cases

In *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), the Supreme Court held that concerted refusals among retailers to deal with wholesalers who sold directly to customers were unlawful under an unreasonableness standard. The Court explained that the retailers' exercise of their combined market power to coerce the wholesalers was the essence of the violation. *Id.* at 611-12. In *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), the Court similarly held that concerted refusals among textile and garment manufacturers to deal with stores that sold "style pirated" garments and with other manufacturers that sold to such stores were unlawful. The Court explained that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates [Section 1 of the Sherman Act].'" *Id.* at 465-66 (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899)). For other group boycott cases of the same era, see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 102 n.584 (4th ed. 1997) (collecting authority).

2. Cases of the Per Se Era

During the late 1940s and through the 1950s, the Supreme Court stated in dicta that group boycotts were per se violations of the antitrust laws. *See id.* at 102-03. The first case to so hold was *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), in which the plaintiff, a retailer of household appliances, alleged that a competing retailer had conspired with appliance manufacturers either not to sell to the plaintiff or to sell to it only on discriminatory and unfavorable terms. The defendants moved for summary judgment on grounds that their conduct was not unreasonable, for numerous other retailers competed in the area, and plaintiff had not alleged any effect on the price, quantity, or quality of household appliances. Rejecting these arguments, the Court wrote that the alleged boycott could be condemned regardless of its effect:

> Group boycotts . . . have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily stimulate competition they were banned.

Id. at 212 (citations omitted) (quoting *Fashion Originators' Guild*, 312 U.S. at 466). The Court again applied the per se rule in *Silver v. New York Stock Exchange*, discussed *infra* at part I.B.3, and in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), in which a trade association of automobile dealers had persuaded General Motors to bar certain dealers from selling to discount outlets. In striking down this "classic conspiracy" to "eliminate a class of competitors," *id.* at 140, the Court wrote that "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct," *id.* at 146.

3. The Dubious Vitality of Per Se Characterization

Although the Supreme Court has continued to indicate that group boycotts fall within the categories of restraints that

are per se unlawful, *see* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 103 n.591 (4th ed. 1997), the Court limited the reach of the per se rule in *Northwest Wholesale*, discussed *infra* at part II.C. Even earlier, however, the Court had recognized that "boycotts are not a unitary phenomenon," *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (1978) (quoting PHILIP E. AREEDA, ANTITRUST ANALYSIS 381 (2d ed. 1974)), and that prior decisions of the Court "reflect a marked lack of uniformity in defining the [per se] term," 438 U.S. at 543. The Court in *Northwest Wholesale*, 472 U.S. at 294, and two courts of appeals, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1366 (5th Cir. 1980); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distrib., Inc.*, 637 F.2d 1376, 1382-83 (9th Cir.), have quoted Professor Sullivan for the proposition that "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine," LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83, at 229-30 (1977). Reviewing authority, one prominent commentary concluded: "[T]he circumstances in which a concerted refusal to deal constitutes a per se unlawful group boycott have not always been clearly defined." ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 101-02 (4th ed. 1997).

B. Joint Venture Essential Facility Cases

A parallel line of cases (involving substantially fewer decisions than the group boycott line) addresses the circumstances under which competitors may demand compulsory access to joint venture essential facilities. The leading decisions through 1980 are reviewed below.

1. *Terminal Railroad*

A concept akin to the essential facility doctrine was first applied under the federal antitrust laws in *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912), in which the government filed suit against 38 corporate and individual defendants challenging their "unification of substantially every terminal facility by which the [rail] traffic of St. Louis is served," *id.* at 394, into a single terminal company owned by multiple railroad companies. The

record indicated that rail access to St. Louis required use of either of two bridges spanning the Mississippi River and connecting the city with the Illinois shore. The two bridges, originally owned independently, had come under the control of the venture; and certain geographic and topographic factors assured that "it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company," *id.* at 397. The Court noted with "utmost significance" that the terminal company was not an independent entity that dealt impartially with each of the railroads in the area; it contrasted this structure with a company that "was in law and fact the agent of all." *Id.* at 398. The Court emphasized that "in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals." *Id.* at 405. The circumstances in St. Louis, however, were "most extraordinary": "The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities." *Id.* Accordingly, on the facts before it, the Court held that the combination of terminal facilities was unlawful. *Id.* at 409. As to remedy, the Court rejected the government's proposal of dissolving the combination and instead provided (1) for the future admission of railroads to the combination upon terms that would place the "applying company upon a plane of equality . . . with the present proprietary companies" and (2) for the future use of the venture's facilities by nonmember railroads upon terms that would "place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *Id.* at 411.

2. *Associated Press*

The principles set forth in *Terminal Railroad* were followed in ensuing years in cases involving local towing facilities in several Great Lakes ports, *see United States v. Great Lakes Towing Co.*, 208 F. 733 (D. Ohio 1913), 217 F. 656 (D. Ohio 1914), *appeal dismissed*, 245 U.S. 675 (1917); a fish market, *see United States v. New England Fish Exch.*, 258 F. 732 (D. Mass. 1919); and a sponge market, *see United States v. Tarpon Sponge Exch.*, 142 F.2d 125 (5th Cir. 1944). The next significant development in the evolution of the essential facility doctrine, however, came with *Associated Press v. United States*, 326 U.S. 1 (1945), in which the government challenged provisions in AP's By-Laws prohibiting members from selling news to nonmembers and granting each member the power to block its nonmember competitors from membership. In assessing the effect of the restrictions, the Court quoted the district court's finding that "[i]t is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting all of the news of the world, or any substantial part thereof; aside from the administrative and organization difficulties thereof, the financial cost is so great that no single newspaper acting alone could sustain it." *Id.* at 13 n.10. The Court observed that "[i]nability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers." *Id.* at 13. Rejecting the contention that other news agencies were available to service nonmember publishers, the Court wrote that "the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from [ ] condemnation. . . ." *Id.* at 17. Elsewhere, the Court dismissed the fact "that AP had not yet achieved a complete monopoly" as "wholly irrelevant." *Id.* at 13. The Sherman Act, the Court wrote, was "specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete." *Id.* at 15. The Court specifically denied that "we reach our conclusion by application of the 'public utility' concept to the newspaper business. . . . We merely hold that arrangements or combinations designed to stifle

competition cannot be immunized by adopting a membership device accomplishing that purpose." *Id.* at 19. The Court affirmed the decree entered below subject to an interpretation requiring AP news "to be furnished to competitors of old [AP] members without discrimination through By-Laws controlling membership, or otherwise." *Id.* at 21. Curiously, the opinion did not cite *Terminal Railroad*; it relied more heavily on boycott authority such as *Eastern States Lumber* and *Fashion Originators' Guild*. (*Terminal Railroad* was relied upon by a concurrence.) Nonetheless, *Associated Press* has been widely regarded as providing "a clear guide" to the application of the Sherman Act to the foreclosure of scarce facilities: "[F]or refusal of entry into an association to constitute illegal restraint of trade there must be some important facility -- sometimes a virtual 'bottleneck' -- in the association's control, such that, by keeping it exclusive to themselves, the members of the association impose a real handicap on would-be competitors. This handicap need not be fatal; the facility need not be 'indispensable': it is enough that the association's exclusive hold on the scarce resource confers significant competitive advantages on members as against outsiders." A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES 68 (2d ed. 1970) (footnote omitted). The principles set forth in *Associated Press* in conjunction with *Terminal Railroad* were rapidly followed in cases involving a tobacco market, *see American Fed'n of Tobacco Growers v. Neal*, 183 F.2d 869 (4th Cir. 1950), and a produce exchange building, *see Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir. 1952).

3. *Silver*

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Supreme Court considered whether the Exchange was liable to a nonmember broker-dealer for injury suffered when the Exchange, pursuant to its rules, ordered members to discontinue private direct telephone wire connections with the nonmember without notice, explanation, or hearing. The Court began its analysis by observing that the challenged conduct plainly would have given rise to per se liability under the Sherman Act, had it occurred in an unregulated context. Citing *Fashion Originators' Guild*, *Associated Press*, *Klor's*, and *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), the Court stated: "[t]he concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market." *Id.* at 347. In light of the institutional characteristics of trading in over-the-counter securities, the Court wrote, a private wire connection was "essential," and denial of access to such connections would substantially hamper an over-the-counter dealer in its crucial endeavors. *Id.* at 348. The Court next turned to whether the Exchange's actions had been exempted from the antitrust laws under the Securities Exchange Act of 1934 or whether the actions might be regarded as justified self-regulation. The Court answered both questions in the negative, *see id.* at 357-67, in part because the lack of adequate procedural safeguards indicated that the Exchange had exceeded the scope of its self-regulatory authority, *id.* at 365. The Court did not specify a remedy, instead remanding the case for further proceedings. *Id.* at 367.

C. Single Firm Bottleneck Monopoly Cases

A third line of cases (also involving substantially fewer decisions than the group boycott line) addresses the circumstances under which competitors may demand compulsory access to a bottleneck monopoly owned and operated by a single firm. The leading decisions through 1980 are reviewed below.

1. *Otter Tail*

The Supreme Court applied an essential facility analysis to a single firm monopoly in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). Otter Tail, a wholesaler and retailer of electric power, distributed at retail to 465 towns in three states (91% of the towns in its service area) under ten- to twenty-year franchises granted by the individual municipalities. Within each municipality, the distribution of electric power was a natural monopoly, and any competition present was "generally between Otter Tail and a prospective or existing municipal system." *Id.* at 370-71. Prospective municipal systems could not purchase wholesale power without access to existing transmission lines. For some of the municipalities in Otter Tail's service area, however, all such lines belonged to Otter Tail, which "refused to sell the new systems energy at wholesale and refused to agree to wheel power from other suppliers of wholesale energy." *Id.* at 371. The Court accepted the district court's determination that Otter Tail had "'a strategic dominance in the transmission of power in most of its service area' and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." *Id.* at 377. The Court also noted that "no engineering factors . . . prevented Otter Tail from selling power at wholesale to those towns that wanted municipal plants or wheeling the power." *Id.* at 378. Relying on *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), and its progeny, *see* 410 U.S. at 377, for the principle that "[u]se of monopoly power 'to destroy threatened competition'" constitutes an attempt to monopolize, the Court affirmed the district court's remedial decree, which enjoined Otter Tail from "[r]efusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in [its service area]" or refusing to use its transmission lines to wheel electric power. *Id.* at 375. Although such a decree would normally burden a court with ongoing responsibilities, one commentary has observed that "[t]he availability of the Federal Power Commission's rate-setting and investigatory authority may have persuaded the *Otter Tail* Court to affirm the issuance of a decree which

under other circumstances might have been too difficult to enforce" because of the price supervision required by an order to sell or wheel power. Note, *Refusals To Deal by Vertically Integrated Monopolists*, 87 HARV. L. REV. 1720, 1725 (1974) (footnote omitted). (The ICC similarly had been available following the Court's decree in *Terminal Railroad*.)

2. *Grand Caillou*

In *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *aff'd in part and rev'd in part sub nom. LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966), the Commission ordered five members of a Louisiana family engaged in the production of canned shrimp and in the development and distribution of patented shrimp peeling machinery to cease and desist from "[d]iscriminating between lessees of such machinery by charging higher rental or use rates to any lessee than are charged to any other lessee," *id.* at 870. The record showed that the machinery was leased subject to a fee schedule based the average size of the shrimp processed; the effect was that shrimp canneries in the Northwest were charged twice the average rate as canneries on the Gulf Coast, due to the different characteristics of their respective shrimp harvests. *Id.* at 836-37. Analogizing the Northwest canneries to "a drowning man," the Commission found that the "discriminatory high peeling rate" had no justification and had been the "principal difficulty" that the Northwest canneries faced in competing with the Gulf Coast canneries. During the course of its opinion, the Commission found that the effect of the peeling machinery "was to obsolete hand picking as an economically feasible method of processing in the canning industry. It became absolutely necessary to install and utilize the machines. . . ." *Id.* at 833. The Commission did not cite essential facility cases, however, and its logic, while largely unstated, appears to have been based on a price discrimination theory. A separate opinion by Commissioner Elman relied on *Terminal Railroad* and *Associated Press* for the proposition that firms possessing monopoly power are subject "to some of the obligations of fair and equal treatment borne by publicly regulated utilities." *Id.* at 868. Observing that the respondents' fee structure was "not dictated by efficiency" and "may well result in the destruction of a substantial

segment of the shrimp canning industry," Elman wrote that the "right of a monopolist to exploit his monopoly . . . does not, in my opinion, include the right to destroy or cripple a major segment of industry." *Id.* at 868-69. The *Grand Caillou* opinion has been criticized by one commentary as "show[ing] no awareness of the considerations bearing on the wisdom of requiring an integrated monopolist to deal with his rivals." 3 PHILIP E. AREEDA & DONALD I. TURNER, ANTITRUST LAW ¶ 729d, at 239 (1978).

3. *Hecht*

In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), a group of promoters who had unsuccessfully sought an American Football League franchise for Washington, D.C. brought suit challenging a restrictive covenant in the thirty-year lease pursuant to which the District of Columbia Armory Board leased Robert F. Kennedy Stadium to the Washington Redskins. The covenant at issue provided that "at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins." 570 F.2d at 985 n.2. Among other issues addressed by the court of appeals was the applicability of the essential facility doctrine to RFK Stadium. In holding that the district court had erred in failing to instruct the jury as to the elements of an essential facility in accordance with the promoters' request, the court of appeals observed that:

> To be "essential" a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants. Necessarily, this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately.

Id. at 992-93 (footnotes omitted). The court held that the district court would have been "substantially correct" to have given the instruction that

> if the jury found (1) that use of RFK stadium was essential to the operation of a professional football team in Washington; (2) that such stadium facilities could not practicably be duplicated by potential competitors; (3) that another team could use RFK stadium in the Redskins' absence without interfering with the Redskins' use; and (4) that the restrictive covenant in the lease prevented equitable sharing of the stadium by potential competitors, then the jury must find the restrictive covenant to constitute a contract in unreasonable restraint of trade.

Id. at 993. The court rejected defendants' argument that the jury should have been permitted to find the restrictive covenant "reasonable": "The garden-variety restrictive covenant does not violate § 1 unless it unreasonably restrains trade; when the restrictive covenant covers an essential facility, however, all possible competition is by definition excluded and the restraint is thus unreasonable *per se* -- provided, of course, that the facility can be shared practically." *Id.* at 993 n.45. This quotation appears partly responsible for the courts' occasional characterization of the essential facility doctrine as a per se rule. *See, e.g.*, *Venture Tech., Inc. v. National Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78,167 (W.D.N.Y. 1981) (jury instruction on essential facility doctrine referred to as a "per se charge"), *rev'd on other grounds*, 685 F.2d 41 (2d Cir. 1982). *But see* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.2f (Supp. 1988) (essential facility doctrine "is not a 'per se' rule in any sense").

II. THE INCOMPLETE CONVERGENCE OF THE THREE LINES

The three lines of cases discussed in the preceding part I -- traditional group boycott cases, joint venture essential facility cases, and single-firm bottleneck monopoly cases -- have long borrowed authority from one another. Beginning in 1980, however, the three lines converged dramatically, so that the legal standards governing group boycotts ancillary to legitimate integration, access to joint venture facilities, and access to single-firm bottlenecks grew largely similar (although some courts still make important distinctions). The discussion below reviews the leading developments since 1980.

A. *MCI Communications*

The opinion in *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), was rendered on appeal from a judgment entered on a jury verdict finding AT&T liable for numerous types of misconduct, including the alleged refusal by AT&T to provide MCI with interconnections to local circuits necessary for MCI to provide telephone customers with its long distance service. In finding that a jury could have concluded that the refusal constituted an act of monopolization, the court of appeals assessed the challenged conduct under the essential facility doctrine. Citing *Hecht*, *Otter Tail*, and *Terminal Railroad*, among other authority, the court wrote:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

708 F.2d at 1132-33. The court's rationale for applying the doctrine to single-firm conduct was that "a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market to another." *Id.* at 1132. Since its holding, *MCI* has provided the most frequently cited formulation of the essential facility doctrine, and it has been widely applied by federal courts. *See, e.g., City of Anaheim v. S. Cal. Edison* Co., 955 F.2d 1373, 1380 (9th Cir. 1992); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991); *Delaware & Hudson Rwy. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990); *McKenzie v. Mercy Hosp. of Independence*, 854 F.2d 365, 369 (10th Cir. 1988); *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976, 983 (9th Cir. 1988); *Flip Side Prods., Inc. v. Jam Prods., Ltd.*, 843 F.2d 1024, 1032 (7th Cir. 1988); *Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501, 1537 (N.D. Ill. 1988). One commentator has generalized the elements of the MCI test to yield the following four elements for "imposing an obligation to make a facility available to competitors":

1. Control of the facility by a monopolist or a group of competitors with monopoly power.

2. The foreclosed competitor's inability practically or reasonably to duplicate the facility or its economic function.

3. The denial of the use of the facility or the imposition of restrictive terms . . . with the consequence of substantial harm to competition in a relevant market in which the monopolist competes (or would be forced to compete) with the plaintiff(s) absent the practice.

4. The absence of a "valid business reason."

William B. Tye, *Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine*, 8 ENERGY L.J. 337, 346 (1987). Tye's fourth element reflects the Supreme Court's analysis in *Aspen*, *infra*, which appears to have extended *MCI* is narrower inquiry into the feasibility of providing access.

B. *Aspen*

The Tenth Circuit and Supreme Court opinions in *Aspen Highlands Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985), were rendered on appeal from a judgment entered on a jury verdict finding the operator of three downhill skiing facilities at Aspen liable under a monopolization theory for discontinuing participation in a joint marketing program (offering multiday, multimountain lift tickets) with the operator of a fourth facility. The defendant assigned error in the denial of its motions for a directed verdict and for judgment n.o.v. The two opinions on appeal considered the circumstances under which a firm with monopoly power must deal with a competitor.

1. The Tenth Circuit Opinion

The court of appeals affirmed based on "two conceptually similar lines of cases which impose a duty to deal upon a monopolist." 738 F.2d at 1519 (quoting *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 855 (6th Cir. 1979). First, citing *Terminal Railroad* and *Gamco* and adopting the

elements identified in *MCI* as necessary to establish liability under the essential facility doctrine, the court concluded that proof sufficient to sustain a jury verdict as to each element had been presented. 738 F.2d at 1520-21. Second, the court held that the plaintiff had presented sufficient evidence for the jury to conclude that the defendant acted with the intent to create or maintain a monopoly. *Id.* at 1521-22. As the court explained,

> in various contexts courts have employed an intent test under which a "business is free to deal with whomever it pleases so long as it has no 'purpose to create or maintain a monopoly.'" *Byars, supra*, 609 F.2d at 855 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see also MCI, supra*, 708 F.2d at 1148. "These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility is 'essential.'" *MCI, supra*, 708 F.2d at 1148 (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (newspaper publisher enjoined from refusing to accept advertisements from customers who advertised with competing radio station); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (permissible for jury to infer that defendant's refusal to sell to plaintiffs was in pursuance of purpose to monopolize)).

738 F.2d at 1519 (citations omitted in part). The court

> decline[d] to adopt a narrow rule that would immunize an *unintegrated* monopolist from antitrust liability for refusing a competitor access to an essential facility. . . . Vertical integration is not essential to finding a violation of the antitrust laws for refusal to deal under an intent test. We believe that it is also apparent that no bright line can be drawn between the bottleneck and intent cases.

Id. at 1518 n.11 (emphasis added). The court explained that the overlap of the essential facility doctrine and the intent test is "apparent upon examination" of *Otter Tail*. *Id.* at 1520 n.13 (quoting *Byars*, 609 F.2d at 857). The court also identified two other cases "discussing a duty to deal

but not distinguishing between the essential facilities doctrine and the intent test," 738 F.2d at 1520 n.13 (citing *Home Placement Serv. v. Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982); *Mid-Texas Communs. Sys., Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1387-88 & n.12 (5th Cir.) ("While in theory there exist differences between the two approaches, in practice the theories are similar")).

2. The Supreme Court Opinion

The Supreme Court affirmed the court of appeals based solely on that court's second theory, the intent test. The Court specifically found "it unnecessary to consider the possible relevance of the 'essential facilities' doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose." 472 U.S. at 611 n.44. Nonetheless, in assessing whether the defendant had "any purpose to create or maintain a monopoly," *id.* at 602 (quoting *Lorain Journal*), the Court observed that the challenged conduct, while "an important change in the character of the market," was not necessarily anticompetitive or exclusionary, *id.* at 604. "The question whether (defendant's) conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [plaintiff]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605. The Court proceeded to observe that the challenged conduct reduced consumer convenience and flexibility, impaired the plaintiff's ability to compete (in part because "the development of a new distribution system . . . proved prohibitively expensive"), and lacked business justification. *Id.* at 605-10. The various factors identified by the Court likely would have been adequate to make out the four essential facility elements identified in *MCI*.

3. Although affirmed on appeal, the district court's jury instructions have been sharply criticized by commentators. Those instructions included the following interrogatory: "Do you find by a preponderance of the evidence that the defendants willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for

anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident?" 472 U.S. at 597 n.21. Areeda and Hovenkamp observe that these instructions might condemn "[v]irtually any act of a monopolist" and, through a series of illustrative examples, suggest that certain refusals by a monopolist to deal with competitors should not be condemned, even if motivated in part by an "anticompetitive or exclusionary" purpose. *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.1g (Supp. 1988).

C. *Northwest Wholesale*

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Supreme Court considered the application of group boycott doctrine to the expulsion of a member from a wholesale purchasing cooperative without notice, explanation, or hearing. The case was presented on appeal from the Ninth Circuit, which had relied on *Silver*, *supra* part I.B.3, in holding that expulsion from a cooperative venture was per se unlawful unless adequate procedural safeguards were afforded. *See* 472 U.S. at 291-92. The Court reversed. It distinguished *Silver*'s characterization of collective refusal to deal as per se unlawful in the absence of implied repeal on the ground that "the New York Stock Exchange occupied such a dominant position in the securities trading markets that the boycott would devastate the nonmember." *Id.* at 291. The Court also limited the significance attached to adequate procedural protections in *Silver* to circumstances impliedly repealing the antitrust laws to accommodate an alternative regulatory scheme. *Id.* at 292-93. The Court explained:

> "Group boycotts" are often listed among the classes of economic activity that merit per se invalidation under § 1. Exactly what types of activity fall within the forbidden category is, however, far from certain. . . .
>
> Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive

> struggle." In these cases, the boycott often cut[s] off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market.

Id. at 293-94 (citations omitted). The Court also observed that the act of expulsion did not necessarily imply anticompetitive purpose or effect:

> Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. . . . Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have anticompetitive effect is not warranted. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis.

Id. at 296-97 (citations and footnote omitted). The Court did note, however, that "a concerted refusal to deal . . . on substantially equal terms . . . might justify *per se* invalidation if it placed a competing firm at a severe competitive disadvantage." *Id.* at 295-96 n.6. The Court also noted that a rule-of-reason analysis might appropriately inquire into the cooperative's motive for expelling a member: "If [the cooperative's] action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices, an inference of anticompetitive animus might be appropriate." *Id.* at 296 n.7.

D. *Kodak*

In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Supreme Court considered a manufacturer's policies limiting the availability of replacement parts for its equipment to independent service organizations (ISOs), thus hindering the ISOs' ability to compete with the manufacturer in servicing its equipment. The Court affirmed a decision of the Ninth Circuit, which had reversed and remanded a district court's entry of summary judgment for the manufacturer after truncated discovery. Although the case focused largely on the ISOs' allegations that Kodak's practices constituted an unlawful tying arrangement in violation of Section 1 of the Sherman Act,

the Court also considered allegations of monopolization and attempted monopolization in violation of Section 2. As to the first element of a monopolization claim, possession of monopoly power, the Court concluded that the ISOs' "evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market," *id.* at 481, was sufficient to survive summary judgment. The Court disagreed with Kodak's contention "that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. . . . Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed only of those companies that service Kodak machines." *Id.* at 481-82 (citation omitted). As to the second element of a monopolization claim, willful use of monopoly power, the Court again concluded that the ISOs had presented sufficient evidence. Citing *Aspen Skiing* among other authority, the Court wrote:

> If Kodak adopted its parts and service policies as part of a scheme of willful acquisition of monopoly power, it will have violated § 2.
>
> . . . [R]espondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether "valid business reasons" can explain Kodak's actions.

Id. at 483 (citations and notes omitted). Although Kodak had identified three putative justifications for its actions, factual questions about the validity and sufficiency of each made summary judgment inappropriate. *Id.* As to the first two justifications -- (1) promotion of interbrand competition by allowing Kodak to enhance its quality of service and (2) improvement of asset management by reducing Kodak's inventory costs -- the Court found triable issues of fact. *Id.* at 483-85. As to the third justification -- prevention of free-riding on Kodak's capital investment in equipment, parts, and service -- the Court was harsher:

> Kodak does not dispute that respondents invest substantially in the service market, with training of repair

> workers and investment in parts inventory. Instead, according to Kodak, the ISO's are free-riding because they have failed to enter the equipment and parts market. This understanding of free-riding has no support in our case law.

Id. at 485 (note omitted). For a free-riding argument to be applicable, the Court wrote, "the ISO's would have to be relying on Kodak's investment in the service market; that, however, is not Kodak's argument." *Id.* at 485 n.33.

E. Recent Cases Distinguishing Between Coordinated and Unilateral Action

Although *MCI, Northwest Wholesale*, and their progeny have unified the application of the essential facility doctrine in single firm and multiple firm settings, some recent cases make clear that courts do still distinguish between unilateral and coordinated actions even in essential facility cases.

1. In *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), rival airlines claimed that American Airlines and United Airlines each individually violated Section 2 by denying access to their respective computer reservation systems. The court of appeals affirmed the summary judgment in favor of American and United. The court made clear that the antitrust analysis of unilateral conduct is fundamentally distinct from that of concerted actions by multiple firms. "*Griffith, Associated Press*, and *Terminal Railroad* are of limited value because each case involved a *combination* in restraint of trade, not single firm conduct. Under the Sherman Act, combinations and individual firms are treated quite differently." *Id.* at 542. The court continued by quoting Areeda:

> > [*Associated Press*] cannot automatically govern unilateral denial of an essential facility for several reasons. First, and most obvious, concerted action is exceptional, whereas *unilateral* action is omnipresent. Innumerable firms engage in unilateral action every day. We have to be very wary about examining the decisions of each of those firms in our economy . . . . Second, concerted exclusion is much easier to remedy, particularly when an outsider, who is willing to invest on an equal basis, seeks admission at the time the joint venture is created. . . . Third, admission to a joint

> venture is a one-time remedy that does not require [the exertion of] day-to-day control [by the courts].

Id. (quoting Philip E. Areeda, *Essential Facilities: An Epithet In Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 844-45 (1990)) (emphasis added by court). The court characterized *Otter Tail* as the "sole Supreme Court case involving a single firm's control of an 'essential facility'" and argued that its application should be limited because it "was an extreme case" in which "[g]iven the difficulty of duplicating Otter Tail's facilities, [the] refusal did more than merely impose some handicap on potential competitors; it eliminated all possibility of competition in the downstream market. *Id.* at 543.

2. In *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), the court found that a monopolist manufacturer's unilateral refusal to license diagnostic software to an ISO was not unlawful. Distinguishing between joint and single-firm conduct, the court wrote: "Despite the theoretical possibility, there have been relatively few cases in which a unilateral refusal to deal has formed the basis of a successful Section 2 claim. Several of the cases commonly cited for a supposed duty to deal were actually cases of joint conduct in which some competitors joined to frustrate others." *Id.* at 1183 (citing *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912)). The court identified *Otter Tail* as the case prior to *Aspen Skiing* "that probably came closest to condemning a true unilateral refusal to deal," *id.* at 1183, but it distinguished *Otter Tail* on grounds that the capital-intensive public utility facility at issue in the case "could not effectively be duplicated and occupied a distinct separate market," *id.*, and that "the Supreme Court laid considerable emphasis on supported findings in the district court 'that Otter Tail's refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position'," *id.* (quoting *Otter Tail*, 410 U.S. at 378). As to *Aspen Skiing*, the court offered two alternative readings -- "It is not entirely clear whether the Court in *Aspen Skiing* merely intended to create a category of refusal-to-deal cases different from the essential facilities category or whether the Court was inviting the application of more general principles of antitrust analysis to unilateral refusals to

deal." *Id.* Based on the parties' positions, the court assumed that *Aspen* did not create a separate category of refusal-to-deal cases.

F. Effects of the Convergence

1. *Northwest Wholesale* has resulted in the substantial unification of essential facility doctrine and group boycott doctrine, at least as to "boycotts" ancillary to legitimate integration. Numerous courts have read *Northwest Wholesale* to mandate rule-of-reason analysis of alleged boycotts unless the boycotting party "possesses market power or exclusive access to an element essential to effective competition." *See, e.g.*, *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1030 (9th Cir. 1988); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii*, 810 F.2d 869, 878 (9th Cir. 1987); *Richards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1333 (9th Cir. 1986); *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 355 (5th Cir. 1986); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679, 693 (E.D. Mich. 1988); *American Floral Servs. v. Florists Transworld Delivery Ass'n*, 633 F. Supp. 201, 221-22 (N.D. Ill. 1986); *cf. Rothery Storage & Van Co. v. Allied Van Lines*, 792 F.2d 210 (D.C. Cir. 1986) (stating that *Northwest Wholesale* required that group boycotts ancillary to economic integration be judged according to purpose and effect).

   a. In *SCFC ILC, Inc. v. Visa USA, Inc.*, the court observed that the Supreme Court has rejected per se treatment of joint venture cases consistently. 36 F.3d 958, 964 (10th Cir. 1994) (citing *Broadcast Music, Inc,. v. Columbia Broad., Inc.*, 441 U.S. 1 (1979) and *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), in addition to *Northwest Wholesale*). "[T]he [Supreme] Court directs us instead to look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation; whether it has the effect of decreasing output; and whether it affects price." *Id.*

   b. Some courts have held that even if market power or exclusive access is involved, group boycotts are properly analyzed under the rule of reason. In *Carleton*

v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926, 933 (D. Vt. 1991), the court held that even if a group boycott (expulsion from a Dairy Herd Improvement Association) denies access to "essential facilities" (official lactation testing and record keeping) "*per se* invalidation [is not justified] where other 'surrounding circumstances' suggest, as here, that the challenged conduct should be weighed under the rule of reason." The court observed that *Northwest Wholesale* "says only the 'market power or exclusive' access is a necessary precondition before expulsion from a cooperative should be deemed per se unreasonable. Neither market power nor exclusive access is a sufficient condition. . . ." *Id.* *See also Wilk v. American Med. Ass'n*, 895 F.2d 352, 359 (7th Cir. 1990) (using a rule of reason analysis to evaluate a group boycott in the context of a learned profession where the "nature and extent of the restraint's anticompetitive effect was too uncertain to warrant *per se* treatment"). *But see Wigod v. Chicago Mercantile Exch.*, 981 F.2d 1510, 1517 (7th Cir. 1992) (holding a per se analysis was appropriate in group boycott case where the defendant "is a monopolistic market that wields great control over who may be a member").

c. One unintended consequence of *Northwest Wholesale* may be increased (or at least newly recognized) exposure facing limited-access joint ventures that are not essential, but that nonetheless possess market power. Consider a joint venture of narrow scope among one-third of the participants in a well-defined market. The venture probably is not essential, for it presumably could be duplicated with membership drawn from the other two-thirds of market participants. Yet its share might be sufficiently great to support a finding of market power. Under the "market power or exclusive access" standard set forth in *Northwest Wholesale*, a court might characterize the exclusion of a competitor from the venture as a per se unlawful group boycott. Such a result would be unfortunate indeed. Joint ventures often seek to restrict participation for legitimate competitive reasons. Where efficient scale can be attained with only limited

industry participation, such restrictions are desirable because they enable the development of multiple, competing ventures and are more likely to yield an efficient market outcome. A rule requiring that competitors be granted access to a non-essential venture would have at least three adverse policy implications. First, it might undermine the development of multiple competing ventures, since competitors would have the incentive to free ride on an existing successful venture, rather than to suffer the risk associated with organizing their own. Second, in markets with a limited number of optimally sized ventures, the ventures' members might lack adequate incentive to compete vigorously; for if they were to succeed and acquire market power, they would be compelled to grant competitors access to the fruits of their efforts. Third, where an optimally sized venture would involve a large fraction of market participants, members of a particular venture might choose to operate at a suboptimal scale for fear that an efficiently sized venture would lead to compulsory access.

d. The severity of the foregoing policy dilemma depends largely on the nature of the per se condemnation still sanctioned by *Northwest Wholesale*. Notwithstanding occasional perceptions to the contrary, a per se standard and a rule of reason standard are not analytically distinct analyses, but rather alternative points along a spectrum. *See* Timothy Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859 (1989). The term "per se unlawful" is best understood to mean that the reasonableness inquiry may be truncated without completely analyzing all justifications for the challenged conduct or balancing the justifications against the likely anticompetitive effects. *Id*. Yet how early the analytical process may be truncated in a particular instance is far from settled. *See, e.g.*, 7 PHILIP E. AREEDA, ANTITRUST LAW ch. 15 (1986). In some decisions "per se unlawful" has meant that the court is not permitted to entertain or assess the defendant's proffered justifications for the challenged conduct, regardless of whether the defendant has market power. *Id*. (This is clearly not the meaning in *Northwest*

Wholesale, which requires a market power showing before a per se characterization may be invoked. *See Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1030 n.9 (9th Cir. 1988) (noting that *Northwest Wholesale* "seems to suggest that the facts be developed as in a rule of reason case . . . in order to determine whether the conduct is per se illegal").) In other decisions the term has meant that the court is not required to entertain the defendant's justifications if the plaintiff has first established that the defendant has market power or perhaps that the challenged conduct had an anticompetitive effect. 7 PHILIP E. AREEDA, ANTITRUST LAW ch. 15 (1986). In still other decisions the term has meant that the court has considered the defendant's justifications, but has not found them convincing and therefore is not required to balance the procompetitive aspects of the justifications against the anticompetitive aspects of the challenged conduct. *Id.*

2. *Kodak* has resulted in the substantial convergence of essential facility doctrine and tying arrangement doctrine, at least in the context of refusals to deal in a critical component that the supplier markets with other products. Where an "essential facility" is marketed as a component of a product bundle, competing suppliers of the other components may seek access not under an essential facility theory, but under a tying arrangement theory.

    a. *Kodak* revives a line of cases that traces, ironically, to conduct involving the same defendant a half-century earlier. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), the Supreme Court upheld a finding of monopolization arising from Kodak's refusal to sell photographic supplies at wholesale prices to a retailer that had refused to sell its business to Kodak, which at the time was seeking to integrate into retail distribution. The Court held that the refusal to deal was "in pursuance of a purpose to monopolize." *Id.* at 375. The line of cases continued with *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), in which the Court ruled that a newspaper publisher violated Section 2 by refusing to accept advertisements from customers that also advertised on

radio stations, which competed with the newspaper for advertising revenues. The 1992 *Kodak (ITS)* decision does not cite either *Southern Photo* or *Lorain Journal*, but it relies on *Aspen Skiing*, which in turn relies heavily on *Lorain Journal*. For a thoughtful discussion of *Southern Photo* and *Lorain Journal*, see Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749 (1995).

b. The use of a tying theory as an access mechanism in lieu of an essential facility theory is illustrated by the pending action by the U.S. Department of Justice against Microsoft Corp. The Department alleges that Microsoft's bundling of its Internet browser with its operating system and that its contractual provisions barring OEMs from offering competing browsers more prominently than the Microsoft browser are unlawful practices. Complaint ¶¶ 130-41, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998). The Department seeks to enjoin Microsoft from bundling its browser with its operating system, unless it also bundles the most current version of the most popular competing browser, Netscape, and permits OEMs to delete the Microsoft browser. Prayer for Relief ¶ 2.e. Although the Department contends that Microsoft has monopoly power in operating systems, it does not characterize the Microsoft operating system as an essential facility, and its complaint does not rely on the essential facility doctrine. Instead, the Department frames its allegations in terms of mainstream exclusive dealing, tying, monopolization, and attempted monopolization theories.

3. When courts do not distinguish between the standards governing compulsory access to joint venture essential facilities and those governing compulsory access to single-firm bottleneck monopolies, they are able to defer resolution of an especially vexing issue: when should an enterprise owned by many members of an industry be treated as a single entity for antitrust purposes? (Corporations, after all, are not typically treated as conspiracies among their shareholders. *But cf. Bascom Food Prods. Corp. v. Reese*

Finer Foods, Inc., 715 F. Supp. 616, 632 (D.N.J. 1989) (analyzing a food distribution corporation's refusal to supply a grocer as a horizontal group boycott among the grocers who were shareholders in the corporation). Little authority addresses the issue directly. For one thoughtful treatment, see 7 PHILIP E. AREEDA, ANTITRUST LAW ¶ 1478, at 349 (1986) ("The 'single-entity' answer seems appropriate for venture activities not governing the members' conduct, while the 'continuing conspiracy' answer seems wise for rule-making activities and for those developments which could make continued collaboration unreasonable for the future"). To the extent that an enterprise may fairly be characterized as a joint venture rather than a single entity, however, there is some question as to whether it *ought* to be subject to the same compulsory access standards as a single-firm bottleneck monopoly. *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.1d, at 661 (Supp. 1988) ("Without necessarily precluding the imposition of a duty to deal upon a monopolist in some circumstances, there are several reasons for doing so less readily than in the combination cases like *Terminal* and *AP*").

4. The various policy implications of *MCI*, *Aspen*, and *Northwest Wholesale* have been debated at length in the literature. *See, e.g.*, Allen Kezsbom & Alan Goldman, *Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1; Philip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989); William Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as an Illustration*, 58 ANTITRUST L.J. 855 (1989); Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance after Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015 (1986); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986); James R. Ratner, *Should There Be an Essential Facility Doctrine?*, 21 U. CAL. DAVIS L. REV. 327 (1988); Arthur H. Travers, Jr., *Does a Monopolist Have a Duty to Deal with Its Rivals? Some Thoughts on the Aspen Skiing-Case*, 57 U. COLO. L. REV. 727 (1986); William B. Tye, *Competitive Access: A Comparative Industry Approach to the*

Essential Facility Doctrine, 8 ENERGY L.J. 337 (1987); Spencer W. Waller, *The "New" Law of Monopolization: An Examination of MCI Communications Corp. v. American Telephone & Telegraph Co.*, 32 DE PAUL L. REV. 595 (1983); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433 (1987); Note, *Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 VA. L. REV. 1069 (1988); Casenote, *The Grinnell Test of Monopolization Sounds a False Alarm: Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 28 B.C. L. Rev. 415 (1987); *see also* Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441 (1983).

III. ESSENTIALITY ISSUES

This part of the outline considers several questions that relate to whether a facility may be considered essential. First, is the facility part of a category that is so competitively significant that denial of access inflicts a severe handicap? Second, is the facility sufficiently dominant in the provision of its category of service so as to be viewed as unique, at least in a static sense? Third, can the facility be practically duplicated, at least to a degree that can be viewed as a tolerable check on the exercise of its dominance? While not the same, these questions are akin to the more conventional antitrust issues of market definition, market share (or perhaps short-run market power) measurement, and entry assessment. And the questions are related to each other, in that they all inquire into sources of limitation on the market power of any particular facility.

A. Availability of Substitutes

1. In order to gain access to an essential facility, the plaintiff must show more than competitive disadvantage, the plaintiff must demonstrate that denial of access is a "severe handicap" to competition. Courts hold that where a plaintiff is already competing successfully without access there is no reason to compel access.

    a. A facility cannot be essential if alternative types of facilities available to an excluded competitor would enable that competitor to compete effectively. *See*

SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 972 (10th Cir. 1994) (credit card association not essential where plaintiff already competes vigorously in the market without membership); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539 (4th Cir. 1991) (defendant's offer to provide railroad service over alternative route could be a reasonable alternative); *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991) (pipeline was not an essential facility where competitors could connect with other pipelines); *McKenzie v. Mercy Hosp. of Independence, Kan.*, 854 F.2d 365, 370-71 (10th Cir. 1988) (hospital facilities not essential to physician's practice); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987) (information services "not a competitive advantage"); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986) (list containing names of competing suppliers not needed in order for new supplier to inform consumers of its existence); *Arbitron v. Phoenix Broad. Corp.*, 1997-2 Trade Cas. (CCH) ¶ 71,957, at 80,667 (S.D.N.Y. 1997) (facility not "essential if most market participants do business without it"); *Futurevision Cable Sys. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 774-75 (S.D. Miss. 1992) (programming not essential where plaintiff had successfully entered the relevant markets and obtained high market shares even without the programming sought); *Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501, 1539 (N.D. Ill. 1988) (concert and artist program not essential to effective competition in sale of concert grand pianos); *Beverage Management v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1157 (S.D. Ohio 1986) (retailer's feature advertisements "not the *only* way for a soft drink bottler . . . to arouse interest in its products"); *Florida Cities v. Florida Power & Light Co.*, 525 F. Supp. 1000, 1004-05 (S.D. Fla. 1981) (access to nuclear power facilities not essential since other types of electricity production were available to plaintiff); *cf. Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 665 F. Supp. 1493, 1537 (S.D. Fla. 1987) (basis for inferring that natural gas, "as opposed to any type of gas," was essential), *aff'd*, No. 87-6108 (11th Cir. Aug. 10, 1989).

b. In *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990), the court held that a nutritional supplement producer failed to demonstrate that defendant-competitor's magazines were facilities essential to the nutritional supplement business. Adopting a narrow construction of the word "essential," the court stated:

> A leading antitrust commentator would limit the analysis to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." Most of the successful essential facility claims fall within the categories stated by this commentator. In cases finding liability in other categories, however, the facility in question was more than dominant; it was effectively the only one in town.

Id. at 569 (quoting PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 736.2 (Supp. 1988)) (citations omitted). Where plaintiff's products were "not only continuing to grow more profitable but were continuing to increase their market share relative to [defendant]'s products," a "severe handicap" required to compel access to an essential facility was not established. *Id.* at 569.

2. As a policy matter, courts and commentators have recognized that the invocation of the essential facility doctrine must be limited in order to preserve proper competitive incentives and to discourage "free riders." In *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) (J. Posner), the court found that compulsory access to a physician-owned clinic was not warranted for an HMO where the clinic "[did] not control 100 percent -- or even 50 percent -- of any properly defined market." The court criticized the proliferation of the essential facility doctrine and warned that *Terminal Railroad* and its progeny should not be read to require every monopolist to share its facilities. *Id*. at 1412. Judge Posner wrote:

> Had the terminal facilities been owned by a firm unaffiliated with any railroad, the firm could have charged whatever prices it wanted, including prices that discriminated against some of the users (monopolists frequently price discriminate), because the antitrust laws do not regulate the prices of natural monopolists. A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of "monopolizing" in violation of the Sherman Act, and can therefore charge any price that it wants, for the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute.
>
> And the charging of a high price is, so far as potential competitors are concerned, an attracting rather than an excluding practice. Consumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors, as required by *Terminal Railroad Ass'n*. . . .

Id. at 1412-13 (citations omitted). *See also* authority cited at *supra* introduction and part II.F.4 and *infra* parts IV.C.2-3. In a pre-*Kodak* ISO case, the Fourth Circuit held that a manufacturer may legally refuse to sell parts to an ISO from its local depot. *Abcor Corp. v. AM Int'l Inc.*, 916 F.2d 924, 929-30 (4th Cir. 1990). The court found that the manufacturer's interest in preventing "free riding" on its inventory program was a legitimate justification for the restraint. The court noted that the parts were still available to the ISO in a remote location. *But cf. Kodak, supra* part II.D (rejecting prevention of free-riding as justification).

3. Although decisions applying the essential facility doctrine seldom undertake express, formal analyses of market definition, certain authority supports the proposition that product and geographic markets in which the plaintiff competes must be defined before the court can properly assess whether access to a facility is essential to the plaintiff's competitive position. *See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995); *Consul. Ltd. v. Transco Energy Co.*, 805 F.2d 490, 493-94 & n.11 (4th Cir. 1986); *Laurel Sand &*

Gravel, Inc. v. CSX Transp., Inc., 704 F. Supp. 1309, 1323 (D. Md. 1989) (market definition issue could not be disposed of on summary judgment), *aff'd*, 924 F.2d 539 (4th Cir. 1991); *City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517, 1531-32 (D. Kan. 1988) ("relevant market" must be proven in every essential facility case); *cf. United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1372 & n.39 (5th Cir. 1980) (market definition necessary, but may be resolved through truncated analysis).

B. Assessment of Dominance

Even if a competitor would be severely handicapped by a denial of access to a given facility, it cannot compel access to the facility unless the facility or the firm that controls the facility was sufficiently dominant to warrant antitrust intervention.

1. A plaintiff must present evidence that the particular facility to which it seeks access is the only one that would permit it to compete without a "severe handicap." *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977) (stadium sought was only stadium in D.C. metropolitan area suitable for exhibition of professional football games). *See Twin Lab. v. Weider Health & Fitness*, 900 F.2d 566, 568-70 (2d Cir. 1990) (advertisement in muscle magazines not essential for nutritional supplement); *Flip Side Prod., Inc. v. Jam Prod., Ltd.*, 843 F.2d 1024, 1033-34 (7th Cir. 1988) (arena-level facility not essential for promotion of concerts since alternative facility available); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986) (stadium sought was only stadium in Chicago area suitable for exhibition of professional basketball); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377-78 (7th Cir. 1986) (no right to promotional assistance from competitor's salesmen); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373-74 (5th Cir. 1980) (evaluating competitive impact of broker's exclusion from multiple listing service); *Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.*, 846 F. Supp. 488, 498 (W.D. Va. 1994) (denial of access must "inflict[] a 'severe handicap' that threaten[s] to eliminate competition in the market"); *Registered Physical Therapists v. Intermountain Health Care*, 1988-2 Trade Cas. (CCH) ¶ 68,233, at 59,486-87 (D. Utah 1988) (office location in

medical tower not essential for physical therapists to compete); *Interface Group., Inc. v. Gordon Publications, Inc.*, 562 F. Supp. 1235, 124243 (D. Mass. 1983) (trade show not essential facility "given that there are many other shows"); *Robinson v. Magovern*, 521 F. Supp. 842, 913 (W.D. Pa. 1981) (surgical facilities available at five other hospitals located in sixteen-county geographic market), *aff'd*, 688 F.2d 824 (3d Cir. 1982); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973) (suspension from golf association was "tantamount to total exclusion from the market of professional golf").

2. The facility need not be "indispensable" to be essential. *Hecht*, 570 F.2d at 992; *Fishman*, 807 F.2d at 539; *Intergraph Corp. v. Intel Corp.*, No. CV-97-N-3023-NE, 1998 WL 180606, at *18 (N.D. Ala. April 10, 1998); *TCA Bldg. Co. v. Northwestern Resources* Co., 873 F. Supp 29, 39 (S.D. Tex. 1995); *see Associated Press v. United States*, 326 U.S. 1, 18 (1945) (rejecting "indispensability" test). *But cf. Colonial Penn Group, Inc. v. American Ass'n of Retired Persons*, 698 F. Supp. 69, 73 (E.D. Pa. 1988) ("facility is only essential where it is vital to competitive viability").
3. The Seventh Circuit has held that in the absence of collusion, a single alternative facility under the control of a competitor of the defendant is sufficient to preclude a finding of essentiality, even if the plaintiff does not have access to the alternative facility. *Flip Side Prod.*, 843 F.2d at 1034. *But see Associated Press*, 326 U.S. at 17 (existence of other facilities does not save exclusion from condemnation). *Flip Side Productions* and *Associated Press* may be reconcilable: in *Flip Side Productions* the excluded competitor would have been capable of using only one facility at a time, whereas in *Associated Press* the excluded competitors would have benefitted from using multiple news agencies simultaneously.

4. One court concluded that "[a] facility that is controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition in the downstream market." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) (airline's control of one reservation system posed no danger of airline monopolizing market for air transportation); *see also In re*

Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443, 1455 (C.D. Cal. 1988). *Cf. MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983) ("monopolist's control . . . can extend monopoly power from one stage of production to another"); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.* 704 F. Supp. 1309, 1323 (D. Md. 1989) (may require monopolist to transact business with another firm only if "purpose and effect of (denying access) is to maintain or extend its monopoly"), *aff'd*, 924 F.2d 539 (4th Cir. 1991). The *Alaska Airlines* court also observed that *MCI* "seem[s] to contemplate a second condition that must be satisfied for a facility to be considered 'essential' in addition to the power to eliminate competition: The power to eliminate competition must not be momentary, but must be at least relatively permanent." 948 F.2d at 544 n.11.

C. Feasibility of Duplication

1. Under the standard formulation of the elements of the essential facility doctrine, the plaintiff must also show that duplication of the facility would be "economically infeasible." *Hecht v. Pro Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977). In *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), the court found that the defendant's pipeline was not an essential facility because competitors could connect with other pipelines or construct new pipelines. The court recognized that in some cases, firms are found liable for monopolization by denying access to a facility essential to competitors. *Id.* at 1482. Citing *MCI*, the court stated that "[i]n essential facilities cases, however, liability hinges on the feasibility of competitors developing competing facilities and of the owner providing access to the facility." *Id. See Twin Lab. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) ("[a]s the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible"); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir.) (not "economically feasible" for long distance service competitor to duplicate local distribution facilities); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 540 (7th Cir. 1986)

(stadium not duplicable without unreasonable expenditure in light of transaction to be facilitated); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1521 (10th Cir. 1984) (difficulty of developing another ski area in Aspen), *aff'd on other grounds*, 472 U.S. 585 (1985); *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484, 487 (1st Cir.) (additional expense of developing and using alternative site would "extract a monopolist's advantage"); *American Fed'n of Tobacco Growers v. Neal*, 183 F.2d 869, 871 (4th Cir. 1950) (plaintiff unable to conduct independent tobacco auctions in its own warehouse); *TCA Bldg. Co. v. Northwestern Resources Co.*, 873 F. Supp. 29, 39 (S.D. Tex. 1995) (private roads not essential for marketing lignite coal where public highways available); *cf. Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501, 1540-41 (N.D. Ill. 1988) (piano manufacturer could develop its own resource comparable to technicians employed by dealers of a competitor).

2. One commentary has proposed: "The test [of feasibility of duplication] should be whether duplication of the facility is a standard cost of entry for the particular market and line of business -- that is, the customary start-up costs for the endeavor and locale." Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441, 465 (1983) (footnote omitted). For example, the cost of building a new stadium is not one of the customary start-up costs for the promoter of a professional football team. *Id.* Another commentary observes that an assessment of feasibility of duplication raises three major issues: (i) barriers to entry, (ii) economies of scale, and (iii) magnitude of sunk costs. William E. Tye, *Competitive Access: A Comparative Industry Approach to the Essential Facility* Doctrine, 8 ENERGY L.J. 337, 363 (1987). (Other commentators might subsume scale economies and sunk costs under the broader category of entry barriers.)

IV. ACCESS ISSUES

This part of the outline considers several questions that relate to the circumstances compulsory access is warranted to a facility, assuming that the facility has been characterized as essential for

certain purposes. First, what limitations, if any, govern the scope of the classes that may legitimately seek access? Second, under what terms must access be provided? Third, what justifications, if any, may be advanced as a basis for denying access?

A. Scope of Classes Permitted Mandatory Access

1. Access to an essential facility need not be provided to one who "is not an actual or potential competitor" of the combination or monopolist in control of the facility. *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987); *see Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976, 983 (9th Cir. 1988); *Garshman v. Universal Resources Holding Inc.*, 824 F.2d 223, 230 (3d Cir. 1987) ; *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376-77 (7th Cir. 1986); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 926-27 (2d Cir. 1980); *cf. Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 787 (3d Cir. 1983) (admitting Memphis football team to league would not result in additional competition). *But see Intergraph Corp. v. Intel Corp.*, No. CV-97-N-3023-NE, 1998 WL 180606, at *18-*19 (N.D. Ala. April 10, 1998) (compulsory access granted to non-competitor customer).

2. Although the plaintiff must compete with the defendant in some sense, this standard is often applied loosely. In *Sunshine Cellular v. Vanguard Cellular Systems*, 810 F. Supp. 486, 498 (S.D.N.Y. 1992), the court denied the defendant's motion to dismiss finding that a cellular telephone service provider had properly alleged an essential facility claim against an adjacent provider who refused to enter into a roaming agreement. The court recognized that the parties did not provide cellular service in the same geographic area but found that plaintiff's claim was still valid. *Id.* "Although it is true that plaintiff and defendant must be 'competitors' for defendant's act to be considered anticompetitive, the parties do not have to be engaged in head-to-head competition." *Id.* "[Plaintiff] and [defendant] are 'competitors' because they are in the same line of business, and [defendant]'s alleged refusal to deal or denial of an essential facility is for the purpose of enhancing [defendant]'s power in the relevant market of providing

cellular service in [the defendant's geographic service area]. *Id.*; *see also Venture Tech., Inc. v. National Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78,169 (W.D.N.Y. 1981) (essential facility doctrine applies even if controller of facility is not "in direct competition with the person being excluded"), *rev'd on other grounds*, 685 F.2d 41 (2d Cir. 1982); *cf. City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517, 1532-33 (D. Kan. 1988) (finding of "some degree" of competition for direct sale customers sufficient).

3. In *Intergraph Corp. v. Intel Corp.*, No. CV-97-N-3023-NE, 1998 WL 180606, at *18-*19 (N.D. Ala. April 10, 1998), the court granted a preliminary injunction forcing Intel (a monopolist computer chip maker) to supply its chips and essential technical information to Intergraph (a computer maker who purchased chips from Intel). In extending the availability of the essential facilities doctrine from competitors to consumers the court noted that "[c]ourts have held that the antitrust laws protect customers and purchasers in cases when a monopolist refuses to deal in order to control a downstream market or frustrate litigation." *Id.* at *18 (citing *Image Technical Serv. v. Eastman Kodak Co.*, 125 F.3d 1195, 1211 (9th Cir. 1997), and *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725, 726 (3d Cir. 1962)). "The antitrust laws impose on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms." *Id.* Compulsory access was warranted "because [the chips] are not available from alternative source and cannot feasibly be duplicated, and because competitors cannot effectively compete in the relevant markets without access to them. Moreover, Intel has no legitimate business reason to refuse to deal with Intergraph. Intergraph has been a loyal and beneficial customer of Intel." *Id.* at *19.

B. Terms of Access

1. If the defendant has offered the plaintiff access at a particular price, the plaintiff must show that the price offered was "unreasonable and amounted to a denial of access." *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.* 704 F. Supp. 1309, 1323 (D. Md. 1989) (rate reasonable in comparison with variable cost figures), *aff'd*, 924 F.2d 539

(4th Cir. 1991); *see Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (where plaintiff was overcharged but not denied use of a facility, relief is not warranted under the essential facility doctrine); *City of College Station, Tex. v. City of Bryan, Tex.*, 932 F. Supp. 877, 888 (S.D. Tex. 1996) ("when the reasonableness of a rate is at issue, the reasonableness standard of the access factor cannot be read to mean that the courts will secure a better deal for an antitrust plaintiff"); *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 665 F. Supp. 1493, 1534 (S.D. Fla. 1987) ("gross disparity" between cost-based "reasonable price" and offer price amounted to refusal to deal), *aff'd*, No. 87-6108 (11th Cir. Aug. 10, 1989); *cf. Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cas. (CCH) ¶ 63,526, at 76,808-15 (N.D.N.Y. 1980) (electric utility justified in refusing to provide wheeling, subtransformation, and delivery services on terms demanded by municipality). In *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647-49 (10th Cir. 1992), the court held that where a natural gas pipeline company canceled a program allowing cities to pay for the transport of gas purchased from third parties, the provision of pipeline company gas to the plaintiffs at FERC-approved prices provided reasonable access to the facility. A concerted refusal to deal with a competitor on terms "substantially equal" to those enjoyed by a venture's members may be treated as a refusal to deal "if it placed [the] competing firm at a severe competitive disadvantage." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-96 n.6 (1985); *cf. Pope v. Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 266-67 (N.D. Miss. 1988) (no showing that membership dues schedule was discriminatory or unreasonable), *aff'd*, 872 F.2d 127 (5th Cir. 1989).

2. The difficulties associated with assessing terms of access reappear with the legally distinct phase of framing relief. In some instances the decision to issue an injunction may turn on the relative ease of specifying the terms under which compulsory access will be ordered. Where a monopolist does not provide any other firm with access to its facility, "the difficulty of setting a price at which the monopolist must deal might well justify withholding relief

altogether." *Byars v. Bluff City News Co.*, 609 F.2d 843, 864 (6th Cir. 1979). By contrast, where access is provided to some competitors, "a court could simply order the owners of a unique facility to treat all customers on equal terms." *Id.* at 863; *see Associated Press v. United States*, 326 U.S. 1, 21 (1945) (decree entered to prevent discrimination). For a brief discussion of the administrability issues raised by orders to deal, including the problem of determining a price for access, see PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.2h (Supp. 1988).

C. Justifications for Exclusion

1. Courts generally permit denial of access to an essential facility to certain competitors if a reasonable business justification exists for doing so and the effect of the restraint on consumers is nonexistent or positive.

   a. In *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992), the court denied two cities compulsory access to a high voltage electric line controlled by a utility. The court reasoned that even "[i]f the Pacific Intertie [a high voltage powerline running from the Pacific Northwest to Southern California] were an essential facility, [the utility] could still deny access if it had legitimate business reasons for that denial." *Id.* at 1381. The court found that the utility's desire to keep the limited capacity it had on the Pacific Intertie available to transport inexpensive power for its entire customer-base rather just selected municipalities was a legitimate justification for the denial. *Id.* The court distinguished *MCI* "where the capacity is not being used" and *Otter Tail* "where the sole reason for the denial of access is to maintain a monopoly" from the facts at hand where the utility "can use its own facility in full." *Id.*

   b. In *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), the Tenth Circuit (reversing a jury verdict entered by the district court) held that the exclusion of issuers of competitive credit cards from the Visa joint venture was not illegal. The court focused on the business justification for the joint venture and the rule

at issue ("Rule 206" which prohibited membership by an applicant which directly or indirectly issues Discover, American Express or other cards deemed competitive by Visa's Board of Directors). For Section 1 claims, "the focus of the procompetitive justifications for the business practice is the consumer. To be judged anticompetitive, the agreement must actually or potentially harm consumers." *Id.* at 965. The court outlined a two step analysis for evaluating the practices of joint ventures under the rule of reason: (1) determine whether the joint venture has market power in the relevant market and (2) evaluate the procompetitive aspects of the restraint. *Id.* at 965. The court found that Visa did not have market power and that the rule, by preventing free riding by rivals, is "reasonably necessary" for Visa's successful operation. *Id.* The court observed that its assessment of the effect on competition must include an "appreciation that the horizontal restraint may be essential to create the product in the first instance. That understanding properly values the proprietary rights and incentives for innovation embodied by the joint venture as well as concerns about free riding." *Id.* at 969. The court concluded that "'selectivity in the membership of a joint venture often enhances a joint venture's procompetitive potential. Forcing joint ventures to open membership to all competitors . . . would decrease the incentives to form joint ventures.'" *Id.* at 972 n.20 (quoting JUSTICE DEPARTMENT INTERNATIONAL ANTITRUST ENFORCEMENT POLICY 42 (Nov. 10, 1988) (CCH Supp.))

c. In *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994), the court held that a manufacturer unilaterally may refuse to license copyrighted diagnostic software to an ISO. "In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not." *Id.* at 1183. Although such conduct may be termed exclusionary, "an

> author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." *Id.* at 1187.

2. Courts have found that "reasonable criteria of selection" are justified where there are "finite limitations" to the number of competitors that can share the facility. *Gamco. Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir. 1952) (physical limitations of building); *see Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165, 172 & n.9 (9th Cir. 1986) (upholding reasonable restrictions on number of tournament golf professionals).

   a. In *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), the court rejected plaintiff's claim that the defendant's reasons for denying access were irrelevant; instead, the court emphasized that

      > to be liable for monopolizing an essential facility, providing access to the facility must have been feasible for the owner. This . . . prerequisite to essential facility liability suggests that essential facilities cases are no different conceptually than cases involving other monopolization theories, because it reintroduces "intent" (a.k.a. "business justification") back into the monopolization equation and excuses refusals to provide access justified by the owner's legitimate business concerns.

      Id. at 1483. While a monopolist can not wrongfully harm competition, the court wrote, there is no duty to help competitors:

      > Monopolists needn't acquiesce to every demand placed upon them by competitors or customers; a monopolist's duties are negative -- to refrain from anticompetitive conduct --rather than affirmative -- to promote competition. Just as the monopolist has no duty to deter the sale of its own equipment by promoting that of a competitor so too it has no

> duty to incur contractual liability itself by excusing its customers from their contractual obligations.

Id. at 1484 (citations omitted).

b. Whether access to the facility in question is "technically and economically feasible" is treated by some courts as an independent element in establishing liability under the essential facility doctrine. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir. 1983); *cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973) ("no engineering factors that prevented [utility company] from selling power at wholesale . . . or wheeling the power); *City of Groton v. Connecticut Power & Light Co.*, 662 F.2d 921, 932-33 (2d Cir. 1981) (refusal to wheel power valid because utility lacked transmission capacity); *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cas. (CCH) ¶ 63,526, at 76,812-14 (N.D.N.Y. 1980) (refusal to wheel power based on sound engineering and economic justifications); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp. 1309, 1323-24 (D. Md. 1989) (not feasible to provide shortline railroad with access to defendant's tracks), *aff'd*, 924 F.2d 539 (4th Cir. 1991).

3. In *City of College Station v. City of Bryan*, 932 F. Supp. 877 (S.D. Tex. 1996), the court listed a number of acceptable justifications for denial of access:

> While the requirement that the monopolist have a "legitimate business reason" cannot be satisfied by the motive of preventing erosion of its monopolistic position, the courts have found a monopolist's goals of discouraging free riding, enhancing its image, or ensuring low costs for its customers to be legitimate business motivations.

Id. at 888.

4. The courts generally place the burden on the defendants to "come forward with some business justification." *Gamco*, 194 F.2d at 489; *see Data Gen. Corp. v. Grumman Sys.*

Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) (monopolist may rebut evidence of exclusionary conduct "by establishing a valid business justification"); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 648 (10th Cir. 1994); *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1031 (9th Cir. 1988) (defendant has burden of "putting forward a plausible, justifiable explanation for its conduct"). "The conjunction of power and motive to exclude [a competitor from the market together] with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." *Gamco*, 194 F.2d at 488. *Cf. Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986) ("[c]onjoined with other evidence, lack of business justification may indicate probable anticompetitive effect").

5. To withstand scrutiny, the criteria for selection or exclusion of participants must appear reasonable and not intended to further anticompetitive purposes. *See Deesen*, 358 F.2d at 170-71 (golf association's tournament entry rules, by maintaining high quality of competition, fostered rather than destroyed competition); *American Fed'n of Tobacco Growers v. Neal*, 183 F.2d 869, 872-74 (4th Cir. 1950) (cannot "exclude an outsider merely because he has [a competitive] advantage in taxes or construction costs"); *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 130 (5th Cir. 1989) ("[i]f properly administered, membership requirements serve pro-competitive purposes"); *Moore v. Boating Indus. Ass'n*, 819 F.2d 693, 710-13 (7th Cir. 1987) (whether defendants had anticompetitive purpose in encouraging compliance with safety laws was jury issue); *Mid-Texas Communications Sys., Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1389 (5th Cir. 1980) (refusal to interconnect proper if based "on articulable concerns of regulatory policy"); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679, 694 (E.D. Mich. 1988) (expulsion of physicians who disagree with cost containment philosophy can be procompetitive); *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 115 (E.D.N.Y. 1988) (defendants "articulated a valid pro-competitive reason" for limiting MLS membership to members of board of realtors). In the case of exclusion from membership in an association,

the criteria should not only "have legitimate justifications in the competitive needs of the association itself" but should be "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375 (5th Cir. 1980) (evaluating membership criteria of multiple listing service); *accord*, *Pope*, 695 F. Supp. 253, 266-67 (N.D. Miss. 1988), *aff'd*, 872 F.2d 127 (5th Cir. 1989); *cf. Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1066 (C.D. Cal. 1971) (overbreadth of rule and lack of "even the most rudimentary hearing" made per se illegal the exclusion of players under a "four-year college rule").

6. Although the lack of procedural safeguards does not compel a finding of illegality, the determination as to the justification for exclusion may be influenced by the adequacy of the procedures by which membership criteria are applied. *See Moore v. Boating Indus. Ass'n*, 819 F.2d 693, 710-13 (7th Cir. 1987) ("arbitrary and unreasonable" conduct not a violation in absence of anticompetitive purpose); *Brant v. United States Polo Ass'n*, 631 F. Supp. 71, 78 (S.D. Fla. 1986) (no lack of procedural due process from which anti- competitive intent could be inferred); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1268 (N.D. Ga, 1973) (termination per se illegal if based upon "completely unfettered, subjective and discretionary determination of an exclusionary sanction by a tribunal wholly composed of competitors"); *cf. Silver v. New York Stock Exch.*, 373 U.S. 341, 361-66 (1963) (need for procedural safeguards).

7. Where a court has otherwise found a duty to deal, the absence of an business or efficiency justification for a refusal to deal by a firm possessing market power has led to a characterization of the refusal as exclusionary or predatory. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985) (no efficiency justification for pattern of conduct); *High Tech. Careers v. San Jose Mercury News*, 996 F. 2d 987, 990 (9th Cir. 1993) ("monopolist can refuse to deal with its competitors only if there are legitimate competitive reasons for the refusal"); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368-69 (9th Cir. 1988) (economic inefficiency a sufficient

justification for refusing to produce propane); *Home Placement Serv. v. Providence Journal Co.*, 682 F.2d 274, 277-78, 281 (1st Cir. 1982) (no legitimate business reason supported newspaper's refusal to run competitor's ads).

8. One commentary has suggested allowing only "three narrowly drawn defenses": (1) the limited capacity of the capacity of the facility, (2) the inability or unwillingness of the foreclosed party to bear monopolist's cost in providing access, and (3) interference with the monopolist's service of other customers. Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 COLUM. L. REV. 441, 474-77 (1983).

关于知识产权领域反垄断执法的指南

（国家工商总局课题组　起草修订第五稿）

第一章　总则

第一条　目的和依据

为了明确国务院反垄断执法机构在知识产权领域进行反垄断执法的原则和方法，提高执法的透明度，为经营者的知识产权行使行为提供指引，根据《中华人民共和国反垄断法》（以下简称《反垄断法》）的有关规定，制定本指南。

第二条　知识产权法与反垄断法的关系

知识产权法与反垄断法有着不同的任务和方法，但是它们拥有共同的目标和功能，即促进创新和竞争，提高效率，维护消费者利益和社会公共利益。

经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用《反垄断法》；但是，经营者滥用知识产权，排除、限制竞争的行为，适用《反垄断法》。

第三条　滥用知识产权及其与垄断行为的关系

滥用知识产权，是指违反有关知识产权的法律、行政法规规定的界限和目的，以不正当方式行使知识产权，损害他人利益和社会公共利益的行为。

滥用知识产权根据具体情形可以构成不同性质的违法行为，其中，属于排除、限制竞争的，可以依据《反垄断法》认定为垄断行为。

第四条　滥用知识产权的垄断行为的性质和类型

滥用知识产权，排除、限制竞争的行为不是一种独立的垄断行为，根据行为的性质和表现形式，分别或者同时构成《反垄断法》所规定的三种垄断行为。具体表现为：

（一）经营者滥用知识产权达成垄断协议；

（二）经营者滥用主要由知识产权所形成的市场支配地位；

（三）具有或者可能具有排除、限制竞争效果的以知识产权为核心的经营者集中。

第五条　知识产权领域反垄断执法的机构

国务院反垄断执法机构根据《反垄断法》和本指南负责知识产权领域的反垄断执法工作。

国务院反垄断执法机构根据工作需要，可以授权省、自治区、直辖市人民政府相应的机构，根据《反垄断法》和本指南负责有关知识产权领域的反垄断执法工作。

国务院反垄断执法机构在进行知识产权领域的反垄断执法工作中，根据需要可以就案件所涉及的专业问题征求国务院有关知识产权业务主管部门的意见。

第六条　适用范围

本指南中的知识产权包括《中华人民共和国专利法》、《中华人民共和国商标法》、《中华人民共和国著作权法》、《中华人民共和国反不正当竞争法》以及《中华人民共和国植物新品种保护条例》、《集成电路布图设计保护条例》、《计算机软件保护条例》等法律、行政法规所规定的财产权利。

在中华人民共和国境内滥用知识产权，排除、限制竞争的行为，适用本指南；在中华人民共和国境外滥用知识产权，排除、限制竞争的行为，对境内市场竞争产生排除、限制影响的，适用本指南。

第二章　知识产权领域反垄断执法的基本分析框架

第七条　知识产权领域反垄断执法的一般分析步骤

国务院反垄断执法机构在对经营者涉嫌滥用知识产权的垄断行为进行分析时，一般采取以下步骤：

（一）确定经营者行使知识产权行为的性质和表现形式；

（二）确定行使知识产权的经营者之间相互关系的性质；

（三）界定行使知识产权所涉及的相关市场；

（四）认定行使知识产权的经营者的市场地位；

（五）分析经营者行使知识产权的行为对相关市场竞争的影响；

（六）如果经营者行使知识产权行为排除、限制了相关市场的竞争，则进一步考察该行为的有利影响以及该有利影响是否大于排除、限制相关市场竞争所造成的不利影响。

第八条　知识产权领域的相关市场的界定

国务院反垄断执法机构在进行知识产权领域的反垄断执法时需要界定相关市场的，依据国务院反垄断委员会发布的《关于相关市场界定的指南》分别界定相关商品市场和相关地域市场，并特别考虑知识产权、创新等因素的影响。

在反垄断执法中涉及知识产权的相关商品市场，可以是技术市场，也可以是含有特定知识产权的产品市场。

知识产权本身具有商品属性，可以根据知识产权的特性、用途及价格等因素，将需求者认为具有较为紧密替代关系的一组或者一类知识产权界定为相关技术市场。

由于知识产权往往与具体的产品相结合，也可以根据产品的特性、用途及价格等因素，将需求者认为具有较为紧密替代关系的一组或者一类含有同类知识产权的产品界定为相关产品市场。

第九条　知识产权与市场支配地位

国务院反垄断执法机构在反垄断执法中将知识产权与其他财产权同样对待，不因经营者拥有知识产权而直接推定其在相关市场上具有市场支配地位。

在知识产权构成经营者获得市场支配地位的一个重要甚至是关键的因素时，国务院反垄断执法机构根据《反垄断法》关于市场支配地位认定和推定的一般原则和方法进行分析。

第十条　行使知识产权行为对竞争影响的分析因素

国务院反垄断执法机构分析行使知识产权行为对竞争的影响，依据的因素包括但不限于：

（一）行使知识产权的经营者与竞争者、交易相对人的市场地位；

（二）相关市场的集中程度；

（三）相关市场进出的难易程度；

（四）产业惯例与产业发展的程度；

（五）行使知识产权行为的时间、效力范围等限制条件；

（六）行使知识产权行为对促进创新和技术推广的影响；

（七）经营者的创新能力和技术变化的速度。

第十一条　行使知识产权行为对竞争影响的评价

行使知识产权行为对竞争产生或者可能产生的不利影响，可以表现为对既有竞争的排除、限制，例如通过知识产权的取得或者独占性许可减少相关市场竞争者的数量，或者通过知识产权交叉许可协议消除经营者之间原本存在的竞争；也可以表现为对潜在市场竞争的排除、限制，例如通过拒绝许可知识产权行为，控制关键技术等资源，设置或者提高相关市场的进入障碍，使得其他经营者不能以合理的条件获得该资源，阻止潜在竞争者的进入。

行使知识产权行为对竞争产生或者可能产生的有利影响，可以表现为通过创新或者技术的传播利用，提高生产或者资源利用的效率等，但是前述效率必须同时满足以下条件：

（一）效率的提高是客观的和可以证明的；

（二）知识产权权利人的限制性行为是效率产生所必不可少的；

（三）产生的效率必须能够为消费者所分享；

（四）知识产权权利人的限制性行为不会严重限制相关市场的竞争。

如果行使知识产权行为对竞争产生或者可能产生不利影响，但经营者能够证明该行使知识产权行为同时也产生或者可能产生有利影响，且有利影响大于不利影响，则国务院反垄断执法机构可以对其不予禁止。

第十二条　经营者相互关系的性质与市场地位对分析竞争的影响

鉴于经营者相互关系的性质和市场地位对竞争影响程度的差异，为提高效率，节约执法资源，国务院反垄断执法机构在分析行使知识产权行为对竞争的影响时着重关注具有竞争关系的经营者和具有或者共同具有较高市场份额的经营者。

如果经营者存在下列情形之一，其知识产权许可等行为可以被视为对相关市场竞争的影响微小，国务院反垄断执法机构可以不予立案调查，但知识产权许可等行为包含本指南第十三条第（一）至第（五）项和第十四条第（一）至第（二）项所规定的条款除外：

（一）具有竞争关系的经营者在相关市场上的市场份额合计不超过百分之二十；市场份额无法计算的，在相关市场上存在至少四家拥有可替代知识产权的其他经营者；

（二）经营者与交易相对人在相关市场上每一当事人的市场份额均不超过百分之三十；市场份额无法计算的，在相关市场上存在至少两家拥有可替代知识产权的其他经营者。

第三章　一般类型的知识产权行使行为的反垄断分析

第十三条　具有竞争关系经营者之间的知识产权协议

对于具有竞争关系的经营者之间达成的以下涉及知识产权的协议，国务院反垄断执法机构应当根据《反垄断法》第十三条的规定予以禁止：

（一）固定或者变更知识产权许可费或者含有知识产权商品的销售价格；

（二）限制知识产权许可数量或者含有知识产权商品的生产数量或者销售数量；

（三）分割知识产权许可市场或者含有知识产权商品的销售市场或者原材料采购市场；

（四）限制购买、开发新技术或者含有知识产权的新设备、新产品；

（五）联合拒绝将知识产权许可给特定交易相对人，或者联合拒绝将含有知识产权的商品销售给特定交易相对人；

（六）国务院反垄断执法机构认定的滥用知识产权的其他垄断协议。

第十四条　经营者与交易相对人之间的知识产权协议

对于经营者与交易相对人之间达成的以下涉及知识产权的协议，国务院反垄断执法机构应当根据《反垄断法》第十四条予以禁止：

（一）固定向第三人转售含有知识产权商品的价格；

（二）限定向第三人转售含有知识产权商品的最低价格；

（三）国务院反垄断执法机构认定的滥用知识产权的其他垄断协议。

第十五条　不予禁止的情形

经营者能够证明所达成的知识产权协议符合《反垄断法》第十五条规定的，国务院反垄断执法机构不适用本指南第十三条、第十四条的规定予以禁止。

第十六条　滥用主要由知识产权形成的市场支配地位

对于主要由知识产权形成的市场支配地位的经营者，国务院反垄断执法机构依据《反垄断法》第十七条和本指南第二章的规定分析认定其下列行使知识产权的行为是否构成滥用市场支配地位：

（一）以不公平的高价许可知识产权；

（二）没有正当理由，拒绝许可知识产权；

（三）没有正当理由，限定交易相对人只能从其或者其指定的经营者获得相关知识产权；

（四）没有正当理由，进行涉及知识产权的搭售，或者附加涉及知识产权的不合理的交易条件；

（五）没有正当理由，对条件相同的交易相对人在许可费等许可条件上实行差别待遇；

（六）国务院反垄断执法机构认定的其他滥用主要由知识产权形成的市场支配地位的行为。

第十七条　拒绝许可知识产权

本指南第十六条第二项所指的拒绝许可知识产权，是指知识产权权利人拒绝许可其他经营者以合理条件使用其知识产权的行为。拒绝许可是知识产权权利人行使知识产权的一种表现形式，在一般情况下，国务院反垄断执法机构不会要求知识产权权利人承担与竞争对手或者交易相对人进行交易的义务。

对于经营者在行使知识产权过程中无条件地或者非歧视性地单方拒绝许可，国务院反垄断执法机构一般不会认为该行为违反《反垄断法》。但是，对于符合下列条件之一的拒绝许可知识产权行为，国务院反垄断执法机构经过分析，可以认定其违反《反垄断法》中有关滥用市场支配地位的规定：

（一）具有市场支配地位的经营者不平等地、歧视性地拒绝许可其知识产权；

（二）具有市场支配地位的经营者拒绝许可的知识产权是被许可人参与相关市场竞争的一项必需设施，而拒绝许可该知识产权导致被许可人不能在相关市场中进行有效竞争，并且对相关市场中的竞争和创新造成不利影响，消费者的合理需求不能得到满足。

拒绝许可知识产权也可能作为经营者实施其他限制性条件或搭售的手段，对此国务院反垄断执法机构将结合相关限制性条件或者搭售，就其对竞争的影响进行分析。

第十八条　涉及知识产权的搭售

本指南第十六条第四项所指的涉及知识产权的搭售，是指权利人就一项知识产权以授予许可等方式行使权利时，违背交易相对人的意愿要求其接受另一项知识产权的许可，或者从权利人处或者权利人所指定的第三人处购买某种商品。构成搭售的商品或者知识产权应当可以分开单独销售或者许可，并且具有独立的消费需求，前一项知识产权被称为搭售品，而后一项知识产权或者商品被称为被搭售品。

搭售对相关市场的竞争产生或者可能产生的不利影响，主要表现为排除了被搭售品市场中其他供应商的交易机会和损害了消费者的选择权。搭售也可能对相关市场的竞争产生有利影响，主要表现为可以降低销售或管理成本。

国务院反垄断执法机构在分析搭售对相关市场的竞争产生或者可能产生的影响时，将考虑搭售的目的、搭售品和被搭售品的性质与相互联系、交易习惯、搭售的影响范围和实施搭售者的实际经营能力等因素。对于同时符合下列条件的搭售，国务院反垄断执法机构可以予以禁止：

（一）知识产权权利人在搭售品市场上具有市场支配地位；

（二）搭售品和被搭售品在性质上和交易习惯上属于两个独立的商品；

（三）搭售对被搭售品市场有实质性影响，将知识产权权利人的在搭售品市场的支配地位延伸到被搭售品市场，排除、限制了其他经营者在被搭售市场上的竞争；

（四）该搭售不具有合理性。

第十九条　涉及知识产权的不合理的交易条件

本指南第十六条第四项所指的涉及知识产权的不合理交易条件，是指权利人就一项知识产权以授予许可等方式行使权利时，违背交易相对人的意愿附加以下交易条件：

（一）要求交易相对人将其改进的技术进行独占性地回授；

（二）禁止交易相对人对其知识产权的有效性提出质疑；

（三）限制交易相对人在许可协议期限届满后，制造、使用、销售竞争性商品或者采用

竞争性技术；

（四）国务院反垄断执法机构认定的其他不合理的交易条件。

第二十条　涉及知识产权的经营者集中

经营者可以通过知识产权转让或者独占性许可协议等方式，取得其他经营者的关键知识产权，并以此取得对其他经营者的控制权，或者能够对其他经营者施加决定性影响。在此情况下，经营者应根据《反垄断法》以及国务院《关于经营者集中申报标准的规定》，在达到经营者集中申报标准时，向国务院反垄断执法机构进行申报。国务院反垄断执法机构根据《反垄断法》以及国务院反垄断执法机构公布的相关经营者集中审查指南，对经营者的知识产权取得行为是否排除、限制了相关市场的竞争进行分析认定，并着重考察经营者的创新能力、其他经营者的创新特征以及相关产业的技术变化特征等因素。

国务院反垄断执法机构在对涉及知识产权的经营者集中进行审查时，为减少特定知识产权对相关技术市场竞争的排除、限制影响，可以采取剥离知识产权等限制性条件。

第四章　若干特定类型的知识产权行使行为的反垄断分析

第二十一条　专利联营

专利联营（专利池）是指两个或两个以上的专利权人通过某一实体组织将各自拥有的专利进行相互许可或者共同许可给第三方的协议安排。这种组织既可以是为此目的专门成立的合资公司，也可以是受委托的某一联营成员或者独立的第三方实体组织。

专利联营在促进互补性技术的一体化、降低交易成本、消除障碍性专利、减少侵权诉讼及其不确定性等方面具有一定的积极作用，但是在某些情况下，专利联营也可能具有排除、限制竞争的效果，因此需要对其进行反垄断分析认定。

国务院反垄断执法机构分析专利联营对相关市场竞争产生的影响时，除遵循本指南第二章确立的原则外，还应当考虑以下因素：

（一）参与专利联营主体的市场地位和专利的性质；

（二）参与专利联营主体的一方具有市场支配地位时，专利联营是否是开放的和非歧视性的；

（三）专利联营是否不合理地封锁第三方的技术或者限制替代性专利联营的建立。

仅由互补性专利组成的联营一般不会对竞争产生不利的影响，包含有替代性专利的联营对相关市场竞争的影响由国务院反垄断执法机构根据个案的具体特点进行分析。

具有下列情形之一的专利联营许可协议条款，可能具有排除、限制竞争的效果：

（一）禁止专利权人在联营之外独立许可专利；

（二）强迫被许可人将其改进或者研发的非必要专利技术独占性地回授给联营体或者许可人；

（三）禁止被许可人质疑联营专利的有效性；

（四）无正当理由，对同一相关市场的被许可人收取不同的许可费用；

（五）无正当理由，限制许可人或者被许可人独立或者与第三方联合研发与联营技术相竞争的技术。

对于专利联营管理组织为了管理联营活动的合理需要而设立限制性条件的行为，一般不会排除、限制相关市场的竞争。但是，如果具有不合理地歧视特定的参加方、限制参加方使用联营专利或者为当事方之间交换有关竞争的敏感信息提供便利等行为，可能具有排除、限制竞争的效果。

第二十二条　标准制定和实施中的行使专利权行为

标准的制定和实施通常有利于统一技术规范、促进技术创新、维护消费者利益和社会公共利益。但是，如果一项标准包含专利技术并得到广泛实施，将会提高其他可替代技术进入该标准的成本，可能会产生专利阻碍效应。如果专利权人在标准制定和实施过程中行使专利

权的行为产生或者可能产生排除、限制竞争的效果，国务院反垄断执法机构将运用本指南第二章规定的分析方法进行分析认定。

在国际、国家、行业或者地方标准的制定过程中，专利权人单方面宣布专利许可条款和价格条件的行为是行使专利权的一种表现形式，一般不会产生排除、限制相关市场竞争的效果。但是，符合下列条件的行为，可能会违反《反垄断法》：

（一）专利权人或者专利申请人知道或者应当知道其专利或者正在申请的专利可能会被纳入有关标准；

（二）专利权人或者专利申请人不按标准制定组织的有关知识产权政策披露其可能会被纳入标准的专利信息或者已经公开的专利申请信息；

（三）专利权人在标准发布后，主张其被纳入标准的专利权；

（四）该行为对相关市场的竞争和创新产生或者可能产生不利影响。例如，没有正当理由，拒绝许可使用该标准的任何人以合理的条件实施其专利；没有正当理由，对条件相同的使用该标准的任何人在许可价格等许可条件上实施差别待遇。

当经营者的某项专利技术纳入国家或者行业强制标准时，应当在相关协议中明确许可费的上限。该许可费上限不应明显超过专利纳入相关标准前的许可费水平。

第二十三条　著作权保护中的技术措施行为

著作权人采取技术措施的行为有利于在信息网络条件下更好地保护著作权，一般不会排除、限制相关市场的竞争。

如果技术措施的采用成为著作权人排除、限制其他经营者在相关市场的竞争手段，例如作为实现其搭售商品或者知识产权的手段时，国务院反垄断执法机构将根据本指南第二章规定的分析方法进行分析认定。

经营者能够采用其他对相关市场的竞争影响较小的可替代方法，没有正当理由而未采用的，国务院反垄断执法机构一般会认为经营者技术措施的运用具有排除、限制竞争的效果。

第二十四条　著作权集体管理组织的行为

著作权集体管理组织是指为权利人的利益依法设立，根据权利人授权、对权利人的著作权或者与著作权有关的权利进行集体管理的社会团体。著作权集体管理组织的设立及其活动的开展通常有利于单个著作权人权利的行使，有利于著作权使用单位和个人及时合法的使用作品。

如果著作权集体管理组织在开展活动过程中，从事符合下列条件之一的行为，国务院反垄断执法机构将运用本指南第二章规定的分析方法进行分析认定：

（一）没有正当理由，收取过高的代理费或许可费；

（二）没有正当理由对条件相同的著作权人实行歧视性待遇；

（三）强迫接受一揽子许可的行为；

（四）从事其他可能具有排除、限制相关市场竞争效果的行为。

第五章　附则

第二十五条　对滥用知识产权排除、限制竞争行为的处理

经营者行使知识产权被认定为滥用知识产权排除、限制竞争行为的，国务院反垄断执法机构依照《反垄断法》的规定追究其法律责任。

第二十六条　实施时间

本指南自　年　月　日起施行。

GUIDE ON ANTIMONOPOLY LAW ENFORCEMENT IN THE FIELD OF INTELLECTUAL PROPERTY RIGHTS
State Administration for Industry and Commerce Task Force
Fifth Draft

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CHAPTER I. GENERAL PROVISIONS

Article 1. Purpose and basis
In order to clarify the principles and methods used by the State Council Antimonopoly Law enforcement agencies in the field of intellectual property antimonopoly enforcement, and to improve the transparency of law enforcement, and to provide guidance for undertakings in exercising intellectual property rights, this Guide is enacted in accordance with the relevant provisions of the Antimonopoly Law of the People's Republic of China (hereinafter referred to as "Antimonopoly Law").

Article 2. Relationship between intellectual property law and antimonopoly law
Intellectual property law and Antimonopoly Law have different roles and approaches, but they share a common goal and function, namely, to promote innovation and competition, improve efficiency, and to safeguard consumer interests and public interests.

Antimonopoly Law does not apply when undertakings behave in accordance with intellectual property law and administrative regulations in exercising intellectual property rights; however, Antimonopoly Law applies when undertakings abuse intellectual property rights or eliminate and restrict competition.

Article 3. Abuse of intellectual property rights and its relationship with monopolistic behaviour
The abuse of intellectual property rights refers to the act of unfairly exercising intellectual property rights in violation of the boundaries and purposes of the relevant intellectual property laws and administrative regulations, which harms others' interests and public interests.

The abuse of intellectual property rights can constitute violations of different natures according to the specific circumstances, and of these behaviours eliminating and restricting competition can be recognised as monopolistic behaviours under the Antimonopoly Law.

Article 4. The nature and type of monopolistic behaviour in abuse of intellectual property rights
Abusing intellectual property rights which eliminates and restricts competition is not one single, independent kind of monopolistic behaviour. Under the Antimonopoly Law, this can comprise

three kinds of monopolistic behaviour respectively or simultaneously according to the nature and manifestation of the acts:
(1) Undertakings abuse intellectual property rights to enter into monopolistic agreements
(2) Undertakings abuse their dominant market positions mainly achieved as a result of their intellectual property rights
(3) Undertakings concentrations centering on intellectual property rights which have or may have the effect of eliminating or restricting competition.

Article 5. Intellectual property Antimonopoly Law enforcement agencies
The State Council Antimonopoly Law enforcement agencies are responsible for intellectual property antimonopoly law enforcement in accordance with the "Antimonopoly Law" and this Guide.

Based on operational needs, the State Council Antimonopoly Law enforcement agencies may authorize the corresponding institutions of the People's Government at the levels of provinces, autonomous regions and municipalities, for work related to intellectual property antimonopoly law enforcement, in accordance with the "Antimonopoly Law" and this Guide.

When conducting Antimonopoly Law enforcement work, Antimonopoly Law enforcement agencies can seek the opinion of relevant departments of the State Council in charge of intellectual property rights on specialized problems involved in a case.

Article 6. Scope of application
Intellectual property rights in this guide include the property rights set forth in the laws and administrative regulations such as the Patent Law of the People's Republic of China, the Trademark Law of the People's Republic of China, the Copyright Law of the People's Republic of China**,** the Law of the People's Republic of China for Countering Unfair Competition and the Regulations of the People's Republic of China on the Protection of New Varieties of Plants, the Regulations for the Protection of Layout-design of Integrated Circuits, and the Regulation for Computer Software Protection.

This Guide applies to the act of abusing intellectual property rights which eliminates and restricts competition in the People's Republic of China. This Guide also applies to the act of abusing intellectual property rights outside the People's Republic of China in a way which eliminates and restricts competition in the domestic market.

CHAPTER II. BASIC ANALYTICAL FRAMEWORK OF INTELLECTUAL PROPERTY ANTIMONOPOLY LAW ENFORCEMENT

Article 7. General steps of analysis of intellectual property Antimonopoly Law enforcement
In analyzing the monopolistic behaviour of undertakings regarding alleged abuse of intellectual property rights, the State Council Antimonopoly Law enforcement agencies generally take the following steps:

(1) determining the nature and form of the undertakings' acts in exercising intellectual property rights
(2) determining the nature of the interrelationship between undertakings exercising intellectual property rights
(3) defining the relevant market where intellectual property rights are being exercised

(4) identifying the market position of the undertakings exercising intellectual property rights
(5) analyzing the impact of the act of exercising intellectual property rights by the undertakings on competition in the relevant market
(6) if the undertaking exercises intellectual property rights in a way which eliminates or restricts competition in the relevant market, conducting further analysis as to the positive effects brought about by the behaviour and whether the positive effects outweigh the adverse effects caused by eliminating or restricting competition in the relevant market.

Article 8. Definition of the relevant intellectual property markets
State Council Antimonopoly Law enforcement agencies, in conducting intellectual property Antimonopoly Law enforcement, need to define the relevant market in accordance with the "Guidelines on the Definition of Relevant Market" published by the Antimonopoly Commission of the State Council. The relevant product market and the relevant geographic market are each defined with particular consideration of the impact of factors such as intellectual property rights and innovation.

The relevant product markets where intellectual property rights are involved in Antimonopoly Law enforcement can be technology markets and can also be product markets comprising specific intellectual property rights.

As intellectual property rights have the attributes of commodities in themselves, based on factors such as characteristics, usage and price of the intellectual property right, a group or a category of intellectual property rights which consumers believe to be possessing a relatively close substitution relationship can be defined as the relevant technology market.

As intellectual property rights often attach to particular products, based on factors such as characteristics, usage and price of the product, a group or a category of products with the same type of intellectual property rights which consumers believe to have a relatively close substitution relationship can be defined as the relevant product market.

Article 9. Intellectual Property and Dominant market position
State Council Antimonopoly Law enforcement agencies treat intellectual property rights in the same manner as other property rights when enforcing Antimonopoly Law, and will not automatically presume the dominant market position of an undertaking in the relevant market because of its possession of intellectual property rights.

When intellectual property rights constitute an important and even crucial factor for an undertaking to gain market dominance, the State Council Antimonopoly Law enforcement agencies will conduct an analysis in accordance with the general principles and methods of the "Antimonopoly Law" on the identification and presumption of a dominant market position.

Article 10. Factors relevant to the analysis of the impact of exercising intellectual property rights on competition
The State Council Antimonopoly Law enforcement agencies will consider the following factors (but not limited to) when it analyzes the impact of exercising intellectual property rights on competition:
(1) the market positions of each of the undertakings exercising intellectual property rights, the trading counterparties and the competitors;
(2) the degree of concentration of the relevant market;

(3) the degree of difficulty in entering and exiting the relevant market;
(4) the existence of industry practices and the degree of industrial development;
(5) conditions restricting the exercise of the intellectual property rights, such as length and scope of their application
(6) the impact of exercising intellectual property rights on promoting innovation and technology;
(7) the innovative capability of the undertaking and the speed of technological change

Article 11. Assessment on the impact of exercising intellectual property rights on competition

The adverse impact or possible adverse impact of exercising intellectual property rights on competition may be shown as elimination or restriction of existing competition, such as reducing the number of competitors in the relevant market through acquisition of intellectual property rights or exclusive licenses, or eliminating existing competition among original undertakings through cross-licensing agreement of intellectual property rights; this impact may manifest as elimination or restriction of potential market competition, such as refusing to license intellectual property, controlling key technology and other resources, or imposing or raising entry barriers of the relevant market, so as to prohibit other undertakings from obtaining those resources on reasonable terms and prevent the entry of potential competitors.

The actual or potential pro-competitive effects of exercising intellectual property rights may manifest as an as improvement in production efficiency or resource utilization through innovation or dissemination and utilization of technology etc, but the aforementioned efficiency must also meet the following criteria:

(1) The improvement in efficiency is objective and can be proved;
(2) The restrictive act of the intellectual property right holder is indispensable to the production of efficiency;
(3) The efficiency generated must be capable to be shared by consumers;
(4) The restrictive act of the intellectual property right holder will not substantially restrict competition in the relevant market.

Even where the exercise of the intellectual property right exercise will or may potentially result in anti-competitive effect, provided that the undertaking can prove that the exercise of that intellectual property right has or potentially has pro-competitive effects, and that the pro-competitive effects outweigh the anti-competitive effects, the State Council Antimonopoly Law enforcement agencies may permit such an act.

Article 12. Impact of the relationship between undertakings and their market positions on competition analysis
As the impact on competition differs according to the relationship between undertakings and their market positions, in order to improve efficiency and conserve law enforcement resources, the State Council Antimonopoly Law enforcement agencies focus on competing undertakings as well as undertakings that have or jointly have high market shares when analyzing the impact of the exercise of intellectual property rights on competition.

If an undertaking satisfies one of the following circumstances, its exercise of intellectual property rights such as licensing of its IPR can be regarded as having a insignificant impact on competition in the relevant markets, and the State Council Antimonopoly Law enforcement agencies may decide not to initiate an investigation, unless the conduct concerning the exercise of intellectual property rights concern those set out in items (1) to (5) of Article 13 and items (1) to (2) of Article 14 of these Guidelines:

(1) The total market share of undertakings with competing relationships in the relevant market does not exceed 20 percent; where market shares cannot be calculated, there should be at least four other undertakings in the relevant market possessing alternative intellectual property rights;

(2) The respective market share of both the undertaking and the trading counterparty in the relevant market is less than 30 percent; where market shares cannot be calculated, there are at least two other undertakings in the relevant market possessing alternative intellectual property rights.

CHAPTER III. ANTIMONOPOLY ANALYSIS OF THE EXERCISE OF GENERAL TYPES OF INTELLECTUAL PROPERTY RIGHTS

Article 13. Agreement between competing undertakings involving intellectual property rights

Competing undertakings are prohibited from concluding the following monopoly agreements involving intellectual property rights in accordance with Article 13 of the Anti-monopoly Law:

(1) Fix or change license fees of intellectual property rights or prices of products with intellectual property rights;

(2) Restrict the quantity of intellectual property licenses or the production or sales volume of products with intellectual property rights;

(3) divide the intellectual property right licensing market, or the sales or raw material purchase market where the product contains intellectual property rights;

(4) Restrict the purchase or development of new technologies or new equipment or new products with intellectual property rights;

(5) Jointly refuse to license intellectual property rights to certain trading counterparties, or jointly refuse to sell products with intellectual property rights to certain trading counterparties;

(6) other monopoly agreements deemed by the State Council Antimonopoly Law enforcement agencies as abusing intellectual property rights.

Article 14. Agreements among undertakings and their trading counterparts involving intellectual property rights

Undertakings are prohibited from reaching the following agreements involving intellectual property rights with their trading counterparts pursuant to Article 14 of the Antimonopoly Law:
(1) fixing the prices of commodities being resold to a third party that contain intellectual property rights;
(2) restricting the minimum prices for commodities being resold to a third party that contain intellectual property rights; and
(3) other anticompetitive agreements determined to be an abuse of intellectual property rights by the State Council Antimonopoly Law enforcement agencies.

Article 15. Non-prohibited circumstances

The provisions of Article 13 and 14 of this Guide shall not be used to prohibit agreements among undertakings involving intellectual property rights where it can be proven that the agreements comply with Article 15 of the Antimonopoly Law.

Article 16. Abuse of dominant market position achieved largely through intellectual property rights

When an undertaking holds a dominant market position that was achieved largely through intellectual property rights, the State Council Antimonopoly Law enforcement agencies will apply Article 17 of the Antimonopoly Law and Chapter II of this Guide to analyse and determine whether the following conduct constitute an abuse of an undertaking's dominant position:
(1) licensing intellectual property rights at unfairly high prices;
(2) without justifiable reasons, refusing to license intellectual property rights;
(3) without justifiable reasons, requiring trading partners to obtain their relevant intellectual property rights exclusively from the undertaking or a designated entity of the undertaking;

(4) without justifiable reasons, tying intellectual property rights or adding other unreasonable trading conditions involving intellectual property rights;
(5) without justifiable reasons, applying differential licensing fees and other licensing terms among comparable trading counterparts; or
(6) other acts determined by the State Council Antimonopoly Law enforcement agencies to be an abuse of an undertaking's dominant market position where that position was achieved largely through intellectual property rights.

Article 17. Refusal to license intellectual property rights
The "refusal to license intellectual property rights" referred to in Subsection (2) of Article 16 of this Guide refers to a refusal by intellectual property rights holders to license intellectual property rights to other undertakings for reasonable use. The refusal to license is a form of exercising a rights holder's intellectual property rights. Under normal circumstances, the State Council Antimonopoly Law enforcement agencies will not impose an obligation on intellectual property rights holders to transact with competitors or trading counterparts.

In the course of an undertaking's exercise of its intellectual property rights, the State Council Antimonopoly Law enforcement agencies generally will not deem an undertaking's unilateral refusal to license to other undertakings a violation of the Antimonopoly Law when that refusal is unconditional or non-discriminatory However, refusals to license intellectual property rights that fall under one of the following categories may be deemed by the State Council Antimonopoly Law enforcement agencies to be a violation of the Antimonopoly Law's provision on the abuse of an undertaking's dominant market position:
(1) Undertakings with dominant market positions unfairly, discriminatorily refuse to license their intellectual property rights;
(2) The intellectual property right refused to be licensed by the undertaking with a dominant market position is an essential element for the licensee to compete in the relevant market, such that the refusal to license that intellectual property right will prohibit the licensee from competing effectively in the relevant market, which will adversely impact competition and innovation in the relevant market, and result in consumer needs not being able to be satisfied.
Refusal to license intellectual property rights can also be a means for undertakings to impose other restrictive conditions or to engage in tying. The State Council Antimonopoly Law enforcement agencies will determine the impact on competition by analysing all relevant restrictive conditions together or by analysing the tying provisions..

Article 18 tie-in sales involving IPRs

For the purpose of Article 16, subsection 4 of this guide, tie-in sale involving IPR refers to the right holder, when exercising its IPR through granting license or other means, requires its trading counterpart to accept license of another IPR or to purchase certain products from the IPR holders or its designated third party against the will of the counterparty. The tied-in products or IPR should be of a nature that can be separately sold or licensed with independent consumer demands. The first IPR is referred to as tying product, and the latter IPR or product is referred to as the tied product.

Tying may have adverse impacts on the competitors in the relevant market, in the sense that it excludes other suppliers' trading opportunity in the tied product market and impairs the choices

of consumers. However, tying may also benefit competition in the relevant market mainly by way of reduced costs for sales or management.

When evaluating the effect or potential effect of tying on relevant market and competitors, the Antimonopoly Law enforcement agencies of the State Council will consider, among other things, the purpose of the tying, the nature of and relationship between the tying and tied products, related trading habits, the scope of effect of tying, as well as the actual operating capability of the one exercising tying. Tying that meet all the following criteria may be prohibited by the State Council Antimonopoly Law enforcement agencies:

(1) the IPR holder has a dominant market position in the tying product market;
(2) the tying product and the tied products are distinct commodities in terms of their nature and trading habits;
(3) the tying has material effect on the tied product market, which extends the dominance of the IPR holder in the tying product market to the tied product market, thus eliminating or restricting competition from other undertakings in the tied product market.
(4) the tie in sale is not reasonable.

Article 19. Unreasonable trading conditions involving IPRs

For the purpose of Article 16, subsection 4 of this guide, “unreasonable trading conditions involving IPRs” refers to the situation where the IPR holder, when exercising an IPR through licensing or other means, impose the following conditions against the will of the transaction counterparty:
(1) to require the counterparty to grant back its improved technology exclusively to the IPR holder;
(2) to prohibit the counterparty from questioning the validity of the right holder’s intellectual property;
(3) to limit the counterparty, after the expiry of the term of the license agreement, from manufacturing, using, or selling competing goods or using competing technologies;
(4) to impose any other unreasonable trading conditions as identified by the State Council Antimonopoly Law enforcement agencies.

Article 20. Concentration of business undertakings involving IPR

Undertakings may by IPR transfer or exclusive license agreement, obtain the key IPRS of other undertakings, and thereby acquiring control or the capacity to exert a decisive influence over other undertakings. In such case, the undertaking should, if the reporting thresholds for concentration are met, make a filing with the State Council Antimonopoly law enforcement agencies in accordance with the Antimonopoly Law and “Provisions of the State Council on the Thresholds for Notification of Concentration of Business Operators”. The Antimonopoly Law enforcement agencies, in accordance with the Antimonopoly Law, as well as published guidelines on review of concentration of business operators, to analyze and determine whether the acquisition of IPR results in eliminating or limiting competition in the relevant market. The agencies will focus on the undertaking’s ability to innovate, the innovative features of other undertakings, as well as the technology development features in the relevant industry.

The Antimonopoly Law enforcement agencies may, during its review of concentration involving IPRs, impose restrictive conditions such as divestment of IPR in order to reduce the effect of eliminating or restricting competition of certain IPR in relevant technical market.

CHAPTER IV. ANTIMONOLOPOLY ANALYSIS OF CERTAIN SPECIFIC TYPES OF BEHAVIOURS EXCERCISING INTELLECTUAL PROPERTY RIGHTS

Article 21 Patent Pool

Patent Pool Arrangement ("Patent Pools") refers to agreement between two or more patent holders to cross-license their respective patents or to grant joint license to third parties through an entity or organization. Such organizations may be joint ventures incorporated for this sole purpose, or entrusted pool participant or independent third-party.

Patent pools may have a positive effect on promoting the integration of complementary technologies, reducing transaction costs, eliminating patent barriers, reducing infringement litigation and its certainties etc.. However in certain circumstances, patent pools may eliminate or restrict competition, therefore antimonopoly analysis is required to determine such effect.

When analyzing the impact of patent pools on relevant markets, the State Council Antimonopoly Law Enforcement Agency shall follow the principles established in Chapter II of this guide and shall also consider the following factors:

(1) The market position of those who participate in the patent pool, and the nature of the patents;

(2) Whether the patent pool is open and non-discriminatory, if those who participate in patent pool have a dominant market position; and

(3) Whether the patent pool is unreasonably blocking third-party technology or restricting the establishment of substitutable patent pools.

Patent pools containing only complementary patents generally do not adversely affect competition; the effect of patent pools with substitutable patents will be examined by the State Council antimonopoly agencies case by case.

The following terms of a patent pool license agreement may have the effect of eliminating or restricting competition:

(1) Prohibiting patentees from independently licensing patents outside of the patent pool;

(2) Forcing licensees to exclusively grant back any improved or developed non-essential patent technologies to the patent pool or the licensor;

(3) Prohibiting the licensee from questioning the validity of patents in a patent pool;

(4) Without valid justification, charging licensees in the same relevant market different license fees; or

(5) Without valid justification, restricting licensors or licensees from conducting research and development of competing technology independently jointly with third-party.

Restrictive conditions imposed by the administration organization of a patent pool reasonably necessary for the sake of managing its activities generally will not eliminate or restrict competition in the relevant market. However, conduct unreasonably discriminating against certain participants, restricting participants from using the patents in the pool, or facilitating exchange of competitively sensitive information between the participants may have an effect of eliminating or restricting on competition.

Article 22. Exercising patent rights during formulation and implementation of standards

The formulation and implementation of the standard is usually beneficial for unifying technical specifications, promoting technological innovation and safeguarding consumer interests and public interests. However, if a standard contains patented technology and is widely implemented, it may increase the entry cost of other alternative technologies to comply with the standard, possibly resulting in patent holdup. In the standard formulation and implementation process, if it is considered that the patent holder in the exercising of the patent right results or may result in excluding or restricting competition, the State Council Antimonopoly Law enforcement agencies will use the analytical provisions under Chapter II hereof to analyze and decide.

In formulating international, national, industry or local standards, patents holders unilaterally declaring patent licensing terms and price conditions is a manifestation of the exercise of patent rights and in general will not eliminate or restrict the relevant market competition. However, behaviour conforming to the following conditions may be a violation of Antimonopoly Law:

(1) the patent holder or patent applicant knows or should have known that its patents or pending patent applications may be included in the relevant standards;

(2) the patent holder or patent applicant fails to disclose relevant information of its patent or already-publicised patent application information in accordance with the policy prescribed by the standard setting organizations or authorities

(3) After the standard has been announced, the patent holder asserts its patents that has been included in the standard;

(4) the conduct causes or is likely to have an adverse effect on competition and innovation in the relevant market. For example, refusing to grant permission to use its patent on reasonable terms without justification; or discriminating licensees who are of the same condition by imposing differential licensing prices or conditions without justification.

When the patent holder's patented technology is included into national or industrial mandatory standards, the patent holder should clearly state the upper limit of the license fee in the relevant agreement. The license fee caps should not be significantly higher than the fee level before such technology is included in the standard.

Article 23. Technical measures of copyright protection

Copyright holders taking technical measures is conducive to better protection of copyright in the information network conditions, and generally does not eliminate or restrict competition in the relevant market.

If technical measures are adopted by copyright holders as measures to eliminate or restrict competition in the relevant market, for example, as a means to achieve tying of products or intellectual property rights, the State Council Antimonopoly Law enforcement agencies will base on the provisions of Chapter II of this guide to analyze and make determination.

If the undertaking is able to use alternative methods that have less adverse impacts on restricting competition in the relevant market, but does not use it without justification, the Antimonopoly Law enforcement agencies will generally consider the undertaking's use of technical measures as having the effect of eliminating or restricting competition.

Article 24. Acts of copyright collective management organization

Copyright collective management organization is a social group entity established in accordance of the law for the interest of a group of copyright holders, which collectively manages the copyrights or other related rights of the right holders based on the authorization of the right holders. The establishment of copyright collective management organization and the performance of its activities usually facilitate the exercise of rights by individual copyright holder and the timely and legal use of copyrighted works by entities and individuals.

If the copyright collective management organization's activities meet any one of the following conditions, the State Council Antimonopoly Law enforcement agencies will apply the provisions of Chapter II of this Guide to analyze and make determination:
(1) charging excessively high agency fees or license fees without justifications;
(2) discriminatory treatment of copyright owners of the same conditions without justifications;
(3) forcing acceptance of a package of licenses;
(4) engaging in other activities that are potentially eliminating or restricting market competition in the relevant market.

CHAPTER V. SUPPLEMENTARY PROVISIONS

Article 25. Handling of conducts of abusing intellectual property rights and acts to eliminate or restrict competition

If an undertaking has been identified as abusing intellectual property rights to eliminate or restrict competition, the State Council Antimonopoly Law enforcement agencies will pursue the violator of legal liabilities in accordance with the provisions of the Antimonopoly Law.

Article 26. Time of Implementation

This guide is effective from [date].