LOOKING TOWARDS IMPLEMENTATION OF CHINA'S ANTI-MONOPOLY LAW

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Thank you for inviting me to join you this afternoon to discuss my perspective on China's new Anti-Monopoly Law. For the past three years I have been involved in extensive discussions concerning the development of the Law. As some of you have heard me say in other settings, I have been in Beijing over the period far more often than I have been in New York. And generally we're pleased with those discussions.

During the decade over which the Chinese government has been drafting the AML, the drafting process has been uncommonly open, as the government has sought input from the public, the business community, and academic and government experts around the globe. The result has been quite successful. The text of the Law reads in a way that is familiar to competition lawyers throughout the world. Some non-competition provisions were added late in the process to address considerations such as the macro-economy and state-owned enterprises, and I will have more to say about those in a minute. But the competition provisions are mainstream.

I am reluctant to say "now comes the tough part," because the drafting work is tough, too, and could easily have gone astray. But the next phase – implementation and operation – can be especially tough for new competition regimes. We have seen the first steps in implementation with the recent release of draft merger notification regulations. Many more steps need to be taken in the near future. The identity and composition of the enforcement agency (or agencies) have not yet been announced. With the exception of the merger notification draft, the regulations and other implementing provisions that will give effect to the AML have not yet been released.

A particular concern at the moment is timing. If the AML is really to take effect on the scheduled date of August 1, time is getting extraordinarily tight to accomplish the

* These views are those of the speaker and do not necessarily represent the position of the Federal Trade Commission or of any individual Commissioner.

many necessary steps. The business community needs a realistic phase-in period for regulations that flesh out the contours of the Law, because businesses have already ordered their affairs by reference to the prior legal framework, and shifts to accommodate new requirements under the AML cannot be instantaneous. It won't work to spring new legal requirements in June or July for implementation as of August 1. When implementing regulations under the AML are eventually announced, I am hoping that those regulations will contemplate transition rules, as U.S. regulations commonly do, to allow for meaningful bridging into the new regime and to allow the business community to reorder its affairs.

Beyond that concern, we need to recognize that competition regulations can be complex, and time will be needed to draft a full set of AML regulations sensibly. The process we have seen on the draft merger notification regulations has been sound, and consistent with the process we see in many jurisdictions – first informal circulation of a preliminary draft in February to a limited set of friendly experts, then comments from those experts, then formal circulation on March 27 of a revised official draft, then seminars and other discussions with both domestic and foreign law firms and other experts, and more generally an opportunity for public comment by April 12. Presumably the March 27 draft will be further revised to reflect the many comments received in April.

This type of thoughtful, stepwise process takes time. It will be a while before the AML regulatory apparatus is fully assembled. The time undoubtedly will extend beyond August 1.

As China moves into the details of implementation, I would foresee three different types of challenges – political, cultural, and analytical. Let me spend the rest of my time this afternoon discussing those in turn.

Political Challenges. The Chinese government resembles ours in that it houses a range of views on difficult questions. One cannot help but notice that the drafting of the AML has been characterized by sometimes-rancorous debate, especially over the last two years, between forces favoring markets and those with a more regulatory, statist bent. As most of you know, some of the rhetoric in Beijing has taken a turn in a direction that is less favorably inclined towards markets, foreign investment, and vigorous competition. An effort to accommodate a wider set of views appears to be reflected in the late revisions in the AML in provisions addressing the macro-economy, state-owned enterprises, administrative monopolies, and sectoral regulation.

If there is a fallacy in the debate, it is in the belief that those provisions are justified by special circumstances in China. Our experience is that the concerns addressed in those provisions are common to all modern economies; we all need to find ways to reconcile competition with the regulatory hand of the state. Consider the list of regulated sectors identified earlier on this panel by our academic participant from Beijing, and compare it to the United States – we also regulate telecoms, railways, electricity, banking, and insurance. I could add other sectors that have not yet been mentioned this afternoon – agriculture, pharmaceuticals, securities. Our system regulates

those, too. If you look just at my agency's cases over the past few years, the FTC has devoted substantial resources to matters that require us to reconcile our competition intervention with the role of regulation – cases involving dentists, physicians, hospitals, natural gas. An entire section of our Web site is devoted to competition advocacy filings submitted to administrative regulators in industries such as law practice and real estate and alcohol.

Ultimately, the extent to which China uses the AML as a tool to promote competition, versus the extent to which it carves firms and sectors out from the statute, will say a lot about China's dedication to creating a market economy. The question is whether the AML will be a competition law or a law for the state regulation of competition. The answer will have broad implications.

Cultural Challenges. Many parts of the world have views that differ from those in the United States on key cultural attributes – attitudes towards attributes such as fairness, or the intensity of competitive head-banging, or sharing of special assets (such as intellectual property), or differential pricing, or the exploitation of power that has been acquired through legitimate means. These differences can manifest themselves in differing legal standards, even in jurisdictions that are commonly recognized as mainstream.

How this will translate into details of implementing the AML is not yet clear. But we know from experience that competition laws can be malleable. United States antitrust law has had a varying history on many of the dimensions I just mentioned. At the moment we're quite accepting of hard-edged competition. We're not terribly sympathetic towards fairness for its own sake.

The latest manifestation of views in China was a draft law issued this week to address fairness in procurement by supermarkets and major retailers and to prevent oppression of suppliers. This could be found in urban zoning provisions to govern malls and markets. The basis for the law was entirely uncoupled from the AML. But I raise it here because it is consistent with a possible future interpretation of the AML. It is consistent with views on similar issues expressed by competition authorities in Japan and Korea and Germany and elsewhere.

We in the United States strike a very different balance. But realistically, we need to recognize that the world is split on many of these cultural questions and that the U.S. perspective on some issues will not prevail in China.

Analytical Challenges. In mentioning analytical challenges this afternoon, I want to make a very limited point: How you conduct a good economic analysis under a competition law is not always obvious. Some people get it intuitively. Many don't. That is true of the press, including some of the business press. That is true of GS-14 and GS-15 lawyers in our enforcement agencies. It is true of enforcement officials in emerging systems.

Our experience with new regimes around the globe is that some of their decisions do not seem to make any economic sense. (I'll acknowledge that some critics and courts say the same thing about old regimes such as mine, too.) As China proceeds into the implementation phase, its enforcement agencies will move through a learning period. We may see decisions that appear to be questionable from the perspective of economic analysis as we understand it. It's possible that some of those decisions may reflect political challenges. And it's possible that some of those decisions may reflect cultural challenges. But it may be that those decisions reflect nothing more than the routine rough-and-tumble that we commonly see as competition authorities develop experience.

Thank you for your time this afternoon. I'll look forward to your questions.