美国律师协会反垄断法部和国际法部对中国工业和信息化部《互联网信息服务市场秩序监督管理暂行办法》草案的共同意见

2011 年 2 月 9 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”）反垄断法部和国际法部（以下统称“两部门”）谨就中国工业和信息化部（“工信部”）2011 年 1 月 12 日发布的《互联网信息服务市场秩序监督管理暂行办法（征求意见稿）》（“暂行办法”）呈递如下意见和建议。[1] 两部门对暂行办法所体现出的工信部的大量想法及付出的巨大努力表示赞赏。同时对工信部提供给我们呈递意见的机会表示欢迎，并希望我方建议能有所助益。如有必要，两部门可提供进一步意见或参与与工信部的商谈。

我们主要针对暂行办法第二章的基本原则提出建议，而非提出具体的法规施行意见。这是因为两部门认为技术和市场进展十分迅速，具体的建议一般会不成熟；此外，比较短的意见征求期限也使两部门很难提出更详细的建议。

两部门数以万计的成员对美国及其他法域的反托拉斯法/竞争法和消费者保护法以及这些法律的实践影响有相当丰富的经验。两部门的意见体现了其成员在美国法律方面的专业知识，和他们对于国际范围内反托拉斯法/竞争法和消费者保护法的熟谙，以及他们对反垄断法和消费者保护法问题的经济分析方面的专业知识。

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[1] 此暂行办法公布于 http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13567763.html 以征求意见。两部门对暂行办法的意见以美国信息产业机构的非官方翻译稿为基准。

概要

两部门谨建议工信部明确（1）该《暂行办法》是仅适用于互联网宽带和无线服务提供商还是同时适用于互联网内容提供商，以及（2）该《暂行办法》是否适用于所有的提供商，包括规模很小或者很有限而不能被认为具有市场支配力的提供商。根据《暂行办法》所影响的提供商的种类的不同，企业所承受的负担和消费者所获得的利益会在很大程度上不同。

两部门谨建议工信部在确定《暂行办法》中有关竞争性行为的条款时，考虑实现在中国所有经济部门达到竞争法实施的一致性这个重要目标。竞争法律及政策一致性这个目标在兼容性要求领域以及单方面拒绝交易领域尤其重要，兼容性要求在《暂行办法》的第 6 条作了规定，而单方面拒绝交易在《暂行办法》的第 8 条作了规定。竞争主管机构和部门监管者同时执行竞争法律可能产生重大的代价以及造成其他困难，尤其是当主管机构和监管者适用不同的甚至相互冲突的竞争规则时。这些代价包括政府对稀有资源的重复使用以及对商界带来的不确定性。当前中国竞争规则和制度还处于发展的早期阶段，这是一个独一无二的机会去避免许多美国和其他法域承受过的重大困难和代价——商界必须面对拥有竞争法共同执法权的多重机构以及竞争法执行的多重程序。

两部门同时也谨建议工信部明确其是否在为互联网信息服务或者其它属于工信部管辖的产业和/或行为建立反垄断法的免除适用或者豁免。两部门期望工信部可以明确和透明化其规则和反垄断法执法机构的规则之间的关系。我们建议反垄法中建立的竞争规则继续适用于互联网信息服务，同时与《暂行办法》保持一致性。

两部门赞赏工信部就防止互联网上的不公平竞争所作的努力。两部门谨建议工信部考虑判断被禁止的行为时纳入“故意”或者“间接故意”的要求，或者涉及第三方用户张贴的内容时考虑为网站运营商提供一些安全港。两部门同时也欢迎工信部明确何种情况构成《暂行办法》第二章规定的行为规范中的“正当理由”。

保护用户的隐私是一项重要的目标。两部门建议工信部定义“用户”并且对互联网信息服务提供者对尚有信息在其控制下的前用户的义务作出规定。我们也谨建议工信部考虑如何进一步平衡对用户信息隐私保护的需要和使用这些信息完成网上交易和提供用户所要求的服务的商业需要。两部门谨建议，根据具体情况性质的不同和所涉信息具体种类的不同，给予所要求的“同意”在种类和程度方面更大的灵活度将会帮助达成更好的平衡。越敏感的信息可能需要明示的具体的同意才可被披露，而就对其他种类的信息的保护而言，可能对特定使用的暗示同意就已足够。最后，两部门谨建议《暂行办法》要求敏感的个人信息只在有限的时间里被保留，而不是被永久保留。有限的保留要求与其它许多法域采用的类似政策更加一致，也会在减少数据被滥用的风险的同时减轻在多个法域运营的互联网信息服务提供者的合规负担。

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE CHINESE MINISTRY OF INDUSTRY AND INFORMATION TECHNOLOGY DRAFT INTERIM MEASURES FOR SUPERVISION AND MANAGEMENT OF THE INTERNET INFORMATION SERVICE MARKET

February 9, 2011

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 ("Antitrust Section") and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA") respectfully submit these comments on the Interim Measures for Supervision and Management of the Internet Information Service Market (Draft for Comment) ("Interim Measures"), of China's Ministry of Industry and Information Technology ("MIIT") published for comment on January 12, 2011.[1] The Sections recognize and appreciate the substantial thought and effort of MIIT reflected in the Interim Measures. The Section welcome the opportunity provided by MIIT to offer these comments, and hope that they may be of assistance. The Sections are available to provide additional comments, or to participate in consultations with MIIT, as appropriate.

We focus in these comments on general principles relating to Chapter 2 of the Interim Measures, instead of on specific implementation suggestions. This is because the Sections believe that the technology and marketplace are evolving so quickly that it would generally be premature to suggest specific approaches and because the short comment period did not allow the Sections to develop more detailed comments.

The tens of thousands of members of the Sections have substantial experience in the antitrust/competition and consumer protection laws of the United States and other jurisdictions, and in the practical implications of those laws. The Sections' comments reflect their members' expertise with U.S. law and their familiarity with antitrust/competition and consumer protection law internationally, as well as expertise in the economic analysis of antitrust and consumer protection issues.

[1] The Interim Measures were published for comment at http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13567763.html. The Sections' comments on the Interim Measures are based on an unofficial translation prepared by the United States Information Technology Office.

Executive Summary

The Sections respectfully suggest that MIIT clarify (1) whether the Interim Measures apply to providers of Internet broadband and wireless services only, or also to providers of Internet content, and (2) whether the Interim Measures apply to all providers, including those that are too small or too limited to be regarded as having any market power. The burdens on businesses and the benefits to consumers will differ significantly according to the type of provider affected by the Interim Measures.

The Sections respectfully suggest that MIIT consider the important goal of achieving consistency in the competition rules that apply to all sectors of China's economy when finalizing the articles of the Interim Measures relating to competitive conduct. The goal of consistent competition law and policy is particularly important in the areas of interoperability requirements, which are addressed in Article 6 of the Interim Measures, and unilateral refusals to deal, which are addressed in Article 8. There may be significant costs and other difficulties when both competition agencies and sectoral regulators enforce competition laws, particularly when the authorities and regulators apply different or even conflicting competition rules. These costs include duplicative expenditure of scarce resources by the government, as well as uncertainty for businesses. At this early stage in the development of China's competition rules and institutions, there is the unique opportunity to avoid many of the significant pitfalls and costs that resulted in the United States and other jurisdictions when businesses are faced with multiple agencies exercising concurrent authority and multiple proceedings over enforcement of competition rules.

The Sections also respectfully suggest that MIIT clarify whether it is creating an exemption or immunity from the Anti-Monopoly Law for Internet information services or any other industries and/or conduct under MIIT's jurisdiction. The Sections encourage MIIT to be explicit and transparent about the relationship between its regulations and those of the Anti-Monopoly Enforcement Authorities. We urge that the competition rules established in the AML continue to apply to Internet information services, consistent with the Interim Measures.

The Sections applaud MIIT's efforts to prevent unfair competition on the Internet. They respectfully suggest that MIIT consider incorporating an "intent" or "acting with knowledge" requirement for prohibited practices, or consider providing some safe harbors for website operators with respect to content posted by third-party users. The Sections also would welcome clarification about what constitutes "proper reasons" under the proposed Code of Conduct set forth in Chapter 2 of the Interim Measures.

Protecting subscriber privacy is an important goal. The Sections suggest that the Interim Measures define "subscriber" and set forth the obligations of IISPs to former subscribers whose information remains in the IISP's control. We also respectfully suggest that MIIT consider further how to balance the need to protect the privacy of subscriber information with the needs of businesses to use such information to complete online transactions and provide services that subscribers seek. The Sections respectfully suggest that greater flexibility in the type and level of consent required, depending on the nature of the situation and the specific types of information concerned, would help achieve a better balance. More sensitive information may require express, specific consent for disclosure while other types of information may be

sufficiently protected by implied consents for certain uses. Finally, the Sections respectfully recommend that the Interim Measures require retention of sensitive personal information for limited periods of time, instead of an indefinite period. A limited retention requirement would be more consistent with similar policies adopted by many other jurisdictions and decrease the compliance burden for those IISPs that operate in multiple jurisdictions while also decreasing the risk that data could be misused.

I. Scope of the Interim Measures

The Sections respectfully suggest that for purposes of the Interim Measures, MIIT clarify the definition of "Internet Information Service Providers" ("IISP") to indicate (1) whether this term would apply only to providers of Internet broadband and wireless services (such as, in China, China Telecom and China Unicom; in the United States, Verizon and Comcast) or also to providers of Internet content (such as Google, Microsoft, and Yahoo!),[2] and (2) whether IISP refers to all sizes of providers. Some of the provisions of the Interim Measures would appear to be applicable only to providers of wireless and broadband service. Others appear to reach providers such as Apple's iPhone.

Moreover, as discussed further in the next section, if the term IISP applies to all providers regardless of size or scope, then some of the provisions of the Interim Measures would impose greater requirements than that imposed by the Anti-Monopoly Law ("AML"). The Interim Measures may impose greater burdens than the AML on small undertakings or undertakings without dominant market power yet provide little significant benefit to consumers. If the term IISP is to include all website operators, the Sections respectfully request that MIIT consider the compliance costs of the proposed Code of Conduct (the "Code") set forth in Chapter 2 of the Interim Measures on the broad range of website operators, particularly small businesses. Although the large providers are more likely to have the resources and experience necessary to comply with the proposed Code, the Code could be a deterrent or barrier to small companies that are seeking to launch their business or become more competitive by utilizing a simple and basic website. Although the Sections fully support MIIT's goal of protecting subscribers' rights, MIIT should consider as well the possible detrimental effects of these regulations on small business, innovation, and the development of online commerce. In addition, in the case of website operators, MIIT should consider carefully whether the proposed Code should apply to all such operators, or only to those who provide client software such as anti-virus software. If the proposed Code applies to all website operators, MIIT should also consider whether it would apply to all of their activities, whether or not those activities relate to provision of online content.

[2] For example, in the United States certain laws apply to Internet service providers in their capacity as providers of wireless and broadband service, such as the Telecommunications Act, 47 U.S.C. § 151, *et seq.*, while other laws apply more broadly to website operators such as the Digital Millennium Copyright Act, 17 U.S.C. § 512, the Children's Online Privacy Protection Act, 15 U.S.C. § 6501, *et seq.*, and the Communications Decency Act, 47 U.S.C. § 230. The Sections recognize that the Administrative Measures for Internet Information Services includes definitions of the term "information services" and suggest that, for the Interim Measures, more refined definitions may be appropriate to clarify the scope of the Interim Measures. The Sections also recognize that the Interim Measures in Article 8 refer to the Telecommunications Service Standards, which may indicate that MIIT intends Article 8 to apply only to providers of wireless and broadband service. Clarification on this point would be beneficial.

The burden imposed on businesses by application of the Code will differ significantly in each distinct case.

II. Application of Competition Rules

A. The Need for Consistency of Competition Rules throughout the Economy

The Sections respectfully suggest that, in finalizing and implementing its regulations for the Internet information service market, MIIT consider the important goal of achieving consistency in the competition rules applied throughout the Chinese economy. As explained below, there are several advantages to having a single set of competition rules applicable to all sectors of the Chinese economy,[3] including the Internet information service market and other related industries subject to regulatory oversight by MIIT. The goal of consistent competition law and policy is particularly important in the areas of interoperability requirements, addressed in Article 6 of the Interim Measures, and unilateral refusals to deal, addressed in Article 8. If the Interim Measures provide competition rules for the Internet information service market (or any other industry or conduct falling under MIIT's jurisdiction) that differ from those embodied in the AML and enforced by the competent agencies – the State Administration for Industry and Commerce ("SAIC"), National Development and Reform Commission ("NDRC"), and Ministry of Commerce ("MOFCOM") – the Sections urge MIIT to be transparent in doing so Further, in case of disagreements between the Anti-Monopoly Enforcement Authorities ("AMEAs") and MIIT, the Sections suggest that MIIT clarify whether the Anti-Monopoly Commission will coordinate and make the final decision, or whether potential conflicts or inconsistencies are to be resolved through some other transparent process.[4]

Significant costs can result when both competition authorities and sectoral regulators concurrently enforce competition laws – particularly when the competition principles applied differ between the two.[5] Industry participants face increased transaction costs from having to defend a proposed transaction or course of conduct before multiple agencies. These increased costs may not be justified by any corresponding increase in consumer welfare.[6] Concurrent competition jurisdiction also can lead to uncertainty regarding the outcome and timing of agency review of a proposed transaction or other business conduct. For example, uncertainty is generated when multiple entities possess the authority to review the competitive effects of a given transaction or practice, especially when they reach differing conclusions regarding the legality of such transaction or practice. Uncertainty also can be created by different time frames for review at the competition agency and sectoral regulator.

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[3] The Sections note that the AML applies to all sectors, with only a partial exemption for the agricultural sector. AML Art. 56. We understand that MIIT is not implementing the AML through the Interim Measures, as only AMEAs have the authority to do so.

[4] The Sections understand that a law such as the AML has greater authority than a regulation.

[5] These Comments are not intended to address the allocation of responsibility for enforcing the AML among SAIC, NDRC, and MOFCOM.

[6] For example, the requirements in Articles 6 and 8 of the Interim Measures, regarding interoperability and unilateral refusals to deal, if applied to operators without dominant market power, may impose costs without significant benefit to consumers. The Sections are unaware of any other jurisdiction that imposes such requirements upon *all* businesses, regardless of market power.

In some cases it may be literally impossible to comply with the rules established by different regulatory bodies. Such conflicting rules can result from the use of different substantive standards, different economic analyses, and different procedures (for example, those involving data and information collection) for evaluating conduct. Such differences in approaches to competition law can make it difficult and excessively costly for both domestic and foreign firms to comply with all legal and regulatory requirements.

From the perspective of the government agencies, concurrent competition jurisdiction results in the duplicative expenditure of scarce resources. It also may generate inconsistent policy approaches and lead to disputes between the agencies where their respective jurisdictions are not clearly delineated. Conversely, avoiding such concurrent jurisdiction can yield certain benefits, such as a stronger support for competition as a means of organizing productive activity[7] and enhanced voluntary compliance on the part of companies in the regulated industries at issue. Another benefit of following a single competition policy within China would be the enhanced ability of the AMEAs to establish common policies and procedures with foreign counterparts, leading to enhanced harmonization of procedural and substantive competition rules, as well as more effective cooperation among China's agencies and their foreign counterparts in reviewing individual matters. Such harmonization and cooperation is much more difficult if there is a perception that there are multiple, competing competition policies embraced by distinct elements of the Chinese government.

China is still in the early stages of developing its competition rules and policy, and thus has the unique opportunity to avoid many of the significant issues, pitfalls, and costs that other jurisdictions, including the United States, have faced with multiple overlapping competition rules and procedures. Further, unlike the United States and other countries with a longer history of competition law enforcement, if China establishes and maintains a consistent competition policy from the start, it would not need to incur the potentially significant costs of a later change to the status quo in order to achieve that consistency. Such costs are often prohibitive.

Recognizing the significant issues and costs resulting from concurrent competition jurisdiction among multiple authorities in the United States, the Antitrust Modernization Commission ("AMC"), a panel established by Congress to evaluate and make recommendations regarding the U.S. antitrust laws, recommended that such concurrent jurisdiction be eliminated with respect to merger review in regulated industries, including the telecommunications/media industry regulated by the Federal Communications Commission ("FCC"). More specifically, the AMC recommended: "For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency."[8] As the AMC explained,

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[7] *See, e.g.*, William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001) (discussing the development of competition policy in transition economies).

[8] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 364, Recommendation 70 (2007) [hereinafter AMC REPORT].

> The recommended approach would ensure competition policy and enforcement consistency, limit inefficiencies and delays associated with overlapping enforcement, align competition policy assessments across industries regardless of the existence of different regulatory agencies, facilitate transparency in decision-making, and allow the antitrust agencies to act where they have a comparative advantage. It would also limit duplicative expenditure of resources and an inefficient allocation of scarce government resources . . . .[9]

The OECD also has addressed the relationship between competition authorities and sectoral regulators, most recently in connection with its 2005 Global Forum on Competition. The OECD similarly concluded that, while sectoral regulators are likely better suited to technical regulation than competition authorities, competition law oversight is best accomplished by competition authorities.[10]

In a 2006 report, the Working Group on Telecommunications Services of the International Competition Network ("ICN") concluded that, while some degree of jurisdictional overlap is unavoidable in the telecommunications industry, overlapping competition jurisdiction may have several negative consequences.[11] Those include, among others, inter-agency power battles, inefficient use of government resources, additional requirements and complexities imposed on firms attempting to address different standards of review, potential lack of transparency, and overall uncertainty in the marketplace.[12]

Pursuing the objective of a unified and consistent approach to competition in all economic sectors does not minimize the importance of sectoral regulators, and the Sections do not intend to detract from the importance of MIIT's role by emphasizing this objective. Sectoral agencies are responsible for the formulation and implementation of policies addressing vital public issues, including, for example, the online consumer protection and privacy concerns addressed in MIIT's Interim Measures. Further, in the experience of other jurisdictions, the familiarity of an agency with the technical aspects, specific products, and services within a given industry makes that agency especially well equipped to engage in technical regulation. In the process of implementing the AML in various regulated sectors of the Chinese economy, the AMEAs might benefit from the technical expertise of sector regulators, such as MIIT. Accordingly, regular liaison and consultation between AMEAs and such regulators – which we

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[9] *Id.* at 365 (footnote omitted).

[10] Competition Committee of the OECD Directorate for Financial and Enterprise Affairs, The Relationship between Competition Authorities and Sectoral Regulators Issues Paper, at 4-5 (Feb. 2, 2005) [hereinafter OECD Issues Paper], *available at* http://www.oecd.org/dataoecd/58/7/34375749.pdf.

[11] International Competition Network, Report of the ICN Working Group on Telecommunications Services, Presented at the Fifth Annual Conference (May 3-5, 2006), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc384.pdf. The ICN is a voluntary membership organization formed in 2001 as a forum open to all agencies with public enforcement responsibility for competition and/or antitrust legislation. At present more than 100 distinct agencies are ICN members. More information on the ICN is available at its website, http://www.internationalcompetitionnetwork.org.

[12] *Id.* at 27.

understand already occurs – could allow both to benefit: AMEAs from MIIT's sectoral expertise and MIIT from the AMEAs' broader competition experience.[13]

B. Potential for Implied Exemption or Immunity from the AML

In addition to considering the importance of consistency in the application of competition rules, the Sections respectfully suggest that MIIT avoid creating – either explicitly or by implication – an exemption or immunity from the AML with regard to the Internet information service market or any other industry in the Chinese economy subject to MIIT's jurisdiction. The competition rules embodied in the AML should continue to apply in the Internet information service market, consistent with the Interim Measures that MIIT is developing. The Sections do not read the Interim Measures as creating an exemption or immunity from the AML. If that is the case, industry participants would benefit from an affirmative statement in MIIT's regulations that the regulations should not be construed as creating such an exemption or immunity. If, however, MIIT were to pursue such an industry-specific exemption or immunity from the AML in the future,[14] the Sections recommend that MIIT state clearly in its regulations the extent to which the competition rules are intended to be displaced by its regulations.

Whether the antitrust rules applied throughout the economy continue to apply to conduct regulated by other government agencies is a problem with many precedents in the competition-law practice of other jurisdictions. In the United States, for example, the Supreme Court first examined this question a century ago.[15] Most recently it addressed the notion of an implied immunity from the U.S. antitrust laws in *Credit Suisse Securities (USA) LLC v. Billing*.[16] There the Court held that, in light of the U.S. Securities and Exchange Commission's ("SEC") extensive and active regulation of initial public offers, including the particular conduct alleged to violate federal antitrust law, as well as the SEC's statutory authority to regulate that conduct, the securities laws impliedly precluded the application of the antitrust laws to such conduct.[17] In so holding, the Court found that application of both the antitrust and securities laws to the particular conduct likely would produce conflicting guidance, requirements, standards, and results; thus, the antitrust claims were "clearly incompatible" with the securities laws and existing regulatory regime enforced by the SEC.[18]

As indicated above, the Sections do not understand that MIIT necessarily intends to exempt conduct from the AML by adopting the Interim Measures, nor do we encourage MIIT to do so. The primary thrust of these comments is to encourage MIIT to be explicit and

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[13] For example, in making determinations involving technical or other regulations, the sectoral regulators could benefit from the expertise of AMEAs in identifying relevant markets and firms with market power. *See, e.g.*, OECD Issues Paper at 4-6.

[14] These comments do not address whether MIIT or any other sectoral regulator has authority to create an exemption or immunity from the AML.

[15] *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912) (ordering remedy for antitrust violation by railroad association, but cautioning district court to avoid interference with regulation of railroad transportation rates by Interstate Commerce Commission, a specialized administrative agency responsible for extensive regulation of railroads).

[16] 551 U.S. 264 (2007).

[17] *Id.* at 278-85.

[18] *Id.*

transparent about the relationship between its regulations on the one hand and the rules and processes of the AMEAs on the other. Ideally the Interim Measures will require marketplace conduct that is consistent with the requirements of the AML. To the extent this is not the case, the cost of compliance for business enterprises that must comply with both sets of laws and regulations will be minimized if MIIT clarifies that at the outset.

The Sections note that the Antitrust Section frequently has expressed its opposition to exemptions and immunities from the U.S. antitrust laws, including implied immunities created by the courts and administrative agencies, and express immunities created by statute.[19] The Antitrust Section has consistently taken the view that exemptions and immunities from competition law should be disfavored, and authorized only in clear instances of market failure, or when some specific countervailing policy objective clearly overcomes the general presumption in favor of organizing productive activity through private enterprise operating within competitive markets. Further, the Antitrust Section frequently points out that previous historical experience involving the substitution of administrative regulation for market competition subject to antitrust law has been generally unsuccessful. Thus, for example, the performance of numerous important sectors of the U.S. economy has been improved – dramatically so in many instances – by the reduction in the scope and rigidity of regulation and a corresponding increase in reliance on market forces. This is the dominant interpretation of U.S. experience in the commercial aviation, surface transportation (rail, motor carrier and water carrier), electric energy production and distribution, and telecommunications industries, to name only some of the leading examples.

For many of the same reasons discussed above with respect to the concurrent jurisdiction of competition authorities and sectoral regulators, there is a significant need for clarity and transparency about whether approval (or disapproval) of a proposed transaction or other business conduct by a sectoral regulator such as MIIT will affect the continuing applicability of the "core" competition rules expressed in the AML, and vice-versa. For example, participants in the Internet information service market will benefit from knowing whether, and to what extent, a decision by MIIT regarding the lawfulness of certain conduct is final, even if it involves issues of competition on which one of the AMEAs otherwise would be expected to rule. Thus, the Sections respectfully suggest that MIIT state clearly whether and to what extent the competition laws are intended to be displaced by any MIIT sector-specific regulations.[20]

III. Application of Rules to Unfair Practices

The Sections applaud MIIT's efforts to prohibit unfair competition on the Internet. The Sections respectfully suggest, however, that MIIT consider incorporating an "intent" or an "acting with knowledge" requirement into the prohibited practices set forth in Article 6 of the proposed Code. Given the prevalence of third party user generated content on

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[19] *See, e.g.*, ABA Antitrust Section Comments to the Antitrust Modernization Commission on General Immunities and Exemptions, the Shipping Act Antitrust Exemption, and the McCarran-Ferguson Act (all available at http://www.abanet.org/antitrust/at-comments/comments.shtml).

[20] The AMC made a similar recommendation in its 2007 report: "Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all." AMC REPORT at 359, Recommendation 64.

the Internet today (such as online forums, chat rooms, social networks, and blogs), it could be highly burdensome for a business to monitor all of the user generated content for compliance with the proposed Code of Conduct.[21] Adding an intent or knowledge requirement to the prohibited behaviors listed in Article 6 would decrease this burden, and a website would not be liable for the content posted by its third party users.

An alternative approach would be to provide safe harbors for website operators to protect them against liability for content posted by their third party users. In the United States, for example, the law provides website operators with safe harbors in the case of user generated content in certain circumstances.[22] These safe harbors protect website operators from certain kinds of liability based on posts by third party users. MIIT also could consider creating a similar type of safe harbor for website operators, so that they will not be responsible for content they do not control, but rather is contributed by third parties.

The Sections would also welcome clarification about what constitutes "proper reasons" under the proposed Code of Conduct. Such clarification would provide important guidance to Internet Information Service Providers and subscribers regarding permitted behavior under the Code. For example, under Article 8, Internet Information Service Providers are prohibited from refusing to deliver service or from terminating such service delivery to its subscribers without proper reasons. Would non-payment of subscription fees or violations of a service provider's Terms of Service constitute "proper reasons" for purposes of the proposed Code of Conduct?

Additional clarification of "proper reasons" would also be helpful in Article 11. If a subscriber is presented with a pop-up advertisement on a website, and then navigates to a different website and is presented with the same pop-up advertisement, would that second pop-up advertisement constitute a "proper reason" to disturb the normal use of computer by the subscriber, given that the second website operator would not have been aware of the subscriber's choice to close the advertisement on the first website? Such clarification would provide helpful guidance to Internet Information Service Providers and to subscribers as they seek to understand what constitutes compliance with the Code.

IV. Implications of Rules on Privacy

The Sections applaud MIIT's goal of protecting the privacy of subscriber information. The Sections suggest that the Code include a definition for "subscriber" and that MIIT also consider the obligations Internet Information Service Providers may have to an individual who is no longer a subscriber but whose information remains in the Internet Information Service Provider's control. The Sections also recommend that MIIT consider

[21] The Sections understand that there is a Regulation on Management of the Administration of Internet Electronic Messaging Services that already applies to social networks and other messaging activities. To the extent that the Code of Conduct in the Interim Measures covers activities of entities within the scope of this Regulation, the Sections suggest that MIIT consider consistency with the Regulation in developing the Code's requirements.

[22] The Communications Decency Act provides a safe harbor to websites to liability for state tort law claims, such as defamation, for user generated content. 47 U.S.C. § 230. Similarly, the Digital Millennium Copyright Act provides a safe harbor to websites for copyright infringement, should third party users post infringing materials to its site. 17 U.S.C. § 512(c). Canada's copyright law provides a similar safe harbor for copyright infringement liability to website operators. Copyright Act, Chapter C-42, 2010.

additional provisions in order to balance the need to protect the privacy of subscriber information and the needs of businesses to use such information to complete online commerce transactions and to provide services that subscribers desire.[23]

The Sections respectfully suggest that MIIT consider recognizing less burdensome consent requirements in certain situations than the express consent required under Article 12 of the Code. For example, Canada recognizes that implied consent is sufficient in certain circumstances, such as the case when a subscriber provides billing information in order to complete a purchase.[24] Another approach to consider is providing sufficient notice to provide consumers with meaningful choices, enabling them to opt out of certain company practices.[25] Typically this model allows subscribers to "opt-out" of some or all of the website's privacy practices. Allowing for implied consent or a "notice and choice" model would reduce the burden on website operators who need to use personal information to complete transactions or services that subscribers request, while still protecting subscribers' personal information.

The Sections also note that in regards to the requirement in Article 12 to report unauthorized disclosures of information, two models currently operate in the United States. One is the strict liability model similar to the one MIIT has proposed in Article 12. The other model that MIIT may want to consider is to limit notification to only those unauthorized disclosures that have the potential to cause significant and substantial harm to subscribers (the "risk of harm model").

Under the strict liability model, all breaches are reported to a subscriber, regardless of the level of risk of harm to the subscriber. Critics of this model have argued that as a result, subscribers are over-notified and unable to distinguish major breaches of security from minor incidents. This model also adds to the costs of doing business, since notification can be expensive. In situations in which there is low risk of harm to subscribers, imposing these additional costs may not be warranted.

Alternatively, under the "risk of harm" model, businesses must notify subscribers of breaches only when there is significant risk that the subscriber will be harmed by the disclosure of their information. Proponents of this model argue that the objective of a breach notification rule should be to establish a reasonable notification trigger that ensures that subscribers receive timely information in cases where they are likely to be significantly affected

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[23] For purposes of these comments, "subscriber information" and personal information" are used interchangeably.

[24] *See* Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, Canada, *available at* http://laws.justice.gc.ca/PDF/Statute/P/P-8.6.pdf ("PIPEDA"); *see also* Office of the Privacy Commissioner of Canada, "Fact Sheet: Determining the Appropriate Form of Consent under the Personal Information Protection and Electronic Documents Act," Sept. 2004, *available at* http://www.priv.gc.ca/fs-fi/02_05_d_24_e.cfm.

[25] Although the notice and choice model is currently under debate in the United States, suggestions for improvement primarily revolve around making the notices clearer, more understandable, and simplifying the ability of consumers to exercise their choices, as opposed to eliminating the model altogether. *See* Preliminary FTC Staff Report, "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers," Dec. 2010, *available at* http://www.ftc.gov/os/2010/12/101201privacyreport.pdf ("FTC Privacy Report"); *see also* Dept. of Commerce, "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework," Dec. 2010, *available at* http://www.commerce.gov/sites/default/files/documents/2010/december/iptf-privacy-green-paper.pdf ("Commerce Privacy Report").

by any unauthorized exposure of their information. Critics however argue that this standard leaves too much discretion to businesses, and may result in non-notification in situations where it was warranted. Because both models currently operate in the United States, the Sections offer both for MIIT's consideration.

Additionally, clarification in Article 14 about the level of consent necessary to provide subscriber information to third parties and to transfer data would be helpful to Internet Information Service Providers as they attempt to comply with the proposed Code of Conduct. In determining the level of consent necessary, many countries evaluate the sensitivity or nature of the data in question and require increased protection based on the perceived sensitivity. For example, many European countries require express consent for any collection or use of sensitive or special personal information.[26] For many European countries, sensitive or special personal information includes data that relates to an individual's health information, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union memberships, and sexual orientation.[27]

The United States also requires increased protection and compliance requirements for certain personal information such as social security numbers, financial information, and health information.[28] What constitutes sensitive or special data often may be determined by the resulting harm that an individual may incur if such data became widely available. For example, in the United States social security numbers and financial information are typically subject to greater protection due to the threat of identity theft and possible financial harm due to broader exposure of this information. Thus, the Sections recommend that MIIT consider recognizing greater protections for the use of sensitive personal information, such as requiring express consent for collection of sensitive personal information and heightened data security requirements. For data that is less sensitive, such as data that is publicly available or that would not cause harm to an individual if it were made public, such data could be subject to less stringent, but still reasonable security protections.[29]

The Sections also recommend that the proposed Code of Conduct recognize that sharing personal information with third parties may be necessary in some instances. For example, many websites use third parties to provide certain services for their websites, such as "hosting." In a hosting situation, the website's content resides on a server that is typically not on the website operator's premises. Because the content of the website is located on a third party's server, that third party likely has access to the content, including subscriber information. Such "sharing" is necessary so that the website operator can provide the website and its services to subscribers. Many jurisdictions recognize that sharing with third parties such as this may be

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[26] *See, e.g.*, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data ("EU Privacy Directive"), at Article 8, *available at* http://ec.europa.eu/justice/doc_centre/privacy/law/index_en.htm. Canada also has similar requirements for health information. PIPEDA, *supra* note 29.

[27] EU Privacy Directive, at Article 8.

[28] *See* Gramm Leach Bliley Act, 15 U.S.C. § 6801(b); Fair Credit Reporting Act, 15 U.S.C § 1681, *et seq*.

[29] For example, the EU Privacy Directive states security measures should be appropriate to the risks presented by processing the data at question and the nature of such data. EU Privacy Directive, at Article 17. The Federal Trade Commission in the United States also advocates a similar approach in the FTC Privacy Report. FTC Privacy Report, at 44-45.

permitted in situations in which the consumer has consented (either impliedly, through the notice and choice model, or expressly) to such sharing, or where the law permits such sharing. [30] The Sections suggest that MIIT consider adopting such an approach to add some flexibility to compliance with the Code.[31]

Finally, the proposed prohibition against modifying or deleting subscriber information without the subscriber's consent raises a number of important issues worthy of further careful consideration. Many jurisdictions have adopted principles that personal information should not be retained longer than necessary to meet the purpose for which it was collected. For example, the United Kingdom's data protection authority, the Information Commissioner's Office, recommends considering the current and future value of the information; the costs, risks and liabilities associated with retaining the information; and the ease or difficulty of making sure the information remains accurate and up to date in determining appropriate retention periods for personal information.[32] The United States also appears to be moving to a limited retention time period approach.[33] The Sections note that the longer subscriber information is retained, the greater the risk of exposure in harmful ways for such subscriber information, whether through a hacker invading a database that stores the data or through the careless disposal of paper records containing such data. Given the increased risk of harm to subscribers resulting from longer storage periods, the Sections recommend adopting a limited retention approach for sensitive personal information, in line with the policies adopted by many other jurisdictions. This approach would also decrease compliance burdens for those Internet Information Service Providers that operate in multiple jurisdictions.

Conclusion

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

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[30] *See* EU Privacy Directive; PIPEDA.

[31] The Sections have focused on the general principles underlying the Interim Measures rather than specific implementing procedures to safeguard physical or electronic information. Given the speed with which technology changes, the Sections believe that maintaining flexibility regarding procedures, while promoting care in safeguarding personal information, will produce better results.

[32] ICO, "Retaining Personal Data (Principle 5)," *available at* http://www.ico.gov.uk/for_organisations/data_protection/the_guide/information_standards/principle_5.aspx.

[33] *See* FTC Privacy Report at 46-47; Commerce Privacy Report at 26-29.