**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。

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。

**目录**

# 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。

<u>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”）</u>

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.
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> (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.
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> (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

[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.