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China's Fair Competition Review: Insights from the U.S. Experience

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Good morning. I am delighted to be here. This

anticompetitive conduct, that is only part of the task of fostering a robust market economy. Blocking only one channel of anticompetitive behavior—private conduct—does not stop and may actually increase pressure on the other channel—government-sponsored or -sheltered anticompetitive behavior.³

China is emerging from a long period with a state-controlled economy, and it is thus unsurprising that anticompetitive regulatory approaches or mindsets remain. The State Council Opinion itself identified these vestiges, such as “local protectionism, regional blockade, industry barriers, business monopoly, granting preferential policies in violation of the law or illegally prejudicing the interests of market players[.]”⁴ But even in a long-established free-market system, such as the United States, parties often seek through government regulation what they cannot lawfully obtain through private activity, whether it be a fixed price, a divided market, or the exclusion of upstart rivals.

Anticompetitive restraints are not only less risky to attain through government fiat than by private action, they are also easier to enforce. The government can exclude new rivals or maverick incumbents by law enforcement or by limiting licenses for providers, without regard to demand.

Consumers are poorly positioned to counter these efforts politically, as the economic theory of regulation long recognized.⁵ Their interests are unorganized and the costs associated with the anticompetitive restraint for any individual consumer is typically small. Thus, it is hard to marshal political pressure for consumer interests. By contrast, the entities that seek shelter

³ See Timothy J Muris, *Principles for a Successful Competitive Agency*, 72 U. CHI. L. REV. 165, 170 (2005). (“Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel.”).

⁴ Opinions of the State Council, *supra* note 2.

⁵ See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 71 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL

from competition are organized firms or trade associations that reap concentrated benefits, and they can generate focused political pressure for the restrictions. In an already highly regulatory environment, competitors have many opportunities to use regulatory mechanisms to keep out competitors.⁶

Competition officials can rebalance the scales by scrutinizing anticompetitive regulation. They can be a voice for consumer interests in a discussion that might otherwise be dominated by organized interests seeking government protection from competition. They can also give unbiased guidance to regulators who are unfamiliar or uncomfortable with market competition.

Establishing a regulatory philosophy, this Order offered twelve principles for federal agencies to use in deciding whether and how to regulate. Its purpose is to ensure that a regulation benefits the public. It requires the regulator to identify a significant market failure or systemic problem, to evaluate alternative approaches to regulation, to choose the regulatory action that maximizes net benefits, to base the proposal on strong economic evidence, and to understand the expected effects of the regulation on those it hurts and benefits. An analysis using the Order 12866 principles can reduce the lingering effects of a planned economy, where businesses needed government approval before taking most actions.

Another path is to focus on competitor control over market entry, or what I call the “Brother, May I?” problem.¹⁷ In this situation, “would-be entrants are effectively required to obtain permission from incumbent competitors to enter or expand within a particular market.”¹⁸ This arises when a trade or professional association controls licensing or

The FTC has generally focused its research, advocacy, and enforcement in healthcare; other expensive transactions for consumers, such as home purchases and mortgages; and emerging technology-driven business models, such as online sales and the sharing economy.

A recurring problem that I have seen many times is an effort by entrenched incumbents to use government regulation or the rules of an association of competitors to restrict market entry by an upstart competitor that uses new technology to unbundle services and offer them at a lower price. Competition officials should be alert to such attempts by incumbents to cement into place restrictions that prevent consumers from enjoying the increased competition brought by new technologies. Frequently, industry argues such restrictions are necessary to protect consumers from low quality offerings but government officials should examine these arguments carefully and require evidence of consumer harm.

Chinese antitrust enforcers might look first to sectors of their economy with similar characteristics to search out regulations that deter competition and harm consumers.

In conclusion, given China's past state-controlled economy, it is unsurprising that anticompetitive regulatory approaches or mindsets remain. In a market system, however, consumer demand should determine products and business models. Misguided government regulation can foreclose competition, and regulators should be alert to regulations that favor particular competitors. Whether the state picks winners and losers itself or effectively delegates that role to self-interested actors makes little difference. Either way, consumers pay the price. Thus, I wish the Chinese AML agencies well in using the Fair Competition Review Mechanism and hope that they find the FTC's experience helpful to their efforts.

Thank you.