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**THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES
AND SECTORAL REGULATORS**

Contribution by Mr. Wang (SAIC, China)

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

By Mr. Wang (SAIC, China)

1 Legislative insights into relations between competition and industry regulatory authorities in China

1. Under the People's Republic of China Anti-unfair Competition Law enacted in 1993, the industry and commerce administrative authorities are established as the authorities to regulate competition. Sub-clause 3.2 of the Law stipulates that "The industry and commerce administrative authorities subordinated to the People's governments above county-level shall perform monitoring and inspections on acts of unfair competition. In case such monitoring or inspection function is assigned to other authorities under other laws or regulations, the stipulations of such other laws or regulations shall apply." Since the Anti-unfair Competition Law is the first in China dedicated for the inhibition of unfair competition, there had been no other laws or regulations establishing alternative authorities for such function when the Anti-unfair Competition Law was enacted. Therefore, for years after enactment of the Law, the industry and commerce administrative authorities had been the sole governing body in China in relation to unfair competition, responsible for implementing the Anti-unfair Competition Law in all industries, including but not limited to power, telecommunications and finance.

2. The authority of industry and commerce authorities as the competition regulatory body has been challenged in recent years, such challenges are mainly from the power, telecommunications, finance, civil aviation and pharmaceutical industries.

3. The People's Republic of China Tendering & Bidding Law stipulates under Article 32 that "Bidders shall not collude in respect of the bid price, repulse the fair competition of other bidders, nor shall they cause detriment to the interests of the Tenderee or other bidders. Bidders and the Tenderee shall not collaborate to impair the national interests, social public interests or the legitimate interests of others." These stipulations are largely identical with those under Article 15 of the Anti-unfair Competition Law, "Bidders shall not collude in the bidding to drive the bid price up or down. Any bidder shall not collaborate with the Tenderee to repel the fair competition of rivals." To avoid doubt in respect of the implementer of the stipulation, the Tendering & Bidding Law further stipulates under Article 7 Item 2, "The administrative monitoring and inspection and division of responsibilities among departments shall be subject to the determination of the State Council". In response to this article, the State Council stipulates that the construction authorities shall monitor and inspect unfair competition in tendering and bidding.

4. The People's Republic of China Telecommunication Regulations (enacted in 2000) makes stipulations under Articles 41 and 42 in relation to the unfair competition in telecommunication sector as more detailed elaboration of the stipulations under the Anti-unfair Competition Law. Meanwhile, the Telecommunication Regulation stipulate that the information industry authorities of the State Council or telecommunication authorities of provinces, autonomous regions or municipalities shall perform monitoring and inspection on unfair competition in this sector, thus completely excluding the industry & commerce authorities from the telecommunications sector.

5. In a document of the State Council in 1998 in relation to the responsibilities of China Insurance Supervisory Commission, the monitoring and inspection duty was assigned to the Commission and its affiliate organisations.

6. Despite the absence of dedicated stipulations under laws or stipulations in respect of the governing body of unfair competition in such sectors as power, civil aviation and pharmacies, certain evidences demonstrate that the industry & commerce authorities are being excluded. For example, the Stipulations in Relation to Prohibition of Unfair Competition on Civil Aviation Transportation Market enacted by CAAC in 1996 designated CAAC to monitor and inspect the unfair competition on nationwide civil aviation transportation market. The Power Market Supervision Methods enacted by China State Power Supervisory Commission in 2003 designated the power supervisory authorities to monitor and inspect the unfair competition of power generation enterprises. Strictly speaking, the above designations could not absolutely exclude the industry & commerce authorities from this regard. However, such designations have never been challenged.

7. In general, in respect of the monitoring and inspection on unfair competition, the industry & commerce authorities still prevail. Nevertheless, in certain sectors such as power, telecommunications and insurance, the industry regulatory authorities have superseded the industry & commerce authorities.

2. Concerns resulted from the exclusion of industry and commerce authorities

8. At least two concerns have arisen from the fact that the unfair competition is under jurisdiction of industry regulatory authorities. Firstly, the industry regulatory authorities usually have interest connections with the enterprises under their regulation. Such interest connection is highly possible to impair the effectiveness of regulatory actions. Prior to the reform and openness, a system without separation of administration and enterprises was in place in China, when the industry regulatory authorities controlled the operation of enterprises within the industry and even, the industry regulatory authorities are also operating organisations. Further to the reform that has lasted 20 years, the regulatory authorities of most industries have ceased to be involved in direct operation. However, such historical connection could not cease in a short period of time. Meanwhile, enormous amount of state-owned enterprises operating in the regulated industries would have closer connections with the regulatory authorities. In addition, since the regulatory authorities are responsible for the policy making, they have enormous communication with the regulated enterprises. Therefore, in comparison with the competition regulatory body, the industry regulatory authorities are more apt for the influence by the enterprises under their jurisdiction and are therefore more tendentious. In particular, in case of interest conflicts between the regulated enterprises and the consumers, the regulatory authorities are likely to take aside the regulated enterprises, thus impairing the protection of consumer interests and rights.

9. Secondly, as the regulatory authorities perform the monitoring and inspection on the unfair competition in the regulated industry, the fairness of such actions may deviate from the should-be level. On one hand, the stipulations differ under different laws and regulations, causing that different authorities may take different punishing actions on the same case of violation. For example, for the administrative penalty of unfair competition of utilities, the Anti-unfair Competition Law requires “termination of the violation action and fine ranging from Rmb 50,000 to Rmb 200,000 based on the severity”, while the Telecommunications Regulations stipulate, in terms of unfair competition of telecommunication enterprises, that “The violating enterprise be charged to take corrective actions, apologize to the customers and compensate any loss to the telecommunication customers. In case of refusal to take corrective actions, apologize to the customer or compensate the loss to the customer, the violating shall be subjected to reprimand and fine of Rmb 10,000 to Rmb 100,000. In case of serious violation, the violating enterprises shall be ordered to terminate its operation for correction”. Obviously, the lower and upper limits of fine under the Telecommunications Regulations are significantly below those under the Anti-unfair Competition Law. On the other hand, the unfair competition in the regulated industries does not differ materially from that in the non-regulated industries. The monitoring and inspection by different authorities will inevitably result in the application of different enforcement yardsticks.

10. Based on the above considerations, we believe the unfair competition regulatory system in regulated industries is unsatisfactory.

3. Shared jurisdiction, a possible solution

11. In order to ensure the enforcement effectiveness and fairness, we believe the industries and commerce administrative authorities shall return to the regulated industries. However, such return shall not be on exclusive basis. As a matter of fact, the industries and commerce administrative authorities may face shortage of technical knowledge while handling violating cases in the regulated industries such as power, telecommunications and insurance and such shortage of technical knowledge may in turn affect the enforcement results. Therefore, we believe it might be a practical approach for the competition regulatory authorities and industries regulatory authorities to share the jurisdiction over unfair competition activities. Such approach combines the administrative proficiency of industries and commerce authorities and technical knowledge of industry regulatory authorities in a mutually supplementary arrangement. In practice, the approach may be implemented in two steps. As the first step, the current laws and regulations shall be amended to stipulate that the industries and commerce authorities and the industry regulatory authorities share the monitoring and inspection on unfair competition. As the second step, a communication mechanism shall be established between the industries and commerce authorities for sharing of information and technologies. We will make further study as to how such mechanism could be established.