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Via Electronic Mail

Deborah A. Garza, Chair
Antitrust Modernization Commission
1001 Pennsylvania Avenue, NW, Suite 800 South
Washington, DC 20004-2505

Re: UPS Comments Regarding Commission Issues for Study

Dear Madame Chair:

I am writing on behalf of UPS, a major U.S.-based provider of parcel express delivery and logistics services around the world, to propose an issue for study by the Antitrust Modernization Commission.

Issue for study: Whether U.S. competition laws and practices are adequate to prevent anticompetitive conduct abroad by state-owned enterprises that cause harm to U.S. exporters.

An emerging academic literature acknowledges that state-owned enterprises (SOEs) generally have both a greater incentive and a greater ability to engage in anticompetitive conduct, as compared with private firms. In a recent article in the Antitrust Law Journal, for example, David Sappington and Greg Sidak argue that:

> "A reduced focus on profit can lead the SOE to price products below cost. It can also increase the SOE's incentive to raise the costs of existing rivals, to erect entry barriers to preclude entry by potential rivals, and to ... circumvent regulations designed to foster competition."

D. Sappington & J. Sidak, "Competition Law for State-Owned Enterprises," 71 Antitrust L.J. 479, 512-13 (2003). As a result, these authors conclude that "It may ... be appropriate to subject an SOE to more stringent competition laws and harsher penalties for violating them." Id. at 513.

When SOEs operate abroad, anticompetitive conduct such as this interferes with the access of U.S. companies to foreign markets, and interferes with their ability to compete. This presents a so-called "footnote 159" problem.

It is well settled that under the Foreign Trade Antitrust Improvements Act, the subject matter scope of U.S. antitrust law reaches conduct abroad that causes harm to U.S. exporters. In 1988, the Department of Justice announced that as a matter of prosecutorial discretion, it would pursue enforcement actions only against those export restraints that harmed U.S. consumers and not against those that harmed only U.S. exporters. Department of Justice, Antitrust Enforcement Guidelines for International Operations (1988), fn 159. In 1992, the Department of Justice reversed this approach, noting that:

> "Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers. Today, when both imports and exports are of importance to [the U.S.] economy, we would not limit our concern to competition in only half our trade."

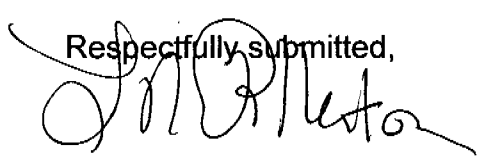
Department of Justice Press Release 92-117 (Apr. 3, 1992), at 2. This policy was later incorporated into the Antitrust Enforcement Guidelines for International Operations released jointly by the Department of Justice and the Federal Trade Commission (1995), at 16.

Despite efforts in recent years to privatize SOEs around the world, partial or even complete state ownership continues to characterize a number of important sectors, such as the postal service, telecommunications, and others. Increasingly, as SOEs expand the scope of their operations, they are beginning to compete directly with private, profit-maximizing enterprises in many important markets. For example, state-owned postal firms frequently offer express delivery services in direct competition with private companies such as UPS. The limited case law in this area demonstrates that state-owned postal monopolies do sometimes engage in anticompetitive conduct that harms U.S. companies. *See, e.g.,* Case COMP/35.141, Deutsche Post AG, 2001 O.J. (L 125) 27. Anticompetitive conduct by SOEs remains difficult to detect, investigate and remedy effectively, however.

The Commission should evaluate the ability of U.S. law to deal with this problem, and make suggestions for needed reforms. This is a multifaceted issue that would require consideration of substantive antitrust law standards, antitrust defenses and immunities, and current modalities for international antitrust cooperation, including the use of positive comity by U.S. antitrust enforcement authorities to encourage enforcement of competition laws by their foreign counterparts. *See* Report of the International Competition Policy Advisory Committee (2000), at 252 ("To improve the effectiveness of U.S. antitrust enforcement, including that pertaining to foreign restraints on U.S. exports, the Advisory Committee believes that the Department of Justice must continue to develop its multipronged strategy of enhancing the credibility as well as the utility of bilateral instruments, expanding multilateral initiatives and preserving its enforcement tools for use when necessary.")

Thank you for your consideration of this request.

Respectfully submitted,



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