DEPARTMENT OF JUSTICE

The Pearl of Great Worth:
The Common Pursuit of Protecting the Markets

ROGER ALFORD
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for Delivery at
2019 China Competition Policy Forum in China

Hainan, China

May 7, 2019

Thank you for the opportunity to be here today. I have been to China on several occasions but never before to Hainan Island. I am delighted to be with you today in this island made famous for huge and colorful pearls.

This island of great pearls reminds me of one of the great antitrust stories in modern literature, written by the American author John Steinbeck.[1] It is about a young boy who is diving in the ocean and discovers a pearl of great worth. When the boy goes to the local village to sell the great pearl, he discovers that all the pearl dealers in town have conspired together to fix the price they will offer. One after another, the dealers feigned little interest, even though it was the most beautiful pearl they had ever seen. They each offered only a fraction of the pearl's true price. The boy knew he was being cheated, and stormed away in fury to try his luck in the distant capital.

That evening, the local villagers discussed the events of the day. "Each of the three dealers knew the pearl was valueless," said one villager. "But suppose they had arranged it before?" asked another. "If that is so, then all of us have been cheated all of our lives." "It is hard to know," said the village elder. "We do know that we are cheated from birth to the overcharge on our coffins. But we survive." He then turned to the boy who rejected the worthless offer and said, "You have defied not the pearl buyers, but the whole structure, the whole way of life, and I am afraid of you." The boy responded to the village elder, "What have I to fear but starvation? … What can I do? Some deep outrage is here."[2]

That story, in a nutshell, is our mission as competition enforcers. To challenge those who prey upon the vulnerable and cheat the system by not buying or selling goods or services based on their true price. The local villagers may not be able to challenge the pearl dealers who fix

[1] John Steinbeck, The Pearl (Penguin Books, 2000).
[2] *Id.* at 51-54.

prices, but we as enforcers can. In so doing, we change the whole structure, and the whole way of life of the people who cannot on their own challenge the powerful.

We join together in pursuit of this common mission. There is a well-known Chinese idiom about Eight Immortals who cross the sea, each showing their own remarkable ability. The meaning behind the idiom is that every actor has a special role to play in achieving a common goal. The same is true for competition enforcement. In the modern world of international commerce, we cannot protect the economic structures against anticompetitive behavior if only a few countries effectively enforce their antitrust laws. Every major market needs effective competition enforcement. With over 130 jurisdictions with competition laws, perhaps the most important benefit of combining our collective strengths is the development of a robust competition community. We are here today, talking about important competition enforcement and policy issues, and sharing our approaches. That alone is significant. As globalization increases, our world continues to need analytical and operational coherence in competition enforcement. And we have worked hard, as a community, to provide that coherence. You only need to look at the multilateral organizations devoted to competition enforcement to see the work that we have done. These include regional efforts, such as the ECN, ASEAN, CARICOM, and COMESA, as well as international organizations whose membership spans the globe, such as the OECD and the ICN. These organizations create a stable infrastructure that allows competition agencies to learn from each other, challenge one another, and continually improve together. They complement the many additional ways by which competition enforcement agencies interact bilaterally.

Further, we are a community that can leverage our collective strengths to confront challenges. One area where we have continued to challenge ourselves is procedural fairness.

Ten years ago, the Department of Justice's Antitrust Division first raised the issue of procedural fairness in the OECD. We then engaged on due process issues in both the OECD and the ICN. Those labors are bearing fruit. This year will be watershed in promoting fundamental due process. Almost a year ago, the Antitrust Division's Assistant Attorney General Makan Delrahim announced the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement, or MFP. The goal of the MFP was to globally strengthen and promote due process in competition law enforcement, and to thereby also improve cooperation among competition agencies around the world. The MFP proposal was different from the reports and recommendations of the past that exist in the area of procedural fairness in two important ways.

First, the substantive standards outlined in the Framework were truly universal. They are not aspirational, but are widely accepted and already recognized by most competition agencies. We derived these principles from the texts of competition chapters in several major trade agreements, as well as the work on procedural fairness conducted by the OECD and ICN, in conjunction with an examination of procedures and practices of major competition agencies around the world.

Second, the MFP proposed an individual competition agency commitment to adhere to these universal principles, and a compliance mechanism that allows signatories to gauge the extent to which fellow adherents are following these principles. Participant competition agencies agree to engage in consultations regarding material issues of competition law covered by the text, to provide reports regarding their procedures to other participants and update these reports in the event of significant changes, to meet regularly to review the implementation and functioning of the framework, and to adopt reports and proposals for improvement.

We developed the initial text of the MFP in close cooperation with a dozen of our closest competition agencies, from both civil law and common law jurisdictions and from both administrative and prosecutorial systems. We worked hard to find solutions that work broadly for competition agencies.

Then, in the summer and fall of last year, we introduced the proposed text to the broader community of competition agencies worldwide. In September and November, we met with over 40 competition agencies. We received unanimous support for the substantive principles set forth in our proposal from each and every competition agency engaged in these discussions. Several agencies proposed implementing the MFP arrangement through the ICN, to take advantage of existing institutions and processes, and to reduce the administrative burden. We agreed that this proposal had merit, and worked closely and tirelessly with ICN Chair Andreas Mundt and his staff to find a way to implement the MFP's strong substantive norms and meaningful review mechanisms within an ICN instrument.

The capstone result of this cooperation is the Framework on Competition Agency Procedures, or CAP, which incorporates the substantive principles and review mechanisms of the original MFP within an ICN instrument. CAP is open to all competition agencies, both ICN members as well as non-member competition agencies. The CAP was opened for signature on May 1 and will be formally launched at the 2019 ICN Annual Conference in Cartagena, Colombia next week. We are confident that dozens of agencies will sign the CAP as charter members next week, including major competition agencies in North America, South America, Africa, Europe and Asia. I look forward to continuing discussions with SAMR here in Hainan in the hopes that they too will sign either the CAP or the MFP. And given that the norms in the framework reflect international minimum standards of fundamental due process, we are

confident that SAMR will follow these procedural norms, even as it decides whether to become a signatory.

Certainly, for us at the Antitrust Division, the CAP is a natural progression from years during which people at all levels of the Antitrust Division, both staff and management, have worked closely with our international counterparts. This cooperation, which has taken many forms, has led to better understanding of our strengths, as well as our differences, and has resulted in a deeper level of engagement. Together with the U.S. Federal Trade Commission, we have entered into cooperation agreements with competition agencies from 15 jurisdictions. In fact, we have entered into cooperation agreements with every competition agency joining me on stage today. Through these agreements, we engage widely in cooperation on individual cases and on broader policy developments.

For example, cooperation in just our merger enforcement alone allows us to share updates on timing, theories of harm and results of economic analysis. Working closely together on a particular matter gives us the benefit of one another's expertise in reviewing the markets involved. That's good for business – such cooperation means more consistency across jurisdictions, speedier resolutions, and less duplicative efforts. And ultimately, that's good for consumers – more efficient government is more effective government.

Let me conclude with two other areas of further dialogue that I suggest can assist us in reaching the shared goal of sound competition enforcement: the purpose of competition enforcement and the enforcement of competition laws on matters involving state-owned-enterprises.

The purpose of competition enforcement is an issue that is being discussed within the United States, as well as around the world. The current debate centers on the differences

between the consumer welfare and the public interest standard. We believe the consumer welfare standard should remain our guiding light because the goals of consumer welfare and competition go hand-in-hand.

At its essence, antitrust law condemns practices that harm competition. Competition for competition's sake and its inherent benefits is the critical policy goal. We believe this is best accomplished through free markets, where the role of antitrust is to ensure that there are adequate incentives for innovation, which is the heart of competition. For example, with respect to monopolies, it is important to recognize that antitrust law does not condemn all monopolies – it condemns the *abuse* of monopoly power. Prices can tend to be higher when monopoly exists. But, monopolies are also fragile because high prices attract new entrants and innovators who seek to cut into the monopolist's market share.

In addition to protecting competition in the marketplace, some competition agencies consider the impact of a merger or conduct, or furthering economic growth domestically, helping socially disadvantaged groups, supporting national champions, protecting privacy, or enhancing national security. We have suggested that the broad reaches of the public interest standard, which encompass a wide range of factors, can result in a vague, less predictable analysis depending on how the factors are applied in any particular transaction. It invites competition agencies to sacrifice the welfare of consumers in pursuit of other goals. In contrast, the focused consumer welfare standard analyzes the impact on prices, output or quality to determine whether a purportedly harmful practice actually has anticompetitive effects and harms consumers.

We understand that not every jurisdiction agrees with us. We welcome continued dialogue on this topic because in a world of global multinationals whose conduct spans multiple

jurisdictions, we should have a deeper understanding of how these different standards impact our enforcement.

Turning to the role of state-owned-enterprises, over the past few decades, SOEs have increasingly played a more prominent role in international commerce. In fact, some of the largest companies in the world are SOEs, including numerous Chinese companies. To the extent those companies engage in anticompetitive commercial behavior that harms the United States market, the Antitrust Division will challenge such behavior and subject foreign SOEs "to the U.S. antitrust laws to the same extent as the activities of privately owned firms."[3] As Assistant Attorney General Makan Delrahim said last year, in the United States state-owned enterprises that are engaged in commercial activity are not immune from the antitrust laws and "where competitors come together to engage in collusive or anticompetitive behavior, we will bring all our enforcement tools to bear."[4]

Last month the Antitrust Division filed a statement of interest interpreting the scope of the commercial activity exception to foreign sovereign immunity. As we noted in that filing, "actions of a foreign company to join and act in furtherance of an antitrust conspiracy can cause a direct effect in the United States even if that company made no direct sales in the United States."[5] Any other interpretation "could immunize many conspirators from liability for their anticompetitive actions, even when the conspiracy substantially harms consumers in the United States."[6]

---

[3] United States, Competition Law and State-Owned Enterprises, OECD, at 6 (2018), available at https://one.oecd.org/document/DAF/COMP/GF/WD(2018)55/en/pdf

[4] Makan Delrahim, Competition, Intellectual Property, and Economic Prosperity (February 1, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-us-embassy-beijing.

[5] *In re Cathode Ray Tube Antitrust Litigation*, Statement of Interest of the United States, at 12 (N.D. Cal, April 23, 2019).

[6] Id. at 15.

In addition, the mere fact that a foreign government owns shares in a company does not render that company an SOE that benefits from foreign sovereign immunity. For a company to enjoy such immunity, it must be majority-owned by a foreign government or engage in a public activity on behalf of the foreign government such that it is an organ of the state. "While commercial enterprises can qualify as organs of a foreign state in certain circumstances, they do not constitute organs when they are acting to maximize profits rather than pursue public objectives on behalf of the foreign state."[7]

The United States is not alone in our concern that foreign SOEs comply with competition laws. As the OECD Secretariat recently noted, "SOEs involved in anti-competitive agreements, mergers or unilateral anti-competitive conduct are regularly prosecuted in jurisdictions with an established competition law."[8] Perhaps the most notable recent example of such concern is the European Commission's case against Gazprom, one of Russia's largest SOEs. Every competition agency represented on stage, as well as the many competition agencies that make up our competition community, is committed to effective enforcement against all those who violate the competition laws. We should all think creatively as to how we can promote competition law enforcement in cases involving foreign SOEs.

In conclusion, the great pearl of wisdom I hope to leave with you today is that our goal as enforcers should always be to tirelessly help those who cannot help themselves from the anticompetitive and predatory behavior of those bad actors who threaten the very structures of economic society, and deprive the common consumer of the true value of their precious goods and noble labors.

---

[7] Id. at 5.
[8] OECD Background Note of Secretariat, Competition Law and State-Owned Enterprises, at 5 (2018), available at https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf.

Thank you.