



DEPARTMENT OF JUSTICE

Charting a Straight Course: Promoting Transparency and Procedural Fairness in Competition Enforcement

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Introduction

Good morning [afternoon]. Thank you so much for inviting me to speak today. I am very happy to be here for the sixth annual competition forum. As some of you may know, I am new to the U.S. Department of Justice's Antitrust Division, having recently moved from the University of Notre Dame law school, where I am a law professor and associate dean for international and graduate programs.

During my time at Notre Dame, I have had the opportunity to encounter China in a number of ways. I have taught many Chinese students, and I can attest to the quality of this most valuable Chinese resource. I have also had the opportunity to study your legal system, and to work with Chinese experts to co-author writings on the improvements Chinese courts have undergone over the past few years. I have travelled to China on several occasions to visit with law firms, law schools and the judiciary. I have visited your great cities—including Beijing, Shanghai, Xian, and Hangzhou—enjoyed your amazing cuisine, explored your history, and marveled at your country's natural beauty. Perhaps my favorite memory of my time in China was a hiking trip I took with my wife and sons on the famous Plank Walk of Mount Huashan, where we watched the sunrise at the top of the South Peak. There is a lovers' lock at the top of that mountain with my wife's name on it. All of this is to say that I am here today with fond memories of my experiences in China so far, and the belief that there are many more wonderful experiences to come. I know my experiences are indicative of the growing and beneficial relationship we have with each other.

I am happy to see a number of academic experts here, including my old colleague Christopher Yoo, as well as many other members of academia who serve on the Anti-Monopoly Commission Advisory Board. I very much look forward to meeting

with you over the next few days and to developing relationships that will carry us into the future and I appreciate the opportunity to share some of the lessons of the U.S. experience in competition enforcement.

The Role of Competition in a Successful Economy

I want to begin my remarks by talking about the role of competition in a successful economy. Based on my academic study, I believe that there is an undeniable link between good governance and human flourishing.

One of the reasons I am so excited about joining the Antitrust Division of the Department of Justice is that I will have the opportunity to play a role in these types of interactions, and specifically in promoting competition law. A competitive process that promotes equal opportunity for everyone is critical to a well-functioning economy. A system of government that enables this type of competitive process affords everyone the opportunity to use their knowledge, skills and resources to prosper. Our goal should be equal opportunity for all, not equal results for all. As former Acting Assistant Attorney General Renata Hesse said when she visited Beijing in October 2016, our objective at the Antitrust Division is to “let the competitive process play out in the free market, lest we accidentally suppress competition in an effort to promote it.”

When we are successful at promoting a healthy competitive process, individual consumers benefit through greater access to quality products and services at market prices. As a result of vigorous competition, consumers have ready access to goods and services, improving their lives in ways large and small. In centuries past, kings and queens had a few hundred servants at their beck and call. In today’s market-based economies, average consumers have thousands of merchants eagerly offering, at

competitive prices, a dazzling array of goods and services to cater to their wants and needs. This competitive process has produced a period of stunning innovation, diversification and information, launching a golden age of consumer welfare. If Winston Churchill were an economist today, he might say “Never before in history has so much been available to so many for so little.”¹

Of course, consumers are not the only ones who benefit from healthy competitive processes; companies benefit as well. This is because a robust competitive process allows companies to compete head-on with rivals, unhindered by artificial anticompetitive barriers to entry, growth, and expansion. Competition creates incentives for companies to become more efficient, make better products, and invest in innovation. Nations benefit, too. When companies are pushed to be efficient, their successes ripple across economies, and ultimately, poverty is reduced. In fact, according to the United Nations, the world is experiencing one of the greatest anti-poverty movements in history, with the poverty rate plummeting by more than two-thirds, from 47 percent in 1990 to 14 percent in 2015.² In another generation, the United Nations is targeting the eradication of extreme poverty completely.³ Part of this success is due to large and important economies like China and India embracing competition, transitioning to market-based structures, and ensuring economic benefits of competition to their citizens.

¹ On August 20, 1940, Prime Minister Winston Churchill addressed the British people regarding the air defense against Nazi Germany’s attack on the British Isles, famously stating: “Never in the field of human conflict was so much owed by so many to so few.” <https://www.theguardian.com/century/1940-1949/Story/0,,128255,00.html>

² See UN Millennium Development Goals Report (2015), available at <http://www.un.org/millenniumgoals/>.

³ See UN Sustainable Development Goals Report (2015), available at <http://www.un.org/sustainabledevelopment/poverty/>.

Competition and the Rule of Law

I want to talk now about another important ingredient for economic prosperity, and that is the rule of law. Throughout the course of my research, I have observed that to promote prosperity, a well-functioning competition regime works best within a society governed by the rule of law. Let me pause for a moment on the meaning of that term, “rule of law.” One of America’s founding fathers, James Madison, offered a definition that resonates with me. In 1788, he wrote that “government [is] the greatest of all reflections on human nature.... If men were angels, no government would be necessary.... In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁴ But what does this mean in practice?

I have found that when you examine the various definitions of rule of law, four key components emerge. First, the rule of law requires a system of government in which all persons are accountable under the law. A second component is that the system of government is based on fair, published and stable laws. A third component is fair, robust and accessible legal process pursuant to which rights and responsibilities based in law are evenly enforced. And fourth, the rule of law requires competent and

⁴ Madison, James. “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.” *Federalist No. 51* (1788), available at www.billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-51/.

independent lawyers and judges.⁵ Accountability, stability, fairness, even-handedness, and independence: these are some of the hallmarks of the rule of law.

The rule of law is essential for human flourishing and economic prosperity. It is not surprising that the richest countries in the world are those that respect the rule of law. For example, the twenty countries that score the highest on rule of law rankings are, with one or two exceptions, also ranked in the top thirty for per capita GDP.⁶ This correlation illustrates the link between law and prosperity. Almost every aspect of healthy economic behavior benefits from clear, transparent, and stable laws. Properly-administered laws provide the stability necessary for market behavior to reflect freedom of choice.

As competition enforcers, we enhance rather than limit freedom, by promoting an environment in which people can know the law, expect fair enforcement, and make genuine and informed choices about their conduct. We provide clear guidance about impermissible behavior by monopolies and among competitors. Our merger guidelines inform companies of the kinds of behavior that raise competition concerns, allowing them to plan accordingly. We are uniquely positioned to observe how the rule of law and economic prosperity are intertwined, and we can be uniquely effective in promoting both goals. That is why the efforts we have made together, and should continue to make, are so valuable and important.

⁵ See, e.g., American Bar Association, *What is the Rule of Law*, available at <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>.

⁶ Compare World Justice Project Rule of Law Index (2016), available at <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016> and World Bank GDP Per Capita (2016) available at http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?year_high_desc=true.

Our Partnership: Past, Present and Future

It has been exactly ten years since China's Antimonopoly Law was enacted on August 31, 2007. Although it has one of the youngest antitrust laws in the world, China has made considerable progress in establishing a legal regime in the competition space. The United States has welcomed the opportunity to collaborate with China in facilitating this progress. In recent years, the United States assisted with China's implementation of its Anti-Monopoly Law, and also participated in the US-China high-level judicial dialogue.

As many of you may know, in August 2016, Principal Deputy Associate Attorney General Baer co-led a U.S. delegation to China for the judicial dialogue, and met with Jiang Wei, the Deputy Head of CCP Central Leading Team for Judicial Reform. Included in that delegation were prominent judges from both the United States and China. This event was a chance for the U.S. and China to engage on the important topic of judicial reform, and reflect on our experiences in ensuring fair, transparent, and independent application of the rule of law. During the course of the engagement, we discussed important topics in the U.S. and Chinese judicial systems, including case management, evidence, expert witnesses, amicus briefs, the use of precedents and China's system of "guiding cases."

Our continued engagement on this topic is significant for competition enforcement. We are the guardians of strong and vigorous competition for economic prosperity. Our lodestar is to promote competition, not to give preference to specific competitors, even when individual businesses jockey for advantage. As nominee for Assistant Attorney General for Antitrust Makan Delrahim emphasized in his confirmation process, enforcement must be grounded on appropriate legal and

economic analysis. Rather than allowing political favoritism to play a role, he emphasized that enforcement should be based “on application of the laws written by Congress,” and on “the particular facts and circumstances presented” by each case.⁷ These statements reflect the longstanding policy of the Department of Justice, and one that he (and we) intend to continue. By eschewing politics in antitrust enforcement, we maintain the stable and predictable enforcement process that is essential to a healthy economic environment.

It has been almost two years since the U.S. and China agreed to procedural fairness commitments in competition proceedings as part of the 2015 U.S.-China Joint Commission on Commerce & Trade. China’s public affirmation of the importance of procedural fairness was welcome news. In making these commitments, China joined a dialogue among competition agencies that is taking place all around the world, including in the International Competition Network and the Competition Committee of OECD. In all of these fora, a major topic of discussion is how we, as competition enforcers, use process to reach the best decisions.

In thinking about what processes will lead us to the best outcomes, the competition community has focused on transparency and procedural fairness. And given China’s rising economic power and its prominence in the competition sphere, the Chinese anti-monopoly agencies are a welcome voice in this international dialogue. As I transition from academia to enforcement, I have had occasion to consider my own contribution to the discussion, and here is what I can say: I believe that transparency is

⁷ Testimony of Nominee for Assistant Attorney General for Antitrust Makan Delrahim before the United States Senate Judiciary Committee (May 10, 2017), available at <https://www.c-span.org/video/?428279-1/senate-judiciary-committee-considers-justice-department-nominations>.

critical, because when rules are fixed and publicly known, they create a stable framework for individual and collective planning and coordination. Prosperity requires freedom to coordinate within the confines of transparent order. Business blossoms in the light of clear guidance, and withers in the fog of cloudy decisions.

Transparency also enhances trust in our authority as competition enforcers. When there are misgivings about an agency's process, or when agencies make unexplained decisions, it is easier for parties to believe that an agency's outcome is flawed. In contrast, when transparent decision-making processes are in place, the legitimacy of the agency's outcome is enhanced. To retain the confidence of both the business community governed by our laws and the public we protect, we must be willing to expose our agencies' policies and practices to aggressive scrutiny and challenge.

Transparency also helps to ensure that we as enforcers get to the right answers, exposing our views to criticism and feedback. The challenge of opposing views is beneficial to us as enforcers because it helps to ensure that our decisions are fully informed, and minimizes the potential for error. In our experience, this transparent approach helps us to understand evidence more fully, prepares us better for litigation, and fosters more effective settlements.

Transparency is particularly important in a world where business transcends boundaries. We live in interconnected economies, and many antitrust matters are reviewed by multiple jurisdictions. When competition agencies follow different processes or reach different outcomes, our differences matter less if people understand and have confidence in each agency's processes and decision-making.

Transparency and procedural fairness also help us to avoid discriminatory enforcement. We are all sensitive to this issue, and at the 2014 U.S. – China Strategic and Economic Dialogue, “[t]he United States and China recognize[d] that the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries, and that enforcement of their respective competition laws should be fair, objective, transparent, and non-discriminatory.”⁸

In a world of rapid change and shifting landscapes, it is critical for competition enforcers to remain steadfast, unbiased and neutral. Political winds may blow, and economic storms may brew, but we must navigate a straight course with eyes fixed on the rule of law, our North Star. By charting a path that is even-handed, fair, and predictable, competition authorities create the conditions for effective business coordination and planning without the risk of political favoritism. In this manner law becomes a navigation tool accessible to all, rather than a custom-made device tailored for the soft hands of the favored few.

I applaud the Chinese anti-monopoly agencies for recognizing the need to address the issues of transparency, procedural fairness and non-discrimination, and for adopting the fair competition review system intended to drive special influence out of regulations. It is critical that antitrust authorities not exercise their review and enforcement authority in a manner that is opaque or discriminatory, applying vague and unwritten rules in a selective and non-transparent manner.

⁸ See U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue (July 11, 2014), available at <https://www.treasury.gov/press-center/press-releases/Pages/jl2561.aspx>.

In looking toward the future, I would like to challenge us to do even more – to think about the next steps that we can take to ensure that competition decisions are made transparently and on their own merits. As an academic, I value input from my counterparts on these issues, and hope that we can find a way to incorporate the voices of academics from both of our countries into our agency-to-agency discussions. I am confident that we would all emerge with useful learning.

Conclusion

In closing, let me say again how delighted I am to be here with you today. I have spent my career working in international law, and I have known Makan Delrahim, our nominee for Assistant Attorney General for Antitrust, for decades. I have no doubt that he intends to make international engagement a priority, and I am honored to be a part of this work on behalf of the Department of Justice. What we as competition enforcers do is critical to the growth and prosperity of our nations. As our Supreme Court has said, “[Competition law was] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”⁹

⁹ Northern Pacific Railway Co. v. United States 356 U.S. 1, 4 (1958).

It is a great pleasure to speak with you, and I am confident that you will find an active and globally-focused DOJ Antitrust Division over the next several years. I look forward to our future engagement as we continue our important work together.