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Federal Trade Commission

**The Defense of Competition and Consumers in a Changing World:
Reflections on a Decade of Competition Enforcement in China**

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Five years ago, I spoke on occasion of the 5th anniversary of the effective date of China's antimonopoly law here in Beijing, and I am deeply honored to join you today, to mark the law's 10th anniversary. In that year, 2013, I made my first of over a dozen trips to China, and I have experienced Beijing in the snow and cold of winter, the heat of summer, and the beauty of spring and autumn. During this time, I have also seen seasons change in Chinese AML enforcement, as the agencies have matured and recently consolidated into a single agency. And I have had the experience of running the Federal Trade Commission as the Acting Chairman during a change in the political climate in my own country.

¹ 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.

As you know, weather prediction is famously difficult, often because of a phenomenon called the butterfly effect. The butterfly effect explains that even small changes in one system can have large, unforeseeable changes other systems, such that the flap of a butterfly's wing creates a tornado a thousand of miles away. And that phenomenon is not limited to weather. As a competition enforcer, I have at times seen the blue skies of consensus suddenly swept by the cold winds of doubt and the clouds of dissension, and I have observed the political weather vane spin and spin again.

Although such forces are certainly not unique to competition enforcement, an important question is how we as competition enforcers and scholars respond to forces that may challenge our core principle that competition delivers the best results for consumers and society. Do we retreat to our storm shelters and hope it will blow over? Do we simply shift to reflect the prevailing winds? Or do we seek to reinforce and improve the structures that promote and safeguard competition so that they can withstand the tempest?

As you may have already guessed, I believe the third approach of strengthening the institutions that support competition is the best way to respond, and I offer three areas of focus. First, continuous improvement of the agencies that safeguard and promote market-based competition. Second, a greater appreciation for the structures that underlie the market economy, especially intellectual property rights that drive innovation. And third, encouraging competition agencies to look beyond private action and also challenge government barriers to competition.

For the remainder of my remarks, I would like to examine each of these three points more deeply in the context of China's experience over the past five years.

Agency Improvement

At the 5th anniversary of the AML, I discussed the characteristics of a successful competition regime. These included basing decisions on competition factors, pursuing consumer welfare as the appropriate goal, and carrying out investigations and cases efficiently and transparently. I also urged international cooperation, which is even more important today than it was five years ago.

On this occasion, I thought it appropriate to acknowledge the actions that China's AML agencies have taken to implement these characteristics over the past five years, charting a course that the State Administration for Market Regulation should continue to follow as it undertakes the ambitious effort to consolidate three agencies into one.

I'll start with an obvious one, international cooperation. Just a few years after the AML took effect in 2008, China's three AML agencies entered into a MOU with the FTC and the US Department of Justice. That agreement set the stage for even deeper cooperation between our agencies, including this past winter when I co-led the FTC-DOJ delegation with my counterpart, Assistant Attorney General Makan Delrahim for our "Joint Dialogue." Our regular Joint Dialogue has allowed leadership from the five participating agencies to exchange views in a frank and effective manner. I am confident that the Joint Dialogue will continue, even as the agencies transition to their new form in SAMR. Moreover, China's efforts to promote international dialogue on competition issues, such as this event, continue to signal how China's competition enforcers value regular international engagement.

Regarding efficiency of operations, MOFCOM had taken numerous steps to pursue the best practices in its merger reviews. Indeed, it effectively addressed the criticism that its review of non-controversial mergers was taking longer than necessary in too many instances. Its

adoption of the simple transactions procedure has, by all accounts, significantly shortened the review time for a sizable majority of transactions, especially those that should take little time to review. SAMR recently announced that the average time to clear simple transactions is down to 17 days from when the notification is accepted. I am hopeful that with continued experience, SAMR's ability to dispose of even more transactions quickly will grow, leaving its staff more time to focus on the modest number of transactions that do present legitimate competition concerns.

Like efficiency, transparency is a key attribute, prompting greater public understanding of the agency's activities and promoting compliance with the law. The three AML agencies took impressive steps in recent years to enhance their transparency, including more detailed merger decisions by MOFCOM and lengthy rulings by SAIC.

NDRC engaged in an extensive effort to promote transparency through the issuance of guidelines in various areas, a process that I understand continues.

A second important aspect of transparency relates to the competition agency's interaction with the parties it investigates. Informing parties of the competition agency's concerns, including the facts, reasons, and evidence for its investigation, provides the parties an important opportunity to respond in detail. This frank and open exchange improves the quality and accuracy of decisionmaking, whether the agency concludes that no violation has occurred, or gains greater confidence that its initial concerns are well grounded.

As SAMR consolidates responsibility within a single agency, I am hopeful that its procedures will place great importance on ensuring enhanced transparency for parties under investigation.

The other two characteristics I recommended for agencies are a focus on competition factors in pursuit of consumer welfare, not that of competitors or others. China's enforcers have indeed frequently stated that, like other competition laws around the world, the AML is designed to promote the welfare of Chinese consumers. That is to be commended. Moreover, many of its agencies' enforcement decisions appear to accord with this approach, even if there are some instances where we might disagree on the best substantive analysis of the conduct at issue.

I am hopeful that SAMR will deepen its efforts to eliminate concerns that exist in the international community that some AML decisions are motivated by factors other than economic efficiency and consumer welfare. Dispelling beliefs that enforcement actions are protecting domestic competitors or promoting particular domestic industries should be a primary goal as SAMR assumes all responsibility for AML enforcement.

Respect for the Role of IP Rights in Enabling Market Competition & Innovation

Another trend over the past 5 years is the increasingly vital role of IP in innovation-driven competition. Of course, the essence of any property right, including intellectual property, is the ability to determine who uses that property and under what terms. As more and more commerce involves IP, the appropriate treatment of intellectual property has become a crucially important issue for competition agencies across the globe.

One of the basic rules of a market economy is that, over time, capital will flow to where it can generate the highest possible returns. If IP rights are diminished inappropriately, however, the rate of return on investments in IP intensive industries will decline. Capital will simply shift away from those industries that rely on IP, to the considerable detriment of society.

National borders cannot effectively compartmentalize this harm; instead it is borne collectively by us all in reduced innovation and impeded human progress.

My research demonstrates that, across the developed world, there is a positive correlation between innovation rates and robust IP protections. The countries that protect IP rights within their borders tend to foster innovation, those that fail to create the necessary predicates to investments in innovation lag behind. Thus, all policymakers should care intensely about creating and maintaining an overall legal environment that encourages investment in IP creation and the innovation that it spurs.

So does all this mean there is no role for antitrust in the policing of IP rights? Absolutely not. For example, when firms reach agreements with their competitors to try to obtain greater protection than the patent system actually provides, antitrust can play a useful role. Or, if a firm gains market power by making a misrepresentation to a standard setting body about the terms upon which its IP will be available, and the organization relies on that promise when it adopts the IP into the standard, competition agencies can and should act. In fact, I am proud to say that the FTC has played a leading role in challenging these kinds of agreements across the economy.

In brief, our role in the IP space is important, but it should be appropriately sensitive to the broader and laudable policy objectives that underlie the modern protection of intellectual property rights.

Turning to China, I recognize that the AML contains provisions prohibiting unfairly high pricing and placing limitations on refusals to deal. As policymakers here move forward with interpreting these provisions, I would urge caution about interpretations that reduce incentives for innovation in China. I believe that the land that brought the world the great inventions of paper, gunpowder, the compass, and printing can surely be a cradle of future innovation—not least given its vast economic power, rich history, and unyielding desire to improve. I submit

that, just as we've seen in other countries, strong patent rights can play a key role in fully realizing China's innovation potential.

Championing Competition across Government

The final issue I would like to discuss involves the need to advocate for competition throughout society, including in government. Although competition law typically scrutinizes private business conduct for anticompetitive effects, competition officials must be alert to threats to competition from many sources, including from government itself.

In some ways, the negative effects of government intervention in markets can be even more problematic than the actions of private actors. Cartel members often cheat on each other. Business conditions can change in ways that disrupt even the most stable oligopoly. But laws and regulations change only when the government decides to change them. Thus, laws can create the barrier to competition that will never fall.

And firms are well aware of the value of government protections from competitive pressures. Even in a country like the United States, which has had a free market system for over 200 years, firms regularly turn to government to try to gain competitive advantage or hamper their rivals.

There are several reasons why private firms are able to influence government action to obtain protections that undermine competition and consumer welfare. One problem is that most government officials have relatively limited experience with competition issues. To be fair, our field is technical and is not very well understood by most people.

In turn, that lack of general knowledge provides opportunities for mischief. It is not because policymakers don't care about the welfare of the citizens but simply because they do not fully understand the implications of the restrictive policies that some interest groups ask them to

adopt. Indeed, it is often possible to cloak anticompetitive motives in neutral-seeming laws and regulations.

Finally, there is the common fear of what market forces will do if unleashed. Free market competition is a powerful driver of economic growth over the long-term but it can create substantial, short-term dislocations. When regulators do not trust markets to get it right, or mistake short-term dislocations for problems that require regulatory solutions, consumers are often the ones who ultimately lose out.

It is our role to address these challenges by speaking up for competition throughout government. For example, the FTC's robust advocacy program, which I headed earlier in my career, has successfully encouraged other government actors to allow more competition in everything from healthcare to online wine sales.

I am glad that the AML has always prohibited anticompetitive government behavior and that in June 2016, the Chinese State Council established a "Fair Competition Review System" to further a unified, competitive market by preventing "excessive and inappropriate government intervention in market[s]. . . ." I applaud the Chinese agencies' ongoing efforts to widen their oversight to include undue government restraints on competition, particularly their successful cases against provincial entities, and I hope that SAMR will continue this important work.

To conclude, I observe that as experienced gardeners know, harsh weather conditions force plants to put down deep roots and become stronger over time. I firmly believe that the challenges facing competition agencies today can likewise serve to make us all stronger and more firmly rooted in our mission to protect consumer interests.

Thanks very much.