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Look Back, Look Forward: China's Antimonopoly Law Enforcement
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Thank you [Fu] Qianwei and the California Lawyers Association for inviting me to participate in this teleconference. I enjoy participating in these calls, as I always learn a lot from my fellow panelists. So thank you also to each of them for really interesting and informative presentations.

In keeping with the title of the teleconference, I thought I would start with a look back over the past ten-plus years, and then evaluate some of what we've seen, how the FTC, along with our counterparts at the Antitrust Division of the Department of Justice, have engaged with the Chinese antimonopoly enforcement authorities, and then wrap up with a bit of a forward looking discussion. Before I go further, however, I'll note that my remarks are my own, and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.

China passed its Antimonopoly Law (AML) in 2007, after many years of discussion and drafting. It became effective on August 1, 2008. In fact, next week in Beijing the Expert Advisory Board of the Antimonopoly commission is hosting a 10th anniversary conference, which I'll be attending along with Commissioner Maureen Ohlhausen and colleagues from the Antitrust Division of DOJ.

In preparing for today's call, I looked back over some of my notes and materials, and identified that when the AML was passed there were at least four significant concerns, among numerous questions.

First, the State Council designated three agencies to handle responsibilities for AML enforcement—The Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC)—which [Zhang] Yizhe noted earlier. There were historical and practical reasons for this division, based on existing responsibilities of each ministry. Having three agencies with enforcement authority created a number of questions about how the agencies would coordinate and whether they would take consistent approaches. In particular, the division of labor between NDRC, for price-related conduct, and SAIC, for non-price related conduct, created numerous concerns that there would be fights between the agencies over cases and differing approaches to much the same conduct. As the only other country with more than one competition agency, we're quite familiar with how multiple agencies can lead to some level of concern regarding consistency, although in the United States the FTC and DOJ have had many years to develop mechanisms to promote consistency and eliminate conflicts.

The second significant concern focused on the interaction between the AML and China's "socialist market economy," two hallmarks of which are a high degree of government intervention in markets and a prominent role for state owned enterprises (SOEs). Indeed, estimates placed over 50% of the economy in state-controlled entities. The AML did little to resolve this tension. For example, Article 1 includes among the AML's purposes "promoting the development of the socialist market economy" and Article 27 calls for consideration of a merger's effects on the "development of the national economy."

Moreover, Article 7 calls for the State to "protect the legitimate business activities of the undertakings in the[] industries" dominated by state owned companies or those granted monopolistic sales. Some read this to create an exemption for SOEs. Regardless of the reading

of the law itself, there was an obvious tension between companies operated and controlled by the government and the government's enforcement of the AML against those very same state-controlled businesses.

Third, the AML created an ambiguous role for the law with respect to intellectual property. Article 55 of the law provides that the AML does not apply to "conduct in exercise of intellectual property rights pursuant to" IP laws and regulations, but does apply to conduct that "eliminates or restricts competition by abusing a company's intellectual property rights." In some respects this is tautological, but given China's existing record on IP enforcement, many questioned how Chinese agencies would apply the AML to IP related conduct, and whether it would be particularly interventionist.

Finally, a number of observers raised questions about the enforcement procedures that would be employed by China's agencies. Chinese administrative enforcement was broadly regarded as opaque and not necessarily adhering to consistent, established rules. Many people wondered whether companies could expect more consistent, transparent, and fair treatment in administrative AML investigations and proceedings.

So, how did our interactions with China on competition issues develop? From well before the AML was passed, the FTC, along with our colleagues at the Antitrust Division of the Department of Justice, worked closely with Chinese officials drafting the law, providing insights and expertise based on our many years of antitrust enforcement experience. While China did not adopt all of our advice, a number of our recommendations appear to have influenced and shaped the AML.

Once passed, our engagement continued, in two principal forms. First, technical assistance and capacity building for enforcers at each of the agencies, which was conducted in

large part through a program funded by the U.S. Trade and Development Agency. This took the form of multiple workshops for Chinese enforcement officials, covering the spectrum of issues from cartels and abuse of dominance to merger review procedures and substance. Second, we offered comments on various guidelines and departmental rules that the three agencies promulgated, from merger notification rules to rules regarding abuse of dominance, agreements, and intellectual property.

In recent years, our focus has continued to evolve, with more cooperation on specific enforcement matters, primarily mergers, with the objective being to seek consistent outcomes and prevent any results that would create conflicting obligations.

In terms of tools, it's probably clear from the foregoing that we've forged a close cooperative relationship with our counterparts in China. Reflecting that relationship, in 2011, the FTC and DOJ entered into a 5-way memorandum of understanding with China's three AML agencies. While unique in the number of parties, the MOU is similar in form and content to those the FTC and DOJ have entered into with numerous other authorities around the world. In addition to setting out principles of our relationship, it calls for periodic bilateral meetings and also offers confidentiality guarantees that facilitate our ongoing cooperation on cases.

This past winter we held the fourth "Joint Dialogue", which involves the Chairman of the FTC, the Assistant Attorney General in charge of the Antitrust Division, and the relevant vice ministers from each of the three ministries in China with AML enforcement responsibilities. Those dialogues have allowed us to exchange views on the most critical issues at senior levels, including this year on the importance of fair and transparent procedures and on carefully calibrated enforcement of the AML with respect to intellectual property. Of course, given the

recent changes to the Chinese enforcement structure it's possible there will be some format tweaks in the future.

Finally, there have been instances where FTC and DOJ have worked with other agencies in the U.S. government to address concerns with antitrust enforcement through higher level channels, such as the Strategic and Economic Dialogue, to try to encourage China to take steps to improve procedural aspects of their AML enforcement.

Now I'll turn back to the concerns I mentioned earlier to assess where China is, and where it may go, and how the FTC, along with DOJ, is likely to address those important next steps.

First, China has taken the important step of consolidating its enforcement into a single agency. That alone should help with coordination, and limit inconsistencies in enforcement. It is, however, quite early and the State Administration for Market Regulation (SAMR) is just beginning the work of consolidating the enforcement apparatus of three different agencies. We appreciate the challenges they face of rebuilding the house while living in it and will engage with SAMR to share relevant experience and insights.

Regarding SOEs, China's agencies have demonstrated a willingness to pursue AML violations by SOEs. While much of this enforcement has involved SOEs at the provincial or lower level, NDRC did in 2011 investigate two large national telecoms SOEs for possible AML violations. I think it is fair to say that China has dispelled any reasonable concerns that SOEs are exempt from the AML, although understandably some may have lingering assumptions that SOEs are treated less harshly than others.

With respect to consumer welfare, China's enforcement has often pursued cases that align with principles of U.S. enforcement. There remain, however, instances of enforcement

where it is more difficult to observe how the result promotes consumer welfare, leading to questions whether the enforcement is motivated by non-competition factors. To be sure, MOFCOM has repeatedly and publicly stated it focuses solely on competition, but its track record, and that of NDRC and SAIC, haven't firmly convinced all observers that it in fact is the case. Greater transparency about the reasons for decisions can help alleviate these concerns, and the FTC will continue its effort to promote reliance upon consumer welfare as the test for antitrust decisions.

China's treatment of IP has continued to attract a lot of attention, most recently for reasons not much related to AML enforcement. AML enforcement regarding IP, however, has remained in a state of uncertainty. SAIC issued departmental rules in 2015 clarifying how it would treat IP related conduct, but shortly thereafter NDRC began a project to draft guidelines that would cover all three agencies' treatment of IP in AML enforcement. That project is ongoing, and presumably has been delayed by the combination of the three agencies. Those guidelines, and future enforcement, will be necessary to clarify whether China will pursue a more interventionist stance regarding IP, or if it will recognize the important incentives for innovation that IP creates and take a more cautious approach to enforcement in this area. The FTC, with DOJ, has worked closely with our Chinese counterparts, sharing our approaches on how careful enforcement can promote innovation and competition, and we will continue to do so.

Finally, SAMR will have the chance to enhance transparency and fairness as it develops its own procedures. All three agencies made noticeable improvements in terms of explaining their decisions to the public. There's always room for more explanation of decisions, but over the past 10 years, merger decisions increased in length and detail, and both SAIC and NDRC began providing information about their enforcement. The FTC regularly promotes the

importance of transparency, and we hope to see continued expansion by SAMR of the efforts to enhance transparency of AML enforcement in China.

The fairness of procedures, however, has continued to trouble companies that are used to operating in the U.S. antitrust system and others adhering to international best practices. Among the concerns identified are limited information on the basis for the investigation, restricted opportunities to respond in the form of evidence and argument, and restrictions on the participation of counsel in meetings. These concerns are ones that FTC Commissioners have raised in the past, and I expect will continue to be an area in which we continue to encourage improvements.

Finally, FTC's engagement with SAMR, working alongside DOJ, will certainly continue. Global markets and transactions demand antitrust agencies make best efforts to cooperate and coordinate to ensure consistent outcomes and aligned remedies, and as China increases its prominence in the competition world cooperation and coordination will become ever more important.

Further, we will continue to engage with SAMR on its policies, both substantive and procedural, to encourage adoption of best practices in rules and procedures. Almost certainly with SAMR's new role there will be plenty of opportunities, and the FTC will continue its strong efforts in this regard.

Thank you for your time, and I hope that there will be questions for this excellent panel.