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Antitrust Enforcement In China – What Next?

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Good morning. Steve, thanks for the introduction. I also want to thank Global Competition Review for organizing yet another exceptional event covering some of today's most important issues in antitrust enforcement. It is a pleasure to be here and discuss what I think is among the most critical challenges facing the global antitrust bar today: integrating new competition regimes like the one in China into the global enforcement community while preserving viable international norms. China represents a unique challenge to integration because it has a culture rooted in historically different economic and legal values than those we hold in the United States and Europe. Right now we are in the middle of what appears to be a significant ramp-up in Chinese antitrust enforcement, including against Western companies, which has brought into stark relief many differences between the Chinese regime and others in the world. Critics claim that China is using its antitrust law to promote industrial policy. And yet China is becoming a leading global economic power, which means we all must find a way to move forward harmoniously and fruitfully.

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.

It is for these reasons I have made engagement with China a top priority. Since becoming Commissioner, I have traveled to China five times, participated in bilateral talks with the Chinese here in the United States, and earlier this year hosted several top Chinese enforcers for an informal breakfast in conjunction with the ABA Antitrust Spring Meeting. In nearly all those meetings, I have extolled the values of predictability, fairness, and transparency in enforcement.

Those of you that have heard me speak on these issues before know that for a competition authority, predictability, transparency, and fairness translate into five actionable agency goals: *First*, only competition-based factors should guide antitrust policy and enforcement decisions. *Second*, those decisions should be informed by industrial organization economics. *Third*, competition regimes should abide by commonly-accepted best practices. *Fourth*, the agency should offer a clear window into its enforcement actions and analyses. Most importantly, parties should receive due process to argue their positions and defend their conduct or transaction. *Fifth*, and finally, the model competition agency today should aspire to international cooperation in both multilateral and bilateral settings. I have raised these points in many speeches and meetings in China and elsewhere. In return, what I have heard from practitioners, enforcers, and academics is that while the Chinese are intently studying more mature regimes like the United States, they are focused on creating a competition enforcement program that has “Chinese characteristics.”

Initially, I was not sure what was meant by “Chinese characteristics” and what this would mean in practice. But more recently, as I read and hear about the stories emerging from China, I am seeing a version of antitrust enforcement that is unfamiliar to me and that makes me increasingly concerned. In particular, I am beginning to worry that the Chinese may be moving away from rather than towards international norms. Let me focus my talk on two of the most notable ways in which this appears to be the case: first, China reportedly is relying on non-

competition factors in analyzing mergers and acquisitions; and second, China appears to be rebalancing the value of intellectual property to favor short term efficiency gains over longer term dynamic efficiency gains that come from strong protection of those rights. We are hearing a lot of criticism of Chinese actions in these two areas. While I am not on the ground and therefore cannot evaluate the veracity of this criticism – the more I hear the more I worry about the future of antitrust in China. Let me elaborate.

I. Application of Non-Competition Factors

To begin with, in the past several months – and especially in the past few weeks – Western businesses and organizations are increasing their scrutiny of Chinese antitrust law enforcement for not adhering to agency best practices that comport with the five goals I set out a minute ago. In particular, a growing chorus is claiming that the Chinese are using the AML to promote industrial policy. For instance, just last week the U.S. Chamber of Commerce and the U.S.-China Business Council issued detailed and strongly worded reports on the state of competition enforcement in China. According to the USCBC report, “[C]oncerns raised by international observers during the AML drafting process – such as the role of industrial policy considerations in competition reviews, lack of due process, and insufficient transparency – remain relevant based on China’s initial enforcement efforts.”² These reports and others point to the text of the AML, the legislative history of the law, as well as recent statements and decisions of the agency for support. I will explore a few of these points.

First, it is clear that the Chinese Anti-Monopoly Law (AML) expressly provides for consideration of non-competition factors. For example, Article 1 says the Law was enacted for,

² U.S.-China Business Council, *Competition Policy and Enforcement in China*, 5 (Sept. 2014), available at <http://uschina.org/reports/competition-policy-and-enforcement-china>.

among other things, “*promoting the healthy development of the socialist market economy.*”³ This could mean anything, including of course the protection of jobs, Chinese state-owned entities, or other foundational aspects of a socialist economy. Thus, the extent to which the Chinese enforcers consider public interest factors ultimately is a matter of discretion. But whether this means that there is pressure from outside the antitrust agencies to consider non-competition factors is not clear.

Turning from the text to the legislative history lends support to the idea that the AML may be used to protect and promote domestic industry. As detailed in the U.S Chamber’s report, during parliamentary debates in 2006, several members of the Chinese National People’s Congress expressed the sentiment that industrial policy would be appropriate to consider under the AML because of the ascendant but still nascent state of Chinese industry. One member noted, “If we allow pillar companies which the country has fostered for years to be taken over by multinationals, the country will face the danger of losing dominant power on industrial development and technological progress.”⁴ Another member purportedly said: “[W]e shouldn’t ignore the industrial policy of our country, which is to facilitate the enterprises to acquire bigger and stronger development with the economy of scale.”⁵ Additional statements seem to endorse competitor coordination and high concentration among Chinese companies to protect certain key industries, like the steel and automobile sectors.⁶

³ Art. 1, China Anti-Monopoly Law (2008).

⁴ Ni Yuefeng, member of NPC Standing Committee, *quoted in* U.S. Chamber of Commerce, *Competing Interests in China’s Competition Law Enforcement: China’s Anti-Monopoly Law Application and the Role of Industrial Policy* at 22 (Sept. 9, 2014) (quoting same), *available at* https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf [hereinafter Chamber Report].

⁵ Yao Xiangcheng, member of NPC Standing Committee, *quoted in* Chamber Report, at 22.

⁶ Chamber Report, at 20-25.

Well, “So what?” you may be asking. Members of the U.S. Congress say many things before passing a law and what they say during debate may or may not carry any sway after the law is passed. Fair enough. So let us take a closer look at statements made since passage of the AML.⁷ To begin with, the Legislative Affairs Commission of the NPC Standing Committee issued commentary on the AML after it was passed. The comments include a doctrine known as the “Three Musts,” which guides enforcement of Article 4 of the AML and includes a directive for the state to implement competition rules consistent with the socialist economy. These “musts” include bearing “in mind the requirements to enlarge and strengthen, concentrate and improve the market competitiveness of our enterprises, [and] macro-coordinate the relations between anti-monopoly and the implementation of national industrial policies”⁸

According to the U.S. Chamber, looking beyond these statements to the Chinese government’s actual enforcement record reveals a troubling pattern of bias against foreign enterprises. MOFCOM (the Ministry of Commerce) has made decisions on 864 proposed transactions thus far and cleared the vast majority of those – 838.⁹ Two deals were blocked outright and 24 were approved with conditions.¹⁰ By themselves, these numbers are in step with other enforcement authorities.

But the Chamber report includes two important additional insights: *First*, although a recent study concludes that 80% of Chinese M&A deals involving a Chinese target are domestic-to-domestic, only 7.6% of reviewed deals were domestic to domestic.¹¹ The disparity in these

⁷ *Id.* at 25-26.

⁸ *Translation of Legislative Affairs Commission, Interpretation of the Anti-Monopoly Law of the People’s Republic of China*, Law Press China (2008) at 4, *as found in* Chamber Report at 24.

⁹ Chamber Report at 28-29.

¹⁰ *Id.* at 29.

¹¹ *Id.* at 28-29.

figures may indicate that many of the solely domestic deals are not being filed with the Chinese antitrust authorities for review. The Chamber claims that a failure to notify MOFCOM of purely domestic reportable deals may operate as a *de facto* exemption from the AML. **Second**, every merger case in which MOFCOM took action to reject or conditionally approve the deal involved a foreign company.¹² And according to the Chamber, these enforcement actions often operated to deflect the proposed acquisition of a famous Chinese brand, protect the supply of an important input for Chinese industry, or to slow foreign competition and offer a competitive advantage to a domestic Chinese company.¹³ By comparison, roughly a third of U.S. conditional approvals and rejections involved foreign companies between 2008 and 2012.¹⁴ Similar numbers exist in other jurisdictions. The Chinese numbers, if accurate, could raise troubling inferences about the purpose and effect of AML merger enforcement as a tool of industrial policy.

Of potentially greater concern are some of the rationales MOFCOM is advancing to justify its decisions. For instance, many observers have criticized MOFCOM's analysis and action in Glencore's acquisition of Xstrata. Neither of these mining companies held or operated assets in China and their combined share of copper concentrate supply as reported by MOFCOM appeared low by almost any standard – about 12% in China and far less when viewed in terms of world production and supply.¹⁵ These concentration levels are below what would normally be seen as a potential problem under conventional antitrust analysis. Nonetheless, MOFCOM took more than a year to review the deal before requiring the parties to divest a copper mine in Peru. No other reviewing agencies took nearly this long to review the deal or saw any issues arising in

¹² *Id.*

¹³ *Id.* at 32.

¹⁴ *Id.*

¹⁵ *Id.* at 34.

copper production or supply.¹⁶ The stark timing and analytical contrasts between MOFCOM's review and those of other reviewing agencies left many people wondering. Some observers pointed to MOFCOM's emphasis on the dependency of China's economy on importation of copper for an explanation, noting: "China is the world's major importing country for copper concentrate, with China's present demand accounting for about 50% of the total global demand."¹⁷

Others, including the U.S. Chamber, also highlighted the fact that the Peruvian mine subject to the MOFCOM order was recently sold to a consortium of Chinese-owned companies, many of them state-controlled.¹⁸

The Chinese antitrust agency heads last week responded to criticisms of their enforcement record at a joint press conference. They argued that their processes are fair, transparent, and follow regulations.¹⁹ Their response suggests to me that they each want to be accepted internationally as a serious and disciplined enforcer. This fact encourages hope that we can continue to engage with these agencies and work with them to find a viable path forward.

Given the importance of China to the world economy and, increasingly, to the antitrust enforcement community, I sincerely hope that future merger analyses from MOFCOM will be more robustly tethered to existing legal and economic norms and contain abundant supporting

¹⁶ *Id.* at 33-34.

¹⁷ "China's imports of copper concentrate in 2011 accounted for 68.5% of total domestic supply, and the trend shows an upward trajectory. In 2011, Glencore's and Xstrata's exports of copper concentrate to China accounted for 13.3% and 4.5% respectively of China's total imports, or 17.8% on a combined basis. The Chinese market is a major market for the undertakings concerned in the concentration. In 2011, Glencore and Xstrata sold respectively 53.7% and 17% of their copper concentrate supplies to the Chinese market." Hannah Ha, et al., *MOFCOM Orders Extraterritorial Divestiture of Key Mining Asset in Glencore/Xstrata Merger: Lessons for Future Notifications* (Mayer Brown May 6, 2013), available at <http://www.mayerbrown.com/files/Publication/fe04b528-e457-4b50-a523-c85fc13e4196/Presentation/PublicationAttachment/5976f676-c847-4c7f-a7a1-d769bda1e92b/130506-PRC-AntitrustCompetition-MA-Mining.pdf>.

¹⁸ Chamber Report at 34.

¹⁹ Michael Martina & Xiaoyi Shao, *Update 2-China's Antitrust Regulators Defend Probes; Qualcomm Inquiry Nearly Over* REUTERS (Sept. 11, 2014).

evidence, including econometric work. For it is only through the presentation of such evidence that any agency, including my own, can dispel naysayers and maintain credibility. As John Adams so famously pointed out: “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.”²⁰

II. Antitrust and Intellectual Property

A second topic of concern is China’s approach to issues at the intersection of the antitrust and intellectual property laws, including licensing practices and standard essential patents. I am a proponent of strong intellectual property protection as a way to promote innovation and long-run consumer gains in an economy. As the U.S. Supreme Court has said, strong intellectual property protection creates “an incentive to inventors to risk the often enormous costs in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy”²¹ In exchange for this “reward for inventions” the patent laws require the inventor to disclose his or her idea, so that after the period of exclusivity expires, “the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use”²²

Recently, China has been exploring how to manage intellectual property rights. SAIC (State Administration for Industry & Commerce) has been working on IP guidelines similar to those the FTC and DOJ issued in the 1990s. This past summer, it issued for comment an eighth version of these Guidelines, now styled as enforceable rules, dealing with issues at the

²⁰ John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, (Dec. 1770) available at <http://www.quotationspage.com/quote/3235.html>.

²¹ *Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 480 (1974).

²² *Id.* at 481, citing *U.S. v. Dubilier Condenser Corp.*, 289 U.S. 178, 187 (1993).

intersection of the antitrust and IP laws. To its credit, SAIC did request public comment across multiple rounds of these rules and made several improvements – for instance, the early drafts relied heavily on per se rules that were shifted to rule of reason analyses in later drafts. These changes appear to be in response to international comments and to better align with treatment of IP in nations outside of China.

In the Rules you will also find, however, several sections that deviate from international norms regarding treatment of IP. For instance, SAIC intends to apply more widely the essential facilities doctrine to patents in standards, a doctrine that has faced serious criticism by the Supreme Court in the United States. In addition, what many people are concerned about is that the Chinese are proposing to apply this principle to all potentially essential patents – even those not contributed voluntarily by the owner to a standard setting body. As Chairwoman Ramirez pointed out in a speech last week, this is a break from practice at the FTC, the DOJ, and Europe.

A point that I want to add to her observation is that, in part, I am concerned that certain actions here in the U.S. may have given some cover to the Chinese for their departure into this line of thinking. As many of you know, the two major FTC decisions involving standard-essential patents, *Robert Bosch GmbH* and *Google/Motorola Mobility*, were closely watched by enforcers in other jurisdictions. I dissented from them for several reasons, including concerns about derogating the value of IP rights without a clear basis, which could send a bad message internationally.

Let me take a minute to explain these cases. In the first matter, *Robert Bosch GmbH* (*Bosch*),²³ while investigating a proposed acquisition, the FTC staff uncovered evidence that the acquired company, SPX Service Solutions (SPX), had sought injunctive relief against

²³ *In re Robert Bosch GmbH*, FTC File No. 121-0081.

competitors for patents that may have been standard-essential and allegedly subject to reasonable and non-discriminatory (RAND) licensing terms.²⁴ The FTC alleged Bosch violated Section 5 of the FTC Act – but not the Sherman Act – and ordered Bosch to refrain from seeking injunctions on these patents against willing licensees and to license the patents on a royalty-free basis.²⁵

Similarly, the FTC settled with Google and its subsidiary, Motorola Mobility.²⁶ As in *Bosch*, the FTC alleged that Google and Motorola violated Section 5 of the FTC Act by seeking injunctive relief on standard-essential patents subject to RAND commitments.²⁷ In *Google*, the FTC imposed a more complex remedy than in *Bosch*, establishing a multi-step process for Google to follow before seeking injunctive relief on its standard-essential patents.²⁸

In my dissents, I took issue with the lack of transparency and guidance the FTC’s decisions provided to patent holders and others subject to our jurisdiction.²⁹ In particular, I raised concerns about the FTC enforcing Section 5 without providing sufficient information about the relationship between that statutory provision and the antitrust laws, including the Sherman and Clayton Acts. Without such information, it is unclear what the term “unfair method of

²⁴ *Id.*, *Analysis of Agreement Containing Consent Orders to Aid Public Comment*, at 4 (Nov. 26, 2012), available at <http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf>.

²⁵ *See id.* at 4-5.

²⁶ *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120.

²⁷ *See id.*, *Analysis of Proposed Consent Order to Aid Public Comment*, at 3-6 (Jan. 3, 2013), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf>.

²⁸ *See id.* at 6-8.

²⁹ *See In re Dissenting Statement of Commissioner Maureen K. Ohlhausen – In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, at 3-4 (Nov. 26, 2012) [hereinafter *Ohlhausen Bosch Statement*], available at <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf>; *In re Dissenting Statement of Commissioner Maureen K. Ohlhausen – In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, at 1-3 (Jan. 3, 2013) [hereinafter *Ohlhausen Google Dissent*], available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf>.

competition” means or how the Commission will use its enforcement discretion under Section 5.³⁰

As I said a minute ago, I was also concerned that the settlements created potentially confusing precedent for foreign enforcers. The FTC placed serious restrictions on the ability of holders of standard-essential patents to seek injunctions, which is a critical intellectual property right.³¹ In my view, the FTC did this in each case with very little, if any, evidence that the patent holder agreed to waive this right when it participated in the standard-setting process. Further, in *Bosch*, the FTC required Bosch to grant royalty-free licenses on its patents as a remedy for seeking injunctions on its potentially standard-essential patents.³² I explained in my dissenting statements that, no matter how good our intentions, I worry that these actions may send the wrong message to our foreign counterparts that we do not place a very high value on intellectual property rights and that we failed to explain adequately why these cases are the exception rather than the norm.

Unfortunately, it turns out my concerns were not merely theoretical. During one of the earliest conferences I attended in China, I was listening to a presentation on the U.S. and Chinese antitrust laws and the FTC’s decision in Google SEPs came up. The lecturer argued that the U.S. has a strong essential facilities doctrine and then drew a line from this supposed precedent (with

³⁰ I also was concerned our decisions would create conflict with other federal institutions since a *de facto* effect of our orders is to prohibit standard-essential patent holders from pursuing injunctive relief in federal courts and the ITC. See Ohlhausen *Bosch* Statement, at 1-2; Ohlhausen *Google* Dissent, at 5-6. Moreover, when we rely on Section 5 of the FTC Act, which only the FTC can enforce, rather than the antitrust laws, which both the DOJ and FTC can enforce, we potentially create two different standards for patent holders, depending on which agency happens to review any alleged misconduct.

³¹ See *In re Robert Bosch GmbH*, FTC File No. 121-0081, *Decision and Order*, at 13-14 (Nov. 26, 2012) [hereinafter *Bosch D&O*], available at <http://www.ftc.gov/os/caselist/1210081/121126boschdo.pdf>; *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, *Decision and Order*, at 6-12 (Jan. 3, 2013), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf>.

³² See *Bosch D&O*, at 13.

no mention of *Trinko*³³) and similar European decisions to the Chinese Anti-Monopoly Law and other Chinese laws that prohibit unreasonable refusals to deal as to essential facilities.

Then, and this is where I really became concerned, turning to a slide that said “inspiration from *Google case*” the presenter reasoned that the FTC’s decision in the Google SEPs matter meant that an “unreasonable” refusal to grant a license for a standard-essential patent to a competitor should constitute monopolization under the essential facilities doctrine. The remedy, he implied, should be compulsory licensing (presumably on favorable terms) because that would be the best way to facilitate competition among the licensees. Again, he may have missed the U.S. appellate court decisions and agency statements that largely defer to the rights of patent holders in licensing matters. Or misunderstood other existing precedent. Either way, I saw many heads nodding in agreement that day.

Importantly, in each of my subsequent trips, the speakers have become more vocal and convinced about this use of essential facilities to handle SEPs – and this approach now also includes SEPs not voluntarily contributed to a standard setting body. I have been invited to China multiple times to argue against this misinterpretation of our laws and to advocate to Chinese enforcers that protecting IP rights is better for their own economy in the long run because it promotes innovation. Unfortunately, despite what I argue, some people point to the majority actions by the FTC and old or overturned judicial decisions and argue that the Chinese interpretation has support in U.S. precedent. They then go on to argue that, even if I am right about the state of U.S. law, it is not unreasonable for them to follow a position apparently supported by at least some in the U.S. and adopt it for China – that is, for them to create laws with “Chinese characteristics.” So, keep in mind, the Chinese are watching our actions closely,

³³ Verizon Commc’ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

but their goal is not just to emulate us. They are searching for a solution that works best for their culture and their economy.

As we move forward with them, I think we will see the Chinese increasingly advocate their version of antitrust enforcement and we may be confronted with the reality that “international norms” may no longer mean what we once thought. However, as John F. Kennedy once noted, “Change is the law of life. And those who look only to the past or present are certain to miss the future.”³⁴ To continue our prominent role in shaping global competition policy, we, too, must continue our focus on future engagement with Chinese officials on these topics. I look forward to the discussion. Thanks.

³⁴ John F. Kennedy, Address in the Assembly Hall at the Paulskirche in Frankfurt, June 25, 1963, *available at* <http://www.presidency.ucsb.edu/ws/?pid=9303>.