SPEECH

Deputy Assistant Attorney General Roger Alford Delivers Remarks at the 2018 Competition Policy Forum in Beijing

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“Crossing the River by Feeling the Stones”:
Reflections on a Decade of Chinese Competition Enforcement

I am delighted to be with you today, and I commend the organizers of this conference for taking the occasion to honor the ten-year anniversary of China’s Anti-Monopoly Law (“AML”). Last year at this time, I gave my first speech as Deputy Assistant Attorney General, and I am delighted to return to China to discuss competition law enforcement. Assistant Attorney General Delrahim also sends his personal congratulations to the State Administration for Market Regulation (“SAMR”) and regrets not being able to be here to celebrate this ten-year anniversary.

There is no doubt that there have been important developments for competition law enforcement in China, particularly with the recent reorganization of the Chinese competition authorities. The formation of the antimonopoly bureau within SAMR combines the antitrust

enforcement responsibilities of three previous agencies. I checked with my economic staff and I believe that the HHI for this three-to-one merger went from 3,267 to 10,000, so it is quite an accomplishment to secure approval of this deal. Seriously though, I offer my sincere congratulations on the creation of the antimonopoly bureau in SAMR, and hope that it will promote greater effectiveness and efficiency in competition enforcement practices.

At this time of a new beginning, I thought it might be useful to share with you some reflections on how competition enforcement became what it is today in China and the United States and offer some perspectives as to how we can move forward together.

China has a fascinating ancient history and an extraordinary recent history. The last few decades have been particularly interesting, with China's economic opening to the outside world. To underscore these fundamental changes in China's economy, it is worth understanding that, as recently as the 1970s, many Chinese farmers were communal farmers working for collectives. Because everyone received the same from the collective, there was little incentive to work hard or produce a surplus. But in 1978, a small group of farmers in Xiaogang agreed to divide up their farmland, give a share of the crop to the government and the collective, and keep the surplus. In essence, they were experimenting with market economics and individual plots. It was a fabulous success. Within a year, they had an enormous harvest with more food than the previous five years combined. Such is the power of the market where free market reigns. Chinese leaders called those early experiments with rural capitalism the "birdcage economy … airy enough to let the market thrive but not so free as to let it escape."

There is no doubting that China is a global economic powerhouse whose economy continues to expand. The private sector now accounts for 60 percent of China's GDP growth and 90 percent of its new jobs. But state-owned enterprises ("SOEs") continue to play a disproportionate role in the economy, with 17 of the top 20 Chinese companies (85 percent) listed on Fortune's Global 500 being majority-owned by the Chinese government. These SOEs dominate key industrial sectors such as aviation, banking, construction, energy, and telecommunications. These critical sectors of the Chinese economy have yet to fully embrace free enterprise, and all the attendant consumer benefits associated with free markets. The current trend is more expansive industrial policies, less market access for imported goods and services, and substantial government support for Chinese industries, particularly ones dominated by SOEs.

The political and institutional changes that have occurred in China have been accompanied by legal reforms, including in the area of competition law. The AML is certainly part of the story of moving from a state-controlled economy to a more market-oriented economy. As you all know, China first incorporated competition concepts when it passed its Anti-Unfair Competition Law in 1993. The Price Law, which also relied upon competition principles, was passed in 1997. The work of drafting the AML began in earnest in 2002, the same year China joined the WTO. The drafters of the AML worked with a number of foreign competition authorities, including the U.S.

Department of Justice and Federal Trade Commission, to prepare a comprehensive competition statute – an economic constitution – which came into effect 10 years ago.

We view the formation of the antimonopoly bureau in SAMR and continuing evolution of the AML as a beneficial contribution to China's economic development.

The tenth anniversary of the AML provides an opportunity to reflect on the United States' experience in codifying, interpreting, and refining its own antitrust policies. That history affirms that antitrust theories evolve over time, and that the process of improving antitrust enforcement is full of setbacks and advances. The United States has experienced its fair share of both, but we strongly believe that the benefits of sound competition policy and enforcement are worth some ups and downs.

There are parallels between the evolution of Chinese and American antitrust policy. Our first federal antitrust law, the Sherman Act, was passed in 1890 against the background of an increasing number of horizontal combinations and a significant shift from an agrarian economy to an industrialized one. The years between 1870 and 1890 – a period we call the Gilded Age – were marked by tremendous economic growth and prosperity that brought key industrial advances in important economic sectors, including transportation, energy, and communications. Swift economic expansion and industrialization also contributed to a rise in real annual GDP. Moreover, a near doubling of the U.S. population during this period provided increased labor supply and increased demand for goods and services.

But all was not perfect. The period was also afflicted by deep economic recessions. In the U.S. at the time, there was sympathy for allowing businesses to organize, coordinate, and centralize operations in order to reduce competitive pricing pressure and to prevent this so-called excessive competition. Of course, these businesses were also motivated by the ability to command supra-competitive prices. By the late 1880s, public pressure mounted against suppression of individual economic opportunities and public hostility towards trusts grew.

It was within this atmosphere that the first U.S. antitrust law – the Sherman Act of 1890 – was born. The statute contains two operative sections. Section 1 prohibits contracts, combinations, and conspiracies that unreasonably restrain trade while Section 2 makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize.

It was clear early on that the broad terms of the Sherman Act would need at least some limiting principles in order to be administrable, and we have spent over a century developing those principles. In 1914, the Clayton Act was passed as an amendment to clarify and supplement the Sherman Act. Among other things, the Clayton Act prohibits anticompetitive mergers and acquisitions and interlocking directorates. Procedurally, the Clayton Act also requires notification of contemplated mergers and acquisitions that meet or exceed certain thresholds.

Interpretation and enforcement of the antitrust laws have evolved over the years. U.S. courts and antitrust lawyers have embraced the principle that antitrust law protects competition, not competitors. But that was not always clear. Early U.S. antitrust enforcement was motivated by a desire to protect small or inefficient businesses. The period is also criticized as having advanced a "big is bad" view of firms. Fortunately, by the 1970s, the rise of the Chicago School of economics had a deeply influential period in antitrust thinking, and its economics-focused approach had a significant positive impact on U.S. antitrust and competition policy. The Chicago School emphasized that the only legitimate goal of antitrust adjudication is protecting consumer welfare and that economic analysis should be applied rigorously to test propositions of antitrust law and to understand the impact of business conduct on consumers. In a similar fashion, the Harvard School led by Phillip Areeda, Donald Turner, and now Justice Stephen Breyer also oriented antitrust enforcement toward economic efficiency and relied on economic theory. Like the Chicago School, the Harvard School discouraged any consideration of competing objectives for antitrust laws, such as political power or protecting small businesses.

Although debate about antitrust law and policy continues today, modern antitrust enforcement in the United States is premised on the consensus view that vigorous competition and free markets best serve the interests of consumers and the economy as a whole. The U.S. Supreme Court has affirmed that the goal of antitrust law is to protect competition, not competitors. This limiting principle disciplines antitrust enforcers and eschews broader social policy goals that are better addressed by representative bodies like Congress. Instead, this consensus approach favors an evidence-based assessment of whether a transaction or conduct is likely to harm, or perhaps already has harmed, competition. Focus on harm to competition means that enforcement decisions are based on a careful assessment of real evidence – business documents, data, market structure, and economic analysis – to determine the effects of a practice on price, output, innovation, quality, and choice. In addition, we look to business incentives in our investigations. Whether our concern is the exercise of market power, the ability to foreclose customers, or the viability of a remedy, understanding business incentives is critical. That task can be fairly simple at times. Take, for example, a merger-to-monopoly, which is inherently suspect except in very rare instances. More often though, our task is challenging.

In all events, enforcement decisions are not based, and should not be based, on the interest of a particular economic player or intended to drive a specific outcome.

In transitioning China toward a marketed-oriented economy, Deng Xiaoping famously called on China to "cross the river by feeling the stones." On the tenth anniversary of the AML and the emergence of the antimonopoly bureau at SAMR, now is an opportune time to reflect on the gradual progress China has made in crossing the river toward effective competition enforcement. In so doing, I will reflect on our own experience in crossing the river and point out the stones we have felt along the way. These suggestions promise the possibility that China

might progress toward a mature antitrust enforcement regime at a pace far faster than our own experience.

First, base your enforcement actions on protecting competition. This standard focuses on allocative efficiency, price competition, quality, and innovation. It lets market-based economics, which are growing by leaps and bounds in China, drive the outcome. This standard also is, in our view, the most objective. It allows competition authorities to focus less on extraneous values and more on economic realities and business incentives. Notions of fairness can be difficult to determine and too subjective to provide consistent, reliable guidance for businesses and consumers alike. Moreover, injecting notions of fairness into competition law enforcement inevitably turns it into regulation that protects competitors rather than competition itself.

Second, avoid competing values that incorporate political and social concerns, which can impose tradeoffs that have the potential to harm Chinese consumers. All enforcement agencies face challenges in dealing with entrenched interests, and the risks of promoting national champions is ever present. In the Chinese context, that means avoiding the temptation to give SOEs privileged status. I was interested to see the announcement last week about SAMR's penalty against PetroChina units for resale price maintenance. To increase the standard of living of over a billion Chinese consumers, prioritizing their welfare and treating SOEs the same as companies without government interests is central. Of course, we intend to do the same. The Antitrust Division does not distinguish between competitors based on their nationality or ownership structure. Any foreign SOE that engages in commercial activity that harms the United States market is not immune to U.S. antitrust laws.

Third, commit resources to economic analysis to enhance the possibility of success. It is important that SAMR has the resources it needs to assess practices in the dynamic economy it regulates. Having motivated, educated, and energetic staff is important for a competition agency to fulfill its mandate, and having a skilled group of economists to provide support and insight into competitive effects is critical. The Antitrust Division has had in-house economists since 1936, and our Economic Analysis Group today has over 50 Ph.D. economists. Agencies committed to rigorous economic analysis need to hire and retain qualified economists, and empower them to review cases and make independent recommendations to decision-makers. In addition, lawyers and staff benefit from training in fundamental microeconomic theory.

Fourth, enforce competition laws consistent with intellectual property rights. That means competition law and policy should not constrain the legitimate exercise of intellectual property rights, or stifle innovation by undermining incentives for investment. It is critical to create a culture of innovation and economic freedom, where the default position is that anything that is not prohibited is permitted. This leads entrepreneurs, investors, and innovators to migrate toward your economy and identify it as a cradle of creation.

Fifth, join the network of international competition agencies. Competition authorities from around the world meet regularly to share experiences and gain insights regarding the latest trends in competition enforcement. These regular meetings dramatically shape the reputation and relationships the competition authorities have with each other, and inform the substance and process of competition enforcement. One of the most important items on the agenda for the coming decade is for SAMR to slowly integrate into international organizations such as the International Competition Network ("ICN").

Sixth, respect fundamental procedural fairness. Process can be as important as substance when it comes to competition enforcement. In particular, we strongly encourage SAMR to avoid discriminatory enforcement of the Chinese competition laws. As I have discussed previously, the prohibition against discrimination is central to the rule of law. The ICN Guiding Principles state that "[c]ompetition agencies should conduct enforcement matters in a consistent, impartial manner, free of political interference." Failure to do so leads to biased antitrust enforcement and broader adverse economic effects.

Likewise, judicial review of competition decisions is healthy and integral to confidence in open markets and the rule of law. Judicial review ensures stability and predictability. From an enforcer's standpoint, we believe the best way to demonstrate the strength of your positions is to allow outside arbiters, including courts, to test them.

When it comes to due process, we recognize the diversity among us on the margins, and yet affirm a common set of practices in pursuit of a coherent approach to enforcing antitrust laws. This is reflected in the work of the ICN and the OECD Competition Committee. It also is evident in the progress we have seen in drafting a Multilateral Framework on Procedures ("MFP"). These negotiations began in Paris in early June and continued through July. The "Paris Draft" of the MFP is now a more complete draft that we are sharing with every competition authority, encouraging them to review, provide suggested improvements, and join the initiative. We will be inviting competition authorities from around the world to New York in early September to continue the MFP discussions and we hope SAMR will join us.

In closing, we want to congratulate you on the tenth anniversary of the AML and on China's efforts to develop a mature competition policy and enforcement system. In the future, we hope to continue the international cooperation with SAMR and hope it will continue to be a strong competition advocate within your government and to the rest of the world.

Topic