



United States of America
Federal Trade Commission

**The Never-ending yet Vital Pursuit of Greater
Cooperation, Convergence, and Transparency**

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Good morning. It is my great pleasure to be here at the First Annual Symposium held by the China Institute of International Antitrust and Investment (CIIAI). I would like to thank Frank Fine, the Executive Director of the CIIAI, for graciously inviting me to speak at this inaugural symposium. Frank and his colleagues at the Institute should be commended for establishing the first globally-oriented antitrust think tank in Asia. Along with other observers of competition law and policy developments, I look forward to the great work and programs the Institute will produce in the future.

This morning, I would like to address three goals that competition agencies have pursued for many years: cooperation, convergence, and transparency. Much has been accomplished in these areas by agencies around the world. Much like the goal of perfection, however, the pursuit of greater cooperation, convergence, and transparency is a never-ending one. We can always seek greater cooperation among competition authorities, particularly those that have arrived on the scene more recently. We can always work toward closer harmonization of the process and substance of our competition analyses. And, we can always provide greater transparency and

guidance to those following and affected by our enforcement and policy decisions. Nonetheless, each of these goals is essential to a well-functioning system of global competition authorities.

In my remarks, I will discuss my expectations for the Federal Trade Commission's (FTC or Commission) priorities in the areas of cooperation and convergence, as well as my own thoughts on the importance of transparency. I will also touch on some recent developments – in both the United States and China – in each of these three areas.

Before I proceed any further, let me take the opportunity to clarify that I am speaking only for myself in presenting these remarks; I am not speaking for the entire Federal Trade Commission. Nonetheless, I can say without hesitation that there is a high degree of continuity in the FTC's international antitrust agenda. The FTC is institutionally structured to ensure continuity, with Commissioners from both of the two major U.S. political parties and staggered seven-year terms for the Commissioners that transcend the election cycle. Also, the priorities of Democratic and Republican Commissioners and administrations in the international area have been remarkably consistent, emphasizing bilateral and multilateral cooperation and seeking convergence toward sound competition policy.

This commitment to fostering international cooperation – stretching back over many administrations and several FTC Chairmanships – has enabled the FTC to strengthen its ties with our international partners, play a lead role in multilateral fora, such as the International Competition Network (ICN), and expand our program of international technical assistance. Whatever policy differences sometimes divide us domestically, Republicans and Democrats have largely shared an international vision and a strong commitment to the role of the FTC in building stronger international antitrust relationships.

I. Cooperation

A. Benefits of Cooperation among Competition Authorities

With that introduction, let me start with the important goal of increased cooperation among competition agencies. To make what I think is by now a fairly well established point, inter-agency cooperation on competition cases is critical given the global nature of many businesses and transactions and the inter-connected nature of the global economy. There are now well over 100 jurisdictions enforcing competition laws. Cooperation among those agencies can mean many different things, including discussions of substantive competition law, economic analysis, and procedural issues; the sharing of general knowledge about a particular industry; and, of course, coordinating on a specific investigation. To be clear, however, cooperation does not necessarily mean consistent results in every case; that is simply not a realistic goal.

Cooperation among competition authorities benefits the agencies involved in the cooperative efforts, the businesses and other parties subject to competition laws, and the economies of the countries involved in the cooperation. Cooperation allows agencies to identify issues of common interest, to improve their analyses, and to avoid inconsistent outcomes. The more cooperation there is across agencies, the more those agencies can deepen relationships with their counterparts – at both the staff and supervisory levels. Even in situations where detailed specifics of an investigation cannot be shared, it is useful for competition authorities to be able to share their experiences – both good and bad. Further, cooperation on cases helps businesses around the globe by providing more consistent outcomes on a particular case, as well as enhanced certainty, which in turn facilitates greater investment and innovation by all businesses. Finally, cooperation facilitates the effective and efficient enforcement of competition laws, which helps to maintain competitive markets and thus a more attractive investment climate.

The most commonly cited example of inconsistent outcomes in the competition area involves merger remedies, or restrictive conditions, as they are often called here in China. Cooperation can help avoid situations in which remedies imposed or accepted by one agency are inconsistent with those imposed by an agency in another jurisdiction. Cooperation can also be beneficial when agencies are coordinating the announcement of their respective merger remedies.

B. FTC Developments and Priorities in the Area of Cooperation

The FTC works bilaterally with a large and growing number of jurisdictions on case cooperation and assistance. The United States government has bilateral cooperation agreements with eight jurisdictions: Australia, Brazil, Canada, the EU, Germany, Israel, Japan, and Mexico. In addition, the U.S. antitrust agencies – the FTC and the U.S. Department of Justice Antitrust Division (Antitrust Division) – have entered into Memoranda of Understanding (MOUs) with the competition agencies in Chile, Russia, India, and of course China.¹

Pursuant to these agreements, or often without an agreement in place, the staff of the FTC cooperates with foreign competition agencies on individual cases and on developing competition policy. The agencies frequently exchange investigative information, for example, when the FTC and a foreign agency review a case that raises competition concerns in one or both jurisdictions. The agencies may exchange both public information and what we often refer to as “agency confidential” information – that is, information that the agency does not routinely disclose to outside parties, but may disclose under federal law. Examples of agency confidential information include staff views on market definition, competitive effects, and remedies, as well as the fact that the FTC is investigating a particular party.

¹ Fed. Trade Comm’n, International Antitrust and Consumer Protection Cooperation Agreements, <http://www.ftc.gov/oia/agreements.shtml>.

To mention a few of our ongoing cooperation efforts, we continue to have frequent opportunities to work with our colleagues in the Canadian Competition Bureau and the Directorate General for Competition at the European Commission (DG Comp). Following the enactment of Canadian rules aligning their merger review procedures more closely with the U.S. system, the FTC has worked closely with Canadian officials to ensure maximum interactivity between our systems. We hold regular in-person roundtables between case handlers. We also have had a series of staff exchanges, made possible by the US SAFE WEB Act,² a statute that enables the FTC to host foreign competition (and consumer protection) agency officials and, in appropriate circumstances, provide them with access to non-public materials, allowing them to gain valuable experience by working with case teams at the FTC.

We have worked closely with DG Comp on merger investigations for many years. More recently, the FTC and DG Comp have cooperated on numerous unilateral conduct investigations, including the recent *Google* search bias and standard-essential patent matters. Although cooperation in conduct cases is more challenging – given that they are not subject to the same time constraints as mergers and parties may not have the incentive to facilitate cooperation – coordination on these matters is important and we are committed to making that happen with the EC and other agencies whenever possible and appropriate.

In recent years, we have seen the emergence of many new competition laws and merger control regimes across Asia, Latin America, and Africa. This presents opportunities to spread the benefits of sound competition policy, but also raises challenges to both cooperation and convergence. New laws and MOUs, combined with increased cross-border business activity, are laying the foundation for broader cooperation, and we have had opportunities to cooperate

² Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers beyond Borders Act, Pub. L. No. 109-455, 120 Stat. 3372 (2006).

productively with jurisdictions such as Mexico. The FTC has worked closely with the Mexican Federal Competition Commission to strengthen its capacity to evaluate and address anticompetitive practices. This has included coordinating a series of judicial education programs featuring prominent U.S. jurists, as well as tightening our coordination in merger reviews. Our relationship with the Mexican competition agency is strong and has provided a bridge to other agencies in Latin America. Brazil, for example, has made major institutional reforms and adopted major legislative changes, including to its merger review system.

From experience, we know that bilateral case cooperation, while distinct from convergence, also facilitates greater understanding and can create a foundation of legal convergence as well. As our cooperation extends to newer agencies and additional types of cases, we hope that we will build a better foundation for deeper substantive and procedural convergence. I expect that finding solutions to practical problems agencies face will build stronger relationships as we learn from each other and assist each other in improving our performance and effectiveness.

Nonetheless, there are certain challenges that we are likely to encounter in our coordination efforts in the future. For example, new rules governing data privacy could make bilateral cooperation more difficult. We have encountered instances in which firms raised concerns that providing requested information to the FTC could violate another country's data privacy laws. As you may know, Europe is currently considering a new privacy regulation. While we share the goal of ensuring adequate privacy protections, we want to make sure privacy rules do not make it more difficult to obtain and share data for law enforcement purposes. We are working with our U.S. government and EC colleagues on these issues.

C. China's Recent Efforts in the Area of Cooperation

Turning to recent coordination efforts by China, as many of you know, in July 2011, the FTC and the Antitrust Division signed a Memorandum of Understanding with the Chinese Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC).³ The MOU establishes a framework for cooperation between the two U.S. antitrust agencies and the three Chinese Anti-Monopoly enforcement agencies. The MOU anticipates cooperation at two levels: first, a joint dialogue among the senior competition officials at all five agencies, and second, communication and cooperation between individual agencies at the senior or working level. The MOU identifies several specific avenues for cooperation, including: (1) exchanges of information and advice about competition law enforcement and policy developments; (2) training programs, workshops, and other means to enhance agency effectiveness; (3) exchanges of comments on proposed laws, regulations, and guidelines; and (4) cooperation on specific cases or investigations, when it is in the investigating agencies' common interest.

Even before the signing of the MOU with the Chinese agencies, the FTC, along with the Antitrust Division, had devoted considerable resources to working with Chinese officials on developing the Anti-Monopoly Law (AML). The two U.S. agencies engaged in frequent meetings and training workshops, in both China and the United States, with all three Chinese competition agencies. We discussed substantive competition analysis and effective investigative techniques with the Chinese agencies. In addition to many informal exchanges, we submitted numerous written comments on draft implementing rules and guidelines. The Chinese

³ See Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding with Chinese Antitrust Agencies (July 27, 2011), *available at* <http://www.ftc.gov/opa/2011/07/chinamou.shtm>. The text of the MOU is available at <http://www.ftc.gov/os/2011/07/110726mou-english.pdf>.

government welcomed our views on the Anti-Monopoly Law as it proceeded through several rounds of drafting. We, in turn, very much appreciated the opportunity to provide our views.

In addition to the MOU, the U.S. agencies and MOFCOM have a *Guidance for Case Cooperation*,⁴ which establishes a framework for cooperation in merger cases. Under that document, which was issued in November 2011, the agencies can – but are not required to – exchange information and engage in other useful cooperative efforts when they are investigating the same transaction.

We will hold another joint dialogue with China and the Antitrust Division under our MOU later this year, having held our initial joint dialogue last September. We have already had the opportunity, in the hard disk drive mergers,⁵ to cooperate with MOFCOM, and look forward to future opportunities. We hosted a MOFCOM official at the FTC for six months through our International Fellows program and will continue our technical assistance program for the three Chinese agencies. Looking forward, I am confident that the FTC will continue to place great importance on building a strong, cooperative relationship with China and its competition agencies. We look forward to expanding and deepening our relationships with all three agencies, to the benefit of U.S. and Chinese businesses and consumers.

Beyond their relationship with the FTC and Antitrust Division, the Chinese agencies now have MOUs or similar arrangements with the EU, the U.K. Office of Fair Trading, and the Korean and Japanese Fair Trade Commissions, among others. Officials from MOFCOM, NDRC, SAIC, and other Chinese government entities are devoting substantial resources to studying foreign competition enforcement through formal technical assistance and exchange

⁴ Guidance for Case Cooperation between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases (Nov. 29, 2011), *available at* <http://www.ftc.gov/os/2011/11/111129mofcom.pdf>.

⁵ See Fed. Trade Comm'n, Statement of the Federal Trade Commission Concerning Western Digital Corporation/Viviti Technologies Ltd. and Seagate Technology LLC/Hard Disk Drive Assets of Samsung Electronics Co. Ltd, at 2 (Mar. 5, 2012), *available at* <http://www.ftc.gov/os/caselist/1110122/120305westerndigitalstmt.pdf>.

programs, secondment of personnel to foreign agencies, and direct exchanges with foreign practitioners, scholars, and industry groups.

Finally, in addition to the international coordination efforts I just discussed, I would like to raise a point about domestic coordination efforts. As the AML is developed further, case coordination and cooperation between NDRC and SAIC, as well as between each of those agencies and their respective provincial authorities, will be important. Such coordination will allow those agencies to avoid inconsistencies, overlaps, and gaps in enforcement of the AML. While it is easy to point out certain (and sometimes high-profile) disagreements between the FTC and the Antitrust Division, overall my experience supports the conclusion that the relationship serves as an example of successful coordination between domestic competition agencies.

II. Convergence

A. Benefits of Convergence by Competition Authorities

A second important goal for competition authorities to pursue is greater convergence upon substantive competition norms, procedural standards, and operational techniques. Convergence does not mean the establishment of identical policies and enforcement mechanisms around the world. As with coordination, total convergence is not a realistic or necessarily proper goal. Nonetheless, as with coordination, convergence can benefit the agencies involved in such efforts, businesses subject to those agencies' laws, and competition law and policy more generally.

From the U.S. perspective, sound competition analysis, consistent outcomes, and convergence toward best practices benefits U.S. consumers and ensures that U.S. businesses receive fair and equal treatment from competition regimes around the world. Standardization also can reduce unnecessary costs associated with competition enforcement by, for example,

simplifying the regulatory review process faced by merging parties. Moreover, the same benefits accrue to any country that seeks increased harmonization of its competition regime with its foreign counterparts. Convergence efforts can also yield benefits of increased cooperation. To that end, one should not underestimate the importance of frequent contacts and networking among agency personnel in day-to-day operations and case work. Finally, increased convergence in procedure and substantive policy encourages competitive markets, investment, a greater understanding and respect for competition laws, and thus greater compliance with those laws by businesses.

B. FTC Developments and Priorities in the Area of Convergence

As many of you know, the FTC and the Antitrust Division have played a leading role in promoting convergence toward best practices in competition policy and enforcement. Given differences in histories, cultures, legal systems, and levels of economic development, it is inevitable that differences in the working and application of competition laws and policies will persist. The FTC believes, however, that learning from the experience of others in handling similar issues – including those involving institutional arrangements, procedures, and the substance of antitrust enforcement – can promote convergence toward better practices.

The FTC works in several multilateral fora on competition law and policy issues. Prominent among these are the ICN and the Organization for Economic Cooperation and Development (OECD). The ICN was founded in 2001 by the FTC, the Antitrust Division, and 14 other competition agencies. Its membership now includes 127 competition authorities. Despite that diverse membership, the ICN has succeeded in achieving consensus on recommended practices in several areas, including merger review procedures, substantive merger analysis, and the criteria for assessing abuse of dominance. Work product by the ICN has

included recommended practices, case-handling and enforcement manuals, reports, legislation and rule templates, and workshops.⁶

The FTC's work in the ICN is a top priority of our international program. We serve on its Steering Group and as Co-Chair of its Agency Effectiveness Working Group, and are active across the wide range of its work. With our partners at DG-Comp, we co-lead a project on "investigative process" that examines aspects of procedural fairness in the context of agency investigations, including topics such as transparency, confidentiality, and internal checks and balances. This multiyear project entails conducting a broad overview of agencies' practices, which we expect to culminate in agreement on best practices or other forms of guidance for agencies. As it addresses fundamental principles for all agencies and is important to our business community stakeholders who face investigations around the world, I expect this to be a banner project, and one worth following.

We also lead the ICN's "Curriculum Project," which develops online video training modules designed principally for younger agencies, as well as new staff at all competition agencies. The first set of modules covers basic concepts of antitrust enforcement, such as market definition, market power, and abuse of dominance. We expect eventually to develop a virtual university of materials for use by agencies at all levels of development.

Turning to the OECD, where we join agencies from countries with developed economies to discuss competition topics of mutual interest, we see some similar new themes. Historically, the multilateral competition organizations have focused on substantive and procedural convergence. Recently, however, we have seen a growing interest in questions of "agency infrastructure," which provides a foundation for effective enforcement. This is reflected in the current work of the ICN I just mentioned and in the current work program of the OECD.

⁶ The ICN's work product is available on the ICN website at <http://www.internationalcompetitionnetwork.org/>.

In addition to its periodic consideration of discrete antitrust topics, the OECD Competition Committee is conducting an ongoing exploration of two strategic themes – (1) international enforcement cooperation, and (2) evaluation of competition enforcement and advocacy. Along with the ICN, the OECD’s International Cooperation Project is reviewing coordinated efforts among competition authorities in investigations to identify examples of effective cooperation and possible areas for improvement.

The ICN and OECD recently conducted a joint survey of competition authorities, the results of which will serve as a basis for ongoing work, which may include model agreements on information exchange and enforcement cooperation. According to the ICN/OECD survey results, international cooperation is a policy priority for a vast majority of competition agencies, with most agencies finding such cooperation to be useful to their enforcement strategies. Further, participants in the survey reported that the benefits from cooperation outweigh the costs. The survey also found that effective cooperation of enforcement action is enhanced by the ability of enforcers to exchange information (both confidential and non-confidential) about the cases they are investigating.⁷

In addition to the ICN and OECD, the United States is a founding member of the Asia-Pacific Economic Cooperation (APEC), a 21-member regional economic forum founded in 1989. APEC is addressing issues of transparency and due process in competition investigations, a consistent priority for both the business community and the United States.

Looking forward, we envision a continuing process of “soft convergence,” by which I mean dialogue among agencies, identifying superior practices, and voluntary acceptance of such practices. Our goal is to convince other competition authorities to embrace sound competition

⁷ See Philip Collins, *The OECD/ICN Joint Survey on International Enforcement Cooperation: A Ground-Breaking Initiative*, COMPETITION POLICY INT’L (2013), available at <https://www.competitionpolicyinternational.com/assets/Uploads/ICN2-26-2013.pdf>.

policies, which are grounded in economic analysis, respectful of intellectual property rights, and fair and transparent to affected persons and businesses. Yet, for the foreseeable future, substantive convergence will remain a challenge. Differences in laws, their interpretation, and legal and economic analysis will remain. This creates a challenge for us to reach consistent outcomes. We will have more work to do just to minimize disruption and costs to firms and agencies.

C. China's Recent Efforts in the Area of Convergence

Moving now to China's efforts in the area of convergence, as I mentioned earlier, in the relatively few years since the AML was adopted, the Chinese government and competition agencies have demonstrated a significant and growing interest in engaging with foreign competition authorities, multilateral competition organizations, and other stakeholders. The Chinese agencies should be commended for their interest in benefitting from the experience of the U.S. and other competition agencies and international competition organizations. With a longer history of enforcing competition laws, we have learned from the many mistakes that we have made during the development of our own laws. China has the advantage of studying the latest competition policy theories and law enforcement methods developed by other countries. So far, it is clear that China and its competition agencies are willing to take advantage of this opportunity.

As just one example, MOFCOM is currently drafting its *Regulation on the Imposition of Restrictive Conditions in Concentrations between Business Operators*.⁸ In doing so, MOFCOM held a series of seminars over the past couple years to obtain feedback on drafts of the regulation. In the process, MOFCOM also discussed its plans for the remedies regulation with competition

⁸ See Press Release, MOFCOM, MOFCOM Held Special Press Conference on "Anti-monopoly Work Progress in 2012" (Jan. 5, 2013) [hereinafter MOFCOM Press Release], available at <http://english.mofcom.gov.cn/article/newsrelease/press/201301/20130108513014.shtml>.

officials from the United States and European Union, reflecting a willingness to seek input from many stakeholders.

It is my hope that China remains an active participant in the many convergence-related discussions taking place across the globe and on a seemingly daily basis. China participates in the work of the OECD Competition Committee as an observer and is a member of UNCTAD. Participation in the ICN by the Chinese competition agencies would be welcome and certainly would be a significant factor in the future success of that organization.

Finally, I fully expect CIIAI, under Frank Fine's strong leadership, to play a significant role in persuading China to continue to converge toward sound competition policy. CIIAI's mandate is to promote due process and transparency in antitrust investigations, and to promote policy convergence where it is practical and advisable to do so. CIIAI thus can – and no doubt will – serve as a catalyst for convergence in China and throughout Asia.

III. Transparency

A. Benefits of Transparency by Competition Authorities

A final and important goal that I would like to discuss this morning is transparency about how and why competition agencies enforce their laws. Such transparency can benefit the agency, parties subject to that agency's laws, and the state of the law more generally.

Transparency in our enforcement efforts, of course, offers guidance to market participants on how to comply with the antitrust laws. In that respect, it offers predictability and fairness to persons and businesses subject to an agency's jurisdiction. It allows them to better understand and predict the likely outcome of particular cases and, in the merger review area, the time and costs that a review is likely to entail. Transparency can foster increased compliance with the law. Transparency also may allow the agency to gain broader support among its various stakeholders for its core mission. In other words, increased transparency can improve the

credibility of the competition agency. Further, the discipline of explaining an agency's decision-making is likely to improve the quality and the end results of that decision-making. Finally, increased transparency by agency heads regarding the substantive norms driving competition policy and law enforcement can be of significant help to agency staff actually doing the case work and trying to implement the agency's competition program.

There are of course many opportunities for an agency to be transparent. These include guidelines on how laws will be implemented, statements explaining actions or non-actions that signify a change in enforcement policy, statements issued in connection with the closing of investigations, releases of merger information and data, and speeches by agency officials.

Certainly, it is understandable why an agency would have reservations about increased transparency. First, there is additional work involved in preparing information for public disclosure. Further, the agency may be concerned about being locked into a publicly disclosed policy or losing some discretion in future matters based on its public statements. Being transparent also opens up an agency to potential criticism for its stated policies or its enforcement decisions. It also may provide a roadmap for competitors to use in complaining to an agency about a proposed merger or a competitor's course of conduct. Even taking into account these considerations, it is crucial that competition agencies strive for as much transparency as possible and practical.

B. FTC Developments Implicating Transparency

Generally speaking, I believe the FTC has been appropriately transparent in our antitrust enforcement. Over the years, we have issued several enforcement guidelines, policy statements, statements in connection with the closing of significant investigations, and (jointly with the Antitrust Division) certain data stemming from our merger review process. I applaud these

efforts and hope the Commission will maintain, if not increase, its level of transparency in the future.

Nonetheless, the FTC has reached some decisions recently with which I disagreed. A significant part of my concern with these decisions is the lack of transparency and guidance that they provide. Before I address those decisions, some background on the FTC may be useful. As many of you know, the FTC is comprised of five Commissioners. When the agency takes a particular action, such as filing a lawsuit or settling with the target of an investigation, individual Commissioners sometimes issue separate statements explaining their views, including why they voted for or against the action.

There are two recent decisions by the FTC that I voted against and in which I issued a dissenting statement.⁹ Each of these actions involved standard-essential patents – that is, patents that are essential to the implementation of a technical standard – and the use of Section 5 of the FTC Act, which prohibits, among other things, “unfair methods of competition.” In the first matter, *Robert Bosch GmbH (Bosch)*,¹⁰ the agency investigated a proposed acquisition by Bosch that raised competitive concerns in the market for certain automotive air conditioning repair equipment. During the course of the investigation, FTC staff uncovered evidence indicating that the acquired company, SPX Service Solutions (SPX), had sought injunctive relief against competitor firms that were interested in licensing certain SPX patents that may have been standard-essential and that SPX allegedly had offered to license on reasonable and non-

⁹ In addition to the two decisions discussed herein, I voted against the FTC’s July 2012 withdrawal of its policy statement regarding the seeking of disgorgement in competition cases because of my concern that such withdrawal would reduce agency transparency and leave those subject to our jurisdiction without sufficient guidance as to the circumstances in which the FTC will pursue the remedy of disgorgement in antitrust matters. *See* Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission’s Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), *available at* <http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf>.

¹⁰ *In re* Robert Bosch GmbH, FTC File No. 121-0081.

discriminatory (RAND) terms.¹¹ The FTC settled this matter with Bosch, requiring Bosch to divest certain assets to address the proposed merger.¹² To address the alleged patent-related conduct, the FTC required Bosch, first, to agree not to seek injunctions on its standard-essential patents against parties that are willing to license such patents, and, second, to license those patents on a royalty-free basis.¹³

In the second matter, the FTC investigated and ultimately entered a settlement with Google and its recently acquired subsidiary, Motorola Mobility.¹⁴ As in *Bosch*, the FTC alleged that Google and Motorola violated Section 5 of the FTC Act – but not the antitrust laws – by seeking injunctive relief against competitors that were willing to license certain standard-essential patents that Motorola had agreed to license on RAND terms through its participation in several standard-setting organizations.¹⁵ In *Google*, the remedy imposed by the FTC was more complex than the flat prohibition on seeking injunctive relief imposed in *Bosch*. Rather, the FTC’s consent order established a multi-step process that Google must wade through before it is permitted to seek injunctive relief on its standard-essential patents.¹⁶

In my dissents in the *Bosch* and *Google* matters, I took issue with, among other things, the lack of transparency and guidance that the FTC’s decisions provided to patent holders and others subject to our jurisdiction.¹⁷ In particular, I raised concerns about the FTC enforcing

¹¹ *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>.

¹² *See id.* at 3-4.

¹³ *See id.* at 4-5.

¹⁴ *In re* Motorola Mobility LLC and Google Inc., FTC File No. 121-0120.

¹⁵ *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>.

¹⁶ *See id.* at 6-8.

¹⁷ *See In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen, at 3-4 (Nov. 26, 2012) [hereinafter Ohlhausen *Bosch* Statement], available at <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf>; *In re* Motorola Mobility LLC and Google Inc., FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 1-3 (Jan. 3, 2013) [hereinafter Ohlhausen *Google* Dissent], available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf>.

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 competition” means or how the Commission will use its enforcement discretion under Section 5. The inherent ambiguity in the FTC Act makes it all the more important that the agency provide meaningful limiting principles to application of Section 5.

A related point I raised in my *Bosch* and *Google* dissents is that one of the effects of those decisions was to create conflict between the FTC and other U.S. government institutions.¹⁸ The first such conflict arises between the FTC on the one hand and the International Trade Commission (ITC) and the federal courts on the other as a result of our prohibiting holders of standard-essential patents from seeking injunctive relief in the ITC and the courts. Our decisions effectively tell holders of standard-essential patents that they cannot go to ITC, where the only available relief is an exclusion order. I would note that I am not saying that competition policy should take a secondary position to other industrial policy concerns. Quite the contrary, the FTC has correctly advocated for a greater role for competition in U.S. industrial policy decisions. However, as I have noted, I believe we need to exhibit a certain amount of regulatory humility and recognize that we may not be the best-positioned governmental entity to act in a particular area if other government institutions have the authority and expertise to address the relevant issues.¹⁹

The second institutional conflict created by these two decisions is between the FTC and the Antitrust Division, with whom we share antitrust jurisdiction. When we rely on Section 5 of the FTC Act, which only the FTC can enforce, rather than the antitrust laws, which both agencies

¹⁸ See Ohlhausen *Bosch* Statement, *supra* note 17, at 1-2; Ohlhausen *Google* Dissent, *supra* note 17, at 5-6.

¹⁹ See Ohlhausen *Bosch* Statement, *supra* note 17, at 2.

enforce, we potentially create two different standards for patent holders, depending on which agency happens to review any alleged misconduct. One wonders how this institutional conflict is viewed by foreign competition authorities.

Another concern raised by these cases is what may be perceived as insufficient recognition of intellectual property rights. In both *Bosch* and *Google*, the FTC placed significant restrictions on the ability of holders of standard-essential patents to seek injunctions, which is a critical intellectual property right.²⁰ 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.²¹ No matter how good the intentions may have been in these cases, my concern is that they may send a message to our foreign counterparts that we do not place a very high value on intellectual property rights. Any such perception is clearly inconsistent with the appreciation for IP rights that we typically hold in the United States. Thus, I would recommend that any agency or party interested in relying on these decisions proceed with caution and to consider all of the Commissioner statements that were issued in connection with those decisions.

C. Chinese Developments Implicating Transparency

Finally, let me turn to recent Chinese developments that implicate the goal of transparency. Both inside and outside of China, companies, competition lawyers, and the press are paying increasing attention to China's competition regime – particularly in the area of merger control. This attention reflects the greater role that China has in the world economy and in the

²⁰ 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>.

²¹ See *Bosch D&O*, *supra* note 20, at 13.

merger control area. The attention also makes the level of transparency of Chinese merger review more important than ever. Fortunately, it appears that MOFCOM has welcomed comments from interested outside parties on how to improve its merger analysis and the transparency of its merger review process. I would note that, although I am focusing on MOFCOM in this discussion of transparency in the merger review process, both NDRC and SAIC have demonstrated a willingness to increase the transparency of their enforcement efforts in the non-merger space. For example, SAIC has released a draft of its *Guidelines on Anti-Monopoly Enforcement in the Field of Intellectual Property Rights*²² and generally has released more information regarding its enforcement efforts over the past year or so.

Speaking of guidelines, MOFCOM has published or is in the process of publishing several of these to provide more guidance on both substantive and procedural issues in the area of merger control. In 2011, MOFCOM promulgated the *Interim Provisions on Assessment of Competitive Impact of Concentrations of Business Operators*, which laid out the framework MOFCOM uses to review mergers.²³ There is also significant interest in several forthcoming guidelines. As I mentioned earlier, MOFCOM has been drafting its *Regulation on Restrictive Conditions*, which will provide a framework for the implementation of merger remedies. MOFCOM is also preparing the *Interim Provisions on Simplified Procedures for Reviewing Cases of Concentrations between Business Operators*, which is expected to create a “fast-track” procedure for reviewing transactions that are unlikely to create competitive concerns.²⁴

As mentioned earlier, another form of transparency is the publication of merger decisions. As required by the AML, the Anti-Monopoly Bureau of MOFCOM has issued an

²² See Alexander Wang, *Latest Developments in China's Antitrust Enforcement: 2012 and Beyond*, 4 INT'L ANTITRUST BULL. 20, 21 (Dec. 2012).

²³ See MOFCOM Press Release, *supra* note 8.

²⁴ See *id.*

official decision for each of the roughly 16 transactions in which it has imposed restrictive conditions, as well as the single transaction that it has blocked.²⁵ MOFCOM's decisions have summarized the agency's findings and competitive concerns. Increasingly, these decisions speak in the same language used by more experienced agencies, focusing on relevant market definition, unilateral and coordinated effects, and entry conditions. The amount of information in those public decisions also has increased over time. These developments are welcome. MOFCOM may also consider issuing decisions in matters that it closes without any restrictive conditions. Often it is as useful for practitioners to know why an agency has closed a merger investigation as it is to know why an agency has challenged a merger. For that reason, I have encouraged my own agency to publish as many closing statements as possible and practical.

MOFCOM went beyond what is required in the AML in late 2012, publishing for the first time a list of the parties to, and the nature of, every transaction that it had unconditionally cleared since the implementation of the AML. MOFCOM updated this information in January 2013 and will provide updates on a quarterly basis.²⁶ The information MOFCOM is now disclosing will improve the ability of companies and their counsel to predict the outcome of the merger review process for their own transactions. MOFCOM's recent increases in transparency are all the more impressive when you take into account the relatively small staff that they have for merger review.

There are two areas of merger control in which additional efforts at increased transparency would be extremely useful. The first is merger remedies or restrictive conditions. Here, there is significant value in merging parties understanding the agency's competitive concerns as early as possible to allow the parties to propose remedies, if possible. Merging

²⁵ See Wang, *supra* note 22, at 20.

²⁶ See MOFCOM Press Release, *supra* note 8.

parties also would benefit from increased transparency on how they should submit remedy proposals and how such proposals are evaluated. Further, in issuing agency decisions, explaining the relationship between the theory of competitive harm and the restrictive conditions imposed would provide additional transparency and guidance. These types of information will help companies better prepare merger filings, address competitive concerns raised by a transaction, propose remedies, if necessary, and more generally navigate the review process.

The second area in which increased transparency would be beneficial involves the role of industrial and other non-competition policies in competition matters. The AML does explicitly allow the competition authorities to consider non-competition factors in formulating and enforcing competition policy. For example, Article 27 of the AML,²⁷ which covers merger control, identifies the effect on the development of the national economy as a factor that MOFCOM can consider in deciding whether to approve a merger. China is of course not the only jurisdiction in which competition law must coexist with industrial policy. Nonetheless, competition authorities, including those in China, should be as transparent as possible when such non-competition policies dictate the result in a competition matter. Without sufficient information to discern the rationale underlying an agency's decision – particularly one that results in the blocking of, or imposition of restrictive conditions on, a merger – businesses and their advisors may be left wondering how the decision was made and what to expect in future matters.

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To conclude, my hope and expectation is that the Federal Trade Commission's cooperation and convergence efforts will continue even in this time of austere government budgets. As I have hopefully convinced you this morning, the benefits greatly outweigh the

²⁷ Anti-Monopoly Law of the People's Republic of China, art. 27(5).

costs in these areas. It is also my expectation that the FTC will continue its cooperation and convergence efforts in a spirit of leadership and all due humility. We recognize that we are making policy and enforcement suggestions to sovereign countries on how they ought to implement their competition regimes. We do this with the firm conviction of our beliefs, but also with great respect for the foreign agencies with which we engage.

In concluding, let me also commend China and its three competition agencies for their quick and meaningful entry onto the global competition stage. The AML has only been in effect for four-and-a-half years, and the competition missions at MOFCOM, NDRC, and SAIC comprise a relatively small number of people. Yet, it is clear that China and these three agencies will play a significant role in global competition law and policy for years to come.

Thank you very much for your attention this morning.