

**Core Competition Agency Principles: Lessons Learned at the FTC
Keynote Address by FTC Chairwoman Edith Ramirez
Antitrust in Asia Conference
ABA Section of Antitrust Law and Expert Advisory Committee of the
Anti-Monopoly Commission of the State Council
Beijing, China
May 22, 2014**

Fei chang gao xing neng gou zai ci gen da jia jian mian. I would like to thank the ABA's Antitrust Section and the Expert Advisory Committee of the State Council Anti-Monopoly Commission once again for inviting me to be here. I appreciate the opportunity to share my thoughts with you.

This year my agency, the U.S. Federal Trade Commission, is celebrating its centennial. While our goals over the past century have remained largely unchanged – ensuring the best results for U.S. consumers by promoting competition – the FTC has engaged in considerable self-assessment, resulting in many improvements to our agency process along the way. As a result, we have learned something about what it takes to have effective antitrust enforcement. This morning I want to share my views on some of the features that we at the FTC have come to recognize are key to an effective competition enforcement regime.

First, I will explain how fair and transparent investigative procedures provide substantial benefits to agencies, including allowing them to reach duly informed decisions. Next, I will discuss how consumers are best served when competition enforcement and policy decisions are based on competition considerations, not other economic or social goals, however worthy. Finally, I will address how, when competition principles intersect with other important values, such as respect for intellectual property rights, competition agencies must carefully balance the two to reach a decision that maximizes consumer welfare.

I. The Importance of Ensuring Fair and Transparent Procedures

Let me begin with the issue of procedural fairness. Much of the discussion of international competition issues is devoted to the substantive competition analysis of business conduct and transactions. That is understandable and necessary, but I believe that in the enforcement of competition laws, process is just as important as substance. Good process leads to effective decisions and bolsters the legitimacy of competition enforcement. In contrast, deficient process contributes to suboptimal decisions and breeds disrespect for competition law and for competition agencies. Moreover, poorly implemented process in some jurisdictions can impair the reputation of competition enforcement internationally, providing all of us in the competition community with a major stake in the proper implementation of competition laws.

Procedural fairness, or what we in the United States call “due process,” has assumed an increasingly prominent place on the international competition agenda. In fact, the U.S. FTC and Department of Justice recently hosted an International Competition Network workshop devoted to this topic attended by approximately 115 competition officials and private sector representatives from 35 jurisdictions.

While there are differences in investigation procedures among antitrust enforcers stemming from variation in substantive laws, as well as diverse economic and cultural contexts, core features of fair and transparent investigative processes have emerged based on substantial work by multilateral institutions such as the OECD and the ICN. These include:

- permitting legal representation for the parties under investigation, including allowing the participation of local and international counsel;
- notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies;

- facilitating direct and meaningful engagement between the parties and the investigative staff and decision-makers; and
- ensuring internal checks and balances on decision-making within the agency.

All of these features are fundamental to competition investigations in the United States. Our rules allow for both local and international counsel to participate in meetings with and before the agencies. This enables us to hear the parties' side of the story from the legal representatives that have the greatest familiarity with the matter under investigation.

Additionally, we notify parties of the legal and factual bases of investigations through frequent written and oral communications. Parties are then encouraged to engage in a continuing dialogue with the attorneys and economists responsible for investigating the matter and to submit written materials containing their view of the facts, legal and economic evidence, defenses, and case theories. The dialogue between investigative staff and parties continues throughout the course of an investigation.

Agency staff and parties also meet frequently in person, affording each side an opportunity to discuss face-to-face the various factual and legal issues raised by the investigation. Then, as an investigation moves close to a decision about whether to bring an enforcement action, meetings are also available, upon request, with senior managers, including the Assistant Attorney General at the Justice Department and the Commissioners at the FTC.

Finally, at the FTC, when cases are pursued internally through the agency's administrative litigation system, often following an injunction granted by a federal district court, detailed procedures ensure the separation of the investigative and adjudicatory aspects of cases. These procedures provide internal checks and balances on decision-making and ensure that the Commission fully considers the parties' arguments before rendering a decision. Moreover, final

Commission decisions following an administrative trial can be appealed to a federal court of appeals. Meanwhile, the Justice Department brings all of its cases before a federal district court.

I recognize that the U.S. approach is just one way to institutionalize these procedural fairness features and that different legal and institutional contexts may provide alternative approaches to incorporating them. It is not the precise mechanism that is important, but rather the appreciation for these types of procedural fairness safeguards that matter.

A. Fair and Transparent Procedures Benefit Agencies

A common first reaction to a call for increased attention to procedural fairness issues is concern that it will undermine an agency's enforcement powers to the benefit of parties who are not complying with the law. In my experience, however, strong procedural guarantees not only ensure fairness to parties but also strengthen the agency's enforcement of competition law.

First, providing parties with information on the theories of harm and evidence relied upon by the agency allows parties to respond effectively and helps the agency to better focus its investigation, understand key areas of dispute, and develop its case. Thus, transparency about the theories of harm and the evidence relied upon can help reduce the resources devoted to investigations. Similarly, early engagement allows agencies and the parties to focus on dispositive issues, and enables agencies to gain insight from the parties, who are often in a better position to know the specifics of a particular industry.

Second, good process is required to ensure the quality and accuracy of agency decisions. Informing parties of the agency's theory of competitive harm allows the parties to meaningfully defend their views. Understanding the parties' arguments forces the agency to sharpen its own arguments, allows it to test its theories, and provides an opportunity to gain insight into the parties' evidence and potential defenses. In particular, it is important to fully understand the

parties' counterarguments when assessing whether to move forward with a case so that the agency fully understands the obstacles it will face in order to prevail. I have experienced how listening to parties enables me to make better, more informed decisions, and this applies equally to FTC staff and managers who routinely engage with parties throughout their investigations.

Third, regardless of the outcome of an investigation, concerns about process create the impression that substantive results are flawed, undermining the perceived legitimacy of the case. In contrast, fair, predictable, and transparent processes bolster the legitimacy of the enforcement outcome. Allowing the public to understand how the agency makes decisions and abiding by those processes is essential to maintaining the agency's credibility with its important stakeholders.

Finally, investigative rules and processes affect international interactions and cooperation. Even a common analytical framework cannot guarantee consistent results when our agencies do not benefit from the same information to test investigative theories and hypotheses. These differing levels of engagement between parties and agencies in parallel investigations can result in "cooperation gaps" due to asymmetric information, which can contribute to different analyses and conflicting outcomes.

B. Potential Barriers to Ensuring Fair and Transparent Procedures

Let me now turn to other perceived barriers to providing fair and transparent procedures. Among those cited by agencies are lack of experience and confidence on the part of the agency, inadequate resources, a desire to preserve the integrity of the investigative process, and the need to protect confidential information and sources. In our experience, fair and transparent procedures can and should be in place from the outset in order to ensure credibility and

confidence in the agency's decision-making and also to facilitate the agency's efficiency and quality control.

With respect to resources, it is critical, particularly for younger agencies, to understand that transparency, as I previously discussed, can result in increased efficiencies by allowing the agency and the parties to focus resources on key issues and by promoting an environment where parties are willing to provide information to the agency. In addition to short-term efficiencies, there are also long-term efficiencies from greater transparency, including increased compliance and deterrence. Transparent and predictable decisions provide parties with guidance, facilitating their ability to determine in advance whether their actual or proposed conduct may violate the antitrust laws.

Finally, confidentiality protections need not pose an impediment to fair and transparent procedures. In the United States, we strictly protect agency and third party confidentiality while still providing the parties with the necessary information to understand the conduct under investigation and the basis for our concerns. A number of measures can be employed to balance transparency with confidentiality. These include providing access to confidential information subject to a protective order; providing meaningful, detailed summaries of the confidential information; and disclosing confidential information only to a limited set of individuals, such as outside counsel subject to an agreement not to share the information with individuals within the company where it might raise competitive concerns.

II. The Importance of Focusing Competition Enforcement on Competition Factors

Another core feature that we have learned leads to sound competition enforcement is a focus on competition factors alone, rather than on consideration of other economic and social policies.

In many Asian countries, competition analysis explicitly or implicitly includes the consideration of non-competition factors, such as employment or the environment. While these considerations may be appropriate policy objectives and worthy goals overall, integrating their consideration into a competition analysis creates substantial challenges for the competition agency that can lead to poor outcomes to the detriment of both businesses and consumers.

In the United States, competition analysis focuses exclusively on preventing or remedying anticompetitive practices. Experience has taught us that consumers and economic development are best served when competition law and policy focus on an analysis of competitive effects and consumer welfare. Moreover, we have seen that robust competition produces substantial benefits for consumers and society as a whole by promoting growth, spurring innovation, and facilitating the efficient allocation of resources.

In addition, the use of non-competition factors in competition analysis raises a host of other concerns. First, in conducting a competitive effects analysis, a competition agency ultimately weighs the procompetitive gains and the anticompetitive harms to determine whether, on balance, the conduct is anticompetitive. Introducing public interest factors significantly complicates this analysis by requiring agencies to balance numerous factors across different markets and to balance efficiency concerns against equity concerns.

For example, in assessing the competitive effects of a merger, a competition agency examines the effects within narrowly defined relevant markets. Public interest factors, in contrast, are often not just limited to the narrow relevant markets at issue in the merger. In addition, competition analysis is dynamic and forward looking, whereas analysis of public interest factors may be more static. A merger conditioned on the merged entity maintaining

employment levels, for instance, ignores the jobs that may be created as resources are re-deployed and efficiencies result from the transaction.

Second, public interest issues typically involve equity concerns that may undermine consumer welfare considerations. For example, merger approval conditioned on the merged entity maintaining specified employment levels or requiring local procurement may raise the merged firm's costs. While this may protect domestic jobs and producers for the short term, it often comes at a cost in terms of higher prices for consumers and a less efficient economy over the long run.

Third, from a policy perspective, it is important to consider the potential impact of implementing a test that attempts to reconcile a wide range of factors. Mixing social and political objectives within competition analysis may undermine the clarity and predictability of competition law and its enforcement, which is likely to deter investment.

Fourth, competition agencies are designed to be experts in competition law and are generally ill-equipped to undertake an analysis of non-competition public interest factors. Accordingly, to the extent that governments seek to advance other objectives through their competition enforcement, that is best done by agencies with the relevant expertise acting through appropriate regulatory mechanisms. This allows those policies to be implemented by agencies with expertise in the relevant field and allows the competition agency to focus on a clear objective without trying to balance a multitude of other policies.

Finally, to the extent that a competition agency nonetheless considers non-competition factors, the other factors it takes into account and the way in which an agency weighs the competition and non-competition considerations should be made transparent to the parties and the public.

III. The Application of Antitrust Law to Intellectual Property Rights

A. The Importance of Preserving Intellectual Property Rights

The final issue I want to discuss today is the need for competition agencies to carefully balance competing considerations in a way that maximizes consumer welfare when competition principles interact with other important values, such as intellectual property rights.

In the United States, we view antitrust and intellectual property as complementary bodies of law that work together to promote innovation: antitrust laws protect robust competition in the marketplace, while intellectual property laws protect the ability to earn a return on the investment necessary to innovate.

Protection of intellectual property rights is equally important when patented technology is incorporated into industry standards. The U.S. Supreme Court has recognized that standard setting is generally procompetitive, and the federal antitrust enforcement agencies have incorporated that principle into their enforcement policies.¹

But we also recognize that, where industry standards include patented technologies, the standard-setting process can create the risk of opportunistic conduct known as “patent hold-up.” The threat of hold-up arises from the difficulty and expense of switching to a different technology once a standard is adopted. This potential for “lock-in” can confer market power on the owners of the patents that are essential to a standard. When that occurs, the patent holder can demand licensing terms that it may not have had the power to obtain in a competitive environment before the standard was adopted. To address the risk of hold-up, standard-setting

¹ *Allied Tube & Conduit v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988); Dep’t of Justice & Fed. Trade Comm’n, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 2007) at 33 (internal quotations omitted) (“IP Report”), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>.

organizations often seek voluntary commitments from patent holders to license their standard-essential patents on fair, reasonable, and non-discriminatory, or FRAND, terms.²

In the United States, in the vast majority of cases, FRAND terms are determined through private negotiations between parties without government intervention. However, U.S. courts and antitrust agencies have intervened in the limited circumstances where a patent holder has knowingly and deceptively failed to disclose patents essential to a standard to avoid a FRAND commitment, or where the patent holder has breached a voluntary commitment to license on FRAND terms to firms implementing the standard.

Both types of conduct can lead to patent hold-up. Hold-up, and the risk of hold-up, may decrease consumer welfare by deterring innovation and reducing competition among standard-compliant products. Firms vulnerable to patent hold-up may postpone or avoid incorporating standardized technology in their products, which may reduce the overall value of the standard to consumers, as well as to other firms that have contributed patented technology to the standard.

B. The FTC's Decision in *Motorola Mobility/Google*

Last year, the FTC addressed the breach of a FRAND commitment in a matter involving Motorola Mobility, which had been acquired by Google.³ In that case, the Commission alleged that the firm's conduct was anticompetitive based on its breach of voluntary commitments to license on FRAND terms. We were concerned that the firm had sought to enjoin and exclude implementers of the relevant standards that were willing to negotiate a license on FRAND terms. The consent order resolving the Commission's enforcement action is structured to provide the

² Some standard-setting organizations seek commitments from members to license their standard-essential patents on reasonable, and non-discriminatory, or RAND, terms. I use the term FRAND here for convenience. The competition policy considerations are the same for both FRAND and RAND commitments.

³ See Complaint, *In re Motorola Mobility and Google Inc.*, Docket No. C-4410 ¶¶ 22-27 (July 24, 2014), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf>; Decision and Order, *In re Motorola Mobility and Google Inc.*, Docket No. C-4410 (July 24, 2014), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>.

parties with opportunities to privately negotiate the FRAND terms, including a reasonable royalty, with possible arbitration or court adjudication as a last resort.

Except under limited circumstances, the consent order prohibits Motorola Mobility and Google from seeking injunctive relief against willing licensees prior to taking certain steps, including offering binding arbitration to resolve disputes.

I want to emphasize that, contrary to how some have interpreted this decision, as well as our other SEP matter, *Bosch*,⁴ neither was based on the “essential facilities” doctrine. Rather, the FTC’s decisions in these cases were based on the parties’ alleged breach of their voluntary commitments to license their patents on FRAND terms, which the Commission had reason to believe tended to impair competition in the relevant markets.

Antitrust liability “for mere unilateral, unconditional refusals to license patents [does] not play a meaningful part in the interface between patent rights and antitrust protections” in the United States.⁵ Requiring patentees that have not voluntarily promised to license their intellectual property would substantially impinge on a patent owner’s core right to exclusive use of its patented technology. Antitrust enforcement that unnecessarily restricts that core right to exclude may discourage firms from undertaking the research and development that lead to invention and innovation. They may instead seek to free ride on the expensive research of others, to the detriment of competition, innovation, and consumers.

By following principles such as those outlined above, competition agencies can promote competition and innovation while protecting the legitimate exercise of intellectual property rights.

⁴ Complaint, *In re Robert Bosch GmbH*, Docket No. C-4377 ¶ 20 (Nov. 26, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcmpt.pdf>; Decision and Order, *In re Robert Bosch GmbH*, Docket No. C-4377 (Apr. 24, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf>.

⁵ IP Report at 32.

* * *

We look forward to continuing to work with our colleagues in Asia and around the world to share our experience and, through international dialogue, strengthen all of our abilities to achieve the best outcomes for consumers.

I appreciate the opportunity to speak with you today and look forward to the remainder of the conference and the opportunity for continued discussion on these and other important topics.

Thank you.