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

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.

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 Googlesearch 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

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

government welcomed our views on the Anti-Monopoly Law as it proceeded through several

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,

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

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

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 in

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

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 Ori,entA7(C)4dhad(O6,(NTj18 0 20 T)2f-2ent)4.1(Omgre1Omgre1Oe)2f-.1(s)1.0

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

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

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[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

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

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[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 is 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

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[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

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.