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US regulators must stop using antitrust law to limit IPRs, former US official says—ABA Spring Meeting

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- DOJ and FTC also should avoid applying extra-jurisdictional remedies in patent licensing
- China AMC advisor says China's antitrust enforcement developing global vision and approach
- China's view of FRAND as an 'invitation to offer' distinct from Western 'contract'—attorney

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The US Department and Justice (DoJ) and the Federal Trade Commission (FTC) should end the Obama administration's aggressive use of antitrust to limit intellectual property rights (IPRs), a former FTC commissioner told a public forum.

Rather, US antitrust regulators should communicate unequivocally to the world the critical role that IPRs play in facilitating economic growth and innovation, said Joshua Wright, a former FTC commissioner who currently teaches law at George Mason University.

Wright, also a possible candidate to head the DoJ Antitrust Division, made his comments during a breakfast roundtable discussion at the American Bar Association's Antitrust Spring Meeting in Washington, DC, on 29 March.

In particular, the FTC should withdraw its "fundamentally flawed" complaint against Qualcomm, the former commissioner said. The agency needs to ensure that it applies its provisions governing unfair methods of competition (UMC) in a manner consistent with the 2015 UMC Policy Statement, and not to devalue IPRs, regulate price or intervene in private arms-length licensing negotiations, Wright said.

In addition, the DoJ and the FTC should avoid the use of extra-jurisdictional remedies such as worldwide, portfolio-wide remedies in patent licensing, such as those imposed by the FTC in negotiated consents such as the N-Data and MMI/Google case, Wright said.

He said that the US approach in antitrust and IPR area is standard. That approach is sometimes useful, but also can lead to misunderstanding, Wright said. However, he added that in some instances US regulators have deviated from the symmetry principle of the FTC's 1995 IPR guidelines. However, Wright predicted that US policy would shift back soon.

When talking about the fair, reasonable and non-discriminatory (FRAND) commitment, Wright raised the issue of whether a breach

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Topics: Intellectual Property, Policy Developments

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Alphabet Inc (Parent Of Google Inc Among Others)
Motorola Mobility Holdings, Inc.

Agencies
US Department Of Justice (DoJ)
US Federal Trade Commission (FTC)
Anti-Monopoly Commission (China)

M&A
Motorola Mobility Holdings, Inc. / Alphabet Inc (Parent Of Google Inc Among Others)

of contract constitutes violation of antitrust law.

Roger Zhang, a partner at East & Concord Partners who also sat on the panel, said that if FRAND is considered a contract under the law, then a breach of FRAND is breach of contract. However he noted that the applicable contract law is French. Under China's contract law, the FRAND commitment itself would not be considered a contract, but an invitation to offer. Thus, this would be a different issue in China, Zhang said.

Speaking at the same event, Senior US Circuit Judge Douglas Ginsburg said he is pleased to see that China has limited the effect of its resolution on Qualcomm to its own jurisdiction.

Huang Yong, a Chinese academic and senior expert advisor to China's State Council Antimonopoly Commission (AMC), speaking on the same roundtable, noted that currently a single jurisdiction's antitrust enforcement regime can have an increasing global impact and implications. This requires antitrust enforcement bodies to have a global vision and to take a global approach, he said.

Huang said that China recently issued its 13th Five-Year Plan on Market Supervision, which emphasizes that China's antitrust enforcement in the next five years shall be geared toward international practices and reflect global vision.

By Lisha Zhou in Washington DC