A Conversation with Bernard Nigro on the Evolving Patent-Antitrust Relationship

TRANSCRIPT

Discussion

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Urška Petrovčič:

So, good morning and welcome to the Hudson Institute. My name is Urška Petrovčič. I’m a senior fellow at the Hudson Institute and I will be your host today during this special session on antitrust and patents. I’m honored to be joined by Mr. Bernard A. Nigro Jr., Principal Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice. Mr. Nigro has previously served as the deputy director of the Federal Trade Commission’s Bureau of Competition. He was a chair of the Antitrust Department of Fried and Frank, and a vice chair of the American Bar Association’s section of antitrust law.

So our discussion today will focus on the evolving relationship between antitrust and patents, which has been at the center of the policy debate for decades now. A patent confers to its holder the right to make an exclusive use of the patented technology for a limited period of time, and this includes the right to exclude competitors from the use of the patented technology. It has been long acknowledged that the ability to enforce patents, including the ability to exclude competitors from the use of the patented technology, is essential to promote innovation.

However, antitrust is concerned with exclusion of competition—not with all type of exclusion, but exclusion that results from anti-competitive practices. So back in the day, some commentators have questioned whether there is some form of inherent conflict between the two bodies of law, given that one gives the right to exclusion and the other is concerned with exclusion.

By now, we have reached the agreement that, actually, the two bodies of law are not in conflict with each other. They’re actually complementary because they both seek to achieve the same goals, and that the innovation that the patent system spurs enhances competition in the long run, expands consumer choice, and these are exactly the goals that antitrust law seeks to achieve.

Despite this agreement—that the two bodies of law are not in contradiction with each other—there is still some open questions regarding the limits that antitrust law poses on the exercise of patent rights. And the questions about these limits have gained increasing relevance in some recent legal disputes.

For example, a particularly thorny issue in the patent and antitrust relationship are standard essential patents. These are patents that are essential to practice industry standards, such as the 4G standard of the 5G standard of which we have heard so much in the last years. So, some commentators have argued that standard essential patents confer too much power to their holders and they have argued that antitrust should be used to police that power. We have seen these arguments made in the past but now, with the coming internet of things, we see these arguments made more often in litigation. For example, we have seen them in litigation related to connected cars.

Another recent case in which we saw this debate about the antitrust and patent relationship was the litigation that the Federal Trade Commission brought against Qualcomm. The FTC alleged that the combination of Qualcomm licensing practices harmed competition and therefore, violated Section 1 and Section 2 of the Sherman Act. The Antitrust Division intervened in this case, however, it sided with Qualcomm, rather than with the FTC on questions regarding the limits that antitrust law poses on the exercise of patent rights.

So, as you can see, although it’s a topic that has been debated for many years, there are still many questions open and they have very important practical implications. That’s why I’m really excited to have today with us Mr. Nigro, who will talk about the recent developments in this field.

So, Mr. Nigro, welcome. It’s great to have you here.

Bernard Nigro:


Thank you for hosting this conference during these challenging times. I'm looking forward to our conversation.

Urška Petrovčič:

Great. So, let me first start with the very general question about the topic that we have been all talking about in the last months. This is COVID-19. So, the pandemic has changed the way we live our lives, and I'm sure it has also had an impact on the work of the Antitrust Division. I know you have been very busy in these months. Could you tell us what the Antitrust Division has been focusing on in the last months?

Bernard Nigro:

Thank you, Urška. Yes. So, as you can see, I'm in my office. We have been very busy. While most of the staff of the Antitrust Division is working remotely, like many of us during the pandemic, we're continuing to conduct our affairs through calls, video meetings and it seems like a much higher volume of emails.

It's at times like these, when the economy's under stress and in flux, that antitrust enforcement becomes more challenging, but also more important. It's more challenging because part of our job requires us to anticipate future competitive effects, which is not an easy task during stable times, and it's certainly more difficult during transitional times like these, although I'm confident that we're up to the task.

It's more important because we have a responsibility to protect and promote competitive markets as a way to further our efforts to maximize output, allocate resources and benefit consumers and workers, at a time when both are struggling.

Just to give you a sense of what we've been working on, our civil and criminal investigations are proceeding on track and enforcement is active as Division personnel have adapted to our new online world. In the past few weeks, we've made decisions on a number of transactions.

Dean Foods’ sale to Dairy Farmers of America is one that was especially hit hard as a result of the pandemic and the closure of the schools and institutions. Dean Foods was already in bankruptcy and its liquidity situation was exacerbated by the unexpected pandemic.

We reviewed the proposed merger of Cengage and McGraw-Hill, two of the largest textbook companies. That merger did not proceed, the parties eventually abandoned it because of concerns that we had with that combination.

Novelis is another matter where we had a first-of-its-kind arbitration on market definition, and that divestiture has moved forward.

And then, the last of the merger cases on the civil side, UTC-Raytheon, involved divestitures, including complete structural relief addressing a vertical issue.

On the criminal side, we've had a number of prosecutions with the Florida Cancer Specialists, which was alleged to have engaged in market allocation. They paid a $100 million penalty and agreed to waive certain non-compete provisions in their contracts.

Apotex is another one. They grew out of our generic pharmaceutical investigation. That resulted in a $24.1 million penalty and a deferred prosecution agreement, and we also finally filed the last of our Clayton Act Section 4A Korea fuels matters.
So, we’ve been busy. We have others that are in the pipeline and should be announced soon. One of the challenges that we’ve had on the criminal side is just the procedural challenge and has to do with the inability to interview witnesses in-person, or to get in front of grand juries, so we’re having to think through how to compensate for that issue as the shutdown of the courts and government agencies continues.

On the other hand, COVID has not stopped us from hiring and onboarding new lawyers, so we’re bringing, as well as economists and legal assistants, including those working on our various technology platform investigations.

And we’re also getting more comfortable taking depositions remotely. We’re trying new technology on that front. And so far, it seems to be working relatively well, which is comforting, because it will allow us to continue to move forward with our important HSR investigations.

We managed, overnight, to convert what has been for years a paper-HSR process to an electronic process. It’s about time and so is glad to see that that happened without any problem within, essentially, 24 hours. Unfortunately, however, the reality is that the deal flow is way down, and so we’re hoping that things pick up as the economy begins to restart.

The other thing that we’re dealing with are new arguments that we’ve had to consider with COVID-19 and its effect on short-term and long-term competition. So, as I mentioned before with the Dean Foods bankruptcy, there’s no question that COVID had a pretty substantial impact on their situation. Cashflow was severely reduced with the closing of the schools and institutions, which created or exacerbated the financial crunch that Dean Foods was facing. And other matters we’re hearing about both short-term and long-term consequences as a result of COVID, and that can cut in two directions.

In some cases, the effects of COVID could end up compromising the ability of smaller, weaker firms to compete, which would make a merger involving larger firms more problematic, not less. It also could compromise the ability of larger firms to compete and make it less likely that entry would occur in situations where we’re worried about a loss of competition from a merger.

So all of that is to say the effect of COVID on business and on the competitive dynamics is a fact that needs to be considered in the overall analysis, but it does not mean, in any respect, that the antitrust law should be relaxed, or that its effect on competitive dynamics is uniform. It’s just as easy to imagine COVID increasing antitrust concerns with some deals, as it is to imagine that COVID substantially compromising the viability of firms relative to the competition.

Finally, our mix of work has changed. Importantly, the Division has been working with private parties and other agencies, including FEMA, HHS, the Department of Agriculture and the PTO to support efforts to address COVID-19. At the outset of the pandemic, we released, with the FTC, a statement explaining how we were to evaluate collaborations aimed at addressing some of the unique issues raised by the COVID-19 emergency. Part of this statement established an expedited business review process, where we committed, as best we can, to issue business review letters within seven days which, for anybody who has been through that process which often takes many, many months, is remarkable.

So far, we’ve been asked to issue three business review letters, and in all three cases, we were able to do it in less than seven days. One involved the airlift of personal protective equipment from around the world to critical areas in the United States. The second involved the distribution of lifesaving medication from the strategic national stockpile. And the third involved an issue confronting hog farmers with maintaining the supply of hogs, because of reduced capacity at the processing stage.
And then finally, our criminal team has been working hard with the COVID-19 Hoarding and Price Gouging Task Force, as well as the Procurement Collusion Strike Force, to address concerns that have been raised in connection with dysfunction in the market related to COVID-19. So we've been very busy and these times have presented a number of interesting issues.

Urška Petrovčič:
Great. It certainly shows that antitrust is a very flexible body of law that can adapt to the changing market conditions as you have, your activities show.

So, let me now focus on the main topic of this session—on the relationship between antitrust and patents. So, the Antitrust Division has been very active in the context of patent rights. It has been advocating for the so-called New Madison Approach. And could you remind our viewers what are the basic principles of the New Madison Approach and how the Antitrust Division has been advocating for the adoption of these principles?

Bernard Nigro:
Sure. So, you talked about how antitrust and intellectual property principles complement each other in the introduction, and we very much agree with that proposition. We, at the Division, believe that respect for intellectual property rights in competition enforcement is critical to promoting innovation and spurring economic growth. We think that strong intellectual property rights are drivers of innovation, a position that originally was advocated persuasively by James Madison, one of the drafters of the constitution.

So, there are four basic principles that fall under the Division's sort of what we call a New Madison Approach. The first is that antitrust laws should be used to address antitrust concerns. In other words, it should not be used to police conduct that undermines the incentive to innovate. It should be, instead, policing conduct that harms the competitive process.

Antitrust law is unique, in that it's not just remedial, but it's also, by virtue of its treble damages provision, designed to deter conduct. And because of that, it's important that its use be limited to conduct that genuinely harms the competitive process, and not simply a tool to address, let's say, unhappiness or frustration with price levels, for example, that might be charged as a result of our FRAND commitment. So, it's really about making sure antitrust does the work that antitrust was designed to do.

Second, standard-setting organizations which are important, as collective bodies, should be careful not to facilitate concerted action that might compromise the competitive process. Collective action that excludes competitors, from the standard-setting process, or that’s aimed at either depressing or increasing licensing rates for the benefits of implementers or patent holders can raise antitrust concerns. Antitrust laws should ensure that concerted action among implementers and innovators does not occur at any level along the supply chain. For example, coordination among implementers to hold out poses a threat to innovation by compromising the ability of innovators and patent holders to enjoy the rewards that spurred them to innovate. This applies especially to the standard-setting process, where diversity of viewpoints should be allowed, rather than opposing a system that skews in favor of one set of competitors.

The third principle that falls under the New Madison Approach is the right to exclude. The right to exclude is derived and associated with all patent rights, it’s a constitutional right, and one of the most fundamental bargaining rights a property owner possesses. So, rules that restrict this right have the
potential to undermine innovation and dynamic competition. It's the position of the Division that a patent holder cannot violate antitrust laws by solely and properly exercising the rights the patent laws confer, such as seeking an injunction or choosing where in the supply chain to license a patent. And where there are claims that have been exercised improperly, patent, contract, or fraud laws should be sufficient to address those concerns, where there is no identifiable harm to competition.

In addition, the Antitrust Division does not think antitrust should be used as a price regulator and antitrust law is really not the right tool to govern the particular outcome of a royalty dispute or royalty negotiation. Royalties are important, and it's important that parties be free to negotiate them as appropriate in light of the market facts and circumstances, and we don't think antitrust necessarily should be charged in the first instance with governing those negotiations.

And then finally, the fourth principle flows from the Supreme Court's decision in Trinko, and that is, that a unilateral and unconditional refusal of license or patent should be considered, per se, legal. It's not an antitrust violation under Trinko, if parties have never done business with each other, to refuse to deal. Depriving a patent holder of this fundamental right necessarily transforms the nature of the patent from a property right into a liability rule, and this is particularly important in the standard-setting context, because it threatens to disrupt the incentive to innovate.

Urška Petrovčič:

Great. Thank you. That is an excellent summary. And I think that, actually, all these principles that you have mentioned, have been reiterated by the Antitrust Division in the various submissions that it has made in litigation.

So for example, in February 2020, the Antitrust Division submitted a statement of interest in Continental v. Avanci, and the case did concern what you mentioned—a refusal to license. And, in that case, Continental argued that the refusal to license was both in violation of the FRAND commitment that SEP holders had made to standard development organizations, as well as in violation of the antitrust law, including Section 1 and Section 2 of the Sherman Act. And the Antitrust Division, in its statement of interest, urged the district court to dismiss the antitrust claims based on Section 2 of the Sherman Act. Could you tell us what the Antitrust Division main argument was in that case?

Bernard Nigro:

So, that's an interesting case. And it's also a good example of some of the New Madison principles I just described. A central point of the brief in that case, as you noted, is that an antitrust cause of action premised solely on refusal to abide by a commitment to license on FRAND terms—that's fair, reasonable, and non-discriminatory terms—would be inconsistent with US antitrust law. The Division's view is that, that's a breach of one's contractual obligations and therefore, is a straight-up contractual law problem, not an antitrust law problem.

The brief went on to explain that antitrust law does not require a licensor to license on a licensee's preferred terms, and that the antitrust law should not be used to regulate pricing levels which, in many cases, when parties can't agree, it's because they're disagreeing about the level of price. That, by itself, is not necessarily harm to competition, it's a product of a dispute over what an appropriate price is under the umbrella of a FRAND commitment. So rather than focusing on price, we think that antitrust law should be used in a way that focuses its conservation on whether the conduct of the patent holder harms competition.
So, one of the things that Continental alleged is that the SEP holders, the standard-essential patent holders, concealed their intent from the standard-development organizations that they were refused to license some suppliers or charged rates that were higher than, maybe, some of the implementers expected. They alleged that those actions amounted to illegally maintaining monopoly power that the defendants initially obtained when their patented technologies became standardized.

The Division took the view in the brief that Continental's allegations regarding deception during the standard-setting process should fail because commitments to license at a fair and reasonable rate are too indefinite to be capable of being misrepresented in a way that can materially harm the competitive process. The commitment to license at FRAND is a contractual commitment, as I said before, and does not convert to an antitrust offense, solely based on the patent holder's intent to maximize what it's seeks to charge consistent with its FRAND commitment. So, any other outcome would necessarily require the courts to impose their own sense of FRAND for that of the market under the guise of the antitrust law.

Urška Petrovčič:

Yeah. Indeed, there is a question whether there was a deceptive behavior at all, but even if there was, that's insufficient to show that there was an anti-competitive behavior.

So another interesting submission that the Antitrust Division made was in March 2020, when it submitted a statement of interest in Intel v. Fortress, and this is a suit that Intel and Apple brought against several defendants, including Fortress Investment, and the complaint alleged the defendants' aggregation of patents violated the Sherman Act, as well as the Clayton Act, and the Antitrust Division urged the court to dismiss the allegations related to both the Sherman Act and the Clayton Act. Could you tell us more about the position of the Antitrust Division in that case?

Bernard Nigro:

Yes. So, this is another example of our both strong belief that protecting intellectual property rights is a driver of innovation. And it's important in that regard to keep in mind that the possibility of licensing or selling a patent also contributes to that drive to innovate.

I mean, not all inventors are talented at distribution, that may, in some cases require a special skillset, and so without effective and efficient distribution, inventions do little to benefit consumers or society or at a minimum, do less than they possibly might be able to do with a broader distribution. So therefore, it's important, in our view, that intermediaries seeking to promote distribution not be unduly discouraged from doing so. And to the extent such distributors engage in conduct through aggregation or licensing of patents that harms competition, the full force of the antitrust laws should apply as they do in other markets.

But that context, from what position did the Division take in the Fortress case? First, our brief explained that in applying the antitrust laws to patents, courts should define markets as they do in any other antitrust matter. And that is, technology markets and markets involving patents are, when it comes to evaluating competitive harm, are no different from other markets. And concepts like interchangeability or reasonable interchangeability in the hypothetical monopolist test should be used when evaluating whether conduct has comprised competition in a particular relevant market.

So, using that framework, the Division argued that Apple and Intel's proposed market which, essentially, included all patents relating to electronics, was facially overbroad. We emphasized the importance of identifying evidence of injury to competition as a way to evaluate antitrust harm in that case. We said in
the filing, in the brief, that aggregating substitute patents might reduce competition, just like eliminating competing companies from the marketplace, but in our view, we do not believe that Apple or Intel identified any patents owned by Fortress that are actually substitutes for each other.

Now, it may be the case that implementers become frustrated with the cost that a patent holder seeks to charge for its intellectual property, but as I said before, that, by itself does not necessarily constitute injury to competition.

Finally, the Division mentioned at the end of the brief the application of the Noerr-Pennington Doctrine to the case and noted that while enforcing one's patent rights and, in particular, the right to exclude would generally be covered by Noerr-Pennington, Noerr-Pennington would not cover the acquisition of patents, the aggregation of the patents, that actually occurred. And that is important to distinguish between the two. There's no petitioning activity associated with the acquisition or aggregation of patents, but there is a petitioning activity associated with seeking to enforce them in a court of law.

Urška Petrovčič:

Yeah. It will be interesting to see what the court will say.

Another important case in which the Antitrust Division intervened is the case that we have mentioned earlier, FTC v. Qualcomm. And in that case, the FTC alleged that the combination of Qualcomm licensing practices violated the Sherman Act—that included the so-called "no license, no chip" policy, the refusal of license—and in May 2019, the district court issued a decision in which it agreed with the FTC. The case is now on appeal. The Ninth Circuit heard the appeal earlier this year. The Antitrust Division intervened in many instances in this case, and, as I mentioned earlier, siding with Qualcomm rather than the FTC. Could you tell us what were the Antitrust Division's main concerns in this case?

Bernard Nigro:

So, to start, this was a bit of a unique situation in several respects. First, it's really unusual for the Antitrust Division to be on the opposite side of an issue from our colleagues in the Federal Trade Commission. Much more typically, we work side by side with them as we're doing in a couple of cases before the Eleventh Circuit, the SmileDirect cases, and as we do in other matters. So for us to be on the other side of an issue from the FTC is not something that we take lightly.

The Qualcomm complaint advanced, in our view, a somewhat novel theory involving Qualcomm's refusal to license component makers and its other standard-essential patent licensing practices. The FTC filed the case following a deeply divided 2-1 commission vote on just a few days before being transitioned to the new administration. Commissioner Ohlhausen who, soon after the vote, would become the acting chairwoman of the FTC, did something unusual as well -- she filed a dissent in the case as it was launched into litigation. And then, the story becomes more interesting because the FTC's current chairman, as well as some senior officials were also recused from the case as is the assistant attorney general for the Antitrust Division, and one of the current commissioners openly criticized the case in the press. So that left four un-recused commissioners who, as best I can tell, are split as to how to handle the case and created that highly unusual situation where the staff was responsible for litigating the case that likely may not have been brought by the current commission.

Off the top of my head, I can't think of a situation like that ever occurring before, so it's an odd state of affairs all in all. But that, by itself, wasn't reason enough for the Department to take the position on the issues raised by the appeal. There were other reasons that weighed on top of the FTC history.
The first is what we’ve been talking about today, which is that the Antitrust Division’s policy and position on patent rights and intellectual property in a number of filings since the fall of 2017 have been at odds with the decision of the district court in Qualcomm. So, given how active we’ve been on the amicus front, and the fact that our positions are consistently contrary to what the district court held, it would have been unusual for us, as well, to sit on the sidelines and say nothing.

Several aspects of the district court’s decision, including the court’s analysis of Qualcomm’s refusal to deal in patented technologies and its decision to premise liability on the charging of unreasonably high prices, risk undermining competition and innovation. And as I said, it was intention with the Division’s position on these issues.

For example, although the court concluded that Qualcomm effectively refused to license its IP. The court failed to explain or identify how Qualcomm’s conduct possibly harmed competition. In charging high prices and refusing to deal on a licensee’s preferred terms may make that less likely, in the Division’s view, that the patent holder will be able to monetize its invention. By that, by itself, is not evidence that competition has been harmed.

Second, and this is also important, as explained in the affidavits filed in the Ninth Circuit, senior officials in both in the Department of Defense and Department of Energy were very concerned that the district court’s expansive global remedy which required the compulsory license of Qualcomm’s patents, could diminish Qualcomm’s competitiveness in emerging 5G technologies and international security. Our job at the Department of Justice is to represent the interest of the federal government as a whole, so we had a responsibility to bring that to the attention of the court and we did.

We had originally sought to encourage the district court to have a hearing on the remedy before imposing it. The district court declined, and thus, we did not have an opportunity prior to the Ninth Circuit to present, for the court to consider, the broader policy issues raised by the federal government including, not just the policies relating to patents and patent rights, but national security as well. The argument was held in February and an appeal was pending. It’s an important case. I think it’s good that the agencies were both able to articulate their views and we’ll see where the Ninth Circuit sides.

Urška Petrovčič:

Definitely, we all look forward to the decision of the Ninth Circuit. It’s, as you said, it’s a very important case.

So if we move back in time, but we keep on the discussion of patents and standard-essential patents, in December 2019, the Antitrust Division, the United States Patent and Trademark Office and the National Institute of Standards and Technology issued a joint policy statement on remedies for standard-essential patents that are subject to a FRAND or a RAND commitment. And this policy statement replaced the earlier policy statement that the Antitrust Division issued with the USPTO. So, what prompted the agencies to issue this new statement, and what was the goal that the agencies sought to achieve with it?

Bernard Nigro:

So, as you mentioned, there was a 2013 joint DOJ-PTO policy statement on standard-essential patent remedies. And the concern was that it was being misinterpreted to suggest that a special set of legal rules apply to standard-essential patterns, and that certain remedies such as injunctions or other exclusionary remedies would, as a matter of law, harm competition.
So, in December 2017, the Division withdrew its support for that statement. Following that withdrawal, a number of interested parties presented a variety of viewpoints as to whether the statement was right, was wrong and how we should appropriately look at the exercise of patent rights and, in particular, the ability to obtain remedies for infringement of standard-essential patents.

The statement is based on the premise that there should not be a special set of rules that apply to standard-essential patents. Rather, what a patent holder may charge or what implementers must pay should be based on good faith negotiation to reach FRAND or RAND license charts. I also think it was important for the federal agencies, the Department of Justice, the PTO and NIST collectively, to communicate a clear message on the scope of remedies available under US law. Intellectual property issues have a significant impact on international commerce, where other agencies and enforcers are looking to hear the US voice. And under Article 2 of the constitution, the executive branch speaks with the voice of the United States on matters involving foreign affairs. So, we think this is a very important topic in the current economy and one that needed some clarification.

So, the statement addresses injunctions, as well as other patent infringement remedies. The agencies had the benefit of further developments in the law since 2013, when the original statement was issued, including some federal circuit cases that are referenced in the statement. For example, Apple v. Motorola, is one in which the court states that it sees no reason to create, as some would argue or urge, a separate rule or analytical framework for addressing injunctions for FRAND committed acts. Similarly, in eBay, Supreme Court held that traditional principles of equity apply in determining whether an injunction should issue in any patent case in federal court. So while FRAND or RAND commitments are surely relevant and may inform the determination of appropriate remedies, the statement supports the proposition that the general framework, in cases with such commitments, should be the same as it is in other patent cases. Thus, without endorsing a particular damages formula, the agencies clarified that when damages for infringement on standard-essential patents are an issue, there also should not be a set of remedies or rules and all remedies, including injunctive relief, should be available if warranted by the facts.

So, we, along with the USPTO and NIST, plan to continue to work to ensure that these policies are indeed balanced, clear and provide appropriate incentives for competition and innovation.

Urška Petrovčič:

Yeah. I think it was a very important clarification about the availability of injunctions. It's, perhaps, also worth pointing out that although some commentators have argued that injunctions are dangerous, because they can confer undue bargaining power to the SEP holders, no company has obtained and been able to enforce an injunctive relief against an infringer of standard-essential patents. So yeah, I think it is very important to rebalance the discussions about the remedies.

So, the Antitrust Division intervened in another case concerning standard-essential patents—that was HTC v. Ericsson. And in this case it submitted an amicus brief together with the USPTO. In this case, the brief did not focus on a theory of antitrust liability but rather, on a methodology to calculate and determine a FRAND royalty for a license to standard-essential patents. And specifically, the brief suggested that the smallest salable patent practicing unit does not have to be the royalty base for a calculation of the FRAND royalty. Could you tell us more about the Antitrust Division's position in that case?

Bernard Nigro:
Yes. So the right to exclude that comes with the patent right means nothing if the patent holder can’t realize fair value for its innovation. And so patent valuation is an important issue because the incentive to innovate is a direct result of one’s ability to capitalize on the innovation. So, we were happy in that case to express a view on this issue alongside the US Patent and Trademark Office, and as we’ve talked about, common standards that promote interoperability are critical, especially in the electronics and telecommunications industries.

So manufacturers seeking to adopt a standard are unwilling to do so absent some commitment from relevant patent owners as to the terms on which such a license would issue. And typically, those terms are some variation of FRAND or RAND. So, the case was all about what does that mean? The Division’s position was that parties must be given sufficient room or flexibility to negotiate a FRAND license. The Division did not think that imposing a formula or regulating price was likely to be helpful, and if anything, risked compromising or undermining the incentive to innovate. So, we urged the Fifth Circuit not to adopt a rigid rule as to how to price standard-essential patents. In that case, the rigid rule that was at issue was a component-based rule, sometimes referred to as the smallest salable patent practicing unit. We took the full position that that would diminish the flexibility and potentially harm competition, as well as temper the incentive to innovate.

The brief argued that market-based evidence, such as prior comparable license, is better evidence of a patent’s value, and that regulating or imposing special rules in the case of standard-essential patents, undermined the patent rights and undermined, more importantly, the incentive to innovate, which is a key driver to dynamic competition.

We argued that there’s no requirement under contract law or patent law for any particular royalty structure or valuation methodology for standard essential patents, and no requirement that licenses be tied to a component. So, really, the thrust of the brief was to further this objective of encouraging parties to negotiate in good faith, and to find, as FRAND stands for, a fair and reasonable value for the patent, as opposed to one that’s imposed by regulation based on a formula such as a component-based formula.

**Urška Petrovčič:**

Thanks. And maybe for our last question, let me move to a topic that you mentioned earlier, which is standard setting or standard development. So, in November 2019, the Antitrust Division resolved the probe with the GSM Alliance, which is an industry association that represents the interest of mobile network operators. And in that case, the Division expressed concerns with the standardization process and particularly, it had concerns that an industry group was able to exercise undue influence during the standardization process. And the probe ended after the GSMA agreed to change its procedure for adopting standards. Could you tell us a little bit about the concerns of the Antitrust Division in that case, but also about the principles in general that the Antitrust Division applies when scrutinizing the activities of standard development organizations?

**Bernard Nigro:**

So some of the most important work that we do focuses on our enforcement efforts in areas where there is joint conduct, and in this case, the joint conduct involved the standard-setting process. We become concerned when individuals or companies coordinate with the goal of compromising competition, foreclosing competitors, and so on. So we want to ensure that any concerted action, whether it’s among implementers or patent holders, is directed toward output enhancing activities, rather than those that run the risk of harming competition.
As the joint statement that we discussed earlier makes clear, voluntary consensus standards, set by standards development organizations, are critical to the economy. They promote interoperability and create, or have the potential at least, to create enormous value and facilitate innovation. So, this is an area where antitrust has a particularly important role to play by ensuring that the collective action of patent holders and implementers alike does not harm competition.

So, in that regard, respected the GSM Association, a trade association for mobile network operators, we issued a business review letter in November of 2019. That followed on a two-year investigation by the Department, where we were concerned that the standard-setting organization had, through its processes and otherwise, essentially steered the design of eSIMs technology and mobile devices by excluding some stakeholders from the process. eSIMs are just what they sound like, they’re SIM cards in mobile phones that are capable of being remotely programmed that facilitate switching from one mobile carrier to another.

In response to, or as a consequence of the investigation, the GSMA drafted new standard-setting procedures and those were reviewed and embodied in the business review letter. In essence, the procedures now provide that the standard-setting process used by GSMA will incorporate more input from non-operator members of the mobile communications industry.

So, among some of the changes, the new standard created a two-stage process for adopting standards. First, it opened membership to its specification-issuing group to all members—operator and non-operator members alike—in order to avoid committees that were dominated by one group or the other. Second, non-operators are permitted under the new procedures to become members of the specification-approving group that ultimately approves the standard. Third, the approval of standards was changed to require a consensus, or in the absence of a consensus, a 71% threshold in favor of the issuance of a specification. And at the approval level, it also requires a double majority by the operator and non-operator members of this specification-approval group with an explanation of any negative votes designed to promote transparency. So, a lot of process but that’s not it.

Fourth, there’s provision for some due process that allowed for appeals to an independent panel, if there were concerns as a result of any new standards that are adopted. And finally, the process I just described cannot be bypassed or modified without support of the double majority within a specification-approval group that I described.

So we think based on this more inclusive process, more transparent process, that allows for more due process and a broader array of voices to be heard, we think the overall outcome, hopefully, will be more positive for consumers. It’s an example of how antitrust law can promote dynamic competition. And we think it encourages a more open and balanced standard-setting process by including all industry stakeholders, and by doing so, it will ideally achieve the best technical solutions. These sorts of principles are also embodied in the, as you may know, the Standards Development Organization Advancement Act, which grants rule of reason treatments to standards and development organizations that adhere to certain principles of openness, balance of interest, due process, an appeal process and consensus.

So our goal with the GSMA business review letter was ultimately to promote competition and in particular, more dynamic competition, in the critical mobile market which, for most people is their principal or only means of communicating or connecting to the World Wide Web.

Urška Petrovčič:
I think with this, we have come to the end of our event. Mr. Nigro, thank you very much for taking the time for joining us today and explaining at such great details about all these important developments and activities at the Antitrust Division. I have certainly enjoyed very much this event, and I'm sure our viewers will too. And I look forward to host[ing] you again.

Bernard Nigro:

Thank you again for inviting me to speak today on this important topic and hopefully, soon, we'll all be back at work and life will return to some level of normalcy.

Urška Petrovčič:

Hopefully. Thank you.

Bernard Nigro:

Thank you.