



IP-Related Antitrust Investigations in China

October 9, 2014

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Introduction: China's Anti-Monopoly Law

- China's Anti-Monopoly Law (AML) came into effect on August 1, 2008.
- Its three substantive chapters cover:
 - monopoly agreements,
 - abuse of dominant market position, and
 - concentrations (mergers).
- These chapters are roughly analogous to Sections 1 and 2 of the Sherman Act, which prohibit anticompetitive agreements and monopolization, and Section 7 of the Clayton Act, which prohibits anticompetitive mergers.

Introduction: China's AML (cont.)

- The AML is enforced by three agencies:
 - The Ministry of Commerce (MOFCOM), which is responsible for merger review;
 - The National Development and Reform Commission (NDRC), which is responsible for price-related conduct (agreements and abuse of dominance); and
 - The State Administration for Industry and Commerce (SAIC), which is responsible for non-price related conduct.

U.S. Antitrust Agencies' Engagement with China

- In July 2011, the FTC and DOJ signed an antitrust memorandum of understanding (MOU) with China's three AML agencies to promote communication and cooperation among the five agencies.
- The MOU provides for periodic high-level consultations among all five agencies as well as separate communications between individual agencies. It also lists several specific avenues for cooperation, including:
 - Exchanges of information and advice about competition law enforcement and policy developments;
 - Training programs, workshops, and other means to enhance agency effectiveness;
 - Providing comments on proposed laws, regulations, and guidelines; and
 - Cooperation on specific cases or investigations, when in the investigating agencies' common interest.

Enforcement

- MOFCOM has undertaken the most significant amount of enforcement, in large part because it must review all notified mergers above specified value thresholds.
- MOFCOM has reviewed over 900 transactions in six years, and has intervened in 24 matters, imposing remedies in 22 and blocking two.
- Every transaction in which MOFCOM has intervened has involved at least one non-Chinese party.
- NDRC and SAIC have until recently focused primarily on domestic firms, but they have both recently initiated enforcement actions against large multinational companies.

Reported Concerns

- Due Process
 - Right to local and international counsel
 - Notification of the legal and factual basis of an investigation
 - Direct and meaningful engagement between the parties and the investigative staff and decision-makers
 - Internal checks and balances on decision-making within the agencies
- Use of Industrial Policy
 - China's AML explicitly provides for the consideration of non-competition concerns, such as protecting "fair" competition and "social public interest," and "promoting the healthy development of the socialist market economy."
- Length of Merger Reviews
- Use of Behavioral Remedies Such as Hold-Separates as a Remedy in Horizontal Merger Cases
- Application of AML to IPR to Reduce Royalty Payments for Local Implementers Rather than Protecting Competition and Long-Run Consumer Welfare

MOFCOM Remedies

- **Hold Separates**
- **Pricing Restrictions**
- **Investment Requirements**
- **Sale Restrictions**
- **Monitors**



MOFCOM Remedies – Hold Separates

- Other jurisdictions typically use hold separate provisions on an interim basis, as a way to sequester assets that are to be divested to resolve a competitive concern.
- MOFCOM hold separates have required the acquiring party to maintain an independent subsidiary to hold the competing assets and run the two businesses independently for a number of years (e.g., Western Digital/Hitachi).
- Because the transaction closes with the hold-separate, the buyer is committed to pay the full purchase price of the acquisition to the target without the integration benefits of the transaction.

MOFCOM Remedies – Pricing and Investment Restrictions

- Most agencies do not impose pricing restrictions as a condition to clear mergers.
- MOFCOM has used price restrictions as a means to maintain a post-close “competitive price” in the market (e.g., Thermo Fisher/Life Technologies).
- In at least one transaction (Seagate/Samsung), MOFCOM required commitments to sustain substantial minimum R&D spending over a period of three years.

MOFCOM Remedies – Sale Restrictions and Monitors

- **Sale Restrictions:** In the recent Microsoft/Nokia transaction, MOFCOM required that Microsoft *not sell* certain patents for a period of five years following the close of the merger.
- **Monitors:** Because many of MOFCOM's remedial orders are neither structural nor self-executing, MOFCOM regularly deploys monitors to ensure compliance.

Recent IP-Related Investigations and Draft Rules

- MOFCOM Decision in *Microsoft-Nokia*
- NDRC Settlement with InterDigital
- NDRC Investigation of Qualcomm
- SAIC 8th Draft AML/IP Rules

MOFCOM Decision in *Microsoft-Nokia* (April '14)

- MOFCOM conditionally approved Microsoft's acquisition of Nokia's devices and services business, imposing numerous conditions on both Microsoft and Nokia, including commitments:
 - to honor FRAND commitments to SSOs,
 - not to seek/enforce injunctive relief against smartphones made by smartphone manufacturers within China, and
 - not to increase royalty rates on specified non-SEPs for a period of 8 years.
- In contrast, enforcers in both the United States and the European Union cleared the transaction without conditions.

NDRC Settlement with InterDigital (May 2014)

Suspension of investigation based on the following commitments by InterDigital with respect to the licensing of its patent portfolio for wireless mobile standards:

- to offer Chinese manufacturers the option of taking a worldwide portfolio license of only its SEPs and comply with FRAND principles when entering into licenses with Chinese manufacturers;
- not to require Chinese manufacturers to provide a royalty-free, reciprocal cross-license of their similarly categorized standards-essential wireless patents;
- to offer Chinese manufacturers the option of entering into expedited binding arbitration under fair and reasonable procedures prior to commencing any action in which InterDigital may seek injunctive relief for the infringement of any of its wireless SEPs; and
- to refrain from seeking injunctive relief against any Chinese manufacturer that enters into an agreement with InterDigital on a binding arbitration mechanism.

NDRC Investigation of Qualcomm

- NDRC notified the company of its investigation in November 2013.
 - Qualcomm understands that the investigation involves allegations that it has violated the AML by:
 - (1) charging “excessive prices” by calculating licensing fees on the basis of the handset as opposed to at the chip level;
 - (2) bundling sales of SEPs and non-SEPs;
 - (3) requiring licensees to grant royalty-free grantbacks;
 - (4) charging for expired patents;
 - (5) bundling sales of patents and chips;
 - (6) refusing to license patents to chip manufacturers; and
 - (7) imposing other “unreasonable” trading conditions on the sale of patents and chips.
- (Qualcomm 10-Q at 12-13.)

SAIC 8th Draft AML/IP Rules

- Significantly, in its latest draft, SAIC took into account a number of recommendations on prior drafts, including eliminating presumptions that certain conduct is anticompetitive.
- Troubling Provisions Include:
 - Application of the “essential facilities” doctrine to IPRs;
 - AML liability for failure to disclose essential patents, without requiring that the patent holder be an active voting participant in an SSO with a written disclosure policy, and without clearing requiring that the failure to disclose resulted in anticompetitive harm;
 - AML liability for failure to license patents found to be essential on FRAND terms, even in the absence of a voluntary commitment to do so.