China's Antitrust Enforcement in 2014: Looking Back, Looking Forward

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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.

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 pubic 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

2014 IP-Related Investigations and Draft Rules

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

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.

Microsoft-Nokia cont.

MOFCOM based its decision in large part on its conclusion that post-acquisition both Microsoft and Nokia would have changed incentives. According to MOFCOM, post-acquisition:

- Microsoft would become a smartphone manufacturer, achieving integration of operating systems and smartphone production, which would give it the incentive to raise royalty rates to raise its rivals' costs; and
- Nokia would exit the downstream market of devices and services, no longer needing cross-licenses for its mobile phone business, which would both decrease its incentives to maintain low royalty rates for the mobile phone industry and increase its incentives to earn higher profits from patent licensing.

Merck-AZ (April 2014)

- MOFCOM conditionally approved Merck's acquisition of AZ, prohibiting bundled sales of liquid crystal and global photoresist products and imposing FRAND-like terms on non-SEPs. (Note: MOFCOM did not impose a requirement to license, but rather that any licenses shall be implemented on FRAND-like terms.)
- MOFCOM concluded that:
  - Merck owned 60% of the global liquid crystal market (over 70% in China), and AZ owned approximately 35% of the global photoresist market (over 50% in China).
  - After the merger, Merck would become the largest supplier of both products while competitors could only supply a single type of product and scale was limited.
  - Merck owned more than 3,500 patents, which created barriers to entry that could not be overcome by competitors and new market entrants in a short period of time.
  - If Merck bundled the two products, it could lower the price of the products through cross-subsidization, thus increasing sales and profits.

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.

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 clearly 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.

Resources

- Chairwoman Edith Ramirez, "Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective," 8th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center (Sept. 10, 2014), http://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf.

- Commissioner Maureen Ohlhausen, "Antitrust Enforcement In China–What Next?," Second Annual GCR Live Conference (Sept. 16, 2014), http://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf.

- Koren W. Wong-Ervin, "Standard-Essential Patents: The International Landscape," PUBLIC DOMAIN (Spring 2014), http://www.ftc.gov/system/files/attachments/key-speeches-presentations/standard-essential_patents_the_intl_landscape.pdf.

- Koren W. Wong-Ervin, "Procedural Fairness and the Importance of Focusing Solely on Competition Factors in Competition Analysis," INTERNATIONAL ANTITRUST BULLETIN (Aug. 2014), http://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_procedural_fairness_-_aug_2014.pdf.