An overview of China’s antitrust enforcement

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Agenda

• Overview of China’s Anti-monopoly Law

• Merger review

• Administrative investigations

• Key cases involving FRAND issues
Overview of China’s Anti-Monopoly Law

- China’s first comprehensive antitrust law, effective on August 1, 2008
- Regulates the following activities:
  - Monopoly agreements (cartels)
  - Abuse of dominant market position (monopolization)
  - Concentrations (mergers and acquisitions and joint ventures)
China’s multifaceted enforcement structure

**China AML enforcement**

- **MOFCOM Merger review**
  - 30 – 40 staff; 3 PhD economists
  - One in 21 bureaus
  - Ministry’s primary responsibility: trade

- **NDRC Price-related violations**
  - 40 staff; 5-6 PhD economists
  - One in 33 bureaus
  - Ministry’s primary responsibility: economic and social development

- **SAIC Non-price-related violations**
  - 15 – 20 staff; 1-2 PhD economists
  - One in 15 bureaus
  - Ministry’s primary responsibility: market supervision
General background of China’s AML

• China is in transition from planned economy to market economy
  – Government plays a big role
  – Many companies lacks full autonomy
  – It takes time to change mind set

• China is at an early stage in implementing AML
  – Antitrust law is complex, evolving
  – Competition analysis often requires fact-intensive and case-by-case assessment
  – Economic principles and empirical analyses are crucial in decision making
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Cases reviewed by MOFCOM

MOFCOM Reviewed Merger & Acquisition Transactions

97.4% of proposed transactions are cleared without conditions
MOFCOM’s competitive analysis

• Market definition
• Market concentration
• Competitive effects
  ➢ Unilateral effects
  ➢ Coordinated effects
  ➢ Conglomerate effects
• Entry
• Powerful buyers
• Efficiencies
Merger remedies imposed by MOFCOM

Types of Merger Remedies Employed by MOFCOM

- Behavioral, 15, 63%
- Structural & Behavioral, 5, 21%
- Structural, 4, 17%
MOFCOM’s Behavior Remedies

• Examples of MOFCOM’s behavior remedies:
  – Prohibition from engaging in certain lines of business
  – Continuation of pre-merger practices
  – Operation as separate entities, also known as “hold separate”
  – Requirements on price, quantity, R&D, licensing practices, or contract terms.
  – Prohibition from sharing competitively sensitive information within the merged firm;
  – Non-discrimination from disadvantaging competitors
Summary of MOFCOM’s merger review

• Economic analysis plays an increasingly important role
  – Engaging outside economic expert
  – Incorporating economic evidence in decisions

• Increasing transparency on reasoning and fuller disclosure on fact finding would be beneficial

• Unique challenges including considerations of non traditional competition issues remain a concern
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Administrative investigation - SAIC

• From August 2008 to the end of 2014
  – Investigated 43 cases
  – Concluded 19 cases
  – Suspended 1 cases
  – 2 (5%) investigations involved foreign companies

• In 2013 & 2014, SAIC imposed fines of RMB19.7 million (USD$3.3 million).
Administrative investigation - NDRC

• From August 2008 to the summer of 2014
  – Investigated 339 entities
  – 33 (10%) involving foreign entities
  – 306 (90%) involving SOE, private domestic firms, and trade associations

• 70 penalty announcements posted on NDRC website:
  – 50 Chinese entities, average fine of 2.2% annual revenue
  – 20 foreign entities, average fine of 4.0% annual revenue
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FRAND Issues are Often Reviewed under the AML Framework

• Article 17 of China’s Anti-monopoly Law (AML): “undertakings with market dominant positions are prohibited from committing the following abusive conducts:”
  
  ➢ 17.1: excessive pricing
  ➢ 17.2: predatory pricing
  ➢ 17.3: refusal to deal without justification
  ➢ 17.4: exclusive dealing without justification
  ➢ 17.5 bundling or imposing unreasonable conditions without justification
  ➢ 17.6 discriminatory treatments without justification
  ➢ 17.7 other abusive conducts identified by AML enforcement agencies
Matters Involved InterDigital - Allegations

- NDRC’s investigation on IDC: started in 06/2013
- Allegations:
  - IDC had a dominant position in licensing wireless communication technology
  - IDC abused its dominant position
    - Seeking to impose unreasonable licensing conditions: free cross-licensing
    - Bundling the licensing of SEPs with non-SEPs
    - Charging excessive licensing rates
    - Charging discriminatory royalty rates for Chinese manufacturers
  - IDC violated its FRAND commitments
Matters Involved InterDigital - Outcomes

• Courts:
  - The Shenzhen Court issued decision in 02/2013
  - IDC violated China’s AML for the abuse of its dominant position
  - Set royalty rate of 0.019% of Huawei’s devices for Chinese SEPs on 2G, 3G and 4G
  - Ordered IDC to pay Huawei damages and attorney fees of USD$3.2M

• NDRC:
  - Suspended investigation in 05/2014
  - IDC made commitments including:
    - offer prospective licensees an option to license SEPs only
    - do not require free cross-licensing
    - offer prospective licensees an option to enter arbitration before seeking injunction
MOFCOM’s Merger Remedies on Microsoft/Nokia (04/2014)

• The transaction:
  ➢ Microsoft acquires the handset manufacturing business
  ➢ Nokia retains control of its patent portfolio relating to wireless communications

• MOFCOM’s concerns of competitive harm
  ➢ Microsoft might use its SEPs and non-SEPs to disadvantage its competitors, Android phone makers; identified 26 patent families associated with Android Project Licensing as “high risk” in causing competitive harm.
  ➢ Nokia, without any further need for cross-licensing, might violate its FRAND commitments and seek excessive royalty.

• Key elements in remedies
  ➢ Microsoft
    ➢ For SEPs: continue to honor FRAND commitments; not to seek injunction against Chinese phone makers; not to seek grant back; not to transfer unless new owners adhere the principles
  ➢ For non-SEPs: continue to grant licenses to Chinese phone makers; offer similar rates and terms as those offered prior to the transaction; not to transfer the patents to new owners in 5 years; only seek injunctions after negotiating in good faith
  ➢ Nokia: continue to honor its FRAND commitments
NDRC’s Investigation on Qualcomm (02/2015)

• NDRC’s allegations
  ➢ Qualcomm has a market dominant position in:
    ➢ the licensing of SEPs in CDMA, WCDMA and LTE
    ➢ the sales of baseband chips: CDMA, WCDMA, and LTE baseband chips
  ➢ Qualcomm abused its market dominance position through:
    ➢ charging excessive licensing rates
      ➢ failed to provide a list of patents and charge royalty for portfolio including expired patents
      ➢ required free cross-licensing
      ➢ used the device price as the royalty base
    ➢ bundling the licensing of SEPs with non-SEPs without justification
    ➢ Imposing unreasonable terms without justification: conditioning the sales of baseband chips on a non-challenging clause in a license agreement
NDRC’s Investigation on Qualcomm - Rectifications

• NDRC’s announcement:
  ➢ Qualcomm to pay a fine of USD$975M
  ➢ Stop abusive conduct
    ➢ For cellphones sold and used in China, apply a royalty base of 65% of the device price
    ➢ Provide list of patents and not to charge for expired patents
    ➢ Not to request free cross licenses
    ➢ Unbundle telecom licenses from other patents
    ➢ Not condition sales of baseband chips on unreasonable terms and not to request a non-challenge clause

• Qualcomm’s press release:
  ➢ Pay a fine of USD$975M fine
  ➢ Stop abusive conduct
    ➢ For branded device sold in China, charge royalties
      ➢ 5% of 3G devices
      ➢ 3.5% of 4G devices
    ➢ Apply a royalty base of 65% of the device price
    ➢ Provide list of patents during negotiations
    ➢ Negotiate in good faith when seeking cross licenses
    ➢ Unbundle licenses of 3G & 4G patents from other patents
    ➢ Not condition sales of baseband chips on unreasonable terms and not request a non-challenge clause
    ➢ Offer an option to take new terms for sales
Thank you

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