An overview of China's antitrust enforcement

Elizabeth Xiao-Ru Wang, PhD

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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

- 30 – 40 staff; 3 PhD economists
- One in 21 bureaus
- Ministry's primary responsibility: trade

- 40 staff; 5-6 PhD economists
- One in 33 bureaus
- Ministry's primary responsibility: economic and social development

- 15 – 20 staff; 1-2 PhD economists
- One in 15 bureaus
- Ministry's primary responsibility: market supervision

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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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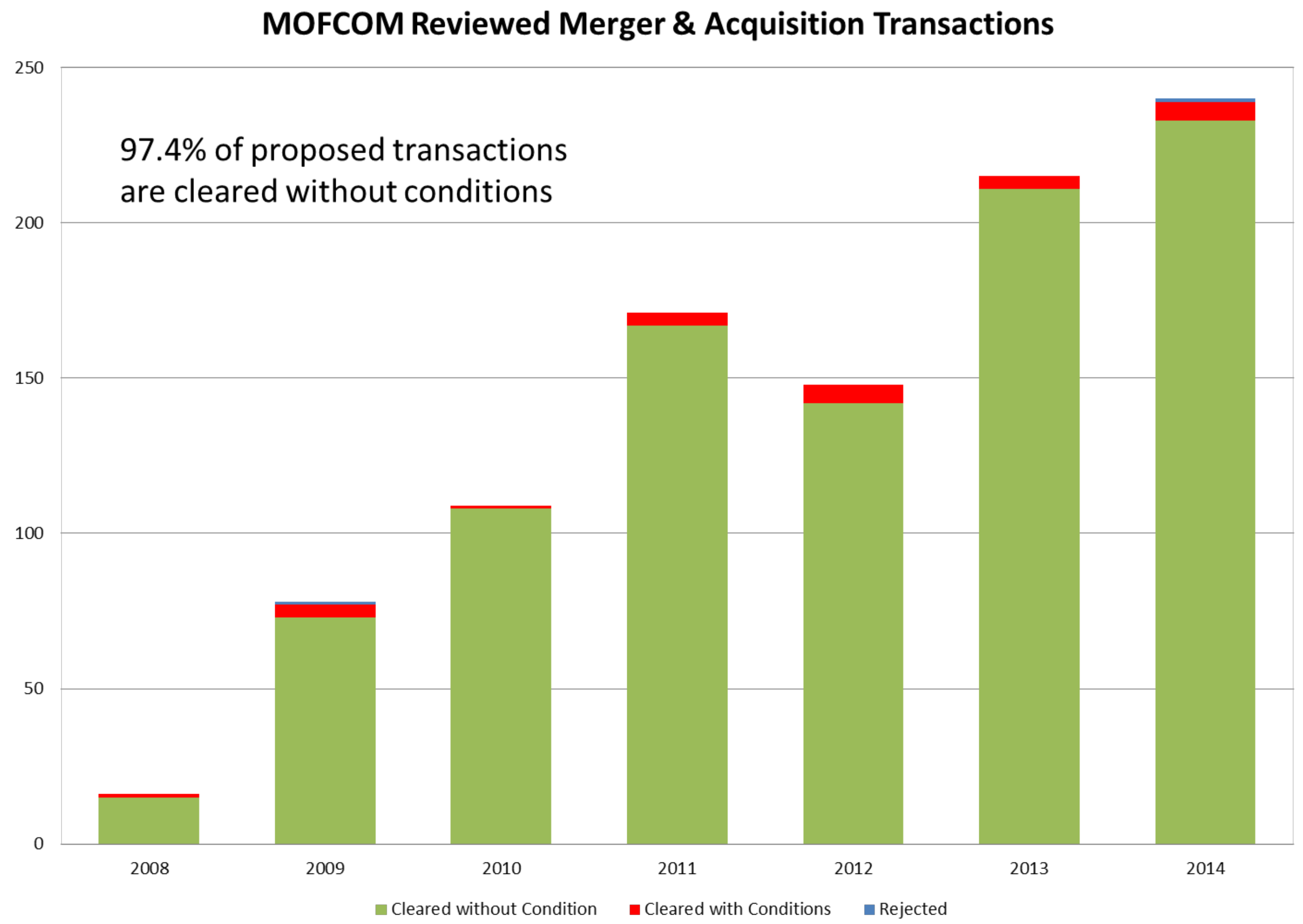
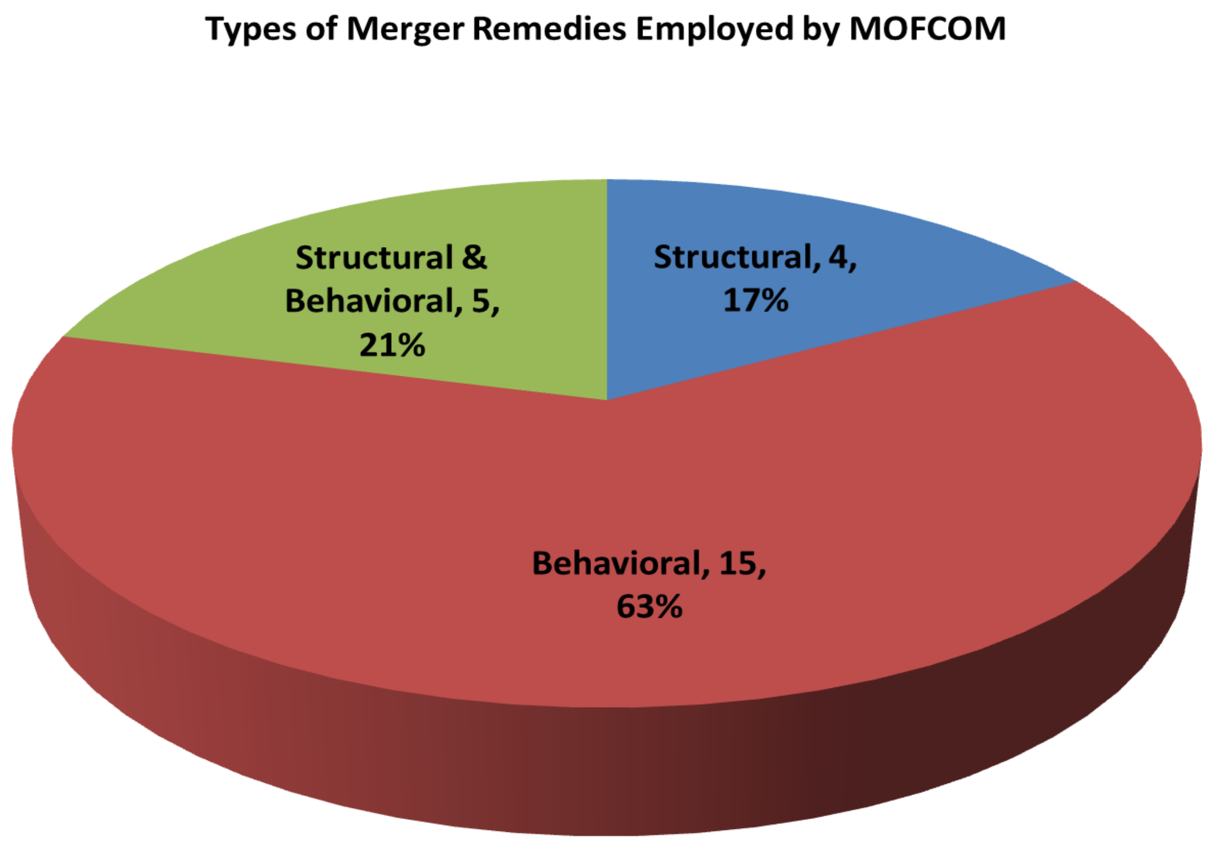
Cases reviewed by MOFCOM



MOFCOM's competitive analysis

- Market definition
- **Market concentration**
- **Competitive effects**
  - Unilateral effects
  - Coordinated effects
  - Conglomerate effects
- Entry
- Powerful buyers
- Efficiencies

Merger remedies imposed by MOFCOM



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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

- Private litigation - Huawei v. InterDigital (IDC): filed in 12/2011
- 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

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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

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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

Elizabeth Xiao-Ru Wang, Ph.D.

王晓茹博士

ewang@crai.com

001-617-425-3596

Charles River Associates

200 Clarendon Street, T-33

Boston, MA 02116, USA

www.crai.com/china