

The Role of IPRs in China's Antitrust Merger Review

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On February 16, 2012, China's Ministry of Commerce (MOFCOM) indicated during a press conference that it was still investigating the \$12.5 billion purchase of Motorola Mobility Holdings by Google Inc., after the U.S. Department of Justice and the European Commission had cleared the transaction without any condition.¹ This news naturally led to renewed interest in how the Chinese antitrust regulators analyze intellectual property rights (IPRs) during its merger review.

Indeed, since the Anti-monopoly Law (AML) took effect on August 1, 2008, MOFCOM has blocked one concentration and imposed conditions on 12 others, with six involving IPRs issues as identified in MOFCOM's public statements.² In this article, we briefly review the role of IPRs under China's merger control regime.

Statutes and Guidelines

The AML does not offer much guidance on issues relating to the intersection of IPRs and antitrust, with only a brief reference to IPRs in Article 55 that "while the law does not apply to undertakings' exercise of their intellectual property rights in accordance with the provisions of laws and administrative regulations relating to intellectual property rights, it shall apply if undertakings abuse their intellectual property rights to eliminate or restrict competition."³

Two sets of merger guidelines may shed some light on how IPRs are considered in merger review. The first is the Guidelines on Definition of Relevant Market, released by the Antimonopoly Commission in 2009.⁴ Article 3 of the guidelines states that, among other factors, when "intellectual property protection's effective period is an ignorable characteristic of the product, the time factor needs to be considered in defining the relevant market. In antitrust enforcement work involving intellectual property rights such as technology trade and licensing agreement, there may be a need to define a relevant technology market, taking into account intellectual property rights, innovation and other factors." For comparison, the U.S. Horizontal

Merger Guidelines also recognizes the need to examine technology markets, but only "[w]hen rights to intellectual property are marketed separately from the products in which they are used."⁵

The other is the Provisional Regulation on the Evaluation of the Competitive Effect of Undertakings' Concentration promulgated by MOFCOM in 2011. While IPRs are not explicitly addressed under the Provisional Regulation, technological advantage and essential facility are included as possible entry barriers (Article 7).⁶ Moreover, the Provisional Regulation recognizes both the positive and negative effects a merger might have on technological development (Article 8). This is consistent with the view that in high-tech industries, competition in technology and innovation may be more important than competition on price.⁷ However, the Provisional Regulation does not provide details on how the positive and negative effects on innovation are evaluated.⁸

Jurisdiction

While MOFCOM is the primary enforcer of merger review, its jurisdiction over IPR issues may sometimes overlap with that of other administrative agencies in charge of enforcing IP laws in China.⁹ In October 2011, China's State Intellectual Property Office published a draft amendment to the "Rules for Compulsory Patent Licensing".¹⁰ Notably, Article 11 of the draft rules

⁵ See DOJ and FTC's Antitrust Guidelines for the Licensing of Intellectual Property, p. 8, at <http://www.ftc.gov/bc/0558.pdf>.

⁶ See <http://fldj.mofcom.gov.cn/aarticle/zcfb/201109/20110907753173.html>.

⁷ See, e.g., William Baer, Antitrust Enforcement and High Technology Markets, at <http://www.ftc.gov/speeches/other/ipat6.shtm>.

⁸ As a comparison, Section 10 of the U.S. Horizontal Merger Guidelines provides some discussions on whether efficiencies of this kind are cognizable. See, <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

⁹ See Michael Jacobs & Xinzhu Zhang, China's Approach to Compulsory Licensing of Intellectual Property Under its Anti-Monopoly Law, *Competition Policy International Journal*, Vol. 6, Number 2, 2010 (noting that because the State Intellectual Property Office (SIPO) is responsible for investigating and deciding issues arising out of claims for compulsory licensing, including the appropriate licensing fees and the length of the licensing, this suggests that all issues relating to compulsory licensing, even those arguably pertaining to anticompetitive conduct, may fall within the jurisdiction of SIPO).

¹⁰ See <http://www.chinalaw.gov.cn/article/cazjgg/201110/20111000350961.shtml>.

¹ See <http://www.mofcom.gov.cn/xwfbh/20120216.shtml>.

² So far MOFCOM has only published decisions for cases that it prohibited or cleared with conditions.

³ See http://www.gov.cn/ziliao/flfg/2007-08/30/content_732591.htm

⁴ See <http://fldj.mofcom.gov.cn/aarticle/j/200907/20090706384131.html>.

provides that “any request for compulsory licensing under Article 48(2) of the Patent Law should be accompanied by a court judgment or a decision of a Chinese antitrust authority finding that the patentee’s exercise of its patent rights constitutes anti-competitive conduct.” Pursuant to Article 48 of the Patent Law,¹¹ the patent administration department may grant a compulsory license to a requesting party if a patentee’s exercise of its patent rights constitutes anti-competitive conduct. This seems to suggest that even if MOFCOM can impose compulsory licensing as remedies during its merger review, it has no authority to issue the license—the requesting party must apply to the patent administration department for the license.

Merger Cases Involving IPRs

As revealed in six published decisions by MOFCOM, IPRs issues have been factored in at least four areas of merger review, including: (1) market definition; (2) barriers to entry; (3) remedies; and (4) ancillary restraints, each of which is discussed below.

Market Definition

In reviewing a proposed joint venture between General Electric (China) and China Shenhua Coal to Liquid and Chemical to develop a coal-water slurry gasification technology (GE/Shenhua), MOFCOM defined the relevant market as “the licensing market for the coal-water slurry gasification technology.”¹² This is the first published decision by MOFCOM in which it explicitly held that a technology licensing market constituted a relevant and separate market. In reaching this conclusion, MOFCOM relied heavily on its finding the slurry coal gasification technology could be distinguished from other coal gasification technology in terms of technological process, the requirements of raw coal and means of input supplies.

Barriers to Entry

IPRs have been identified as barriers to entry in three of MOFCOM’s published decisions in 2011. During its examination of a proposed acquisition by a French private equity fund Alpha V of the Italian textile machinery manufacturer Savio, MOFCOM identified high barriers of entry into the overlap market of electronic yarn clearers because “patents, proprietary technology and trade secrets are essential to R&D and manufacturing of electronic yarn clearers.”¹³ Similarly, MOFCOM found in GE/Shenhua that the slurry coal gasification technology “involves a lot

of patent protection” and “entry to this technology licensing market is difficult.” When reviewing Seagate’s proposed acquisition of Samsung’s hard drive disk business, MOFCOM held that “intellectual property and other proprietary knowledge is essential to the hard drive disk industry.”¹⁴ MOFCOM also stressed the importance of non-IP core technology, engineering process and technology team that formed substantial entry barriers. In its decision to impose conditions on Western Digital’s proposed acquisition of Hitachi Global Storage Technologies, MOFCOM expressed similar concerns.¹⁵

Remedies

MOFCOM has imposed divestiture or compulsory licensing of IPRs as remedies in two conditional approvals of mergers between large multinational companies. To address MOFCOM’s concern of the potential unilateral effects resulting from Pfizer’s proposed acquisition of Wyeth in 2009, the merging parties committed to divest Pfizer’s swine mycoplasma pneumonia vaccine business under the brands Respisure and Respisure One in mainland China and to ensure that “the divested business include both tangible assets and intangible assets (including IPRs) necessary for the viability and competitiveness of the divested business.”¹⁶ During Panasonic’s proposed acquisition of Sanyo in 2009, MOFCOM required that the merging parties divest three products that were of competitive concern (i.e., coin-type lithium batteries, consumer Ni-MH batteries and automotive Ni-MH batteries) and license their relevant IPRs to the acquiring firm.¹⁷ In the EU, in situations where a competitive issue is created as a result of the combination of the merging parties’ technology/IPRs, divestiture is often deemed a preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors; indeed, the European Commission may only accept licensing as an alternative when divestiture is not feasible, necessary, or would impede on-going research and development.¹⁸

Ancillary Restraint

In GE/Shenhua, GE licensed its slurry coal gasification technology to the newly created joint venture with

¹⁴ See <http://fdj.mofcom.gov.cn/aarticle/zcfb/201112/20111207874274.html>.

¹⁵ See <http://www.mofcom.gov.cn/aarticle/b/c/201203/2012030793792.html>.

¹⁶ See <http://fdj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html>.

¹⁷ See <http://fdj.mofcom.gov.cn/aarticle/zcfb/200910/20091006593175.html>.

¹⁸ See Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004, paragraph 38.

¹¹ See http://www.gov.cn/flfg/2008-12/28/content_1189755.htm.

¹² See <http://fdj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855595.html>.

¹³ See <http://fdj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855585.html>.

Shenhua. While MOFCOM's decision does not address this aspect of the transaction, its silence seems to indicate a tacit approval of this technology transfer between the parent and its joint venture. Notably, the European Commission has also upheld such type of licensing as "ancillary restraint," noting that "a license granted by the parent undertaking to the joint venture may be considered directly related and necessary to the implementation of the concentration."¹⁹

Conclusion

The IPRs' role in MOFCOM's antitrust review seems to have become increasingly important. It remains to be seen how MOFCOM continues to take IPRs into account in its future antitrust reviews.

¹⁹ See Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), paragraph 42.