

Advanced Seminar on China Antitrust

April 2, 2015

China Review – IP related Antitrust Cases

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Tweeting about this conference?

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Qualcomm Antitrust Investigation

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Qualcomm: Dust Settled for Now

- NDRC decision: issued on February 10; publicized on March 2



The image shows a screenshot of an official document from the National Development and Reform Commission (NDRC) of the People's Republic of China. The document is titled 'Administrative Penalty Decision' (行政处罚决定书) and is issued to Qualcomm Incorporated. It details the commission's investigation into Qualcomm's alleged abuse of its standard-essential patents (SEPs) in the CDMA, WCDMA, and LTE markets, leading to an administrative penalty.

中华人民共和国国家发展和改革委员会
National Development and Reform Commission

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中华人民共和国
国家发展和改革委员会
行政处罚决定书
发改办价监处罚[2015] 1号

当事人：高通公司 (Qualcomm Incorporated)
地 址：(略)

根据《中华人民共和国反垄断法》等法律法规，本机关于2013年11月立案，依法对当事人滥用CDMA、WCDMA和LTE无线通信标准必要专利（以下简称无线标准必要专利）许可市场及CDMA、WCDMA和LTE无线通信终端基带芯片（以下简称基带芯片）市场的支配地位，实施垄断行为进行了调查。本机关的调查情况和处理决定如下：

一、当事人在无线标准必要专利许可市场和基带芯片市场具有市场支配地位

本机关对当事人的调查涉及无线标准必要专利许可市场和基带芯片市场，当事人在上述相关市场具有市场支配地位。

Source: http://www.sdpc.gov.cn/fzqggz/jgjdyfld/fjgld/201503/t20150302_666176.html

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Qualcomm: Key Outcome

- **Fine: 6.88 billion RMB (USD\$962 million,** approximately 8% of Qualcomm's annual sales revenues in China)
- **Conclusion: Qualcomm has dominant position in the market of wireless communication standards SEPs and baseband chips and has abused such dominant position.**

Qualcomm: Key Outcome

- Conducts found to be abuse of market dominant position:
 - **Unfair and excessive royalties:** charging for expired patents, mandate free reverse licensing, etc.

“不论当事人对外许可的专利组合有无变化，以及是否有新的专利不断加入到专利组合中，当事人进行长期甚至无固定期限许可的同时，不提供专利清单本身都不具有合理性。”

“当事人向被许可人谋求专利反向许可本身并不违反相关法律，但获得专利反向许可的需求并不是在所有情况下免费获得专利反向许可的理由。当事人获得被许可人专利反向许可应当尊重被许可人的创新成果，对被许可人反向许可的专利价值予以考虑”

– Tying non-SEPs with sales of SEPs

“当事人滥用在无线标准必要专利许可市场的支配地位，在无线标准必要专利许可中，没有正当理由搭售非无线标准必要专利许可.....被许可人是否与当事人签订一揽子专利许可协议，应当在当事人提供无线标准必要专利和非无线标准必要专利清单的前提下，由被许可人自主做出选择。”

– Attaching unreasonable conditions to the sales of baseband chips

- *“当事人滥用在基带芯片市场的支配地位，在基带芯片销售中附加不合理条件.....无线通信终端制造商使用当事人的无线标准必要专利应当支付公平、合理的专利许可费，但当事人在专利许可要约中包含了过期专利收费、要求被许可人进行专利免费反向许可、没有正当理由搭售非无线标准必要专利许可等不合理条件，利用在基带芯片市场的支配地位，以不供应基带芯片相要挟，强迫潜在被许可人签订包含不合理条件的专利许可协议，该行为不具有合理性。”*

Qualcomm: Key Outcome

- NDRC demands:
 - **Patent list provided for licensees** to avoid royalties for expired patents
 - No mandate for reverse licensing *against the licensees' free will or without paying unreasonable consideration*
 - SEP royalties charged basing on **65%** of the end smartphone wholesale price
 - No tying sales or unreasonable conditions attached

Qualcomm: Aftermath

- Questions left open:
 - *What if* licensees are willing to grant reverse license in order to maintain and take shelter under the Qualcomm umbrella?
 - Would 35% off on royalties make a fundamental difference?
 - Who would be the next Qualcomm?
 - *Would it be easier* to make cellphones? Or rather, without the Qualcomm protection umbrella, would it be even harder to access the smartphone market?

Microsoft/Nokia Merger Control Review

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Microsoft/Nokia: Merger Control Review

- MOFCOM Decision: issued and publicized on April 8, 2014.



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商务部公告2014年第24号 关于附加限制性条件批准微软收购诺基亚设备和服务业务案经营者集中反垄断审查决定的公告

文章来源: 商务部反垄断局

2014-04-08 14:25

文章类型: 原创 内容分类: 政策

【发布单位】中华人民共和国商务部

【发布文号】公告2014年第24号

【发布日期】2014-04-08

中华人民共和国商务部（以下简称商务部）收到美国微软公司（Microsoft Corporation, US, 以下简称微软）收购芬兰诺基亚公司（Nokia Corporation, Finland, 以下简称诺基亚）设备和服务业务（Devices & Services Business）案的经营者集中反垄断申报。经审查，商务部决定附加限制性条件批准此项经营者集中。根据《中华人民共和国反垄断法》（以下简称《反垄断法》）第三十条，现公告如下：

Source: <http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml>
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Microsoft/Nokia: Competitive Analysis

- Microsoft: Purchase Nokia's hardware business
- Competitive Analysis :
 - Capacity - upstream SEPs and Non-SEPs of android phones
 - “微软安卓项目许可中的专利（包括标准必要专利和非标准必要专利）是实现安卓操作系统和安卓手机重要功能“必要的”技术组成部分，对于生产和制造安卓手机不可或缺。中国市场上的绝大部分安卓手机制造商，出于自身的技术限制，难以通过技术设计避免使用，也难以通过商业上可行的技术方案予以替代。”
 - Motivation - entering mobile terminal manufacturing market
 - “为使微软的移动终端获得相对有利的市场地位，微软有动机通过提高其他智能终端制造商的专利使用费来提高竞争对手成本。”
 - Potential licensees cannot defense
 - “中国市场上活跃的大部分智能手机制造商（90%以上）不具备与微软进行交叉许可的基础。这些智能手机制造商对微软提高专利许可费或索取过高专利许可费不具备有效的抗衡能力。”
 - Licensing is the major barrier to market access
 - Influence on Chinese smartphone market

Microsoft/Nokia: Competitive Analysis

- Nokia: Preserve critical patent portfolio including SEPs
- Competitive Analysis :
 - Capacity - powerful mobile communication SEPs
 - “诺基亚拥有数千项通信标准必要专利。根据各公司申报的标准必要专利情况，从专利持有总数和专利持有质量看，诺基亚是通信标准领域的翘楚。诺基亚的移动通信标准必要专利是所有智能手机制造商从事生产活动需要使用的，诺基亚凭借这些标准必要专利拥有对智能手机市场的控制力。”
 - Motivation - rely on interests from royalties
 - “诺基亚在本集中后不再需要就其手机业务取得交叉许可，其维持较低水平的手机行业的整体专利收费水平动力下降，这种需求的缺失增加了诺基亚依赖专利许可费盈利的动机。”
 - Potential licensees cannot defense
 - “诺基亚不再从事设备和服务业务，潜在被许可人与移动智能终端相关的专利已不为诺基亚所需。这些智能手机制造商对诺基亚提高专利许可费或索取过高专利许可费不再具备有效的抗衡能力。”
 - Licensing is the major barrier to market access
 - Influence on Chinese smartphone market

Microsoft/Nokia: Legal Issues

- *Will Microsoft charge **Unfair and excessive royalties**?*
 - SEPs? only a small number!
 - De Facto SEP
- *Will Nokia become a giant **patent troll**?*
 - Domain market position: Huawei vs IDC
 - Motivation: no worry on counter claim
 - Unfair and excessive royalties?
 - Abide the FRAND principles?

Microsoft/Nokia: Key Outcome

- **Approved with additional restrictive conditions**
- **Microsoft:**
 - No seeking injunctions or exclusion orders on SEPs against the smartphones manufactured by enterprises in China.
 - The royalty rate cannot be higher than that before this merger.
- **Nokia:**
 - Abide the FRAND principles.
 - No enforcement of injunctions on SEPs against “licensees in good faith”
 - ***“licensees in good faith” : willing to licensing negotiation.***
- “判定一方是否为善意许可人或善意被许可人的相关因素之一可以是：一方在没有不合理拖延的情况下，愿意就有关诺基亚提出的许可条件是否与诺基亚承担的FRAND义务不一致而可能引起的争议交由双方均可合理接受的独立裁决机构解决，愿意受该裁决约束，基于该裁决结果订立FRAND许可协议，并支付任何基于该裁决结果和协议可能产生的裁定赔偿和FRAND许可费。”

Thanks

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