

The Chinese MOFCOM again uniquely imposes AML conditions on a transaction in the smartphone sector (Google/Motorola Mobility)

China, Mergers, Abuse of dominance, Discriminatory practices, Dominant position, Essential facility, Excessive prices, Intellectual property, Predatory pricing, Access to facilities, Barriers to entry, Geographic market, Economic efficiency, Remedies (mergers), Ex ante price control, Obligation to supply, Market definition, Market power, Effect on competition, Anticompetitive object/effect, Regulated services, Telecommunications, Information technology

Chinese MOFCOM, 19 May 2012, Announcement No. 25 (2012), regarding anti-monopoly review decision granting conditional approval of Google acquisition of Motorola Mobility

<http://fldj.mofcom.gov.cn/aarticle/...>

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The notification for *Google's* acquisition of *Motorola Mobility* was submitted to China's Ministry of Commerce on 30 September 2011. It was ultimately accepted on 21 November 2011 by MOFCOM after supplementation. At the expiration of the Phase III, or extended Phase II, period, on 19 May 2012, MOFCOM issued its decision granting conditional approval of the transaction.

MOFCOM took a prophylactic approach to the *Motorola Mobility* patent portfolio. It also imposed conditions on *Google's* Android platform, reflecting concern over vertical integration and perhaps particularly domestic downstream competitors. The net result and key goal of MOFCOM's decision may be to ensure access to *Google* technology for Chinese handset makers, protecting a significant domestic industry. The decision may also lead to MOFCOM becoming an arbiter of FRAND (fair, reasonable and non-discriminatory) terms for the *Motorola Mobility* patent portfolio.

MOFCOM identified the relevant markets to be smart mobile terminals (e.g., smart phones, tablets, televisions) and smart mobile terminal operating systems. It distinguished smart mobile terminals from personal computers and other mobile phones on the fact that the smart mobile terminal OS platform is open and on the differences in the interactive experience and portability. MOFCOM also concluded that smart mobile terminal OSs are distinct from other OSs and other products, and therefore constituted a separate market.

MOFCOM concluded that the smart mobile terminal market was fiercely competitive, characterized by relatively low concentration, and continuous new product and upgrade introductions, and that

Motorola Mobility had no clear advantage over its competitors in that market.

In contrast, the smart mobile terminal OS market is highly concentrated. In the fourth quarter of 2011, *Google's* Android accounted for 73.99% of the market in China, while *Nokia's* Symbian accounted for 12.53% and *Apple's* iOS for 10.67%. Thus, three OSs accounted for 97.19% of the market in China. MOFCOM found that Android had market dominance, based upon the high market share that it concluded reflects the great dependence of terminal makers on that OS, *Google's* strong financial resources and technological development capacity, and high market entry barriers. Moreover, MOFCOM expects Android's dominance to persist and strengthen for the foreseeable future, because *Nokia* has announced the abandonment of Symbian, iPhones are much more expensive than Android phones, and Microsoft's Windows phone OS is still in its early phase of market entry.

MOFCOM focused on the dependence on Android of smart mobile terminal makers, software developers and endusers. The cost to terminal manufacturers of switching to another OS is very high, requiring changes in both hardware and software. Applications developed on the Android platform need substantial adjustments to be compatible with other OSs. Users accustomed to the Android platform may find a new OS very different, making a switch a relatively big business risk for terminal makers. MOFCOM found that the open source and free nature of Android were major reasons for its rapid acceptance in the market and concluded that it is important to maintain Android's current availability to avoid substantial adverse impact on those who have reasonably relied on that availability. MOFCOM also concluded it would be important for *Google* to continue its practice of randomly selecting a smart mobile terminal maker to test new versions of Android, giving that manufacturer a head start in incorporating the new version, instead of relying only on *Motorola Mobility* to do so post-acquisition. MOFCOM concluded that such discriminatory treatment by *Google* would distort market competition and disadvantage *Motorola Mobility's* competitors.

As for market entry, MOFCOM noted that OS development for smart mobile terminals require technological and financial strength, while the high concentration of the OS market formed a very high entry barrier. MOFCOM found that the number of compatible applications and the quality of consumer experience are key factors in competition among OSs. It found that Android and iOS have attracted most of the applications developers and consumers, and that developers would incur substantial cost and risk in switching to new platforms while consumers would need to adjust to a new interface and buy new smart terminals if their service adopted a new OS. MOFCOM considered these factors to have created high entry barriers to other OSs, and concluded that new entry is unlikely to lessen or eliminate the anticompetitive effects that it had identified (apparently referring to potentially limited access to Android, discriminatory treatment of *Motorola Mobility's* competitors, and unreasonable terms in licenses of *Motorola Mobility* patents).

MOFCOM also focused on the fact that *Google's* primary motivation in acquiring *Motorola Mobility* was its large patent portfolio, containing many patents essential in the mobile phone industry. It concluded that, post-transaction, *Google* would have the motivation and the ability to impose patent license conditions that would injure competition and ultimately consumers.

As a result, MOFCOM approved the transaction with several conditions. First, *Google* will continue to license current and future versions of Android on a free and open basis. Second, *Google* will not discriminate among original equipment manufacturers who agree not to develop Android apps or

otherwise modify their Android platform. Finally, *Google* would continue to fulfill *Motorola Mobility's* undertaking to license its patents on a FRAND basis. *Google* may apply in five years for revision or revocation of the first two conditions, which expire if *Google* no longer controls *Motorola Mobility*.

MOFCOM's decision is noteworthy as the fourth transaction in which MOFCOM imposed conditions or prohibited the transaction when no other jurisdiction that reviewed it did [1]. While there were concerns over *Google's* possible use of *Motorola Mobility's* patent portfolio, which many assumed was the impetus for the transaction, both the European Commission and the United States Department of Justice Antitrust Division concluded that the transaction did not change the status quo with respect to the patent portfolio and thus did not warrant a remedy under their merger control regimes. Therefore, both European Union and United States enforcers decided that the appropriate approach was to monitor *Google's* use of the *Motorola Mobility* patent portfolio and take action later if necessary [2].

The economic analysis in the *Google/Motorola Mobility* decision is significantly more detailed than in MOFCOM's earliest decisions. The results reflect a cautious approach to the potential impact of a vertical integration. It is interesting that MOFCOM went beyond functionality to consider the open source nature of the Android operating system to be a market defining factor [3]. Yet, MOFCOM also considered iOS within the relevant market. Moreover, while switching costs may be substantial for terminal makers and software developers, it seems a static analysis to focus on enduser dependence on Android. Setting aside the rapid switch recently by large numbers of endusers to Android from other OSs, which might indicate that endusers may be just as quick to switch to the next big thing, the fact that endusers are now accustomed to the Android and may dislike the experience of using a new OS, sounds like a poor reason to require continued access to Android. That would seem as likely to further entrench Android and deter new entry and innovation as to protect terminal makers from the business risk of adopting a new OS.

Moreover, given *Motorola Mobility's* relatively small position in smart mobile devices, there would seem to be little incentive for *Google* to favor *Motorola Mobility* at the risk of losing the more successful makers of the majority of smart mobile devices and therefore the large base for its search and advertising services. MOFCOM's concerns about the vertical integration implications of the combination of Android and *Motorola Mobility* echo those reflected in GM/Delphi, and appear based on concerns over the many Chinese makers of smart devices. Chinese smart device makers are generally focused on middle and lower end products, and weaker than global brands in production, distribution and aftermarket services. They are arguably also more dependent on Android. Therefore, if *Google* were to discriminate among device makers with respect to Android, it is likely that Chinese manufacturers would be disfavored.

MOFCOM's prophylactic approach toward *Google's* control of *Motorola Mobility's* patent portfolio is reminiscent of its approach in InBev/Anheuser-Busch, and may again also reflect the fact that MOFCOM would have no jurisdiction if there is post-acquisition anti-competitive conduct. It may also reflect skepticism toward analyses of probable motivation to act anticompetitively, whereas the European Commission relied on information from market participants that would indicate a lack of incentive for *Google* to act in a discriminatory manner towards handset makers. The decision is also significant in applying only competition analysis to an entity, *Google*, that is at odds with the government on censorship. It is an indication that MOFCOM will segregate non-economic factors from its merger control enforcement.

[1] MOFCOM imposed conditions in *Mitsubishi Rayon/Lucite*, *GM/Delphi*, *Seagate/Samsung*, and *Google/Motorola Mobility*, while neither the European Commission nor the United States did. Other transactions in which MOFCOM imposed conditions appear to be transactions that were not subject to notification in the European Union or the United States, such as the *Uralkali/Silvinit* and *Alpha V/Savio* acquisitions and the *Tiande-Henkel* and *ARM-Giesecke & Devrient-Gemalto* joint ventures. However, United States antitrust authorities may, and do, investigate and prosecute transactions with United States nexus, whether or not they were notifiable.

[2] European Commission, Mergers: Commission approves acquisition of *Motorola Mobility* by *Google* (Press Release [IP/12/129](#), February 13, 2012) ; [Case No. COMP/M.6381](#), ***Google/Motorola Mobility***, [2012] C(2012) 1068; U.S. Department of Justice Antitrust Division, *Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisition of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd.* (Press Release, February 13, 2012, available at <http://www.justice.gov/atr/public/p...>).

[3] That might imply that Mozilla Firefox is in a distinct market from Internet Explorer, an unlikely conclusion.

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