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## Comment

# China's stance on the Google/Motorola merger: Implications for competition in intellectual property-intensive sectors

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## A B S T R A C T

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China's merger enforcement agency approved the Google/Motorola merger with conditions. This pattern of approval is not in full accordance with that in other jurisdictions, including the United States and the European Union, which made unconditional approvals. This contradiction attracted ample criticism; some critics believe that China's policy is designed to protect domestic industry. In investigating the Chinese merger agency's decision and the basis for its decision making, this article finds that much of the criticism is groundless and misleading because the critics have failed to incorporate all elements of the global value chain of mobile intelligent terminals into their analyses. The investigation also shows that, although the decision makers are less experienced, their decisions are based on Chinese competition law and market realities. It is important for international firms to be aware of this pattern in merger analysis.

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## 1. Introduction

Competition law is designed to reduce the price of a product to its cost, as well as to maximise output, from which end users can benefit. Typical competition law enforcement tends to stop mergers in those markets where suppliers are concentrated, or rectify any abusive and collusive practices aimed at increasing prices or reducing production. Such enforcement efforts are now enhanced by technical improvements and advanced technology, the adoption of which successfully reduces costs

and maximises production and supply. Standardisation, as a form of implementing advantageous technologies, potentially improves production methods and benefits end users in a number of ways; for example, in compatibility, interoperability, coordination and a higher level of safety and quality.

However, in addition to the benefits that standardisation potentially provides, it may also cause bottlenecks, either in the production process or for the competition in relevant markets. Standardisation, advanced either by individuals or by government, leads to a dominant market position, the abuse of which therefore is potentially unavoidable. Facilitated by intellectual

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property (IP) law protection, the exercise of such a dominant position generates ambiguous issues that may preclude competition law from applying. Some patent holders try to leverage their patents to maximise their profits by using, as typical examples, patent hold-up, excessive licensing rates, grant-back and cross-licensing.

Against such bottlenecks, there has been discussion about competition law intervention on such foes of standardisation. Fair, reasonable and non-discriminatory (FRAND) commitment generally refers to the terms to which a patent holder commits to a standard-setting organisation (SSO) in order to licence their standard-essential patents (SEPs). As an obligation, FRAND notably accelerates the standardisation process and lessens the potential for competition law violation hazards; consequently, it is widely accepted by SSOs, patent holders and competition law enforcers. However problems still arise when holders of SEPs seek injunctive relief against alleged infringers, or when an owner of intellectual property rights (IPR) refuses to grant a licence on FRAND terms. This topic is hotly discussed and interpreted by Western academics; it relates to the propriety of competition law intervention, because of the negotiation-based character of IP licensing.

The standardisation process, as well as its corresponding bottlenecks, is also evolving fast in developing-country markets. However, owing to industrial structure differences, their impacts occur in different areas to those in the Western markets, and they have also brought new issues to the exercise of IP and competition law. China is a typical developing country; the Chinese domestic market is one of the biggest markets in the world and has become an important part of the global market for international firms. China actively engages in international standard setting and application, especially in the telecommunications sector, such as in those adopted by the European Telecommunications Standards Institute and the Telecommunications Industry Association.

In contrast to the standard-setting issues that have arisen in Western markets, the Chinese market has to confront the problem of regulating any market-originated standardisation, namely, *de facto* standards – which do not go through SSOs. Besides, the Chinese market is involved more in those markets downstream or adjacent to the IPR market, which challenges the IPR-focused competition law and policy. The recent Google/Motorola merger,<sup>1</sup> which was conditionally approved by Chinese antimonopoly law (AML) enforcement agency, reflects such issues. However, the pattern of approving the merger is not in full accordance with that in other countries such as the United States, or those in the European Union (EU), which make unconditional approvals. This contradiction has been interpreted differently by commentators, with some even linking this conditional approval to antitrust protectionism.

This paper investigates China's stance on the Google/Motorola merger; it examines the Chinese law and policy, with regard to the standardisation process, and the industry status of mobile intelligent terminal products and their operating

system (OS) markets in China. The investigation demonstrates that, although the AML enforcement agencies are less experienced compared to some of their Western counterparts, they are able to make decisions based on established law and market reality. This in turn indicates that, as an international antitrust power centre, the Chinese AML enforcement agencies apply law and policy under certain stances or patterns, which should not be neglected by international firms – especially those who compete in IPR-intensive product markets. The suggestion that there should be cooperation within competition law enforcement agencies is generally beneficial, but coordination of positions of these agencies is counterproductive and unrealistic.

Part 2 introduces China's AML enforcement-agency approval of the Google/Motorola merger and the controversial decisions made in the US and EU. Comments on China's pattern of competition law enforcement are included. Part 3 investigates the basis for China's decision-making. Part 4 summarises the AML agency's stances and patterns of enforcement and their implications for international or IP-intensive firms. Finally, Part 5 provides conclusion.

## 2. Approval of the Google/Motorola merger

### 2.1. China's conditional approval of the Google/Motorola merger

On 19 May 2012, the Ministry of Commerce of the People's Republic of China (Mofcom) announced its approval of the Google/Motorola concentration with additional restrictive conditions.<sup>2</sup> The whole decision-making process was as follows. On 30 September 2011, Mofcom received the declaration of concentration of undertakings on the acquisition of Motorola Mobility by Google. After initial reviews, Mofcom decided that the concentration might eliminate or restrict competition in the market for mobile intelligent terminal OS in China. The case went through an extended further review. During this review, Mofcom pointed out to Google the competition-eliminating or restricting effect generated from the concentration, and held negotiations on how to resolve the said competition issues. On 15 May 2012, Google submitted a final commitment on how to solve the competition issues to Mofcom. Mofcom, upon evaluation, considered that the commitment could mitigate the adverse impact of the concentration on competition and thence made its final decision.<sup>3</sup>

The decision addresses three issues: licensing the Android system on free-of-charge terms and keeping it as open-source software; fair and non-discriminatory treatment of

<sup>1</sup> Announcement No. 25, 2012 of the Ministry of Commerce – Announcement of Approval with Additional Restrictive Conditions of the Acquisition of Motorola Mobility by Google. <http://english.mofcom.gov.cn/article/policyrelease/domesticpolicy/201206/20120608199125.shtml>. [Accessed 14 June 2016].

<sup>2</sup> Announcement No. 25, 2012 of the Ministry of Commerce – Announcement of Approval with Additional Restrictive Conditions of the Acquisition of Motorola Mobility by Google. <http://english.mofcom.gov.cn/article/policyrelease/domesticpolicy/201206/20120608199125.shtml>. [Accessed 14 June 2016].

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