

China's Ministry of Commerce Conditionally Clears the Google/Motorola Mobility Deal

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On 19 May 2012, China's Ministry of Commerce ('MOFCOM') announced its conditional clearance decision on the acquisition of Motorola Mobility by Google, which removed the last hurdle for the USD12.5 billion vertical deal. The MOFCOM is the only antitrust authority to impose remedies on its clearance of the transaction. The US Department of Justice, the European Commission, the Korea's Fair Trade Commission, and other relevant antitrust authorities have unconditionally approved the transaction.

Review Process

The MOFCOM received the parties' notification of the transaction on 30 September 2011 but found that the filing documents were incomplete. The MOFCOM formally accepted the notification on 21 November 2011 after it was satisfied with the parties' supplemental materials. During the preliminary (phase I) review, the MOFCOM found that the transaction will have the effect of eliminating or restricting competition in the market for smart mobile device operating systems ('OSs') in China and initiated further (phase II) review on 21 December 2011. On 20 March 2012, the MOFCOM decided to further extend the phase II review after the notifying parties agreed with the extension.

During the review, the MOFCOM solicited opinions from the relevant government agencies, trade associations and downstream business operators and consulted experts on technical issues of the transaction.

Market Definition and Competitive Assessment

Pursuant to China's Anti-Monopoly Law ('AML') and the relevant AML implementing regulations, the MOFCOM comprehensively reviewed and assessed market conditions, concerns related to the free, open-source Android mobile OS, Google's fair treatment of original equipment manufacturers ('OEMs') as well as patent licensing of Motorola Mobility, market entry, and the effects of the transaction on competition of the relevant markets.

(1) Relevant Markets

The MOFCOM defined the relevant product markets as (1) smart mobile devices, and (2) smart mobile device OSs. The MOFCOM noted that the geographic scope of the markets for smart mobile devices and smart mobile device OSs is worldwide but it focused its review on the Chinese market.

The MOFCOM found that the competitive landscapes of smart mobile devices and smart mobile device OSs are significantly different. The market for smart mobile devices is fragmented, highly competitive, innovative and fast changing. OEMs are facing strong competitive pressures and Motorola Mobility is not at an obvious advantageous position vis-à-vis other OEMs.

On the other hand, the market for smart mobile device OSs is highly concentrated. In the fourth quarter of 2011, Google's Android, Nokia's Symbian, and Apple's iOS held 73.99%, 12.53%, and 10.67% share, respectively, in the Chinese market for smart mobile device OSs.

Given the high market share of Android, OEMs' dependence on Android, Google's robust financing and R&D capacities, and the significant entry barriers, the MOFCOM found that Android holds a dominant position in the market for smart mobile device OSs. In addition, given that Nokia has given up on Symbian, Apple's iPhones are sold at much higher prices than smartphones running on Android, Microsoft's Windows Phone is at a nascent stage, the MOFCOM held that the dominant position of Android is expected to be maintained and strengthened for a relatively long period of time in the future.

(2) Free and Open-source Android Mobile OS

The MOFCOM found that Android achieved its dominant position mainly because of its free and open-source strategy. OEMs, software developers and end users highly depend on the Android ecosystem. Post transaction, whether Android will continue to be free and open-source is vital important for the relevant parties' reasonable expectations and interest.

(3) Google's Fair Treatment of OEMs

The MOFCOM found that, given Android' dominant position in the market for smart mobile device OSs, Google would have incentives and abilities to favour Motorola Mobility following the transaction. For example, Google could choose Motorola Mobility as the lead device manufacturer for each new version of Android. Such discriminatory treatment of OEMs would distort competition on the market for the smart mobile devices.

(4) Motorola Mobility's Patent Licensing

The MOFCOM noted that Motorola Mobility has a large number of patents for mobile devices and many of them are essential patents. The rationale for the transaction resides in the acquisition of Motorola Mobility's patents. Subsequent to the transaction, Google would have incentives and abilities to impose unreasonable licensing terms and conditions, impeding competition and eventually harming the consumer interest.

(5) Market Entry

The MOFCOM noted that the barriers to entry into the market for smart mobile device OSs is significantly high and new entries would not be able to remove or reduce the identified competition concerns in the foreseeable future.

Remedies

The MOFCOM and Google had several rounds of consultation regarding how to address the identified competition concerns. MOFCOM assessed Google's final commitments submitted on 15 May 2012 and was satisfied that the commitments would be able to reduce the adverse effects of the transaction's on competition.

Three obligations were imposed. First, Google must continue its current business practice of keeping Android platform free of charge and open. This obligation does not prejudice Google's rights to maintain software relevant to the Android platform close-sourced and Google's rights to seek payment and other considerations.

Second, Google must treat all OEMs in a non-discriminatory manner. This obligation only applies to OEMs who agree not to divide or derivate the Android platform and does not apply to the supply, licensing or distribution of products and services related to the Android platform.

Third, Google must honour Motorola Mobility's existing commitment to license its patents on fair, reasonable and non-discriminatory ('FRAND') terms.

The first and the second obligations are valid for five years from the date of the issuance of the MOFCOM decision, and Google may apply to the MOFCOM for modification or discharge of the obligations should the market conditions or competition conditions change.

Google must appoint an independent monitoring trustee to supervise its performance of the above obligations and must report to the MOFCOM and the monitoring trustee every six months regarding its performance of the obligations in the next five years.

Comments

The Google/Motorola Mobility decision is the MOFCOM's 13th conditional clearance decision since the AML came into effect. Similar to the MOFCOM's previous practice, the Google/Motorola Mobility decision is relatively light on reasoning. For example, it is unclear how the MOFCOM reached the conclusion that Google would have incentives to favour Motorola Mobility (at the cost of damaging Google's relationship with other Android OEMs and jeopardizing Google's mobile search and advertising revenues).

Regarding the concerns on patent-licensing, a FRAND commitment does not mean that an essential patent holder must impose the same terms on every party seeking licences and cannot be considered as a guarantee that the patent holder will not abuse its market power. The exercise of determining the excessiveness of royalties implies complexity and uncertainty and thus challenges the MOFCOM's ability to monitor Google's performance of obligations.