

SheppardMullin

美国盛智律师事务所

Sheppard Mullin Richter & Hampton LLP
15F, China World Office 1, No. 1 Jian Guo Men Wai Avenue
Chaoyang District, Beijing 100004, China
(86 10) 5706 7500 main
(86 10) 5706 7555 main fax

美国盛智律师事务所北京代表处
中国北京市朝阳区建外大街1号
中国国际国贸中心写字楼1座15层 邮编: 100004
电话: (86 10) 5706 7500
传真: (86 10) 5706 7555

UNOFFICIAL Mandarin-English Sheppard Mullin translation of April 8, 2014 MOFCOM conditional approval re Microsoft acquisition of Nokia

Case: MOFCOM's conditional approval of MS' acquisition of Nokia

Introduction to parties: The acquirer, Microsoft Corporation, US ("MS") develops, produces, licenses, supports and sells computer software and consumer electronics. The target, Nokia Corporation, Finland ("Nokia") is an international telecom and information technology company. Its main products are feature cellphones, smartphones, Internet infrastructure, free digital map information as well as navigation services.

Timeline:

- On September 2, 2013, MS entered into a stock and asset purchase agreement with Nokia acquiring all of Nokia's Devices & Services Business;
- On September 13, 2013, MOFCOM received the antitrust review application of the acquisition and asked for supplemental materials to the application;
- On October 10, 2013, MOFCOM filed the case and started initial review;
- On November 8, 2013, MOFCOM decided to conduct a further review and then concluded that the acquisition could have effects of excluding and limiting competition;
- On February 8, 2014, MOFCOM extended the deadline of further review to April 8, 2014;
- On April 8, 2014, MOFCOM conditionally approved the deal.

Market analysis:

1. In terms of related product market, MOFCOM believes that vertical connections exist between MS and Nokia. MOFCOM focuses its review on smartphone market (Nokia), mobile intelligent terminal operating system (MS) and patent licensing market of mobile intelligent terminals (Nokia).

- 1) Smartphone market is deemed as a separate product market for antitrust analysis because smartphones (Nokia), tablets (MS) and feature phones, i.e., traditional mobile phones (Nokia) do not belong to the same product market.
 - 2) Mobile intelligent operating system used on smartphones and those used on tablets are highly fungible between each other.
 - 3) Patent licensing market of Standard Essential Patent (“SEP”) is reviewed as one market. Current SEPs include 2G, 3G and 4G. Smartphones have to use 2G, 3G and 4G simultaneously.
 - 4) Android, as a commonly used smartphone operating system, has patent licenses from MS. Therefore smartphones with Android system must obtain patent licenses from MS. Such patent licenses from MS usually are non-SEPs. However, when no other operating systems can be obtained, even non-SEPs can enable the patent licensor to block competition. Therefore MS’ license to Android and MS’ another 26 non-SEP licenses are reviewed.
2. With regard to related geographic market, MOFCOM’s review focuses on competitive effect on China’s market.

Competitive effect analysis:

1. Vertical connections between MS’ mobile intelligent terminal operating system and Nokia’s smartphones are not able to exclude and impede competition. The reason is that with regard to the China’s market of mobile intelligent terminal operating system, competitors like Apple’s IOS and Google’s Android have market shares of 26% and 72% respectively, well beyond MS’ 1.2%; with regard to the market of smartphones in China, Nokia’s market share is only 3.7%.
2. However, MS could exclude and impede competition in China’s smartphone market based on its license over Android. The reasons are the following:
 - 1) MS’ license over Android, which includes SEPs and non-SEPs, is necessary to produce Android smartphones. As Android smartphone has a market share of over 80% in China, MS is able to impede competition in the downstream market of smartphone production.
 - 2) MS has the motive to raise royalty fee after its acquisition of Nokia. Before the acquisition, MS does not produce smartphones; after the completion of the acquisition, MS will enter the areas of mobile terminal production and can realize the synchronization of operating system and smartphones production. To look at the situation as a whole, previously MS had a reduced reliance on smartphone makers in order to promote its own mobile intelligent terminal operating system; but in order to obtain relatively advantaged market position for its mobile terminals, MS has the motive to increase its competitors’ costs by increasing

royalty fee incurred to other intelligent terminal makers. Therefore, it is concluded from the antitrust review that MS is likely to exclude and impede competition after the acquisition through its patents over smartphones.

- 3) Potential licensees are not capable of opposing MS because market researches show that more than 90% smartphone producers in China are not able to have a cross-license with MS.
 - 4) Patent license is the main roadblock for market entry in smartphone industry.
 - 5) If MS abuses smartphone related patents, China's smartphone market could be negatively affected as China has a large consumption for smartphones.
3. Similarly, Nokia could abuses its patent licenses reserved after the acquisition is completed. The reasons are the following:
- 1) Nokia has reserves of thousands of patents related to telecom and smartphones. These SEPs are necessary for smartphones production. Therefore Nokia has the ability to control the smartphone market.
 - 2) The acquisition enhances Nokia's motive to rely on profits from patent licensing. As Nokia will basically exit from downstream market of devices and services, Nokia will not have to obtain cross-license for its smartphone business after the acquisition, so its motivation to maintain a low level royalty fee in smartphone industry will decrease. Such lack of need will enhance Nokia's motive to rely on profits from patent licensing.
 - 3) Potential licensees are not capable of opposing Nokia. After the completion of the acquisition, Nokia will cease to offer cross-license. As a result, former licensees by Nokia's cross-license will lose the benefit a low royalty fee.
 - 4) Patent license is the main roadblock for market entry in smartphone industry.
 - 5) If Nokia abuses smartphone related patents, China's smartphone market could be negatively affected as China has a large consumption for smartphones.

Conditions imposed on MS:

1. With regard to SEPs, MS will continue to adhere to the existing ("FRAND") terms of the standard setting organizations (SSOs). MS will refrain from seeking injunctions over such SEPs against smartphones produced by Chinese producers. MS will refrain from demanding cross-licenses when licensing such SEPs except for any patents that the licensees have in the same industry. MS will only transfer such SEPs to those who agree with the above limitations. Any potential licensee with MS-related SEPs should also be bound by the same principles.

2. With regard to non-SEPs, MS will continue to offer, at consistent or discounted rates, non-exclusive license of its non-SEPs to domestic Chinese smartphone producers

For the next five years, MS will not transfer its SEPs listed in attachment 1¹ or 2² to other parties. After this five-year period, MS will only transfer these SEPs to those who agree to be bound by conditions imposed on MS.

3. The above conditions should not impose extra burdens on MS' licensing conduct outside commercial practices.
4. The above conditions are effective for the next eight years with the following five exceptions: 1) The commitments in Condition 1 will be effective until such time as MOFCOM agrees to amend or terminate them; 2) The commitment contained in Condition 2 prohibiting MS from transferring certain patents will only be effective for the period provided; 3) The commitment in Condition 5 will be effective for a period of five years following MOFCOM's decision until April 8, 2019; 4) If at any time market conditions or the competitive dynamics change, MS may apply to MOFCOM for amending or relieving any or all of these commitments; 5) If at any time MS does not control the Nokia Devices and Services Business, these commitments will cease to be effective.
5. MOFCOM is entitled to inspect MS' compliance with the above conditions and MS is obligated to report its compliance 45 days after the end of each calendar year.

Conditions imposed on Nokia:

1. Nokia's must make sure its commitments to license its SEPs continue to comply with the existing FRAND terms of the SSOs.
2. Nokia must refrain from seeking injunctive relief against licensees of SEPs that are subject to FRAND except in the case where licensee has breached the FRAND terms.
3. Nokia agrees to define licensor or licensee's "good faith" as a matter of each party's willingness to solve FRAND terms related disputes through arbitration and be bound by the arbitration decision.
4. Licensees are not obligated to accept any license not complying with FRAND terms by Nokia.
5. Nokia will only transfer SEPs to those who agree to be bound by the FRAND terms applicable to those SEPs.
6. Nokia will not change its valuation standards of FRAND licenses.

¹ Attachment 1 is named "MS Patent Lists that MOFCOM Focused on in its Review".

² Attachment 2 is named "Lists of Patents Licensed under MS Android Project". This attachment has three subtitles: 1) "SEPs" Generally Implemented by Smartphones; 2) "Patents" Implemented in "Android"; 3) Other "non-SEPs".

7. The above conditions should not impose extra burdens on Nokia's licensing conduct outside FRAND terms.
8. Condition 6 does not apply to any company who is entitled to claim patent right against Nokia.
9. MOFCOM is entitled to inspect Nokia's compliance with the above conditions and Nokia is obligated to report its compliance 45 days after the end of each calendar year.