



# Assessment of Information Technology Mergers in China

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## 1. Introduction

In the four years since the enactment of China's Anti-Monopoly Law (AML), the Ministry of Commerce (MOFCOM) has attracted attention with its conditional clearance of mergers in the information technology (IT) sector.<sup>2</sup> Amongst the 15 conditional clearances to date, three decisions involve transactions in the IT industry. These are Seagate Technology PLC's (Seagate) acquisition of the hard disk drive (HDD) business of Samsung Electronics Co., Ltd. (Samsung);<sup>3</sup> Western Digital Corp.'s (Western Digital) acquisition of the HDD business of Hitachi Global Storage Technologies (HGST), later renamed Vivotix Technologies Ltd.;<sup>4</sup> and Google Inc.'s (Google) acquisition of Motorola Mobility (Motorola).<sup>5</sup> Yet, these cases are but a few of the transactions, regulations and industrial policies that are shaping how competition law will be applied to the IT sector in China.<sup>6</sup>

This article provides an overview of MOFCOM's three conditional clearance decisions in the IT sector, considers MOFCOM's approach to horizontal and non-horizontal mergers in this sector, and draws out some of the implications for future IT mergers in the China context.<sup>7</sup>

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<sup>2</sup> The AML was enacted on 1 August 2008. As at 14 August 2012, MOFCOM had conditionally cleared 15 transactions and prohibited one transaction.

<sup>3</sup> Announcement of the Antitrust Review Decision regarding the conditional approval of the acquisition of the hard disk drive business of Samsung Electronics Co., Ltd. by Seagate Technology Public Limited, Announcement No. 90 of 2011, 12 December 2011.

<sup>4</sup> Announcement of the Antitrust Review Decision regarding the conditional approval of the acquisition of the hard disk drive business of Hitachi Global Storage Technologies by Western Digital Corporation, Announcement No. 9 of 2012, 2 March 2012.

<sup>5</sup> Announcement of the Antitrust Review Decision regarding the conditional approval of the acquisition of Motorola Mobility by Google Inc., Announcement No. 25 of 2012, 19 May 2012.

<sup>6</sup> Recent examples of government policies involving the high-technology sector and the Internet include the Ministry of Industry and Information Technology's (MIIT) Internet Rules on regulating the market order for Internet information services, notably competition between providers of Internet information services, users' rights and online data protection, which was published on 31 December 2011 and came into effect on 15 March 2012. An interpretation of these rules was published on the same day. The first draft was published in January 2011 against the backdrop of the public dispute between Qihoo 360 and Tencent. An abuse of dominance case lodged by Qihoo 360 is currently before the High People's Court of Guangdong Province. See, also MIIT's White Paper on Mobile Devices published in April 2012.

<sup>7</sup> Most recently, on 13 August 2012, MOFCOM conditionally cleared Wal-mart's acquisition of a controlling stake in Newheight Holdings Ltd., the parent company of China's largest online retailer and provider of value added telecommunications services. The case brought the variable interest entity (VIE) structure under the spotlight. The VIE structure is an investment structure, which was developed to circumvent foreign

## 2. Background

MOFCOM has approved the vast majority of transactions reviewed unconditionally since August 2008 when the AML came into effect.<sup>8</sup> Based on available statistics, only roughly 2% of transactions have resulted in a prohibition or conditional clearance decision. None of these interventions related to the IT sector until recently. On 12 December 2011, MOFCOM announced its approval of Seagate's US\$1.38 billion acquisition of Samsung's HDD business subject to behavioral remedies. Three months later, on 2 March 2012, MOFCOM approved Western Digital's US\$4.3 billion acquisition of HGST in the same sector subject to structural and behavioral remedies. In both cases, MOFCOM concluded that the transaction would have anti-competitive outcomes: the transaction would eliminate a major competitor, reduce the competitive pressures on the remaining competitors in terms of pricing and increase the risk of coordination in the HDD market. On 19 May 2012, MOFCOM announced its approval of Google's US\$12.5 billion acquisition of Motorola subject to behavioral remedies. It determined that Google would have the ability and incentive to favor Motorola following the transaction, and thereby undermine effective competition in the smart mobile devices market.

The Seagate/Samsung and Western Digital/HGST decisions provide insight on MOFCOM's approach to horizontal mergers, whilst Google/Motorola highlight its treatment of non-horizontal mergers in the IT sector. These cases are discussed in turn below as well as their possible implications for future IT transactions.

## 3. Horizontal mergers

### 3.1. Seagate/Samsung

The Seagate/Samsung and Western Digital/HGST decisions concerned consolidation in the concentrated HDD market, a market with only 5 major global competitors. According to MOFCOM, the major HDD competitors prior to either transaction were: Seagate (33%); Western Digital (29%); HGST (18%); Toshiba (10%); and Samsung (10%) with comparable shares in China. Seagate/Samsung resulted in a 5 to 4 merger, and Western Digital/HGST reduced the number of remaining competitors from 4 to 3. Both reviews occurred in the context of parallel reviews in other jurisdictions, including in the EU and US.

#### 3.1.1. Procedure and Substance

The Seagate/Samsung merger was notified to MOFCOM on 19 May 2011. MOFCOM declared the notification complete on 13 June 2011 and cleared the

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investment restrictions in "restricted" sectors in China such as telecommunications and media (e.g. Internet content provision, online media, online gaming, online retail and other value added telecommunications services). See, Announcement of the Antitrust Review Decision regarding Wal-mart's acquisition of 33.6% of Newheight Holdings Ltd., Announcement No. 49 of 2012, 13 August 2012.

<sup>8</sup> MOFCOM is obliged to publish only prohibition or conditional clearance decisions. There is no publically available record of transactions reviewed and unconditionally cleared by MOFCOM some of which include transactions in the IT sector.

transaction on 12 December 2011. It cleared the transaction at the end of the Extended Phase II review period, after exhausting the total statutory review period of 180 calendar days (i.e. 30 days for Phase I, 90 days for Phase II, and 60 days for Extended Phase II).<sup>9</sup>

MOFCOM defined the relevant market as the HDD market and determined that this was global in scope. MOFCOM's decision shows increased sophistication in the assessment of market dynamics. In one of the most detailed decisions to date, it considered:

- the structure of the HDD market: noting its concentrated nature, high degree of transparency and high barriers to entry given, inter alia, IP and other technology requirements and no new entry in the past 10 years;
- purchasing in the HDD market: which involved confidential bidding procedures and computer manufacturers sourcing typically from only two to four HDD manufacturers;
- capacity utilization: noting that available capacity was limited with all 5 major global manufacturers recently operating at approximately 90%;
- innovation: emphasizing the importance of innovation on the competitiveness of HDD manufacturers; and
- buyer power: noting that distributors generally did not wield sufficient countervailing buyer power, large computer manufacturers rarely opposed price increases and instead passed such increases to end customers, and end customers had limited buyer power given how dispersed they were in the market.

MOFCOM concluded that the transaction would have anti-competitive effects in the HDD market, as it would eliminate a significant HDD competitor globally as well as in China, reduce the competitive pressures on HDD manufacturers in terms of pricing in bidding procedures organized by computer manufacturers. It also considered the increased risk of coordination between the remaining competitors given the degree of market transparency, which enabled HDD manufacturers to predict the competitive behavior of competitors.

### 3.1.2. Remedies

MOFCOM imposed behavioral remedies requiring Samsung to remain an independent competitor for 12 months from the date of MOFCOM's decision – at which time MOFCOM will determine whether to release Seagate from this obligation having regard to prevailing market conditions (and upon Seagate's application). The main conditions imposed to ensure independence include that Seagate would establish an independent subsidiary to set the price of Samsung-produced HDDs, sell HDDs through independent sales teams, and operate separate production lines with own equipment, processes and systems. Seagate

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<sup>9</sup> Only a relatively small number of cases have entered the Extended Phase II review period to date. MOFCOM may make use of the Extended Phase II review only in limited circumstances prescribed by the AML, including where merging parties consent to the extension.

was also required to establish firewalls to prevent the exchange of competitive information between Seagate and Samsung's sales teams. Seagate would establish an independent R&D center for Samsung's HDD products, but was permitted to provide technical assistance.

In addition, Seagate undertook to increase Samsung's production capacity within six months of the decision and without altering its existing business model substantially or forcing Samsung's existing customers to purchase HDDs from Seagate on an exclusive basis. Seagate also undertook not to force TDK China Co. Ltd. (a company that handled HDD assembly for Samsung) to supply HDD magnetic heads to Seagate exclusively. Seagate also committed to invest at least US\$800 million yearly over the next three years to develop innovative products and solutions.

### 3.2. Western Digital/HGST

#### 3.2.1. Procedure and Substance

Western Digital's merger with HGST was notified to MOFCOM on 2 April 2011. MOFCOM declared the notification complete on 10 May 2011. On 1 November 2011, Western Digital withdrew its notification, a few days before expiry of the Extended Phase II review period, and re-filed it citing changes in the underlying facts notified to MOFCOM. MOFCOM re-started its "clock" on 7 November 2011 after accepting the revised notification. It subsequently cleared the transaction on 2 March 2012 towards the end of the second Phase II review period.

As in Seagate/Samsung, MOFCOM defined the relevant market as HDD and determined that the market was global. It considered the same market dynamics, including market structure, purchasing, capacity utilization, innovation and buyer power.

MOFCOM reviewed both transactions at the same time and analyzed the effects on competition resulting from each transaction on its own merits, as well as their combined effect on the HDD market if both transactions were cleared.<sup>10</sup> MOFCOM's decision in Western Digital/HGST highlighted HGST's competitiveness as a strong and innovative HDD manufacturer suggesting that MOFCOM viewed HGST as more likely to be an effective competitive constraint on pricing in the HDD market than an independent Samsung.<sup>11</sup> MOFCOM concluded that the

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<sup>10</sup> It is not apparent on the face of the decision that MOFCOM followed a "priority rule" whereby the first of the two transactions to be notified was reviewed as though the second transaction did not exist, and the second transaction was reviewed as though the first transaction had already occurred. A so-called priority rule exists in the EU but, not in the US where each transaction is reviewed on its own merits. This was the first time in the EU that the priority rule had a direct and far-reaching impact on the outcome of the EU's review of parallel mergers. For other instances where the priority rule was applied in the EU, although with no practical consequences see, for example, Case COMP/M.4600 First Choice/TUI, 4 June 2007 and Case COMP/M.4584 MyTravel/Thomas Cook, 26 March 2007, and Case COMP/M.4854 TomTom/Tele Atlas, 14 May 2008 and Case COMP/M.4942 Nokia/Navteq, 2 July 2008.

<sup>11</sup> See, also Press Release of the Federal Trade Commission (FTC), FTC Action Preserves Competition in the Market for Desktop Hard Disk Drives Used in Personal Computers, 5 March 2012, available at <http://ftc.gov/os/caselist/1110122/120305westerndigitalstmt.pdf>. The FTC found that "[i]n a market for

Western Digital/HGST merger would lead to the elimination of a significant competitor in an already concentrated market, reduce competition and incentives to innovate and increase the risk of coordination between the remaining competitors.

### 3.2.2. Remedies

Like the EU and US, MOFCOM required Western Digital to divest HGST's 3.5-inch HDD assets to a third party within 6 months. The business was subsequently sold to Toshiba Corp.

However, MOFCOM went further and imposed significant behavioral remedies requiring HGST to remain separate from Western Digital. It required Western Digital to operate HGST as an independent competitor for 24 months from the date of MOFCOM's decision – at which time MOFCOM will determine whether to release Western Digital from this obligation based on prevailing market conditions upon application by Western Digital. This included retaining HGST's independent legal personality and conducting its business independently in relation to R&D, production, procurement, distribution, after-sales service, administration, accounting, investment and HR appointments. Western Digital was also required to establish information firewalls to prevent the exchange of competitive information with HGST.

### 3.3. Possible Implications for Horizontal Mergers

The decisions reflect MOFCOM's evolving approach to IT mergers involving competitors. The Seagate/Samsung and Western Digital/HGST decisions represent the most detailed analysis of coordinated effects to date. Although both cases focused on coordinated effects, a number of the lessons learned can be expected also to inform the approach to unilateral effects cases.

First, in marked contrast to earlier decisions involving coordinated effects,<sup>12</sup> Seagate/Samsung and Western Digital/HGST appear to acknowledge that the mere risk of post-merger coordination in a concentrated market is not enough to establish coordinated effects. The decisions suggest that MOFCOM will conduct detailed analyses of the market(s) implicated in a transaction and will consider, inter alia, the market structure, procurement cycles and purchasing decisions, pricing and price determination, market transparency, barriers to entry/expansion, buyer power, etc. and determine whether the resulting post-merger market structure would be conducive to coordinated effects. In particular, it will consider whether and how collusion might occur in the market, the nature of

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*desktop HDDs containing only Western Digital, [Hitachi Global Storage Technologies (HGST)], and the combined Seagate/Samsung entity, HGST would retain the ability and incentive to act as an effective constraint on desktop HDD pricing. By contrast, Samsung would be less likely to serve as a meaningful constraint on pricing in a desktop HDD market consisting of Western Digital/Hitachi, Seagate, and Samsung. Based on these considerations, the Commission made the decision to challenge the Western Digital/HGST transaction while clearing the Seagate/Samsung transaction...".*

<sup>12</sup> See, Announcement of the antitrust review decision regarding the conditional approval of Novartis' acquisition of Alcon Laboratories, Inc.(Alcon), Announcement No. 53 of 2010, 13 August 2010; and Announcement of the antitrust review decision regarding the conditional approval of OAO Uralkali's (Uralkali) acquisition of OAO Silvinit (Silvinit), Announcement No.33 of 2011, 2 June 2011.

the collusive mechanism, why collusion is significantly more likely to occur after the merger, as well as why that merger would make collusion more effective or sustainable following the merger.

Its approach to coordinated effects (and unilateral effects) is reflected in its Interim Provisions on the Assessment of the Effects on Competition of Concentrations of Undertakings (Interim Provisions).<sup>13</sup> The Interim Provisions regrettably provide limited guidance on MOFCOM's precise approach – in particular when transactions will/will not raise substantive concerns. However, the Interim Provisions acknowledge that high-technology mergers can benefit technological progress by enabling companies to rationalize resources in terms of technology and R&D capability.<sup>14</sup> At the same time, the Interim Provisions note that such mergers may have adverse competitive effects if they reduce incentives to innovate.<sup>15</sup> The Seagate/Samsung and Western Digital/HGST decisions highlight MOFCOM's preoccupation with the perceived negative impact on technological progress.

Second, MOFCOM will not hesitate to adopt decisions that diverge from other jurisdictions – even after other jurisdictions have approved the transaction. In the EU and US, Seagate/Samsung was cleared unconditionally whereas Western Digital/HGST was cleared subject only to the condition that Western Digital divest HGST's 3.5-inch HDD assets to a third party.<sup>16</sup> It is unclear whether MOFCOM adopted a different threshold for intervention, or whether it simply focused on different facts.

In practice, a different outcome is likely where China presents unique or particular features. The AML enables MOFCOM to take account of both competition and non-competition factors in its analyses. As such, close attention is paid to the impact of a transaction on national economic development, industrial policy and, generally, the Chinese social and economic fabric even in cases with a global dimension. It bears emphasizing in this context that the IT sector is sensitive in China, which is home to the world's largest consumers of PCs and the manufacturing facilities of the world's major computer manufacturers. The technology sector is also regarded as a key sector for national security purposes in China.<sup>17</sup>

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<sup>13</sup> Interim Provisions on the Assessment of the Impact of Concentrations of Undertakings on Competition, issued by MOFCOM, effective as of 5 September 2011.

<sup>14</sup> Interim Provisions, Article 8.

<sup>15</sup> Interim Provisions, Article 8.

<sup>16</sup> There are instances where MOFCOM has cleared a transaction ahead of other major jurisdictions. A recent example is its approval of UTC's acquisition of Goodrich where it approved the transaction before clearances in the EU and US. See, Announcement of the Antitrust Review Decision regarding the conditional approval of the acquisition of Goodrich Corporation by United Technologies Corporation, Announcement No. 35 of 2012, 15 June 2012.

<sup>17</sup> See, Circular of the General Office of the State Council on the Establishment of a Security Review System regarding mergers and acquisitions of domestic enterprises by foreign investors, 3 February 2011, Article 1. Under the terms of the Circular, certain acquisitions by foreign companies of domestic entities active in key sectors, including the IT sector which impact national security, require separate national security review.

Third, the decisions highlight MOFCOM's willingness to consider behavioral or non-structural remedies as a credible alternative to structural remedies, which are generally regarded as more intrusive. It is worth noting in this regard that the AML enables MOFCOM to impose remedies to "mitigate" identified concerns, and not necessarily to eliminate such concerns altogether (as would a structural remedy). The power to mitigate arguably lowers the threshold for intervention. This power might also explain MOFCOM's apparent readiness to accept behavioral remedies in favor of structural remedies.

Behavioral remedies are not necessarily a soft option in the China context as the Seagate/Samsung and Western Digital/HGST decisions show. The "hold separate" arrangements imposed in Seagate/Samsung and Western Digital/HGST are far-reaching and burdensome in terms of intrusiveness into the companies' internal organization and management, and monitoring costs. MOFCOM imposed extensive conditions requiring the merging entities to keep a number of key functions separate, including R&D, production, procurement, distribution, after sales services, administration, accounting, investment and HR, and to maintain information firewalls.<sup>18</sup> In Seagate/Samsung, the "hold separate" obligation applies for 12 months, and in Western Digital/HGST the obligation will remain in place for 24 months. MOFCOM has reserved the right to consider whether to extend the term of the "hold separate" obligation in both cases.

Quite apart from the administrative burdens of a "hold separate" remedy, how such a remedy would enable merging parties to realize anticipated post-merger synergies is questionable. For example, development costs that could be saved as a result of one R&D team (as opposed to two separate teams) developing products. MOFCOM's decisions do not specify whether MOFCOM will carefully consider efficiencies that might arise in a given transaction and whether any merger-specific efficiencies might outweigh the loss in competition resulting from a transaction.

Fourth, MOFCOM may include a review clause in its decisions enabling merging parties to apply to MOFCOM to waive the conditions imposed. Not all MOFCOM decisions include a review clause, although MOFCOM may entertain applications for waiver in such cases. In line with international practice, merging parties would need to show a material change in market conditions, that the remedy is no longer necessary, or that it cannot be implemented.

Lastly, MOFCOM may coordinate its review with other jurisdictions such as the EU and the US. The pull and re-file in Western Digital/HGST suggests that MOFCOM may have coordinated its review with the FTC in order to be satisfied with the sale of HGST's relevant HDD assets to Toshiba Corp. The FTC's press release on its conditional clearance of Western Digital/HGST noted that it coordinated its review with various competition authorities, including MOFCOM.

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<sup>18</sup> A comparison of the hold-separate obligations imposed in the two decisions suggests that MOFCOM imposed a "softer" hold-separate remedy in Seagate/Samsung by expressly authorizing limited information disclosures in its decision.



The degree of cooperation between MOFCOM and other competition authorities has increased over time. It is also common for merging parties in global transactions to keep MOFCOM abreast of merger clearances and/or the review process in other jurisdictions. Coordination of reviews among different jurisdictions can be expected to increase and deepen in the future – especially in cases involving a global remedy, or a remedy relating to a market that is also affected in China, or where coordinating a clearance timetable is important.

## 4. Non-Horizontal Mergers

### 4.1. Google/Motorola

In Google/Motorola, MOFCOM focused on the acquisition of Motorola's portfolio of standard essential patents (SEPs), and combination of Google's mobile operating system (OS) Android and Motorola Mobility's mobile devices (including mobile phones and tablets).

#### 4.1.1. Procedure and Substance

MOFCOM used the full statutory review period to clear the transaction, resulting in the review process taking approximately 6 months. The Google/Motorola merger was notified to MOFCOM on 30 September 2011. MOFCOM accepted the notification as complete on 21 November 2011 and subsequently cleared the transaction on 19 May 2012.<sup>19</sup>

MOFCOM determined that the relevant markets were the global markets for smart mobile devices and operating systems for smart mobile devices. It found that Google was dominant in the market for smart mobile device OSs globally and in China (with a 73.99% market share).

In challenging the transaction, MOFCOM concluded that the transaction would have a negative impact on the China markets for smart mobile devices and smart mobile device OSs. MOFCOM was concerned that Google would have the ability and incentive, post-merger, to favor Motorola to the detriment of other smart mobile device manufacturers. In its view, Google could provide new versions of its Android OS to Motorola first before providing this to other manufacturers for initial "testing" purposes and/or Google might be inclined to use only Motorola for testing purposes. This would place Motorola in an advantageous position, thereby significantly impeding competition in smart mobile devices. MOFCOM was also concerned that by acquiring Motorola's portfolio of standard essential patents, Google would have the ability and incentive to impose unreasonable conditions on patent licensees resulting in an adverse impact on competition in the smart mobile device and smart mobile device OS markets, and thereby harming consumers.

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<sup>19</sup> The transaction reportedly required approval by the Anti-Monopoly Commission (**AMC**) and not just MOFCOM. The AMC has an advisory and policy function pursuant to the AML and includes officials from the State Council and other government agencies, including MOFCOM. The AMC was also reportedly convened in the context of the Coca-Cola/Huiyuan prohibition decision.

#### 4.1.2. Remedies

MOFCOM imposed behavioral remedies to address the identified concerns, including that:

- Google must license its Android platform (current and future versions) on a free and open source basis, consistent with its current practice;
- Google must treat Original Equipment Manufacturers (OEMs) on a non-discriminatory basis with respect to its Android platform; and
- Google must observe the fair, reasonable and non-discriminatory (FRAND) commitments made by Motorola Mobility concerning use of its SEPs.

All the remedies imposed – except the FRAND condition – apply for a period of 5 years from the date of MOFCOM’s decision. Upon expiry of the 5-year period, MOFCOM may adopt a further decision based on prevailing market conditions.

#### 4.2. Possible Implications for Non-Horizontal Mergers

Google/Motorola offers insight on MOFCOM’s approach to IT mergers like the Seagate/Samsung and Western Digital/HGST decisions – albeit in relation to non-horizontal mergers and vertical foreclosure concerns. Many of the lessons considered above apply equally in this context.

First, the decision highlights the propensity for diverging outcomes in cases involving global markets. The transaction was approved in other jurisdictions without remedies except in China where it was scrutinized. This is not altogether surprising given the mobile network growth in China (with some 80 million new subscribers coming online every year for the past decade). Google’s fractured relationship with China might also account for the lengthy review period. In 2010, Google had several disagreements with the Chinese government over online freedom and alleged intrusions by hackers – resulting in Google deciding to shift its service from Mainland China to Hong Kong.

Second, the decision suggests that the approach to non-horizontal mergers and analyses of vertical foreclosure in particular is still evolving. MOFCOM’s decisions to date do not contain the same level of detail or appear to display the same increasing degree of sophistication shown in relation to horizontal mergers. The Interim Provisions make clear that MOFCOM will consider input and customer foreclosure in its analyses of vertical mergers but does not provide further particulars. Regrettably, the Google/Motorola decision provides limited guidance on MOFCOM’s precise approach to assessing vertical foreclosure effects.

As noted above, MOFCOM was essentially concerned with two issues: (a) Google’s smart mobile device OS as a key input into smart mobile devices; and (b) SEPs as key to smart mobile devices. However, the decision does not clearly articulate why the transaction raised specific competition concerns in the China context where the salient facts were the same as those relied on by other jurisdictions. The outcome of MOFCOM’s assessment is all the more surprising, as the decision noted that “Motorola [did] not have any obvious advantage over its competitors” and that the smart mobile device market is competitive.

The focus on Google's significant market share in smart mobile device OSs (and its incontestability in the absence of meaningful competitive constraints) suggests that pre-merger dominance or market power is a pre-requisite for a vertical theory of harm and that market share will play an important role in determining whether a company has the ability to foreclose competition.

However, the threshold for assessing a company's incentive to foreclose competition is not entirely clear. Nor does the decision specify the rationale for concluding that a foreclosure strategy would result in a significant impediment to competition downstream. The decision suggests that MOFCOM adopted a different intervention threshold. Unlike MOFCOM, other regulators such as the Commission in the EU concluded that Google had no incentive to favor Motorola handsets in providing early access to new versions of the Android OS, as Motorola's handset business generated minimal profits and such a strategy risked undermining Google's relationship with other Android OEMs and its search and advertising revenues.<sup>20</sup> Further, the Commission found that Google's ability to favor certain handset-makers was not merger-specific. This is because Google already selected one or a few handset manufacturers for early testing of new Android OS versions.<sup>21</sup> It is thus unclear why MOFCOM concluded that Google had the necessary incentive to foreclose competition. It bears repeating that the IT sector is sensitive in China. The AML, as noted above, requires merger analyses to balance competition issues against non-competition factors that might affect the healthy development of China's socialist market economy.

Lastly, FRAND or FRAND-type commitments are relatively common in the context of vertical mergers in China. In Google/Motorola, MOFCOM required Google to observe FRAND commitments made by Motorola concerning use of its patents. MOFCOM's concerns mirrored those of the Commission and the US Department of Justice (DOJ). Both jurisdictions took note of Google's public commitment that Motorola's SEPs would remain available under FRAND terms (including a provision allowing prospective licensees to challenge Motorola's published 2.25% FRAND rate). However, MOFCOM considered it necessary to formalize this commitment by including the FRAND commitment as a remedy in the decision. It remains to be seen whether MOFCOM will seek to determine what amounts to fair, reasonable and non-discriminatory terms for the SEPs in issue in

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<sup>20</sup> The Commission's decision states that Motorola's market share at the European Economic Area and global levels in 2010 were [0-5%] and [0-5%] respectively by volume. Given Motorola's very low market share, the revenue loss for Google from restricting access to Android is more likely to be far greater than the potential gain from Motorola's smart mobile device sales. It was instead in Google's commercial interests to maintain Android to all OEMs. Further, the Commission found that even if Google were to prevent Motorola's competitors from accessing Android or were to degrade Android offered to competing OEMs, a significant impediment to effective competition was unlikely to arise as it appeared from market investigations that other existing mobile OSs currently under development would provide roughly equivalent features or characteristics to those of Android. See, Case No COMP/M.6381 – Google/Motorola Mobility, 13 February 2012, paragraph 80.

<sup>21</sup> It is worth noting that the Commission considered conglomerate relationships between Google and Motorola in its decision but MOFCOM did not. The Commission was of the view that Motorola and Google were active on markets that were to some extent related or complementary or belonging to a range of products that is generally consumed by the same set of customers for the same end-use (namely consumers that use smartphones or tablets). See, paragraph 163.

this case. In line with its approach in other cases, it can be expected that MOFCOM may require Google to set a framework or benchmark against which to assess whether licensing terms are truly FRAND in nature.

This is not the first time that MOFCOM has imposed FRAND or FRAND-like remedies in vertical mergers – sometimes in cases that might not attract intervention in other jurisdictions. Earlier this year, MOFCOM imposed FRAND commitments in relation to a joint venture between Henkel Hong Kong Holding Ltd. and Tiande Chemical Holdings Ltd.<sup>22</sup> A FRAND-like remedy was also imposed in relation to General Motors Corp.'s acquisition of Delphi Corp..<sup>23</sup> Unlike the earlier decisions, the FRAND commitment imposed in Google/Motorola is not detailed and does not provide any specifics on how the remedy should be implemented stating simply that "Google shall observe the FRAND commitment made by Motorola". It is unlikely that this reflects MOFCOM's likely approach in the future. In practice, MOFCOM's conditional clearance decisions are short, and generally reflect only the salient aspects of a given remedy leaving implementation details to a later stage for negotiation with the merging parties. In this case, MOFCOM essentially imported Google's public commitment, and allowed Google to provide specific details on how it would implement this commitment after adoption of the decision.

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<sup>22</sup> Announcement of the antitrust review decision regarding the conditional approval of the acquisition of joint control over Weifang Dekel Innovative Materials Co. Ltd, Announcement No. 6 of 2012, 9 February 2012. MOFCOM was concerned that Tiande, a leading global supplier of Ethyl Cyanoacrylate (ECYA), would sell ECYA to the joint venture on preferential terms. It required Tiande to supply ECYA to all downstream customers on FRAND terms. MOFCOM also required Tiande not to sell ECYA at an unreasonably high price. It is unclear why MOFCOM concluded that Tiande had the necessary incentive to restrict supply to other customers given the cost of such foreclosure strategy in terms of revenue loss.

<sup>23</sup> Announcement of the antitrust review decision regarding the conditional approval of General Motor Corporation's (GM) acquisition of Delphi Corporation (Delphi), Announcement no. 76 of 2009, 28 September 2009. In this decision, MOFCOM required that each of GM and Delphi should ensure that Delphi would undertake to supply domestic car manufacturers on a non-discriminatory basis and undertake to assure reliable supply of good quality products and ensure that the prices and quality of supply are consistent with "market practice".

## Conclusion

There are arguably too few cases to discern clear trends with regard to MOFCOM's approach to IT mergers. What is clear is that IT mergers will be looked at closely in China given the sector's sensitivity. As the cases illustrate, MOFCOM will scrutinize IT mergers, including transactions involving global markets.

The cases also suggest that MOFCOM's approach to horizontal mergers is more developed than in the case of non-horizontal mergers. In both instances market share analyses play an important role in the competition analysis. However, the threshold for intervention may differ in the case of non-horizontal mergers.

The analysis will focus on competition concerns but also on how a given transaction might adversely affect the China context – in Seagate/Samsung and Western Digital the HDD market, and in Google/Motorola smart mobile devices and smart mobile operating systems. It remains to be seen whether MOFCOM will continue to be receptive to behavioral remedies in particular in the IT sector as a basis for clearing problematic transactions. This seems likely given its power under the AML to impose remedies to mitigate identified concerns.