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The KFTC's Extraterritorial Overreach

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Introduction

The Korea Fair Trade Commission's recent decision against Qualcomm is notable as one of the most significant examples of intentional territorial overreach by an antitrust enforcer in memory.[1] The KFTC's remedy ignores principles of jurisdiction and comity by ordering global changes to Qualcomm's licensing and sales practices, even where those changes affect commerce that has no cognizable effect on the welfare of Korean consumers. The legitimate enforcement interests of every other global competition and IP agency are virtually ignored; the KFTC defines how commerce for the licensing of Qualcomm's IP rights and sales of its chipsets will occur around the world. This outcome is not unintentional; the decision contains an explicit provision to protect the interests of Korean corporations operating abroad. In short, the KFTC has appointed itself as a global IP police force projecting questionable competition standards well beyond its borders to protect its own domestic Korean producers. In so doing, the KFTC's decision undermines the legitimate interests of other jurisdictions that it invades.

KFTC's Remedy Sweeps Well Beyond Its Legitimate Interests

The KFTC imposes sweeping, worldwide behavioral remedies that restrict or eviscerate Qualcomm's rights under its *non-Korean* patents, compel Qualcomm to amend or enter into contracts outside of Korea that it otherwise would not be required to enter into, and institute a non-appealable arbitration process on virtually all of Qualcomm's licensing negotiations, wherever they take place.

The decision contains four primary remedial orders. First, the KFTC imposes a mandatory obligation for Qualcomm to propose terms for licensing its mobile SEPs (with significant specific limitations on the demands Qualcomm can make), and to submit to binding arbitration in all cases where agreement is not reached.[2] Second, Qualcomm must supply handset makers with modem chipsets even if the handset maker has not licensed Qualcomm's SEPs or where an existing license agreement has "not been executed or has expired or has not been complied with".[3] Third, Qualcomm is barred from seeking ("shall not engage in coercive comprehensive package") (i) licenses that cover both SEPs and non-SEPs; (ii) licenses that cover 2G, 3G, and 4G patents; (iii) licenses where the royalty rates were decided without "a reasonable royalty assessment process;" and (iv) licenses calling for Qualcomm's licensing of a handset maker's patents.[4] Fourth, Qualcomm must notify all modem chipset makers and handset makers who previously requested or executed license

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[1] Korea Fair Trade Comm'n, Case No. 2015SiGam2118, *In re* Alleged Abuse of Market Dominance of Qualcomm Inc., Decision No. 2017-0-25 (Jan. 20, 2017), *unofficial translation available in English at* www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf [hereinafter KFTC Order].

[2] KFTC Order, *supra* note 1, Decision and Order, ¶ 2.c. The KFTC lists "the International Chamber of Commerce, World Intellectual Property Organization, and/or courts" as potential arbiters. *Id.*

[3] *Id.*, Decision and Order, ¶ 3.a. Qualcomm is not required to supply handset makers who have, according to a court order, infringed Qualcomm's mobile communications SEPs. *See id.,* ¶ 3.

[4] *Id.*, Decision and Order, ¶ 5.

agreements covering Qualcomm's mobile communications SEPs about the KFTC's remedial orders.[5]

In its most troublesome turn, the KFTC would apply these remedies to all dealings globally with all of the following makers or suppliers of handsets and modem chipsets:

1. Handset makers that are headquartered in Korea;
2. Handset makers and sellers that sell handsets in Korea;
3. Enterprises that supply handsets to an enterprise that sells handsets in Korea;
4. Modem chipset makers that are headquartered in Korea; and
5. Enterprises that supply modem chipsets to handset makers falling under items 1 through 3.[6]

Because virtually every enterprise in the smartphone supply chain falls within one of these definitions, the decision covers virtually the entire global ecosystem of smartphone component manufacturers and handset makers. The geographic scope is not limited in any way to the actual sales of modem chipsets or handsets in Korea. For the listed enterprises, the remedy extends to ***all*** interactions related to both the agreements and negotiations of the relevant patent licenses and chipset sales by Qualcomm globally, without reference to actual effect in Korea. Licensing related solely to the hypothetical company's sales in the U.S. or EU, for example, would be covered by the KFTC order due to the simple fact that the company sells handsets in Korea.[7]

It is especially telling, and troubling, that the KFTC applies the order to all license agreements with handset makers ***headquartered*** in Korea, irrespective of the geographic location of the IP rights, license agreement, manufacturing, destination market or impact on commerce. The KFTC order does not reflect any concern, in this respect, with whether there is any impact on its own consumers' welfare or whether there is any domestic effect. The only conceivable concern appears to be whether its own national champions benefit.

Indeed, the KFTC unabashedly asserts it is taking on the role of the world's IP police force. In its press release announcing the decision, it proclaims that "the KFTC is the first [competition authority] to impose corrective measures on Qualcomm's unfair business model"

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5 *Id.*, Decision and Order, ¶ 7.

6 Press Release, Korea Fair Trade Comm'n, KFTC Imposes Sanctions Against Qualcomm's Abuse of SEPs of Mobile Communications (Dec. 28, 2016), *available at* www.ftc.go.kr/eng/solution/skin/doc.html?fn=0575fbdccbed8ced77b565db3dc7d32ffc7051e67ef109afad6d4f1cd780d6e8&rs=/eng/files/data/result/files/bbs/2017/, at 16 [hereinafter KFTC Press Release]; KFTC Order, *supra* note 1, Decision and Order, ¶ 9. Note that the press release states that modem chipset makers selling to handset makers that sell handsets in Korea are not covered by the scope of the remedy, but the unofficial translation of the decision indicates that these enterprises are, in fact, included in the scope of the remedy.

7 *See* KFTC Order, *supra* note 1, Decision and Order, ¶ 9.b. Although an official English translation of the KFTC's final decision is not yet available, Qualcomm believes that the final decision may actually extend the geographic scope even farther than initially stated in the KFTC's press release. The unofficial translation of the decision also covers handset manufacturer companies 1) "headquartered in Korea and its Affiliates," 2) companies "selling in or into Korea and its Affiliates," or 3) companies "supplying handsets to a company meeting the qualifications" of 1-2. *Id*.

and notes that "the measures are designed to turn 'an exclusionary ecosystem that allows Qualcomm to be an exclusive beneficiary'" and that it was seeking to "serve as the trigger to restore fair competition in the mobile communications industry."[8] In short, the KFTC's extraterritorial objectives were clearly and undeniably on display.

The KFTC's Overreach Offends International Norms

The KFTC's remedy departs dramatically from what would be permissible if undertaken by other regulators, including those in the U.S., were they similarly situated, despite what generally is regarded (by other enforcers) as expansive U.S. jurisdictional reach. It is settled law that, where foreign conduct causes harm solely to foreign commerce, independent from harm to U.S. commerce, U.S. regulators do not have authority to impose a remedy.[9] The same is true when any such harm is not direct, substantial and reasonably foreseeable as to U.S. commerce, and of the type that the antitrust laws were meant to address.[10]

Enforcement agencies' assessment of the domestic effects of foreign conduct is a crucial analytical step prior to the imposition of a remedy. This analysis assures that the remedy is appropriately constrained to instances of domestic injury.[11] Importantly, even where a U.S. agency determines foreign conduct has the prerequisite effect on U.S. commerce, an agency will seek a remedy that includes conduct or assets outside the U.S. *only* to the extent that including them is necessary to redress harm or threatened harm to U.S. commerce and consumers.[12] This principle was recently reiterated in the agencies' *Antitrust Guidelines for International Enforcement and Cooperation*.[13] Moreover, even where voluntary commitments by parties are broad, they must be construed narrowly to confine the effect to the appropriate jurisdiction of the U.S. federal courts.[14]

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8 KFTC Press Release, *supra* note 6, at 2.

9 *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 159 (2004); *c.f.* Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 853-54, 860 (7th Cir. 2012) (*en banc*) (concluding no direct effect, and thus no Sherman Act liability, is possible in the "situation in which action in a foreign country filters through many layers and causes a few ripples in the United States.").

10 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 3.2 (Jan. 13, 2017), *available at* www.justice.gov/atr/internationalguidelines/download [hereinafter U.S. INT'L GUIDELINES].

11 Assessing the effects of foreign conduct can be a fact-intensive inquiry and, in the U.S., typically involves the collection and analysis of evidence to determine: "(1) whether the [conduct] was the proximate cause of the effect, (2) whether the effect was substantial, and (3) whether that effect was a result of the [behavior] that was foreseeable to a reasonable person making practical business judgments." *See, e.g., id*., § 3.2 (Illus. Ex. C).

12 Polypore Int'l, Inc. v. Fed. Trade Comm'n, 686 F.3d 1208, 1219 (11th Cir. 2012) (affirming Commission decision in a merger matter with remedy including assets located outside the United States); United States. v. Cont'l AG & Veyance Technologies, No. 14-cv-2087 (D.D.C. 2014) (facilities in Mexico divested); U.S. v. Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. DE C.V., No. 13-cv-127 (D.D.C. 2013) (brewery in Mexico divested); *In re* Victrex, plc, Dkt. No. C–4586 (FTC July 14, 2016) (remedy prohibiting contract provisions that could result in exclusivity, including when products are manufactured or sold abroad for use in products sold or cleared for use in the United States); In re Intel Corp., Dkt. No. 9341 (FTC Nov. 2, 2010) (remedy including requirements regarding licensing with foreign CPU maker that potentially competed with Intel in order to restore competition in United States).

13 U.S. INT'L GUIDELINES, *supra* note 10, § 5.1.5.

14 *See* Maureen K. Ohlhausen, Acting Chairman, U.S. Federal Trade Comm'n, Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity and Constraints, Address Before the International Bar Association 21st Annual Competition Conference 7 (Sept. 8, 2017), *available at* www.ftc.gov/system/files/documents/public_statements/1252733/iba_keynote_address-international_guidelines_2017.pdf.

In the final decision and order, the KFTC completely foregoes this important analysis—neglecting to analyze which of Qualcomm's licensing practices have a direct, substantial and foreseeable effect on the Korean domestic market.[15] Instead, the KFTC broadly concludes, without analysis, that any licensing to any enterprise anywhere has a "direct, significant and reasonably predictable influence" on the domestic market as long as that *enterprise* has some token connection to sales of handsets or components in Korea.[16] They reach this conclusion without regard to whether the relevant activities of those enterprises relate to products sold in Korea.[17]

Moreover, the KFTC does not address why commerce that is *purely* foreign to Korea is properly caught by its orders. The only observable motivation within the decision is the explicit endeavor to provide favorable licensing terms to Korean companies irrespective of whether the commerce at issue relates in any way to domestic commerce.

In addition, the KFTC fails to apply basic comity principles. It did not consider whether its decision, or the outlier substantive standards it applied, was in conflict with foreign law. For example, it did not consider whether its compulsory licensing remedy conflicts with U.S. case law and longstanding agency practice which honor an IP holder's core right to exclude, and impose a general presumption of legality for unilateral unconditional refusals to license.[18] Moreover, it failed to consider comity beyond strict conflict principles. The DOJ and FTC recently described its approach to comity in Section 4.1 of the International Guidelines:

> [T]he Agencies will assess the articulated interests and policies of a foreign sovereign *beyond whether there is a conflict with foreign law*. In determining whether to investigate or bring an enforcement action regarding an alleged antitrust violation, the Agencies consider the extent to which a *foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct*.[19]

Under this standard, the KFTC should have considered whether the U.S. has different

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15 *See, generally,* KFTC Order, *supra* note 1, Reasoning, ¶¶ 480-83.

16 *See id*., Reasoning, ¶ 482; *see also id*., Decision and Order, ¶¶ 1-9.

17 *See id*.

18 *In re* Indep. Serv. Org. Antitrust Litig., 203 F.3d 1322, 1327–28 (Fed. Cir. 2000) ("In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws. We therefore will not inquire into his subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant."); U.S. DEP'T OF JUSTICE & U.S. FED. TRADE COMM'N., ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 30 (Apr. 2007), *available at* www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf ("Taking all of the relevant factors together—including the fact that no case supported this type of antitrust liability before *Kodak*, and the silence of section 271(d)(4) on the issue, the Agencies conclude that liability for mere unconditional, unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections."); U.S. DEP'T OF JUSTICE & U.S. FED. TRADE COMM'N., ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 3 (Jan. 12, 2017), *available at* www.justice.gov/atr/IPguidelines/download ("The antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation.").

19 U.S. INT'L GUIDELINES, *supra* note 10, § 4.1 (emphasis added).

standards for IP licensing and remedies involving IP, but it did not.

Even under the broadest possible reading of a standard requiring domestic impact, the KFTC's orders are impermissibly overreaching.

Dangers of the KFTC Remedy If Allowed to Stand

The implications of the KFTC's remedy are extraordinary. The decision presumes that the KFTC may fully regulate not only the IP rights conferred by foreign sovereigns, but the commerce conducted between private parties in foreign jurisdictions, irrespective of whether the commerce between those parties has any impact on Korean consumers. It divorces the remedy from the consumer welfare implications within Korea—the only interests the KFTC is justified in protecting.

The worldwide scope of the orders is particularly striking given that the rights they control—namely patent rights—are by their nature strictly territorial. It is a bedrock principle of patent law, reaffirmed by the U.S. Supreme Court on several occasions, that a U.S. patent can only be enforced against activities occurring inside the territory of the United States.[20] Despite this clear limitation on the reach of U.S. and other non-Korean patents, the KFTC takes it upon itself to dictate Qualcomm's rights with respect to non-Korean patents in the United States and other countries around the world.

If the KFTC is permitted to assert this level of authority over the world's commerce, then the potential for commercial chaos is virtually limitless. The KFTC will already have established the principle that a shadow of an effect on a country's domestic commerce *or on its domestic producers* is sufficient justification to march into the specific terms on which a company can compete around the globe. And, if one country begins to use its competition laws as a tool of industrial policy, it is sure that others will follow, creating a huge potential for conflicting remedies and the use of competition law as a tool of *global* industrial policy.

In short, the KFTC's proposed remedy would mark the first step in a race to the bottom. A single sweep of the pen would allow a competition agency to advantage its domestic champions in global markets, with no consequence. The U.S., with its many companies that have global reach and make enormous contributions to technology and IP development, would be at the greatest risk.

The KFTC's remedial order in the Qualcomm case represents an attempted overreach of the kind that the international competition and legal community should not abide. If the basis for the KFTC's decision is upheld on legal grounds, which remains to be seen, the remedy should be properly constrained to the effect on its domestic consumers, not used to advantage its domestic champions.

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[20] *See, e.g.*, Life Technologies Corp. v. Promega Corp., 137 S.Ct. 734, 743 (2017) ("when . . . a product is made abroad and all components but a single commodity article are supplied from abroad, this activity is outside the scope of the statute [on patent infringement, 35 U.S.C. § 271]"); Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 441 (2007) ("It is the general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country.").