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I. INTRODUCTION

With last month's widely anticipated conclusion of the investigation by China's National Development and Reform Commission ("NDRC") of Qualcomm, Inc.'s licensing practices, the Chinese antitrust authority announced its intention to wade into the worldwide battles between holders of standard-essential patents and those companies that implement those standards in their devices, such as smartphones or tablets.

Although reports of the approximately $975 million settlement, equal to 8 percent of Qualcomm's 2013 Chinese revenues, have garnered most of the attention, it is the range of behavioral remedies agreed to that may well have the greatest long-term significance for Qualcomm and other companies engaged in licensing standard-essential patents.

II. THE INVESTIGATION AND CONCERNS

Qualcomm, a leading provider of chips for mobile telephones and a leading innovator in related software technology, was notified of NDRC's active inquiry into the company's patent licensing practices in November of 2013. The ensuing investigation that culminated in the February settlement apparently encompassed evidence provided by mobile device manufacturers, rival chip makers, raids on Qualcomm facilities, and cooperative interaction with Qualcomm executives.

According to reports, the NDRC was concerned that through a series of interrelated technology licensing practices affecting Chinese mobile device manufacturers, Qualcomm had violated China's anti-monopoly law ("AML") by abusing a dominant market position in both the 3G and 4G wireless communications standard-essential patent licensing markets and also in the baseband chip market. These alleged abuses fit broadly into three categories:

1. **Charging Excessive Patent Licensing Fees**: The allegations of excessive pricing were not based on any one discrete element of conduct or license term, but rather included concerns that: (i) Qualcomm's licensing offerings charged for expired patents, (ii) Qualcomm insisted on royalty-free grant-backs to the licensee's patents, (iii) Qualcomm charged a higher rate to licensees forced to accept a package that included non-essential patents, and (iv) Qualcomm based its royalties on the value of the end product.
2. **Tying or Bundling of Essential Patents and Non-Essential Patents**: Qualcomm was alleged to have used its dominant position in wireless standard-essential patents to force

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licensees to accept package licenses that included non-essential patents without justification.

3. **Abuses Related to the Sale of Qualcomm's Baseband Chips**: Qualcomm was alleged to have conditioning the sale of baseband chips on an agreement that its customers enter a patent license that included the allegedly abusive terms described above and also agree not to challenge that agreement. In this manner, Qualcomm was alleged have used its dominant position in chipsets to force the acceptance of the allegedly unfair license agreements.

III. REMEDIES

In addition to its agreement to pay a fine equal to approximately $975 million, Qualcomm agreed to implement several behavioral-type remedies related to the conduct that was the focus of the investigation. Going forward, Qualcomm will be required to license its standard essential Chinese patents at 5 percent for 3G mobile devices and 3.5 percent for 4G devices, based on 65 percent of the net selling price of devices sold for use in China.

In addition, Qualcomm:

1. will provide a list of patents during negotiations and not charge a fee for expired patents,
2. will not require royalty-free grantback or reverse license from licensees,
3. will refrain from tying non-wireless communication standard-essential patents in licensing packages (without justification), and
4. will not condition the supply of chips on customers' agreement to entering a licensing agreement with unreasonable terms, including no-challenge clauses.

IV. COMMENTARY

According to various public reports, a focal point of the NDRC investigation had been Qualcomm's use of the value of the end product as the base for the application of its royalty rates. Significantly, while the NDRC remedy can be fairly described, as *Forbes* does, as having achieved a "35% price reduction," the NDRC accepted the selling price of the end device as the appropriate royalty base.[2] This resolution may reflect either the agency's recognition that the value of the intellectual property in question is appropriately realized by reference to the end product, notwithstanding the 65 percent limitation, or simply the agency's view that market forces and customary practice—not antitrust policy—should control in this area.

Also of significance is the limitation of the remedy's application to devices sold for use in China by Chinese manufacturers. An issue frequently raised in national agency enforcement activities related to intellectual property licensing is the potential extraterritorial reach of remedial orders. The action by NDRC appears to address that concern head-on.

[2] Patrick Moorhead, *Qualcomm Settlement With China's NDRC Removes Major Speedbump*, FORBES (Feb. 10, 2015), *available at* http://www.forbes.com/sites/patrickmoorhead/2015/02/10/qualcomm-settlement-with-chinas-ndrc-removes-major-speedbump/.

As the formal remedial order becomes public, it will be interesting to undertake further examination and to assess the extent to which its apparent underlying rationale may be considered and applied by agencies in other jurisdictions.