CLEARY GOTTLIEB

ALERT MEMORANDUM

March 16, 2015 clearygottlieb.com

China's NDRC Concludes Qualcomm Investigation, Imposes Changes in Licensing Practices

On March 2, 2015, China's National Development and Reform Commission ("NDRC"), the agency responsible for investigating price-related violations of China's Anti-Monopoly Law (the "AML"), published a decision (the "NDRC Decision")[1] regarding its investigation into alleged anticompetitive conduct by Qualcomm Incorporated ("Qualcomm"), the world's largest smartphone chipmaker. Qualcomm was found to have engaged in anticompetitive conduct relating to the licensing of standard essential patents ("SEPs") for wireless communication technology and baseband chip sales.

NDRC ordered Qualcomm to cease certain anticompetitive conduct and pay a fine of RMB 6.088 billion (~$975 million), the largest penalty imposed to date under the AML. Qualcomm announced that it would not contest the NDRC Decision and agreed to change certain of its patent licensing and baseband chip sales practices in China.[2]

I. SUMMARY

The most important aspect of the NDRC Decision is that SEP licensors of Chinese patents are now required to pay reasonable rates for cross-licenses of Chinese patents. This could have a major impact, especially if this principle is followed elsewhere, considering that a licensee should in principle be able to charge royalties for cross-licensed patents on the same basis as the royalties charged by the licensor, subject to appropriate adjustments to reflect any differences in the innovative value of the licensed and cross-licensed patents.

While the royalty base for Qualcomm's SEPs is reduced to 65% of the device wholesale price, which mitigates the royalties at least to some extent (although the license will no longer include Qualcomm's non-SEPs), the NDRC Decision does not require that royalties be based on the "smallest saleable component" (the chip), as some had advocated. Nor does the NDRC Decision require Qualcomm to lower its

[1] NDRC Administrative Sanction Decision No. 1 [2015] (Mar. 2, 2015), *available at* http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html. NDRC previously announced the conclusion of its 15-month investigation (the "NDRC Announcement"): NDRC Ordered Qualcomm to Rectify Its Anti-Competitive Behavior and Imposed a Fine of RMB 6 Billion (Feb. 10, 2015), *available at* http://www.sdpc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html (summarizing the NDRC Decision).

[2] Press Release, Qualcomm, Qualcomm and China's National Development and Reform Commission Reach Resolution ("Qualcomm Press Release") (Feb. 9, 2015), *available at* https://www.qualcomm.com/news/releases/2015/02/09/qualcomm-and-chinas-national-development-and-reform-commission-reach.

royalty percentages, except if and to the extent patents expire without being replaced by new patents of equal value.

Another implication of the NDRC Decision is that licensors must not tie SEPs to non-SEPs, although voluntary portfolio licenses are not prohibited.

While the royalty reduction applies to all devices sold for use in mainland China, the benefits of the other remedies appear to be largely limited to device makers that manufacture in mainland China. Since Qualcomm is subject to a non-discrimination obligation under its FRAND obligations, however, device makers that manufacture outside mainland China are expected to argue that they are entitled to the same treatment, at least for sales in mainland China in competition with Chinese OEMs and possibly elsewhere.

The remainder of this memorandum provides (i) a background on NDRC's investigation; (ii) an overview of the *Qualcomm* decision; (iii) an analysis of the implications for other technology companies doing business in China; and (iv) a discussion of key procedural aspects of NDRC's investigation.

II. BACKGROUND

Since the AML entered into force in 2008, NDRC has gradually increased its enforcement efforts. NDRC focused initially on local cartels, fining an international cartel (LCD panels) for the first time in January 2013. Since then, NDRC has investigated both domestic and international cartels and resale price maintenance matters. In 2014, NDRC and its local agencies imposed total fines of approximately RMB 1.8 billion (~$293 million) for violations of the AML.

NDRC did not dedicate significant resources to abuse of dominance cases until June 2013, when it launched an investigation of InterDigital, Inc. ("InterDigital"), a U.S.-based patent licensing entity.[3] Since then, NDRC – along with the other two Chinese antitrust authorities[4] – has increased its scrutiny of intellectual property rights, as evidenced most recently by the NDRC Decision in *Qualcomm* and NDRC's ongoing investigation of Vringo.

[3] Before 2013, NDRC and its local agencies investigated only three publicly reported abuse of dominance cases, all of which involved domestic Chinese companies: Wuchang Salt (product tying), China Telecom and China Unicom (discriminatory treatment/margin squeeze), and two pharmaceutical companies (refusal to deal). Around the same time as the *InterDigital* investigation, NDRC's local agencies launched two excessive pricing investigations: Guangdong river-sand and Qinghai pasteurized milk.

[4] The State Administration for Industry and Commerce ("SAIC") is drafting "Rules on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition." The Ministry of Commerce ("MOFCOM") has tackled IP rights issues in the context of merger review, as demonstrated by the conditional approvals granted in Google/Motorola Mobility, Microsoft/Nokia, and Merck/AZ Electronic Materials.

III. OVERVIEW OF THE QUALCOMM DECISION

NDRC's investigation of Qualcomm began in November 2013 with a dawn raid at the company's Beijing and Shanghai offices, and took more than fifteen months to complete.

A. Market Definition and Dominance

NDRC concluded that (i) there were separate markets for the licensing of each wireless communications SEP in the relevant country/region of registration (consistent with the approach taken by the Chinese courts in the *InterDigital* matter); (ii) that the Qualcomm case therefore concerned a collection of relevant SEP licensing markets; and (iii) that CDMA baseband chips, WCDMA baseband chips, and LTE baseband chips, respectively, constitute three separate relevant global downstream markets. This approach to market definition is broadly in line with U.S. and EU competition law.

NDRC further held that Qualcomm's dominance in the market for licensing of each relevant wireless communications SEP could be presumed, according to Articles 18 and 19 of the AML, based on its 100% market share, which largely exceeded the 50% presumption threshold. This was further supported by Qualcomm's ability to control pricing and other competitive dynamics in the relevant market, wireless communications device makers' dependence on Qualcomm's SEPs, and high entry barriers. According to NDRC, Qualcomm did not provide evidence rebutting the allegation of dominance.

NDRC also held that Qualcomm has a dominant position in the CDMA, WCDMA, and LTE baseband chip markets, based on Qualcomm's market share of above 50% (by value) in each market. Calculating market shares by value, in NDRC's view, provided a better representation of market power than volume shares. NDRC also stated that Qualcomm's higher market share by value meant that the company could impose a higher average selling price than its competitors, which further supported a claim of dominance.

B. Anticompetitive Conduct

NDRC determined that Qualcomm engaged in several types of anticompetitive conduct:

1. Charging Excessive Royalties. NDRC found that Qualcomm charged excessive royalties when licensing its patents to Chinese companies, including by:

    a. Requiring Chinese licensees to cross-license their relevant SEPs and non-SEPs to (or not assert their relevant patents against) Qualcomm and its customers without compensation and without offsetting royalties. Importantly, NDRC noted that these royalty-free cross-licenses could also give Qualcomm advantages over its baseband chip competitors, creating barriers to entry into baseband chip markets;

b. Bundling wireless SEPs (which are essential) and non-wireless SEPs (of uncertain value) into a package;

c. Imposing patent rates based on the net wholesale prices of handset devices;

d. Failing to provide patent lists to negotiation counterparties; and

e. Effectively charging for expired patents by imposing the same royalty rate in long-term or indefinite licensing agreements without taking account of expired patents (and without being able to show that the value of newly added patents is equivalent to the value of expired patents).

2. Bundling SEPs and Non-SEPs without Justification. NDRC found that, when offering patent licenses, Qualcomm bundled wireless communications SEPs with non-SEPs, without justification. NDRC found that this practice restricted non-SEP licensing by Qualcomm's competitors. NDRC rejected Qualcomm's argument that it can be difficult to distinguish between SEPs and non-SEPs and insisted, without much explanation, that distinguishing the two is manageable and normal practice.

3. Imposing Unreasonable Sales Terms on Baseband Chip Customers. NDRC found that Qualcomm conditioned its supply of baseband chips on unreasonable licensing terms (as described above) and on a covenant not to challenge the licensing agreements (the Qualcomm Press Release limited this covenant to not challenging "unreasonable terms").

Based on these findings, NDRC determined that Qualcomm violated Article 17(i) (selling products at unfairly high prices) and Article 17(v) (tying products or imposing unreasonable conditions on trade) of the AML, eliminated and restricted market competition, hindered and repressed technology innovation and development, and harmed consumer interests.

C. Remedies

NDRC required Qualcomm to (i) cease the anticompetitive conduct; (ii) pay a fine of RMB 6.088 billion (~$975 million); and (iii) implement rectification measures agreed upon by Qualcomm and NDRC (these measures will travel with Qualcomm's SEPs if they are transferred), including:

1. Lower Royalty Base. According to the Qualcomm Press Release, Qualcomm agreed to reduce the basis for royalties to 65% of the net selling price of branded

devices sold for use within mainland China. The NDRC Announcement and Decision emphasized, however, that the relevant net selling price is the "wholesale" price, and did not limit this rectification measure to "branded" devices only. Qualcomm was not required to change the royalty percentage – 5% for SEPs relating to 3G devices (including multimode 3G/4G devices), and 3.5% for SEPs relating to 4G devices (including 3-mode LTE-TDD devices) that do not implement CDMA or WCDMA. Thus, the 3.5% royalty only applies to LTE devices that are not backward compatible. The 35% reduction of the royalty base is partially offset, however, by the fact that the licenses no longer include non-SEPs so that at least those licensees who use Qualcomm's non-SEPs will have to pay additional royalties for their use.

2. No Charge for Expired Patents. For wireless communications device makers within mainland China, Qualcomm agreed to provide patent lists regarding its current 3G and 4G essential Chinese patents and is prohibited by NDRC from charging royalties for expired patents. This implies that the royalty rate may change over time, as patents expire, unless expired patents are replaced by new patents that Qualcomm can show are equally valuable. However, the Qualcomm Press Release does not refer to any such potential reduction.

3. No Cross-License of Non-SEPs against Licensees' Will and No Cross-License without Fair Compensation. NDRC barred Qualcomm from requiring cross-licenses of non-SEPs from licensees against their will and requiring cross-licenses without fair compensation. To that end, Qualcomm announced it would negotiate in good faith and provide fair consideration when seeking a cross-license from a Chinese licensee in connection with a license to Qualcomm's current 3G and 4G SEPs.

4. Eliminating Bundling of SEPs and Non-SEPs without Justification. Qualcomm agreed to offer licenses to its current 3G and 4G Chinese SEPs separately from licenses to its other patents.

5. Modifying Sales Terms for Baseband Chips. Qualcomm agreed not to condition its supply of baseband chips to wireless communications device makers within China on their willingness to enter into patent licensing agreements with the above-mentioned unreasonable licensing terms or on their agreement not to challenge such unreasonable terms. While not specifically mentioned in the NDRC Announcement or the NDRC Decision, the Qualcomm Press Release further specified that (i) Qualcomm is not required to sell chips to any entity that is not a Qualcomm licensee; and (ii) this obligation does not apply to chip customers that refuse to report their sales of licensed devices as required by the licensing agreement.

Although the NDRC Decision stated that Qualcomm may apply for administrative or judicial review, Qualcomm said it would not challenge NDRC's findings or penalty and would continue to increase investment in China. NDRC expressed its support for Qualcomm's continued investment in China and stated that it "will support Qualcomm in charging reasonable royalties for its technologies which are under patent protection." This is understood to suggest that NDRC will not object to Qualcomm's enforcement of its patents against Chinese OEMs who have refused to pay for a FRAND license. Various mobile device manufacturers welcomed NDRC's Decision.[5]

IV. ANALYSIS

A. Increased NDRC Scrutiny of Patent Holders' Pricing and Licensing Practices

The *Qualcomm* case highlights the NDRC's active enforcement of China's AML, including by regulating the pricing practices of patent holders. This is noteworthy since antitrust authorities in other jurisdictions have been reluctant to review excessive pricing (even the European Commission has not conducted such reviews, despite having power to do so under Article 102(a) TFEU).

China has repeatedly demonstrated its willingness to regulate patent licensing practices of foreign companies, as evidenced by the *Qualcomm* case and two recent proceedings involving InterDigital. In December 2011, Huawei, a Chinese manufacturer and provider of telecommunications products, initiated litigation against InterDigital, seeking damages for InterDigital's alleged abuse of its dominant market position and failure to license SEPs on FRAND terms.[6] In June 2013, shortly after the lower court decision in the civil litigation, NDRC initiated an investigation of InterDigital. NDRC suspended its investigation without imposing a fine in May 2014 after InterDigital agreed to change certain licensing practices, including compliance with FRAND principles when

5 Companies such as Samsung China, Huawei Technology Company Limited ("Huawei"), ZTE Corporation, and MediaTek Inc. welcomed NDRC's decision. *See,* Samsung China Announcement (Feb. 13, 2015), *available at* https://china.samsung.com.cn/News/NewsDetail/10084; *See also*, MediaTek Announcement (Feb. 10, 2015), *available at* http://www.mediatek.com/zh-CN/news-events/mediatek-news/15/; *See also*, *Huawei and ZTE Reacted to the Antitrust Decision in Qualcomm Case: NDRC's Decision Welcomed,* China News (Feb. 10, 2015).

6 The lower court ordered InterDigital to pay RMB 20 million (~$3.3 million) in damages to Huawei and to license the patents at a royalty not to exceed 0.019% of the sale price of the relevant Huawei products. In October 2013, the Guangdong People's High Court upheld the lower court's ruling that InterDigital violated the AML with its licensing practices (the "*InterDigital* Decision"). The full text of the decisions in Chinese is *available at* http://www.gdcourts.gov.cn/ecdomain/framework/gdcourt/jndbijapddnebboelcfapbecpepdnhbe.jsp?wsid=LM4300000201404170243091131155&sfcz=0&ajlb=5 and http://www.gdcourts.gov.cn/ecdomain/framework/gdcourt/jndbijapddnebboelcfapbecpepdnhbe.jsp?wsid=LM4300000201404170309021586689&sfcz=0&ajlb=5.

negotiating licensing agreements with Chinese manufactures and agreeing not to require Chinese manufacturers to provide royalty-free cross-licenses.[7]

B. Balanced Outcome

Despite concerns about NDRC's increased scrutiny of patent holders, the NDRC Decision contains elements favorable to patent holders that have aggressively interpreted FRAND.

First, Qualcomm retained its ability to calculate royalties based on the wholesale price of the entire device (albeit limited to 65% of that price), rather than only on the price of the chip, the smallest saleable component, as many have advocated. Notably, NDRC's approach conflicts with the proposal by the Electronic Intellectual Property Center of China's Ministry of Industry and Information Technology ("MIIT") to use the smallest saleable component as the base.[8] The result is not only that Qualcomm has been able to preserve part of its royalty formula, but also that Qualcomm has avoided a duty to license at the chip level, which could in turn have led to patent exhaustion.

Second, by resolving NDRC's investigation, Qualcomm has improved its ability to collect revenues from Chinese licensees that previously allegedly underreported their use of Qualcomm's patents. Indeed, after NDRC's investigation, Qualcomm announced an improved revenue forecast for fiscal 2015.[9]

That said, the NDRC Decision contains a change that could have a major impact, in that SEP licensors of Chinese patents (i) are now required to pay reasonable rates for cross-licenses of Chinese patents; and (ii) cannot insist on a cross-license of non-SEPs as a condition for an SEP license. Licensees who cross-license SEPs must, of course, comply with FRAND obligations (if any) for the cross-license of their SEPs, but terms that are considered FRAND for Qualcomm patents (including the basis for royalty calculations and the rate) are presumably also FRAND for cross-licensed SEPs, subject to appropriate adjustments to reflect any differences in the innovative value of the

[7] Press Release, InterDigital Inc., China's NDRC Accepts InterDigital's Commitments and Suspends Its Investigation (May 22, 2014), *available at* http://ir.interdigital.com/releasedetail.cfm?ReleaseID=849959 (Specifically, InterDigital's commitments included: (i) offering potential licensees SEPs without requiring the licensing of non-SEPs and complying with FRAND principles in royalty negotiations; (ii) not requiring Chinese licensees to grant royalty-free cross-licenses of SEPs; and (iii) offering Chinese licensees the opportunity to arbitrate licensing terms of SEPs before InterDigital seeking exclusionary or injunctive relief).

[8] *See, e.g.*, Article XI of the Draft Template for Intellectual Property Rights Policies in Industry Standards Organization issued by the Electronic Intellectual Property Center of MIIT, unofficial translation *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_20150129.authcheckdam.pdf ("Article XI. The Member making a commitment to license its Necessary Claims under FRAND terms and conditions agrees that a reasonable royalty may consider the following factors . . . [including] [t]he value contributed to a Compliant Portion by a Necessary Claim, *assessed against the smallest component or device* that is compliant with the Final Standard and that practices the relevant Necessary Claims.") (emphasis added).

[9] *Qualcomm in $975m record China fine*, Financial Times (Feb. 10, 2015).

licensed and cross-licensed patents. In addition, cross-licensors are free to charge at will for non-SEPs not covered by FRAND obligations.

This ban on extracting non-FRAND cross-licenses eliminates discrimination against certain patent-rich licensees (who previously paid the same royalty as patent-poor licensees but also had to give a free cross-license to their patents, thus bearing an additional opportunity cost and giving up any ability to differentiate their products from other licensees through non-essential innovation). The effect of the ban is not merely limited to the level of the royalties, but can also be expected to have impact on downstream markets. It has been argued, for instance, that Qualcomm's collection of royalty-free cross-licenses to SEPs and non-SEPs gave its chips an unassailable competitive advantage because buyers of Qualcomm chips received a better deal than buyers of non-Qualcomm chips (who pay the same royalty to Qualcomm, but do not receive rights to use Qualcomm's licensees' patents). This had the effect of raising barriers to Qualcomm's chip rivals. The NDRC Decision reduces or eliminates this concern.

C. Calculation of Royalty Base and FRAND Rate for SEPs

The NDRC Decision contains no indication of the proper approach to determining a royalty base or a FRAND rate for SEP licenses.

Royalty Base. As noted above, despite support for use of the "smallest saleable component" as the base for setting royalties, NDRC allowed Qualcomm to set royalties based on 65% of the wholesale net selling price of the device – apparently as a negotiated compromise between the full wholesale price of a device and the "smallest saleable component" concept, or as a reflection of the fact that the future licenses will likely in practice continue to include Qualcomm non-SEPs. A principled analysis should have included a review of economic value, or industry expectations of royalty levels and basis, at the time when the standard was set.

This approach differs from that taken in the *InterDigital* Decision, where the Chinese court set the proper royalty rate at 0.019% of the price of the relevant products. In that case, the court compared the royalty rate charged to Chinese licensees to that charged to non-Chinese licensees. The result is to leave Chinese precedent in some state of confusion in this respect. NDRC may have concluded that what matters is not the formula for the calculation of the royalty, but whether the net amount is commensurate to the value of the technology. The NDRC Decision did not contain an indication of the value, however, or whether value must be calculated on an *ex ante* basis (*i.e.*, before the industry was locked into the standard to which the SEPs apply), as authorities and courts in the United States and the EU have found.

Royalty Rate. Given the lack of supporting information in the NDRC Decision, it is not clear how the relevant percentages (the 5% rate for 3G, and the 3.5% rate for

LTE) were calculated,[10] other than that these are reported to be rates that Qualcomm charged in the past. This appears to be the result of a negotiated compromise, which affects its precedential value.

Moreover, the NDRC Decision does not set the royalty rate for Qualcomm's non-SEPs, which Qualcomm will in the future offer separately from its SEPs and which could also include *de facto* essential patents. Qualcomm announced that it would maintain its 5% and 3.5% royalty rates, even though the royalties now include only SEPs (unbundled from non-SEPs), which some interpret to suggest that Qualcomm is charging a zero royalty for its non-SEPs.

D. Beneficiaries of the NDRC Decision

The NDRC Decision only covers Qualcomm's dealings with wireless communications device makers that make or sell devices in mainland China and that were "closely related to market competition and consumer interests within the territory of [mainland] China." The territorial scope of NDRC's remedies differs depending on the remedy: the change in the royalty base applies to devices sold for use in mainland China regardless of where they were made, whereas the changes with respect to the remaining remedies apply only to device makers located within mainland China. The rectification measures do not apply to Qualcomm's licensing practices outside mainland China that do not significantly affect competition in mainland China.

This is not to say that the NDRC Decision will have no effect outside China. Device makers that manufacture elsewhere but sell into China may be able to avail themselves of Qualcomm's non-discrimination obligation pursuant to its FRAND promise and any applicable competition law. Moreover, the NDRC remedies can be expected to be invoked outside China as a benchmark for FRAND terms.

E. Significance of Qualcomm's Fine

Qualcomm's fine of RMB 6 billion (~$975 million) is the largest fine imposed to date for a violation of the AML, three times larger than the total fines imposed by NDRC in 2014. Previously, the largest fine handed down by NDRC under the AML in a single case was the RMB 832 million (~$136 million) fine imposed on seven of the eight participants in the auto parts cartel, and the largest fine imposed on a single company was the RMB 290 million fine (~$47 million) against Sumitomo Electric.

[10] Article 11 of the Anti-Price Monopoly Rules provided that, when determining whether excessive pricing exists, the following should be taken into consideration: (i) whether the sale price is significantly higher than the sale price of other competitors; (ii) if the cost is generally stable, whether the sale price is increased beyond normal scale; (iii) whether the sale price increase level is significantly higher than the cost increase level; and (iv) other factors.

NDRC may impose a fine of 1% to 10% of the prior year's turnover. The Qualcomm fine represents approximately 8% of Qualcomm's 2013 sales in China (notably, this is not limited to sales of the relevant products). NDRC previously only issued fines closer to 10% of turnover in hard-core cartel cases. NDRC stated that it based the fine on the severity and duration of Qualcomm's anticompetitive conduct.[11] In a press conference held by NDRC on February 10, 2015,[12] Director General Xu explained that NDRC reduced Qualcomm's fine by two percentage points based on its cooperation with the investigation. It is a matter of some concern, nonetheless, that such a high fine could be imposed for practices that were controversial, but for which not very clear precedent existed.[13] Contrast this with the *Motorola* SEP case in the EU, where no fine was imposed in view of the absence of precedent.[14]

V. PROCEDURAL ANALYSIS

The February 10 NDRC press conference revealed that two American companies complained to NDRC about Qualcomm's anticompetitive conduct in 2009, and in August 2014, another American company, together with Chinese and Asian companies, also filed complaints. During its 15-month investigation, NDRC and Qualcomm communicated on at least 28 occasions, eight of which were meetings attended by DG Xu and Qualcomm's Chief Executive Officer, Steven Mollenkopf.

NDRC's conduct in the investigation faced significant pressure from the United States, which challenged China's disproportionate focus on foreign companies and lack of due process and transparency.[15] In response, NDRC denied charges of selective

---

11 Article 47 of the AML authorizes the antitrust authority to confiscate illegal gains and impose a fine between one and ten percent of the prior year's turnover. Article 49 of the AML stipulates that the antitrust authority shall take into consideration factors such as the nature, extent, and duration of the violation when setting the fine.

12 *See NDRC explains why it has not imposed a 10% fine*, Xinhua Press (Feb. 10, 2015).

13 The *InterDigital* case could have been taken as a precedent, but it is recent and does not explain the basis for a finding of excessive royalties. The NDRC Decision could have mentioned, but did not refer to, the Supreme People's Court Circular (Document 2008 Min San Ta Zi No. 4) on construction standards, which provides that, "if a patentee has participated in setting a standard or if, upon its consent, its patent is incorporated into a national, industrial or local standard, it is considered that the patentee permits any third party to exploit the patent while implementing such standard, and a third party's exploitation of that standard shall not constitute an infringement as provided by Article 11 of the PRC Patent Law [which grants a patent holder exclusive rights to practice the invention]. The patentee may request the exploiting party to pay royalties. However, such fees shall be substantially lower than the normal licensing fees."

14 Case AT.39985 – Motorola – Enforcement of GPRS Standard Essential Patents, European Commission's Decision (Apr. 29, 2014), at para. 561, full text *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

15 Various senior Chinese officials, including the Chinese Premier, Chinese Vice Premier, and spokesman of the China Foreign Affairs Ministry, separately defended NDRC, emphasizing that antitrust investigations are conducted in accordance with Chinese law and are transparent and fair. China's three antitrust regulators also held a joint press conference to defend their recent investigations into foreign companies, reiterating that antitrust enforcement is not selective but "fair and transparent."

enforcement, reported that Qualcomm had launched extensive lobbying efforts against its investigation, and removed antitrust economist Mr. Xinzhu Zhang from the Expert Advisory Panel of the Anti-Monopoly Commission on the ground that Mr. Zhang violated the Advisory Panel's rules by advising Qualcomm in this case.[16] In order to build its case and gain public support for its findings, NDRC not only reportedly invited some competition lawyers and experts to attend meetings with Qualcomm and asked think-tanks and academics to publish reports in favor of NDRC's position, but also made some efforts to improve transparency by issuing timely (and unprecedented) press releases after many meetings with Qualcomm's senior executives. Although the reports were very short, they provide some insight into the meetings, including by demonstrating that Qualcomm's legal advisors were present and trying to clarify the focus of NDRC's investigation. It appears that, to a certain extent, Qualcomm was given the opportunity to present a defense – a positive development in light of prior media reports describing a confession-focused culture at NDRC.

VI. CONCLUSION

The *Qualcomm* case demonstrates the willingness of NDRC, along with MOFCOM and SAIC, to use the AML to challenge patent licensing practices in the technology sector. While the fine imposed on Qualcomm was high, the rectification measures will not completely change Qualcomm's business practices – while royalties were reduced by about 35%, and Qualcomm will have to provide reasonable consideration for cross-licenses, Qualcomm can continue using its 5% and 3.5% royalty rates on a base determined by the overall device wholesale price (much higher than the royalty rate determined in the *InterDigital* Decision), it may independently set the royalty rate for its non-SEPs (which may well contain *de facto* SEPs), and it may limit its chip sales to entities that conclude and abide by licensing agreements. SEP owners doing business in China should evaluate the antitrust implications of their own licensing practices accordingly. Non-practicing entities in particular should take note.

* * *

Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practice" section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

It should be kept in mind that Qualcomm has been and is under investigation in various jurisdictions, including the United States, the EU, South Korea, and Taiwan, and that decisions and judgments have been entered against Qualcomm in the United States, Japan, and South Korea.

16 *See China sacks anti-monopoly adviser over Qualcomm payment: Xinhua*, Reuters (Aug. 13, 2014); *see also China: Monopoly position – Architect of Beijing's antitrust laws say they are being used in a turf war between regulators,* Charles Clover, Financial Times (Jan. 25, 2015).

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099