

经营者集中反垄断审查中的知识产权问题

IPR Issues in Merger Review

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1、知识产权与反垄断法的一般关系

General Relationship between IPR and AML

- 两者具有相同的价值取向——促进创新
Both have the same value orientation - promoting innovation
- 中国是技术的引进国，政府将知识产权发展列为了国家战略
As a technology licensee country, China views the development of intellectual property rights as a national strategy
- 知识产权的不当使用可能违反反垄断法
The undue use of IPR may violate AML.
- 处理涉及知识产权的反垄断问题应该保持谨慎
Be cautious when dealing with anti-monopoly issues involving intellectual property rights

2、经营者集中反垄断审查中的知识产权 IPR issues in Merger Review

- 反垄断法第27条所列的评估因素包括对知识产权的考量
IPR is an element in assessing mergers according to Article 27 of AML.
- 在某些并购案件中，知识产权构成重要考虑因素
In Certain Merger cases, IPR presents important issues.
- 在评估时，区分标准必要专利和非标准必要专利
Different Approaches towards SEPs and Non-SEPs.

3、涉及知识产权的合并可能产生的反竞争效果

Mergers involving IPR issues may presents anti-competitive effects

- 在横向并购中，同类产品的专利组合和强化可能会实质性增强市场地位，通过所持专利提升竞争成本和市场进入成本，最终损害消费者利益。

In horizontal mergers, the integration of complementary patents may substantially strengthen the market position of the merged company, who may increase competition cost and market entry difficulties, and damage the consumer interests by using its patents.

- 在纵向并购中，专利与产品的结合，可能会对其他下游产品生产商产生封锁效果。
- In vertical mergers, the combination of patents and down-stream products may result in foreclosure effects in down-stream product market.

- 在个别案件中，产品与专利的分离，也可能增加专利持有人滥用专利的可能。
- In extreme scenario, the separation of manufacture from patents may give patent holder incentives to abuse.

4、对知识产权反竞争效果的评估方法

Measures used in assessing the potential anti-competitive effects brought about by IPR issues.

- 召开座谈会
Interviews and Meetings
- 实地调研
On-spot investigation
- 调查问卷
Questionnaires
- 独立第三方评估
Independent third party assessments

5、案例分析

Case Analysis

- 谷歌收购摩托罗拉手机案
Google/Motorola Mobility (2012)

纵向合并（安卓系统+摩托罗拉智能手机）
Vertical Integration (Android + Motorola Smart Phone)

救济措施

Remedy:

谷歌将在免费和开放的基础上许可安卓平台

Google shall continue to open android source code

谷歌应当继续遵守摩托罗拉移动现有的公平、合理和非歧视（FRAND）
义务

Google shall honor Moto's FRAND commitments regarding SEPs.

• 微软收购诺基亚设备和服务业务案

Microsoft/Nokia services and devices (2014)

- 纵向关联（微软与智能手机相关的专利+诺基亚的智能手机）
vertical relation (MS' Patents + Nokia's Smart Phone)
救济措施：微软继续按照当前条件许可
Remedy: Ms will continue to license on current terms
- 诺基亚（设备与专利分离，保留专利增加其滥用的动机）
Nokia (The separation of devices from Nokia's patents increased the possibility of patent-abuse by Nokia)
救济措施：诺基亚继续履行FRAND承诺
Remedy: Nokia will continuously perform its FRAND commitments.

•赛默飞世尔收购立菲（2014） Thermo Fisher Scientific/Life Technologies

- 横向集中

Horizontal merger

- 救济措施:

Remedy:

剥离细胞培养业务（包括知识产权）

Divestment of businesses relating to gene modulation (siRNA reagents), cell culture, cell media in similar terms

向第三方供应 SSP试剂盒和SDS-PAGE蛋白质标准品或给予第三方有关SSP试剂盒和SDS-PAGE蛋白质标准品的永久非排他性技术许可

Thermo fisher shall supply SSP kits and SDS-PAGE protein standards to third parties on an OEM basis or based on a perpetual and non-exclusive license for the next 10 years

6、商务部附加知识产权救济条件的案件 MOFCOM IPR-related remedies.

- 全部24起附条件案件中，约10起附加了与知识产权相关的条件，其中包括知识产权强制许可、知识产权许可条件以及知识产权剥离。

In all 24 conditional approved cases, about 10 of them involving IPR-related conditions, which cover compulsory licensing, licensing terms, and divestment of IPRs.

- 经营者集中反垄断审查本身的预防性决定了与知识产权相关的救济措施的特点，具有前瞻性和宽容性。

The nature of merger review determined that the IPR-related conditions should be forward-looking.



谢谢大家！

Thank you for your attention!