MOFCOM CONDITIONAL CLEARANCE OF

GOOGLE – MOTOROLA MOBILITY ACQUISITION

(Saturday, 19 May 2012)

Highlights

• Since 2008, 14 merger review decisions (13 conditional clearances, 1 prohibition) were issued by the Ministry of Commerce of China (“MOFCOM”). In the past seven months, six conditional clearance decisions were issued.

• Following a trend illustrated in recent case decisions (Seagate-Samsung/Western Digital-Hitachi), this time MOFCOM again took a path that is different from those taken by EU and US antitrust authorities.

• The recent cases show MOFCOM’s
  - continued vigilance over mergers which are found to pose material competition concerns,
  - continued China focus despite a global market definition, and
  - confidence in its own remedies mechanism while taking into account the merger clearance decisions in other jurisdictions.

• This case is another reminder to put PRC merger notification planning on the front burner when executing global M&A deals which require PRC merger filing.

To contact the authors, please email: John Jiang at johnjiang@zhonglun.com, Scott Yu at scottyu@zhonglun.com, Jenny Zhang at changjing@zhonglun.com. About Zhong Lun: Ranked Band 1 in Corporate/M&A and Antitrust/Competition (Chambers Asia 2011/2012), with over 700 legal professionals strategically located in 9 offices, Zhong Lun has one of the largest and most experienced PRC competition teams with 7 partners supported by more than 20 associates. The team has completed more than 40 PRC merger filings.
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On Saturday, 19 May 2012, the very last day of the permissible maximum period for merger control review under China’s Anti-monopoly Law (the “AML”), the Ministry of Commerce of the People’s Republic of China ("MOFCOM") conditionally cleared Google Inc. (“Google”)’s acquisition of Motorola Mobility Holdings, Inc. (“Motorola Mobility”) (the “Acquisition”).

Following a trend illustrated in recent case decisions (Seagate-Samsung/Western Digital-Hitachi), MOFCOM again took a path that is different from those taken by EU and US antitrust authorities. It found that Google:

• has a dominant market position in the smart mobile terminal operating system market in China (see Section 3 below for detailed analysis); and
• has both ability and incentive to leverage its dominant position in the smart mobile operating system market when competing in the complementary market of smart mobile terminal through Motorola Mobility.

and consequently imposed the following behavioral remedies:

• maintain free Android open source licensing for 5 years (subject to reassessment during and after such 5 year period);
• maintain non-discriminatory access to its Android system for 5 years (subject to reassessment during and after such 5 year period); and
• continue licensing Motorola Mobility patents on a fair, reasonable and non-discriminatory (FRAND) basis.

This latest MOFCOM conditional merger clearance of a global M&A deal has some noteworthy aspects which should be evaluated by global industry leaders and competition law practitioners.

1. Significant contrast in timing of clearance

While both the European Commission and the U.S. Department of Justice ("DOJ") announced unconditional clearance of the Acquisition on 13 February 2012, it took another 3 months for MOFCOM to clear the Acquisition with conditions on 19 May 2012.

After notification to the European Commission on 25 November 2011, the Acquisition was unconditionally cleared after an 80-day review period. In China, the initial notification was submitted to MOFCOM on 30 September 2011, but was not docketed
until 21 November 2011. Afterwards, the maximum review period under the AML (i.e. 180 days) was used up before the Acquisition was conditionally cleared. We note that in its decision, MOFCOM stated that it engaged in multiple rounds of consultation with Google, which made its final commitments offer on 15 May. The conditional clearance decision was issued 4 days later.

As shown in Table 1 (Published merger decisions: review stages) below, all of the most recent 5 MOFCOM conditional clearance cases were cleared only in the Extended Review phase, indicating MOFCOM’s increasingly cautious approach (and willingness to engage in extended negotiations) in reviewing transactions which involve material competition concerns.

### Table 1: Published merger decisions: review stages

<table>
<thead>
<tr>
<th>Published Merger Decisions: Review Stages</th>
<th>Preliminary Review</th>
<th>Second-phase Review</th>
<th>Extended Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inbev-AB</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KO-Huiyuan</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Mitsubishi Rayon- Lucite</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GM-Delphi</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pfizer-Weyth</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>PS-Sanyo</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Novartis-Alcon</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Uralkali- Silvinit</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alpha V – Savio</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GE- Shenhua</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Seagate-Samsung</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Henkel –Tiande Offshore JV</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Western Digital – Hitachi</td>
<td>✓ ✓</td>
<td>✓ ✓</td>
<td>✓</td>
</tr>
<tr>
<td>Google - Motorola</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

(Note: In the Western Digital/Hitachi case, the applicant withdrew the initial notification before the expiration of the maximum statutory review period on the grounds of a material change of relevant facts, and re-filed immediately afterwards; MOFCOM cleared the transaction during Phase II of the restarted review period.)

2. Continued China focus despite a global market definition

MOFCOM defined two relevant product markets when analyzing this Acquisition, i.e. the smart mobile terminal market (“Terminal Market”) and the smart mobile terminal operating system market (“OS Market”).

3
For both products, MOFCOM acknowledges that the geographic market is global. However, MOFCOM expressly states that although it considered the competition conditions from a global perspective, its competitive analysis focuses on the Chinese market. This approach is consistent with MOFCOM’s practice in reviewing past merger cases, and is expected to be followed in the future.

With respect to the Terminal Market, MOFCOM takes the view that the market is fragmented and Motorola Mobility enjoys no significant competitive advantage. However, MOFCOM’s findings on the structure of the OS Market differ significantly from those stated by the US DOJ in its Press Release issued on 13 February 2012, as shown in the table below (the European Commission’s Press Release does not state the market shares of the major OS players in EEA):

**Table 2: Respective Findings of OS Market Shares by US DOJ and MOFCOM**

<table>
<thead>
<tr>
<th></th>
<th>Google’s Android system</th>
<th>Apple’s iOS</th>
<th>Nokia Symbian system*</th>
<th>RIM</th>
<th>Microsoft</th>
<th>CRn</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>US Market</strong></td>
<td>46%</td>
<td>30%</td>
<td>/</td>
<td>15%</td>
<td>6%</td>
<td>CR4: 97%</td>
</tr>
<tr>
<td><strong>China Market</strong></td>
<td>73.99%</td>
<td>10.67%</td>
<td>12.53%</td>
<td>/</td>
<td>/</td>
<td>CR3: 97.19%</td>
</tr>
</tbody>
</table>

*Note: MOFCOM Decision states that Nokia has announced that it will gradually phase out the Symbian system.

While the US market is populated by 4 viable operating system providers, in China, Android and iOS appear to be the only remaining two significant competitors for the foreseeable future (taking into account the likely exit of the Symbian system). MOFCOM expressly stated in its decision that all other players are marginal competitors with negligible market shares.

3. **Factors considered in finding of dominance**

MOFCOM listed the following factors in finding that Google has a dominant position in China’s OS Market.

**Table 3: Factors Considered**

<table>
<thead>
<tr>
<th>No.</th>
<th>Factors Considered(1)</th>
<th>MOFCOM Findings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Market share and market competitiveness</td>
<td>Android system has exceptionally high market share (73.99%), with iOS being the only other viable competing OS</td>
</tr>
<tr>
<td>2</td>
<td>Ability to control sales market or input (procurement) market</td>
<td>/</td>
</tr>
<tr>
<td>No.</td>
<td>Factors Considered</td>
<td>MOFCOM Findings</td>
</tr>
<tr>
<td>-----</td>
<td>-------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>3</td>
<td>Financial strength and technical resources</td>
<td>Google has strong financial resources and technical development capabilities</td>
</tr>
<tr>
<td>4</td>
<td>Other undertakings’ reliance</td>
<td>Most players in Terminal market are highly reliant upon Android system</td>
</tr>
<tr>
<td>5</td>
<td>Market entry difficulty</td>
<td>New entries are unlikely due to high market entry barriers</td>
</tr>
<tr>
<td>6</td>
<td>Other factors relevant to the finding of dominant market position of the undertaking.</td>
<td>/</td>
</tr>
</tbody>
</table>

**Notes:**
(1) The factors are prescribed in Article 18 of the AML.
(2) Article 7 of the Provisional Rules on the Competitive Impact Assessment of Concentration of Undertakings provides that in determining the ease of market entry, the likelihood, timeliness and sufficiency of entry shall be fully considered.

The different competitive conditions identified by MOFCOM for the Chinese market are likely the main reasons that MOFCOM’s rulings differ from those of EU and US competition authorities.

4. **Assessing harm: conglomerate effect in associated markets**

In its assessment of potential harm, MOFCOM analyzed the relevant markets and competition concerns by using an approach that bears some resemblance to the approach (i.e. theory of leverage) adopted in reviewing the Coca Cola/Huiyuan case (which attracted considerable controversies), although the specific analyses differ. After finding Google’s dominant position in the OS Market, MOFCOM concluded that after consummation of this Acquisition, Google will have both the incentive and ability to leverage its dominant position in the OS Market to gain advantage in the associated Terminal Market, thereby distorting and harming the competition in the Terminal Market, and ultimately harming consumer interests.

5. **Explicit FRAND Commitment**

While US DOJ indicated in its press release that they will closely monitor Google’s use of essential patents of Motorola Mobility in the wireless device industry, particularly as they relate to smartphones and computer tablets, MOFCOM has taken a substantial further step by imposing a behavioral commitment: Google was required to maintain Motorola Mobility’s current commitment of offering FRAND (fair, reasonable and non-discriminatory) licensing terms for its patents.

MOFCOM’s requirement on FRAND commitment may have been partly explained by US DOJ’s comments in its news press that Google’s commitments with respect to essential patents licensing were ambiguous:
“[Google’s] policy is to refrain from seeking injunctive relief for the infringement of SEPs against a counter-party, but apparently only for disputes involving future license revenues, and only if the counterparty: forgoes certain defenses such as challenging the validity of the patent; pays the full disputed amount into escrow; and agrees to a reciprocal process regarding injunctions.”

6. Key Takeaways

To date, MOFCOM has published its merger review decisions in relation to 14 cases (thirteen were conditionally approved and one (Coca Cola/Huiyuan) was prohibited), all involving multinationals who are leaders in the relevant industries. It has become evident that China’s antitrust regime is having a critical impact on global mergers and acquisitions. China merger control issues continue to be at the forefront of global M&A deals, and MOFCOM clearance is often the last condition to fulfill before the deal can be consummated.

In the past, companies could seek approvals in the US and the EU and assume that merger clearance from other jurisdictions was likely to be relatively straightforward. However, as shown in MOFCOM decisions issued in the last 6 months (such as Seagate/Samsung, Western Digital/Hitachi and Google/Motorola Mobility), a global transaction may have obtained clearance from the EU and/or the US authorities, but may still face substantial challenge from MOFCOM, in particular if the merger parties have high market shares in China. Therefore, in planning their M&A transactions, the major market players can no longer afford to put China merger notification planning on the back burner.

Further, MOFCOM published findings and remedies may also have other impacts on both the merger parties and competitors/customers. Below are some examples:

- For global deals which are unconditionally cleared by US/EU authorities, but are subject to behavioral remedies imposed by MOFCOM (e.g. the FRAND requirement in Google/Motorola Mobility deal), it remains to be seen to what extent such remedies can be applied extra-territorially.

- Under current Chinese antitrust law practice, to what extent market share data and dominance findings in MOFCOM’s decision can be used as prima facie evidence in a private antitrust litigation remains to be tested.

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1 Article 2 of the AML provides, *inter alia*, that the AML also applies to monopolistic conducts outside China to the extent they create eliminative or restrictive impact on China’s domestic market competition.

2 On 3 May 2012, the Supreme People’s Court of China promulgated its long-awaited AML judicial interpretations (SPC Interpretations, which will take effect on 1 June 2012) to guide private antitrust litigations against alleged monopolistic conducts. According to the SPC Interpretations, a plaintiff may bring a private antitrust lawsuit either before or after a dispositive ruling by an anti-monopoly law enforcement agency (such as MOFCOM). If such a private lawsuit is accepted by the court, the plaintiff may use information externally released by a merger party (e.g. market share, market position and market condition) as prima facie evidence of market dominance.
Further, if MOFCOM findings show combined market share exceeding 66% (for top two players) or 75% (for top three players), there could be implication for collective dominance presumption under Article 19 of AML (subject to refutation through contrary evidence).

For a detailed note authored by John Jiang, Wu Peng and Scott Yu on planning and executing PRC merger control notification, please visit Practical Law Company (PLC) website: [www.practicallaw.com/5-517-6303](http://www.practicallaw.com/5-517-6303)

Attached is a copy of the bilingual version of MOFCOM Google-Motorola Mobility clearance decision (Zhong Lun unofficial translation). If you would like to receive a copy of the bilingual version of AML judicial interpretations issued by the Supreme People’s Court, please send an email to: zlatc@zhonglun.com, with subject line: SPC AML judicial interpretations bi-lingual version.
关于附加限制性条件批准谷歌收购摩托罗拉移动经营者集中反垄断审查决定的公告

MINISTRY OF COMMERCE PUBLIC ANNOUNCEMENT CONCERNING ANTI-MONOPOLY REVIEW DECISIONS ON CONDITIONAL APPROVAL OF GOOGLE’S ACQUISITION OF MOTOROLA MOBILITY

中华人民共和国商务部（以下简称商务部）收到谷歌公司（以下简称谷歌）收购摩托罗拉移动公司（以下简称摩托罗拉移动）的经营者集中反垄断申报。经审查，商务部决定附加限制性条件批准此项经营者集中。根据《中华人民共和国反垄断法》（以下简称《反垄断法》）第三十条，现公告如下：

一、立案和审查程序
I. Case Docketing and Review Procedures

2011年9月30日，商务部收到谷歌收购摩托罗拉移动的经营者集中申报。经审核，商务部认为该申报文件、材料不完备，要求申报方予以补充。11月21日，商务部确认经补充的申报文件、资料符合《反垄断法》第二十三条的要求，对该项经营者集中申报予以立案并开始初步审查。

Upon Phase I review, MOFCOM was of the view that the Concentration will likely have eliminative or restrictive competitive effect on China’s smart mobile terminal operating system market. The case entered further review phase. On 21 December, MOFCOM decided to commence Phase II review. On 20 March 2012, with the notifying party’s consent, MOFCOM decided to extend the Phase II review period.

审查过程中，商务部征求了相关政府部门、行业协会和下游企业的意见，并就技术问题咨询了有关专家，对申报方提交的文件、资料的真实性、完整性和准确性进行了审核。
根据《反垄断法》及其相关规定，商务部对此项集中涉及的相关市场状况、安卓系统的免费开源问题、谷歌公平对待终端制造商问题、摩托罗拉移动专利许可问题、市场进入等进行了审查，综合评估了此项集中对相关市场竞争等方面的影响。

Pursuant to the AML and its relevant provisions, MOFCOM examined the pertinent aspects of this Concentration, including relevant market conditions, free and open source aspects of Android system, Google’s fair treatment of terminal manufacturers, the licensing of Motorola Mobility patents, market entry etc., and conducted a comprehensive assessment over the impacts of the Concentration on competition in the relevant market.

（一）集中交易
1. The Concentration

2011年8月15日，谷歌与摩托罗拉移动签订收购协议。根据该协议，谷歌将收购摩托罗拉移动的全部股份，收购完成后摩托罗拉移动将成为谷歌的全资子公司。谷歌主要经营互联网搜索引擎和在线广告服务，并提供在线服务和软件产品。谷歌开发了移动智能设备操作系统安卓，并以开源、免费的方式提供给移动智能设备制造商使用。摩托罗拉移动是移动设备制造商，产品主要包括手机和平板电脑。

On 15 August 2011, Google and Motorola Mobility entered into an acquisition agreement. Pursuant to such agreement, Google will acquire all of the shares of Motorola Mobility and Motorola Mobility will become Google’s wholly-owned subsidiary upon consummation of such acquisition. Google is mainly active in providing internet search engine and online advertising service, as well as providing online service and software products. Google developed Android, a smart mobile device operating system, and supplies it to manufacturers of smart mobile devices on a free and open source basis. Motorola Mobility is one of the mobile device manufacturers and its main products include handphone and tablet computer.

（二）相关市场
2. Relevant Market

移动智能终端和移动智能终端操作系统构成本案的相关商品市场。

Smart mobile terminal and smart mobile terminal operating system constitute the relevant product markets for this Concentration.

移动智能终端是指具备开放的操作系统平台，个人电脑级的处理能力，高速接入能力和丰富的交互界面的智能终端，目前主要是指智能手机，还包括平板电脑、智能电视等。移动智能终端已经成为互联网业务的关键入口和主要创新平台，其操作系统平台的开放性、人机交互体验的独特性和携带的便捷性显著区别于个人电脑、功能手机等其他产品，构成一个独立的市场。

Smart mobile terminal refers to a smart terminal with an open operating system platform, processing capacity comparable to a personal computer, high-speed access capacity and rich interface for human-computer interaction. Such smart terminals currently mainly refers to smartphones, and also covers tablet computers and smart television sets etc.. Smart mobile terminal has become a key access point and main innovation platform for internet businesses, and its open operating system platform, unique human-computer interaction experience and convenient portability have significantly distinguished it from other products such as personal computer and functional hand-phone, and therefore smart mobile terminal constitutes an independent market.

移动智能终端操作系统是管理移动智能终端硬件与软件资源的程序，其与电脑操作系统等其他产品差异明显，构成单独的相关商品市场。

Smart mobile terminal operating system is a program which administers the hardware and software resources of a smart mobile terminal. It is significantly distinct from other products such as computer operating system, and therefore constitutes a separate relevant product market.
移动智能终端及其操作系统市场具有全球市场的特征。商务部在审查中考虑了全球市场的竞争状况，但重点考察了中国市场状况。

**Smart mobile terminal and its operating system markets have the characteristics of a global market. MOFCOM considered the competition conditions in global markets during its review, but focused its review on China market conditions.**

(三) 相关市场状况。

### 3. Relevant Market Conditions

移动智能终端市场和其操作系统市场呈现出不同的竞争状况。移动智能终端市场集中度相对分散，竞争激烈，市场不断推陈出新，更新换代频繁，各制造商均面临较大的竞争压力。调查表明，摩托罗拉移动相对于其他竞争者并不具备明显优势。

**Smart mobile terminal market and its operating system market have different competition conditions. The smart mobile terminal market is relatively fragmented with fierce competition, with frequent product replacement and continuous product upgrade; each of the manufacturers faces fairly high competitive pressure. Our investigation shows that compared to other competitors, Motorola Mobility enjoys no significant competitive advantage.**

与上述市场显著不同，移动智能终端操作系统市场是一个高度集中的市场。最新数据表明，2011年第四季度，仅谷歌开发的安卓系统就占据73.99%中国市场份额。此外，诺基亚的塞班系统占12.53%，苹果的iOS占10.67%，三者合计占据97.19%的中国市场份额。考虑到安卓系统超高的市场份额、移动智能终端制造商对安卓系统的高度依赖性、谷歌公司雄厚的财力和技术开发能力以及很高的市场进入门槛，商务部认定安卓系统在移动智能终端操作系统市场占据市场支配地位。考虑到安卓系统超高的市场份额、移动智能终端制造商对安卓系统的高度依赖性、谷歌公司雄厚的财力和技术开发能力以及很高的市场进入门槛，商务部认定安卓系统在移动智能终端操作系统市场占据市场支配地位。在移动智能终端操作系统市场，安卓系统具有相当的市场支配地位，市场进入高，短期内将保持和加强。

**In significant contrast to the aforementioned market, smart mobile terminal operating system market is a highly concentrated market. The latest data indicate that, in the fourth quarter of 2011, the Google-developed Android system alone possesses a market share of 73.99% on China market, with Nokia’s Symbian system taking 12.53% and Apple’s iOS taking 10.67%; the combined market share of these three systems on China market reaches 97.19%. Given the exceptionally high market share of Android system, the high reliance of smart mobile terminal manufacturers upon Android system, the strong financial resources and technical development capabilities of Google and the high market entry barriers, MOFCOM found that Android system has a dominant position in smart mobile terminal operating system market. In light of the facts that (i) Nokia has announced that it will gradually abandon Symbian system, (ii) the sale prices of Apple mobile-phones are generally much higher than smartphones using Android system, and (iii) the WINDOWS PHONE operating system developed by Microsoft Corporation is still in its starting stage, the market dominance of Android system is expected to be maintained and strengthened for a considerably long period of time in the future.**

（四）安卓系统的免费、开源问题。

### 4. The Free and Open-source Aspects of Android System

目前，安卓系统已经形成完整的生态产业链，移动智能终端制造商、软件开发商、最终用户均对安卓系统形成依赖性。终端制造商必须依据安卓系统进行设计开发，软件开发商依据安卓系统进行研发，而开发出的应用软件仅适用于安卓系统而无法适用于其他操作系统。最终用户由于使用习惯等原因也会对安卓系统形成相当程度的依赖。调查发现，对于移动智能终端制造商而言，更换操作系统成本巨大，必须更改相关硬件和软件以适应新的操作系统，同时，操作系统的更改还可能导致用户体验的差别。安卓系统已经形成了完整的生态产业链，移动智能终端制造商、软件开发商、最终用户均对安卓系统形成依赖性。终端制造商必须依据安卓系统进行设计开发，软件开发商依据安卓系统进行研发，而开发出的应用软件仅适用于安卓系统而无法适用于其他操作系统。最终用户由于使用习惯等原因也会对安卓系统形成相当程度的依赖。调查发现，对于移动智能终端制造商而言，更换操作系统成本巨大，必须更改相关硬件和软件以适应新的操作系统，同时，操作系统的更改还可能导致用户体验的差别。
Android system, and the developed application software operates only on Android system and is not compatible with any other operating system. End users will also have considerable reliance on Android system due to such factors as use habits. Our investigation finds that, for smart mobile terminal manufacturers, the cost of switching operating system is tremendous. They will have to modify relevant hardware and software to adapt to the new operating system, and in addition, the change of operating system may also result in altered user experience, thereby creating fairly high commercial risk.

The free and open-source aspects of Android system are important factors for it to gain market dominance in a relatively short period of time. To continue providing Android system on a free and open-source basis is vital to the protection of the reasonable expectation and legitimate interests of stakeholders. If Google changes its current business model of making available Android system on a free and open-source basis after the completion of the Concentration, each of the stakeholders will suffer material adverse impact.

（五）谷歌公平对待终端制造商问题。
5. Google’s Fair Treatment of Terminal Manufacturers

此项集中完成后，摩托罗拉移动成为谷歌的全资子公司。鉴于谷歌在移动智能终端操作系统上的市场支配地位，谷歌有能力给予摩托罗拉移动优于其他移动智能终端制造商的待遇。如先于其他制造商向摩托罗拉移动提供最新开发的安卓系统。调查中，商务部发现，谷歌在推出新版的安卓系统前，会首先非指向性地选择一个移动智能终端制造商合作，以测试新版安卓系统与终端硬件设备的适应性。被选中的终端制造商将有机会先于其他制造商获得新版安卓系统，从而在移动智能终端的市场竞争中处于有利地位。此项集中完成后，谷歌将有可能仅选择摩托罗拉移动作为测试对象。谷歌对移动智能终端制造商的差别待遇将扭曲该市场的竞争，使摩托罗拉移动之外的其他终端制造商处于不利的竞争地位。

After the completion of the Concentration, Motorola Mobility will become a wholly-owned subsidiary of Google. Given Google’s dominant position in smart mobile terminal operating system market, Google has both the incentive and ability to treat Motorola Mobility more favorably than it treats other smart mobile terminal manufacturers, such as providing the latest Android system to Motorola Mobility before providing it to other manufacturers. During its investigation, MOFCOM found that, before launching a new version of Android system, Google will, on a non-preferential basis, select a smart mobile terminal manufacturer for cooperation in order to test the compatibility of the new version of Android system with the terminal hardware device. The selected terminal manufacturer will have an opportunity to obtain the new version of Android system ahead of other manufacturers, thereby gaining a competitive advantage on the smart mobile terminal market. After completion of the Concentration, Google will likely only select Motorola Mobility as its testing partner. Google’s discriminative treatments of smart mobile terminal manufacturers will distort competition on such market, and put the terminal manufacturers other than Motorola Mobility in an unfavorable competitive position.

（六）摩托罗拉移动专利许可问题。
6. Licensing of Motorola Mobility Patents

摩托罗拉移动拥有众多手机领域的专利，相当一部分专利属于核心专利。谷歌收购摩托罗拉移动的主要目的就是拥有这些手机专利。此项集中完成后，谷歌将同时拥有强大的软硬件开发和集成能力，借助其在移动智能终端市场的支配地位，谷歌有能力在专利许可中向相对方附加不合理的许可条件，这将对相关市场的竞争造成损害，并最终损害消费者的利益。

Motorola Mobility holds a large number of patents in mobile-phone field and many of them are essential patents. Google’s main objective in acquiring Motorola Mobility is to own
these mobile-phone patents. After completion of the Concentration, Google will currently have strong development and integration abilities for both software and hardware, and by leveraging its dominant position in smart mobile terminal market, Google will have both the incentive and ability to impose unreasonable licensing terms on licensees in patents licensing arrangements, which will harm competition on the relevant market and eventually harm consumer interests.

(七) 市场进入。

7. Market Entry

如前所述，移动智能终端操作系统市场是一个高度集中的市场，安卓系统、塞班系统和苹果iOS占据了97%以上的市场份额，其他经营者所占份额极为有限，属边缘竞争者。As mentioned above, smart mobile terminal operating system market is highly concentrated, with Android system, Symbian system and Apple iOS collectively holding over 97% market share. The other undertakings in the market, with negligible market shares, are marginal competitors.

移动智能终端操作系统的开发需要雄厚的技术和资金实力，高度集中的市场对新进入者形成了极高的进入壁垒。一个移动智能终端操作系统是否能够取得成功，关键取决于与该操作系统相匹配的软件开发环境是否友好、是否能够吸引软件开发者。优秀的应用开发环境可以大大降低开发门槛，提高开发效率，提升用户体验，进而吸引众多软件开发者，最终具有良好用户体验的应用软件吸引消费者和潜在购买者。以移动智能终端操作系统为基础开发的应用软件数量的多寡、用户体验的优劣已经成为不同操作系统之间竞争的关键要素之一。

The development of smart mobile terminal operating system requires strong technical and financial strengths, and the high market concentration constitutes an extremely high barrier for new entrants. The success of a smart mobile terminal operating system will critically rely on the friendliness of software development environment surrounding such operating system and the attractiveness to software developers. Excellent application development environment can significantly lower development threshold, improve development efficiency, enhance user experience, thereby attracting numerous software developers, and eventually application software with good user experience will attract consumers and potential buyers. The number and the user experience of application software developed based on smart mobile terminal operating system have become one of the key factors for the competition among various operating systems.

目前，典型的移动智能终端操作系统软件开发环境包括安卓开发环境、苹果开发环境和微软开发环境。数量庞大的安卓应用和苹果应用已经成功吸引了绝大多数软件开发者以及消费者，转换开发环境不仅需要软件开发者适应新的技术要求，还将面临失去众多消费者的巨大商业风险；而且，对于消费者而言，改变操作系统意味着熟悉新的操作界面、更换智能终端等额外成本。可见，安卓系统和苹果系统已经形成完整的、具有强大市场吸引力和良好口碑的系统，无论市场的边缘竞争者还是新进入者，都面临极高的进入门槛。在可预期的未来，市场进入难以减轻或消除上述排除、限制竞争效果。

Currently, the typical software development environments based on smart mobile terminal operating system include Android development environment, Apple development environment and Microsoft development environment. The large number of Android applications and Apple applications has successfully attracted the vast majority of the software developers and consumers. In switching development environment, a software developer will not only be required to adapt to the new technical requirements, but will also be exposed to huge commercial risk of losing numerous consumers. In addition, from the consumers’ perspective, switching the operating system means incurring such additional costs as being acquainted with new operating interfaces and replacement of smart terminals. In light of the above, Android system and Apple system have established complete systems with strong market attractiveness and good reputation, and either the marginal competitors or new entrants will face extremely high market entry barrier. In the foreseeable future, it will be difficult for new market entries to mitigate or eliminate the above eliminative or restrictive competitive effect.
三、附加限制性条件的商谈
III. Consultations Regarding Restrictive Conditions

在审查期间，商务部向谷歌指出此项集中将产生的排除、限制竞争效果，并就如何解决上述竞争问题进行了多轮商谈。2012年5月15日，谷歌向商务部提交了解决竞争问题的最终承诺。经评估，商务部认为，该承诺能够减少此项集中对竞争产生的不利影响。

During the review process, MOFCOM pointed out to Google that the Concentration will have eliminative or restrictive competitive effect, and conducted several rounds of consultation sessions with the parties as to how to address the aforementioned competition concerns. On 15 May 2012, Google proposed the final commitments to address the competition concerns. Upon assessment, MOFCOM was of the view that such commitments are sufficient to mitigate the adverse impact of the Concentration on competition.

四、审查决定
IV. Review Decisions

经审查，商务部认为谷歌收购摩托罗拉移动具有排除、限制竞争影响。根据谷歌向商务部作出的承诺，商务部决定附加限制性条件批准此项集中。谷歌应当履行如下义务：

Upon review, MOFCOM was of the view that Google’s acquisition of Motorola Mobility will have eliminative or restrictive effect on competition. Based on Google’s commitments to MOFCOM, MOFCOM decided to approve the Concentration with restrictive conditions. Google shall fulfill the following obligations:

(一) 谷歌将在免费和开放的基础上许可安卓平台，与目前的商业做法一致。安卓平台是指用于移动设备的当前及未来版本的开源软件堆栈，包括以目前发布于http://code.google.com/android/的形式存在的且在义务期内（除非这些义务被修改或解除）于该网站或后继网站上可获得的操作系统、中间件及关键开源应用程序在内。本项义务不影响谷歌对与安卓平台相关的软件（包括但不限于在安卓平台上运行的应用程序）保持闭源或使之闭源的权力。本项义务不影响谷歌就其提供的与安卓平台相关的产品和服务（包括但不限于在安卓平台上运行的应用程序）寻求付款或其他对价的能力。

(1) Google shall license Android platform on a free and open source basis, in a manner consistent with its current commercial practice. Android platform refers to the current and future versions of open source software stack for mobile devices, including the operating system, middleware and key open source application programs, in the form currently published on http://code.google.com/android/ and available on such website or its successor websites within the commitment period (unless such obligations are modified or discharged). This obligation will not impact Google’s rights to keep or make Android platform related software close-sourced. This obligation will not impact Google’s ability to seek payment or other consideration for its provision of Android platform related products and services (including but not limited to application programs operating on Android platform).

(二) 谷歌应当在安卓平台方面以非歧视的方式对待所有原始设备制造商。本项义务仅适用于已经同意不对安卓平台进行分化或衍生的原始设备制造商。本项义务不适用于谷歌提供、许可或分销与安卓平台相关的产品和服务（包括但不限于在安卓平台上运行的应用程序）的方式。

(2) Google shall treat all original equipment manufacturers on a non-discriminative basis for provision of Android platform. This obligation only applies to the original equipment manufacturers that have agreed not to carry out differentiation or derivation from Android platform. This obligation does not apply to Google’s provision, licensing or distribution of Android platform related products and services (including but not limited to application programs operating on Android platform).

(三) 本次交易后，谷歌应当遵守摩托罗拉移动在摩托罗拉移动专利方面现有的公平、
合理和非歧视（FRAND）义务。
(3) After the Concentration, Google shall continue to comply with Motorola Mobility’s current obligations of offering fair, reasonable and non-discriminatory (“FRAND”) terms with respect to the patents of Motorola Mobility.

(四) 根据商务部《关于实施经营者集中资产或义务剥离的暂行规定》（商务部公告2010年第41号），谷歌委托独立的监督受托人对谷歌履行上述义务的情况进行监督。
(4) Pursuant to MOFCOM’s Provisional Rules on Assets or Business Divestiture in Connection with the Implementation of Concentration of Undertakings (MOFCOM Public Announcement [2010] No. 41), Google shall entrust an independent supervisory trustee to supervise Google’s performance of the above obligations.

对于第（一）项和第（二）项义务，自商务部决定之日起5年内有效。如果市场状况或市场竞争发生变化，则谷歌可以向商务部申请变更或解除此2项义务。如果谷歌不再控制摩托罗拉移动，则此2项义务失效。
The obligations under Items (1) and (2) above shall be in force for a period of 5 years since the date of this decision. In the event that relevant market conditions or market competition changes, Google may apply to MOFCOM to modify or discharge these two obligations. If Google no longer controls Motorola Mobility, these two obligations shall no longer be in force.

自商务部决定发布之日起5年内，谷歌应当每6个月就其遵守上述义务的情况向商务部和监督受托人报告。5年期满后，商务部可以继续评估中国移动智能终端操作系统市场的状况，并根据评估状况依法作出决定。
Within 5 year since the date this decision is issued by MOFCOM, Google shall report its performance of the above obligations to MOFCOM and its supervisory trustee every 6 months. Upon expiration of the 5-year period, MOFCOM is entitled to re-assess the market conditions of China’s smart mobile terminal operating system market and make further decisions in accordance with the law based on such re-assessment.

商务部有权通过监督受托人或者自行监督检查谷歌履行上述义务的情况。谷歌未适当履行上述义务时，商务部有权根据《反垄断法》相关规定作出处理。
MOFCOM has the right to supervise and examine, through supervisory trustee or on its own, Google’s performance of the above obligations. Where Google fails to properly perform the above obligations, MOFCOM has the right to impose sanctions in accordance with the relevant provisions of the AML.

本公告自发布之日起生效。
This announcement shall take effect on the date of its promulgation.

中华人民共和国商务部
Ministry of Commerce of the People’s Republic of China

二〇一二年五月十九日
19 May 2012