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MICROSOFT-NOKIA MERGER CONTROL IN EAST ASIA

By Luke Hung-Yu Chuang¹ and Shih-Wei Chao²

This article discusses the Microsoft–Nokia merger control case to illustrate the varying approaches taken by the antitrust authorities of China, South Korea, and Taiwan to mitigate the anticompetitive effect potentially arising from Microsoft’s acquisition of Nokia’s business unit. Unlike regulators in the United States and the European Union, those in these Asian countries took into consideration the possible harm to their respective local industries from the acquisition and imposed restrictions on the respective abilities of Microsoft and Nokia to enforce their patents. The Microsoft–Nokia case demonstrates that different antitrust regimes exist among Asian countries as well as between regions of the globe.

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INTRODUCTION

In September 2013, Microsoft announced it would acquire most of Nokia's Devices and Services Business ("DSB"), including the design team, manufacturing capacity, marketing support, and approximately 8,500 design patents.³ Nokia also agreed to grant Microsoft a 10-year nonexclusive license to its patent portfolio with the option of making it permanent.⁴ At the time, Microsoft was the clear leader in the world's computer operating system market.⁵ Nokia had also been a renowned mobile phone enterprise for the past two decades. The purpose of Microsoft's acquisition of Nokia's assets was to help Microsoft officially enter the smartphone market, in which Nokia was no longer competitive; the asset acquisition could help Microsoft bring its own smartphone and mobile operating system to market.⁶ Microsoft's aspiration was to transform into a competitive smartphone manufacturer by combining Nokia's device design and manufacturing capability with its own Windows Phone operating system.⁷

This vertical integration did not go to plan.⁸ Despite the significant boost from this acquisition and investment, Windows Phone as a mobile operating system never became successful, and Microsoft was unable to achieve a smartphone market share on par with that of

³ John "Jay" A. Jurata, Jr. & Inessa Mirkin Owens, *A New Trade War: Applying Domestic Antitrust Laws to Foreign Patents*, 22 GEO. MASON L. REV. 1127, 1138–39 (2015).

⁴ *Microsoft to Acquire Nokia's Devices & Services Business, License Nokia's Patents and Mapping Services*, MICROSOFT NEWS CENTER (Sept. 3, 2013), <https://news.microsoft.com/2013/09/03/microsoft-to-acquire-nokias-devices-services-business-license-nokias-patents-and-mapping-services/>.

⁵ Ed Bott, *Latest OS Share Data Shows Windows still Dominating in PCs*, ZDNET: THE ED BOTT REPORT (Apr. 1, 2013, 16:15), <https://www.zdnet.com/article/latest-os-share-data-shows-windows-still-dominating-in-pcs/>.

⁶ *See Microsoft, Nokia Devices and Services Business Aim to Remake Mobile Market*, MICROSOFT NEWS CENTER (Apr. 25, 2014), <https://news.microsoft.com/2014/04/25/microsoft-nokia-devices-and-services-business-aim-to-remake-mobile-market-2> ("The completion of Nokia Devices and Services business acquisition April 25 will enable Microsoft to accelerate its share of smartphones and feature phones in developed and emerging markets, and increases its role as a devices and services company.").

⁷ *See James Vincent, Four Reasons Why Microsoft Had to Buy Nokia*, THE INDEPENDENT (Sept. 3, 2013, 15:19), <http://www.independent.co.uk/life-style/gadgets-and-tech/features/four-reasons-why-microsoft-had-to-buy-nokia-8796638.html>.

⁸ *See Tom Warren, Microsoft Wasted at least \$8 Billion on Its Failed Nokia Experiment*, THE VERGE (May 25, 2016, 5:20 AM), <https://www.theverge.com/2016/5/25/11766540/microsoft-nokia-acquisition-costs>.

Apple or Samsung.⁹ Microsoft eventually sold Nokia's DSB to Foxconn and HMD Global.¹⁰

Microsoft's acquisition was not a successful business strategy, but the case is useful for the insights it offers to the comparative study of merger control and antitrust law in general. When major multinational corporations ("MNCs") such as Microsoft and Nokia engage in mergers and acquisitions ("M&As"), they are typically required to notify the antitrust authorities of countries in which they operate and refrain from completing the transaction until such authorities have finished examining the potential effects on economies and markets they represent.¹¹ In some cases, the authorities intervene, but the extent to which they do so varies considerably; intervention is much more likely when the industry is a sensitive one, such as the development and manufacture of smartphones or other high-tech products.¹² Factors such as the country's economic status, position in the global market, and whether the country hosts prominent businesses determine the ease with which regulatory approval is granted for a proposed M&A.¹³ Approval of some deals may be contingent upon certain conditions; in such cases, regulators may require the participating companies to agree to certain limitations on their business operations (known as "behavioral injunctions") or agree to relinquish certain assets (known as "structural remedies").¹⁴ These conditions are not meant to be detrimental to merging companies but are rather aimed at preserving

⁹ See Roger Cheng, *Microsoft may have just Killed Its Lumia Line. Good Riddance*, CNET (May 18, 2016, 8:34 AM), <https://www.cnet.com/news/microsoft-may-have-just-killed-its-lumia-line-good-riddance/>.

¹⁰ *Microsoft Selling Feature Phone Business to FIH Mobile Ltd. and HMD Global, Oy*, MICROSOFT NEWS CENTER (May 18, 2016), <https://news.microsoft.com/2016/05/18/microsoft-selling-feature-phone-business-to-fih-mobile-ltd-and-hmd-global-oy/>.

¹¹ See Ilene Knable Gotts & Sarah E. Strasser, *International Pre-Merger Notification Requirements*, in ALI-ABA'S PRACTICE CHECK MANUAL ON ADVISING BUSINESS CLIENTS II: CHECKLISTS FORMS AND ADVICE FOR THE PRACTICAL LAWYER 305, 305 (American Law Institute, 2000).

¹² See W. Adam Hunt, *Business Implications of Divergences in Multi-Jurisdictional Merger Review by International Competition Enforcement Agencies*, 28 NW. J. INT'L L. & BUS. 147, 147-48 (2007); See also Keke Feng, *Patent-Related Mergers and Market Definition Under the 2010 Horizontal Merger Guidelines: The Need to Consider Technology and Innovation Markets*, 34 T. JEFFERSON L. REV. 197, 197-202 (2011).

¹³ D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1103-04 (2010).

¹⁴ Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 15 (2001).

market competition and, in some cases, safeguarding the national economy and industry.

Seeking clearance of the proposed acquisition, Microsoft and Nokia filed merger notifications in numerous countries and regions.¹⁵ Both the United States (“US”) and European Union (“EU”) promptly approved the merger without any conditions or restrictions.¹⁶ Russia, India, Turkey, and Israel also gave such unconditional approval.¹⁷ However, the case was rather different in East Asia, namely in China, South Korea, and Taiwan, which are home to many of Microsoft and Nokia’s allies and adversaries.¹⁸ The antitrust authorities in these East Asian countries took significantly longer to investigate the proposed acquisition and make their decisions, and the decisions were less friendly to the companies.¹⁹

The US and EU decisions were respectively announced in late November and early December 2013.²⁰ In the US, merger control cases

¹⁵ See Tim Ferguson, *Microsoft-Nokia Deal Clears European Regulatory Hurdle*, MOBILE WORLD LIVE (Dec. 5, 2013), <https://www.mobileworldlive.com/featured-content/top-three/microsoft-nokia-deal-clear-final-regulatory-hurdle/>.

¹⁶ *Microsoft Nokia Merger gets SA Stamp of Approval*, BUSINESSTECH, (Feb. 19, 2014), <https://businesstech.co.za/news/telecommunications/53370/microsoft-nokia-merger-gets-sa-stamp-of-approval/>.

¹⁷ *Id.*; Foo Yun Chee, *Microsoft to Win EU okay for \$7.3 Billion Nokia Deal: Sources*, REUTERS (Nov. 22, 2013, 9:30 AM), <https://www.reuters.com/article/us-microsoft-nokia-eu/microsoft-to-win-eu-okay-for-7-3-billion-nokia-deal-sources-idUSBRE9AL0V320131122>.

¹⁸ Already the world’s largest smartphone market in 2013, China was home to some of the biggest smartphone brands at the time, including Xiaomi, Huawei and Lenovo. Even Apple, the most profitable smartphone company in the world, has its phones assembled in China. South Korea is home to the famous brands Samsung and LG and is well-known for its economic reliance on the high-tech sector, particularly smartphone and component manufacturing. Taiwan’s HTC was in its prime around 2013, leading the Taiwanese smartphone industry. See *Gartner Says Annual Smartphone Sales Surpassed Sales of Feature Phones for the First Time in 2013*, GARTNER (Feb. 13, 2014), <https://www.gartner.com/en/newsroom/press-releases/2014-02-13-gartner-says-annual-smartphone-sales-surpassed-sales-of-feature-phones-for-the-first-time-in-2013>. See also *Research and Markets: The Chinese Smartphone Industry: 2013 – 2014*, BUSINESS WIRE (Apr. 25, 2014, 7:00 AM), <https://www.businesswire.com/news/home/20140425005246/en/Research-Markets-Chinese-Smartphone-Industry-2013-->.

¹⁹ See Kim Yoo-chul, *FTC Conditionally Approves Microsoft-Nokia Deal*, THE KOREA TIMES (Feb. 5, 2015, 19:32), http://www.koreatimes.co.kr/www/news/tech/2015/02/133_173064.html.

²⁰ *U.S. Approves Microsoft Purchase of Nokia's Mobile Business*, REUTERS (Dec. 2, 2013, 12:27 PM), <https://www.reuters.com/article/us-nokia->

are decided by the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”).²¹ They approved via grant of early termination but did not disclose much more than the decision itself.²² Thus, it is unclear to what extent they investigated the competitive effect of the proposed acquisition. By contrast, the European Commission (“EC”), the authority in charge of EU merger control, released a much more thoroughly detailed decision.²³ Its investigation results indicated that Microsoft’s products did not have a large enough market share to be considered competitors with major players in the industry, Android and iOS.²⁴ The EC further argued that Nokia should not even be included in the competition investigation based on how EU merger control is designed.²⁵ The US and EU both moved quickly in

microsoft-antitrust/u-s-approves-microsoft-purchase-of-nokias-mobile-business-idUSBRE9B10TY20131202 [hereinafter *U.S. Approves*]; *EU Commission Approves Microsoft Takeover of Nokia Business*; REUTERS (Dec. 4, 2013, 8:46 AM), <https://www.reuters.com/article/us-eu-commission-microsoft-nokia/eu-commission-approves-microsoft-takeover-of-nokia-business-idUSBRE9B30SP20131204> [hereinafter *EU Commission*].

²¹ The Hart–Scott–Rodino Act of 1976 amended the Clayton Antitrust Act to include a premerger notification program, which requires corporations to notify the FTC and the Antitrust Division of the DOJ in advance of any mergers or acquisitions. See *Premerger Notification Program*, FED. TRADE COMM’N (last visited June 18, 2020), <https://www.ftc.gov/enforcement/premerger-notification-program>. After notification, such deals enter a waiting period during which the government reviews them. If a certain M&A transaction poses a threat to the market and consumers, the FTC and DOJ may interfere through formal legal action. Otherwise deal closure is permitted after the waiting period (outlined in the Hart–Scott–Rodino Act) terminates. In some cases, the government may find a transaction to be harmless competition-wise and will thus grant early termination of the waiting period, tantamount to early approval. See also *Merger Review*, FED. TRADE COMM’N (last visited June 18, 2020), <https://www.ftc.gov/enforcement/merger-review>.

²² Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules, 78 Fed. Reg. 76146–48 (Dec. 16, 2013).

²³ See Case COMP/M.7047 - Microsoft/Nokia, 2013 O.J. (C. 8873) 1, 8–9 [hereinafter *EC Decision*].

²⁴ The Commission concluded that after acquiring Nokia’s DSB, Microsoft’s market share would still be too insignificant to represent a risk of monopolization. This was true for all of Microsoft’s products and assets, including its Windows Phone operating system, its Office program and other productivity apps, and its patents regarding the data synchronization protocol named Exchange ActiveSync (“EAS”). *Id.* paras. 102–03, 137–38, 164.

²⁵ *Id.* paras. 252–63. The EC was hesitant to include Nokia in this case’s competition investigation, stating that since the “merged entity” consisted of only Microsoft and the acquired Nokia division, the remainder of Nokia fell outside the Merger Regulation’s scope. The EC nevertheless reasoned as if Nokia were subject to the investigation. The EC concluded that Nokia’s

clearing the acquisition, declining to place any sort of conditions on Microsoft and Nokia.²⁶

By contrast, the authorities in China, South Korea, and Taiwan were more circumspect in their decision-making. All three ultimately opted to grant approval for the merger on a conditional basis between early 2014 and mid-2015.²⁷ Most of the conditions imposed on Microsoft involved its standard essential patents (“SEPs”) and nonstandard essential patents (non-SEPs).²⁸ Microsoft’s ability to seek injunctive relief against domestic companies was restricted, thereby blocking a crucial strategy in patent enforcement and litigation.²⁹ Limitations were also imposed on Microsoft’s freedom to charge future licensees a higher royalty rate or impose other unfavorable license terms.³⁰ For Nokia, while regulators in China, South Korea, and Taiwan focused on its numerous telecommunication SEPs, they did not uniformly impose conditions on Nokia.³¹

standard essential patents (“SEPs”) were already subject to fair, reasonable and non-discriminatory (“FRAND”) commitments made to standard setting organizations (“SSOs”) and most of them were already in-license agreements, which Nokia could not readily alter the fees and terms of. Nokia’s non-SEPs, on the other hand, did not constitute a portfolio too extensive to design around, and their enforcement efforts were not merger-specific in the sense that, even before the merger, these patents were already being used by Nokia to seek injunctions and to sue for infringement.

²⁶ *U.S. Approves*, *supra* note 20; *EU Commission*, *supra* note 20.

²⁷ See Jung Suk-yeec, *Korea Fair Trade Commission Gives Conditional Approval to Business Consolidation of Microsoft and Nokia*, BUSINESS KOREA (Feb. 6, 2015, 00:28), <http://www.businesskorea.co.kr/english/news/politics/8925-ms-nokia-merger-approved-korea-fair-trade-commission-gives-conditional-approval>.

²⁸ Shangwu Bu (商务部) [China Ministry of Com.], Shangwu Bu Gonggao 2014 Nian Di 24 Hao (商务部公告 2014 年第 24 号) [China Ministry of Com. Announcement No. 24 of 2014] 1, 8 (2014), <http://www.mofcom.gov.cn/article/e/c/201404/20140400542508.shtml> (China) [hereinafter *MOFCOM Decision*]; *The Korea Fair Trade Commission (“KFTC”) Roots Out the Possibility of MS’s Abuse of Patent Rights*, Korea Fair Trade Commission 1, 3–5 (Aug. 24, 2015), http://www.ftc.go.kr/solution/skin/doc.html?fn=47a731f026da112322e2a330b7ffd350ff0c3dd0f93bb32e33d808d3bbeb66f1&rs=/fileupload/data/result/BBSMSTR_000000002402/ [hereinafter *KFTC Decision*].

²⁹ *MOFCOM Decision*, *supra* note 28 at 8; *KFTC Decision*, *supra* note 28 at 3, 5.

³⁰ *MOFCOM Decision*, *supra* note 28 at 8; *KFTC Decision*, *supra* note 28 at 4.

³¹ *MOFCOM Decision*, *supra* note 28 at 9–10; *KFTC Decision*, *supra* note 28 at 5–6; Taiwan Fair Trade Commission (“TFTC”) Merger Case Decision No. 103001 at 1–2 (Feb. 19, 2014), <http://www.ftc.gov.tw/uploadDecision/771dabc1-ec6b-4d37-acf7-cf94f057427b.pdf> (in Chinese) [hereinafter *TFTC Decision*].

It is evident that a major difference between authorities in Eastern and Western nations lies in how they addressed the M&A participants' patents. The East Asian countries were all particularly focused on patents and especially how they would be enforced after the acquisition.³² The Western jurisdictions, most notably the EU in its detailed decision, elected to downplay the merger's impact on the patent license market.³³ The scale and significance of the mobile device industry in various countries may have been a major factor influencing their respective decisions. For East Asian countries, smartphone companies represent larger shares of national economies than they do in the US or EU; thus, East Asian countries had more at stake in Microsoft's venture into the smartphone market.³⁴ It is therefore natural that the East Asian authorities would scrutinize Microsoft and Nokia's deal more closely than their EU and US counterparts and enforce their antitrust law in a manner that would protect a substantial portion of their domestic industry. Despite this common focus on their domestic economies, the various East Asian countries' regulators reached different decisions because of historical and focal differences in competition regulations as well as their specific partitions of the general "mobile device industry".³⁵

An "international competition law" has never been promulgated under the current World Trade Organization ("WTO") regime.³⁶ Without a binding global standard, each national government has the sovereign authority to protect its domestic market and tailor regulations to fit the local economy and industry policy.³⁷ Through analysis of the Microsoft–Nokia merger case, this article attempts to illuminate how antitrust merger control regulations can be used to protect the development of local industry and still allow both investment in and access to the domestic market by MNCs. The argument herein is that when interfering with market function and scrutinizing M&A deals,

³² See *MOFCOM Decision*, *supra* note 28 at 9–10; *KFTC Decision*, *supra* note 28 at 5–6.

³³ See *EC Decision*, *supra* note 23, at 17–18.

³⁴ See Richard Wray, *How the Smartphone Made Europe Look Stupid*, *THE GUARDIAN* (Feb. 13, 2010, 19:06), <https://www.theguardian.com/business/2010/feb/14/mobile-world-congress-phones-networks>.

³⁵ See *Microsoft & Nokia v. Fair Trade Commission*, 2015 SIFAYUAN JIANSUO XITONG 31–32 (Taipei High Admin. Ct. Jun. 25, 2015) [hereinafter *THAC Adjudication*].

³⁶ See Daniel C.K. Chow, *How China Promotes its State-Owned Enterprises at the Expense of Multinational Companies in China and Other Countries*, 41 *N.C. J. INT'L L.* 455, 456 (2016).

³⁷ See Andrew Guzman, *The Case for International Antitrust*, 22 *BERKELEY J. INT'L L.* 355, 355 (2004).

government antitrust agencies should broadly consider the balance of the domestic industry's development, the benefit to local consumers, and the harm to foreign MNCs.³⁸ Closely examining the Microsoft–Nokia merger control case can help to clarify differences in national economies and domestic industries among these jurisdictions and policy motivations for the antitrust agencies' merger control decisions.

This article sequentially discusses the Microsoft–Nokia merger control decisions in China, South Korea, and Taiwan. Each discussion begins with a brief introduction to the competition law and its enforcement within each jurisdiction. The discussion then focuses on how each national antitrust agency determined the conditions to attach to the approval of the acquisition application. Finally, and of the most importance, the scope and intensity of restrictions imposed by each authority are compared as well as policy motivations for such restrictions. The final section is the conclusion.

I. MICROSOFT-NOKIA MERGER CONTROL DECISIONS

A. *Decision in China*

China enacted its Antimonopoly Law (“AML”) in 2008.³⁹ At the time of Microsoft and Nokia's proposed M&A, China had three government agencies responsible for AML enforcement: the National Development and Research Commission (“NDRC”), which addresses price-related monopolistic conduct, the State Administration for Industry and Commerce (“SAIC”), which enforces AML rules not related to price, and the Ministry of Commerce (“MOFCOM”), which oversees merger control.⁴⁰ The following analysis is not affected by the fact that China subsequently consolidated its antitrust enforcement agencies into the State Administration for Market Regulation

³⁸ See Sergio Baches Opi, *Merger Control in the United States and European Union: How Should the United States' Experience Influence the Enforcement of the Council Merger Regulation?*, 6 J. TRANSNAT'L L. & POL'Y 223, 225–33 (1997).

³⁹ Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 238 (2008). Generally, the AML prohibits monopolistic conduct, including entering into anticompetitive agreements, abusing dominant market position, and engaging in M&As that may potentially eliminate or restrict competition. See also Salil K. Mehra & Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, 49 VA. J. INT'L L. 379, 396 (2009).

⁴⁰ Jillian Bray, *Firmly Grasping the Knife: An Investigation of the Asymmetric Application of Chinese Antitrust Law as a Protectionist Tool*, 24 CARDOZO J. INT'L & COMP. L. 351, 366 (2016).

(“SAMR”), but it is relevant that the MOFCOM was the authority in charge of the case this article focuses on.⁴¹

The purpose of China’s AML, to some extent, differs from that of other countries’ competition laws. The general consensus is that the basic goals of antitrust law are to enhance economic efficiency and to safeguard consumer welfare.⁴² As a part of antitrust enforcement, merger control should only aim to protect consumers by prohibiting M&As that are likely to create or enhance market power rather than reaching to serve broader policy goals such as public interest or industry development.⁴³ By contrast, China’s AML states clearly that its purpose is to “promot[e] the healthy development of socialist market economy”.⁴⁴ The term “socialist market economy” refers to China’s state-owned enterprises (“SOEs”) and is an indication of the country’s public ownership.⁴⁵ Thus, it is evident that in addition to promoting market-based competition, China drafted its AML to at least in part facilitate the pursuit of goals established by the Chinese Communist Party (“CCP”), one of which is bolstering its SOEs.⁴⁶ The MOFCOM is instructed to consider the resulting influence on national economic development when evaluating proposed M&As.⁴⁷

M&A deals cannot be closed without approval by the MOFCOM if the deal participants exceed the turnover threshold set separately by the Provisions of the State Council on Thresholds for Prior Notification

⁴¹ Miguel del Pino et al., *International Antitrust*, 53 YEAR IN REV. (ABA) 33, 42 (2019).

⁴² Andrew L. Foster, *Navigating the Unique Features of China’s Competition Landscape*, 31 ANTITRUST L.J. 79, 80 (2017) (“Notwithstanding ongoing debate as to whether consumer welfare or total welfare should form the benchmark for the relevant economic welfare standard, most competition regulators accept that the basic goals of antitrust law are to enhance economic efficiency and safeguard consumer welfare.”).

⁴³ *Id.*

⁴⁴ Anti-monopoly Law of the People’s Republic of China, art. 1 (promulgated by the Standing Committee of the National People’s Congress on Aug. 30, 2007 and effective Aug. 1, 2008) [hereinafter AML], available at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>.

⁴⁵ Daniel C.K. Chow, *China’s Enforcement of its Anti-Monopoly Law and Risks to Multinational Companies*, 14 SANTA CLARA J. INT’L L. 99, 102–03 (2016).

⁴⁶ *Id.*; See also Joanna Tsai & Yajing Jiang, *Lessons from an Analysis of the Economic Approaches in China and the United States in Recent and Earlier Cross-Jurisdictional Merger Cases*, 24 GEO. MASON L. REV. 1117, 1123–24 (2017).

⁴⁷ AML, *supra* note 44, art. 27(5).

of Concentrations of Undertakings.⁴⁸ These M&A participants are responsible for submitting a notification to the MOFCOM, which triggers a 30-day “Phase 1” initial merger review period after which it decides whether the notification is complete.⁴⁹ The MOFCOM may extend the review period by 90 days (known as a “Phase 2” review), which may be extended by an additional 60 days if the participants agree.⁵⁰ After review and investigation, the MOFCOM may either approve without conditions, impose certain restrictions, or block the transaction completely.⁵¹ Although the MOFCOM has rarely intervened in M&A deals, these cases are especially important because they provide insight into when and how the MOFCOM steps in.⁵² When the MOFCOM does opt to conditionally approve an M&A deal, behavioral conditions are imposed more frequently than structural ones.⁵³

In the Microsoft–Nokia acquisition case, Microsoft and Nokia filed a notification with the MOFCOM on 13 September 2013.⁵⁴ The MOFCOM accepted the notification as complete and initiated a Phase 1 review on 10 October 2013.⁵⁵ The investigation extended into Phase 2 on 8 November 2013 and was further extended for another 60 days on 8 February 2014.⁵⁶ The acquisition application was eventually approved by the MOFCOM on 8 April 2014.⁵⁷ Because of the deal’s potential effect on the patent license market, the MOFCOM concluded that it had concerns regarding the potential anticompetitive effect of

⁴⁸ *Id.* arts. 21, 25, 26; Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings (promulgated by the State Council of the People’s Republic of China on Aug. 1, 2008 and effective Aug. 1, 2008), available at <http://fldj.mofcom.gov.cn/article/c/200903/20090306071501.shtml>.

⁴⁹ AML, *supra* note 44, art. 25.

⁵⁰ *Id.* art. 26.

⁵¹ *Id.* arts. 28–29.

⁵² See Cunzhen Huang & Fei Deng, *Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China*, ANTITRUST 44, 44 (2017). See also Fei Deng & Cunzhen Huang, *A Ten-Year Review of Merger Enforcement in China*, THE ANTITRUST SOURCE, 1, 1 (2018).

⁵³ Shaoping Chen, *Merger Control Under China’s Anti-Monopoly Law*, 13 CHI.-KENT J. INT’L & COMP. L. 177, 199 (2013).

⁵⁴ MOFCOM Decision, *supra* note 28, at 1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Microsoft's Android license program (including both SEPs and non-SEPs) and Nokia's telecommunication SEPs.⁵⁸

The MOFCOM was first concerned that Microsoft would transform into a smartphone original equipment manufacturer ("OEM") after the acquisition and thus would directly compete with Chinese domestic manufacturers, the vast majority of which produced Android phones.⁵⁹ Microsoft would then have both the motivation and the power to raise royalty fees for its Android license program, containing key Android-related patents that would be virtually impossible for the Chinese domestic manufacturers to circumvent.⁶⁰ The acquisition would enable Microsoft to impose extra costs on its opponents or even provide it with the leverage necessary to require manufacturers to transform into production of devices using the Windows Phone operating system.⁶¹ For Nokia, the company would leave the smartphone manufacturing market and primarily retain its SEP licensing business.⁶² This suggested that Nokia would be inclined to raise its SEP royalty fees in search of profit and could do so without consequences because it would no longer need to obtain cross-licenses from its licensees.⁶³

The MOFCOM therefore decided to impose certain restrictions on both Microsoft and Nokia to preserve competition in the Chinese domestic patent license market.⁶⁴ The list of restrictions in the

⁵⁸ *Id.* at 5–6. The relevant markets in the case were the following: (1) smartphone (not including tablet), (2) mobile device operating system, and (3) mobile device patent license. The MOFCOM, in the merger control decision, did not think Microsoft's acquisition of Nokia would disrupt the smartphone and operating system markets, given the miniscule market shares of Microsoft's mobile device operating system and Nokia's smartphone. *Id.* at 2–4.

⁵⁹ See Dominic Sunnebo, *Android 87% Share in China; More Brands Competing*, KANTAR WORLDPANEL (May 10, 2017), 1, 1–2, <https://www.kantarworldpanel.com/global/News/Android-87-Share-in-China-More-Brands-Competing>.

⁶⁰ *MOFCOM Decision*, *supra* note 28, at 4–5.

⁶¹ *Id.*

⁶² See Dan Levine, *Why Nokia Didn't Sell Its Patents to Microsoft*, REUTERS (Sep. 4, 2013, 12:46 PM), <https://www.reuters.com/article/us-nokia-microsoft-patents/why-nokia-didnt-sell-its-patents-to-microsoft-idUSBRE9820ZZ20130903>.

⁶³ See *MOFCOM Decision*, *supra* note 28, at 5–7.

⁶⁴ See Elizabeth Xiao-Ru Wang, *Patent Pledge Enforcement in China*, in PATENT PLEDGES: GLOBAL PERSPECTIVES ON PATENT LAW'S PRIVATE ORDERING FRONTIER 197, 202–03 (Jorge L. Contreras & Meredith Jacob eds., 2017).

MOFCOM's decision turned out to be extensive and onerous.⁶⁵ With respect to Microsoft's SEPs, Microsoft was required to (1) continue to adhere to the fair, reasonable and non-discriminatory ("FRAND") commitments it had made to standard setting organizations ("SSOs"), (2) not seek injunctive relief or exclusion orders against Chinese smartphone manufacturers, (3) not request that licensees license their patents to Microsoft in exchange (except for the licensees' SEPs in the same standard), and (4) not transfer its SEPs to a party who refused to follow all of the above.⁶⁶ As for Microsoft's non-SEPs, the restrictions were also demanding. Microsoft had to (1) continue to offer nonexclusive licenses to Chinese smartphone manufacturers, (2) cap future royalty rates and license terms unrelated to price at the then-current level, and (3) not transfer any of the non-SEPs to any other party until 5 years after the acquisition deal.⁶⁷ With respect to restrictions relating to its SEPs, Nokia also had to (1) continue to honor its FRAND commitments to SSOs, (2) not seek injunctive relief against good-faith potential licensees, (3) agree to use independent arbitration to solve FRAND disputes and be bound by the arbitrator's decision, (4) not bundle or tie SEPs with other non-FRAND-committed patents to license, and (5) agree to never transfer its SEPs to a party refusing to honor FRAND commitments.⁶⁸

Overall, the restrictions imposed by the MOFCOM covered activities in both SEP and non-SEP license markets.⁶⁹ Compared with unconditional approvals given by the US and EU, these restrictions seem onerous. This accords with the tendency of Chinese antitrust enforcement agencies to impose stricter conditions than their US and EU counterparts, especially where patent rights are concerned.⁷⁰ The Chinese government increasingly uses antitrust law to address

⁶⁵ Although it appeared that the MOFCOM decided these terms unilaterally, a document published by Microsoft on its official blog indicates that the MOFCOM's decision came as a result of some sort of negotiation with Microsoft and Nokia, albeit not through an "official" consent decree process. See *Chinese Ministry of Commerce Approves Microsoft-Nokia Deal*, MICROSOFT CORPORATE BLOGS (Apr. 8, 2014), <https://blogs.microsoft.com/blog/2014/04/08/chinese-ministry-of-commerce-approves-microsoft-nokia-deal/>.

⁶⁶ *MOFCOM Decision*, *supra* note 28, at 7.

⁶⁷ *Id.*

⁶⁸ *Id.* at 8.

⁶⁹ Huang & Deng, *supra* note 52, at 47.

⁷⁰ *Id.* at 45.

perceived “monopolistic” practices in industries, particularly in the technology industry where SEPs are a major issue.⁷¹

B. Decision in South Korea

South Korea introduced its Monopoly Regulation and Fair Trade Act (“MRFTA”) in 1980 and established the Korea Fair Trade Commission (“KFTC”) as its enforcing agency.⁷² Not unlike China’s AML, the MRFTA strives for “the balanced development of the national economy.”⁷³ It is apparent that promoting national policy plays a role in enforcement of MRFTA, although in traditional areas of antitrust enforcement, including merger control, it may not be as much of a priority as it is in China.⁷⁴ MRFTA was voluntarily introduced without influence from other countries or organizations and with an aim to respond to public demand to counter the tyranny of *chaebols* and establish a well-functioning market economy in a time of political and economic turmoil.⁷⁵ Enforcing MRFTA enables the KFTC to limit the dominance of *chaebols* and protect parties at a disadvantage such as consumers or small and medium-sized enterprises (“SMEs”).⁷⁶ The *chaebols* are mega corporate groups that are often established and owned by a single person or family.⁷⁷ In the 1950s, the South Korean government decided that allowing a few select companies to freely expand into various industries was a shortcut to increasing exports and jobs.⁷⁸ The government went so far as to explicitly provide the newborn

⁷¹ Liyang Hou & Mengchi Tian, *IPR Protection and Antitrust Regulation of SEPs in China*, in *SEPs, SSOS AND FRAND: ASIAN AND GLOBAL PERSPECTIVES ON FOSTERING INNOVATION IN INTERCONNECTIVITY* 232, 253–54 (Kung-Chung Liu & Reto M. Hilty eds., 2020).

⁷² See Hwang Lee, *Overview of Competition Policy*, in *CHINA-KOREA IP & COMPETITION LAW ANNUAL REPORT 2017 VOLUME I* 163, 164, 173 (Meng Yanbei & Lee Hwang eds., 2017).

⁷³ Monopoly Regulation and Fair Trade Act (effective Dec. 31, 1980, as amended on Dec. 30, 1996). The purpose of the MRFTA also includes promoting fair and free competition, encouraging creative enterprising activities, and protecting consumers. *Id.*

⁷⁴ See Youngjin Jung & Seung Wha Chang, *Korea's Competition Law and Policies in Perspective*, 26 *Nw. J. INT'L L. & BUS.* 687, 695 (2006).

⁷⁵ Lee, *supra* note 72, at 164. See also Kyu Uck Lee, *Economic Development and Competition Policy in Korea*, 1 *WASH. U. GLOBAL STUD. L. REV.* 67, 70 (2002).

⁷⁶ Lee, *supra* note 72, at 173.

⁷⁷ See Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol's Corporate Governance*, 14 *CARDOZO J. INT'L & COMP. L.* 21, 23 (2006).

⁷⁸ Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 *TEX. INT'L L.J.* 1, 13 (2016).

chaebols with benefits, such as cheap loans and relief funds.⁷⁹ *Chaebols* that have dominated South Korea to this day include world-class mobile device manufacturers Samsung and LG, which, as is explained later, may be of certain importance in the Microsoft–Nokia merger control decision.

In the Microsoft–Nokia case, Microsoft and Nokia notified the KFTC of their M&A transaction on 1 November 2013.⁸⁰ After the KFTC expressed concerns, Microsoft voluntarily proposed a remedy program on 27 August 2014, but it was deemed to be insufficient.⁸¹ The KFTC initiated a consent decree process on 4 February 2015, and the acquisition application was eventually approved on 24 August 2015, with Microsoft agreeing to an alternate remedy plan.⁸²

In the KFTC’s competition analysis, the sole relevant market was the patent license market comprising both smartphone and tablet patents.⁸³ The KFTC’s main concern was that Microsoft “might abuse its patent rights against Korean smartphone manufacturers” upon becoming a device manufacturer itself through the acquisition.⁸⁴ Stated differently, the risk was that while engaging in the device business, Microsoft might unilaterally raise license royalties or file patent lawsuits against its competitors to obstruct their businesses.⁸⁵

In fact, the restrictions the KFTC imposed on Microsoft were quite comparable to the MOFCOM’s aforementioned conditions, where both Microsoft’s SEPs and non-SEPs were addressed.

⁷⁹ See Christopher Hale, *Addressing the Incentive for Expropriation Within Business Groups: The Case of the Korean Chaebol*, 30 *FORDHAM INT’L L.J.* 1, 27 (2006).

⁸⁰ *KFTC Decision*, *supra* note 28, at 1.

⁸¹ *Id.* at 1–2.

⁸² *Id.* at 1–7.

⁸³ *Id.* at 2. The KFTC also stated in its public notice that the geographic scope of its remedy plan included not only South Korea but also overseas markets because the plan sought to impose a limit on Microsoft’s ability to exercise patent rights in foreign jurisdictions. *Id.* In the same case, the MOFCOM had limited the scope merely to the Chinese domestic market. *MOFCOM Decision*, *supra* note 28, at 4.

⁸⁴ *KFTC Decision*, *supra* note 28, at 1.

⁸⁵ *Id.* However, the KFTC’s concern was not without criticism. Post-merger Microsoft might have little ability to raise its license royalties because major Android device manufacturers were said to have long-term license contracts with Microsoft; moreover, in reality Microsoft had weak incentives to raise its royalties because of the low popularity of Nokia’s smartphone (Lumia)—Microsoft would minimally benefit from raising royalties demanded of Android device manufacturers. Sang-Seung Yi & Yoonhee Kim, *Patent Pledges: Korean Perspectives*, in *PATENT PLEDGES: GLOBAL PERSPECTIVES ON PATENT LAW’S PRIVATE ORDERING FRONTIER* 209, 221 (Jorge L. Contreras & Meredith Jacob eds., 2017).

Microsoft's SEPs were those related to communication technology, and its non-SEPs were those that consisted of core Android technologies, which the KFTC claimed were "practically impossible to replace or circumvent".⁸⁶ Regarding its SEPs, Microsoft agreed to (1) continue to honor its FRAND license commitments to SSOs, (2) not seek any SEP-based injunctive relief or exclusion orders against South Korean smartphone or tablet manufacturers, (3) not require SEP licensees to grant back their patents to Microsoft (except for the licensees' SEPs essential to the identical standard), and (4) not transfer its SEPs to any party that did not agree to follow all of the above.⁸⁷ As for its non-SEPs, Microsoft agreed to (1) continue to offer nonexclusive licenses to South Korean smartphone or tablet manufacturers, (2) keep royalty rates and non-pricing license terms no more demanding than before the acquisition, (3) offer a complete license package to South Korean manufacturers who were previously only partially covered, (4) not transfer these non-SEPs for 5 years, and (5) not seek non-SEP-based injunctive relief or exclusion orders against South Korean manufacturers whose license negotiations are in good faith.⁸⁸ After conducting its investigation into what would remain of Nokia after the acquisition, the KFTC concluded that Nokia's patents were "not merger-specific [and thus not] subject to the M&A investigation."⁸⁹ Ultimately, no obligation was imposed on Nokia by the KFTC, which was a quite different outcome from the severe restrictions imposed on Nokia's patent license in China.⁹⁰

C. *Decision in Taiwan*

Taiwan enacted its Fair Trade Act ("FTA") in 1992, and it was a major and necessary step toward conformance with international trade practices.⁹¹ The Taiwan Fair Trade Commission ("TFTC") was vested with power to enforce the FTA through various means, including competition investigations, imposition of sanctions, and, of course,

⁸⁶ *KFTC Decision*, *supra* note 28, at 3–4. Note that most of these patents were not South Korean patents. Jurata & Owens, *supra* note 3, at 1141.

⁸⁷ *KFTC Decision*, *supra* note 28, at 3.

⁸⁸ *Id.* at 4–5.

⁸⁹ *Id.* at 6.

⁹⁰ The KFTC mentioned at the end that it conducted a separate investigation into Nokia and would continue monitoring Nokia's potential abuse of patents. *Id.*

⁹¹ Pijan Wu & Caroline Thomas, *Taiwan's Fair Trade Act: Achieving the 'Right' Balance?*, 26 *Nw. J. INT'L L. & BUS.* 643, 645 (2006).

merger control.⁹² The FTA was not a purely domestic development but was strongly influenced by relevant statutes in the US, EU, and Japan.⁹³ The introduction of the FTA in Taiwan was not voluntary, and during the legislative process, numerous concerns were raised in the society. It took over 10 years to draft and finally implement the FTA.⁹⁴ The most disputed aspects of the FTA were provisions and policies for stricter merger control, which possibly were in conflict with the government's own policy of encouraging mergers; concerns were raised about delaying and hindering future M&As.⁹⁵ To avoid delay and also alleviate administrative burdens, the TFTC amended its provisions in 2002 to adopt a "pre-merger notification system"; before the 2002 amendment, companies had to obtain its prior approval.⁹⁶ In the current system, companies are required to notify the TFTC if a prospective M&A participant exceeds the market share or sales figure threshold.⁹⁷ Within a certain period outlined in the FTA, the TFTC can opt to make a decision to either completely block or conditionally approve an M&A deal; otherwise, the companies can proceed with the deal.⁹⁸ Conditional approval means the TFTC can attach conditions, including performing certain undertakings, to its approval decisions provided that the agency has anticompetitive concerns regarding a deal.⁹⁹ These decisions, conditions, and undertakings can be appealed to administrative courts in Taiwan.¹⁰⁰

1. TFTC Decision

In the Microsoft–Nokia case, Microsoft and Nokia filed a merger notification with the TFTC on November 20, 2013.¹⁰¹ The TFTC issued its decision on February 19, 2014, which was earlier than the

⁹² Fair Trade Act of 2017, arts. 6, 10–12, 26–28 (promulgated Feb. 4, 1991, amended Jun. 14, 2017), XIANXING FAGUI HUIBIAN, available at <http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1295&docid=15182>. [hereinafter referred to as the Taiwan Fair Trade Act].

⁹³ Wu & Thomas, *supra* note 91, at 664.

⁹⁴ *See id.* at 646.

⁹⁵ *Id.* at 646, 655.

⁹⁶ *See id.* at 656.

⁹⁷ Taiwan Fair Trade Act, *supra* note 92, art. 11.

⁹⁸ *Id.*

⁹⁹ Wu & Thomas, *supra* note 91, at 650; Taiwan Fair Trade Act, *supra* note 92, art. 13. When deciding whether to completely block the transaction or to impose conditions or undertakings, the TFTC evaluates whether the overall economic benefit of the merger would outweigh the disadvantages that would result from competition restraint.

¹⁰⁰ Taiwan Fair Trade Act, *supra* note 92, art. 48.

¹⁰¹ THAC Adjudication, *supra* note 35, at 2.

decisions of authorities in either China or South Korea.¹⁰² The TFTC's restrictions on Microsoft's and Nokia's patent license practices were more moderate than those imposed on Microsoft by China or South Korea or those imposed on Nokia by China.¹⁰³ The main concern of the TFTC was fairly similar to those of the MOFCOM and KFTC, namely that it would be possible for Microsoft to raise the license fees for its Android license program not for the relatively benign purpose of pushing mobile device manufacturers to select the less costly Windows Phone operating system but rather for the anticompetitive purpose of harming its new opponents in device manufacturing.¹⁰⁴ The TFTC contended that after acquiring Nokia's DSB, Microsoft could possibly manufacture its own devices rather than rely on other manufacturers to do so.¹⁰⁵ Microsoft therefore might have an incentive to raise the Android licenses fees to raise rivals' manufacturing cost.¹⁰⁶ For Nokia, upon selling its DSB, the company would have the capability to increase its SEP license fees because it would no longer need to acquire cross-licenses from its licensees.¹⁰⁷ Most notably, the TFTC indicated that the FTA had not excluded Nokia from its competition investigation, even though it had sold only some of its assets.¹⁰⁸ The TFTC stated clearly in its decision that the agency opted to take a different stance from that of the EC regarding the inclusion of Nokia in the investigation.¹⁰⁹

The TFTC's list of restrictions on Microsoft and Nokia was a very short one compared with that of the MOFCOM or the KFTC. The

¹⁰² See *TFTC Decision*, *supra* note 31, at 10.

¹⁰³ See *id.* at 1–2. In the TFTC's decision, the relevant markets were found to include mobile operating systems, mobile devices (both smartphones and tablets) and patent licensing for both, but the TFTC's investigation and decision focused on the patent license market, which is the same with the MOFCOM's and KFTC's investigations. As for the geographic market, the TFTC limited the scope of its investigation to effects on the domestic market, which is the same as MOFCOM's scope but different from that of the KFTC's. See *id.* at 1–3.

¹⁰⁴ See *id.* at 5–7. The TFTC reasoned that because the Android and iOS ecosystems were both far more developed than the Windows Phone ecosystem, they were popular enough among consumers to ensure that manufacturers had little incentive to switch to Windows Phone, even if Microsoft demanded higher Android fees. Another group of Microsoft's patents, those related to EAS technology, were not as readily exploitable because they were mostly already subject to long-term license agreements with fees that could not be altered unilaterally by Microsoft. See *id.*

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *TFTC Decision*, *supra* note 31, at 6.

¹⁰⁷ *Id.* at 7.

¹⁰⁸ *Id.* at 7–8.

¹⁰⁹ *Id.*

TFTC simply ordered (1) Microsoft to not inappropriately price or discriminate when licensing its mobile device related patents to allow licensees to freely choose which operating system to incorporate into their devices, and (2) Nokia to continue licensing its SEPs according to FRAND principles and to not transfer SEPs to any party that did not agree to do so as well.¹¹⁰

Despite fewer and less severe restrictions being imposed, the Microsoft–Nokia case was not yet over in Taiwan. The parties filed a petition appealing the TFTC’s restrictions at the Taipei High Administrative Court (“THAC”), which they would not do with respect to the later China and South Korea decisions.¹¹¹ After the TFTC’s decision was upheld by the THAC, Nokia opted to appeal even further to the Supreme Administrative Court (“SAC”). The appeal was denied on August 3, 2016, and finally the case was resolved.¹¹² Although the petition was unsuccessful, the THAC’s and SAC’s adjudication incorporated debates between the TFTC and Microsoft/Nokia and resulted in a more thorough exposition of the legal reasoning of the TFTC’s decision.

2. THAC Adjudication

Before the THAC, the merger-seeking parties argued that the TFTC failed to articulate why having a stronger ability to raise license fees would necessarily lead them to actually doing so and had relied on adverse testimony from fellow competitors and their own speculations.¹¹³ However, the THAC sided with the TFTC, finding that its collected evidence had been sufficiently examined without bias.¹¹⁴ The THAC further indicated that because of the dynamic and uncertain nature of competition in the high-tech market, the TFTC may rely on evidence that is relatively lacking in clarity or specificity to justify its decision.¹¹⁵

The parties also argued that the TFTC should have considered prior decisions in many other jurisdictions rather than only the later

¹¹⁰ *Id.* at 2.

¹¹¹ See *THAC Adjudication*, *supra* note 35.

¹¹² *Nokia v. Fair Trade Commission*, 2016 SIFAYUAN JIANSUO XITONG (Sup. Admin. Ct. Aug. 3, 2016) [hereinafter *SAC Adjudication*].

¹¹³ See *THAC Adjudication*, *supra* note 35, at 6, 8–9.

¹¹⁴ See *id.* at 34–41; Andy C. M. Chen, *Patent Assertion Entities in Merger Review in Taiwan: Issues of Characterization and Remedies*, PATENT ASSERTION ENTITIES AND COMPETITION POLICY 1, 4–5 (2017).

¹¹⁵ Chen, *supra* note 114, at 4. However, the THAC’s adjudication and rationale were criticized for ambiguously refuting the argument that merger control was a process of “predicting” future market impacts. *Id.*

decisions in China and South Korea¹¹⁶—before the TFTC decision, the Microsoft–Nokia case had already been approved unconditionally in the US, EU, Canada, Mexico, Brazil, Israel, Russia, and Ukraine.¹¹⁷ However, the THAC in its adjudication elected to only refer to the later MOFCOM and KFTC decisions in China and South Korea, agencies which made the decisions after the TFTC and were the exceptions in imposing restrictions on either Microsoft or Nokia.¹¹⁸ The THAC reasoned that Taiwan, China, and South Korea were home to mobile device manufacturers, which was not the case for the US, EU, and others, and consequently the antitrust authorities would likely make different merger control decisions.¹¹⁹ Because the portion of the economy represented by mobile device manufacturing is substantially larger in East Asian countries than in Western or other countries, the effects of the Microsoft–Nokia acquisition in East Asia would presumably be larger.¹²⁰ Therefore, the various East Asian countries’ antitrust authorities were more cautious and approved the acquisition only with certain restrictions imposed on the parties.¹²¹

The THAC further noted that Taiwan’s mobile device manufacturers operated on the slimmest of profit margins and the competition among these manufacturers was intense.¹²² If the TFTC did not impose restrictions on merging entities in its approval, its divergence from the actions of the MOFCOM and KFTC might lead patentees to take advantage of the situation to raise their license fees in Taiwan to compensate for their losses in other East Asian areas.¹²³ This would result in additional manufacturing costs and reduce the manufacturers’ profit, which would be harmful to Taiwan’s domestic manufacturers and reduce their competitiveness in the global market, particularly with respect to rivals from China and South Korea.¹²⁴ This rationale not only justified the THAC’s adjudication referring to the MOFCOM and KFTC decisions but also rebutted Nokia’s argument that the TFTC should follow the EU’s example and not impose any restrictions on it.

¹¹⁶ See *THAC Adjudication*, *supra* note 35, at 7, 9, 26–27, 32.

¹¹⁷ *Id.* at 26.

¹¹⁸ *Id.* at 26–27.

¹¹⁹ *Id.* at 26.

¹²⁰ *Id.* at 26–32.

¹²¹ See *id.*

¹²² See *THAC Adjudication*, *supra* note 35, at 12, 31.

¹²³ See *id.* at 12.

¹²⁴ See *id.* at 12, 31.

3. SAC Adjudication

Nokia was the only party to appeal to the SAC. Despite Nokia bringing up the EU and South Korean decisions as examples in its argument that it should be excluded from the competition investigation, the SAC held the same viewpoint as the THAC, which was to respect the TFTC's full authority to make its own decisions according to Taiwan's own competition law and environment.¹²⁵ If examples were to be closely followed, then MOFCOM's decision (where restrictions on Nokia were even more strict than those in Taiwan) had to be taken into consideration as well.¹²⁶ Nokia further argued that it was not necessary to order FRAND compliance because it had already made such commitments to SSOs.¹²⁷ The SAC rejected this argument, opining that FRAND commitments were not designed for M&A situations and did not contain provisions that prevent antitrust authorities from imposing restrictions.¹²⁸

The SAC also agreed with the THAC and TFTC that after selling its DSB, Nokia would no longer manufacture and sell mobile devices and its new business model would be built around licensing out patents.¹²⁹ Prior to the acquisition, Nokia and Taiwanese domestic manufacturers could "check-and-balance" each other because of their respective licensing and manufacturing needs.¹³⁰ If Nokia were to raise license fees or change its license policy, Taiwanese manufacturers could retaliate likewise.¹³¹ However, once Nokia no longer manufactures and sells mobile devices, the situation changes dramatically. Nokia could possibly become a so-called non-practicing entity ("NPE"), which profits by means of licensing patents.¹³² It would then practically be impossible for the Taiwanese manufacturers to "check-and-balance" Nokia given its market power based on its

¹²⁵ See *SAC Adjudication*, *supra* note 112, at 22, 25, 32–34. The SAC further stated that the decisions in the other jurisdictions did not have binding effect for the court and that these foreign decisions at most served to 'support' the court's judgment. See *id.* at 34, 37.

¹²⁶ See *id.* at 34, 37.

¹²⁷ See *id.* at 26. This argument by Nokia was quite similar to the rationale of the EU decision in the same case. See *EC Decision*, *supra* note 23, paras. 251–258.

¹²⁸ See *SAC Adjudication*, *supra* note 112, at 38–39.

¹²⁹ See *id.* at 40; *THAC Adjudication*, *supra* note 35, at 11, 35.

¹³⁰ See *SAC Adjudication*, *supra* note 112; *THAC Adjudication*, *supra* note 35.

¹³¹ See *SAC Adjudication*, *supra* note 112; *THAC Adjudication*, *supra* note 35.

¹³² See *SAC Adjudication*, *supra* note 112.

SEPs.¹³³ The SAC ruled that the TFTC was justified in imposing the FRAND requirements on Nokia's SEPs as a result.

The SAC also discussed modern-era merger control, especially where the transaction involves patents. The SAC stated that intangible assets are undeniably of critical importance in merger control decisions.¹³⁴ Thus, antitrust authorities should examine the merging parties' patents, informational assets, and their effect on the domestic market. Even if a party (Nokia in this case) does not gain possession of any new patents, if its existing patents could be used in the market in a different manner, competition analysis is necessary.¹³⁵ The SAC further opined that competition analysis is based on prediction¹³⁶—epistemologically, how an M&A transaction will affect the market cannot be known beforehand.¹³⁷ But, provided that authorities base their decisions on thorough research and convincing evidence, then such decisions should not be deemed arbitrary.¹³⁸

II. DECISION COMPARISON

The *Comparison of Microsoft–Nokia Merger Control Decisions* table summarizes in sequence the Microsoft–Nokia merger control decisions as well as the final restrictions imposed on Microsoft's and Nokia's patents.

¹³³ *See id.* But it was commented that various rules or standards for characterizing NPE were necessary, if the court or agency examined the case's competitive effect by means of the business-model transformation theory. Chen, *supra* note 114, at 20.

¹³⁴ *See SAC Adjudication, supra* note 112, at 32–33, 40.

¹³⁵ *See id.* at 33.

¹³⁶ *Id.* at 40–41.

¹³⁷ *See id.* at 41.

¹³⁸ *See id.*

Comparison of Microsoft–Nokia Merger Control Decisions

Date, jurisdiction		November 2013	December 2013	April 2014	August 2015	February 2014–August 2016
		US	EU	China	South Korea	Taiwan
Microsoft SEP	Continue FRAND license commitment	none	none	V	V	Δ ¹²⁷
	Not seek injunctive relief			V	V	X
	Not request grant-back license			V	V	X
	Only transfer to assignee with same restraint			V	V	X
Microsoft Non-SEP	Continue nonexclusive license	none	none	V	V	Δ ¹²⁸
	Cap royalty rate and license term			V	V	
	5-year transfer ban			V	V	X
	Offer complete license			X	V	X
	Not seek injunctive relief			X	V	X
Nokia SEP	Continue FRAND license commitment	none	none	V	none	V
	Not seek injunctive relief			V		X
	Accept arbitration			V		X
	Not tie to other patents			V		X
	Only transfer to assignee with FRAND commitment			V		V

Issuing its decision in February 2014, the TFTC in Taiwan was the first East Asian country to conditionally approve the case, followed by the MOFCOM's decision in China and KFTC's consent agreement in South Korea.¹³⁹ Of these, only the TFTC's decision was later appealed to the administrative courts (the THAC and SAC) and subject to debate for over 2 years.¹⁴⁰ During litigation in Taiwan, decisions by the China and South Korea agencies were cited by parties and taken under consideration by the courts.¹⁴¹ The TFTC's conditional approval was not only the first one issued and only one appealed in East Asia but was also the last one affirmed in the world.¹⁴² Because neither Microsoft nor Nokia appealed in China, the MOFCOM's conditional approval was the first to be affirmed in East Asia.¹⁴³ South Korea was

¹³⁹ See *MOFCOM Decision*, *supra* note 28; see *KFTC Decision*, *supra* note 28; see *TFTC Decision*, *supra* note 31.

¹⁴⁰ See *MOFCOM Decision*, *supra* note 28; see *KFTC Decision*, *supra* note 28; see *TFTC Decision*, *supra* note 31.

¹⁴¹ See, e.g., *THAC Adjudication*, *supra* note 35, at 32–33; *SAC Adjudication*, *supra* note 112, at 34.

¹⁴² See Suk-ye, *supra* note 27.

¹⁴³ See Luke Hung-yu Chuang (莊弘鈺), *Shiye Jiehe Guanzhi zhi Zhuanliquan Kaoliang Zuigao Xingzheng Fayuan 105 Niandu Panzi di 403 hao Panjue Pingxi* (事業結合管制之專利權考量：最高行政法院 105 年度判字第 403 號判決評析) [Patent Consideration in Merger Control: Comment on Nokia v. FTC], *TAIWAN L.J.* (台灣法學雜誌), no. 380 (2019).

the last of the three East Asian countries to make the merger control decision.¹⁴⁴ After the TFTC's and MOFCOM's decisions in early 2014, the companies were probably aware that it was unlikely the KFTC would approve the same case without any restrictions. Microsoft therefore started to negotiate with and submitted its voluntary corrective proposal to the KFTC in August 2014; the consent agreement was reached in August 2015, which effectively resolved potential disputes.¹⁴⁵ The restrictions on Microsoft's patents were similar in South Korea and China, indicating that the MOFCOM's decision might have been highly influential on the KFTC's consent agreement.

As for restrictions on patents, the MOFCOM imposed severe restrictions on Microsoft's and Nokia's patents. Neither Microsoft nor Nokia could freely exercise their patent rights in China; for instance, they were limited in their abilities to file for injunctive relief, determine license rates and terms, and select assignees. The TFTC imposed relatively moderate restrictions on Microsoft's and Nokia's patents. Microsoft and Nokia were still permitted to seek injunctive relief and change license terms if the situation was appropriate, and Microsoft had much freedom to transfer its patents because of no period or assignee restraints. The KFTC's restrictions were somewhere in the middle. As the MOFCOM had, the KFTC imposed extensive restrictions on Microsoft's patents, particularly on Microsoft's non-SEPs; however, unlike the MOFCOM and TFTC, the KFTC imposed no restrictions on Nokia's patents. Thus, Microsoft would have mostly the same restraints on its patent enforcement in South Korea and China, but Nokia would not be restrained in its patent enforcement in South Korea, unlike in China and Taiwan.

III. POLICY CONSIDERATIONS

A. *Intensity of Antitrust-Patent Regulation*

In the preceding sections, it was clear that regulatory considerations and eventual remedies revolved around Microsoft's and Nokia's patents. Whether it is appropriate to restrict patent rights through antitrust law and where boundaries should be set if so have

¹⁴⁴ See Jessica C. Wong, *The Challenges Multinational Corporations Face in Protecting Their Well-Known Trademarks in China*, 31 BROOK. J. INT'L L. (2006).

¹⁴⁵ See *KFTC Decision*, *supra* note 28, at 1–2; Jinyul Ju, SEPS, SSOs AND FRAND: ASIAN AND GLOBAL PERSPECTIVES ON FOSTERING INNOVATION IN INTERCONNECTIVITY 212, 227 (Kung-Chung Liu & Reto M. Hilty eds., 2020).

long been controversial questions.¹⁴⁶ Some scholars have argued that antitrust law is necessary to prevent patent holdup, especially in the realm of SEPs, and it also ensures the effectiveness of FRAND commitments.¹⁴⁷ Others have taken the opposite approach and contended using antitrust measures to counter patent holdup is “a dangerous cure for an illusory disease.”¹⁴⁸

In China’s case, the MOFCOM apparently viewed the possibility of Microsoft and Nokia taking actions, such as seeking injunctive relief or setting more demanding license fees and terms, as crossing the line from “regular patent exercising” to anticompetitive behavior and thus intervened through merger control. Likewise, authorities in both South Korea and Taiwan demonstrated antitrust law in these jurisdictions can be used to control how patent owners exercise their rights. The principle reason, although contested in litigation in Taiwan, was that these East Asian countries are home to many mobile device manufacturers; therefore, the three antitrust authorities had to take their domestic industry development into account.¹⁴⁹ If one of these authorities was more passive in enforcing its country’s antitrust law while the others were more active, that country would be at risk for patent owners shifting the pressure to their domestic licensees, claiming more license fees and compensating for their losses in the other countries.¹⁵⁰ Stated differently, these East Asian countries possess largely similar industry environments and to some extent compete with each other; thus, having manufacturing or licensing costs deviate too much from others could damage competitiveness and the domestic industry. The three antitrust authorities seemed to adopt a similar stance for this reason, all intervening in the Microsoft–Nokia transaction and eventually conditionally approving the case.¹⁵¹

¹⁴⁶ See, e.g., Michal S. Gal & Alan D. Miller, *Patent Challenge Clauses: A New Antitrust Offense?*, 102 IOWA L. REV. 1477 (2017); Matthew G. Sipe, *Patents v. Antitrust: Preempting Conflict*, 66 AM. U. L. REV. 415 (2016).

¹⁴⁷ A. Douglas Melamed & Carl Shapiro, *How Antitrust Law can Make FRAND Commitments More Effective*, 127 YALE L. J. 2110 (2018).

¹⁴⁸ David J. Kappos, *The Antitrust Assault on Intellectual Property*, 31 HARV. J. L. & TECH. 665, 673 (2018).

¹⁴⁹ See *THAC Adjudication*, *supra* note 35, at 26.

¹⁵⁰ See *id.* at 12.

¹⁵¹ The decisions by the EU and US to not interfere with Microsoft and Nokia’s transaction were case specific and do not necessarily imply that antitrust law never serves to restrict patent rights. Note that unlike the East Asian antitrust authorities, the EC imposed no restriction on either Microsoft’s or Nokia’s patents. *EC Decision*, *supra* note 23, at 49. If this is not a simple matter of oversight by the EC, one might infer that at least in this case’s investigation, the EC prioritized competition in the markets for

The willingness to enforce antitrust law was similar among the East Asian countries, but the intensity of the enforcement action varied. With regard to Microsoft in this case, for instance, China and South Korea both required that Microsoft comply with numerous requirements, but Taiwan was more restrained in its approach.¹⁵² Notably, China and South Korea both explicitly ordered the continuation of FRAND licensing, whereas Taiwan did not. This suggests that Chinese and South Korean authorities may be more inclined to view FRAND requirements as a powerful tool to check SEP owners.¹⁵³

The disparity in strictness also likely had to do with the fact that the TFTC had fewer prior examples to reference because it was one of the first to decide whether to approve the M&A with certain restrictions. This disparity also reflected differences in the three authorities' determination to safeguard its respective country's mobile device industry. In China's case, companies such as Huawei, Xiaomi, and Oppo together held a growing share of the global smartphone market.¹⁵⁴ It was therefore likely that protecting this industry was among the CCP's policy goals,¹⁵⁵ and this had a strong influence on the MOFCOM's decisions. In South Korea, though its world-class companies Samsung and LG are both *chaebol*, which the government should be inclined to restrain, the mobile device industry represents a

physical products over the market for patent licensing. But not much can be inferred from the brief decision of the US authority, meaning no effective comparison can be made between these two Western jurisdictions.

¹⁵² The MOFCOM and KFTC generally required Microsoft not to seek injunctive relief against domestic manufacturers, not to require licensees to grant-back their patents, not to transfer its patents under certain conditions or period, to continue FRAND license commitments, to offer nonexclusive licenses, and to keep license fees and terms at a certain level. *MOFCOM Decision*, *supra* note 28, at 8-9; *KFTC Decision*, *supra* note 28, at 4-5. The TFTC only required Microsoft not to inappropriately price or discriminate when licensing its patents to domestic manufacturers. *TFTC Decision*, *supra* note 31, at 2.

¹⁵³ FRAND violations are generally deemed to be *per se* illegal under Chinese antitrust law. Claire Guo, *Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes*, 18 J. MARSHALL REV. INTELL. PROP. L. 259, 270 (2019).

¹⁵⁴ See *Chinese Brands Hold 48 Percent Smartphone Market Share Globally: Counterpoint*, GADGETS360 (Aug. 2, 2017), <https://gadgets.ndtv.com/mobiles/news/china-global-smartphone-share-as-per-counterpoint-research-1732479>.

¹⁵⁵ This view was supported even by Chinese scholars. See, e.g., Xiaoye Wang (王晓晔), Yachi Ding (丁亚琦), *Sheji Biaozhun Biyao Zhuanli de Jingyingzhe Jizhong Kongzhi* (涉及标准必要专利的经营者集中控制) [Merger Control Involving Standard Essential Patent], HUADONG ZHENFA U. L. REV. (华东政法大学学报) no. 6, 88, 98 (2016).

major sector of the South Korean economy; thus, Microsoft could not be allowed to freely enter the market and take a share.¹⁵⁶ Samsung's concern that Microsoft might raise its 76 at-issue SEPs for the Android system was given a relatively high amount of weight by the KFTC despite minimal support being offered for this proposition.¹⁵⁷ Taiwan is a relatively small country with a complicated diplomatic status and a developed mobile device industry.¹⁵⁸ The TFTC is in a very different position than its equivalents in the US, EU, and even East Asia.¹⁵⁹ Taiwan was not anticipated to possess enough bargaining clout among the international community to enforce its antitrust law; therefore, the TFTC realistically could not impose extensive restrictions in its conditional approval compared with the MOFCOM and KFTC in China and South Korea.

B. Approaches to Post-Acquisition Nokia

Nokia, which sold off part of its business and became smaller and seemingly less powerful after the acquisition, was treated quite differently by the jurisdictions. The Merger Regulation of the EU was construed to exclude Nokia from the competition investigation, finding that it was not part of the "merged entity" because it would in fact lose a part of its business.¹⁶⁰ Taiwan's TFTC and administrative courts held that Nokia's change in market position, business strategy, and bargaining power would be the direct result of the transaction and thus were merger-specific, but the TFTC imposed only light restrictions on Nokia.¹⁶¹ China was more proactive in restraining post-acquisition

¹⁵⁶ Zahra Ullah, *How Samsung Dominates South Korea's Economy*, CNN TECH (Feb. 17, 2017), <http://money.cnn.com/2017/02/17/technology/samsung-south-korea-daily-life/index.html>. See also Yi & Kim, *supra* note 85, at 221.

¹⁵⁷ Ju, *supra* note 145, at 226–27.

¹⁵⁸ See Wu & Thomas, *supra* note 91, at 661.

¹⁵⁹ See *id.*

¹⁶⁰ As the EC stated, "Nokia is the seller whereas the Commission's investigation relates to the merged entity." Press Release, EUROPEAN COMMISSION, *Mergers: Commission Clears Acquisition of Nokia's Mobile Device Business by Microsoft* (Dec. 4, 2013), http://europa.eu/rapid/press-release_IP-13-1210_en.htm. Note that despite this, the EC was careful to provide further reasoning, stating that Nokia's SEPs were already subject to SSO FRAND conditions and the non-SEPs were already in force and thus not merger specific. See *EC Decision*, *supra* note 23, paras. 252–63.

¹⁶¹ The restrictions only required Nokia to continue its FRAND commitments and to transfer its SEPs to assignees with the same commitment. In fact, Nokia was not required to do anything other than continue its FRAND commitments. *TFTC Decision*, *supra* note 31, at 2. Yet, some American cases even held that although the SEPs were transferred, the

Nokia, judging from its list of restrictions imposed on the company, which was not much shorter than its list of restrictions on Microsoft.¹⁶²

The MOFCOM justified its unique treatment of Nokia by reasoning that Nokia's business model would shift to an SEP-licensing orientation; thus, it could arbitrarily raise licensing fees in search of profit. China and Taiwan might have had the same concern that Nokia would transform into an NPE, a concern made even more evident during litigation at the SAC in Taiwan.¹⁶³ China and Taiwan were thus the only two regimes in the world to impose restrictions on Nokia. As mentioned before, Taiwan was presumably cognizant of its special diplomatic status and relatively weak bargaining power in the international community, which may likely have been a factor in their treatment towards MNCs and their patents. If the MOFCOM had not taken a similar stance and imposed even more severe restrictions in China, the TFTC might have lost its support in the global business world and then would have eventually withdrawn its decision or settled the case in the courts in Taiwan.

The KFTC's decision was the last one made among the three antitrust authorities, which means the Microsoft–Nokia acquisition had already been subject to considerable discussion and debate in South Korea.¹⁶⁴ The KFTC did not concur with the TFTC's and MOFCOM's decisions to restrict Nokia and opined that Nokia's patents were not so "merger-specific" as to call for competition investigation.¹⁶⁵ Despite initiating a separate investigation into Nokia and continuing to monitor Nokia's potential patent abuse, the KFTC undertook no further proceedings and imposed no restrictions on Nokia in the end.¹⁶⁶ One possible reason for this result was that the KFTC did not believe that the acquisition would necessarily transform Nokia into an NPE.¹⁶⁷ In fact, Nokia did continue operating some business units and even

FRAND commitments were binding on new assignees. *See, e.g., Core Wireless Licensing S.A.R.L. v. Apple Inc.*, 899 F.3d 1356 (Fed. Cir. 2018). The aforementioned TFTC's two restrictions on Nokia thus appears to be redundant.

¹⁶² *See MOFCOM Decision, supra* note 28.

¹⁶³ *See SAC Adjudication, supra* note 112, at 40.

¹⁶⁴ *See KFTC Decision, supra* note 28, at 2.

¹⁶⁵ *Id.* at 6. KFTC's interpretation seemed to contrast with the TFTC's and MOFCOM's, where the merger-specific quality was not based on Nokia itself but rather on the potential change to Nokia's market position and business environment.

¹⁶⁶ *See id.*

¹⁶⁷ It might require more empirical or convincing evidence to understand Nokia's transformation into an NPE. Even the agency prediction and court judgment in Taiwan were somewhat questionable. *See Chen, supra* note 114, at 4–5, 20.

launched new products after the acquisition, and consequently classifying Nokia as an NPE would not be entirely accurate.¹⁶⁸ The South Korean patent remedy system was not suitable for Nokia to use to become an NPE; although the courts could still give protection to patent owners through infringement damages and injunctive relief, the scale and impact were well below those of the US and EU.¹⁶⁹ Another possible reason for imposing no restraint on Nokia was to ensure South Korean domestic manufacturers, primarily Samsung and LG, did not receive excessive protection. Because Samsung and LG are two of the most dominant *chaebol* in South Korea, offering too much support to *chaebol* would have not only been harmful to the government's public image but also detrimental to South Korea's market competition, which is one of the reasons why South Korea's MRFTA was enacted in the first place.¹⁷⁰

C. *Following Appeals and Lawsuits*

In China, South Korea, and Taiwan, the Microsoft–Nokia acquisition was cleared under certain conditions. Despite those conditions being far less severe in Taiwan than in the other two countries, the only appeals in any country were filed against the decision of Taiwan's antitrust authority. One of the reasons may have been that at the time, the majority of the global antitrust authorities approved the Microsoft–Nokia M&A without imposing any conditions or restrictions, making the TFTC a notable exception and the first to issue such a conditional approval. In this view, it was reasonable for Microsoft and Nokia to appeal to administrative courts. The THAC sided with the TFTC, and Nokia was the only party to appeal to the SAC, possibly because Microsoft realized that the restrictions it faced in Taiwan were much more moderate than those it faced in China and South Korea. Additionally, Microsoft's and Nokia's appeals also reflected the controversial and conflicting merger policy in Taiwan. The TFTC's merger control might sometimes be cumbersome and cause delay, but the government is usually active in promoting mergers

¹⁶⁸ See *SAC Adjudication*, *supra* note 112, at 39–40.

¹⁶⁹ Chuang, *supra* note 143, at 129, 135–37.

¹⁷⁰ Soeun Lee, *Opportunity for South Korea to Break up 'Chaebol' System*, THE WISCONSIN INTERNATIONAL REVIEW (Mar. 5, 2017), <https://thewire.wisc.edu/2017/03/05/opportunity-for-south-korea-to-break-up-chaebol-system/>. It was possible that the KFTC decided that reining in Microsoft's patents would be sufficient to safeguard the South Korean mobile device industry and economy but allowing Nokia to enforce its patents freely would provide for some "check-and-balance" against the already-almighty Samsung and LG.

and amending regulations such as the Business M&A Law and the Company Law to liberalize Taiwan's industry.¹⁷¹ The petition to the administrative courts might also have helped to clarify the government's ambiguous policy regarding merger control. Finally, again due to its unique international status, Taiwan does not have a strong position from which to enforce its antitrust law against MNCs; therefore, Nokia's or Microsoft's petition might best be viewed as a re-bargaining process between the TFTC and MNCs in court.

It is understandable why judicial relief was not sought in China. Though China's legal system appears to offer means of appeal or seeking relief, effective recourse is *de facto* nonexistent if a party is dissatisfied with the MOFCOM's decision regarding an M&A deal.¹⁷² Corporations might fear retribution by the Chinese government, as the government has the power to interfere with their investment projects and otherwise make business difficult.¹⁷³ Virtually, all enforcement authorities and channels of relief are also controlled by the same entity—the CCP.¹⁷⁴ It is therefore questionable whether an independent judiciary can be realized under the Chinese regime.¹⁷⁵ With courts and appellate systems having difficulty deviating from the administrative decisions by the MOFCOM—decisions of the CCP itself, relief attempts are likely to be in vain and may even backfire on the petitioning party.

For South Korea, the KFTC's decision was preceded by a consent decree process, which implied that Microsoft, at least to some extent, had negotiated with the KFTC about its remedy options, thus putting Microsoft in a more difficult position to disagree with the final decision.¹⁷⁶ In fact, the KFTC's decision came even later than the TFTC's and the MOFCOM's decisions in Taiwan and China respectively. It is possible that upon seeing how the case developed in jurisdictions with an industry environment similar to South Korea's,

¹⁷¹ Wu & Thomas, *supra* note 91, at 655–56.

¹⁷² Wong, *supra* note 144, at 970.

¹⁷³ See Chow, *supra* note 45, at 106–07.

¹⁷⁴ Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT'L & COMP. L.J. 1, 61 (2010).

¹⁷⁵ See Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html>.

¹⁷⁶ See Seung-Soon Lim, *Recent Examples of Consent Decrees in Korea and Their Implications*, IN-HOUSE COMMUNITY (Oct. 14, 2016), <http://www.inhousecommunity.com/article/recent-examples-of-consent-decrees-in-korea-and-their-implications/>.

Microsoft did not anticipate receiving a merger control approval without any restrictions or conditions. Additionally, the THAC issued its adjudication opinion 2 months before the KFTC's decision, which might also have caused Microsoft to not feel optimistic about its chances of success in the South Korean courts. The last possible reason for not seeking judicial relief in South Korea is that Microsoft's acquisition of Nokia gradually turned out to be a "monumental mistake", which was already apparent by the time the deal was finally approved in South Korea.¹⁷⁷ This provided little incentive for Microsoft to pursue full implementation of the deal.

CONCLUSION

In the absence of an international competition regulation or standard, each national antitrust agency is free to make its own merger control decisions on the basis of the needs of its local economy and industry policy. It was illustrated in the article that while most countries imposed no restraints when approving the Microsoft–Nokia acquisition application, there were three exceptions. China's MOFCOM imposed severe restraints on both Microsoft and Nokia, demonstrating the Chinese government's aim to protect its booming local industry. The KFTC imposed constraints comparable to those of the MOFCOM's on Microsoft but not on Nokia, implying that the South Korean government was cautious to enforce its antitrust policy to preserve its own industrial innovation and balance. Despite Taiwan having limited bargaining power in the international community, its TFTC nevertheless imposed mild restraints on Microsoft and Nokia in what might be called a bold pioneering decision in East Asia—it was even the only decision worldwide that was appealed to a country's highest court. This comparative study illustrated the different stances Western and Eastern countries may have regarding whether or not to interfere with market operations through competition regulation. Most notably, Eastern countries have a different regulatory intensity and scope driving their considerations to intervene in market competition. Competition regulation is never done in isolation from other factors, and each country's competition decision is indeed tailored to its respective economic and political concerns.

¹⁷⁷ Gregg Keizer, *Microsoft Writes Off \$7.6B, Admits Failure of Nokia Acquisition*, COMPUTER WORLD (Jul. 8, 2015), <https://www.computerworld.com/article/2945371/smartphones/microsoft-writes-off-76b-admits-failure-of-nokia-acquisition.html>.