



EMERGING CHALLENGES (LAWFARE) July/2019

5G: when legal systems are a nation's destiny

While the news of Huawei suing the US federal government on the 28th of May before the District Court for the Eastern district of Texas was making the headlines in global news, very little was known about another even more significant legal matter. On May 21st the district judge of the Northern District of California ruled against Qualcomm for breaching the antitrust law, upholding the previous US Federal Trade Commission's decision.

Apparently, the fact that US federal and legal authorities quash legal actions promoted by American businesses against Chinese groups on essential matters, is not considered big news.

Without discussing the merit of the judgment, well-motivated in detail (see <https://www.scribd.com/document/411066611/19-05-21-Judgment-in-Favor-of-FTC-Against-Qualcomm>), one should remind that Trump has just issued an executive order preventing companies from doing any business with foreign entities that threaten national security. Such a position perfectly fits with the decision of the Department of Commerce to put Huawei on a blacklist, by forbidding the Chinese operator to purchase US technologies and basically compete in the domestic market.

It seems as though the notion of antitrust is quite "trendy" nowadays, since a few days earlier (April 29th) the "Shanghai Market Regulation Bureau" (SMRB) fined the local subsidiary of the US Eastman Chemical Company with a penalty of \$3,6 million for alleged abuse of dominant position.

It is worth noting this is the first time that the SMRB (which is the Shanghai branch of the "State Administration for Market Regulation" SAMR) has ruled on an antitrust case, thus drawing a lot of attention. Indeed, the case is intriguing because, if one looks at the details, the ruling is based on a very thin legal ground, something that any rule of law and constitution tries to avoid.

In fact, SAMR and SMRB are carrying out their antitrust activity in an environment where rules are missing or are difficult to find or are not precisely defined for a clear legal understanding and application.

Not surprisingly, the draft released by SAMR this year defines the abuse of dominant position as any conduct linked to “disguised forms via setting specific trading conditions or by other indirect means”. A catch-all clause that does not offer any serious legal protection, not even to Chinese

To sum up, in the USA the opposition and balance of powers is nothing new. Indeed, it is a key aspect of the Constitution and the possible guarantee of least preventing unashamed despotism, if not a guarantee of equity.

The Qualcomm case is a further proof of this, given that the judgment confirms the decision of a Federal Agency against the San Diego giant. Last year Trump vetoed the prospected acquisition of Qualcomm by the competitor Broadcom (a \$117 billion deal), on the grounds of national security. The US administration justified this choice by presuming some alleged ties between Broadcom and “third parties”.

Under these circumstances, the judgment, if on the one hand stops the US 5G in its tracks as it nixes the business model adopted by Qualcomm – the US leader in the development of new technology – on the other it paves the way to Huawei by claiming that Qualcomm has to license its standard-essential patents to its competitors on the so called FRAND terms – fair, reasonable and non-discriminatory.

Therefore, while in China the law assumes an increasingly abstract character to serve the one-Party rule, in the USA a federal judge curbs much of the White House’s policy with a stroke of pen.

Aside from the trade wars, at the end of the day Trump’s worst enemy does not seem to be China, but his own domineering approach to handling the political and commercial relations, the direct result of the much drastic culture of “hire and fire”.

The bottom line behind these skirmishes is the inevitable friction between the two superpowers and the increasingly competitive way they are addressing the global order.

On the one hand we have a system where the State is not a third party, despite good legislative intentions, generating two serious problems for the Chinese leadership: corruption that is intrinsic to the lack of check and balance and consequently a high degree of legal inefficiency. On the other hand, a Presidency opposing constitutional values, which adopts the typical model of corporate autocracy to solve problems.

In the drama “A man for all seasons”, Thomas More is quoted as saying – with implacable British logic – that “even the devil has the right to the protection of the law, because without it he is the only one with a free hand”.

Huawei has resorted to the US law recognizing a sovereignty and a quality not to be found in its own country.

The race against time is under way and is also likely to dramatically affect the 2020 Presidential election although to this day Trump seems to be leading.

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