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## CHINA – MEASURES CONCERNING PATENT LICENSING TERMS

### REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION

The following communication, dated 20 January 2025, from the delegation of the European Union to the delegation of China, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the People's Republic of China ("China") pursuant to Article 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") with regard to a measure adversely affecting the protection and enforcement of intellectual property rights and with regard to China's compliance with its obligations under Article 63.3, second sentence, of the TRIPS Agreement.

#### 1. THE MEASURE AT ISSUE ADVERSELY AFFECTING THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

According to China's law, Chinese courts have the authority to determine, without the consent of both parties, worldwide licensing conditions, and in particular royalty rates, for portfolios of standard essential patents (SEPs) which include non-Chinese SEPs. In accordance with China's law, a legally effective decision determining such conditions is binding on both parties and is enforceable in China including with respect to the non-Chinese SEPs.

Chinese courts have interpreted and applied the law in this manner. On 28 November 2023, China's Chongqing First Intermediate People's Court took a decision against the objections of the patent owner setting worldwide licensing conditions, including royalty rates, for SEPs.<sup>1</sup> The Court set the rates Chinese phone manufacturer OPPO has to pay worldwide for using Nokia's patented technology in 2G, 3G, 4G and 5G "smart terminal products", such as mobile phones. Based on China's law, other courts can take decisions setting licensing conditions without the consent of both parties, notably the patent owner, for worldwide licences covering non-Chinese SEPs, which are binding on both parties and enforceable in China. There are substantiated indications that other courts accepted similar requests to decide worldwide licensing conditions.

Having regard to the above, the measure at issue in this consultations' request comports the legal instruments giving Chinese courts the authority to take, without the consent of both parties, decisions setting the conditions for worldwide licences for SEPs, which are binding on both parties and enforceable in China, including with respect to non-Chinese SEPs. This measure appears to curtail the ability of the parties, SEP owners and implementers, to enforce their rights and ensure the respect of obligations with respect to non-Chinese SEPs in the courts of the jurisdictions where the non-Chinese patents were granted and curtails the ability of the courts of the jurisdictions where the non-Chinese patents were granted to adjudicate actions relating to those patents in the respective jurisdictions.

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<sup>1</sup> People's Republic of China Chongqing First Intermediate People's Court Civil Judgment in OPPO v Nokia, (2021) Yu 01 Min Chu No.1232. 重庆市第一中级人民法院 (2021) 渝01民初1232号, 民事判决书.

The legal instruments through which China imposes and administers this measure, include the following, operating separately or in combination:

- Article 5, 6 and 7 of the *Civil Code of the People's Republic of China*;<sup>2</sup>
- Article 24(3) of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Disputes (II)*; <sup>3</sup>
- any unpublished act or decision through which China imposes and administers these acts; and
- any amendments, supplements, extensions, replacement acts or decisions, renewal acts or decision, related acts or decisions, or implementing acts or decisions.

Legal basis for the complaint in respect of China's measure

The measure described above appears to be inconsistent with China's obligations under the covered agreements, in particular its obligations under the following provisions of the TRIPS Agreement:

1. Article 4bis of the Paris Convention, as incorporated into the TRIPS Agreement by virtue of Article 2.1 of the TRIPS Agreement, because China's measure has as its effect to restrict the possibility for the parties subject to a decision to start or continue proceedings before the courts of another Member, and thus for the courts and other authorities of that other Member to decide questions relating to the registration or validity of a patent issued in its jurisdiction.
2. Article 28.1 of the TRIPS Agreement, both alone and in conjunction with Article 4bis of the Paris Convention, as incorporated into the TRIPS Agreement by virtue of Article 2.1 of the TRIPS Agreement, because China's measure has as its effect to restrict the possibility for parties subject to a decision, notably the patent owner, to start or continue proceedings before the courts of another Member to decide questions relating to the making, using, offering for sale, selling, or importing the product that is the subject matter of a patent outwith China, and for the courts and other authorities of that other Member to decide questions relating to the registration or validity of a patent issued in its jurisdiction.
3. Article 28.2 of the TRIPS Agreement, both alone and in conjunction with Article 4bis of the Paris Convention, as incorporated into the TRIPS Agreement by virtue of Article 2.1 of the TRIPS Agreement, because China's measure has as its effect to restrict the possibility for the parties subject to a decision, notably the patent owner, to start or continue proceedings before the courts of another Member to decide questions in relation to licensing contracts, and for the courts and other authorities of that other Member to decide questions relating to the registration or validity of a patent issued in its jurisdiction, in relation to a licensing contract.
4. Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.1 of the TRIPS Agreement, because China's measure has as its effect to restrict the exercise by a patent owner of its exclusive right to prevent third parties not having the owner's consent from making, using, offering for sale, selling, or importing the product that is the subject matter of a patent within the territory of other Members.
5. Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.2 of the TRIPS Agreement, because China's measure has as its effect to restrict the right of the owner of a non-Chinese SEP to freely negotiate and agree on FRAND contractual licence terms for the use of the SEP within the territory of the Member that has granted that patent.
6. Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 44 of the TRIPS Agreement, because China's measure has as its effect to restrict the possibility for a patent

<sup>2</sup> As last amended on 01 September 2023 and entered into force on 01 January 2024.

<sup>3</sup> Fa Shi (2020) 19 Hao, that was adopted on 29 December 2020 and entered into force on 01 January 2021. 《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》等十八件知识产权类司法解释的决定，法释〔2020〕19号。

owner to request judicial authorities of other Members to order a party to desist from an infringement.

2. **CHINA'S COMPLIANCE WITH ITS OBLIGATIONS UNDER ARTICLE 63.3, SECOND SENTENCE, OF THE TRIPS AGREEMENT**

On 20 December 2023, the European Union sent an official request for information pursuant to Article 63.3, second sentence, of the TRIPS Agreement requesting China to supply the Chongqing First Intermediate People's Court Civil Judgment in OPPO v Nokia of 22 November 2023, which it stated it had reason to believe affected its rights under the TRIPS Agreement.<sup>4</sup> That specific judicial decision was in the area of intellectual property rights as it concerned the conditions for a patent licence, including royalty rates. China's response appears to be inconsistent with its obligations under Article 63.3, second sentence, of the TRIPS Agreement.

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The measure maintained by China restricting the protection and enforcement of intellectual property rights, and China's lack of compliance with its obligations under Article 63.3, second sentence, of the TRIPS Agreement appear to nullify or impair the benefits accruing to the European Union directly or indirectly under the covered agreements.

The European Union reserves the right to raise additional measures and claims, including under other provisions of the covered agreements, regarding the above matters during the course of the consultations and in any future request for panel proceedings.

The European Union looks forward to receiving China's reply to this request and to finding a mutually convenient date for the consultations.

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<sup>4</sup> Communication from the European Union IP/C/W/707.