CHAPTER 5

Intellectual Property Rights and Antitrust in China

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China's Anti-Monopoly Law (AML)[1] came into effect on August 1, 2008, following its enactment the year before and 13 years of drafting. China enacted the third amendments to its Patent Law[2] on December 26, 2008, effective October 1, 2009. This chapter summarizes the AML. It also discusses those aspects that may have particular impact on intellectual property rights (IPR) and the provision of the Patent Law that implicates competition law issues. It also discusses the implementing regulations and judicial interpretations relating to those laws that involve the IPR–competition law interface.[3]

A. An Overview of AML

The AML is China's first comprehensive antitrust law, and in many respects it is within the mainstream of modern competition laws. It includes the three pillars of most modern antitrust laws. First, it includes a chapter devoted to monopoly agreements that addresses "cartels and other multi-party

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1. A translation of the Anti-Monopoly Law may be found at http://www.lawinfochina.com/display.aspx?lib=law&id=0&CGid=96789. The original Chinese text may be found at http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

2. A translation of the Third Amendment to the Patent Law may be found at http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html. The original Chinese text may be found at http://www.gov.cn/flfg/2008-12/28/content_1189755.htm.

3. Article 329 of the Contract Law and the Foreign Trade Law also address IPR contract provisions that may be anti-competitive and therefore unenforceable.

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anti-competitive conduct."[4] Second, it includes a chapter focused on "abuse of dominant market position" dealing with unilateral conduct, potentially including that by IPR holders.[5] Third, it includes a chapter on "concentrations,"[6] which covers mergers and acquisitions and joint ventures.

The AML also includes distinctive provisions, such as a chapter on abuse of administrative power directed toward rampant local protectionism.[7] It also includes articles on businesses in sectors that are economically vital or implicate national security and are dominated by state-owned enterprises,[8] businesses that have exclusive distribution rights pursuant to law,[9] and trade associations.[10]

The law establishes a multilevel and multi-faceted enforcement structure, all under the State Council, the chief executive body. A new entity, the Anti-Monopoly Commission (AMC), was created to research and draft competition policy, organize and publish studies on the state of competition, develop guidelines under the AML, coordinate the enforcement of the AML, and fulfill assignments from the State Council.[11]

The AML also specifies that the State Council will designate anti-monopoly enforcement authorities (AMEAs) that will be responsible for enforcement. The State Council designated three existing agencies to share enforcement responsibilities: (1) the Ministry of Commerce (MOFCOM), (2) the State Administration for Industry & Commerce (SAIC), and (3) the National Development & Reform Commission (NDRC). MOFCOM is the secretariat for the AMC and is the AMEA responsible for merger control and for enforcing the AML against anti-competitive conduct in international trade. The SAIC is assigned to enforce the AML regarding all other violations, except for pricing conduct. It also has enforcement jurisdiction of the Anti-Unfair Competition Law. The NDRC prosecutes pricing-related

4. AML Ch. II (Monopoly Agreement).
5. *Id.* Ch. III (Abuse of Market Dominance).
6. *Id.* Ch. IV (Concentration of Business Operators).
7. *Id.* Ch. V (Abuse of Administrative Power to Eliminate or Restrict Competition).
8. *Id.* Art. 7.
9. *Id*.
10. *Id.* Arts. 11, 16.
11. *Id.* Art. 9. The General Office of the State Council issued a Notice regarding the Functions and Membership of the Anti-Monopoly Commission on July 28, 2008. 国务院办公厅关于国务院反垄断委员会主要职责和组成人员的通知国办发〔2008〕104号, *available at* http://govinfo.nlc.gov.cn/jlsfz/zfgb/200818/201010/t20101009_443078.htm?classid=44.

violations of the AML. It retains its broad authority under the Price Law. The statute specifies the investigatory authority of the AMEAs, including requirements such as mandating at least two officials on each investigation and written records of interrogations.[12] The confidentiality of trade secrets is expressly protected.[13]

The AML also provides for a range of remedies.[14] Investigations may be suspended and eventually terminated upon targets taking action to address the AMEA's concerns.[15] With monopoly agreements, leniency is available to a participant who discloses the violation and cooperates with the investigation.[16] Otherwise, and also with abuse of dominant market position, illegal gains may be confiscated and fines may be imposed of between 1 and 10 percent of the previous year's turnover.[17]

Trade associations that organize monopoly agreements are subject to fines of up to RMB500,000 (~USD80,000) and cancellation of their registration.[18] Consummation of a transaction in violation of the AML may result in an order to divest, a fine of up to RMB500,000(~USD80,000), or other orders to restore the status quo ante.[19] The AML also expressly provides that violators may be civilly liable for damages caused to others, which supports private actions.[20]

The Supreme People's Court (SPC) initially designated the intellectual property (IP) sections of the People's Courts to handle cases arising under the AML that were brought in venues with such sections[21] and provided guidance on procedures applicable to civil cases under the AML, including

12. AML Art. 40.
13. *Id.* Arts. 41, 54.
14. *Id.* Ch. VIII (Legal Liabilities).
15. *Id.* Art. 45.
16. *Id.* Art. 46.
17. *Id.* Arts. 46, 47.
18. *Id.* Art. 46.
19. *Id.* Art. 48.
20. *Id.* Art. 50.
21. The SPC's Notice on Studying and Implementing the Anti-Monopoly Law may be found at http://zzzy.chinacourt.org/public/detail.php?id=582. In August 2014, the National People's Congress Standing Committee established three specialized IP courts in Beijing, Shanghai, and Guangzhou. http://news.xinhuanet.com/politics/2014-08/31/c_1112298943.htm.

the allocation of the burden of proof.[22] The IP sections may be the sections of the People's Courts most experienced in handling complex matters. Fines and criminal sanctions are authorized for obstructing investigations.[23]

The law is notably lacking in significant remedies for violations of the prohibitions against competitive abuse of administrative powers. It expressly provides for administrative review and review under the administrative law of AMEA decisions.[24] The AML also provides for administrative and criminal penalties for AMEA staff members who abuse their powers.[25]

The AML does not distinguish between foreign and domestic businesses. However, until July 2009, foreign investors were also subject to the premerger competition notification and review provisions of the Provisions on Mergers and Acquisitions (M&A) of a Domestic Enterprise by Foreign Investors (Foreign M&A Provisions).[26] In July 2009, the Foreign M&A Provisions were amended[27] to conform the provisions on premerger notification and review to the AML, so foreign buyers would be subject to only one notification and review requirement. The July 2009 amendments retained the requirement of a notification to MOFCOM of "transfers of the actual controlling right of the domestic enterprise owning any famous trademarks or traditional Chinese brands."[28] This clause, though not cited, may underlie the disposition of some merger investigations.

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22. The SPC's Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Cases Concerning Monopolistic Conduct may be found at http://www.chinacourt.org/law/detail/2012/05/id/145752.shtml.

23. AML Art. 52.

24. *Id.* Art.53.

25. *Id.* Art. 54.

26. A translation of the 2006 Provisions on M&A of a Domestic Enterprise by Foreign Investors may be found at http://www.pathtochina.com/sample/PTC_Merger_and_Acquisition_of_Domestic_Enterprises_in_China.pdf. The original Chinese text may be found at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=36791.

27. A translation of the 2009 Provisions on M&A of a Domestic Enterprise by Foreign Investors may be found at http://english.mofcom.gov.cn/article/policyrelease/announcement/201003/20100306819130.shtml. The original Chinese text may be found at http://english.mofcom.gov.cn/aarticle/subject/cv/updates/201003/20100306819133.html. A translation of the No. 6 MOFCOM Decree revising the Provisions on M&A of a Domestic Enterprise by Foreign Investors may be found at http://english.mofcom.gov.cn/aarticle/newsrelease/commonnews/200907/20090706421863.html. The original Chinese text may be found at http://www.mofcom.gov.cn/article/b/f/200907/20090706416939.shtml.

28. Foreign M&A Provisions Art. 12.

B. AML Provisions Relating to IPR

The AML has only one provision that expressly relates to IPR, Article 55, which states:

> This Law is inapplicable to undertakings which use intellectual property rights according to the laws and administrative regulations relevant to intellectual property, but is applicable to undertakings which abuse intellectual property and eliminate or restrict market competition.

Several other articles may have special relevance to IPR holders.

- Article 13 prohibits agreements that "limit the purchase of new technologies or new facilities, or limit the development of new products or new technologies."
- Article 15 exempts agreements that otherwise are violations if they "improve technology or research and develop new products . . . unify product specifications and standards."
- Article 17 prohibits those with a dominant market position from "without valid reasons" refusing to trade, restricting trading partners to only trade with the undertaking or undertakings designated by the undertaking, or applying differentiated treatment in regards to transaction conditions such as trading prices to equivalent trading partners.
- Articles 17 and 18 state that "dominant market position" may be found where, for example, a business can control the price or quantity of products or other trading conditions in the relevant market or can block or affect entry into the relevant market or where there is substantial "reliance on the undertaking by other undertakings in transactions." The latter would seem to raise the possibility that a business may be found to have market dominance because it is a major supplier or customer to another.
- Article 27 includes "the effect of the proposed concentration on . . . technological progress" as a factor in reviewing concentrations.

C. Implementation of the AML Relating to IPR

At least two sets of regulations under the AML may be relevant to IPR. In addition, in June 2014, the State Council issued Several Opinions to Promote Fair Market Competition and Protect Normal Market Order, directing MOFCOM, NDRC, SAIC, and the State IP Office (SIPO) to address monopolistic agreements that hamper innovation and technological advancement.[29]

On December 31, 2010, the SAIC issued its Regulation Prohibiting Abuse of Dominant Market Position under the AML (SAIC Regulation), effective February 1, 2011.[30] This regulation prohibits a business holding a dominant market position from, without valid justification, reducing, delaying, or ceasing an existing transaction, or refusing to engage in a new transaction with a counter-party.[31] It also prohibits a business holding a dominant market position from imposing restrictive conditions that makes it difficult for the counter-party to continue its dealings with the business.[32] This provision raises concerns that any change in the terms of trade or the termination of an arrangement may be problematic.

Article 4(5) of the SAIC Regulation prohibits any business with a dominant market position from

> [r]efusing to allow the counterparty to use its necessary facilities under reasonable conditions in the course of production and operations. For finding of violation under Item (5), factors such as the following shall be considered on a comprehensive basis: feasibility in separately investing and building, or developing such facilities, degree of reliance of the counterparty on such facilities in effectively running its production and operations, possibilities of such undertaking making available such facilities, and its impact over the production and operations of such undertaking.

Article 4 adopts the essential facilities doctrine that was incorporated in drafts of the AML but omitted in the enacted law.

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29. http://www.gov.cn/zhengce/content/2014-07/08/content_8926.htm#.
30. The SAIC Regulation may be found at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103267.html.
31. SAIC Regulation Art. 4.
32. *Id.*

On April 7, 2015, the SAIC issued its Regulations on the prohibition of conduct eliminating or restricting competition by the abuse of IPR (IP Abuse Regulation), after years of drafting and at least 8 official drafts.[33] The IP Abuse Regulation tracks the language of the AML in prohibiting concerted anti-competitive conduct that involves the exercise of IPR, unless the conduct is exempt under AML Article 15.[34] It specifies that a dominant market position shall not be presumed from mere ownership of IPR[35] and provides limited safe harbors where (1) the aggregate shares of competing business operators involved in an IPR transaction do not exceed 20 percent in a relevant market or there are at least four other substitute, independently controlled technologies that can be obtained at reasonable cost in the market; or (2) the individual market shares of the business operators do not exceed 30 percent in the market, or there are at least two other substitute, independently controlled technologies that can be obtained at reasonable cost in the market.[36] The safe harbors apply unless the challenged conduct is shown to have actual anti-competitive effect and apparently are intended to apply to conduct not prohibited by Articles 13(1)–(5) and 14(1)–(2) of the AML.[37]

Consistent with Article 4 of the SAIC Regulation, the IP Abuse Regulation also incorporates the essential facilities doctrine. It IP Abuse Regulation provides in Article 7 that

> [w]here its intellectual property right constitutes a facility essential for production and business operations, a business operator in a dominant market position shall not refuse to license other business operators to use such intellectual property right under reasonable conditions, without legitimate reasons, to eliminate or restrict competition.
>
> When determining the nature of the conduct in the preceding paragraph, the following factors need to be considered at the same time: (1) such intellectual property right cannot be reasonably substituted in the relevant market and is necessary for other business operators to compete in the relevant market; (2) the refusal to license such

33. The IP Abuse Regulation may be found at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201504/t20150413_155103.html.

34. IP Abuse Regulation Art. 4.

35. IP Abuse Regulation Art. 6.

36. IP Abuse Regulation Art. 5.

37. *Id.*

> intellectual property right will have a negative impact on competition or innovation in the relevant market, to the detriment of consumer welfare or public interest; (3) licensing such intellectual property right will not cause unreasonable harm to such business operator, etc.

The IP Abuse Regulation prohibits a rights holder with dominant market position from imposing exclusivity[38] and ties[39] on its trading partners in exercising its IPR without legitimate reasons. It also prohibits rights holders with dominant market position from requiring exclusive grant backs, imposing no-challenge clauses, restricting post-license noninfringing competition, and imposing post-termination royalties or royalties on invalid IPR.[40] Rights holders with dominant market positions are prohibited giving discriminatory treatment to similarly situated trading partners, without legitimate reasons.[41]

Reflecting the concern in many sectors of China's government about the impact of patent pools, the IP Abuse Regulation in Article 12 includes detailed provisions relating to pools, prohibiting use of pools to eliminate or restrict competition in exercising IPR. Pool members may not use the pool as a mechanism to exchange sensitive competitive information unless their actions fall within the exemptions of Article 15 of the AML. The manager of a pool with dominant market position may not use the pool to restrict pool members from licensing their IPR outside the pool or members or licensees from developing competing technology. They are also prohibited from requiring exclusive backs to the pool manager or pool members, prohibiting licensees from challenging pool patents, and giving differential treatment to similarly situated pool members or licensees, without legitimate reason.

Similar concerns regarding standards development activities are reflected in Article 13 of the IP Abuse Regulation. Article 13 prohibits a right holder with dominant market position without legitimate reason in a standard development process from, when it deliberately failing to disclose information regarding its patent to the standard development organization or expressly relinquishing its IPR but then asserting its IPR after the IPR has been incorporated in a standard. It also prohibits the right holder from, after a patent has become a standard essential patent (SEP), eliminating or

38. IP Abuse Regulation Arts. 8, 10(5).
39. IP Abuse Regulation Art. 9.
40. IP Abuse Regulation Art. 10(1)-(4).
41. IP Abuse Regulation Art. 11.

restricting competition with conduct such as refusing to license the SEP or imposing a tie-in licensing the SEP, or attaching other unreasonable trading conditions in violation of the reasonable and nondiscriminatory (F/RAND) principle.

The IP Abuse Regulation provides for investigations by the SAIC of suspected abuse of IPR to eliminate or restrict competition under the AML and the SAIC's regulation of the procedure for handling of cases involving monopoly agreements and abuse of dominant market position.[42] Fact-specific analyses are identified as central to the determination of whether conduct involving IPR violates the AML.[43] The IP Abuse Regulation sets forth the following steps to be taken in analyzing and determining abuse of IPR to eliminate or restrict competition:

1. determine the form of the exercise of the IPR,
2. ascertain the characteristics of the relationship of the parties exercising the IPR,
3. define the market involved in the exercise of IPR,
4. determine the market positions of the parties, and
5. analyze the impact on competition in the market of the exercise of the IPR.[44]

The IP Abuse Regulation also distinguishes between licensing situations in which the parties had a preexisting competitive relationship and those in which the parties were not competitors. In the former case, the license is considered an agreement between competitors, subject to the more rigorous scrutiny given to such arrangements, while the latter situation is considered a vertical arrangement between seller and buyer even if the licensor and licensee will both be using the licensed IPR in competition.[45] In analyzing the competitive impact of conduct involving the exercise of IPR, the IP Abuse Regulation specifies that the SAIC would consider the following:

1. the market position of the parties;
2. market concentration;
3. entry barriers;

42. IP Abuse Regulation Art. 14.
43. IP Abuse Regulation Art. 15.
44. *Id.*
45. *Id.*

4. industry practices and maturity;
5. impact of license restraints on output, geographic markets, consumers;
6. impact on innovation and dissemination of technology; and
7. the innovative capacities of the parties and the speed of innovation in the market[46]

The penalties for violations of the AML by abuse of IPR to eliminate or restrict competition include confiscation of illegal gains and fines of between 1 and 10 percent of total sales revenues in the preceding year. If an illegal agreement was entered into but not implemented, a fine of less than RMB500,000 (~USD80,000) may be imposed in lieu of a percentage. In setting the fine, the SAIC shall consider factors such as the nature, degree, and duration of the illegal conduct.[47]

D. Competition Aspects of the Patent Law

China's Patent Law[48] provides in Article 48 that

> under either one of the following situations, the Patent Administrative Department . . . may upon the request of an entity or individual qualified to exploit it, grant a compulsory license to exploit the patent: . . . (2) for the purposes of eliminating or reducing the adverse effect of monopolistic conduct on competition, where the patentee's exercise of the patent right is determined through legal proceedings to be monopolistic conduct.

SIPO issued Measures for Compulsory Licensing of Patent Implementation (Compulsory Licensing Measures) in March 2012.[49] It provides in Article 5 that

46. IP Abuse Regulation Art. 16.
47. IP Abuse Regulation Art. 17.
48. The Patent Law, as amended in 2008, effective 2009, may be found at http://www.gov.cn/flfg/2008-12/28/content_1189755.htm. On April 1, 2015, SIPO published for public comments proposed amendments to the Patent Law. Two ABA sections jointly submitted comments on those proposed amendments.
49. The Compulsory Licensing Measures may be found at http://www.sipo.gov.cn:8080/zwgs/ling/201203/t20120319_654876.html.

> [i]f the actions of a patent right holder in exercising their patent right are legally deemed to be monopolistic actions, then in order to eliminate or reduce the negative effects of said actions on competition, an entity or individual which is able to implement the patent can petition for a compulsory license based on the provisions of Article 48 paragraph 2 of the Patent Law.

The Compulsory Licensing Measures itemize the materials that must be submitted with an application for a compulsory license, including an application for a license under Article 48(2) of the Patent Law, an in-force judgment, or determination by a judicial authority or an AMEA that the patent holder's exercise of the IPR is monopolistic.[50] The Compulsory Licensing Measures also provide for adjudication by SIPO of compulsory license royalties.[51] In December 2013, the Standardization Administration of China (SAC) and SIPO issued Interim Provisions on the Administration of National Standards Involving Patents.[52]

The SPC in July 2014 issued a Draft for Public Comment of Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Patent Infringement Cases (II) (the JI II Consultation Draft).[53] Article 27 of the JI II Consultation Draft provides that

> [w]here non-compulsory national, industrial or local standards explicitly disclose the information of a patent that is relevant to such standards, if an accused infringer alleges non-infringement defense by arguing that no license from the right holder is required for implementing such standards, a people's court shall not sustain such allegation. However, where the patentee violates the principle of fair, reasonable and non-discrimination and negotiates in bad faith with the accused infringer regarding licensing terms for the patents relevant to the standards, if the accused infringer asserts that it shall not

50. Compulsory Licensing Measures Arts. 9, 11.

51. *Id.* Ch. IV.

52. SAC and SIPO Order No. 1, Dec. 19, 2013, *available at* http://www.sac.gov.cn/gybzheb/zxtz_850/201312/t20131226_149313.htm.

53. The JI II Consultation Draft was posted for comment at http://www.chinacourt.org/article/detail/2014/07/id/1355331.shtml. Three ABA sections jointly submitted comments on the JI II Consultation Draft. Those joint comments may be found at http://www.americanbar.org/content/dam/aba/uncategorized/international_law/aba_comments_on_prc_ji_ii_on_patent_trials_final_combo.authcheckdam.pdf.

stop the act of implementation of standards based on such grounds, a people's court generally shall sustain such assertion.

The licensing terms of patents relevant to the standards shall be decided through the negotiation between the patentee and the accused infringer; where no agreement is reached after sufficient negotiation, the parties may ask a people's court to decide. In the determination of the licensing terms, the people's court shall apply the principle of fair, reasonable and non-discrimination, and make comprehensive consideration of the degree of innovativeness of the patent and the utility of the patent in the standard, the technical area of the standard, the nature of the standard, the implementation scope of the standard, relevant licensing terms and other factors.

Article 30 of the JI II Consultation Draft provides that

[w]here the infringer stops practicing relevant patents and it will damage the social public interest or will cause serious interest imbalance between the parties, a people's court may rule that the infringer shall not stop the act of practicing the patent, but shall pay reasonable royalty instead.

E. The Interaction of the AML and IPR

The interaction of AML Article 55 with Patent Law Article 48, and the application of the AML to conduct involving IPR, is evolving.

Article 55 applies the AML to "undertakings which abuse intellectual property and eliminate or restrict market competition." Yet the Patent Law is silent on IPR abuse. One question is whether, if a refusal to license a patent or other conduct involving a patent is found to be an AML violation, Article 48(2) would enable compulsory licenses to all who demonstrate a capability to exploit the patent. Or, if a compulsory license is granted under Article 48(2), has the patent holder failed to "use intellectual property rights according to the laws and administrative regulations relevant to intellectual property," and is it therefore subject to a finding of AML violation and AML penalties?

Another question may be if conduct involving IPR is found to violate the AML, would it be deemed to be an abuse of the IPR and therefore not "using IPR according to the laws and administrative regulations relevant

to intellectual property," which would appear to be a tautology? Would someone claiming injury from monopolistic conduct involving IPR be eligible for a compulsory license under Article 48(2) as well as damages under Article 50 of the AML?

1. Merger Reviews under the AML and IPR

MOFCOM has imposed conditions regarding IPR in several of its conditional approvals of transactions. It was concerned that Nokia would abuse its control of standard essential patents (SEPs) for mobile communications after selling its device business to Microsoft and becoming essentially a patent portfolio company with no need for cross-licenses from other mobile device manufacturers. It was also concerned that Microsoft would use its portfolio of patents covering the Android operating system to disadvantage Chinese device makers. MOFCOM approved the transaction on the condition that Microsoft and Nokia would honor F/RAND commitments for SEPs and not seek injunctions for infringement of those SEPs against smartphones manufactured by Chinese producers.[54] It also required Microsoft to continue to license its non-SEPs covering the Android operating system to Chinese smartphone makers under fees not higher than those prevalent before the Nokia acquisition.[55] In conditionally approving the acquisition by Merck kGaA of AZ Electronic Materials, MOFCOM concluded that the transaction would restrict competition in liquid crystals and photoresists used in manufacturing flat panel displays and required Merck to commit for three years to licensing liquid crystal patents on nonexclusive, commercially reasonable, and nondiscriminatory terms and not to bundle its products.[56] Merck also must notify MOFCOM prior to entering into liquid crystal patent licenses in China.[57]

Earlier, MOFCOM conditioned approval of the General Electric China–China Shenhua Coal to Liquid and Chemical Co. joint venture on a prohibition against the joint venturers forcing technology customers to use the joint venture's technology or raising the costs of using other

54. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml.

55. *Id.*

56. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml.

57. *Id.*

technologies by restricting the supply of raw coal for use with coal-water slurry gasification technology or by conditioning the license of the joint venture's technology on the supply of raw coal.[58] MOFCOM approved Google's acquisition of Motorola Mobility on conditions that Google will (1) continue to license current and future versions of Android on a free and open basis, (2) not discriminate among original equipment manufacturers who agree not to develop Android apps or otherwise modify their Android platform, and (3) continue to fulfill Motorola Mobility's undertaking to license its patents on a F/RAND basis.[59] Google may apply in five years for revision or revocation of the first two conditions, which expire if Google no longer controls Motorola Mobility.[60] In approving the joint venture among ARM Co., Giesecke & Devrient Co., and Gemalto Co., MOFCOM required that for eight years following the formation of the joint venture, ARM will not (1) discriminate between the joint venture and the joint venture's competitors regarding access to its TrustZone technology needed for trusted execution environments (TEEs) development and (2) design its IPR to reduce the performance of third parties' TEEs.[61]

MOFCOM's decisions also raise questions of whether national brands will play an outsized role in premerger reviews even though they are mentioned only in the Foreign M&A Regulation and the AML is silent in this respect. MOFCOM found no anti-competitive impact from InBev's acquisition of Anheuser-Busch.[62] Nonetheless, MOFCOM conditioned its approval of the transaction on a prohibition against InBev increasing the 27 percent of Tsingtao Beer that Anheuser-Busch held (and that InBev would acquire in acquiring Anheuser-Busch) or its own 28.56-percent holding of Zhujiang Brewery and from buying interests in two other Chinese beer brewers without prior MOFCOM review even if the transactions would otherwise be exempt under the AML from competition review. MOFCOM stated that the conditions were imposed because of the size of the transaction and the

58. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107824342.html?1104118153=840603354.

59. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/aarticle/zcfb/201205/20120508134324.html.

60. *Id.*

61. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/aarticle/ztxx/201212/20121208469841.html.

62. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html.

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market position of the resulting entity, to minimize potential adverse effects in China's beer market.

In prohibiting Coca-Cola's proposed acquisition of Huiyuan, China's largest juice manufacturer, MOFCOM explained its decision[63] in terms of Coca-Cola's likely post-acquisition ability to leverage its dominant position in the carbonated drinks market to the fruit juice market and to affect other fruit juice competitors and harm competition and consumers, and also on Coca-Cola's post-closing control on two major juice brands, Minute Maid and Huiyuan, that when coupled with its position in carbonated drinks may increase its dominance in the juice market and raise entry barriers for potential competitors. MOFCOM stated that the transaction would hamper the development of China's fruit juice industry by making it harder for smaller domestic juice firms to survive and depressing their ability to compete and innovate.

2. Abuse of Monopoly Power Involving IPR

NDRC has investigated the licensing practices of several major IPR holders, apparently under the theory that the holders were abusing IPR and monopoly positions. Investigations involving InterDigital and Qualcomm Technologies have attracted substantial attention. In May 2014 NDRC suspended its investigation into InterDigital after obtaining commitments from InterDigital regarding the levels of royalties it charges on its patent portfolio of 2G, 3G, and 4G wireless mobile technology patents, licensing of SEPs, and cross-licenses and grant back clauses relating to its patent portfolio for wireless mobile standards.[64] InterDigital also agreed to arbitration of infringement claims and to refrain from seeking injunctive relief in such cases.[65] Qualcomm disclosed in November 2013 that it was being

63. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html.

64. NDRC Announcement, *NDRC Suspend Investigation into IDC for Price-Monopoly Conduct*, May 22, 2014, *available at* http://www.ndrc.gov.cn/gzdt/201405/t20140522_612466.html. InterDigital Press Release, *China's NDRC Accepts InterDigital's Commitments and Suspends Its Investigation*, May 22, 2014, *available at* http://ir.interdigital.com/releasedetail.cfm?ReleaseID=849959.

65. *Id.*

investigated by NDRC.[66] NDRC has apparently concluded that Qualcomm, which holds key patents for 3G and 4G mobile technology, is a monopolist and abused its monopoly power by charging exorbitant license fees, fees on expired patents, tying, coerced cross-licenses and grant backs, and refusals to license.[67] As of late 2014, NDRC is apparently focused on determining a remedy.[68]

Earlier, InterDigital had been sued by Huawei Technologies on the ground that InterDigital had abused a dominant market position by charging exorbitant royalties on SEPs and bundling SEPs with non-SEPs for 2G, 3G, and 4G technology. Both the Shenzhen Intermediate People's Court[69] at the first instance and the Guangdong High People's Court[70] on appeal found that InterDigital had abused a dominant market position, imposed damages, and set the royalty rate for InterDigital's SEPs at 0.019 percent of the sales price of Huawei's products, lower than InterDigital's original rate[71] and apparently lower than what Huawei charged on its own handset patents. The courts concluded that InterDigital had breached its F/RAND obligations under standard development organization agreements that designated French law and applied Chinese law. They found that each SEP held by InterDigital constituted a distinct product market and that InterDigital held 100 percent of each of those markets. As a nonpracticing

66. Qualcomm, *China's National Development and Reform Commission Notifies Qualcomm of Investigation*, https://www.qualcomm.com/news/releases/2013/11/25/chinas-national-development-and-reform-commission-notifies-qualcomm.

67. 发改委调查美国IDC，其涉嫌在华收取歧视性高专利费 http://china.cnr.cn/NewsFeeds/201402/t20140219_514889433.shtml; 高通公司总裁第三次到国家发展改革委接受反垄断调查 http://jjs.ndrc.gov.cn/gzdt/201407/t20140711_618477.html.

68. Press briefing, Sept. 11, 2014, http://www.china.com.cn/zhibo/2014-09/11/content_33487367.htm.

69. Shenzhen Intermediate People's Court, Huawei v. InterDigital, Feb. 4, 2013, [2011] Shen Zhong Fa Zhi Min Chu Zi No. 857 and No. 858.

70. Guangdong High People's Court, Huawei v. InterDigital, Oct. 16, 2013, [2013] Yue Gao Fa Min San Zhong Zi No. 305; Oct. 21, 2013, [2013] Yue Gao Fa Min San Zhong Zi No. 306. The court found that InterDigital's bundling of SEP and non-SEP patents were justified on efficiency grounds and therefore did not violate the AML.

71. The parties settled their dispute by agreeing to binding arbitration and dismissing all litigation except the actions in China, in which some of the rulings have been appealed to the SPC. InterDigital Form 8-K Report, filed Dec. 23, 2013, *available at* http://www.sec.gov/Archives/edgar/data/1405495/000140549513000044/a2013_12x23-form8xk.htm; http://articles.chicagotribune.com/2013-12-24/news/sns-rt-interdigital-patentshuawei-20131224_1_patent-royalty-interdigital-shares.

entity, InterDigital was not competitively constrained by any need to license others' IPR.

The SAIC announced an investigation into Microsoft in July 2014 that included raids on several Microsoft locations in China,[72] apparently on the theory that Microsoft has been abusing a monopoly position in operating systems by creating compatibility issues with its competitors' software, by incomplete documentation, and by bundling Windows and Microsoft Office. The majority of Windows installed in China are pirated copies, so it would appear that SAIC is attributing to Microsoft all copies of installed Windows in China in viewing Microsoft as a monopolist in operating systems.

In October 2014, the Supreme People's Court (SPC) issued its first decision under the AML, in the case brought by Beijing Qihoo Technology Co., Ltd. against Tencent Technologies (Shenzhen) Co., Ltd and Shenzhen Tencent Computer System Co., Ltd., the owner of the QQ online communications platform.[73] In a lengthy opinion, the SPC set out its approach to analysis of abuse of dominance claims under the AML.

Qihoo claimed that Tencent abused its monopoly position in instant messaging (IM) software and service in China, by requiring IM users to use Tencent's QQ IM software exclusively and bundling that software with its antivirus software QQ Doctor through routine updates of QQ Software Manager. Tencent argued that it did not hold a dominant position in a relevant market, and its business practices were reasonable. It claimed that it required users to choose between Tencent's QQ and Qihoo's 360 Safety Guard antivirus software to prevent Qihoo's plug-ins such as 360 Privacy Protector from interfering with QQ, and that the inclusion of QQ Doctor in QQ Software Manager updates was not impermissible bundling. Qihoo had introduced software to block QQ pop-up ads on devices using Qihoo's software and had published an article claiming that its software had detected privacy violations by some IM software, implying that Tencent was scanning its users' computers. Under Tencent's either-or policy, which lasted for only

72. SAIC announcement, 国家工商总局专案组对微软公司进行反垄断突击检查, *available at* http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html; SAIC announcement, 国家工商总局专案组对微软公司继续进行反垄断突击检查, *available at* http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201408/t20140806_147358.html. The SAIC also raided an office of Accenture Technology Solutions (Dalian) Co. that advised Microsoft.

73. http://www.court.gov.cn/xwzx/yw/201410/t20141016_198470.htm.

one day, QQ users could use any security software other than Qihoo's Safety Guard. The Guangdong Higher People's Court found that Qihoo did not demonstrate an appropriate relevant market and that Tencent did not hold a dominant market position and dismissed Qihoo's claims. Qihoo appealed to the SPC, which affirmed the dismissal.

The SPC held that the plaintiff had the burden of proof in demonstrating the relevant market in abuse of dominance claims under the AML. It indicated that the court may find a relevant market other than what the parties claim. Recognizing that it may be difficult to identify a relevant market, in cases of lack of data or complex market conditions, the SPC also stated there will be cases in which no relevant market may be defined and in which case the plaintiff will bear the consequences of a lack of defined relevant market. The SPC also held that market definition is only a tool to determine market power and competitive impact. Therefore, it is not essential to define a relevant market in abuse of dominance claims, because market power and competitive impact may be determined from direct evidence.

The SPC defined the relevant market in the case as IM software and services in China. It rejected the lower court's view that the market is global, pointing out that Chinese consumers cannot readily subscribe to IM services offered by non-Chinese providers, given the regulatory requirements imposed by the government. The SPC accepted the hypothetical monopolist test but concluded that the "small but significant and non-transitory increase in price" (SSNIP) test is inappropriate in the context of industries such as the Internet where free services were common and any price would be an infinite price increase. In those industries, competition was based on nonprice factors, and product differentiation may be significant. The SPC considered that the "small but significant and non-transitory decrease in quality" (SSNDQ) test may be more appropriate in such contexts and applied a qualitative rather than quantitative analysis given the difficulty of quantifying quality and the lack of data. It analyzed whether IM users would switch services if there was a small but significant and nontransitory decrease in quality of IM services.

The SPC specifically adopted a dynamic analysis, considering likely competitive responses within a period such as a year to alleged abusive conduct by a hypothetical monopolist, particularly whether there would be competitive constraints on potential abuse of dominance. The SPC

considered both whether e-mails and short messages services (SMS, or text messages) are in the same market, and the trend of mobile-end IM services supplanting PC-end IM services. It also considered the relevance of online application platforms and the two-sided nature of those businesses,[74] concluding that competition among platforms is focused on the products and services on them and that users do not consider Tencent's QQ IM service and Qihoo's Internet security service substitutes for each other. It concluded that the relevant product market was IM services only.

However, while Tencent's position in IM services was over 80 percent and under Article 19 of the AML,[75] it may be presumed to have dominant market position, the SPC concluded that Tencent did not have a dominant market position. It noted that when Tencent implemented the either-or choice requiring users to choose between QQ and Qihoo's security software, Tencent's competitors gained users, and there was little impact on the security software market, supporting the lack of a dominant position. It noted the robust competition among dozens of IM services in China and the rapid entry of new products and providers. The SPC stated that the competition among online application platforms may be considered when determining whether there is market dominance in IM services.

In considering whether Tencent improperly bundled its QQ IM service with its QQ Doctor security software, the SPC outlined the factors that should be considered in analyzing such claims: (1) whether the allegedly tying and tied products or services are distinct from each other, (2) whether the alleged offender has a dominant position in the alleged tying product or service, (3) whether the holder of the dominant market position has imposed a tie; (4) whether there is any justification for the tie, and (5) whether there has been an adverse impact on competition. It concluded that Tencent's conduct that lasted one day was in response to Qihoo's blocking software and article and did not eliminate or restrict competition. The bundling of QQ IM software and QQ Doctor enabled users to better manage the IM software

74. Tencent offers QQ and other services to users for free and gets revenues from advertising as well as sales of mobile value-added services and virtual items for its online gaming services. Qihoo also offers free services, including its Safety Guard Internet security product, and sells advertising and web game services.

75. AML Article 19 provides that a dominant market position may be presumed with a market share of 50 percent or more.

and increased the value and performance of QQ IM. The SPC noted that while Qihoo's share of security software sales had declined and Tencent's share rose, the focus of the AML was on injury to market competition and not on injury to individual competitors. Qihoo was ordered to pay Tencent RMB796,800 (USD130,000) for legal costs.

F. Conclusion

Quite a few AML provisions may be invoked where IPR is involved, even while the AML expressly provides that use of IPR in accordance with IPR law and regulations will not be subject to the AML. The Patent Law raises the possibility of compulsory licensing where there is an AML violation.