IV. China's 2017 IP Guidelines

A. China at the Crossroads between Competition Enforcement and Intellectual Property Rights

The interplay between competition law and IPR protection has been increasingly in the focus of competition enforcement authorities in many jurisdictions including China. The landmark judgement on *Huawei v. InterDigital* (covered in depth in the next chapter) and the *Qualcomm* decision issued by NDRC demonstrated that both judicial and governmental bodies are willing to deal with complex IPR-related matters.[78] After the landmark decision on *Qualcomm* in 2015 which resulted in an unprecedented fine, the Chinese competition authorities put other IP-intensive sectors under scrutiny. Specific attention is being paid to telecommunication, pharmaceuticals, medical equipment, automotive, agro-machineries and plant varieties.

However, in the absence of clear guidelines on IPR-related monopolistic conduct, IPR owners and investors have concerns as to which practice would constitute violation of Art. 55 of the AML. It is therefore imperative to provide more detailed guidance to specify the boundary between legitimate exercise of IPRs and abuses of the rights to eliminate or restrict competition.

So far all three Chinese enforcement agencies were making efforts to develop guidelines on assessment of IPRs under the AML. Currently the "*Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude and Restrict Competition" (Provisions)* released by SAIC on April 7, 2015 represented the only legal document serving as a basis for its enforcement against IPR-related anticompetitive conducts. The Provisions aim to balance the lawful interests of IPR owners and other relevant parties, and impose enforcement against AML violators. However, as discussed in Part II, SAIC is merely empowered to enforce non-price related violations. Therefore, its *Provisions* have inherent deficiencies when it

78 Slaughter and May, *Competition Law in China*, November 2016, available at https://www.slaughterandmay.com/media/879862/competition-law-in-china.pdf.

comes to violation of the AML regarding price-related or merger control issues.

Despite insufficient coverage, SAIC's endeavor to explore the complex area of interplay between IPR and competition law has provided valuable experience for further development of rules.

B. Characteristics and Main Principles of the IP Guidelines

Under the coordination of the China's Anti-Monopoly Commission (AMC) operating on behalf of the State Council, the first draft of the *Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comments)* ("IP Guidelines") was published in Chinese on March 23, 2017.[79] These Guidelines combined issues from the three competition agencies and taking into account the opinion of the State Intellectual Property Office (SIPO).

The *IP Guidelines* are composed of five chapters with a total of 27 articles covering the following issues:

	Issues Covered	
Chapter 1	General issues: analytical principles, framework; relevant market; factors to be considered in assessing anti-competitive effects; conditions for establishing positive effects	Articles 1 – 5
Chapter 2	Restrictive agreements relating to IPRs: joint R&D, cross licensing, exclusive grant-back, non-challenging clause, standard setting, safe harbour criteria	Articles 6 – 12
Chapter 3	Abuse of dominant market position involving IPRs	Articles13 – 18
Chapter 4	Concentration of business operators involving IPRs	Articles 19 – 24
Chapter 5	Other circumstances involving IPRs	Articles 25 – 27

79 Chinese version available at http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml.

1. Principles of analysis – Art. 1

Art. 1 of the Guidelines provides four basic principles to be respected when assessing whether exercise of IPRs excludes or restricts competition.

- The first principle sets forth that basic analytical framework needs to be consistent with that of the AML.
- The second principle states consideration of specific characteristics of IPRs.
- The third principle acknowledges that there is no presumption of market dominance simply due to ownership of IPRs.
- The fourth principle calls for consideration of positive effects of efficiency and innovation upon assessment of relevant conducts on a *case by case* basis.

The third principle provides IP owners with legal certainty. However, situation could become controversial depending on how relevant product market is defined. As will be discussed in the *Huawei v. InterDigital* case in Part V, the Chinese courts tend to adopt a very narrow approach in defining the product market for SEP owners; so did NDRC in its decision on *Qualcomm* case.

The fourth principle seems to suggest that the Guidelines took a more cautious approach, i.e. each case is different, and more factors need to be taken into consideration when assessing IP-related conduct under the AML. One may take it as a positive sign that the policy-makers admitted the complexity between granted exclusivity of IPR on the one hand and competition concerns on the other. Arguably, this is a hint that the authorities would value the importance that dynamic efficiency could bring, particularly prospective market effects generated by the new economy.

2. Safe harbour principle – Art. 12

Art. 12 of the Guidelines specifies three criteria on IPR-related agreements, and meeting any of them will not be considered monopoly agreements, as set in Articles 13(6) and 14(3) of the AML

(a) aggregate shares of undertakings in a competitive relationship in the relevant market do not exceed 20 percent
(b) Shares of undertakings in a non-competitive relationship in any relevant market do not exceed 30 percent

(c) In case market shares of relevant undertakings are difficult to obtain, or market shares are unable to reflect the market position of the undertakings, there should exist four or more than four substitutable technologies on the relevant market that are independently controlled by other undertakings and obtainable *at reasonable costs*[80] in addition to the technology controlled by the relevant parties to the agreement.

Art. 12 of the Guidelines aims at providing "efficient enforcement, offering clear prospects for market stakeholders".[81] The purpose of this stipulation is to suggest that any agreement which fulfills the above criteria will not fall into the scope of Art. 13(6) and Art. 14(3) of the AML, and thus will not be considered as monopolistic conduct. The safe harbour principle in the Guidelines provides guidance and better predictability for IPR owners. However, it is undefined what costs would be "reasonable costs" for obtaining alternative technologies in relevant market. Future public enforcement and court rulings need to interpret and set benchmarks.

The requirement of market shares of Art. 12 of the Guidelines for competing and non-competing undertakings is in line with Art. 3 of the EU Commission Regulation on "Technology Transfer Block Exemption Regulation" (TTBER).[82] Unlike in the TTBER, the "hardcore restrictions"[83] were not mentioned in the Chinese Guidelines. In the absence of a clear delineation of the scope of hardcore restrictions on price fixing, output constraints, market and customer allocations, the exemption defined by the "safe harbour principle" might practically have not much effect.[84]

3. Refusal to license IPRs – Art. 15

"Essential facilities doctrine" imposes on owners of essential facility the duty to deal with competitors in order to maintain competition. This doctrine is not mentioned anywhere in the enacted AML. Art. 15 of the

80 Emphasis added.

81 Original Chinese text of Art. 12: "为了提高执法效率，给市场主体提供明确的预期 … ".

82 Commission Regulation (EU) 316/2014 of 21 March, 2014.

83 *Id.*, Art. 4 Sect. 1 (a) – (c).

84 Stephanie Wu, *China Publishes the 2nd Version of the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights*, April 2017, CPI Competition Policy International, available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/04/Asia-Column-April-Full.pdf.

Guidelines stipulates that "*without justifiable reasons, a dominant undertaking, in particular if IPR is part of essential facility for production and business operations, refuses to license its IPR to other business operator, may constitute abuse of market dominance to exclude or restrict competition*." In addition, Art. 15 sets forth five factors which may be considered in assessing whether refusal to license IPR constitutes abusive conduct:

(1) commitment made by the business operator to license the IPR
(2) whether the IPR is indispensable for other business operators to enter the relevant market
(3) refusal to license such IPRs will result in negative effects and the degree of negative effects on innovation from other business operators
(4) whether the rejected licensee lacks will and capability to pay reasonable license fees
(5) whether refusal to license relevant IPRs will damage the interests of consumers and the public

3.1 The essential facility doctrine adopted by SAIC

In the current *Provisions* from SAIC, the essential facility doctrine was introduced in Art. 7. Upon examining and comparing the languages and adopted factors in SAIC's *Provisions* and Art. 15 of the Guidelines, one may conclude that Art. 15 introduced a much more cautious approach in assessing abusive conduct of refusal to deal. The wording "indispensable" in the above-mentioned factor (2) and "degree of negative effects" in factor (3) did not appear in SAIC's *Provisions*. This more tentative attitude of the latest *IP Guidelines* on the essential facility doctrine could be the result of heavy criticism directed at Art. 7 of SAIC's *Provisions* in 2015.

3.2 The essential facility doctrine from the US perspective

It is widely accepted that this doctrine was first developed in the US case *Terminal Railroad Association*[85] in 1912 ruled by the Supreme Court. However, in 2004 the US Supreme Court explicitly denied the existence of the essential facility doctrine in the *Trinko* case. *"We have never recog-*

85 *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912).

nized such a doctrine…… We find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'; where access exists, the doctrine serves no purpose" In the US, the court generally observes that forced sharing may discourage the incentives for innovation which eventually will benefit consumers.[86]

A brief overview of the development of the US antitrust law may reflect its attitude towards the essential facility doctrine. The US federal antitrust law has developed over more than a century's time. The core part is found in the 1890 Sherman Act and the 1914 Clayton Act, which went through amendments over time. The refinement of the US antitrust law including its jurisprudence evolved with changes of the political and economic climate within the country. The adoption of the Sherman Act was the endorsement of the Congress for the free market principle. This general principle should contribute to the long-established ideals of economic opportunity, freedom of exchange, security of property and political liberty.[87] From another perspective, one may also understand that the US antitrust law was established in response to populist political pressure to curb large trusts' economic power and monopolization at the market.[88] By the 1970s, the US adjudication was strongly influenced by the Chicago School of antitrust economic theory on *efficiency*, which replaced the Harvard structuralism.[89] With the "law-and-economics" movement, the US courts tend to interpret the goals of the antitrust law much more narrowly based solely on economic theory.[90] The efficiency argument was readily accepted at

86 Maureen K. Ohlhausen, *Illuminating the Story of China's Anti-Monopoly Law*, October 2013, available at https://www.ftc.gov/sites/default/files/documents/public_statements/illuminating-story-chinas-anti-monopoly-law/1310amlstory.pdf.

87 James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1890-1918*, (1989) 50 Ohio State Law Journal 258 – 395; see also Qianlan Wu, *Competition Laws, Globalization and Legal Pluralism* (Hart Publishing Ltd. 2013) 17.

88 *Supra* note 44.

89 In examining the restraints on competition by merger, courts focus on impact on the market structure and if there would be market foreclosure, which will prevent other competitors from entering the relevant market. *Brown Shoe* decision by the Warren Court is a typically influenced by Harvard structuralism. See also Qianlan Wu, *Competition Laws, Globalization and Legal Pluralism*, (Hart Publishing Ltd. 2013) 18.

90 *Supra* note 44.

that time owing to fierce global competition, in particular from Japanese companies. The US antitrust law strongly advocates for efficiency, and belief in self-correction of the market.

3.3 The essential facility doctrine under the EU law

The development of essential facilities doctrine within the EU is widely believed to be a natural consequence of privatizing infrastructure and other public utility goods in order to break up the dominance of such companies.[91] In addition to tangible facilities such as public infrastructure, the European Court of Justice (ECJ) has made a series of rulings on intangible facilities involving IPRs. Most of the court decisions under the EU competition law are cases on refusal to deal rather than on essential facilities.[92] In the past decades, the EU case law established the criteria for "exceptional circumstance test" when assessing if a "refusal to deal" has competition implications or not. *Bronner* case[93] is widely taken as a turning point of EU's attitude towards this doctrine. In the ruling of this case the ECJ set higher standards than, for instance, on *Commercial Solvents* case[94]. The fact that the facility owner possesses a dominant market position is not sufficient for him to be ordered to deal with its competitors. In comparison with the view from the US Supreme Court, the ECJ accepted that in certain exceptional circumstances, a refusal to supply a potential competitor with an essential facility can constitute a breach of Article 82 of the EC Treaty.[95] The exceptional circumstances were first mentioned in the *Magill* case[96]. In this case, the abusive conduct resulted from the "refusal to

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91 James Turney, *Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation*, Northwestern Journal of Technology and Intellectual Property, 2005, Vol 3, No. 2.

92 Sebastien J. Evrard, *Essential Facilities in the European Union: Bronner and Beyond,* 10 Colum. J. Eur. L. 491 (2003-2004).

93 *Bronner v. Mediaprint*, C-7/97, [1998 E.C.R.] at I-7791.

94 *Commercial Solvents v. Commission*, C-7/73 [1974 E.C.R.] at 223.

95 CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY (2002), (2002/C 325/01), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN.

96 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission,* Joined Cases C-241/91 P & C-242/91, P, 1995 E.C.R. I-743, [1995] 4 C.M.L.R.718.

deal" prevented emergence of a new product, namely a general television magazine which consumers require.

The *Microsoft* decision[97] in 2007 is another landmark case in the EU on competition law applying to intellectual property. The EU invoked competition rules for consumer welfare against absolute IP protection,[98] and imposed on *Microsoft* to release the interoperability code to its competitors. This case started with a complaint filed by *Sun Microsystems*, alleging that *Microsoft* refused to supply it with interoperability information for interoperation with Microsoft's operating system. After examination the Commission held that Microsoft's interoperability code was indispensable for other operating systems to interoperate with Windows system. Furthermore, the refusal to license prevented other competitors to come up with new products in the relevant market which customers demand. Therefore, *Microsoft* abused its market dominance and its refusal to license constituted violation of Art. 82 EC.[99] In consistence with the decision of *Magill* case, the Court of First Instance affirmed the findings of the Commission.

From the EU jurisprudence, particularly from the *Microsoft* case ruling, it is apparent that the market structure and some equality for competitors should be maintained. However, the *Microsoft* decision triggered heavy debates in the relevant circles. Some argued that the Windows operating system has already become a *quasi* consumer standard and available at a very competitive price. The EU competition authorities nevertheless intervened based on Microsoft's strong market power and its imposition of unfair conditions upon other market participants.[100] One may conclude that under the EU competition policy and its general attitude toward essential facilities doctrine, a compulsory license is more likely to be granted for intangible facilities than under the US competition regime.

97 *Microsoft v. Commission*, T-201/04 (2007).

98 Tsenchov, *Latest Development in the Microsoft Case in the European Union: Microsoft Officially Allows Browser Choice to Customers*, (2010), The Columbia Journal of European Law 16, page 85 – 88.

99 Art. 82 EC corresponds to Art. 102 TFEU.

100 *Supra* note 91.

3.4 Compulsory license under TRIPs Agreement

Under TRIPs Agreement general framework is laid down in various stipulations. Art. 8(2) of TRIPs Agreement gives member states a general guidance that appropriate measures may be introduced in each country's own legislation to prevent abuse of IPRs. Article 31 of the Agreement sets forth clear provisions, under which a compulsory license can be granted once the judicial or administrative review establishes anti-competitive conduct of IPR holders.

Furthermore, Art. 40(1) acknowledges that some licensing practices of IPRs may have adverse effects on trade, and may impede the transfer and dissemination of technology. Art. 40(2) specifies examples of anti-competitive practice such as exclusive grant-back conditions, preventing challenges to validity and coercive package licensing. These are also focal points of the Chinese IP Guidelines concerning licensing practice, which will be discussed below.

3.5 Inevitable legal uncertainty of the essential facility doctrine

As elaborated earlier, it can become a complex task to strike the right balance between IPR protection and competition policy. Courts from older jurisdictions such as the EU and the US have to carefully weigh the balance between the interest of IPR holders and consumer benefits irrespective of whether the essential facilities doctrine is explicitly recognised or not. In the case of intangible essential facilities, unlike with tangible essential facilities such as harbours or airports, the investment put into innovations and new ideas cannot be easily measured. And precisely for further promoting such creativity, exclusive IPR regime exists to protect inventors. Innovation will be hampered, if the exclusivity is taken away from innovators through an "easy" compulsory license based on essential facility doctrine. Because of the great difficulties to reconcile the two regimes, it is almost impossible for regulators to set up a clear rule for limiting exclusivity of IPR holders for the benefit of overall consumer welfare. This requires competition agencies and courts to take decisions on a case-by-case basis.

Based on the wording of the *IP Guidelines*, it is assumed that the Chinese authorities would take similar cautious approaches in assessing if a compulsory license should be granted. For emerging economies, it might be quite tempting to apply this doctrine, since certain patented technologies may not yet be available in the country. Any lax application of the doctrine by granting compulsory license would discourage the incentives of innovators. Art. 15 of the *IP Guidelines* somewhat reflects the cautious attitude of the Chinese regulators. It still remains to be seen how competition agencies will put this newly introduced doctrine into practice, and how future judicial judgements would further interpret the principle. Any legal uncertainty is problematic, since recoupment of innovations could be jeopardized simply by an order to license their IPRs to a competitor.[101]

4. SEP licensing

The whole Chapter 2 (Articles 6 to 12) of the *IP Guidelines* deals with IP-related monopoly agreements. Articles 6 to 10 specify the following conducts: joint R&D, cross-license, exclusive grant-back, non-challenge clause, standard setting. All these articles have also close relationships with SEP licensing.

As will be discussed in Part V, standard essential patents (SEP) could grant patent holders automatic access to downstream product markets by licensing the standard technology. In spite of the dynamic efficiency and the possible *ex post* effect of innovation for dynamic industries, licensors do have stronger bargaining power than licensees. Particularly at this stage, a large number of Chinese companies are licensees. Therefore, Chinese policy-makers and competition authorities have reasons to pay close attention to fair licensing practice involving SEPs.

The message from the provisions in Chapter 2 and the pertinent factors to be considered is quite clear. Incentives of innovation from licensees should not be discouraged and hampered by coercions from the licensor. Art. 8 of the *IP Guidelines* concerns only exclusive grant-backs. Factors to be considered are, *inter alia,* whether licensor provides substantial values for the exclusive grant-backs, or whether the exclusive grant-backs discourage licensee to innovate. In order to motivate licensee to further develop the licensed technology, it is detrimental to bind licensees with certain obligations and terms such as free granting back the improved licensed technology to the licensor, or "non-challenging clauses" of patent

101 *Supra* note 91.

validity. These conducts are also explicitly put as "excluded restrictions" in Art. 5 Section 1(a) and (b) of the TTBER Regulation.[102] The deep concern on technology licensing agreement of the Chinese policy-makers seems to be fully in line with the approach of the EU. This demonstrates the importance of maintaining licensee's incentives to further develop and diffuse technology, which is the very essence of both IPR regime and competition policy.[103]

C. Some Concluding Remarks

The release of the long-awaited *IP Guidelines* will provide IP owners with certainty and predictability when exercising their IPRs in China. The validity of the Guidelines will apply to all three competition agencies in China.

The long drafting process and repeated amendments signaled that the intersection between exclusivity of IPR and the competition regime is extremely delicate. With the *IP Guidelines* Chinese competition authorities seek to provide principles and examining criteria to distinguish between permissible business practice and abuse of IPRs. As discussed above, there still cannot be a very clear demarcation between the two systems. Future administrative and judicial decisions will contribute to establishment of clearer rules. A few aspects of *IP Guidelines* need to be improved. As an example, further clarifications on terms such as essential facilities would be of great help. According to the EU experience, only if other market participants are hindered to compete in a downstream market, should the doctrine be instituted.

Furthermore, in various provisions, though a list of factors for determining abuse of IP rights is given for assessment purposes, the language sometimes sounds rather ambiguous. It would be commendable to the Chinese authorities to give weight to each mentioned factor according to its significance so that more predictability can be established.

Clearly, the draft *IP Guidelines* intend to provide adequate protection for licensees. In this aspect, US commentators urged the Chinese authorities to reconsider provisions such as non-challenge clause and expired and

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102 See Commission Regulation (EU) No 316/2014 of 21 March 2014.
103 *Supra* note 4.

invalid patents in package licensing portfolios. They should not be regarded as inherently or likely anti-competitive.[104]

It is important for younger jurisdictions like China to borrow doctrines that have already been given interpretations in older jurisdictions. This will generally speaking increase predictability for market participants. In this sense, it is even more essential for Chinese competition agencies and courts to consistently and tentatively apply those newly introduced doctrines.

104 Melisa Lipman, *Antitrust Group Urges China to Adjust Approach to IP Abuse*, Available at https://www.law360.com/articles/913654/antitrust-group-urges-china-to-adjust-approach-to-ip-abuse.