A Look into the SAIC New IPR Abuse Rules: From the Perspective of Compliance

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I. INTRODUCTION

On April 13, 2015, SAIC promulgated the *IPR Abuse Rules* that became effective on August 1, 2015.

As a special regulation on IPRs related to AML issues, the drafting of the IPR Abuse Rules can be dated back to SAIC's efforts of drafting the *Guideline for Law Enforcement on IPR Antitrust* (the "Guideline") in 2009**.** Due to the complexity and sensitivity of the issue and the absence of law enforcement experience, SAIC has decided not to promulgate comprehensive guidelines but to formulate rules instead to regulate the major issues as a priority. Since 2013, SAIC has solicited opinions from various industries and released an exposure draft on its website for public comments ("Exposure Draft') in June, 2014.[3]

The IPR Abuse Rules primarily regulate the following six aspects:

(1) defining monopolistic conducts that eliminate and restrict competition, relevant markets and the like;

(2) prohibiting monopoly agreements between undertakings through IPRs' implementation, and stipulation of "safe harbor" rule;

(3) prohibiting the abuse of dominant market position in the course of implementation of IPRs and prohibitive regulations on specific abusing conducts;

(4) regulating patent pool and monopolistic conducts during the formulation and implementation of standards;

(5) clarifying analysis, principles and framework of SAIC system's AML enforcement in connection with IPRs;

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[3] *See* the official website of SAIC: Drafting Notes for Soliciting Public Opinions on Rules of Industry & Commerce Authorities on Prohibiting the Exclusion or Restriction of Competition through Abusing Intellectual Property Rights, available at: http://www.saic.gov.cn/gzhd/zqyj/201406/t20140610_145803.html.

(6) administrative sanctions.

This article will conduct a preliminary look into the IPR Abuse Rules from the perspective of compliance in the context of some recent cases.

II. BACKGROUND

First of all, IPRs related to AML issues have become a hotspot in Chinese AML law enforcement and judicial practice. National Development and Reform Commission ("NDRC") has investigated and adjudicated InterDigital and Qualcomm's abuse of dominance cases since 2013. Guangdong Higher People's Court has ruled the case of *Huawei v. InterDigital* on abuse of dominance in connection with Standard Essential Patents ("SEPs"). Chinese Ministry of Commerce ("MOFCOM") has imposed restrictive conditions on the concentration of Microsoft's acquisition of Nokia's mobile business and Merck KGaA's acquisition of AZ Electronic Materials. Besides, SAIC is currently conducting an AML investigation against Microsoft. Against such backdrop, the promulgation of the IPR Abuse Rules naturally attracts extensive attention.

Secondly, before the issuance of the IPR Abuse Rules, there are also some laws and regulations dealing with IPR related monopoly issues in China.

- From the perspective of law, according to Article 55 of Antimonopoly Law ("AML"), "this Law shall apply to any conduct of an undertaking whereby intellectual property rights are abused to eliminate or restrict competition." In other words, all regulations related to monopoly agreements, abuse of dominance and concentration of undertakings in AML can be applied to IPRs.

- According to Article 329 of the *Contract Law of the People's Republic of China*, a technical contract that "illegally monopolizes technologies, impedes technological progress" is deemed as null and void. Article 343 regulates that technology transfer contract "shall not restrict technological competition and development." Article 344 regulates that "a patent exploitation license contract shall be valid only within the period of continued existence of the patent. If the valid duration of the patent right expires or the patent right is declared invalid, the patentee may not conclude a patent exploitation license contract relating to that patent with others."

- According to Article 30 of *Foreign Trade Law of the People's Republic of China*, for circumstances "where an intellectual property rights owner prevents a licensee from querying the validity of intellectual property rights contained in a license contract, implement compulsory blanket licensing, or stipulate exclusive grant back conditions in a license contract" occurring during foreign trade, MOFCOM may adopt necessary measures to eliminate such impact. From the perspective of administrative regulations.

- Article 27 to Article 29 of the *Regulations of the People's Republic of China on the Administration of the Import and Export of Technology ("Regulations of the Import and Export of Technology")* and Article 43 of the *Regulations for the Implementation of the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures* have similar provisions.

- From the perspective of Judicial Interpretation, Article 10 of *Interpretation of the Supreme People's Court on Issues relating to Applicable Laws for Trial of Dispute Cases involving Technical Contracts* ("Judicial Interpretation") regulates 6 circumstances belong to "illegal monopoly of technology and obstruction of technological advancement" that render a contract null and void.

As a departmental regulation of SAIC, the IPR Abuse Rules only implement the AML in some specific respects and will not rule out the application of the above laws, regulations and judicial interpretation. In other words, certain conducts cannot be deemed as compliance with the AML and/or other applicable rules only on the grounds that the IPR Abuse Rules fail to make express reference to them as monopolistic conducts.

Thirdly, China applies dual-track regime (i.e. administrative law enforcement and judicial practice) in AML field. There is a further "separate law enforcement" framework involving three law enforcement agencies: NDRC, MOFCOM and SAIC. As a departmental regulation of SAIC, the IPR Abuse Rules only apply in law enforcement activities conducted by SAIC and its provincial counterparts. For People's Courts system, the legal basis for trial primarily includes laws and regulations, while generally departmental regulations only acts as a reference. Therefore, in trying AML cases involving IPR, it is not mandatory for a judge to apply the IPR Abuse Rules. In the field of administrative law enforcement, monopolistic conducts in connection with IPR can encompass three areas including monopoly agreements, abuse of dominance and concentration of undertakings. The IPR Abuse Rules do not touch upon concentration of undertakings, which is MOFCOM's responsibility, for example, whether undertakings' participating in patent pool (especially the Joint Ventures set up for patent pool) constitutes concentration of undertakings, whether such transaction will trigger an obligation to notify the operation and how to conduct merger review on such transaction, etc. Another noteworthy point is that although IPR abusing conducts usually intertwined with price behavior and non-price behavior, due to the divergent responsibilities between SAIC and NDRC, the IPR Abuse Rules only regulate non-price related monopoly agreements and abuse of dominance. A comparison between the IPR Abuse Rules and its Exposure Draft can further elaborate this issue: brackets are added in Article 3 of the IPR Abuse Rules, further elaborating "except for price monopoly." Article 12 deletes the term of "price" as "competition-related sensitive information" in requiring "members of the patent pool shall not make use of patent pool…to conclude a monopoly agreement." The above further indicates that for purposes of compliance, companies cannot merely observe the IPR Abuse Rules, but shall also pay attention to judicial practices of the courts, regulations and law enforcement of NDRC and MOFCOM.

In a nutshell, while the IPR Abuse Rules are of guiding significance for the AML compliance in IPR, the IPR Abuse Rules are not a "master key" for all. Only through systematized mindset, keeping the foothold on the whole system of China's AML and other applicable laws and rules and the AML law enforcement and judicial practice can companies follow the AML compliance in connection with IPRs.

In light of the foregoing, we hereby analyze the principal articles of the IPR Abuse Rules.

III. PRINCIPAL ARTICLES OF THE IPR ABUSE RULES

A. Basic Definitions and Application Scope

Looking at the title and most articles, the IPR Abuse Rules seem to apply to all types of IPR abusing conducts. However, the word "technology" appears repeatedly in Articles 3, 5, 10, 12, 13, etc., and Article 12 and 13 only refer to or mainly target at patent issues. It can be inferred that the IPR Abuse Rules primarily regulate the abuse of technology-related IPRs, including patent, software copyright, layout designs of integrated circuit, etc., while rarely touch upon trademark right, geographical indications or copyrights outside the realm of software.

According to Article 3, abuse of IPRs to eliminate and restrict competition shall refer to violation of the provisions of the AML by undertakings in exercising their IPRs and carrying out monopoly conducts (except for price monopoly conducts) such as implementation of monopoly agreements and abuse of dominance. Such definition provides little guidance in determining the relevant monopolistic conducts, and its main merits are: firstly, generally providing that IPR monopolistic conducts may appear as monopoly agreements and abuse of dominance; secondly, price-related monopolistic conducts do not fall into the scope of the IPR Abuse Rules. For example, the "monopoly agreements" in Article 4 and 5 and "discrimination" in

Articles 11 and 12, which shall have a broad extension, do not cover price-related conducts in these IPR Abuse Rules.

Paragraph 2 of Article 3 also provides the definition of "relevant market," which requires "taking into account impact of such factors as IPR and innovation," but fails to explain in detail how to take such factors into account. The only clarification here is that "the relevant product market can be either relevant technology market or relevant goods market covering specific IPR" while the relevant technology market refers to "the market formed as a result of competition among the technology concerned in exercising the IPR and substitutable technologies of the same type." We believe that when trying to determine whether two or more technologies are "substitutable" or "competitive," the nature, function and royalties of the technologies shall be taken into consideration.

In NDRC's investigation against Qualcomm ("Qualcomm case"), the relevant commodity markets defined by NDRC contained both the technology market, i.e., "a set of separately formed relevant product markets for license of each wireless SEP" or "wireless SEP portfolio license market" and the commodity market concerning IPR, i.e., CDMA baseband chip market, WCDMA baseband chip market and LTE baseband chip market.[4]

B. Monopoly Agreement and "Safe Harbor"

One distinctive feature of the IPR Abuse Rules is that it makes abuse of dominance the key point of regulation (Article 6 through Article 11, Article 12 and Article 13) while makes few provisions on monopoly agreement (Article 4, Article 5 as well as Paragraph 2 of Article 12).

Among these provisions, Article 4 merely quotes Article 13, Article 14 and Article 15 of the AML, indicating that these three articles apply to IPRs with no further or detailed regulations. In other words, the IPR Abuse Rules fail to elaborate any "other monopoly agreements" where Paragraph 6 of Article 13 and Paragraph 3 of Article 14 of AML empowers the SAIC to do so, including categorizing other monopoly agreements in connection with technological development collaboration and technology license. To that end, this article seems to fail the drafters' expectation "to further implement the relevant requirements of the AML, to regulate law enforcement practices of SAIC and guide undertakings to exercise IPR pursuant to the law"[5], rendering the IPR Abuse Rules lack of certainty and predictability.

Notwithstanding the foregoing, by reference to the aforementioned provisions of Judicial Interpretation and *Regulations Import and Export of Technology*, the following agreements may be exposed to the risk of being regarded as "other monopoly agreements": (1) restricting one concerned party from carrying out new R&D on the technical basis of the subject matter of the contract or restriction of its use of improved technology or agreement on free grant-back; (2) restricting one party from obtaining from other sources a technology that is similar or competitive to that of the technology provider; (3) imposing obviously unreasonable restriction in terms of quantity, variety, price, sales channel and export market of product manufactured or service provided by the assignee of the technology through implementing such technology; (4) requiring licensee to accept conditions that are not essential for the implementation of the subject technology, including purchase of non-essential technologies, raw materials, products, facilities, services and takeover of non-essential personnel; (5) unreasonably restricting the channel or source of technology in terms of purchase of raw materials, parts, products or facilities by the assignee of the technology; (6) prohibition of raising objection by the assignee of the technology on the validity of the subject technology IPRs or imposing

[4] *See* NDRC: Administrative Sanction Decision against Qualcomm Company (Fa Gai Ban Jia Jian Chu Fa (2015) No.1) http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

[5] *See* "New Regulation released by SAIC: Prohibition of Abusing Intellectual Property Rights to Eliminate and Restrict Competition," News Release on SAIC Official Website.

conditions on such objection; (7) requiring assignee to pay usage fees or undertake related responsibilities for expired patent or technologies that are declared void.

Article 5 is the "safe harbor" rule, i.e., where the parties' aggregate market share does not exceed certain threshold or there are alternative technologies in the relevant markets, then generally such agreements will not be regarded as "other monopoly agreements." This article may be interpreted from the following perspectives:

Firstly, since Article 4 or other articles of the IPR Abuse Rules fail to categorize "other monopoly agreements," which makes Article 5 in a way like "a tree without roots." As discussed above, agreements with seven circumstances including exclusive grant-back face the risk of being regarded as "other monopoly agreements," however, as long as any of those circumstances meets the threshold of "safe harbor," such agreements will not be regarded as monopoly agreements.

Secondly, Article 5 fails to specifically provides any conduct that does not constitute monopoly agreements, or any conduct that may be "presumed" not constitute monopoly agreements, but simply provides certain conducts which "may not be deemed as a monopoly agreement." In other words, even if certain agreements fit the prerequisites of "safe harbor," they still may be regarded as monopoly agreements. SAIC has large discretion in this respect, which may reduce the actual value of "safe harbor."

Thirdly, Article 5 fails to regulate the calculation method for "market share" in the technology market. In practice, there are two approaches: first, the market share for the technology itself, taking technology licensing as an example, is the market share of the undertaking's technology in the competing technology market. Second, the market share is the proportion of sales of products containing the technology concerned in the market of products incorporating technology concerned or substitutable technologies of the same type. In Qualcomm case, NDRC adopted the first approach in calculating Qualcomm's market share in the relevant wireless SEP license market, i.e., finding that Qualcomm hold 100 percent market share in each wireless SEP license market on the ground that SEPs are "unique and non-substitutable," further, Qualcomm also holds 100 percent market share in wireless SEP portfolio licensing market. However, NDRC adopts the second approach in calculating Qualcomm's market share in baseband chip market.[6]

C. Abuse of Dominance

Article 6 primarily regulates the determination of dominant market position, providing that an undertaking cannot be presumed to hold dominant market position merely based on its ownership of IPR. However, from the final judgment of *Huawei v. InterDigital*[7] and the Administrative Sanction Decision that NDRC issued to Qualcomm ("ASD"), it seems the undertakings holding SEPs will more likely be regarded as holding dominant market position.

Articles 7 through 11 regulate 5 types of conducts on abuse of dominance, namely, refusal to license, exclusive dealing, tying, imposing unreasonable transaction terms and discriminating among transaction counterparties with equal standing.

The common constitutive element among these five conducts is the undertaking has dominant market position. Under circumstances that do not concern SEPs, undertakings will less likely be regarded as holding dominant market position, and accordingly the risk of being found in violation of Article 7 through Article 11 of the IPR Abuse Rules is relatively low. However, it is noteworthy that while Article 7 through Article 11 prohibit undertakings with dominant market position from doing certain conducts, it does not necessarily mean that undertakings not holding dominant market position are allowed to do the above conducts. As

[6] *See* NDRC's Administrative Section Decision to Qualcomm Incorporation

[7] Higher People's Court of Guangdong Province (2013) Yue Gao Fa Min San Zhong Zi No. 306 Paper of Civil Judgment.

discussed above, if undertakings without dominant market position abuse IPR, such as exclusive dealing, exclusive grant-back, prohibiting transaction with third parties, may still be exposed to the risk of being regarded as concluding "other monopoly agreements."

We will elaborate the constitutive elements for each of the above five conducts as follows:

1. Refusal to License

To constitute "refusal to license," the following requirements shall be fulfilled: (1) the subject undertaking's IPRs constitute "essential facilities" for other undertakings' business activities, i.e. such IPRs can hardly be reasonably substituted (which cannot be reasonably substituted by IPRs of any third party or cannot be developed by other undertakings or the costs for development are manifestly high), making it an essential factor for other undertakings to compete in the relevant market; (2) the undertaking refuses to license to other undertakings or disguisedly refuse to license by imposing unreasonable conditions; (3) there are no justifiable causes for such refusal to license. Although Article 7 has not directly defined "justifiable causes," it makes reference to Article 8 of *Rules of Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position*, which provides that whether there are "justifiable causes" or not shall be decided from both the positive and negative aspects: on one hand, whether such refusal to license may have adverse impact on competition or innovation and further harm consumer welfare or public interests; on the other hand, whether licensing of such IPRs will cause unreasonable harm to the IPR holders.

It is worth noting that the so-called "reasonable conditions" shall have included reasonable price condition. However, since the IPR Abuse Rules are not applicable to price-related monopolistic conducts, it is still subject to further clarification from the law enforcement agency whether refusal to license by charging excessive license fees falls within the regulation scope of the IPR Abuse Rules.

2. Exclusive Dealing

To constitute "exclusive dealing," the following requirements shall be reached: (1) requiring a transaction counterparties to only deal with itself or its designated undertakings; (2) there are no justifiable causes for such restricting; (3) such exclusive dealing eliminates or restricts competition. It is worth noting that whether exclusive dealing naturally eliminates or restricts competition shall be decided upon further analysis on the impact on competition in accordance with Article 16 of the AML; however, conducting such further analysis seems to narrow the scope of application of Paragraph 1 of Article 17 of the AML.

Moreover, Article 8 fails to define "justifiable causes." Therefore, in practice, reference may still be made to Article 8 of *Rules of Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position*, i.e., taking the following factors into comprehensive consideration: (1) whether such exclusive dealing conducts adopted by an undertaking for its normal business activities or normal benefit; and (2) the impact of such conduct on the economic operation efficiency, public interests and economic development. ("without justifiable cause" is also a constitutive element for "tying" and "discriminating among transaction counterparties with equal standing," with similar determination mindset, thus we will not dwell on this in the following text.)

3. Tying

Article 9 provides some detail in regulating tying in connection with IPRs, i.e., an undertaking should have (1) forcibly engaged in bundled sale or combination sale of different products against trade practice or consumption habits, etc., or without regard to the functionalities of the relevant products, (2) such tying enables the undertaking to leverage its dominant position on the tying product market to the tied product market, thereby eliminating or restricting competition of other undertaking(s) on the tying product market or tied product market. It is worth noting that these two conditions need to be fulfilled concurrently. In other words, forcibly tying which fail to cause extension of the undertaking's dominant market position will not be prohibited by the IPR Abuse Rules. We understand, the extension of dominant market position here does not refer to having dominance in both the tying product market to the tied product market, but refers to the fact that the undertaking's leveraging of its dominance in the tying product market to eliminate and restrict competition in the tied product market.

In Qualcomm case, NDRC found that Qualcomm had incurred in patent tying conduct. Qualcomm raised three defenses including that most licensees voluntary chose to obtain licenses to the whole patent portfolio, and it is very difficult to distinguish wireless-SEPs from non-wireless-SEPs, etc. NDRC held that "non-wireless-SEPs and wireless SEPs are different in nature, independent from each other," thus licensing wireless non-SEPs and wireless SEPs respectively will not affect their utilization and value. Qualcomm "setting a single fixed royalty rate and adopting the method of licensing a whole portfolio […] has tied non-wireless-SEP license to wireless SEP license without justifiable causes by leveraging the dominant position in wireless SEP market."[8]

4. Imposing Unreasonable Transaction Terms

1. Article 10 specified five types of prohibited conducts imposing unreasonable transaction terms, namely, requiring exclusive grant-back; prohibiting transaction counterparties from questioning the validity of the subject IPRs; restricting the transaction counterparties from making use of competing commodities or techniques upon expiry of the licensing period without infringing the IPRs; continuing to exercise IPRs for expired patents or invalid patents; prohibiting the transaction counterparties from entering into transactions with third parties.

2. In Qualcomm case, NDRC found transaction terms such as "charging royalties for expired wireless SEPs," "requiring free cross-license from licensees," etc. As regards the first issue, Qualcomm responded that, although there are certain patents becoming expired each year, a larger number of new patents are being added into the patent portfolio, therefore, this issue of charging royalties for expired patents does not exist. However, NDRC found "the position that newly added patents can make up for the value of expired patents cannot be proven." As regards to the second issue, Qualcomm responded that free cross-licenses were part of the overall exchange of value with licensees, while NDRC considered such view lacking support of facts and evidences.[9]

3. From the perspective of compliance, it is worth noting that undertakings that have no dominant market position conducting such conducts may also be found as "other monopoly agreements," especially when there are prohibitive regulations on exclusive grant-back and exercising rights on void IPRs in the *Foreign Trade Law, the Regulations of the Import and Export of Technology* and the *Judicial Interpretation*.

5. Discriminating among Transaction Counterparties with Equal Standing

Article 11 provides similar regulations in the AML, considering it fails to provide specific guidance for determination of "equal standing." Under the context of technology license, to determine whether the transaction counterparties are of equal standing, we shall take into comprehensive consideration the factors including technical purpose and technical application of the transaction counterparties, the attribute of the

[8] *See* NDRC: Administrative Sanction Decision against Qualcomm Incorporation

[9] *See* NDRC Administrative Sanction Decision against Qualcomm Incorporated. Chinese text of the decision is available at: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

products applying the technology concerned, scope of sales (e.g. within the territory of certain country or worldwide), sales volume, sales amount and profits, etc.[10]

D. Two Special Circumstances

While Article 4 through 11 are general regulations for IPR-related abusive conducts, Article 12 and Article 13 provide two special circumstances, i.e. operation of patent pool and SEPs.

1. Operation of Patent Pool

Paragraph 2 of Article 12 prohibits undertakings from concluding horizontal or vertical monopoly agreements through the operation of a patent pool. Compared with the AML, in light of the practices of the operation of patent pools, this clause additionally provides that members of a patent pool shall not make use of the patent pool to exchange sensitive competition-related information such as output or market allocation. For setting up and operating patent pool, exchange of certain information, such as the number, value, term of the relevant patents of members, seems to be inevitable, and such information should not be included in the category of "sensitive competition-related information" under this provision.

Paragraph 3 prohibits patent pool management organizations with dominant market position from making use of patent pool without justifiable causes to implement the following abusive conducts to eliminate or restrict competition. Items 3 and 4 substantially correspond with the provisions of Article 10; while Items 1, 2, 5 focus on the particular issues of patent pool, i.e. patent pool management organizations shall not restrict a patent pool member from licensing patent(s) as an independent licensor outside of the patent pool, nor shall they restrict a patent pool member or a licensee, independently or jointly with a third party, from carrying out research and development on technologies competing with the pooled patents, or discriminate among patent pool members or licensees with equal standing on the same relevant market in terms of trade conditions.

It is worth noting that, with respect to these prohibited conducts listed in Items 2, 3 and 4 of Paragraph 3, undertakings without dominant market positions may violate the relevant provisions on monopoly agreements in the AML.

2. SEPs

SEPs become a key issue in recent enforcement and judicial practice, including InterDigital case and Qualcomm case investigated by NDRC, *Huawei v. InterDigital* case tried before Guangdong Higher People's Court, and Microsoft's acquisition of Nokia's mobile business reviewed by MOFCOM.

Article 13 of the IPR Abuse Rules is SEP related. Paragraph 1 of this clause is a general regulation. Given that Paragraph 2 provides detailed regulation only on abuse of dominance, it is particularly important for undertakings to look into Paragraph 1 for IPR related monopoly agreements.

Paragraph 1 of Article 13 has provided clarification of the term "standard" in brackets. However, literally, there might be different interpretations towards the clarification in brackets: first, it might mean that standards are mandatory requirements included in national technical specifications; second, it might mean that standards are mandatory requirements including without limitation to national technical specifications. We tend to concur with the latter. Apart from the mandatory requirements formulated by the State authorities, standards should also include normative documents formulated and promulgated by standard setting

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[10] *See* LIU Xu: Opinions on Rules on Prohibition of Abusing of Intellectual Property Rights to Eliminate or Restrict Competition (Exposure Draft), p. 201, July, 2014【这一条引用建议明确来源】

organizations or alliances through consultation and uniformly applied within the industry[11] or standardized technical solutions jointly formulated by the industry players through cooperation.[12]

Paragraph 2 of Article 13 prohibits two types of abuse of dominance without justifiable causes: (1) "patent hijack" in the process of participation in standard setting; (2) undertakings' failure to comply with the fair, reasonable and non-discriminatory principles ("FRAND" principle). "FRAND" principle is recognized worldwide, however, consensus lacks on regulation of specific conducts, and case-by-case analysis is required. Moreover, it seems inappropriate to qualify the undertakings in "with dominant market position" for the conducts described in this paragraph, as these conducts should be prohibited for undertakings with or without dominant market positions.

E. Administrative Sanction

According to Article 17, in the event of IPR abuses, law enforcement agencies may order to cease the illegal conduct, confiscate illegal income, and impose a fine of no less than 1 percent but no more than 10 percent of the turnover concerned in the preceding year. This clause is basically the same with Articles 46, 47 and 49 of the AML without providing further guidance on the practice and predictability to the penalties. In particular, with respect to the sanction amount, the following two issues are still pending clarification in future regulations or practices:

(1) The definition of the term "turnover." It seems unclear whether the turnover means the turnover gained directly from the IPR abuses or the turnover of all affiliates within the same group; whether it refers to global revenue or only revenue within China; whether it covers revenues from all relevant markets or only one relevant market.

(2) The wide discretion of 1 percent to 10 percent of turnover. There is no specific guidance on imposing specific level of sanctions. Based on practice in other jurisdictions, the fine imposed on IPR abuses are lighter than that on monopoly agreements. In the meantime, to encourage innovation, there can be certain differences in the level of sanctions on IPR-related monopolistic conducts and regular monopolistic conducts.

In the Qualcomm case, NDRC ordered Qualcomm to cease the illegal act and imposed a fine. The amount of the fine is 8 percent of its annual turnover within China in 2013.

IV. CONCLUSION

As the first legal document specially regulating IPR-related AML issues, the IPR Abuse Rules are of important significance for AML enforcement in China. However, given its limited applicable scope as a departmental regulation, the IPR Abuse Rules are unable to cover all IPR related monopolistic conducts. There is still room to improve practicability and predictability. Undertakings shall avoid interpreting and applying the IPR Abuse Rules in an isolated manner, and shall instead ensure AML compliance by looking comprehensively at all other relevant laws and regulations in a comprehensive and systematic fashion.

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[11] *See* Ministry of Commerce Public Announcement Concerning Merger control review Decisions on Conditional Approval of Microsoft's Acquisition of Nokia's Devices and Services business. Chinese text of the announcement is available at: http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml.

[12] *See* NDRC Administrative Sanction Decision against Qualcomm Incorporated. Chinese text of the decision is available at: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.