

IPRs and China's Anti-Monopoly Law: Friends or Foes?

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THE INTERPLAY BETWEEN intellectual property rights (IPRs) and antitrust has been recognized as an important issue from the very beginning of the antitrust enforcement history in China. As in many other jurisdictions, the exercise of IPRs in China is not immune to the application of antitrust rules. The 2007 Anti-Monopoly Law (AML) aims to strike the right balance between, on the one hand, legitimate use and, on the other hand, abuse of IPRs: the AML “shall not apply to the exercise of intellectual property by business operators pursuant to the relevant laws and administrative regulations on intellectual property; however, this law shall apply to the conduct of a business operator which eliminates or restricts competition by abusing intellectual property rights.

China's evolving economy is increasingly relying on the creation and the exploitation of IPRs. The upgrading of China's industrial capabilities, the shift from “made in China” to “made by China,” and the emphasis on growing a consumer-oriented, technology-led economy put IPRs at the core of multiple policy initiatives. As part of that national effort to foster innovation, China's antitrust enforcement agencies have taken a leading role in defining the boundaries between antitrust and IP law, albeit in an uncoordinated manner to date. While the State Administration of Industry and Commerce (SAIC) published guidance in the form of IPR Abuse Rules in April 2015 (the SAIC Rules),² the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC) issued decisions interpreting and applying the AML to regulate the use of IPRs.

The State Council, China's highest government body, has now mandated its Anti-Monopoly Committee to prepare a single, coordinated set of guidelines dealing with the interface between IPRs and the AML (the IPR Guidelines). As part of this exercise, both the NDRC and the SAIC have issued

draft guidelines on the same issues to be incorporated in the Anti-Monopoly Committee's final package. The NDRC Draft Guidelines³ and the SAIC Draft Guidelines⁴ converge in many respects but remain different in important aspects, and the final position that will be adopted by the Anti-Monopoly Committee is still unclear.

In this complex and fast-moving environment, IPR holders active in China often struggle to keep track of the current trends and probable evolutions of the law and practice of Chinese antitrust enforcers to minimize the risk that their IPR portfolio is impacted.

The Institutional Puzzle and Key Issues

One of the striking features of the antitrust enforcement landscape in China is how fragmented it is. This is a source of complexity—and, at times, perplexity—for IPR holders operating in China. In addition to judicial courts, three administrative agencies are tasked with enforcing the AML.

MOFCOM is in charge of enforcing the merger review provisions of the AML. MOFCOM has no mandate, and no active role, in policing corporate behavior, but it does exercise considerable influence through the remedies it imposes in problematic concentrations, including upon the uses of IPRs.⁵ This is made possible by MOFCOM's extensive reliance on behavioral remedies rather than structural fixes in merger cases. For instance, in its decision clearing the acquisition of Alcatel-Lucent by Nokia, MOFCOM imposed a series of obligations on Nokia to effectively ensure that the portfolio of Alcatel's 2G, 3G, and 4G cellular communication standard-essential patents (SEPs) would be made available on fair, reasonable, and non-discriminatory (FRAND) terms to potential bona fide licensees on a long-term basis.⁶

The **NDRC** is responsible for regulating price-related infringements of the AML. It is also responsible for the enforcement of China's Price Law. The NDRC's foray into the field of IPRs is best illustrated by the historic RMB6.088 billion (approximately US\$975 million) fine imposed on Qualcomm for abusing its dominant position in the wireless SEP licensing market and the baseband chip market.⁷

The **SAIC** is in charge of enforcing many laws, including the AML with respect to anticompetitive non-price conduct. The SAIC had kept a relatively low profile on the enforcement front, until its decision to impose a RMB677.7 million

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(approximately US\$97 million) fine on Tetra Pak for abusing its dominant position through tie-in sales, exclusivity obligations and—although these related directly to prices—exclusionary rebate schemes.⁸

Tetra Pak illustrates the difficult delineation between the NDRC and the SAIC’s respective remit.⁹ Competition between the regulators is an important element in the dynamics of antitrust enforcement in China and explains why the SAIC and the NDRC have submitted numerous draft guidelines on the abusive exercise of IPRs. The lack of a unified approach increases difficulties for IPR holders operating in China.

This article will examine three major areas of concerns faced by IPR-rich companies doing business in China in light of the IPR Guidelines currently in preparation: the limits to the right to refuse to license; the safe harbors for licensing agreements; and the issue of unfairly high royalty rates.¹⁰

Right to Refuse to License, or a Duty to Deal with Prospective Licensees?

One of the most controversial issues that the Chinese antitrust agencies aim to tackle relates to the refusal by a dominant company to license IPRs. This should not come as a surprise. Whether denying a license could harm competition—and under which conditions—has been a hotly debated topic in recent years in the antitrust community on a global basis, including in China. Moreover, the AML itself, contrary to the laws in other jurisdictions (e.g., Article 102 of the Treaty on the Functioning of the European Union), provides in general terms that a refusal to deal by a company holding a dominant position without a valid justification will constitute an abuse.¹¹

The debate initially crystallized around the SAIC Rules because they include a provision on abusive refusals to license, which attracted strong criticism for applying the “essential facility” doctrine. The SAIC’s position appears to have evolved on that point, though, since the subsequent SAIC Draft Guidelines only contain a passing reference to essential facility. Setting itself apart from the SAIC, the NDRC does not mention the notion of essential facility in its Draft Guidelines at all. That should, however, do very little to alleviate the concerns of IPR holders because the NDRC is arguably pushing for stringent conditions on legitimate refusals to license.

The SAIC Rules. Article 7 of the Rules provides that a dominant undertaking shall not, without justification, refuse to license to other undertakings under reasonable conditions an IPR that constitutes an essential facility for manufacturing and operating activities, thus eliminating or restricting competition.

Article 7 adds that, when examining a case of refusal, the SAIC will assess whether the following cumulative factors are present:

1. The fact that there is no reasonable substitute for the IPR concerned such that the IPR is essential for other under-

takings to participate in [a or the] relevant market;

2. The fact that the refusal to license the IPR concerned will negatively affect competition or innovation in [a or the] relevant market, harming the consumer interests or public interests;

3. The fact that the licensing of the IPR concerned would not cause unreasonable harm to the IPR owner.

Because it relies on the notion of essential facility, Article 7 raises a lot of questions and leaves many—if not most of them—unsolved. The doctrine of essential facility is unprecedented in China, contentious in many jurisdictions, and not well suited for IPRs. In particular, it has been argued that it has never been applied to patents (while it may have been applied to other types of IPRs). In the absence of a proper definition—in China or any other jurisdiction—of what constitutes an essential facility in the context of IPRs, the application of Article 7 will inevitably be hotly disputed.

The concept of essential facility as outlined in Article 7 is relatively broad: it appears to apply to production technologies as well as technologies (or other IPRs, such as know-how, design rights, etc.) that are used in marketing and commercialization. There is nonetheless a lack of clarity in what could be covered: for instance, Article 7 is silent on whether it is limited to the production of goods or could also apply to the provision of services.

Perhaps a more important question is whether the concept of essential facility under the Rules is limited to technology required to effectively compete in a separate market (as was the case in international precedents, such as in the EU *Magill*¹² or *Microsoft*¹³ cases), or could it also be relied upon by companies wanting to compete in the same market as the holder of the IPRs? Under the first factor that the SAIC has to examine, it is not clear if the two relevant markets are the same or not (thanks in part to the Chinese language that does need to use the definite or indefinite article). The potential scope of application of Article 7 appears to be broad and may give rise to innovative and unexpected claims by competitors.

There is also no definition or guidelines on what can constitute a “justification” to refuse to grant a license. Will it have to be an objective justification or will the holder of the IPR be able to put forward more subjective factors to justify its refusal? Article 7 of the Rules indicates that there should be a balance of interests between, on the one hand, the adverse impact on innovation and competition harming consumers or the public interest and, on the other hand, the fact that the licensor’s interests should not be unreasonably damaged. The proposition that “licensing the intellectual property right would not cause unreasonable damage to the licensor,” however, leaves the door open to multiple interpretations—although it plainly and dangerously suggests that inflicting some degree of damage to the licensor will be acceptable. Also left open is the notion of “reasonable compensation” that the licensees should offer as a condition to be granted a license.

Relying on broad, barely defined concepts, Article 7 leaves a wide margin of discretion to the SAIC—particularly as the

prospect of judicial oversight over SAIC decisions is minimal. According to public reports, the SAIC is conscious that Article 7 is controversial. SAIC officials emphasized that they would apply caution in enforcing the Rules. There will undoubtedly be much scrutiny by the international antitrust community of the way the duty to deal outlined in Article 7 will be implemented by the SAIC. Until there is more certainty, there is a real risk that the threat of forced licensing could reduce multinational companies' incentives to innovate in China—or, at least, to offer their most innovative products to Chinese customers.

The SAIC Draft Guidelines. The latest version of the SAIC Draft Guidelines mark a noteworthy evolution because the provision on refusals to license¹⁴ no longer relies on the condition that the IPR concerned constitutes an essential facility. Article 24 of the SAIC Draft Guidelines is applicable to any IPR, yet adds as a nod to the SAIC Rules that an unjustified refusal would be abusive “in particular if the IPR concerned constitutes an essential facility for production and operation activities.”

Article 24 also clarifies that the refusal to license IPRs is one legitimate form of exercise of IPRs by their holders, which under normal circumstances, should not be objectionable.

The SAIC Draft Guidelines, however, just like the SAIC Rules, cover the possibility that a refusal by a dominant company to license on reasonable terms may be abusive. Unless it is justified, such refusal could exclude or restrain competition and be found to be in breach of the AML.

Likewise, Article 24 lists the same three factors as the SAIC Rules as a guide to assess whether a refusal is abusive, namely: whether the IPR is necessary to compete on the relevant market or can be substituted; whether the refusal could have a detrimental effect on competition, innovation, consumers, or other public interests; and whether the license could cause unreasonable harm to the IPR holder.

The NDRC Draft Guidelines. The provision on abusive refusals to license in the NDRC Draft Guidelines¹⁵ is worded in a way very similar to the SAIC Draft Guidelines (which have obviously been influenced by the NDRC formulation) although it makes no reference to the notion of essential facility. The main difference between the NDRC Draft Guidelines and the SAIC Draft Guidelines is that the two Draft Guidelines provide disparate elements. The NDRC indicates that, depending on the particular circumstances of each specific case, it will consider:

1. Whether the holder has undertaken any commitment to license the IPR concerned;
2. Whether the IPR concerned is essential to enter [a or the] relevant market, or whether alternative IPRs are reasonably available;
3. Whether the prospective licensee is able and willing to pay a reasonable licensing fee;
4. What will be the impact on innovation by the holder if the IPR concerned were to be licensed;

5. Whether the prospective licensee will lack the necessary quality and technical ability to ensure the proper implementation of the IPR concerned or the safety and performance of the products implementing that IPR; and
6. Whether the use by the prospective licensee can have a negative impact on energy conservation, the environment, or other social and public interests.

The first three factors put forward by the NDRC are unsurprising because they are in line—if not completely with international standards (insofar as the NDRC Draft Guidelines also cover the possibility that a refusal to grant a license to a third party wanting to compete on the same relevant market can be abusive)—at least with the SAIC Rules and Draft Guidelines.

The other three factors, however, depart from the SAIC's position. While each is in some respects favorable to the holder of IPRs, depending on how broadly they may be interpreted and how systematically they may be applied by the NDRC, they could also increase the burden on IPR holders refusing to grant a license. Effectively, IPR holders confronted with a request for license will need to complete a due diligence analysis on two key aspects.

First, IPR holders will need to assess whether their own prospects for pursuing innovative efforts will decrease if the IPR concerned were licensed. This is obviously a powerful tool in the hands of the NDRC to effectively conclude that non-practicing entities should not be able to refuse a license. For practicing entities, however, doing a fair analysis could be extremely complex and will, in any event, lead to much doubt and uncertainty. In practice, it is questionable whether an IPR holder can properly measure how its incentive and ability to innovate could be impacted by the granting of a license. One could argue that the risk that the most valuable innovations systematically give rise to a duty to license, allowing rivals to free-ride on others' innovative efforts, is a powerful disincentive to invest in R&D. This would lead to the logical conclusion that the most valuable technologies—which likely include those that are deemed essential—should not be subject to a duty to license according to the NDRC. This appears to be at odds with the objectives pursued by the NDRC and hard to reconcile with the SAIC's position. In any event, the NDRC Draft Guidelines do not provide any guidance on this point and do not indicate to what degree innovation must be impacted in order to justify a refusal.

Second, IPR holders will have to make inquiries about the exact uses of the IPR concerned anticipated by the prospective licensee and to evaluate whether that prospective licensee is committed to high standards of safety, quality, and compliance with energy conservation and environmental standards. Knowing your counterparty is obviously a key element of any license agreement. It is typically in the best interests of an IPR holder—at least from a financial and reputational perspective—to get an understanding of who their licensees are and how they intend to, and actually do, implement the IPR concerned. The NDRC Draft Guidelines,

however, appear to extend the category of potential licensees by effectively reversing the burden of proof: they suggest that an IPR holder could refuse a license only to those prospective licensees that are not “fit enough.” This again would leave a considerable margin of discretion to the NDRC to decide whether a refusal to license is legitimate and supported by sufficient evidence of the risk (on the environment, safety, or other public interests) that a license would have carried.

If the NDRC proposal is eventually the one adopted in the final version of the Guidelines, IPR holders should be prepared to face persistent requests for licenses coming from China and to spend time to carefully respond to these requests. While both the NDRC and the SAIC acknowledge at the outset that a refusal to license is a legitimate form of exercise of IPRs, demanding conditions attached to a refusal could, in practice, negate that premise.

Finally, it is worth noting that the SAIC and NDRC provisions on refusals to license are not about compulsory patent licensing. Rather, IP owners within the purview of these provisions do not have unfettered rights to refuse licensing, resulting in the potential for forced dealing between an unwilling licensor and an arguably willing licensee. Under China’s compulsory licensing regime, a violation of these provisions would be a basis for compulsory licensing. Therefore, compulsory licensing can be the outcome; but the State Intellectual Property Office of China, not the SAIC or NDRC, is the competent agency to grant compulsory licensing of patents.

Safe, but Very Narrow, Harbors

Following the approach of other regulators around the world, including in the United States and the European Union, both the SAIC and the NDRC are keen to provide safe harbors for agreements that raise no competition concerns in order to improve the efficiency of competition law enforcement efforts as well as to increase legal certainty for the benefit of IPR holders. They do so in a relatively uniform way (except for the critical market share threshold), but IPR holders should be aware that the scope of application of the safe harbors is in practice extremely narrow.

The SAIC defines the harbors in similar terms in the Rules and the Draft Guidelines:

- For horizontal agreements between competitors, the exercise of IPRs may be found not to constitute an anticompetitive agreement if either (1) the combined share of the parties on the relevant market affected by the parties’ behavior is no more than 20 percent, or (2) there are at least four substitutable technologies that are controlled by independent third parties and can be obtained at reasonable cost in the market.
- For vertical agreements, the exercise of IPRs may be found not to constitute an anticompetitive agreement if either (1) the combined share of the parties on the relevant market affected by the parties’ behavior is no more than 30 percent, or (2) there are at least two substitutable technologies that are controlled by independent third parties

and can be obtained at reasonable cost in the market.

The different thresholds depending on whether the agreements are horizontal or vertical reflect the fact that vertical relationships are generally considered less harmful to competition than agreements between competitors. The market share thresholds retained by the SAIC are comparable to those defined in the European Technology Transfer Block Exemption Regulation (the TTBER).¹⁶ Interestingly, however, the SAIC goes further than the TTBER in that it also considers the number of alternative technologies, and not merely the market shares of the parties. This means that even competitors with a combined market share in excess of 20 percent could fall within the safe harbor if there are four or more alternative technologies controlled by independent entities. The proper definition of the relevant affected market and the identification of all alternative technologies (i.e., the ones that are controlled by independent entities and are readily available on the market for a reasonable cost, but not those proprietary technologies that are not licensed out) will be key in that context.

The NDRC’s approach is stricter than the SAIC. First, the market share thresholds are lower: 15 percent for horizontal agreements and 25 percent for vertical agreements. Second, the NDRC does not adopt the criterion of the number of available alternative technologies.

The most important point to bear in mind, however, is that both the SAIC and the NDRC hold that the safe harbors are not automatic and do not confer an absolute protection:

First, the safe harbors only cover agreements that do not fall within one of the categories of anticompetitive agreements defined in Article 13(1) to (5) and Article 14(1) and (2) of the AML prohibiting, *inter alia*, agreements between competitors relating to price fixing, quotas, or market allocation, and agreements with non-competing licensees containing “resale-price maintenance” provisions. In other words, an agreement can benefit from the safe harbor only to the extent that it could otherwise have fallen in one of the “catch-all” categories of Article 13(6) and Article 14(3). This limitation is substantial as many licensing agreements will include price, use, or territorial restrictions. In particular, Article 13(4) of the AML specifically prohibits agreements between competitors in relation to “restricting the purchase of new technologies or equipment, or the development of new technologies or products.” As many of the IP-related restrictive agreements between competitors could fall within the scope of Article 13(4), it remains to be seen whether the condition for applying the safe harbor to licensing agreements between competitors will eventually be very limited or extremely difficult to prove.

Second, the SAIC and the NDRC make clear that safe harbors are not available where there is evidence that an agreement has the effect of eliminating or restricting competition. In other words, the safe harbor remains available until the SAIC or the NDRC can prove that an agreement can generate anticompetitive effects.

In practice, IPR holders should be cautious when availing themselves of the safe harbors, even in cases where they are below the market share thresholds or there are multiple alternative technologies readily available. An assessment of the actual or potential effects of licensing agreements on competition should be conducted in order to mitigate risk.

Excessive Royalties

The NDRC—which is a price regulator as well as an antitrust enforcer—is known for paying particular attention to pricing issues when assessing vertical agreements under the AML. Resale price maintenance has long been a focus of the NDRC’s enforcement priorities.¹⁷ In the field of IPRs, the main ground of the NDRC’s decision against Qualcomm was that Chinese mobile device manufacturers had been charged unreasonable royalties for Qualcomm’s IPRs.¹⁸ The NDRC continues in the same vein with an important provision in the chapter on abuses of dominance targeting the practice of licensing IPRs at unfairly high prices.

More surprisingly in light of the fact that it is generally not responsible for price-related infringements of the AML, the SAIC Draft Guidelines also contain a provision on excessive royalties. This is an addition compared to the SAIC Rules, whose Article 10 covers unreasonable restrictive conditions in licensing agreements, but does not mention royalty rates specifically.

The ability to regulate royalty rates under the NDRC and SAIC Draft Guidelines derives from the law itself. Article 17(1) of the AML provides that excessive pricing shall be an abuse of dominance. Moreover, the AML’s purposes are not limited to preventing anticompetitive conduct. The AML is also meant to increase economic efficiency, safeguard the public interest, and promote the development of a socialist market economy.¹⁹ This forms the foundation for Chinese antitrust agencies to take into account broader industrial policy considerations when applying the AML and explains why these agencies are generally more willing to tackle pricing issues than their counterparts in other jurisdictions.

The NDRC and SAIC approaches are in broad terms similar.²⁰ Both acknowledge that, in order to continue to incentivize innovation, IPR holders are entitled to recoup R&D investments. They should decide freely on royalty rates, subject to one limitation: the rates should be reasonable. Unfairly high rates would have a negative impact on competition and constitute an abuse if the IPR holder concerned is in a dominant position. Importantly, the Draft Guidelines clarify that the mere holding of IPRs does not equate to being in a dominant position.²¹ There is no such presumption, even for SEPs.

There is no definition of what a fair or reasonable royalty rate ought to be. Each of the NDRC and SAIC Draft Guidelines instead set out a list of factors that may be considered before a finding of abuse is made. These factors include considering:

- The licensing history for the IPRs concerned;

- Commitments to license made by the IPR holders;
- The geographic or product scope covered by the licensing agreement;
- In case of a package licensing, whether some of the IPRs included in the package could be expired, invalid, or not required by the licensee;
- Obligations imposed on the licensee not taken into account when setting the royalty (e.g., cross-licensing or grant-back obligations); and
- The circumstances under which a licensing agreement is entered into (e.g., if it follows threats of or actual proceedings for injunctive relief).

The main factor to be considered, however, is obviously the royalty rate itself. There is in that respect a disturbing divergence between the SAIC and the NDRC. The SAIC proposes to look at whether the licensing fee claimed by the holder is consistent with the value of the IPR concerned. The NDRC, on the other hand, is concerned about the contribution of the IPRs concerned to the value of the goods that implement them and the issue of royalty stacking in the case of SEPs. In both cases, there is no more precise guidance at this point on how these factors ought to operate.

Despite multiple critics both in China and abroad against any provision on excessive licensing fees, IPR holders should not expect that the final IPR Guidelines will remove such a provision. It will be up to the Anti-Monopoly Committee to increase legal certainty by shedding more light on the practical and objective methodology that dominant IPR holders should follow when setting licensing fees to avoid the risk of abuse.

Conclusion

The Chinese antitrust agencies should be praised for proposing to adopt a unified approach to the application of the AML to the exercise of IPRs. Irrespective of the merits of their provisions, the numerous drafts published by the NDRC and the SAIC help to shape the debate and alert IPR holders on areas of possible concern.

The process of adoption of the final IPR Guidelines, however, has taken much longer than was originally planned. The uncertainty around the IPR Guidelines is problematic both for licensees and licensors at a time when the Chinese economy’s transformation relies on a compelling push to innovate. Although one can only speculate on the reasons for this delay, it is understood that Chinese IP-rich companies are actively participating in the process. This involvement may result in a slight reshifting of the balance between licensors and licensees, in particular in the three areas discussed in this article. ■

¹ Anti-Monopoly Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 55, http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm.

- ² Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude or Restrain Competition (Order No. 74 promulgated by the State Admin. of Indus. & Commerce, Apr. 7, 2015).
- ³ Nat'l Dev. & Reform Comm'n, Anti-Monopoly Guidelines for the Abuse of Intellectual Property Rights (Draft for Comments Dec. 31, 2015), http://jjs.ndrc.gov.cn/fjgld/201512/t20151231_770233.html [hereinafter NDRC Draft Guidelines].
- ⁴ State Admin. of Indus. & Commerce, Announcement on Soliciting Public Opinions on the Guidelines for Anti-Monopoly Law Enforcement Against the Abuse of Intellectual Property Rights (7th Draft of the State Administration of Industry and Commerce) (Feb. 4, 2016), http://www.saic.gov.cn/zwgk/zyfb/qt/flid/201602/t20160204_166506.html [hereinafter SAIC Draft Guidelines].
- ⁵ MOFCOM's role is also important in the drafting of the final version of the guidelines to be issued by the Anti-Monopoly Committee because the Anti-Monopoly Committee has no permanent staff. MOFCOM acts as its secretariat and MOFCOM officials will therefore effectively be in charge of reconciling the different drafts proposed by the NDRC and the SAIC as well as coordinating with China's State Intellectual Property Office.
- ⁶ Press Release, Ministry of Commerce, MOFCOM Approves Nokia's Acquisition of Equity of Alcatel-Lucent Conditionally (Oct. 21, 2015), <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201510/20151001151049.shtml>.
- ⁷ Qualcomm, National Development and Reform Commission Penalty Decision [2015] No. 1 (Feb. 9, 2015).
- ⁸ Tetra Pak, State Administration of Industry and Commerce Penalty Decision [2016] No. 1 (Nov. 9, 2016).
- ⁹ For another illustration of how tenuous the distinction between price and non-price conduct can be, see the decisions issued by the SAIC and the NDRC against Chongqing Qingyang Pharmaceuticals, a manufacturer of active pharmaceutical ingredients which was determined to manipulate the market for allopurinol for its own benefit in two steps: first by organizing shortage of supply and second by increasing retail prices through increasing its rivals' costs as well as direct price-fixing and market-allocation mechanisms. The local branch of the SAIC issued a fine of RMB439,308.53 (approximately US\$66,500) in relation to the refusal to supply. Chongqing Qingyang Pharmaceuticals, State Administration of Industry and Commerce Penalty Decision [2015] No. 15 (Oct. 28, 2015). Less than three months later, the NDRC imposed fines totaling RMB1.8 million (approximately US\$272,000) on Chongqing Qingyang Pharmaceuticals and its distributor Chongqing Datong because they played a leading role in the formation of the anticompetitive agreements. (Chongqing Qingyang Pharmaceuticals, National Development and Reform Commission Penalty Decision [2016] No. 1 (Jan. 15, 2016).
- ¹⁰ For the sake of clarity, it is noted that the IPR Guidelines should cover multiple other important areas, including all aspects of IPR licensing but also standard setting, patent pools, as well as the assessment of IPRs in merger control proceedings.
- ¹¹ See Anti-Monopoly Law of the People's Republic of China, art. 17(3).
- ¹² Joined Cases C-241/91 P & C-242/91 P, Radio Telefis Eireann & Independent Television Publications Ltd v. Comm'n, 1995 E.C.R. I-808.
- ¹³ Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601.
- ¹⁴ SAIC Draft Guidelines, *supra* note 4, art. 24.
- ¹⁵ NDRC Draft Guidelines, *supra* note 3, sec. III(ii)(2).
- ¹⁶ Commission Regulation No. 316/2014, 2014 O.J. (L 93) 17 (explaining the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements).
- ¹⁷ See, e.g., the RMB118.5 million (approximately US\$17.2 million) fine imposed on Medtronic for imposing the price of its medical equipment supplies to distributors. Medtronic, National Development and Reform Commission Penalty Decision [2016] No. 8 (Dec. 5, 2016).
- ¹⁸ See Press Release, *supra* note 6.
- ¹⁹ Anti-Monopoly Law of the People's Republic of China, art. 1.
- ²⁰ SAIC Draft Guidelines, *supra* note 4, art. 23; NDRC Draft Guidelines, *supra* note 3, sec. III(ii)(2).
- ²¹ SAIC Draft Guidelines, *supra* note 4, art. 22; NDRC Draft Guidelines, *supra* note 3, sec. III(i).