Intellectual Property Rights and Antitrust in China

by Yee Wah Chin

China's Anti-Monopoly Law[1] (AML) came into effect on Aug. 1, 2008, following its enactment the year before and 13 years of drafting. China enacted the Third Amendments to its Patent Law[2] on Dec. 26, 2008, effective Oct. 1, 2009. The interaction of the two laws is a concern to antitrust and intellectual property law practitioners interested in the legal landscape in China, and those businesses in China with significant intellectual property portfolios and market presence. This article summarizes the AML, and discusses those aspects that may have particular impact on intellectual property rights (IPR), as well as the provision of the Patent Law that implicates competition law issues.

While China ultimately decided to omit what it terms patent abuse as a specific aspect of the Patent Law, it is clearly concerned with the issue, and appears to be relying on the Anti-Monopoly Law to deal with the concern.

An Overview of AML

The AML is China's first comprehensive antitrust law, and in many respects is within the mainstream of modern competition laws. It includes the three pillars of most modern antitrust laws, with a chapter devoted to monopoly agreements that addresses "cartels and other multi-party anti-competitive conduct;"[3] a chapter focused on "abuse of dominant market position" dealing with unilateral conduct, potentially including that by IPR holders;[4] and a chapter on "concentrations,"[5] which covers mergers and acquisitions and joint ventures.

The AML also includes distinctive provisions: a chapter on abuse of administrative power that is directed toward rampant local protectionism;[6] and articles on businesses in sectors that are economically vital or implicate national security, and that are dominated by state-owned enterprises[7] and businesses that have exclusive distribution rights pursuant to law,[8] as well as on trade associations.[9]

The law establishes a multi-level and multi-faceted enforcement structure, all under the State Council, the chief executive body. A new entity, the Anti-Monopoly Commission, is created to: 1) research and draft competition policy; 2) organize and publish studies on the state of competition; 3) develop guidelines under the AML; 4) coordinate the enforcement of the AML; and 5) fulfill assignments from the State Council.

The AML also specifies that the State Council will designate anti-monopoly enforcement authorities (AMEAs) that will be actually 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, as well as 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 with respect to all other violations, except for pricing conduct. The NDRC is responsible for prosecuting pricing-related violations of the AML. 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.[10] The confidentiality of trade secrets is expressly protected.[11]

The AML also provides for a range of remedies.[12] Investigations may be suspended and eventually terminated upon targets taking action to address the AMEA's concerns.[13] In the case of "monopoly agreements," leniency is available to a participant who discloses the violation and cooperates with the investigation.[14] Otherwise, and also in the case of abuse of dominant market position, "illegal gains" may be confiscated and fines may be imposed of between one and 10 percent of the previous year's turnover.[15]

Trade associations that organize monopoly agreements are subject to fines of up to RMB500,000, and cancellation of their registration.[16] Consummation of a transaction in violation of the AML may result in an order to divest, a fine of up to RMB500,000 or other orders to restore the status quo ante.[17] The AML also expressly provides that violators may be civilly liable for damages caused to others, which seems to create a private right of action.[18]

The Supreme People's Court has designated the intellectu-

al property (IP) tribunals of the People's Courts to handle cases arising under the AML, apparently because the tribunals may be the sections of the People's Courts most experienced in handling complex matters. Fines and criminal sanctions are authorized for obstructing investigations.[19]

The law is notably lacking in significant remedies for violations of the prohibitions against competitive abuse of administrative powers. On the other hand, it expressly provides for administrative review and review under the administrative law of AMEA decisions.[20] The AML also provides for administrative and criminal penalties for AMEA staff members who abuse their powers.[21]

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 & Acquisitions of a Domestic Enterprise by Foreign Investors. In July 2009, the foreign M&A provisions[22] was amended to conform its provisions on premerger notification and review to the AML, so that foreign buyers would be subject to only one notification and review requirement. On the other hand, 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."[23] This clause, though not cited, may underlie the disposition of several merger investigations.

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 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.

Implementation of the AML Relating to IPR

At least two sets of draft regulations may be particularly relevant to IPR.

The SAIC issued for comments a draft Regulation Prohibiting Abuse of Dominant Market Position under the AML.[24] This draft prohibits, where no justified reasons exist, reducing, limiting, or ceasing an existing transaction, or refusing to engage in a new transaction, with a counter-party. It also provides that refusing, reducing, limiting, or ceasing transactions with a counter-party under the same transaction conditions may be regarded as a situation where no justified reasons exist. This provision raises concerns that any change in the terms of trade or the termination of an arrangement may be problematic.

Article 8 of the draft regulation provides that,

> Where other business operators cannot conduct business operations without accessing the channels, network or other necessary facilities owned by the business operator possessing a dominant market position, the business operator possessing a dominant market position shall not refuse to allow such other business operators to use such channels, network or other necessary facilities under reasonable conditions.

This draft Article 8 indicates that the SAIC is considering adopting the essential facilities doctrine that was incorporated in drafts of the AML but omitted in the enacted law. It would seem antithetical to the fundamental premise of IPR, which is the right to exclude others from a particular field.

There have also been circulated several sets of draft guidelines[25] on enforcement of AML relating to IPR. Their status is unclear. Nonetheless, the drafts likely reflect the current thinking of at least some significant group among the AMEAs, Anti-Monopoly Commission and State Council.

Hopefully, at some point, a document of this type will be officially released for public comment. In all

events, it is likely that some guidelines will eventually be issued dealing with IPR under the AML, as it was a major area of concern of the AML's drafters and is a major preoccupation of the three AMEAs and the Anti-Monopoly Commission.

In many aspects, the draft guidelines track the language of the AML.[26] The guidelines specify that the abuse of IPR to exclude or restrict competition is not an independent monopolistic activity. Depending on the facts, such conduct may be a monopoly agreement, abuse of dominant market position and/or a concentration between undertakings in the sense of the AML. Economic and fact-specific analyses are expressly identified as central to the determination of whether conduct involving IPR violates the AML.

The draft guidelines list some types of license restrictions that are generally suspect. Acquisitions of IPR are subject to review under the AML. The draft guidelines state that abuse of IPR that does not exclude or restrict competition, but violates IPR or anti-unfair competition related laws or regulations, shall be dealt with in accordance with those laws and regulations, presumably instead of the AML.[27]

The draft guidelines indicate that there is no presumption of market power from IPR ownership, which is consistent with the approach in the U.S. and other competition law regimes. It establishes some safety harbors.[28] Unless "core restrictive conduct" is involved, there would be a presumption of *de minimis* competitive effect if the combined market share of the competing entities involved is less than 20 percent, or, where market shares are undeterminable, there are at least another four competitors in the market. There is also a safe harbor in the absence of "core restrictive conduct," where the entities involved are not competitors and each has less than a 30 percent market share in its respective market, or where each of the markets involved has at least two other competitors. The types of conduct identified as core restrictive conduct generally track the AML, including horizontal price fixing, output restrictions and division of input or output markets, group boycotts, and agreements among non-competitors on resale or minimum prices to third parties.

However, the examples in the draft guidelines regarding how these principles apply to IPR may reflect problematic approaches.[29] The draft guidelines identify as examples of core restrictive conduct licenses among competitors that include output restrictions and exclusive grant-back requirements. To some extent, the concerns arise from the apparent lack of distinction in the draft guidelines between IPR licenses involving parties who are competitors in the area of the license and IPR licenses involving parties who compete only outside the area of the license. Licenses involving parties who compete only outside the area of the license have more in common with those involving parties who are not competitors than with those involving parties who compete in the area of the license.

Some reassurance might be gleaned from the fact that the draft guidelines also provide exemptions for core restrictive conduct that appear to apply a reasonableness test. Core restrictive conduct is exempt from liability under the AML if the proponent demonstrates that the conduct would help improve technology or quality, develop new products, cut costs, or increase efficiency.

Less within the antitrust mainstream are exemptions for conduct during economic recession and to "safeguard legitimate interests in foreign trade or international economic cooperation."[30] Other unusual factors that the draft guidelines include as exempting core restrictive conduct include activity that would increase specialization among the parties or the competitiveness of small and medium sized businesses, or promote energy conservation or environmental protection.[31]

Perhaps even more controversial from the U.S. antitrust perspective are provisions relating to digital protection against copyright infringement and refusals to license. The draft guidelines provide that "technical measures" against copyright infringement may be investigated for competitive impact, with a presumption of anti-competitive impact if there are alternative, less anti-competitive methods to protection against infringement.[32] The impact of such a provision on digital protection against copyright piracy may be substantial.

While the draft guidelines state that there is no obligation for a rightsholder to license, "unfair and discriminatory refusals to license" or "refusal to license without justification"[33] are suspect. Reflecting the great concern in many sectors of China's government about the impact of patent pools and standard setting involving IPR, the draft guidelines include detailed provisions relating to the treatment of pools and standard setting. Where members have a dominant market position, a patent pool must be "open and non-discriminatory."[34] It is unclear how these attributes would be determined in the patent pool context. Whether a patent is "essential" to a standard will be a major factor in analyzing conduct relating to that patent in connection with that standard.

The draft guidelines provide that IPR claims will not be enforced against practitioners of a standard where the rightsholder participated in the standard development and failed to disclose the IPR during the development process, if an AMEA finds that the conduct has been monopolistic.[35] Moreover, an AMEA may impose a license on a reasonable and non-discriminatory (RAND) basis if it finds that an IPR holder participating in standards development refused to license its IPR to enable others to practice the standard, or licenses its IPR on "unreasonable or discriminatory" terms, and such conduct is an AML violation. There

is no indication of how an AMEA would determine what is RAND.

Competition Aspects of the Patent Law

China's Patent Law 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: (1) where, in the 3 years since the patent grant and the 4 years since the filing date of the patent application, the patentholder has not exploited the patent or has insufficiently exploited the patent without justified reason; (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.

The Interaction of the AML and IPR

The interaction of AML Article 55 with Patent Law Article 48, as well as the application of the AML generally to conduct involving IPR, is yet to be seen, since the only announced government enforcement actions under the AML have been decisions by MOFCOM regarding concentrations.

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(1), has the patentholder 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?

In the area of concentrations, MOFCOM's decisions thus far 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.[36] Nonetheless, MOFCOM conditioned its approval of the transaction on a prohibition against InBev increasing the 27 percent of Tsingtao Beer that A-B held (and which InBev would acquire in acquiring A-B) 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 market position of the resulting entity, to minimize potential adverse effects in China's beer market.

In its outright prohibition of Coca-

Cola's acquisition of Huiyuan, China's largest juice manufacturer, MOFCOM explained its decision[37] in terms of the anti-competitive effects of Coca-Cola's post-acquisition ability to leverage its dominant position in the carbonated drinks market to the fruit juice market, thus affecting other fruit juice competitors and harming competition and consumers, as well as the control that Coca-Cola would have 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.

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 specter of compulsory licensing where there is an AML violation. Until final implementing regulations are issued and there is more experience with the AML and the Third Amendments to the Patent Law, there will be doubts regarding how IPR will fare under the AML.

Endnotes

1. A non-authoritative translation of the Anti-Monopoly Law may be found at a website of China's Ministry of Commerce, at www.fdi.gov.cn/pub/FDI_EN/Laws/ law_en_info.jsp?docid=85714. The original Chinese text may be found at the Ministry of Commerce's website at www.fdi.gov.cn/pub/FDI/zcfg/law_ch_info.jsp?docid=82500.
2. A non-authoritative translation of the Third Amendment to the Patent may be found at www.lilon.com/ipdata/atent%20Law.pdf. The original Chinese text may be found at the State Intellectual Property Office's website at www.sipo.gov.cn/sipo2008/zcfg/flfg/zl/fljxzfg/200812/t20081230_435796.html.
3. AML Chapter II (Monopoly Agreement).
4. AML Chapter III (Abuse of Market Dominance).
5. AML Chapter IV (Concentration of Business Operators).
6. AML Chapter V (Abuse of Administrative Power to Eliminate or Restrict Competition).
7. AML Article 7.
8. *Id.*
9. AML Articles 11, 16.
10. AML Article 40.
11. AML Articles 41, 54.
12. AML Chapter VIII (Legal Liabilities).
13. AML Article 45.
14. AML Article 46.
15. AML Articles 46, 47.
16. AML Article 46.
17. AML Article 48.
18. AML Article 50.
19. AML Article 52.
20. AML Article 53.
21. AML Article 54.
22. A non-authoritative translation of the No. 6 MOFCOM Decree revising the Provisions on M&A of a Domestic Enterprise by Foreign Investors may be found at a website of China's Ministry of Commerce, at www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=108906. The original Chinese text may be found at the Ministry of Commerce's website at www.fdi.gov.cn/pub/FDI/zcfg/law_ch_info.jsp?docid=108857.
23. Foreign M&A Provisions Article 12.
24. The draft regulation was published for public consultation on SAIC's website at www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/t20090427_37769.html. An unofficial translation is on file with the author.
25. Unofficial translations of some of these draft guidelines are on file with the author.
26. This discussion is based on the earliest of the drafts of the guidelines known to have been circulated widely. Later drafts have been circulated to varying degrees, and differ from the early draft in some significant areas, in several ways that raise concerns regarding the use of compulsory licenses and the essential facilities doctrine, and the application of the AML premerger notification requirement.
27. Draft AML IPR Enforcement Guidelines Article 3.
28. Draft AML IPR Enforcement Guidelines Articles 6, 12.
29. Draft AML IPR Enforcement Guidelines Articles 13, 14.
30. Draft AML IPR Enforcement Guidelines Article 15.
31. *Id.*
32. Draft AML IPR Enforcement Guidelines Article 21.
33. Draft AML IPR Enforcement Guidelines Article 17.
34. Draft AML IPR Enforcement Guidelines Article 19.
35. Draft AML IPR Enforcement Guidelines Article 20.
36. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html.
37. The decision by MOFCOM's Anti-Monopoly Bureau may be found at http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html.

Yee Wah Chin *is of counsel at Ingram, Yuzek, Gainen, Carroll & Bertolotti, LLP. She is a frequent writer and speaker on antitrust subjects. She led numerous American Bar Association task forces that commented on China's Patent Law and Anti-Monopoly Law, and the antitrust laws of many other countries, and has been active in OECD and U.S. Chamber of Commerce projects on China.*