



Intellectual property law and competition law in China – Analysis of the current framework and comparison with the EU approach

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Table of Contents

Introduction	31
I. Present IPRs protection in China	31
A. Overview	32
B. IPRs infringement impact	33
II. Competition and IP law – in conflict or complementary?	33
III. Competition law regime in China	35
A. History	35
B. AML	36
C. Enforcement	38
D. Enforcement evaluation	41
1. Inadequacy of AML	41
2. Lack of clarity in Article 55 AML	42
3. Unclear relationship between AML and other applicable competition and IP laws	43
4. Unclear relationship between Article 55 AML and TRIPS	44
5. Unrealistic Guide	44
6. Lack of experience and guidance in adjudication	45
7. Unclear division of labour among three AMEAs	46
E. Summary	47
IV. Comparison with the E.U. approaches	48
V. Lessons for China	49
Conclusion	50

Introduction

There is a famous Chinese saying, according to which competition results in improvement¹.

Indeed, it is Chinese tradition to encourage competition in order to enhance innovation and improvement, especially using their intellectual property rights (“IPRs”) as drivers. However, there have been numerous reports on IPRs infringements by Chinese companies, leading to doubts on China’s ability to protect IPRs. Therefore, it is of primary importance to determine whether the new Anti-monopoly Law (“AML”) enacted in 2008² and the State Administration of Industry and Commerce (“SAIC”) Draft Guide on Anti-monopoly Law enforcement in the field of intellectual property rights 2012³ (“Guide”) will help protect IPRs or rather deepen the problems. It is argued that the regime has worked successfully to provide better IPRs protection along with other intellectual property (“IP”) law regimes. However, it is also argued that there is room for improvement. Firstly, AML is inadequate in addressing the problems. Secondly, it lacks clarity in relation to Article 55 AML, thirdly, transparency in the relationship between AML and other applicable competition and IP laws, and fourthly, with the Agreement on Trade Related Aspects of IPRs⁴ (“TRIPS”). Fifthly, the Guide does not accord with the reality. Sixthly, the enforcement bodies lack guidance and experience in adjudication, and lastly, a clear division of labour in enforcement. Furthermore, China should continue to learn from various other international approaches well-established in the European Union and the United States⁵.

Part I of the essay will examine the present IPRs protection in China. In Part II, contrary to the myth that competition and IP law conflict with one another, it will be argued that both foster innovation and development, and enhance consumer welfare. The competition law regime in China will be discussed in Part III, with a specific focus on AML. The enforcement of the regime will be evaluated. Next, the E.U. approach will be discussed in Part IV, which China can consider adopting: the Block Exemptions approach from the E.U. on horizontal agreements, which will be discussed in Part V.

It should be noted that despite of the fact that competition and IP law are related to many other aspects, at the very outset alternative methods of protecting IPRs and other Chinese competition-related legislation will not be discussed. Furthermore, the essay will not engage in an economic nor trade-related approach in analysing the relationship between competition and IP law.

I. Present IPRs protection in China

To Part A contains an overview of the present IPRs protection in China. IPRs infringement affects the Chinese and the world economy as a whole, which is the subject of discussion in Part B.

¹ In Chinese: “有競爭 才有進步”

² Anti-monopoly Law 2008

³ SAIC Draft Guide on Anti-monopoly Law enforcement in the field of intellectual property rights 2012

⁴ Agreement on Trade Related Aspects of Intellectual Property Rights 1994

⁵ The author would like to thank Professor Valentine Korah and Professor Ioannis Lianos, Faculty of Laws, University College London and Professor Thomas Cheng, Faculty of Laws, University of Hong Kong for reviewing and offering unfailing guidance to the essay précis.

A. Overview

IP law in China is of a high quality by global standards⁶. Both Chinese and foreign firms are granted same amount of cost and time in applying IPRs under Chinese law, comparable with the rest of the world⁷. The present IPRs protection in China has improved significantly compared with that a decade ago. As China increasingly interacts on a global level and is part of the World Trade Organisation (“WTO”), its laws have been constantly evolved to provide IPRs protection and attract further investment. IPRs protection was featured in the Twelfth Five Year Plan (2011-2015)⁸ with the pharmaceutical sector being one of the strategic industries that call for special attention.

However, China is still infamous for counterfeits and piracy, and was even labelled as the “theft of American IP”, with branded goods, digital products, movies and music⁹, surpassing over US\$1 billion¹⁰. Chinese firms have a strong ability to mirror foreign technology. Many foreigners are also concerned with legal and political non-transparency (to be discussed in Part III), and restricted market access, caused by preferential treatment to Chinese companies in tax and finance¹¹. Such local protectionism is likely due to official and public concern about potential foreign dominance over Chinese businesses and a strong desire to build up the latter¹², which can be seen from the Chinese foreign investment policies of favouring foreign technology transfer to Chinese companies¹³. As a result, it is less common that the foreign party can defend successfully against IPRs infringement by a Chinese party, and rarely the opposite is true: in the *Tsum-Sony*¹⁴ case, Sony as the foreign party won. Lastly, the problem with abusive IP litigation is serious, with over 90% of all such cases between Chinese IPRs holders¹⁵. Thus, there is a strong and urgent call for better IPRs protection¹⁶ in China.

⁶ Ian Harvey (2011) *Intellectual property: China in the global economy – myth and reality* https://workspace.imperial.ac.uk/business-school/Public/research/I_Egroup/IPRC/IP_in_china_lan_harvey.pdf (17th July 2013)

⁷ *ibid*

⁸ The Twelfth Five Year Plan (2011 – 2015), 11 March 2011

⁹ U.S. International Trade Commission *China: effects of intellectual property infringement and indigenous innovation policies on the U.S. economy* U.S. International Trade Commission 2011, 3-8

¹⁰ Xiantao Huang *Patent: Strategy, management and litigation* China, Beijing Shi 2008, 3

¹¹ Reuters “EU business sees partial reversal of China reforms” *Reuters New York* 2nd September 2009 (online version)

¹² Alan Fels *China’s Antimonopoly Law 2008: An Overview* (2012) 41 *Rev Ind Organ* 7-30, 9

¹³ *ibid*

¹⁴ *Tsum (Shanghai) Technology Co Ltd v. Sony Corporation* (2004) Shanghai No. 1 Intermediate People’s Court

¹⁵ H. Stephen Harris Jr., Peter J. Wang, Yizhe Zhang, Mark A. Cohen and Sebastien J. Evrard *Anti-monopoly law and practice in China* New York, Oxford University 2011, 250

¹⁶ Albert Guangzhou Hu *Propensity to patent, competition and China’s foreign patenting surge* (2010) 39(7) *Research Policy* 985-993

B. IPRs infringement impact

To IPRs infringement has a huge impact on the economy in China and the world. Chinese companies' innovations are stifled¹⁷ because of piracy. Many foreign investors will lose confidence in dealing with Chinese companies. The gains of a lower cost of production do not outweigh the losses, and most importantly, China has the unwanted label as a piracy country. Foreign firms such as some IP-intensive firms suffered losses of up to US\$48 billion in 2009 and had spent approximately US\$4.8 billion to address the infringement problem¹⁸. These are in respect of reducing profits, increasing legal costs of taking legal action and defending against IPRs infringement, damaged brand name and product reputation¹⁹. Like in China, their innovation is stifled and competition is reduced. Consumers will have less choice and consumer welfare is hindered. Therefore, there is every reason to better enhance IPRs protection, such as through competition law.

II. Competition and IP law – in conflict or complementary?

To many, competition and IP law appear to conflict with each other. In fact, they can be complementary and share similar policy goals e.g. encouraging innovation and development, and enhancing consumer welfare²⁰. It is argued that competition law can help enhance IP protection.

There are controversies about the conflicts between competition and IP law. On one hand, IP law grants IPR owners the exclusive right of exploit their IPRs. This entitles them to exclude others from copying or commercialising an invention that falls within the scope of their IPRs²¹. They can charge reasonable monopoly rates when others use or buy their IPRs and licenses to achieve exclusivity, and territorial and price restraints²². These rights are justified as IPR holders should, as a matter of public policy be entitled to recoup the substantial amount of time and effort invested in researching and developing their products and services²³. On the other hand, unreasonable monopoly rates may trigger competition law sanctions. Indeed, competition law is concerned with curtailing market power exercised by firms (especially the dominant ones) which may prove harmful to consumer welfare²⁴. With an enhanced level of competition, consumers benefit from lower prices and wider choices. Competition law is against monopoly, which IP law may create. This is especially true

¹⁷ Jayanthi Iyengar "Intellectual property piracy rocks China boat" *Asia Times China* 16th September 2004 (online version)

¹⁸ The statistics are from a survey in above 8, interviewing over 5,000 U.S. firms, conducted by an independent fact-finding federal agency.

¹⁹ *ibid*

²⁰ Valentine Korah The interface between intellectual property rights and competition in developed countries (2005) 2:4 *SCRIPTed* 429

²¹ Angie Ng, Ding Liang and Peter Waters (2008) *The intersect between intellectual property law and competition law – implications for China* <http://www.kingandwood.com/article.aspx?id=IPBulletin081127-01> (17th July 2013)

²² *ibid*

²³ James F. Rill and Mark C. Schechter International anti-trust and intellectual property harmonization of the interface (2003) 34 *Law and Policy International Business* 783, 783

²⁴ *SCM Corp v. Xerox Corp.* 645 F.2d 1195, 1203 (2d Cir. 1981)

for cumulative innovation²⁵ when existing IPRs are supposed to encourage, not to hinder follow-on innovation.

In fact, most conflicts between competition and IP laws stem from the uncertainties on, for instance, the extent of which competition policy on IPRs is about short-run efficiency aims, whether market power should be inferred from the existence of IPRs, and striking the balance on anti-competitive restriction in the exercise of IPRs²⁶.

Both competition and IP law share the same policy goals of encouraging innovation and development, and enhancing consumer welfare²⁷. Both competition and IP law aim to protect IPRs in order to facilitate innovation and encourage investment in researching and developing more new ideas. IP law, in particular, facilitates the commercialisation of innovation and encourages public disclosure when the IPR owner registers its IPR. Both spur competition among rivals to be the first to enter the marketplace²⁸. Efficient production (static efficiency) and more innovative activity (dynamic efficiency) can be achieved with better consumer welfare.

One author once stated that IP law is a carrot, whereas competition law is a stick²⁹. Competition law recognises that an effective legal regime of IPRs is essential to a competitive economy, while IP law recognises the value of competition by limiting the life and breadth of IPRs³⁰. In the *Magill* case³¹, it was held that the mere ownership of an IPR cannot automatically confer monopoly. IPRs may indeed confer a legal monopoly, depending on the existence of substitutes in the market³²; but not necessarily an economic monopoly in competition law on the exercise of IPRs³³.

It is overly optimistic to expect that IP law can independently regulate the exercise of IPRs so comprehensively to meet competition objectives³⁴. Nor should there be an over reliance on the

²⁵ Ioannis Lianos and Rochelle C. Dreyfuss *New challenges in the interaction of intellectual property rights with competition law – a view from Europe and the United States* Centre for Law, Economics and Society, Faculty of Law, University College London April 2013

²⁶ Organisation for Economic Co-operation and Development (“OECD”) *Competition policy and intellectual property rights* OECD 1997

²⁷ Michael A. Carrier *Innovations for the 21st century: harnessing the power of intellectual property and antitrust* Law United Kingdom, Oxford University Press 2009

²⁸ DOJ and FTC *Antitrust enforcement and intellectual property rights: promoting innovation and competition* DOJ and FTC U.S. 2007, 2

²⁹ Ariel Ezrachi *International research handbook on international competition law* United Kingdom, Edward Elgar 2012, 464

³⁰ Ioannis Lianos *A Regulatory theory of IP: Implications for competition law* Centre for Law, Economics and Society, Faculty of Law, University College London, November 2008

³¹ *Radio Telefis Eireann and Independent Television Publications Ltd v. Commission* (1989) C241-91

³² Competition Commission of Singapore *Competition Commission of Singapore Guidelines on the treatment of intellectual property rights* Competition Commission of Singapore 2007, 4

³³ Gustavo Ghidini *Intellectual property and competition Law: the innovation nexus* Edward Elgar United Kingdom 2006, 109

³⁴ Steven Anderman *EC Competition law and intellectual property rights: the regulation of innovation* Oxford Clarendon Press 1998, 17

competition law regime for the best IPRs protection. A proper balance should be maintained between the two. The analysis is particularly relevant to China as it is developing rapidly technologically³⁵.

III. Competition law regime in China

The competition law regime in China is relatively new. The focus of this paper will be on the AML which came into effect in 2008. AML is one of three statutes that protect competition in the Chinese markets³⁶. Some scholars describe it as an economic constitution³⁷. The AML aims to prevent and restrain monopolistic conduct, promote fair competition, enhance economic efficiency, safeguard consumer and social public interests³⁸ and promote a healthy development of the socialist economy with Chinese characteristics³⁹, thus protecting small and medium enterprises from larger competitors, in particular, foreign rivals⁴⁰. The approach of the AML accords with other international approaches and reflects global concerns⁴¹.

The legislative background of the AML is discussed in Part A. The AML and the evaluation of its enforcement are discussed in Parts B, C and D respectively. The position will be summarised in Part E.

A. History

As a result of China's reform and opening-up policies in the late 1970s, China's efforts in promoting fair competition and cracking down on monopoly activities have been successful⁴². There are numerous provisions that regulate monopolistic conduct and restraints on competition, dispersed in various laws, regulations and administrative rules⁴³. The earliest law on competition is the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy 1980, commonly referred to as the Ten Articles on Competition, which aims to combat monopolies⁴⁴. The Chinese law continued to develop and there are currently three pieces of legislation related to competition. The first one is the AUCL, which prohibits 11 types of illegal conduct, including monopolistic conduct, such as abuse of dominant market position by public enterprises, predatory pricing, designated transactions by public utilities, tying, bid rigging and administrative monopoly, which is unique and

³⁵ Thomas Cheng "The Patent-Competition Interface in Asia: a regional approach" in above 39

³⁶ The other two are the Anti-Unfair Competition Law 1993 ("AUCL") and the Price Law 1998.

³⁷ Paul Jones Licensing in China: the New Anti-monopoly Law, the abuse of IP rights and trade tensions (2008) XLIII(2) *les Nouvelles: J. Licensing* 106

³⁸ Article 1 AML

³⁹ The Constitution of the People's Republic of China 1993

⁴⁰ Nathan Bush *The PRC Antimonopoly Law: unanswered questions and challenges ahead* The Antitrust Law Group, American Bar Association U.S. 2007

⁴¹ Daniel Sarvin (2008) *China's Anti-monopoly will have a broad impact beyond notification* http://www.martindale.com/business-law/article_Bingham-McCutchen-LLP_493958.htm (17th July 2013)

⁴² Nie Peng "China's first Anti-monopoly Law takes effect" *Xinhua News Agency* 2nd August 2008 (online version)

⁴³ Consumer Protection Law 1993 and Bidding Law 1999

⁴⁴ Promotion and Protection of Competition in the Socialist Economy 1980

common in China⁴⁵. Secondly, the Price Law 1998, which is the price control law on cartels, predatory pricing and price discrimination⁴⁶, and thirdly, the AML 2008. The enactment of the AML was put on the legislative agenda in 2004, passed in 2007 after 13 years of continuous development and three revisions, and implemented in 2008.

Many Chinese lawmakers hoped that the AML would provide a solution to pressing competition problems, though not necessarily directed at IPRs⁴⁷ but on mergers and acquisitions. Such issue was raised in a hostile takeover and IPR dispute case between a domestic Chinese beverage manufacturer Wahaha and the French food company Danone⁴⁸. Wahaha was the target of a takeover bid by Danone, which simultaneously charged Wahaha for inappropriate use of its trademark. The chairman of Wahaha, Zong Qinghou, a member of the legislative body, the National People's Congress ("NPC"), and another member, Li Guo-guang, in the NPC, also from the Legal Committee and the Vice President of the Supreme People's Court ("SPC"), called for a proposal to restrict foreign investment from monopolising various industries in China through mergers and acquisitions⁴⁹. Therefore, the AML was implemented with the hope to protecting fair competition in China in general.

B. AML

To Among the eight chapters and 57 articles in the AML, it prohibits four types of activities: monopolistic agreements, abuse of dominance⁵⁰, concentration of undertakings⁵¹ and abuse of administrative power to eliminate or restrain competition⁵². Monopolistic conduct both within the territory and those outside are subject to AML scrutiny⁵³. Only actions conducted by agricultural producers and rural economic organisations are excluded from the operation of the AML⁵⁴. The main articles which will be discussed below are Articles 13, 14, 17 and 55⁵⁵.

Articles 13 and 14 are about anti-competitive monopoly agreements. Article 13 prohibits horizontal agreements that fix the prices, limit the output or sales, divide the sale market or raw

⁴⁵ Pate R. Hewitt What I heard in the great hall of people – realistic expectations of Chinese antitrust (2008-2009) 75 *Antitrust L. J.* 195

⁴⁶ Shang Ming Antitrust in China – a constantly evolving subject (February 2009) *Competition Law International* 4 – 11, 4

⁴⁷ Thomas R. Howell, Alan Wm. Wolff, Rachel Howe and Diana Oh China's new Anti-monopoly Law: a perspective from the United States (2009) 18(1) *Pacific Rim L. Poly J* 53, 62

⁴⁸ Lan Xinzhen "Wahaha vs. Danone" *Beijing Review China* 7th June 2007 (online version)

⁴⁹ Zong Qinghou "Proposal on legislation restricting foreign investment from monopolizing various industries in China through mergers and acquisitions and maintaining economic security" *Xinhua Net China* 14th March 2007 (online version)

⁵⁰ Article 3 AML

⁵¹ Article 19 AML

⁵² Article 32 AML

⁵³ Article 2 AML

⁵⁴ Article 56 AML

⁵⁵ Abuse of administrative power will not be discussed.

material procurement market, limit the purchase of new technologies or new facilities or limit the development of new products or new technologies, engage in boycott transactions and other prohibitions⁵⁶. The Judicial Interpretation on Adjudication of Technology Contracts in 2005 declares that restrictions on the acquisition of competing technology or development can be considered as "illegal monopoly of technology"⁵⁷. Similarly, Article 14 prohibits vertical agreements that fix the prices for resale, restrict minimum price for resale and other prohibitions⁵⁸. There are exemptions in Article 15 for the application of Articles 13 and 14, such as if the agreements enables the consumer to share the benefits derived from the agreement and will not severely restrict competition, and either improve technology or research and develop new products, upgrade product quality, reduce cost, improve efficiency, unify product specifications and standards, carry out professional labour division, improve operational efficiency and enhance competitiveness of small and medium sized entities, serve the public welfare, such as conserving energy, protecting the environment and providing disaster relief, mitigate serious sale decreases or excessive production during economic recessions, safeguard justifiable trade interests and economic cooperation, or other circumstances stipulated by law and the State Council⁵⁹.

Article 17 is about abuse of market dominance⁶⁰. It prohibits those with dominant market position from without justifiable cause engaging in predatory pricing, refusing to trade, allowing exclusive dealing or tying. Article 18 further explains that there are a number of factors to determine the finding of a dominant market position for a business operator⁶¹, such as its market share, its capacity to control the markets, its financial and technical conditions, the degree of dependence of other business operators and the degree of difficulty to enter the market⁶². Article 19 then stipulates the dominant market share threshold required⁶³: 50% for one business operator, two of them: 66.7% and three of them: 75%.

Article 55, which is under the chapter on Supplementary Provisions, is particularly related to IPRs. It states that:

"This Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law."⁶⁴ (Emphasis added)

⁵⁶ Article 13 AML

⁵⁷ Judicial Interpretation on Adjudication of Technology Contracts 2005

⁵⁸ Article 14 AML

⁵⁹ Article 15 AML

⁶⁰ Article 17 AML

⁶¹ In this context, the phrases "business operators" and "IPR owners" will be used interchangeably as they refer to the same type of people in the AML.

⁶² Article 18 AML

⁶³ Above 61

⁶⁴ Article 55 AML

The first half of Article 55 sets out an exemption from the application of the AML, which IPR owners are not subject to such scrutiny for merely exercising their IPRs consistent with the laws and relevant administrative regulations on IPRs. The exemption is however, conditional⁶⁵. The second half sets out the condition: if they engage in any conduct that seeks to eliminate or restrict market competition by abusing their IPRs, then, the AML shall apply. The plaintiff or the complainant bears the burden of proof to determine whether the alleged conduct violates specific provisions of the AML. When the defendant has recourse to the first half of Article 55 as a defense, the complainant must then prove the defense is not available by relying on the second half, that the conduct constitutes an IP abuse with anti-competitive effects⁶⁶. A balancing analysis will be taken to see if pro-competitive effects are created by restraining the exercise of IPRs and whether such outweigh the anti-competitive effects caused by the defendant's activities before the defense is effective.

There are mainly two enforcement bodies to the AML and other competition laws: the Anti-monopoly Commission ("AMC"), and three Anti-monopoly Enforcement Agencies ("AMEAs")⁶⁷. Firstly, the Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission ("NDRC") enforces against prohibition on abuse of administrative power in price-related matters. Secondly, the Anti-monopoly and Unfair Competition Enforcement Bureau of SAIC) enforces against the same but on non-price related matters. Lastly, the Antimonopoly Bureau of the Ministry of Commerce ("MOFCOM") administers and conducts merger reviews. These agencies are also respectively responsible for determining whether IPRs should be granted in the first place. On the judicial aspect, the IP tribunal of the Intermediate People's Courts hears civil cases relating to competition, with the same jurisdiction by the SPC, regardless of whether these disputes are IP related or not⁶⁸.

There are also leniency programs that play an important role in investigating and sanctioning monopoly agreements⁶⁹. Whistle-blowers can report to the AMEAs but often this would have stirred suspicion among business partners. This is special and unique in the AML regime compared with other international approaches.

C. Enforcement

The enforcement of the AML by the AMC and the AMEAs has been a success. More officials were employed to intensify the enforcement efforts. Until 2012, the NDRC had investigated 49 price-monopoly cases, few involving abuse of dominance, and 20 of them were closed with administrative penalties⁷⁰. The SAIC had investigated 17 cases: 16 on cartels⁷¹ and 1 on abuse of dominance with administrative penalties in 6 cases. The MOFCOM had accepted 186 notifications of concentration

⁶⁵ *ibid*

⁶⁶ Susan Ning (2009) *Antitrust litigation in China* <http://www.kingandwood.com/article.aspx?id=antitrust-litigation-in-china-03-china-bulletin-2009&language=en> (17th July 2013)

⁶⁷ *ibid*

⁶⁸ SPC Provisions on the Cause of Action of Civil Cases 2011

⁶⁹ Above 46, 7

⁷⁰ Susan Ning, Hazel Yin and Yunlong Zhang (2013) *The Anti-monopoly Law of China: what we have seen in 2012?* <http://www.chinalawinsight.com/2013/02/articles/corporate/antitrust-competition/the-anti-monopoly-law-of-china-what-we-have-seen-in-2012/> (17th July 2013)

⁷¹ Cases involve big foreign companies such as Samsung, LG, etc.

cases⁷², approved 142 of them and 16 with conditions. The SPC had then selected 34 typical competition and IP cases from 2012⁷³, and summarised them with issues on the application of the laws that can have universal significance. It had also issued a judicial interpretation relating to the court procedures to be followed in the AML in 2009⁷⁴.

A Draft Guide on competition enforcement involving IPRs⁷⁵ was published after four years of collaborative effort of the AMEAs, the State Intellectual Property Office (“SIPO”), comments from the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) in the U.S.⁷⁶. There were also voluntary submissions from foreign and domestic firms, trade associations, private practitioners and scholars⁷⁷. The Guide is not binding but has been successfully used as guidance.

Just like other international approaches and the discussion in Part II, business operators with IPRs will not be automatically deemed to be enjoying dominant market power, under the safe harbour mechanism in Article 19 AML⁷⁸. When analysing monopoly behaviours, the SAIC for instance, will define the relevant market and determine the market position, analyse the nature and manifestation of the exercise of the IPR on competition and the relationship between the operators in the market⁷⁹. The restriction on competition caused by the monopolistic conduct must exceed that of a normal exercise of IPRs before the SAIC takes action⁸⁰. Also, the AMEAs will not investigate a unilateral, unconditional or non-discriminative refusal to license, but those that are obviously unfair and discriminative, without justification or as a means of enforcing other restrictive terms or tying arrangements⁸¹.

The AMEAs have specific enforcement focuses. Abuses of IPRs were specifically mentioned in the National Patent Development Strategy as an area that calls for attention⁸². The SAIC for instance, focuses on monopoly conducts of public utility enterprises, such as electricity, water and gas suppliers, typical antitrust cases that cause serious impact on market competition, industrial monopolies and regional blockades⁸³.

⁷² One of the cases is the Huiyuan Juice acquisition by Coca-Cola, rejected by MOFCOM in 2009.

⁷³ SPC *SPC Annual report of intellectual property cases* SPC 2012

⁷⁴ SPC Action Plan for Intellectual Property Protection 2009

⁷⁵ The Guide

⁷⁶ Susan Ning and Hazel Yin (2012) *China's Anti-Monopoly Law: retrospect and prospect on the fourth anniversary* <http://www.kingandwood.com/Bulletin/ChinaBulletinContent.aspx?id=6a3d8f71-d16d-4c1d-b3d0-b251d881e617> (17th July 2013)

⁷⁷ Richean Li The Chinese State Administration of Industry and Commerce makes another attempt to define anticompetitive exercise of intellectual property rights (August 2012) *Competition Law Centre*

⁷⁸ Above 51

⁷⁹ Above 77

⁸⁰ *Dexian v. Sony* (2004) Shanghai No. 1 Intermediate People's Court

⁸¹ Article 17, the Guide

⁸² National Patent Development Strategy 2000, Chapter IV (1)

⁸³ Susan Ning, Sun Yiming and Kate Peng (2012) *Chinese antitrust regulators vow to increase transparency* <http://www.mondaq.com/x/193012/Cartels+Monopolies/Chinese+Antitrust+Regulators+Vow+to+Increase+Transparency> (17th July 2013)

On standard setting and development, there are no standard settings in China. Such standards are set by the State on a compulsory or voluntary basis, outside the AML framework⁸⁴. There are concerns that standard settings or technology pools can create negative effects on competition, when they prohibit licensors from granting licenses outside of joint business operation, insert no-challenge and non-competition clauses in the agreement, charge exhaustive rates and demand grant-backs⁸⁵, with no justifiable reason. Neither are there published guidelines by the AMEAs for the operation of standard-setting bodies (“SSOs”), patent pools or licensing, providing IPR holders with assurance that their standard setting activities would definitely not be subject to the AML⁸⁶. However, the Guide clarifies that the acts of managing the joint business operation will not be automatically reviewed⁸⁷, except when the acts constitute discrimination against other participants, restricting them from using the patents⁸⁸. If the IPR holder participates in the standard setting and development but fails to disclose the IPR during the development process and its conduct has been monopolistic, its IPR claims will not be enforced⁸⁹. An AMEA may impose a license on a reasonable and non-discriminatory basis as sanction. Scrutiny will increase further if the market position of the operator is more dominant and they unreasonably restrict the establishment of substitute operations⁹⁰. Moreover, the Guide also suggests prohibiting agreements that fix patent royalties between competing business operators⁹¹. But it fails to understand that it has been the practice in China for operators to determine royalties among themselves. It remains to be seen how the law around SSOs will develop, as the AMEAs are very unlikely to intrude into the State’s domain.

On the issue of the enforcement powers of the AMEAs and the courts, apart from administrative penalties, the Measures for Compulsory Patent Licensing issued by the SIPO in 2011 states that neither the AMEAs nor the courts will have the power to grant compulsory patent licenses to remedy violations of the AML⁹². Instead, such orders would be granted at the discretion of the State Council’s Patent Administration Department, upon review by the NDRC or the SAIC, coupled with the application by the concerned party⁹³.

The NDRC has also held many seminars with the E.U. and other countries to provide training for enforcement staff and even sent officials to learn in the E.U. on its anti-monopoly laws and enforcement work⁹⁴. On that note, the enforcement of the competition law regime, in particular the AML is evaluated below.

⁸⁴ Above 15, 231

⁸⁵ *ibid*

⁸⁶ *ibid*, 233-234

⁸⁷ Article 24, the Guide

⁸⁸ *ibid*

⁸⁹ Article 20, the Guide

⁹⁰ *ibid*

⁹¹ *ibid*

⁹² SIPO Measures for Compulsory Patent Licensing 2011

⁹³ *ibid*

⁹⁴ Hanghong Wu (2012) *The Chinese Anti-monopoly policy: achievements, problems and prospect* <http://www.jftc.go.jp/cprc/koukai/sympo/2012notice.files/130222sympo6.pdf> (17th July 2013), 11

D. Enforcement evaluation

The AML has been implemented quite successfully over the past 5 years. However, most of the successes are not directly related to IPRs. There are certain aspects on implementing and enforcing the AML that had drawn attention for Chinese lawmakers for future amendments and improvements, such as 1) the inadequacy of AML itself, 2) lack of clarity in Article 55; call for transparency because of the 3) unclear relationship of AML with other applicable competition and IP laws, 4) that unclear relationship between Article 55 and the TRIPS, 5) the Guide not matching with the reality; 6) lack of experience and guidance in adjudication of competition law cases, and lastly, 7) the unclear balance of power between the three AMEAs.

1. Inadequacy of AML

The AML is not adequate in addressing the competition law problems facing China today. For instance, the exemptions under Article 15 may offer some protection for IPR holders, but very often they find it difficult to satisfy the burden of proof for the conditions required, such as consumer benefiting from the agreement⁹⁵. Also, by permitting the most common types of cartel agreements, Article 15 actually significantly weakens the pro-competitive purpose of the AML⁹⁶. Similarly, by requiring similar favourable licenses to be granted to other firms in the market once the license is granted to the original licensee, the AML may have created a compulsory IP licensing system⁹⁷, which discourages innovation rather than encouraging⁹⁸.

Certain provisions of the AML related to the dominant position are vague and require further clarification. Such dominance can be achieved with a market share as low as 10%⁹⁹ in the cases decided¹⁰⁰, while Article 19 AML specifically states that such market share shall not be presumed as dominance and in the Guide, 20%¹⁰¹. Also, the approach which presumes dominant position of multiple entities based on their combined market share is worrying¹⁰². It appears that entities with low market concentration will be punished because there are not a lot of market participants. There is no guidance as to what suffice for them to rebut the presumption¹⁰³. Moreover, the AML does not seek to

⁹⁵ Above 47, 87

⁹⁶ *ibid*

⁹⁷ International Law Office and Lovells (2009) *The Anti-monopoly Law and IP rights: a relationship under strain* <http://www.internationallawoffice.com/Newsletters/detail.aspx?q=3e09021e-ce50-4e11-8f1e-316e3f74eb1d> (17th July 2013)

⁹⁸ Kristie Nicholson and Zirou Liu Avoid competition problems in China (July/August 2008) *Managing intellectual property*

⁹⁹ Frank Schoneveld (2013) *Abuse of IP rights under China's antitrust rules: recent cases have a potentially serious impact* <http://www.mondaq.com/unitedstates/x/230592/Antitrust+Competition/Abuse+Of+IP+Rights+Under+Chinax0027s+Antitrust+Rules> (17th July 2013)

¹⁰⁰ *Interdigital v. Huawei* (2013) Shenzhen Intermediate Court and *Microsoft v. Guangzhou Kam Hing* (2010) Guangzhou Intermediate Court

¹⁰¹ Article 12, the Guide

¹⁰² Harris H. Ganske The monopolization and IP abuse provisions of China's Anti-monopoly Law: concerns and a proposal (2008) 75(1) *Antitrust Law Journal* 213-229, 213

¹⁰³ *ibid*

distinguish between IPR holders who are competitors in the area of the IPR license and those who compete outside¹⁰⁴.

From the statistics, there are too few successful cases of enforcing against violations under the AML. Although the *Dexian v. Sony* case¹⁰⁵ is decided on the AUCL before AML had commenced, the issue is whether Sony had abused its IPRs by tying¹⁰⁶ which AML can be applicable as well. Sony's insistence on using its patented replacement battery was held not to be an abuse of IPR; even though *prima facie* it was dominant over the digital market. There was no evidence of unnecessary technological strategies. SAIC is the AMEA for both laws, so it is likely that it will give the same or similar interpretation to the AML as that in the AUCL. In *Shanda v. Sursen*¹⁰⁷, it was decided that the AML was not violated either. The case is about an unauthorized adaptation of an online novel by two avid fans who were disappointed by the ending. They decided to write an unauthorized sequel to it using the same characters, and published it online which became highly successful. They alleged Shanda to have abused the IPR while they had actually infringed the copyrights of the novel. These cases reflect that AML may be useless in enforcement as the threshold for any competition violation is too high. The AMEAs may have taken an overly-cautious approach, which made the enforcement weak.

Lastly, it is unclear whether the AML has a retrospective or prospective effect as it is silent on the issue. AML is thus inadequate to solve the competition problems.

begin

2. Lack of clarity in Article 55 AML

The language adopted in AML is very general, including Article 55. Certain key terms are not defined, such as to what constitutes to eliminating or restricting market competition, IPRs, or the abuse of IPRs¹⁰⁸. It is unclear whether Chinese medicine, genetic resources or traditional knowledge can be part of an IPR¹⁰⁹. There are almost no cases until present for the AMEAs to interpret the terms¹¹⁰. Currently, among the three AMEAs, only MOFCOM publishes all its decisions of prohibition or conditional approval¹¹¹. Arguably, maximum flexibility is given to the AMEAs to interpret the AML on their own¹¹² and if that does not work, they can always seek for judicial interpretation from the SPC or the State Council, which is a standard Chinese legislative practice. Companies, especially foreign ones, would have no idea whether their conduct has the potential to violate the AML.

¹⁰⁴ Yee Wah Chin Intellectual property rights and antitrust in China (February 2010) *New Jersey Lawyer* 39-43, 40

¹⁰⁵ Above 51

¹⁰⁶ Article 17 AUCL

¹⁰⁷ *Shanda Interactive Entertainment v. Beijing Sursen Electronic Technology* (2009) Shanghai No. 1 Intermediate People's Court

¹⁰⁸ Global Competition Review *Intellectual property and antitrust 2013* London, Law Business Research Ltd 2013, 33

¹⁰⁹ Above 15, 217

¹¹⁰ Michael Jacobs and Xinzhu Zhang "China" in R. Ian McEwin Intellectual property, competition law and economics in Asia Oxford *Hart Publishing Ltd* 2011, 153

¹¹¹ Above 66

¹¹² The Guide

Questions have also been raised about the relationship between Article 55 and the general prohibitions under AML, as Article 55 is put under the Supplementary Provisions¹¹³ at the end of the AML. Only Article 55 is particularly addressed to IPRs, which is significantly less compared with other international regimes. Some practitioners and academics therefore view IPRs as an exception to the application of the AML, implying that IP laws are considered to be equivalent in status to the AML, with a safe harbour for IPR holders to exercise their IPRs legitimately. Others argue that AML should be strictly applied to all cases where IPRs are involved¹¹⁴. It is now clarified by the Legislative Affairs Commission of the Standing Committee of NPC that competition law does not apply to all IP aspects but only when the circumstances required are met¹¹⁵. Such however, is not accepted in the E.U. approach¹¹⁶. By categorising Article 55 as a supplementary provision, AML lowers Article 55's status and affects how it connects with the rest of the AML provisions.

Another concern is whether Article 55 extends the prohibition on abuse of dominant position to activities carried out by non-dominant IPR holders¹¹⁷. If so, non-dominant IPR holders will be unable to engage in certain potentially abusive activities. The market share threshold test for the abuse of dominance in Article 19 AML will be irrelevant¹¹⁸. Also, it remains unclear as to whether dominant entities exercising IPRs are subject to the same competition scrutiny as dominant entities selling other goods or services, as IP indeed differs from other types of property¹¹⁹. Article 55 therefore requires further clarification.

3. Unclear relationship between AML and other applicable competition and IP laws

The AML does not explicitly repeal but coexists with many existing applicable Chinese competition and IP laws and regulations, such as those mentioned in Parts A and B above. Based on the general principles of hierarchy¹²⁰, AML as the more recent economy-wide legislation take precedence over previous laws and regulations in cases of conflict, but to the extent they do not contradict it, they may apply concurrently¹²¹.

¹¹³ H. Stephen Harris Jr. and Yizhe Zhang Antitrust and three rising giants: Part 1 – China (2008) *International Company and Commercial Law Review* 339, 345

¹¹⁴ China Law and Practice (2011) *Crossroads: Anti-monopoly and IP rights* <http://www.chinalawandpractice.com/Article/2893305/Channel/16143/Crossroads-Anti-monopoly-and-IP-rights.html> (17th July 2013)

¹¹⁵ The Legislative Affairs Commission of the Standing Committee of NPC *Interpretation, legislative rationale and relevant regulations for the Anti-monopoly Law of the People's Republic of China* Beijing, Beijing University Press 2007, 346

¹¹⁶ Joseph Darke *Abuse of dominant position and intellectual property law* Translated from the German by Yuling Wu "Missbrauch einer marktbeherrschenden Stellung und Recht des geistigen Eigentums" China: *Global Law Review* [2007(6)]

¹¹⁷ Above 51

¹¹⁸ Dr. George Yijun Tian The impact of the Chinese Anti-monopoly Law on IP commercialization in China & general strategies for technology-driven companies and future regulators (2010) *Duke L & Tech Rev.* 4, ¶24

¹¹⁹ Above 20

¹²⁰ Articles 79 and 83, Legislation Law 2000

¹²¹ *ibid*

It remains true that Chinese competition and IP laws are fragmented, confined in scope and rarely enforced¹²². The problem with dual application is that some laws and regulations differ significantly with AML, for instance, in the amount of penalties for tying, bid rigging and price controls¹²³. The Patent Law 1998 was silent on any IPR abuse while Article 55 AML provides so. Despite the revised Patent Law in 2008 to cater for compulsory licensing¹²⁴, so to harmonise it with the AML, it remains unclear if an infringement under the Patent Law will be subject to both itself and AML. Thus, further clarifications are necessary as IPR owners, in particular the foreign ones, are uncertain about the legal implications behind all the relevant competition and IP laws.

4. Unclear relationship between Article 55 AML and TRIPS

There were concerns that Article 55 AML will have violated Article 40 TRIPS. Article 40 TRIPS provides that China may adopt appropriate measures to prevent or control abuse of IPRs consistently with other provisions of the TRIPS¹²⁵. China acceded to the WTO in 2001 and has an obligation to comply with all WTO agreements, including the TRIPS¹²⁶. Some states had expressed concern as to the compatibility of the phrase “abuse of IPRs” in Article 55 AML as it seems to go beyond what TRIPS considers as abusive practices under Article 31(k)¹²⁷ for compulsory licensing¹²⁸. However, the Chinese representatives assured that Article 55 had not breached the TRIPS and the AML is fully compatible. Any further development on the issue remains to be seen.

5. Unrealistic Guide

Although the Guide has been useful in many ways in assisting the understanding and enforcement of the AML, in many other ways it is somehow unrealistic. Article 11 illustrates certain types of competitive activities, including cross-licensing¹²⁹, without however realising the market reality that cross-licensing can also produce pro-competitive effects, such as reducing the risk of IPR infringements, saving monitoring costs and focusing on innovation¹³⁰. The Guide also provides that a dominant company may not impose unreasonable transactional conditions involving IPRs without justifiable reasons. *Prima facie*, this prohibition would appear to ban a wide category of provisions that are however routinely included in IPRs and settlement agreements, such as the use of a no-challenge

¹²² Hannah Ha and Gerry O'Brien China's Anti-monopoly Law – a great leap forward? (March 2008) *Asia Law* 8-14

¹²³ Above 12

¹²⁴ Article 48 Patent Law 2008

¹²⁵ Article 40 TRIPS

¹²⁶ WTO *Report of the Working Party on the accession of China* WTO 2001, ¶286

¹²⁷ Article 31(k) TRIPS states that: “Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.”

¹²⁸ WTO *Communication from the European Communities under the transitional review mechanism of China* IP/C/W/503 WTO 2007, ¶23

¹²⁹ Article 11, the Guide

¹³⁰ Above 75

clause¹³¹. The European Commission (“E.C.”) has examined the issue in the Pharmaceutical sector Inquiry, but it has not made an infringement decision on that clause¹³². It remains unclear whether E.C. will comment further for the Guide to reflect more of the market reality.

Article 17 of the Guide dealing with refusal of license states that AMEAs will not impose a duty to deal with competitors or other parties upon an IPR, but added that the unilateral refusal to license must be unconditional and non-discriminatory¹³³. This will mean that the IPRs holder will only be safe from competition violation if he licenses to everyone or to none, or he will be taking the risks of being challenged by the AMEAs¹³⁴. This is absurd to the original purpose of the AML. Moreover, the Guide does not explain why individual assessments are taken applicable to all operators, when there should be no such requirements for non-dominant operators¹³⁵. So the usefulness of the Guide remains to be improved.

6. Lack of experience and guidance in adjudication

The specialised delegation of the jurisdiction to the IP tribunals may mean that the tribunals have better capacity to deal with the IP abuse cases. But equally they are not better equipped in dealing with competition law issues that are new to them. Sometimes, the courts had not even referred to the matter to the IP tribunal. In *Sursen v. Shanda and Xuanting*, the regular court ruled on the matter without delegating jurisdiction to the IP tribunal¹³⁶, but the parties did not challenge the jurisdiction. Indeed, the jurisprudence and capability of economic analysis on competition law in China are still in development¹³⁷. Judges have limited training to understand the issues. There are no or limited precedents for the AMEAs and the judges to follow. The work of the AMEAs is rarely disclosed and the public always question about the reliability of their decisions, causing distrust among them¹³⁸. Such is reflected in NDRC’s decision on agreeing with an early settlement with China Telecom and China Unicom instead of imposing fines on them, which are state-owned enterprises (“SOEs”). The preparation of further interpretations or advice is likely to involve not just the AMEAs but also other enforcement bodies¹³⁹. That means that delays are resulted in publishing the guidance. At the end, it relies on the bodies themselves to implement the laws¹⁴⁰. It is useless if they do not.

Foreign business investors are often worried that the AML will be used abusively against them while the enforcement bodies and the judiciary turn a blind eye on the domestic and SOEs¹⁴¹. They

¹³¹ *ibid*

¹³² E.C. *Pharmaceutical sector inquiry final report* E.C. 2009

¹³³ Article 17, the Guide

¹³⁴ Above 77

¹³⁵ *ibid*

¹³⁶ *Sursen v. Shanda and Xuanting* (2009) Shanghai No. 1 Intermediate People’s Court

¹³⁷ Above 110

¹³⁸ Above 66

¹³⁹ Above 66

¹⁴⁰ X. Wang The prospect of antimonopoly legislation in China (2002) *Washington University Studies Law Review* 201-232

¹⁴¹ Mary Hanzlik The implications of China’s Anti-monopoly Law for investors: problematic protection of intellectual property (2008) 3(1) *Entrepreneurial Bus. L.J* 75, 89

are concerned that the AML will be used as a defense to avoid or delay infringement actions involving Chinese parties, as the anti-monopoly investigation process once initiated is very time-consuming¹⁴². As discussed, Chinese officials often claim that China is plagued with foreign technology businesses that use unfair competition tactics¹⁴³. Under local protectionism, judges tend to be biased in favour of the SOEs, supported by local committees or local people's congresses¹⁴⁴. The authorities are unlikely to offend them because of the pressure that they would lose the tenures, benefits or even be removed for a verdict that the local government is not pleased with¹⁴⁵. Additionally, local courts may suffer from significant funding reductions if they do not take government interests (which are about SOEs) seriously¹⁴⁶. This lack of independence has a significant impact on the prosecution of pharmaceutical counterfeiters especially. Therefore, many companies, foreign and local, call for a shift in the enforcement focus to the SOEs as they are likely to abuse their administrative power to achieve dominance. Same standards should be adopted for both domestic and foreign businesses.

7. Unclear division of labour among three AMEAs

Lastly, the enforcement aspect of the AML in relation to IPRs is weak¹⁴⁷. Firstly, it is due to the unclear division of labour among the three AMEAs. The AMC does not have substantive enforcement powers but formulates competition policies and guidelines, evaluates competition conditions, coordinates enforcement activities and reports back to the State Council¹⁴⁸. The AMEAs on the other hand, have strong powers¹⁴⁹, including the power to inspect and investigate business and non-business premises, and seize relevant evidence without a court order. However, the AML does not detail the structure of the AMEAs¹⁵⁰. All three AMEAs have been struggling for more power. Despite the seemingly clear division of responsibilities as discussed, the NDRC had once issued notice with respect of a case while the SAIC should have been the best candidate to decide. It was a case on the tying of wholesale of table salt with detergent washing powder¹⁵¹. Clearly it is a non-pricing practice which SAIC has the power to decide.

Each of the AMEAs, such as the NDRC and the SAIC had implemented rules respectively on the implementation of the AML¹⁵². But the level of detail in the rules is limited. However, they were not

¹⁴² Above 15

¹⁴³ H. Harris Stephen Jr. The making of an antitrust law: The pending Anti-monopoly Law of the People's Republic of China (2006) 7 *Chi. J. Int'l L.* 169, 173

¹⁴⁴ Huang Ying Basic IP principles of antitrust Law (August 2010) 38 *China IP Magazine*

¹⁴⁵ Albert Hung-yea Chen *An introduction to the legal system of the People's Republic of China* Hong Kong, LexisNexis 2004, 157

¹⁴⁶ *ibid*

¹⁴⁷ U.S. International Trade Administration *IPR toolkit: protecting your intellectual property rights (IPR) in China* U.S. Department of Commerce 2005

¹⁴⁸ Above 12

¹⁴⁹ Articles 10 and 39 AML

¹⁵⁰ Adrian Emch The Antimonopoly law and its structural shortcomings 2008(1) *Global Competition Policy Magazine*

¹⁵¹ NDRC decision against Wuchang Branch of Hubei Salt Industry Group Co. Ltd 2010 (the Washing Powder case)

¹⁵² SAIC Regulations on Prohibition of Monopoly Agreements 2010, SAIC Regulations on Prohibition of the Abuse of a Dominant Market Position 2011 and the NDRC Regulations on Anti-Price Monopoly 2010

deterred in enforcing what they consider to be relatively obvious anti-competitive domestic horizontal cartel activities, which have been the main focus of enforcement in other laws before the AML commenced. In relation to other types of agreements, this means that there is ongoing uncertainty as to which agreements can or will be challenged under the AML¹⁵³.

Secondly, the weak enforcement is because of the complex government structure. On a higher policy level, there are five levels of government and more than a dozen other governmental departments called “competition liaison agencies” across the geographical spread¹⁵⁴, such as sector regulators, financial regulators and even the police and national security agencies. There are problems of allocation of enforcement responsibilities among the three AMEAs and other enforcement bodies with jurisdiction potentially overlapping and conflicting with each other¹⁵⁵. The lack of clarity on legal enforcement in general has been an institutional problem in China which hinders the efficiency and effectiveness of law enforcement as a whole¹⁵⁶. Due to the influx of parties seeking to obtain IPRs, the AMEAs had allocated a significant portion of their budgets and personnel to reviewing the IPRs applications. There were limited resources left to handle the investigation and adjudication of IPR infringement claims¹⁵⁷. The complex division of labour among the AMEAs has worsened the competition enforcement and this has to be changed.

E. Summary

In summary, the implementation of the AML over the 5 years was sparingly successful. AML needs clarity and guidance for the application of the articles, especially on Article 55; transparency as to how different competition and IP laws and rules, such as the TRIPs interact with the AML and a better enforcement mechanism among the AMEAs and other enforcement bodies. The enforcement should aim more at the SOEs rather than foreign businesses. The NDRC and the SAIC had stated in August 2012 that they would increase transparency of their enforcement actions under the AML¹⁵⁸. Some basic information of the investigation would be stated clearly to the public, such as what procedures to follow in order to apply for leniency, when the business operator under investigation will be notified, and how fines are calculated and determined. It remains to be seen that a single agency, fair and independent¹⁵⁹, will be established to be responsible for the enforcement and implementation of both the AML and other competition laws¹⁶⁰. Alternatively, specific guidelines on the division of labour among the AMEAs and other enforcement bodies will be available if the current model is kept. Conflicts between them can be reduced and capacity-building within each of them can be enforced. Lastly, a specific IP and competition piece of legislation may be desirable, instead of relying on Article 55 AML only, combining various applicable laws and regulations and with a clearer structure.

¹⁵³ Above 66

¹⁵⁴ Above 12

¹⁵⁵ Above 110

¹⁵⁶ *ibid*

¹⁵⁷ Above 12

¹⁵⁸ Above 77

¹⁵⁹ David Tang and Bill Zhang (2007) *The PRC's New Antimonopoly Law has a long way to go* <http://www.mondaq.com/article.asp?articleid=54318> (17th July 2013)

¹⁶⁰ Jiao Wu “Calls for a single anti-monopoly agency” *China Daily* 14th December 2007, 3

Gerald F. Mosoudi, Deputy Assistant Attorney General of the Anti-trust division of DOJ in the U.S. commented that the Chinese government has indeed demonstrated its openness to the ideas and experiences of competition law enforcers worldwide in the enforcement of the competition law regime¹⁶¹. Definitely China can look into more of the established approaches in the E.U., to improve on the existing regime, especially on the application of the AML. China should also continue to increase the reward to foreign investors and induce more innovation¹⁶².

IV. Comparison with the E.U. approaches

Different international approaches vary in the degree of seriousness with which competition laws are enforced and the right institutional approach to competition protection and whether it is best done administratively or judicially¹⁶³. Note however that there is still no consensus as to the definition of some key elements, such as “competition” and “anti-competitive”. Chinese AMEAs can draw on lessons from countries with well-established regimes with more advanced IP and competition laws, such as the E.U. The two approaches have been well-established for many years and are models for many competition law regimes in the world. Most importantly, China can learn from the success as well as avoiding the wrong turns they had made. But it is equally important to understand how the regimes deal with the interrelation between IPRs protection and competition law enforcement. The different political and cultural beliefs behind the regimes inevitably lead to different answers in dealing with IPRs enforcement, not just because they ascribe to different schools of economic thought¹⁶⁴.

E.U.

The E.U. is an established regime and is mostly laid out in the Treaty on the Functioning of the European Union¹⁶⁵ (“TFEU”). It prohibits anti-competitive agreements¹⁶⁶, abuses of dominant position¹⁶⁷ and patent misuse, and governs SSOs. The AML finds many resemblances to the TFEU. The general prohibitions of AML such as Articles 13 to 16 reflect Articles 101 and 102 TFEU. Article 101 prohibits agreements to restrict prices when licensee sells goods to third parties, impose no-challenge clauses, prohibit licensee from supplying from anyone, restrict reselling to certain types of customers, and impose exclusive grant-backs or assignment-back obligations¹⁶⁸. Article 102 describes four ways of a dominant position: tying, refusal to license, unfair pricing and excessive pricing¹⁶⁹. Standard-setting may raise particular competition concerns, such as a patent ambush¹⁷⁰,

¹⁶¹ Above 35, 646

¹⁶² *ibid*

¹⁶³ Honourable Chief Justice Robert French *Unleashing the tiger? – Competition law in China and Hong Kong* Melbourne Law School Conference 2008

¹⁶⁴ R. Ian McEwin *Intellectual property, competition law and economics in Asia* Oxford Hart Publishing Ltd 2011, 17

¹⁶⁵ Treaty on the Functioning of the European Union 1957

¹⁶⁶ Article 101 TFEU

¹⁶⁷ Article 102 TFEU

¹⁶⁸ Above 166

¹⁶⁹ Above 167

¹⁷⁰ Article 101(3) TFEU

where the patent holder fails to inform a SSO about the relevant patent, similar to the suggestion in the Guide. Other examples include an inadequate standardization process with standard-setting procedures that are not sufficiently open and transparent, compulsory licensing and standards manipulation. But as discussed, there are no such equivalent provisions in the AML.

The AML is very similar to the TFEU. Articles 17 to 19 AML are similar to Article 102 TFEU, and the pre-merger notifications are similar to that in Articles 86 and 87 TFEU respectively. Both the E.U. approach and AML has no criminal liability system for violation of the laws but rely on fines. The presumption of dominance is 50%¹⁷¹, which is higher than that in Article 19 AML. The burden of proof lies similarly on the claimant or the enforcement authority¹⁷². Again, there is no equivalent Article 55 in the TFEU¹⁷³.

The Guide resembles the four-prong test from the E.U. approach: firstly, the agreement must contribute to improving production or distribution of goods or promoting technical or economic progress; secondly, the restrictive conduct must be indispensable to achieve the efficiency; thirdly, that efficiency must be shared with consumers; and lastly, the restrictive conduct will not severely impede competition in the relevant market¹⁷⁴. But requiring a dominant firm to grant access to its essential IPR under Article 18 of the Guide¹⁷⁵ is a departure from the *IMS Health* case¹⁷⁶, as it is not only about the secondary market as stated in the case, but the market at the same level as in the Guide. Plus, the Guide does not stress the preclusion of a new product and objective justification elements while listed in Article 15 AML¹⁷⁷, thus expanding the essential facility doctrine improperly and opening potential floodgates for more IPR infringements. Although China is in no way bound to follow E.U. law, some insight may continue to be gained by learning from the E.U. approach¹⁷⁸.

V. Lessons for China

To As the Chinese saying goes, it is best to learn from everyone and gather the wisdom¹⁷⁹. Mindful of China's specific social and economic circumstances rather than uncritically importing legislative models from other approaches¹⁸⁰, there is no 'one size fits all' approach for China. It is argued that China can certainly learn from the Block Exemptions approach adopted by the E.U. for horizontal agreements.

¹⁷¹ AKZO Chemie (1991) C-62/86 ECRI-3359

¹⁷² Above 64

¹⁷³ Above 113

¹⁷⁴ Above 77

¹⁷⁵ Article 18, the Guide

¹⁷⁶ *IMS Health GmbH & Co. OHG. v. NDC Health GmbH & Co. KG.* (2004) C-418/01

¹⁷⁷ Above 114

¹⁷⁸ Above 51

¹⁷⁹ In Chinese: “集思廣益”

¹⁸⁰ Above 110

Block Exemptions from the E.U. approach

Similar to Article 15 AML and Article 12 of the Guide with a list of the safe harbour rules, the Block Exemptions from the E.U. approach are highly suitable for AML to adopt, in particular, the 2004 Technology Transfer Block Exemption Regulation¹⁸¹ (“TTBER”) for technology transfer. As well, other specialisation agreements on unilateral and reciprocal specialisation, and joint production are suitable for China¹⁸². These are attempts to exclude the application of Article 101(1) TFEU¹⁸³. The TTBER prohibits exclusive grant-back obligations of a licensee’s own severable improvements, no-challenge clauses and restrictions on the licensee’s ability to exploit its own technology or on its ability to develop new technology where the license is granted to a non-competitor¹⁸⁴. It is very detailed in contrast with the Guide. It aims to strike a delicate balance between granting rights broad enough to create incentives for innovation, but at the same time not so broad as to hamper further improvements for competitors¹⁸⁵. It allows firms to formulate their licensing agreements according to their commercial and business needs¹⁸⁶. But TTBER only applies to bilateral agreements at present. It should include more IP-related agreements that can affect competition law¹⁸⁷, which China may consider expanding its scope to cover the above deficiencies and to multi-party licensing agreements as well. Note however that the market share threshold combined in the TTBER is 20%¹⁸⁸, not 10%. It remains a problem for China to keep such a low threshold.

Conclusion

It has been a longstanding debate as to how to “marry the innovation bride and the competition groom”¹⁸⁹ in China. The competition law regime in China in particular with the AML had implemented quite efficiently to provide IPRs protection, alongside with other competition and IP regimes. Still, the regime is relatively young and there are many areas of improvement, on improving clarity, transparency with other laws, including the TRIPS and better enforcement structure. China should continue to learn from the approaches taken by developed regimes in the E.U.. As the economic

¹⁸¹ Commission Regulation (EC) No. 772/2004 of 27th April 2004 on the application of Article 81(3) TFEU to categories of technology transfer agreements

¹⁸² Commission Regulation (EC) No 2658/2000 of 29th November 2000 on the application of Article 81(3) TFEU to categories of specialisation agreements

¹⁸³ Commission Regulation (EU) No 1218/2010 of 14th December 2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements

¹⁸⁴ Article 5(1), TTBER

¹⁸⁵ Willard Tom *Summary in competition law and innovation* OECD 1998, 455

¹⁸⁶ Christina Aristidou (2010) Cyprus: the EU has/has not achieved a proper balance between competition law and intellectual property
<http://www.mondaq.com/x/83430/Antitrust+Competition/The+EU+Has+Not+Achieved+A+Proper+Balance+Between+Competition+Law+And+Intellectual+Property> (17th July 2013)

¹⁸⁷ A. Dolmans and A. Piilola The proposed new Technology Transfer Block extension: is Europe really better off than with the current regulation? (2003) 26(4) *World Competition* 541

¹⁸⁸ Above 181 ¶13

¹⁸⁹ Mario Monti *The New EU Policy on Technology Transfer Agreements* Paris 2004

reform in China deepens, the breadth and depth of law enforcement will get better, which is highly desirable¹⁹⁰.

As the former Prime Minister Wen Jiabao once said, the competition of the world's future, including China, is the competition in IP¹⁹¹. There is hope for China's AML and the competition law regime to develop for better IPRs protection and keep up with the traditional Chinese culture of encouraging innovation and improvement throughout.

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¹⁹⁰ Huang Ying China's antitrust law enforcement after the 18th party congress February 2013 (2) *CPI Antitrust Chronicle* 4

¹⁹¹ Wen Jiabao *Opening ceremony of the National People's Congress* Beijing 2013