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ABSTRACT

Anti-Monopoly Commission ("AMC") has charged four Chinese state agencies with developing guidelines on when IPR-related conduct violates China's Anti-Monopoly Law. So far, two of those agencies—the NDRC, which oversees price-related conduct, and the SAIC, which oversees non-price-related conduct—have released draft guidelines. Those drafts, however, display striking differences between the enforcement approach of the two agencies, the NDRC appears significantly more open than the SAIC to balancing anticompetitive harms with procompetitive benefits under a rule-of-reason approach, whereas the SAIC's draft in places imposes a threshold requirement of a dominant market position.Here, the authors explore five elements of the NDRC and SAIC guidelines—(1) safe harbors, (2) "unfairly high" licensing rates, (3) refusals to deal, (4) patent pools, and (5) standard-essential patents—and highlight the core principles of the Chinese agencies, comparing them with one another as well as with international standards. The authors also raise practice considerations for clients and counsel when assessing risk exposure for IPR-related business strategies that cross international boundaries.

La Commission Anti-Monopole chinoise a mandaté quatre agences d'Etat chinoises pour développer des lignes directrices relatives à des pratiques liées aux droits de propriété intellectuelle susceptibles de violer le droit antitrust chinois. Jusqu'à présent, deux de ces agences – la NRDC qui s'est attaquée aux pratiques de prix abusifs – et la SAIC, qui s'est attaquée aux pratiques non tarifaires – ont chacune publié leurs projets. Toutefois, ces projets font apparaître d'importantes différences dans l'approche de mise en œuvre du droit de la concurrence des deux agences (la NRDC apparaissant plus ouverte pour contrebalancer les effets pro- et anti-compétitifs en application d'une règle de raison alors que le projet de la SAIC impose un seuil pour évaluer la position dominante sur le marché). Les auteurs étudient cinq points des lignes directrices de la NRDC et de la SAIC – (1) les seuils de sécurité, (2) les taux de licence abusifs, (3) les refus de vente, (4) les Communautés de brevets (5) et les brevets essentiels. L'article met en avant les principes directeurs des agences chinoises, en les comparant tant entre elles qu'avec les standards internationaux. Les auteurs soulèvent également des considérations pratiques pour les clients et leurs conseils dans l'évaluation de l'exposition au risque pour les entreprises engagées dans des stratégies liées aux droits de propriété intellectuelle qui traversent les frontières internationales.

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I. Introduction

1. Since the inception of the Chinese antitrust regime in 2008, China has rapidly established itself as a force in global antitrust enforcement, particularly in technology sectors and other industries that depend on intellectual property rights ("IPRs"). Multinational companies in those sectors have increasingly found themselves in the crosshairs of Chinese enforcers. In 2015, for example, China levied a nearly billion-dollar fine against Qualcomm, and it is currently conducting a large-scale investigation of Microsoft for potential violations of the Anti-Monopoly Law of the People's Republic of China ("AML"). And while China has at times faced criticism for opaque and politically motivated

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antitrust enforcement,[1] it has recently taken steps to increase transparency and procedural fairness. In that connection, China is currently developing guidelines for antitrust enforcement with respect to IPRs. Four of China's state agencies, at the direction of China's Anti-Monopoly Commission ("AMC"), have been charged with developing individual IPR guidelines, which are expected ultimately to be integrated into a master set of IPR guidelines. Two of those agencies have released guidelines thus far: the State Administration of Industry and Commerce ("SAIC") and the National Development and Reform Commission ("NDRC").[2]

2. Although the situation may evolve as additional guidelines emerge, the SAIC and NDRC guidelines have already shed light on important differences in the development of antitrust policy inside the Chinese antitrust agencies. As one example, the NDRC, charged with enforcement of price conduct, has issued guidelines that signal greater receptivity to rule-of-reason analyses that evaluate potential procompetitive benefits. By contrast, the SAIC, charged with enforcement of non-price conduct, has steered away from procompetitive balancing that could temper enforcement. It remains to be seen whether the final set of integrated guidelines will reconcile or reinforce apparent tensions like these between the NDRC and the SAIC, though some have taken the position—which we do not share—that the drafts submitted "do not differ in principle but only in style."[3] In addition, the Chinese guidelines have in important respects both borrowed and diverged from the IPR guidelines of international authorities in the United States, the EU, Japan, South Korea, and elsewhere.

3. Increasingly, practitioners are required to consider carefully the points of contact and departure among antitrust regimes to advise clients on risk exposure for business strategies that cross international boundaries. To that end, we here identify several of the most notable provisions in the Chinese IPR guidelines released to date, compare the Chinese positions to those of other jurisdictions, and explore some implications of the differences.

1 *See*, e.g., A. Huyue Zhang, Bureaucratic Politics and China's Anti-Monopoly Law, 47 *Cornell Int'l L.J.* 671, 674 (2014) ("*Chinese antitrust enforcement outcomes largely result from a struggle among government agencies which decide antitrust issues in terms of the personal consequence for their stature and power*" as well as "*protectionism and discrimination*.").

2 No guidelines have yet been released for China's merger control agency, the Ministry of Commerce ("MOFCOM"), or its State Intellectual Property Office ("SIPO"), though recent press reports suggest that the AMC had received all four drafts from the NDRC, the SAIC, MOFCOM, and SIPO by early June of 2016. *See* China's Anti-monopoly Commission forms team to revamp draft IP antitrust guidelines, *PaRR*, July 20, 2016.

3 Id. (quoting a local practitioner).

II. Features of SAIC and NDRC guidelines

4. Below we survey the Chinese guidelines' treatment of five key issues one must frequently consider when advising clients on antitrust exposure arising from IPR-related business conduct: (1) safe harbors, (2) "unfairly high" licensing rates, (3) refusals to deal, (4) patent pools, and (5) standard-essential patents.

1. Safe harbors

5. The SAIC's and the NDRC's "safe harbor" provisions exempt conduct from antitrust liability at threshold figures generally similar to those in the U.S., the EU, and Japan. However, in the case of the SAIC, the Chinese agency also makes a significant departure from the U.S. standard, in a manner that could incorporate price regulation into the safe harbor analysis.

6. The SAIC provides that—barring "*contrary evidence*" of anticompetitive harm—an undertaking on IPRs will be granted a safe harbor: (i) in the case of competitors, where (a) the parties' combined shares do not exceed 20%, or (b) there are at least four substitutable technologies independently controlled by other entities and "*which can be acquired at reasonable costs*," and (ii) in the case of non-competitors, where (a) neither party's share exceeds 30%, or (b) there are at least two substitutable technologies independently controlled by other entities and, again, "*which can be acquired at reasonable costs*."[4] The SAIC's safe harbor provisions do not, however, apply to competitor agreements to limit price or restrict output.[5]

7. The NDRC's safe harbors—which also contain certain exceptions—exempt IPR undertakings: (i) in the case of competitors, where the parties' combined shares do not exceed 15%, and (ii) in the case of non-competitors, where the share in any relevant market does not exceed 25%.[6] It is not clear why the NDRC has adopted thresholds that are below those set by the SAIC.

8. Safe harbors at the levels set by the SAIC and the NDRC mirror approaches taken in other jurisdictions. The SAIC's approach is perhaps closest to that taken in the U.S. by the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC"), which—excepting agreements that are "*facially anticompetitive*"—extend "*safety zones*" to IPR licenses where the parties'

4 State Administration for Industry and Commerce, Announcement on Soliciting Public Comments on Anti-monopoly Enforcement Guidelines on Abuse of Intellectual Property Rights 7th Edition Art. 21 (2016) (as translated by Wolters Kluwer).

5 Id.

6 State Council Anti-Monopoly Commission, Anti-Monopoly Guidelines on Intellectual Property Abuse Sec. II(iii) (2015) (unofficial English translation).

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combined shares do not exceed 20%, or, if no share data are available, there are four or more independently controlled technologies "*at a comparable cost to the user*."[7] Similarly, the European Commission ("EC") extends safe harbor treatment to agreements between competitors with combined shares below 20% and, in the case of non-competitors, 30%.[8] Japan also deems "*minor*" any effects in reducing competition if the parties have combined shares below 20%.[9]

9. One critical difference between the approach in the U.S. and that of the SAIC, however, is the guidelines' treatment of prices for substitute technologies. The U.S. guidelines focus on substitute technologies at "*comparable cost*," whatever the rate set by the market, whereas the SAIC focuses on substitute technologies at "*reasonable*" costs, leaving space open for the agency to apply its own subjective view of an appropriate price level. This ambiguous standard of price "reasonableness" seems likely to complicate the task of practitioners' efforts to determine the applicability of safe harbors in China compared to the U.S. and other jurisdictions.

10. The American Bar Association ("ABA") focused on this language in the original draft form of the SAIC rules, suggesting that the SAIC "*eliminate the ambiguity of determining the 'reasonable' cost and serve the goal of identifying true substitute technologies*."[10] The SAIC retained the provision as written in the seventh draft of its guidelines, however, leaving room for price oversight by Chinese antitrust enforcers—an issue that has become even more controversial in light of the subsequently released draft NDRC guidelines.

2. "Unfairly high" licensing rates

11. After the NDRC released its draft guidelines in December 2015, commentary from the international antitrust bar focused on the provision establishing "*licensing IPRs with unfairly high royalties*" as an abuse of dominance.[11] In addition, the SAIC—although responsible for non-price conduct, not price conduct—also contains in its guidelines provisions policing the use of unfairly high licensing fees.[12] These provisions represent a significant departure from international norms.

12. The NDRC guidelines, while stating that the default position is not to regulate royalty rates under the AML, outline a seven-factor test for exceptions in which "*dominant*" businesses may not license royalties at "*unfair*" rates (with dominance defined, under Article 19(1) of the AML, as a firm that has 50% or more share). Those seven factors include, *inter alia*, licenses for which the rate charged "*obviously does not match*" the value of the IPR licensed, the license history or comparable rates of relevant IPRs, whether the royalties exceed the geographical or product scope of the IPRs, and whether the licensor charges royalties for expired or invalid IPRs.[13]

13. The most recent draft of the SAIC guidelines (the seventh) takes an analogous approach, imposing antitrust liability against dominant firms for royalties that are "*unfair*" and will "*eliminate or restrict competition in the relevant market*."[14] The factors considered by the SAIC are substantively similar to those considered by the NDRC.[15]

14. These provisions also track the NDRC's recent enforcement efforts, particularly with regard to its investigation into Qualcomm's licensing practices. The NDRC concluded its Qualcomm investigation in February 2015 with a record fine of RMB 6.088B (approximately $975M USD) for, among other conduct, artificially inflating royalties charged to licensees of standard-essential wireless technology. The NDRC found that Qualcomm had charged royalties for expired patents, demanded free cross-licenses for patents from standard-essential patent ("SEP") licensees, and charged licensees at rates based on the net selling prices of handset devices, all leading to unfair and excessive royalties.[16]

15. As a threshold matter, antitrust enforcement addressed to the "reasonableness" of the royalty rate, divorced from any evidence of harm to competition, represents a significant deviation from international norms. Indeed, to the extent that these provisions permit such enforcement they do not appear to have an analogue in the IPR guidelines of other major antitrust authorities. Japan, for example, considers "*prohibitively expensive*" royalties to be "*equivalent to a refusal to license*" that "*normally constitutes no problem*."[17] The South Korean guidelines also regard high royalties as "*a fair exercise of patent rights*," and take issue only with conduct that harms competition, such as collaborating to fix

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7 DOJ & FTC, Antitrust Guidelines for the Licensing of Intellectual Property Sec. 4.3 (1995) ("US").

8 Comm'n Reg. 316/2014, art. 3, 2014 O.J. (L 93) 21 ("EC Reg").

9 Japan Fair Trade Comm'n, Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 2(5) (2016) ("JFTC").

10 The ABA's commentary responded not directly to the SAIC guidelines but rather to the rules implementing the draft guidelines. Nonetheless, the SAIC guidelines and the implementing rules are substantively similar and the ABA's commentary cited here is applicable to both. Am. Bar Ass'n, Joint Comments of the American Bar Association Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law on the SAIC Draft Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition ("Joint ABA Comments on SAIC Draft Rules") (July 9, 2014), at 2.

11 NDRC Sec. III(ii)(1).

12 *See*, e.g., SAIC Arts. 23, 28, 29.

13 Id.

14 SAIC Art. 23.

15 It remains unclear, however, how the SAIC's enforcement authority for unfair licensing rates will come into play, as the SAIC is responsible for non-price conduct.

16 D. Lim, China's NDRC Issues Penalty Decision Against Qualcomm Imposing $975M Fine, *tidBITS*, Feb. 9, 2015.

17 JFTC Part 3(1)(i).

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or maintain a royalty rate.[18] Similarly, neither the U.S. nor the EC scrutinizes IPR royalty rates independent of anticompetitive conduct.[19]

16. Not surprisingly, the Chinese focus on the reasonableness of royalty rates has been roundly criticized. Prior to the NDRC's fine of Qualcomm, FTC Chairwoman Edith Ramirez criticized the NDRC for imposing liability for excessive royalties, stating: "*I am seriously concerned by these reports*" because they "*suggest an enforcement policy focused on reducing royalty payments for local implementers as a matter of industrial policy, rather than protecting competition and long-run consumer welfare*."[20]

17. The ABA characterized the NDRC's unfair royalties provision as "*in tension with the principle of U.S. competition policy that competition law should not prohibit a monopolist from charging the highest prices that it can obtain for its products and its IPRs, and the royalty level should not be a matter of concern for competition law*."[21] Among other critiques, the ABA characterized the factors as "*vague and ambiguous*" and in need of narrowing.[22]

18. More broadly, the provisions raise a related question about whether China will determine price "*fairness*" using antitrust principles or as a means to promote domestic industrial policy. Both the SAIC and NDRC guidelines are enacted in accordance with the AML, which states that it serves antitrust ends such as "*protecting fair competition in the market*" while also supporting domestic growth through "*promoting the healthy development of the socialist market economy*."[23] The result is a mandate that could require Chinese antitrust authorities to focus on the needs of Chinese competitors rather than solely on free-market competition.

19. With that said, it is also worth noting that the Chinese IPR provisions in some respects parallel enforcement in other jurisdictions. Other jurisdictions do, for example, recognize harm to competition when licensors unlawfully extend their patents beyond their geographical, temporal, or subject matter boundaries. In the U.S., there is a line of cases outlining "*patent misuse*" as an equitable defense to infringement actions or actions to collect royalties: "*What patent misuse is about* (…) *is 'patent leverage,' i.e., the use of the patent power to impose overbroad conditions on the use of the patent in suit that are not within the reach of the monopoly granted by the Government*."[24] Similarly, South Korea imposes antitrust liability for charging royalties beyond the subject matter and time period of a patent grant.[25]

20. The distinction, however, is that the SAIC and NDRC guidelines are not focused solely on exceeding the scope of a patent grant. Instead, they set forth a wide range of additional factors for consideration, which opens the door for subjective and non-transparent enforcement determinations regarding "*unfairly high*" royalties.

3. Refusals to deal and the essential facilities doctrine

21. The Chinese guidelines also depart from U.S. antitrust norms—and somewhat from European antitrust norms[26]—in adopting the essential facilities doctrine.

22. In the United States, firms have no general obligation to supply their competitors; a unilateral refusal to deal is not, except in very unusual circumstances, unlawful.[27]

23. The NDRC's guidelines adopt the U.S. position as a starting point. "*Generally*," the NDRC states, "*business operators are under no obligation to deal with their competitors or counterparties*."[28] But then the NDRC leaves open the possibility of invoking the essential facilities doctrine in several situations, including where "*the relevant IPRs are necessary to have access to the relevant markets, and* [there are insufficient] *reasonably*

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18 Korea Fair Trade Comm'n, Guidelines for Review of Unreasonable Exercise of Intellectual Property Rights Sec. III(3) (2014) ("KFTC").

19 *See*, e.g., Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 89; Communication from the Commission—Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements, 2014 O.J. (C 89) 3, 82–83 (Sec. 4.2.1 Royalty Obligations) ("EC Guidelines"). The U.S. does have a standard for how to calculate reasonable royalty rates for purposes of determining damages in infringement cases, known as the *Georgia-Pacific* factors, which also include factors used by the SAIC and NDRC guidelines such as licensing history and rates charged for comparable IPR. *See* Chairwoman Edith Ramirez, *Standard-Essential Patents and Licensing* (Sept. 10, 2014), at 9–10 ("Ramirez") (discussing *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir. 1971)). However, that standard applies in the case of infringement and not as a general governor of licensing rates.

20 Ramirez at 9; *see also* W. J. Baer, Assistant Attorney General for Antitrust, DOJ, Remarks as Prepared for Delivery at the 41st Annual Conf. on Int'l Antitrust Law and Policy: Int'l Antitrust Enf't: Progress Made; Work to Be Done (Sept. 12, 2014) ("*Any short-term gains derived from imposing what are effectively price controls will diminish incentives of existing and potential licensors to compete and innovate over the long-term*.").

21 ABA, Joint Comments of the American Bar Association Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law on the Anti-Monopoly Guideline on Intellectual Property Abuse (Draft for Comments) ("Joint ABA Comments on NDRC Draft Rules") (Feb. 4, 2016), at 14.

22 Id. at 15.

23 AML Art. 1.

24 *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1331-32 (Fed. Cir. 2010) (en banc), *cert. denied*, 563 U.S. 987.

25 KFTC Sec. III(3)(A)(3)–(4).

26 The EC has an essential facilities doctrine, based primarily on cases related to abuse of a dominant position, but only applies it rarely. *See*, e.g., Commission of the European Communities, Defining what is legitimate competition in the context of companies' duties to supply competitors and to grant access to essential facilities, in OECD Policy Roundtables: The Essential Facilities Concept 93 (1996). However, the European Court of Justice has applied the doctrine only under "*exceptional circumstances*," when the inability to access the essential facility would "*eliminate all competition*" in that market or in a downstream market. Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, 1998 E.C.R. I-07791, at § 26; Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, 2004 E.C.R. I-05039, at § 12.

27 *See Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410-11 (2004) (stating that, notwithstanding the opinions of several lower courts, the Supreme Court has "*never recognized*" the essential facilities doctrine); DOJ & FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (Apr. 2007), at 6 ("*Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections*.").

28 NDRC Sec. III(ii)(2).

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available alternative IPRs," and also where there is a "*lack of necessary support for qualities and technologies*" for the use of IPRs.[29]

24. The SAIC guidelines include no prefatory language that businesses have no general obligation to deal with their competitors. Instead, the SAIC sets forth three factors for determining whether an IPR constitutes an "*essential facility*": (1) the IPR "*cannot be reasonably substituted*" and is "*necessary*" for competition; (2) refusing to license the IPR will adversely affect competition or innovation, to the impairment of "*consumers' interests or public interests*"; and (3) licensing the IPR will not cause "*unreasonable harm*" to the licensor.[30]

25. American commentators have expressed concern about this position taken by both the SAIC and NDRC. For example, in urging the SAIC to omit this provision, the ABA stated its "*concern that* [the SAIC] *endorses the wide application of the 'essential facilities doctrine*,'" which it asserted "*has rarely been used in the jurisdictions where it exists, and has never been used in the patent context anywhere in the world*."[31] Others have voiced a concern that the SAIC rule would "*allow virtually any unilateral refusal to license to be characterized as an abuse of IPR, depending on how the factors are applied*."[32] Nonetheless, both guidelines have retained this provision, requiring practitioners to perform an essential facilities analysis in China that has been rejected by the U.S. and employed in the EC only in "*exceptional circumstances*."

4. Patent pools and cross-licensing

26. One area where the NDRC (if not quite the SAIC) appears closer to the antitrust philosophies of non-Chinese agencies is in patent pooling and cross-licensing.

27. As a threshold matter, before turning to the SAIC and NDRC provisions, it is worth noting that there are several points of commonality among international jurisdictions such as the U.S., Japan, and South Korea. First, the intellectual property guidelines of all three jurisdictions acknowledge the procompetitive benefits of patent pooling and cross-licensing, including their potential to reduce transaction costs, improve efficiency, and promote innovation.[33] Second, all three guidelines appear to favor a rule-of-reason analysis that weighs those procompetitive benefits against "*unreasonable*" anticompetitive harms.[34] Third, all three guidelines explicitly caution against using patent pools as a mechanism for collusive agreements to fix price or volume or engage in market division.[35] And fourth, all three raise similar concerns about the potential for a patent pool to foreclose competition. The U.S. guidelines, for example, identify two primary types of harm: (1) foreclosing firms that do not participate in the patent pool from being able to "*effectively compete*," where the pool participants collectively hold market power, and (2) discouraging pool participants from engaging in R&D.[36]

28. The NDRC guidelines appear largely consistent with the approaches taken by the U.S., South Korea, and Japan.[37] The NDRC acknowledges procompetitive benefits of patent pools and adopts a rule-of-reason analysis to balance them against certain enumerated harms. One of those harms is the risk of collusive activity through the impermissible exchange of competitively sensitive information ("CSI"), such as price and volume, that is not "*necessary*" to the pooling collaboration.[38] And, like the U.S., Japan, and South Korea, the NDRC raises concerns about "*block*[ing]" or foreclosing competitors in a relevant market.[39]

29. In contrast to the NDRC, there are starker differences between the SAIC's approach to patent pools and those of international authorities. For example, unlike the NDRC and the U.S., Japan, and South Korea, the SAIC makes no reference to the potential procompetitive benefits of patent pools. Thus, the SAIC's treatment does not appear to follow the rule-of-reason approach of the NDRC or other countries. Instead, in certain places, the SAIC appears to impose a presumption of a violation unless patent pool members can affirmatively "*prove*" that their conduct does not violate the AML.[40] The SAIC guidelines also caution patent pools against restricting members from independently licensing patents or developing competing technologies outside of the patent pool.[41] Those restrictions are not contained in, for example, the U.S. guidelines.

30. There is, however, one important respect in which the SAIC's approach mirrors the approach taken by the U.S. The U.S. guidelines take the view that anticompetitive harms occur most frequently where pool participants are dominant, either in the form of "*market power*" in the relevant market and/or comprising "*a large fraction*" of

29 Id.

30 SAIC Art. 24.

31 Joint ABA Comments on SAIC Draft Rules, at 3; *see also* Joint ABA Comments on NDRC Draft Rules, at 17–18.

32 The U.S. Chamber of Commerce and the Am. Chamber of Commerce in China, Joint Comments to the State Administration of Industry and Commerce on the Guideline on Intellectual Property Abuse (Draft for Comments 7th Version) ("Chamber of Commerce Comments") (Feb. 2016), at 11.

33 US Sec. 5.3, JFTC Part 3(2)(i)–(iii), and KFTC Sec. III(4)(A).

34 *See* id.

35 *See* id.

36 US Sec. 5.3; *see also* JFTC Part 3(2)(i)(d) (focusing on harm to entrants and hampering existing competitors) and KFTC Sec. III(4)(A)(2) (cautioning against unreasonably withholding licenses from non-pool licensees or extending licenses on discriminatory terms).

37 NDRC Secs. II(i)(2)–(3).

38 Id. at (4); cf. KFTC Sec. III(4)(A) (raising similar concerns in South Korea about patent pools facilitating "*information exchange*" among competitors).

39 Id. at (3).

40 *See* SAIC Art. 29 (imposing the presumption with regard to exchanging CSI).

41 Id. at (1)–(2).

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R&D activity.[42] Similarly, the SAIC conditions patent pool liability on the patent pool's "*dominant market position*."[43] By contrast, the NDRC guidelines—like those of Japan and South Korea—contain no explicit mention of market power in assessing the antitrust implications of patent pools.

31. Commentary from the U.S. antitrust bar has focused on some of these differences between the Chinese guidelines and U.S. standards. For example, the ABA has proposed that the SAIC adopt a rule-of-reason analysis for patent pools, using the "*extensive guidance*" of U.S. authorities on how to weigh competitive effects.[44] Similarly, the U.S. Chamber of Commerce has criticized the SAIC guidelines for unduly focusing on exclusionary conduct and the exchange of CSI without regard to possible procompetitive effects.[45]

32. As a general matter, while the SAIC and NDRC mirror and diverge from international norms in various respects, the NDRC guidelines overall appear closer to the U.S. standard than do the SAIC guidelines. If these discrepancies persist after the guidelines are revised and integrated, the paradoxical effect would be closer alignment between international jurisdictions and China on the price effects of patent pools (reviewed by the NDRC) than on their non-price effects (reviewed by the SAIC).

5. Standard-essential patents

33. The Chinese guidelines also address the key area of standard-essential patents ("SEPs"). SEPs are patents that are incorporated into industry technical standards, typically in exchange for a commitment to the standard-setting organization ("SSO") that the patent-holder will license its SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms. As with patent pools, the NDRC hews closer to the approach taken by international authorities (which favor rule-of-reason treatment), whereas the SAIC departs significantly from other authorities, especially the U.S.

34. The NDRC approach to SEPs acknowledges the efficiencies that can be created from adopting industry standards. In doing so, it outlines what appears to be a rule-of-reason analysis for assessing anticompetitive harms, focusing on several factors, including whether the standard-setting involves competitors, whether it excludes specific businesses or relevant solutions, and whether it requires an agreement not to implement other standards.[46] Similar to its position on patent pools, the NDRC imposes no prerequisite of market power for a finding of harm to competition.

35. The SAIC guidelines, on the other hand, enumerate prohibited actions with no reference to potential procompetitive benefits of standard-setting. The SAIC prohibits a firm from "*deliberately fail*[ing] *to disclose*" information regarding its IPRs to the SSO or waiving its rights, only to assert them later after the patent has been included in a standard.[47] The SAIC rules implementing the SAIC guidelines also prohibit conduct that violates the FRAND "*principle*" (e.g., refusing to deal)—apparently without any threshold requirement that the SEP be subject to an actual FRAND contractual commitment.[48] On the other hand, the SAIC guidelines appear to require a "dominant market position" for liability, where the NDRC does not.[49]

36. The SAIC's approach departs in several important ways from standards used in the U.S. and other jurisdictions. The first departure concerns the rule of reason. Although the U.S. guidelines—released in 1995—make no reference to SEPs or FRAND commitments, the agencies have repeatedly stated that they assess SEP-related antitrust issues under the rule-of-reason framework.[50] Because the NDRC appears to embrace the rule of reason for SEPs, it seems to be more closely aligned than the SAIC is with the U.S. approach and that of other foreign enforcers.[51]

37. Another distinctive feature of the SAIC approach is the extent of the FRAND obligation that it imposes. For example, the South Korean and EC guidelines acknowledge the private use of FRAND commitments as a means to prevent certain anticompetitive behaviors, but those jurisdictions do not automatically apply FRAND obligations.[52] By contrast, the SAIC guidelines appear to require FRAND licensing of SEPs regardless of whether there exists any contractual agreement to do so. Commentators, including the ABA, have urged the SAIC to confine this provision solely to SEPs subject to FRAND contractual commitments, in order to avoid eliminating the exclusivity rights conferred in a patent grant and unduly reducing incentives for innovation.[53]

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42 US Sec. 5.3.

43 SAIC Art. 29.

44 Joint ABA Comments on SAIC Draft Rules, at 7.

45 Chamber of Commerce Comments, at 16–17.

46 NDRC Sec. II(i)(4).

47 SAIC Art. 28.

48 SAIC Rules Art. 13. The SAIC guidelines do not contain the same language as the SAIC rules regarding conduct that violates the FRAND "*principle*," but the most recent version of the guidelines does bar patent-holders from engaging in the same types of conduct prohibited by the rules, regardless of whether or not the patent is FRAND-encumbered. *See* SAIC Art. 28.

49 SAIC Art. 28

50 *See*, e.g., DOJ & FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (Apr. 2007), at 37; Ramirez at 4; FTC, Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Motorola Mobility LLC and Google Inc*., File No. 121-0120 (Jan. 3, 2013).

51 *See*, e.g., KFTC Sec. II(2)(D), III(5)(A)(1-6) and EC Guidelines § 277 (analyzing standardization agreements "*in their legal and economic context with regard to their actual and likely effect on competition*").

52 KFTC Sec. III(5)(A); EC Guidelines §§ 287–288.

53 Joint ABA Comments on SAIC Draft Rules, at 9–10 (noting that the SAIC's position on extending FRAND commitments to non-FRAND-encumbered patents is in conflict with the EC).

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38. The SAIC also adopts a position with respect to disclosure of rights to the SSO that stands in contrast to the approach taken by the U.S. The SAIC guidelines impose antitrust liability for firms that, in the standard-setting process, "*deliberately fail to disclose the information about their rights to the* [SSO]."[54] Importantly, the SAIC guidelines do *not* appear to require any causal link between the patent-holder's failure to disclose its rights to the SSO and the SSO's decision to incorporate a patent into a standard. The SAIC's approach was rejected by the D.C. Circuit in *Rambus, Inc. v. FTC.*[55] In that case, the FTC had entered an order finding that Rambus had deceptively failed to disclose computer memory patent interests to an SSO, which then unknowingly incorporated the patented technology into an industry standard. The D.C. Circuit vacated the FTC's order, reasoning that the failure to disclose must pose anticompetitive harm, such as causing the SSO to incorporate the patent into the standard.[56]

39. In sum, the NDRC, like the U.S., the EU, and South Korea, favors rule-of-reason treatment for SEP-related antitrust questions. The SAIC, by contrast, does not identify procompetitive benefits to SEPs and does not appear to take a rule-of-reason approach, and it also imposes liability in several SEP scenarios that would not violate antitrust laws in other jurisdictions, the U.S. in particular. As with patent pools, the question that practitioners will face is whether China will retain or reconcile two different sets of standards on SEPs—one closer to the U.S. and other authorities on price conduct overseen by the NDRC, and one somewhat more distant on non-price conduct overseen by the SAIC.

III. Conclusion

40. Time will tell what positions the final integrated Chinese IPR guidelines will take. However, the individual agency guidelines from the NDRC and SAIC have already exposed striking differences in the way the Chinese authorities are approaching IPR-related antitrust issues, including some apparently divergent views among the agencies themselves. So the question is not only how the final IPR guidelines will compare to those of more established international antitrust authorities, but also which Chinese agency's views will be more strongly represented in the final product. ■

54 SAIC Art. 28(1).

55 522 F.3d 456, 464-67 (D.C. Cir. 2008).

56 *See* id. For context, the EU guidelines do not specifically address this question, instead advocating generally for "*good faith disclosure*" of IPR essential for the implementation of standards, EC Guidelines § 286, and Japan's guidelines do not explicitly address SEPs. South Korea's position on this issue is not entirely clear. Its guidelines impose liability for "*unreasonably not disclosing information* [regarding] *patents applied for or registered in order to increase the possibility of being designated as a Standard Technology*," a standard which appears similar to that identified by the SAIC. The guidelines contain an example of such misconduct, however (Example 3), which directly links the nondisclosure with anticompetitive harms, such as exclusion of competitors and excessive royalties, in a way that appears closer to the U.S. standard.

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