

# THE IMPACTS OF THE CHINESE ANTI-MONOPOLY LAW ON IP COMMERCIALIZATION IN CHINA & GENERAL STRATEGIES FOR TECHNOLOGY-DRIVEN COMPANIES AND FUTURE REGULATORS

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## ABSTRACT

*After thirteen years of discussion and three revisions, China's Anti-Monopoly Law (AML) was promulgated on August 30, 2007 and has come into effect on August 1, 2008. It is the first anti-monopoly law in China and has been viewed as an "economic constitution" and a "milestone of the country's efforts in promoting a fair competition market and cracking down on monopoly activities." However, the wording of some provisions of the AML, including the sections dealing with Intellectual Property (IP) protection, is not very clear. And juridical interpretations and more specific implementing regulations on the AML have not yet appeared. This has led to a lot of uncertainty for the operations of foreign enterprises, particularly IP related enterprises in China. This iBrief will provide an overview of possible impacts of the AML on the IP protection and commercialization in China. First, it will provide a brief overview of the AML, including both major compliments and criticism. Second, it will examine both opportunities and potential legal risks of foreign IP holders and investors when operating in China, particularly focusing on the impacts of Article 55, the IP-related provision. Thirdly, it will provide some practical suggestions and strategies for foreign IP holders and technology-driven companies to operate in China, such*

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*as some useful defenses for potential IP lawsuits. Finally, it will provide some suggestions for future interpretation and implementation of Article 55 in the AML by drawing on lessons from the experiences of the United States and the European Union.*

## INTRODUCTION

¶1 The interrelationship between intellectual property and anti-trust law has been one of the central issues in international intellectual property debates for many years. Intellectual Property (IP) law grants a monopoly that enables rights holders to prevent others from commercializing products or services that make use of their IP.<sup>2</sup> In doing so, rights holders can exclusively explore their IP for a period of time, and thereby justify and recoup “their often substantial investment in research and development” of their products or services.<sup>3</sup> By contrast, anti-trust/competition law is designed to stop monopolistic conduct and to safeguard a fair competition order of the market.

¶2 However, IP laws and competition laws also have certain common aims, particularly in terms of promoting innovation and enhancing consumer welfare.<sup>4</sup> IP laws have been based on the premise that limited monopoly rights will enhance innovation, progress of science, and public welfare.<sup>5</sup> IP laws enable Intellectual Property Rights (IPR) holders to exclusively explore the market value of their IP for limited times so rights holders can recoup their investment cost, thereby incentivizing further innovation. Without effective IP laws, widespread piracy will reduce the value of investment of IP holders and result in “slower rates of economic progress and reduced consumer welfare.”<sup>6</sup> Competition and anti-trust laws have been based on the premise that competition is the “best way to ensure

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<sup>2</sup> Kirstie Nicholson & Zirou Liu, *Avoid competition problems in China*, MANAGING INTELL. PROP., July/August 2008, <http://www.managingip.com/Article/1968516/Avoid-competition-problems-in-China.html>.

<sup>3</sup> James F. Rill & Mark C. Schechter, *International Anti-trust and Intellectual Property Harmonization of the Interface*, 34 LAW & POL’Y INT’L BUS. 783, 783 (2003).

<sup>4</sup> See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTI-TRUST ENFORCEMENT & INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 1 (2007), available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf> [hereinafter 2007 Report].

<sup>5</sup> See U.S. CONST. art. I, § 8, cl. 8 (explicitly empowering Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective Writings and Discoveries”).

<sup>6</sup> Rill & Schechter, *supra* note 3, at 783.

that consumers and other users receive maximum innovation and quality at the lowest possible prices.”<sup>7</sup>

¶3 It is therefore possible for IP rights to exist within the permitted boundaries of competition laws; however, when IP holders’ actions go beyond the legitimate IP protection, competition concerns may arise.<sup>8</sup> Thus, it is important to strike a sound balance between IP protection and fair market competition in order to make IP laws and anti-trust laws work collaboratively to achieve their legislative goals (that is, enhancing innovation, consumer protection, and public welfare). This is particularly true in the current globalized knowledge economy. On the one hand, overly strong IP laws may limit competition and lead to monopoly prices, which may limit the public’s access to IP assets. This will not only limit the public’s capability of making further innovation, but also have negative impacts on the progress of sciences and the sustainable growth of the national economy. On the other hand, overly strong competition laws may restrict the protection and exercise of IP rights. This may limit the distribution of IP products and services, and have negative impacts on IP-related international trade, and, ultimately, the “rate of progress toward creation of a single global economy.”<sup>9</sup>

¶4 This paper will focus on the newly enacted Chinese anti-monopoly law and its impacts on both IP protection and the operations of IP-relevant foreign enterprises in China. China has nearly one-quarter of the world’s population, and it is one of the fastest growing economies in the world. China’s GDP rose to \$7.099 trillion in 2007, and China’s economy became the “second-largest economy in the world after the U.S.”—as measured on a purchasing power parity (PPP) basis.<sup>10</sup> Any international IP commercialization or anti-monopoly strategy cannot afford to simply ignore a nation with such a market.

¶5 After thirteen years of discussion and three revisions, China’s Anti-Monopoly Law (AML) was promulgated on August 30th, 2007 and came into effect on August 1st, 2008. It is the first anti-monopoly law in China. It has been viewed as an “economic constitution,”<sup>11</sup> and a “milestone of the

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<sup>7</sup> IEEE STANDARDS ASS’N, PROMOTING COMPETITION AND INNOVATION: WHAT YOU NEED TO KNOW ABOUT THE IEEE STANDARDS ASSOCIATION’S ANTI-TRUST AND COMPETITION POLICY 1 (2007), <http://standards.ieee.org/resources/antitrust-guidelines.pdf>.

<sup>8</sup> Nicholson & Liu, *supra* note 2.

<sup>9</sup> Rill & Schechter, *supra* note 3, at 783.

<sup>10</sup> CIA – The World Factbook, China, [https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate\\_ch.html](https://www.cia.gov/library/publications/the-world-factbook/geos/countrytemplate_ch.html) (last visited Jan. 25, 2010).

<sup>11</sup> Paul Jones, *Licensing in China: The New Anti-Monopoly Law, The Abuse of IP Rights and Trade Tensions*, XLIII (2) LES NOUVELLES: J. LICENSING

country's efforts in promoting a fair competition market and cracking down on monopoly activities."<sup>12</sup> However, the wording of some provisions of the AML, including the sections dealing with IP protection, is not very clear. Judicial interpretations and implementing regulations on the AML have not yet appeared. This has led to a lot of uncertainty for the operations of foreign enterprises, particularly IP related enterprises in China.

## I. AN OVERVIEW OF THE AML

¶6 The AML has been widely described by Chinese officials and academics as China's "Economic Constitution."<sup>13</sup> Many believe that the AML is a "milestone in Chinese economic policy" and a significant step towards a real market economy in China.<sup>14</sup> However, some commentators believe that the AML may also have a potential negative impact on foreign competition in China.<sup>15</sup>

¶7 Before examining how the AML will affect IP protection in China in detail, this iBrief will outline the law. The AML includes fifty-seven articles and can be divided into eight chapters: Chapter I—General Provisions; Chapter II—Monopoly Agreements; Chapter III—Abuse of Dominant Market Position; Chapter IV—Concentration; Chapter V—Prohibition of Abuse of Administrative Powers to Restrict Competition; Chapter VI—Investigation of Suspicious Monopoly Behaviors; Chapter VII—Legal Liability; and Chapter VIII—Supplementary Provisions.

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EXECUTIVES SOC'Y INT'L 106 (June 2008) (stating that the AML is widely described by Chinese officials and academics as China's "Economic Constitution").

<sup>12</sup> Nie Peng, *China's First Anti-monopoly Law Takes Effect*, XINHUA NEWS AGENCY, Aug. 1, 2008, [http://news.xinhuanet.com/english/2008-08/01/content\\_8901182.htm](http://news.xinhuanet.com/english/2008-08/01/content_8901182.htm).

<sup>13</sup> Jones, *supra* note 11, at 2.

<sup>14</sup> Richard Student, Note, *China's New Anti-Monopoly Law: Addressing Foreign Competitors and Commentators*, 17 MINN. J. INT'L L. 503, 503 (2008). See also Liu Ying, *BCCC cautiously optimistic over impact on FDI of new Anti-Monopoly Law*, 21 CHINA IP MAGAZINE 1, <http://www.chinaipmagazine.com/en/journal-show.asp?id=401> (stating British Chamber of Commerce (BCCC) and the European Chamber of Commerce China (EUCCC) feel cautiously optimistic on the potential impacts of the Chinese AML).

<sup>15</sup> Student, *supra* note 14, at 503 ("While the AML is a milestone in Chinese economic policy, its substance has been particularly newsworthy for alleged weaknesses which may have a negative impact on foreign firms and investors doing business in China.").

### A. Purpose of AML & Global Concerns

¶8 Article 1 of the AML sets out the purposes of the law, including: (1) preventing and prohibiting monopolistic conduct, (2) protecting fair market competition, (3) improving efficiency of economic operation, (4) safeguarding consumer and public interests, and (5) promoting the healthy development of the socialist market economy.

¶9 It is clear that the purposes of the AML are quite internationalized and reflect global concerns. As some commentators have observed, aside from the use of nomenclature in the last provision on socialist market economy, “none of these would be out of place in a competition statute outside of China.”<sup>16</sup> In the process of the law making, the Chinese government has widely invited comment and feedback on AML drafts from various international stakeholders.<sup>17</sup> As Gerald F. Masoudi, Deputy Assistant Attorney General of the Anti-Trust Division of the US Department of Justice (DOJ), commented, the Chinese government has demonstrated its openness to “the ideas and experiences of anti-trust law enforcers” worldwide.<sup>18</sup>

### B. Scope of Application

¶10 In addition to covering domestic economic activities, the AML covers commercial conduct of certain foreign and international enterprises.<sup>19</sup> Chapter 1 Article 2 of the AML explicitly states that the new law is applicable not only to “monopolistic conduct in economic activities within the territory of P.R. China,” but also to “monopolistic conduct outside of the territory of P.R. China” if such conduct “results in eliminating or restricting” domestic market competition in China.<sup>20</sup>

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<sup>16</sup> Paul Jones, *China's New Anti-Monopoly Law: An Economic Constitution for the New Market Economy?*, CHINA L. REP., Sept. 2007, at 3, 4, <http://meetings.abanet.org/webupload/commupload/IC860000/newsletterpubs/CLRsep2007.pdf>.

<sup>17</sup> See *id.* at 4.

<sup>18</sup> Gerald F. Masoudi, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks presented to the UIBE Competition Law Center Conference on Abuse of Dominance: Theory and Practice: Some Comments on the Abuse-of-Dominance Provisions of China’s Draft Antimonopoly Law 2 (July 21, 2007) (transcript available at <http://www.justice.gov/atr/public/speeches/225357.pdf>).

<sup>19</sup> Daniel Sarvin, *China's Anti-Monopoly Will Have A Broad Impact Beyond Notification*, Aug. 18, 2008, <http://www.bingham.com/Media.aspx?MediaID=7415> (see specifically the Extra-Territorial Reach section).

<sup>20</sup> Anti-Monopoly Law (P.R.C.), art. 11(1), (2). (2007), available at [http://www.fdi.gov.cn/pub/FDI\\_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf](http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020071012533593599575.pdf).

¶11 Moreover, the AML explicitly provides that the legislation is “not applicable to a business’s lawful conduct in accordance with its legitimate IP rights.”<sup>21</sup> This placement of IP and anti-trust law in equal position further evidences China’s embrace of global concerns.<sup>22</sup>

### *C. Enforcement Agencies—Trinity Enforcement Model*

¶12 The AML specifies that the State Council shall create two new entities to develop and enforce the law, namely: (1) the Anti-Monopoly Commission (AMC),<sup>23</sup> and (2) the Anti-Monopoly Enforcement Agency (AMEA).<sup>24</sup>

¶13 The AMC does not have substantive enforcement powers. Its responsibilities include: formulating competition policies and guidelines, evaluating competition conditions, and coordinating enforcement activities.<sup>25</sup> The State Council of China has already established an AMC at the end of July 2008—one week before the AML took effect.<sup>26</sup>

¶14 By contrast, the AMEA has strong enforcement powers.<sup>27</sup> These include the power to inspect and investigate business and non-business premises; and the power to obtain relevant evidence, such as seizing documents, accounting records, electronic data, and bank account records.<sup>28</sup> Moreover, the AMEA may even conduct all these enforcement actions without a court order.<sup>29</sup> However, the AML does not detail the structure of the AMEA. According to the source close to the law-making process, three government agencies, rather than a single body, will be responsible for the enforcement of the AML: (1) the Ministry of Commerce (MOFCOM), (2) the National Development and Reform Commission (NDRC), and (3) the

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<sup>21</sup> *Id.* at art. 55.

<sup>22</sup> *See supra* text accompanying notes 8–9. More details on IP-related provisions in the AML will be discussed in Part III of this iBrief.

<sup>23</sup> Anti-Monopoly Law (P.R.C.), art. 9 (2007).

<sup>24</sup> *Id.* at art. 10.

<sup>25</sup> *Id.* at art. 9.

<sup>26</sup> Peng, *supra* note 12, at ¶ 5.

<sup>27</sup> Anti-Monopoly Law (P.R.C.), art. 10, 39. (2007).

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at art. 39. *See also* Peter J. Wang, H. Stephen Harris, Jr. & Yizhe Zhang, *New Chinese Anti-Monopoly Law*, JONES DAY COMMENTARIES, ASIA, Oct. 2007, available at [http://www.jonesday.com/pubs/pubs\\_detail.aspx?pubID=S4662](http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S4662) (explaining that “[t]he AMC itself is a compromise between the outcry for one unified enforcement agency and the maintenance of the existing division of powers among different authorities under the State Council”).

State Administration of Industry and Commerce (SAIC).<sup>30</sup> Each focuses on different issues.<sup>31</sup>

¶15 Under the new structure, MOFCOM is responsible for merger review. The NDRC is responsible for monopoly agreements, particularly price-fixing issue. The SAIC is responsible for abuses of dominant position.<sup>32</sup> It will be interesting to see how this trinity model works. Some commentators have expressed concerns,<sup>33</sup> and believe that the trinity enforcement model “creates a complicated institutional framework where conflicts are probable.”<sup>34</sup>

¶16 On July 31, 2008, China announced that its specialized IP courts have jurisdiction over anti-monopoly law cases. As many commentators have pointed out, “these courts are likely to be better equipped in dealing with complex economic concepts under competition law than China’s general judiciary.”<sup>35</sup> This also arguably provides a convenient avenue to deal with possible conflicts between IP law and the AML.

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<sup>30</sup> Peng, *supra* note 12.

<sup>31</sup> See Wang et al., *supra* note 29 (noting that “many [commentators] view the vagueness of these AML provisions as an acknowledgement of the concurrent enforcement of the AML by three existing government agencies”).

<sup>32</sup> Dina Kallay, Counsel for I.P. and International Antitrust, U.S. Fed. Trade Comm’n, China’s New Anti-Monopoly Law: An International Antitrust Convergence Perspective, Remarks at the Melbourne Law School’s “Unleashing the Tiger? Competition Law in China and Hong Kong” Conference 1 (October 4, 2008) (transcript available at <http://www.ftc.gov/oia/speeches/081004kallaymelbourne.pdf>). Moreover, the NDRC completed a draft of the anti-price-monopoly regulations in July 2008, which are intended to implement the AML. The SAIC has set up an independent bureau in charge of investigation and punishment of unfair competition, commercial bribery, smuggling and other cases that break relevant commercial laws. See Peng, *supra* note 12.

<sup>33</sup> *China’s anti-monopoly law commission in force*, XINHUA NEWS AGENCY, July 16, 2008, available at [http://news.xinhuanet.com/english/2008-07/16/content\\_8553183.htm](http://news.xinhuanet.com/english/2008-07/16/content_8553183.htm). See also Peng, *supra* note 12 (noting that Huang Yong, an anti-monopoly consultant at the Ministry of Commerce, said “[i]t is hoped that a unified institution comes out in the coming years, which will be better in accordance with the country’s situation”).

<sup>34</sup> Adrian Emch, *The Antimonopoly Law and Its Structural Shortcomings*, GLOBAL COMPETITION POL’Y MAG., Aug. 8, 2008, at 2, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1221922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1221922).

<sup>35</sup> Peng, *supra* note 12.

*D. General Prohibition Provisions—Compared with the European Union.*

¶17 Similar to the Treaty of Rome (E.C. Treaty), the AML contains three general prohibitions. Chapter II of the AML contains a prohibition on “monopoly agreements,” including six types of agreements among competing entities (horizontal relationship)<sup>36</sup> and three types of agreements between entities and their trading partners (vertical relationships).<sup>37</sup> The chapter also provides a number of exceptions relating to the purposes of the agreements.<sup>38</sup> Chapter III of the AML provides a prohibition on the abuse of a “dominant market position.” It details seven types of acts that abuses dominant market position, such as predation, refusal to deal, exclusive dealing, tied sales, and price discrimination.<sup>39</sup> It also sets out the specific factors for determining the dominant market position of an undertaking.<sup>40</sup> Chapter IV of the AML focuses on “concentration activities,” such as (1) a business merger, (2) an acquisition of control over other business operators via asset or equity purchase, or (3) situations where a business operator acquires control or decisive influence over other business operators by contract or any other means.<sup>41</sup> It set up a “reporting requirement” mechanism.<sup>42</sup> For any activities that may result in a high concentration of business power exceeding the “reporting threshold,” they must be reported to the Agency prior to their execution.<sup>43</sup>

¶18 It is clear that the structure of the AML provisions is similar to the E.C. Treaty. Article 81 of the E.C. Treaty focuses on “anti-competition treaty,” Article 82 mainly focuses on prohibiting “abuse of a dominant position,” and Articles 86 and 87 deal with “concentration.”<sup>44</sup>

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<sup>36</sup> See Anti-Monopoly Law (P.R.C.), art. 13 (2007).

<sup>37</sup> See *id.* at art. 14.

<sup>38</sup> See *id.* at art. 15. More details on these exceptions will be discussed in Part IV.B.

<sup>39</sup> See Anti-Monopoly Law (P.R.C.), art. 17 (2007).

<sup>40</sup> See *id.* at art. 17–18.

<sup>41</sup> See *id.* at art. 40.

<sup>42</sup> See *id.* at art. 39. The AML has not set forth the reporting threshold within the law itself, but rather, it provides that the threshold will be prescribed from time to time by the State Council.

<sup>43</sup> See *id.*

<sup>44</sup> See The Treaty Establishing the European Community, Title VI, art. 81, 82, 86 & 87, (2006) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>. See also IP/IT Update, *Competition Law*, Feb. 2, 2009, <http://www.ipit-update.com/compec.htm> (stating “EC law competition law derives from arts. 81 to 89 of the Treaty of Rome”).

## II. THE IMPACTS ON IP PROTECTION IN CHINA: APPLIES TO "ABUSES" BUT NOT "LEGITIMATE" USES OF INTELLECTUAL PROPERTY RIGHTS

### A. Meaning of the Article 55

¶19 In addition to the above general prohibitions, the AML contains a specific provision, Article 55, relating to IP. It provides: "This Law is not applicable to the undertakings which use Intellectual Property Rights according to the laws and administrative regulations relevant to intellectual property, but is applicable to the undertakings which 'abuse IP' and 'eliminate or restrict market competition.'"<sup>45</sup>

¶20 This provision will have a profound implication on the IP protection and enforcement in China. For the first time, it sets out the basic relationship between the AML and IPRs in China.<sup>46</sup> Article 55 implies that the laws governing IPRs are considered to be "equivalent in status" to the AML.<sup>47</sup> It provides IPR holders with a safe harbor for their legitimate conducts on exercising their IPRs. So long as the IPR holder complies with IP related laws and regulations, the provisions of the AML will not apply.<sup>48</sup> Since it is a general international practice to provide legal immunity for an entity's lawful conduct in accordance with its legitimate IPRs, Article 55 has been deemed as "further evidence that reflects China's embrace of global concerns."<sup>49</sup> On the other hand, the AML explicitly prevents abuse of IPRs. As some commentators observed, although the language of Article 55 is "very general," it has clearly presented a concept similar to "patent misuse" under U.S. law, which prohibits a patent holder from "seek[ing] to leverage its lawful monopoly IP rights to extend them beyond the proper scope of the patent."<sup>50</sup> Indeed, as mentioned above, the Chinese regulators

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<sup>45</sup> See Anti-Monopoly Law (P.R.C.), art. 55 (2007).

<sup>46</sup> See Jones, *supra* note 11.

<sup>47</sup> See *id.* at 3.

<sup>48</sup> Stated differently, Article 55 appears to recognize that the simple exercise of IP rights, without more, will not be a violation of the AML. See Masoudi, *supra* note 18, at 9 (commenting on Article 54 of the AML draft, which became Article 55 of the AML enacted on August 30, 2008. Masoudi states that "[s]ince the right to exclude others from using the invention is the essence of an intellectual property right, the unilateral decision of the right holder to exclude some or all applicants from using its protected intellectual property is the most simple exercise of IP rights and should not be subject to antimonopoly attack as an abuse.").

<sup>49</sup> See Sarvin, *supra* note 19.

<sup>50</sup> See Wang et al., *supra* note 29. The Chinese characters used in the law, "lanyong," can be translated as either "abuse" or "misuse."

did try to incorporate the experience and advice of foreign stakeholders into the law-making process of the AML.<sup>51</sup>

¶21 Although Article 55 reflects global concerns on IP abuses and the intersection between IP and Competition law, the language of Article 55 is overly general. Consequently, it does not appear to apply directly to the interpretation of IPRs, as is the case in the US.<sup>52</sup> Neither has it provided a clear definition of the abuse of the IPR, nor has it detailed potential liability for IP abuses. This creates many uncertainties for foreign entities (particularly IP-related entities) working in China.

### *B. Potential Problems & Legal Risks under Article 55*

¶22 The potential legal uncertainty of Article 55 has already been the subject of much debate. Generally speaking, there are at least three major issues.

¶23 First, questions have been raised concerning the relationship between the general prohibitions of the AML and Article 55. For example, is Article 55 merely designed to clarify the application of the AML in the IP context, or does it create a wider prohibition?<sup>53</sup> Some commentators believe that Article 55 may have extended the scope of the prohibition on abusing a dominant market position to activities that non-dominant companies carried out in an IP context.<sup>54</sup> IPRs do not necessarily confer an entity dominant market position. Thus, if Article 55 is interpreted broadly, the subject matter of the AML prohibition would arguably not only cover entities with dominant positions but also cover entities *without dominant positions*. Using Microsoft's business operation in China as an example, Microsoft often argues that it does not have a dominant market position because "genuine Microsoft products have a very low market share in China" due to widespread piracies.<sup>55</sup> However, if Article 55 is interpreted

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<sup>51</sup> See Part V. for more examples on this issue.

<sup>52</sup> The US has not used its antitrust laws to define IP abuse. The US uses special legal guidelines to regulate the use of IP licences. *See, e.g.*, U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTI-TRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.htm> [hereinafter *1995 Guidelines*]. More details will be discussed in Part IV.C.

<sup>53</sup> *See* Nicholson & Liu, *supra* note 2.

<sup>54</sup> *See id.* *See also* Anti-Monopoly Law (P.R.C.), art. 55 (2007) (explicitly stating that "this Law ... is applicable to the undertakings which abuse IP and eliminate or restrict market competition," and only applies to companies abusing a dominant market position").

<sup>55</sup> Tanya Fong, *Microsoft introduce novel piracy defence*, ALB LEGAL NEWS, Sept. 2, 2008, available at <http://au.legalbusinessonline.com/news/breaking-news/29332/details.aspx> (quoting Microsoft Global VP Zhang Yaqin).

widely to include non-dominant IP companies, the “*test of dominant position*” may become *irrelevant* in determining monopolistic activities of IP companies. Consequently, the “piracy defense” alone will not be sufficient to provide Microsoft with a safe harbour for monopolistic lawsuits.

¶24 Secondly, some commentators fear that Article 55 may prevent entities from engaging in any abusive activities, such as price discrimination and discrimination in IP licensing.<sup>56</sup> In other words, some commentators believe that the AML may require that similarly favorable licenses be granted to any other firms or licensees in the market once an IP licence is granted to the original licensee. Some commentators pointed out, by requiring IP holders to treat “similar third parties in a similar way,” the AML may potentially create a compulsory IP licensing system.<sup>57</sup> Some commentators believe such a system may have significant negative impacts on encouraging innovation. The right of IPR holders to refuse to grant a license to other firms has been regarded as a “core part” of the exclusive rights under the IP laws and is directly tied to “creating incentives for innovation.”<sup>58</sup> Depriving such a right from IP holders on the ground of harming competition may result in a diminution of their investment incentives on research and development of IP products, and, in turn, may “slow innovation, harming consumers and reducing productivity gains for the economy as a whole.”<sup>59</sup>

¶25 The third concern is about the potential impacts of Article 55 on IP infringement proceedings in China. Many multinational companies fear that domestic IP companies may use Article 55 to restrain foreign IP holders from enforcing their IP against domestic competitors.<sup>60</sup> They may attempt to avoid or delay infringement actions brought against them by using Article 55 as a “defense,” and claim that bringing an infringement action against them constitutes an abuse of IPRs or a restriction of market competition. For example, if a company has been accused of patent infringement in China, it may claim that the alleged patent is preventing competition and then request the AMEA to conduct an anti-monopoly investigation—a very time-consuming procedure. Therefore, some commentators believe that the enactment of the AML has paved the way for software firms in China to bring anti-trust lawsuits against Microsoft and other foreign software companies for their business practices in China.<sup>61</sup>

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<sup>56</sup> Nicholson & Liu, *supra* note 2.

<sup>57</sup> *Id.*

<sup>58</sup> Masoudi, *supra* note 18, at 9. It should be noted that the Article 54 of the draft AML that Masoudi referred to in his remark is the Article 55 of the AML enacted on August 30, 2008.

<sup>59</sup> *Id.*

<sup>60</sup> Wang et al., *supra* note 29.

<sup>61</sup> Nicholson & Liu, *supra* note 2.

*C. Recent Development of Anti-monopoly Lawsuits and Investigations Using Microsoft as an Example*

¶26 On July 31, 2008, one day before the AML took effect, Dong Zhengwei, a partner with Beijing-based Zhongyin law firm, submitted a document, “*Application and Proposal for Protecting Citizen Property Rights*,”<sup>62</sup> to the AMEA (the MOFCOM, the NDRC, and the SAIC respectively), and suggested the AMEA initiate an anti-monopoly investigation against Microsoft.<sup>63</sup> He alleged that Microsoft was using its dominant market position to manipulate software prices in China, and had breached Articles 6, 17, and 19 of the AML, which prohibit abuse of market dominance.<sup>64</sup> He further called for a \$1 billion fine for Microsoft’s violation of the AML, allowed by Article 47.<sup>65</sup> The MOFCOM replied on August 15, 2008, informing Zhengwei that the application had been transferred to its Treaty and Law Division.<sup>66</sup>

¶27 Microsoft has fought anti-trust disputes around the world for more than a decade. Microsoft, the U.S. DOJ and several state governments agreed to a settlement in 2001, which required Microsoft to share its application programming interfaces with third-party companies, and appoint a three-person panel to check compliance with the settlement.<sup>67</sup> Although some states claimed that the sanctions were inadequate, the U.S. appeals court unanimously approved the settlement with the DOJ in 2004.<sup>68</sup>

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<sup>62</sup> The Chinese title of document is CHINESETEXT 1.

<sup>63</sup> “CHINESETEXT2” [“Chinese Lawyer applying for an anti-monopoly investigation against Microsoft and suggesting impose 1 billion USD fine”], XINHUA NEWS AGENCY, ¶ 17 (Aug. 17, 2008), [http://news.xinhuanet.com/legal/2008-08/17/content\\_9424867.htm](http://news.xinhuanet.com/legal/2008-08/17/content_9424867.htm).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* Article 47 provides: “Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year.” Anti-Monopoly Law (P.R.C.) art. 47 (2007).

<sup>66</sup> Gao, Lingyun & Tan, Xiaolan, CHINESETEXT3, [Civil Lawyer Initiating Antitrust Lawsuits Against Microsoft], SOUTHERN CITY DAILY, ¶ 2 (Aug. 20, 2008), <http://sc.stock.cnfol.com/080820/123,1764,4631746,00.shtml>

<sup>67</sup> United States v. Microsoft Corp., 2002-2 Trade Cas. (CCH) ¶ 73,860 (D.D.C. 2002).

<sup>68</sup> Massachusetts ex rel. v. Microsoft Corp., 373 F.3d 1199, 1250 (D.C. Cir. 2004). See also, Brad Smith, Senior Vice President, Gen. Counsel and Corporate Sec’y, Microsoft Corp., News Conference Regarding Ruling of U.S. Court of Appeals for the District of Columbia Circuit on Antitrust Settlement Remedies (June 30, 2004) (transcript available at <http://www.microsoft.com/presspass/exec/bradsmith/06-30AppealsRuling.msp>)

¶28 In Europe, after losing its anti-trust case in 2004, Microsoft has been repeatedly fined.<sup>69</sup> Furthermore, in February 2008, the European Union's (E.U.) Competition Commission has levied a fine of €999 million—about \$1.35 billion—against Microsoft for failing to comply with the European Commission's 2004 anti-trust decision, which mandated Microsoft to share interface and protocol information from its workgroup systems with third party companies.<sup>70</sup> Since the 2004 decision, Microsoft has been fined more than \$2.4 billion in total by the European Commission.<sup>71</sup>

¶29 In Asia, Microsoft has been pursued for anti-trust violations both in Japan and Korea. In July 2004, Japan's Fair Trade Commission found Microsoft in violation of Article 19 of its Antimonopoly Act for provisions in its licensing agreement with PC makers that unduly restricted their business operations.<sup>72</sup> In Korea, the Fair Trade Commission levied a fine of \$32 million against Microsoft in 2005, and ordered Microsoft to “create versions of Windows XP that did not include Windows Media Player and Windows Messenger.”<sup>73</sup>

¶30 If the investigation of the Chinese AMEA (MOFCOM) is completed and a lawsuit is filed, China will become the fifth jurisdiction to take aim at Microsoft's business practices, after the U.S., E.U., Japan and South Korea.

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<sup>69</sup> On March 24, 2004, the European Commission ruled that Microsoft abused its Windows monopoly and fined the company €97.2 million as well as ordering it to reveal more of its software code and limiting its bundling of its software into Windows XP. See John P. Jennings, *Comparing the US and EU Microsoft Anti-trust Prosecutions: How Level is the Playing Field?*, 2 ERASMUS L. & ECON. REV., 71, 78–79 (2006).

<sup>70</sup> Geoff Duncan, *EU Fines Microsoft \$1.35 Billion*, DIGITAL TREND, February 27, 2008, <http://news.digitaltrends.com/news-article/15881/eu-fines-microsoft-1-35-billion>.

<sup>71</sup> Gregg Keizer, *EU Fines Microsoft Another \$1.3B*, COMPUTER WORLD, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9065018> (pointing out that “Microsoft had already been fined a total of \$1.16 billion by the EU in two previous levies, including the original March 2004 ruling and a 2006 penalty for noncompliance. Including today's fine, the company will have been hit with penalties that total just under \$2.5 billion”).

<sup>72</sup> Press Release, Microsoft Corp., Microsoft Corporation's Response to the Japanese Fair Trade Commission's Recommendation (July 26, 2004) (available at <http://www.microsoft.com/presspass/press/2004/Jul04/07-26JFTCResponsePR.asp>).

<sup>73</sup> Gregg Keizer, *China Denies Reports of Microsoft Anti-Trust Investigation - Microsoft Says It's "In Compliance" with Chinese Law*, COMPUTER WORLD, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9100818>.

### III. STRATEGIES FOR TECHNOLOGY-DRIVEN COMPANIES

¶31 Given the significance of the AML, any foreign investors and firms who are interested in the fast-growing Chinese market need to incorporate the requirements of the AML (including Article 55) into their future strategic plans.<sup>74</sup> They should also take into account both the opportunities and the legal risks and uncertainties brought by the AML. This iBrief will next introduce some defenses that IPR holders may use for potential IP abuse lawsuits, and strategies for foreign companies to use the AML to acquire a better market position in China.

#### *A. Non-dominant Position Defence*

¶32 One of most frequently used defenses to monopoly activity is arguing non-dominant position based on widespread piracy. As mentioned above, when faced with the allegation that Microsoft has abused its dominant market position to impose a monopoly price on consumers, Microsoft argues that they do not actually have a dominant market position due to the high piracy rate in China.<sup>75</sup> For example, according to the statistics of the Business Software Association (BSA), the software piracy rate in China in 2007 was eighty-two percent.<sup>76</sup> Microsoft, therefore, claimed that it does not have actually power to conduct any monopolistic activities such as pricing control because it obviously does not control the entire market.<sup>77</sup>

¶33 As such, unless Article 55 of the AML is interpreted broadly to include non-dominant IP companies, IP companies may still use the widespread piracy defense against anti-trust challenges.

#### *B. New Exemptions for IP Abuse Claims—Monopoly vs. National Development*

¶34 The AML also introduced some new exemptions for companies conducting monopolistic activities. One notable caveat in Chapter 2 of the AML is Article 15, which authorizes a competent anti-monopoly authority

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<sup>74</sup> Sarvin, *supra* note 19.

<sup>75</sup> Fong, *supra* note 55.

<sup>76</sup> BUS. SOFTWARE ALLIANCE (BSA), FIFTH ANNUAL BSA AND IDC GLOBAL SOFTWARE PIRACY STUDY (2007), available at [http://global.bsa.org/idcglobalstudy2007/studies/2007\\_global\\_piracy\\_study.pdf](http://global.bsa.org/idcglobalstudy2007/studies/2007_global_piracy_study.pdf). See also Press Release, Business Software Alliance, New Study Projects Significant Economic Benefits From Reducing Software Piracy, (Jan. 22, 2008) (available at <http://www.bsa.org/country/News%20and%20Events/News%20Archives/en/2008/en-01222008-idcstudy.aspx>).

<sup>77</sup> Fong, *supra* note 55.

to approve exemptions from Articles 13 and 14 if certain monopoly agreements among the operators are beneficial to: (1) improve technology or research and develop new products; (2) upgrade product quality, reduce costs, improve efficiency, unify product specifications and standards, or realize division of work based on specialization; (3) improve operational efficiency and enhance competitiveness of small and medium sized entities; or (4) serve the public welfare, such as conserving energy, protecting the environment, and providing disaster relief.<sup>78</sup>

¶35 These provisions are obviously designed to encourage foreign investment in research and development and encourage the transfer of new technology to China. Many foreign technology-driven companies, such as Microsoft, Intel, Google and Dell have made investments in China and are expected to continue investing. As some commentators observed, these foreign companies are adopting a long term view that the Chinese government will not restrict their business operations in China so long as their activities do not conflict with or undermine the development of the Chinese economy.<sup>79</sup> Thus, they are prepared to “continue to bring their core technologies to China and will continue to share and/or license them to Chinese domestic companies,” so long as China adopts practical measures to improve IP protection.<sup>80</sup> Therefore, those technology-driven companies (such as Microsoft) may use Article 15 as a potential defense against IP abuse claims. For example, they may claim that their business operations in China are beneficial to “improv[ing] technology or research and develop[ing] new products” as outlined by Article 15(i). Again, Microsoft can be used as an example in this case. Microsoft has set up the China Research & Development Group.<sup>81</sup> Most recently, in November 2008, Microsoft announced that it will invest more than \$1 billion on its research and development center in China over the next three years.<sup>82</sup> Thus, Microsoft may arguably use Article 15(i) as a defense for any potential IP abuse lawsuits in China.

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<sup>78</sup> Anti-Monopoly Law (P.R.C.), art. 15(1)–(4) (2007) (translated by the author).

<sup>79</sup> Liu Ying, *BCCC Cautiously Optimistic Over Impact on FDI of New Anti-Monopoly Law*, CHINA INTELLECTUAL PROPERTY, 2008, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=401> (last visited Nov. 15, 2008).

<sup>80</sup> *Id.*

<sup>81</sup> See Microsoft Corp., China Research and Development Group, <http://www.microsoft.com/china/CRD/EN/aboutus.mspx> (last visited Nov. 16, 2008).

<sup>82</sup> Elaine Hardcastle, *Microsoft to spend \$1 bln on R&D in China*, REUTERS, Nov. 13, 2008, available at <http://www.reuters.com/article/idUSTRE4AC2ZV20081113>.

¶36 However, according to Article 15, all these exemptions are subject to approval of a competent anti-monopoly authority. It is still unclear which specific agency (MOFCOM, NDRC or SAIC) is the “competent anti-monopoly authority” under Article 15, and will have a final power to determine the availability of the immunity of Article 15 under the AML. This creates another uncertainty for AML enforcement.

### *C. Opportunities for Consumer and Competitors*

¶37 As important legislation to maintain and improve competition in the Chinese market, the AML brings more opportunities than legal risks for investors from different countries. It provides an opportunity for foreign software companies (such as foreign investment companies owned by the E.U., Korea, and Japan) to fairly compete with each other. It also enables investors to initiate anti-monopoly investigations and lawsuits against monopolistic activities of software giants, such as Microsoft. In doing so, the AML helps these companies maintain and expand their market share in China. It is clear that a fair competition environment underpinned by the AML is good for both domestic companies and foreign investment companies.

¶38 Public consumers will also benefit. Fair competition will provide consumers with more affordable prices and more purchase options.<sup>83</sup> This may also indirectly contribute to the prevention of piracy because consumers will have a legal, real alternative to paying for software from the dominant player.

## IV. RECOMMENDATIONS FOR CHINESE REGULATORS—FUTURE INTERPRETATION OF ARTICLE 55

### *A. Key Issues & Theoretical Solution*

¶39 Article 55 of the AML explicitly states that the law “is applicable to . . .” entities which “[a]buse IP and eliminate or restrict market competition.”<sup>84</sup> Thus, two key questions that future regulators have to answer when drafting judicial interpretation regulations are: (1) how to define abuse of IP; and (2) how to determine whether a conduct of IPR holders, such as restraints of IP licensing arrangements, has eliminated or restricted market competition.

¶40 Regulators can start to answer these questions by drawing on lessons from countries with advanced IP and anti-trust laws, such as the U.S. and the E.U. It is important to understand how the E.U. and the U.S.

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<sup>83</sup> See also Susan Ness, *Preface*, 7 *COMMLAW CONSPECTUS* 229, 230 (1999).

<sup>84</sup> Anti-Monopoly Law (P.R.C.), art. 55 (2007).

deal with the interrelation between IP protection and enforcement of anti-trust law. Yale Law School Professor Ward S. Bowman, in his book *Patent and Antitrust Law: A Legal and Economic Appraisal* (1973), has provided a clue to deal with this issue. He said:

“[T]he *anti-trust/patent conflict*, as courts have assessed it, is to a large extent *illusory*. It is based on a long-accepted but *mistaken notion* that a legal monopoly, a *patent* may be used as a *lever* to *monopolize* the *unpatented*. In addition, courts seem oblivious, whether or not patents are involved, to the consumer-benefiting efficiencies derivable from agreements sellers make with buyers concerning how, when, where, and under what conditions a licensee may use information . . . .”<sup>85</sup>

Bowman further listed a number of licensing arrangements that will be found “not to be means of creating new and broader monopoly,” such as tie-ins, territorial licensing, functional division of use, end-product pricing, and all-or-none offers.<sup>86</sup>

¶41 It is clear that Bowman argues that IP rights do not necessarily confer market power. There is no direct conflict between IP laws and anti-trust law; they share common goals in enhancing innovation and consumer welfare. Secondly, most IP licensing agreements (including restraints in IP licensing arrangements) are “pro-competitive” rather than “anti-competitive” in nature.<sup>87</sup> It seems that Bowman’s view has now been accepted by regulators in both the E.U. and the U.S.<sup>88</sup>

### *B. The European Union Model – Block Exemptions*

¶42 In order to facilitate the enforcement of anti-trust law in the IP areas and strike a sound balance between economic freedom and protection of competition, the E.U. enacted its new “Technology Transfer Block Exemption Regulation” (TTBER) in April 2004.<sup>89</sup> The TTBER prohibits: (1) exclusive grant-back obligations of a licensee’s own severable

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<sup>85</sup> WARD S. BOWMAN, *PATENT AND ANTITRUST LAW* ix (1973).

<sup>86</sup> *Id.*

<sup>87</sup> Bowman tried to correct at least two common misconceptions the people may have in terms of the interrelationship between IP and anti-trust law and the nature of IP licensing agreements. People often believe: (1) the monopoly/exclusive rights under IP laws will definitely result in monopolistic activities of IPR holders in the market, and (2) most of restraints in IP licensing arrangements are anticompetitive in nature.

<sup>88</sup> See *infra* Parts V.B–C.

<sup>89</sup> See Commission Regulation 772/2004, 2004 O.J. (L 123) 11 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:123:0011:0017:EN:PDF> [hereinafter TTBER]. TTBER replaced Commission Regulation 240/96. 1996 O.J. (L 31) 2.

improvements, (2) no-challenge clauses with respect to IP validity, and (3) 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-competitor.<sup>90</sup>

¶43 Moreover, the E.U. noticed that, similar to Bowman's argument, technology licensing agreements "have *positive effects* that outweigh their restrictive effects on competition."<sup>91</sup> Thus, the new regulation is comprised of "block exemption" provisions in order to strike a sound balance between the IP protection and the protection of competition and to create "an area of certainty for most licensing agreements."<sup>92</sup> The EU further enacted a very detailed TTBER Guideline to facilitate the implementation of the TTBER regulation.<sup>93</sup> The Guideline has greatly facilitated the understanding and implementation of all provisions in the TTBER.<sup>94</sup> Although the AML also includes certain similar exemption provisions, such as Article 15, for general prohibitions of monopolistic conducts, these provisions are overly simplified as compared with the counterparts of the TTBER regulation and guideline.

### *C. The US Model—The Rule of Reason Approach*

¶44 In order to improve the certainty of application of IP licensing agreements, the U.S. DOJ and the Federal Trade Commission (FTC) jointly published the *Anti-trust Guidelines for the Licensing of Intellectual Property* in April 1995 (1995 Guidelines).<sup>95</sup> The Guidelines set up three general principles for determining IP-related monopolistic activities, reflecting Bowman's views: (1) the Agencies regard intellectual property as being essentially comparable to any other form of property, (2) the Agencies do not presume that IP creates market power in the anti-trust context, and (3) the Agencies recognize that IP licensing allows firms to

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<sup>90</sup> See TTBER, Art. 5, §§1(a)–(c), 2. See also Jones, *supra* note 11, at 14 (providing a summary of core prohibition provisions in TTBER).

<sup>91</sup> See EUROPA, *Technology transfer agreements*, [http://europa.eu/legislation\\_summaries/competition/firms/126108\\_en.htm](http://europa.eu/legislation_summaries/competition/firms/126108_en.htm) (last visited Nov. 15, 2008).

<sup>92</sup> *Id.* See also TTBER, Arts 4, §§ 1(c), 2(b). See also Commission Notice 2004/C 101/08, Guidelines on the application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0097:0118:EN:PDF> [hereinafter TTBER Guideline].

<sup>93</sup> See TTBER Guideline, *supra* note 92. The TTBER Guideline provides very detailed instructions on applications of the TTBER and Article 81 (3) of the EC Treaty in general.

<sup>94</sup> *Id.*

<sup>95</sup> *1995 Guidelines*, *supra* note 52.

combine complementary factors of production and is generally *pro-competitive*.

¶45 In line with these principles, the 1995 Guidelines adopted a more general approach, the “rule-of-reason” approach, to evaluate restraints in licensing arrangements. Put simply, under the “rule of reason” approach, if the agencies or courts find a licensing restraint is likely to have both anticompetitive and pro-competitive effects, the agencies then have to assess whether the “restraint in question” can be expected to contribute to an “efficiency-enhancing integration of economic activity,” and evaluate whether the efficiency-enhancing effects that the restraint may have outweigh those anticompetitive effects.<sup>96</sup> In doing so, the DOJ attempts to strike a sound balance of the “pro-competitive effects of licensing against possible anticompetitive effects in related markets.”<sup>97</sup>

¶46 Furthermore, in order to facilitate implementation of the 1995 Guidelines and enhance the pro-competitive effects of IP licensing arrangements, the DOJ and the FTC issued another joint document - *Anti-trust Enforcement & IPRs: Promoting Innovation and Competition* in 2007 (2007 Report).<sup>98</sup> The report re-emphasized the generally *pro-competitive nature* of IP licensing arrangements,<sup>99</sup> and reaffirmed the “rule of reason” approach set forth in the 1995 Guidelines. Moreover, the 2007 Report provides a detailed guideline for agencies and courts to apply the rule of reason approach and general principles established in 1995 Guidelines to “particular activities involving IPRs.”<sup>100</sup> The first two chapters of the 2007 Report focus on certain methods that an individual IPR holder might “employ to maximize the benefits it receives from its IP.”<sup>101</sup> The remaining chapters of the report focus directly on four important issues in IP licensing practices, including: (1) how to analyze potential competitive harm that patent pools and cross-licensing arrangements may cause; (2) how to evaluate the pro-competitive and anticompetitive effects of specific types of restrictions in IP licenses, such as non-assertion clauses, grant backs, and reach-through royalty agreements; (3) how to evaluate anti-trust consequences of tying and bundling of IPRs; and (4) how to evaluate the competitive significance of restrictions that attempt to extend the temporal

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<sup>96</sup> See discussion *supra* Part III.D.

<sup>97</sup> See Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, 1997 BROOKINGS PAPERS ON ECON.: MICROECONOMICS 283, 286, available at <http://faculty.haas.berkeley.edu/shapiro/ninenono.pdf>.

<sup>98</sup> See 2007 Report, *supra* note 4.

<sup>99</sup> *Id.* at ch 4.

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.* at 5.

reach of patents.<sup>102</sup> Compared with the 1995 Guidelines, the 2007 Report is much more specific, and easier to apply when resolving the IP abuse issues in IP licensing practices.

#### *D. General Recommendations*

¶47 Below are some general lessons that the Chinese regulators may learn from the U.S. and E.U.:

##### *1. Forms of Regulations—Special Regulation vs. General Regulations*

¶48 First, in light of proper practice, it is necessary to enact a special legal document to regulate the enforcement of the AML law in IP areas. As introduced above, due to the complexity of enforcing anti-trust law against IP holders, both the E.U. and U.S. have enacted special policy documents particularly dealing with IP abuse issues. Thus, the Chinese regulators should also enact a special legal document to regulate the enforcement of the AML law in IP areas, rather than make a general judicial interpretation regulation for the implementation of the AML.

¶49 Second, it is necessary to enact a specific guideline to facilitate the implementation and enforcement of the special legal document. As introduced above, in addition to enacting special regulations on how to enforce anti-trust law in IP areas, both the E.U. and the U.S. enacted specific guidelines to interpret and facilitate the understanding and implementation of their special regulations. For example, the 2007 Report not only summarized the general principles and approach (the “rule of reason” approach) to determine the pro- or anticompetitive nature of IP licensing arrangements, but also provided specific examples<sup>103</sup> and explanations of how to apply these principles to resolve specific issues in IP licensing practices (such as tying and bundling of IPRs) and to realize the common purposes of IP law and anti-trust law in “promoting innovation and enhancing consumer welfare.”<sup>104</sup>

##### *2. Content of Regulation & Guideline—Striking a Sound Balance*

¶50 Future regulations and guidelines should strike a sound balance between IP protection and protection of competition. There are various ways to realize such a goal. Chinese regulators may consider drawing on lessons from both the U.S. and the E.U. approaches and develop their own approach which suits the specific situations in China.

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<sup>102</sup> *Id.* at 5.

<sup>103</sup> See also the 1995 Guideline, which provided thirteen examples to explain the implementation of the Guidelines. *1995 Guidelines, supra* note 54 *passim*.

<sup>104</sup> *2007 Report, supra* note 4, at 4.

¶51 First, future regulators may set up some general principles to clarify the complementary relationship between IP protection and anti-trust law.<sup>105</sup> Both IP and anti-trust laws have a common goal in enhancing innovation and consumer welfare, such as “bring[ing] new and better technologies, products, and services to consumers at lower prices.”<sup>106</sup> As the U.S. D.O.J. noted, “anti-trust does not protect competition for its own sake; instead, it protects competition as a force that leads to increased efficiency, growth, and consumer welfare.”<sup>107</sup> Thus, the final goal of the IP law and anti-trust law is the same in enhancing technological progress and the growth of the national economy.<sup>108</sup> The establishment of these general principles will provide important guidance for the courts and the public to understand the interrelation between IP protection and anti-trust law, particularly the “pro-competitive” effects of most IP licensing arrangements. This helps correct the common misconception that strong IP protection definitely results in market monopoly.

¶52 Second, future regulators may learn from the E.U., and introduce the E.U.-style “block exemption” provisions in future judicial interpretation in order to provide the immunity for pro-competitive IP licensing arrangements. This will not only help strike a sound balance between economic freedom of parties and protection of competition, but will also increase the legal certainty of IPR holders using licensing agreements.<sup>109</sup> This would arguably create more incentives for IPR holders to invest in further innovation.

¶53 Third, future regulators may set up a general approach, such as the U.S.-style “rule of reason” approach, to evaluate specific IP abuse issues in IP licensing practices. Although the U.S. and China may have different priorities, similar approaches may be adopted by both countries to evaluate the competitive effects of IP licensing agreements. This type of general approach will also help to resolve some difficult situations, which may not have been addressed in mandatory laws (“block exemption provisions”). In other words, the mandatory law and the “rule of reason” approach may

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<sup>105</sup> Thomas O. Barnett, Assistant Att’y Gen., Antitrust Division, U.S. Dep’t of Justice, Recent Developments in Antitrust and Intellectual Property Law, Presentation to the American Conference Institute’s Third Annual In-House Counsel Forum on Pharmaceutical Antitrust 2 ( May 16, 2007) (transcript available at <http://www.justice.gov/atr/public/speeches/223390.pdf>) (“Antitrust and intellectual property laws are complements because both seek to protect and encourage innovation and growth.”).

<sup>106</sup> 2007 Report, *supra* note 4, at 1.

<sup>107</sup> Barnett, *supra* note 105.

<sup>108</sup> See also 2007 Report, *supra* note 4, at intro.

<sup>109</sup> See EUROPA, *supra* note 91 (stating the exemption provisions in the new guidelines 2004 creates “an area of certainty for most licensing agreements”).

work collectively to provide greater legal certainty for both IP holders and users.

### *3. Enforcement Review Mechanism*

¶54 Sound laws should suit specific situations of a nation. Thus, future regulators should always take into account specific social and economic circumstances in China, rather than uncritically importing the legislative models used in the U.S. and the E.U. Future regulators should bear in mind that the final goal of these regulations is to enhance innovation and growth of the national economy. Regulators should ensure that the implementation of new regulations and guidelines will maintain a sound market and ensure that both domestic industries and foreign IP companies operating in China have an equal opportunity to participate in both international and domestic competition.

¶55 The Chinese AML was recently enacted, and Chinese courts do not have sufficient experience in enforcing the anti-trust laws in IP areas. As such, in addition to learning from the enforcement experiences of the EU and the US, it would be desirable to set up a three-year review mechanism in order to evaluate the effectiveness of the prospective IP-anti-trust regulations and guidelines in China. Through the review mechanism, the Chinese regulators may identify the problems of enforcement and reform the law in a timely fashion, making sure that the laws best suit the specific social and economic environment in China.

## CONCLUSION

¶56 In conclusion, this iBrief focused on examining possible impacts of the Chinese AML on the IP protection and commercialization in China. It first provided a brief overview of the AML. It then examined both the opportunities and the potential legal risks the AML creates for the business operations of foreign IP holders and investors in China. It particularly focused on the uncertainty brought by Article 55, and recent developments of anti-trust disputes in which Microsoft is a party. The iBrief then provided some practical advices and strategies for foreign IP holders/investors to operate in China, such as using Article 15 as a defense against potential IP abuse lawsuits. Finally, by drawing on the U.S.'s and the E.U.'s experiences enforcing anti-trust law in IP areas, it provided some practical suggestions for future regulators to better interpret and implement Article 55 of the AML.

¶57 Generally speaking, the promulgation of the AML is an important progression of China's efforts in fighting against monopoly activities and promoting competition. Article 55, for the first time, expressly defined the role of the IP law in the AML. It reflected a strong intention of the Chinese

regulators in striking a sound balance between protecting IP and competition. However, the AML, including Article 55's IP provision, is still far from perfect. The lack of detailed implementing regulations and guidelines on the interrelation of IP and competition laws has resulted in legal uncertainty for both foreign and domestic technological companies operating in China. In order to make future regulations strike a better balance of protecting IP and competition, China may consider drawing on experiences from the US and EU to develop an approach that suits its own needs. It is imperative to make mandatory laws (the EU-style block exemption provisions), the rule of reason approach (the US-style evaluation approach), and national development policy (that is, public interest exemptions) work collectively to resolve the IP abuse dilemmas. In doing so, provide greater legal certainty for both IPR holders and public users.