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# 1 Introduction to IP and Anti-Monopoly Legislation and Practice in China

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## 1. Intellectual Property Law

### 1.1 Development history of China's intellectual property legal system

Intellectual property (**'IP'**) is result of commodity economy and science and technology development. Different from developed Western countries who began their IP legislation in the seventeenth to eighteenth centuries, the People's Republic of China (**'China'**) experienced a process from 'being forced to get involved in' to 'actively making use of' IP only 200–300 years later. The century evolution of IP in China could be divided into four stages.[1] The first stage: Passive Acceptance. China's IP protection system is generally considered to originate from the end of the Qing Dynasty. It is a product of reform policy implemented by the Qing Government with the aim of learning from the West. For the first time, the *Regulation on Rewarding Creation and Invention to Rejuvenate the Industry* enacted by Guangxu Emperor introduced a patent system to China. Nevertheless, the regulation was annulled with the failure of his 'Hundred Days of Reform'.

(p. 2) The second stage: Selective Arrangement. Ever since the establishment of the People's Republic of China in 1949, several administrative rules were released to protect IP, which were not, strictly speaking, laws. From the 1970s to the early 1990s, relevant legislative work was enhanced, with the enactment of the *Trademark Law of the People's Republic of China* (**'Trademark Law'**), *Patent Law of the People's Republic of China* (**'Patent Law'**), and *Copyright Law of the People's Republic of China* (**'Copyright Law'**) in 1982, 1984, and 1990 respectively. China's IP legal system thus began to be established, and the legislation in this period was based on selective institutional arrangements.

The third stage: Adjustment Period. From the 1990s to the early twenty-first century, China's IP regime entered an important stage for development and improvement. In preparation for becoming an official member of the World Trade Organization, Chinese legislators overhauled the Trademark Law (in 1993 and 2001), Patent Law (in 1992 and 2000), and Copyright Law (in 2001), and enacted *Regulations of China on the Protection of New Varieties of Plants* in 1997, *Regulations on the Protection of Layout-designs of Integrated Circuits* in 2001, and other regulations. In a nutshell, China managed to transform from low-level to high-level IP law and transit from localization to internationalization within just ten years. At international level, the *Memorandum of Understanding on Intellectual Property Rights* between the Governments of China and the United States of America (**'US'**) expedited the internationalization of China's IP policy. Domestically, acting as a newly industrialized country, China greatly needed to promote the development of science and technology through strengthening IP protection. A number of legislative amendments basically helped to achieve modernization of institutional innovation.

The fourth stage: The New Era of Strategic Initiative. Establishment of National IP Protection Working Group and the National IP Strategy Formulation Leading Group in 2004 and 2005 signified that China's IP regime had entered a new strategic stage. Until now, an IP legal system with rational coordination between specific IP laws (such as the Patent Law, Copyright Law, and Trademark Law amended in 2008, 2010, and 2013 respectively) and *Anti-Unfair Competition Law of China* (**'AUCL'**) has been established in China, having the *Constitution Law of China* as its foundation and *General Principles of the Civil Law* as its support. Nevertheless, a degree of systematization still needs to be upgraded. For example,

there is no business secret protection law, and relevant provisions are scattered in *Contract Law*, AUCL, and *Criminal Law*.

Major international conventions and treaties on IP protection already entered into by China include but are not limited to *Convention Establishing the World Intellectual Property Organization* (in 1980), *Paris Convention for the Protection (p. 3) of Industrial Property* (in 1984), *Madrid Agreement Concerning the International Registration of Marks* (in 1990), *Intellectual Property Treaties of Integrated Circuits* (in 1989), *Berne Convention for the Protection of Literary and Artistic Works* (in 1992), *Universal Copyright Convention* (in 1992), *Patent Cooperation Treaty* (in 1994), *International Convention for the Protection of New Varieties of Plants* (in 1999), *Agreement on Trade-Related Aspects of Intellectual Property Rights* (in 2001), *World Intellectual Property Organization Copyright Treaty* (in 2007), and *WIPO Performances and Phonograms Treaty* (in 2007).

## 1.2 'Dual-track approach' to regulate IP in China

### *1.2.1 Administrative management*

China runs a 'dual-track' approach to regulating IP, namely administrative management and judicial protection. As for administrative management, Chinese administrative agencies are in charge of registration, authorization, settling IP-related disputes, as well as investigating and punishing violations against IP. Various bureaus, departments, and ministries from both central and local levels are entitled to enforce different branches of IP laws in China. More specifically, the central government directs and coordinates agencies at province or city levels to carry out specific law enforcement work. An efficient and rational IP customs protection mechanism has also been set up, having Patent Law, Trademark Law, Copyright Law, *Foreign Trade Law of China* (**'Foreign Trade Law'**), and *Customs Law of China* as the basic principles, and *Regulations of China on Customs Protection of Intellectual Property Rights* and *Measures of the General Administration of Customs of China on the Implementation of the Regulations of China on Customs Protection of Intellectual Property Rights* as specific instructions, which corresponds with the 'Border Measures' required by the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[2] Before approval of the State Council's Institutional Reform Program (**'Program'**) by the 1st Session of the 13th National People's Congress on 17 March 2018,[3] there were eleven central agencies each managing a specific branch of IP in China. For more details, please find Figure 1.1 below.(p. 4)

| | Administrative Agency | Type of IP |
|---|---|---|
| 1 | State Intellectual Property Office ('**SIPO**') | Patent and Integrated Circuit Layout Design Right |
| 2 | Trademark Office of the State Administration for Industry and Commerce ('**SAIC**') | Trademark |
| 3 | National Copyright Administration | Copyright |
| 4 | Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the SAIC | Prevention of Unfair Competition |
| 5 | General Administration of Quality Supervision, Inspection and Quarantine ('**GAQSIQ**') | Geographical Indications of Origin |
| 6 | Ministry of Agriculture | Agricultural Plant Variety Right |
| 7 | State Forestry Administration | Forestry Plant Variety Right |
| 8 | Ministry of Commerce ('**MOFCOM**') | IP in Relation to International Trade |
| 9 | Ministry of Science and Technology | IP in Relation to Science and Technology |
| 10 | General Administration of Customs | IP in Relation toImport and Export Goods |
| 11 | Ministry of Industry and Information Technology | Internet Domain Name |

View full-sized figure

**Figure 1.1**

The State Administration for Market Regulation (**'SAMR'**) was established and directly affiliated with the State Council, integrating the competence of the State Administration for Industry and Commerce (**'SAIC'**), the Price Supervision and Anti-Monopoly Bureau under the National Development and Reform Commission (**'NDRC'**), the Anti-Monopoly Bureau under the Ministry of Commerce (**'MOFCOM'**), and the Anti-Monopoly Commission under

the State Council and others.[4] The SAMR has ended the era of three Chinese administrative departments taking charge of anti-monopoly enforcement. One of the main responsibilities of the SAMR is to enforce the anti-monopoly laws and regulations. SAMR shall promote and guide the implementation of competition policy and fair competition review system; review concentration of business operators; govern monopolistic agreement, abuse of dominant market position, and abuse of administrative power; guide Chinese undertakings to respond to relevant overseas anti-monopoly investigations/suits; as well as be in charge of the daily work of the Anti-Monopoly Commission affiliated with the State Council.[5]

(p. 5) The SIPO 1.0 was restructured and the new state intellectual property office—National Intellectual Property Administration, PRC (**'CNIPA'**)[6] absorbs competence of SIPO 1.0, SAIC (trademark), and GAQSIQ (Geographical Indications of Origin). CNIPA will be managed by the SAMR. Main responsibilities of CNIPA include, but are not limited to, formulating and implementing IP policies to protect trademark, patent, geographical indication of origin, and integrated circuit layout design; enacting department regulations; guiding law enforcement pertaining to trademark and patent, as well as local IP dispute resolution/settlement and rights protection assistance.[7] Law enforcement responsibilities of trademark and patent shall be borne by the comprehensive law enforcement team of market supervision.[8]

### *1.2.2 Judicial protection*

On 24 April 2017, the Supreme People's Court of China (**'SPC'**) released the *Outline of the Juridical Protection of Intellectual Property in China (2016–2020)* (**'Outline'**).[9] It is the first time the SPC has published a protection outline specifically targeted at a special judicial field. The Outline gives clear guiding ideology, basic principles, major objectives, and key measures with respect to IP judicial protection work. In accordance with the Outline, an IP judicial protection mechanism has been established with judicial protection acting as the guiding role, having civil trial as the foundation and the parallel development of administrative trial and criminal trial. Ever since the first IP case was accepted in February 1985, the Chinese People's Courts have dealt with a dramatic increase in the number of cases, covering unfair competition disputes and all the IP prescribed by the *Agreement on Trade Related Aspects of Intellectual Property Rights*.

The Chinese IP trial mechanism has also been gradually optimized. The SPC set up the IP trial division in October 1995. Since November 2014, IP Courts have been successively set up in Beijing, Guangzhou, and Shanghai. In early 2017, IP Courts were established successively in Nanjing, Suzhou, Chengdu, and Wuhan. Co-trial of IP civil, administrative, and criminal cases was practised all over China (p. 6) since July 2016. By the end of 2016, 224 intermediate people's courts have been designated by the SPC or are empowered by relevant laws to have special jurisdiction over civil disputes in relation to patent, plant variety right, integrated circuit layout design, monopoly, and recognition of well-known trademarks. Moreover, 167 grass-root people's courts have been approved by the SPC to hear general IP civil cases. Furthermore, thirty-four IP judicial interpretations and more than forty judicial policy documents were enacted by the SPC from 1985 to 2016 so enabling IP judicial protection play the leading role.[10]

## 2. Anti-Monopoly Law

After almost two decades of discussion, *Anti-Monopoly Law of the People's Republic of China* (**'AML'**) came into effect on 1 August 2008. AML was enacted to prevent and restrain monopolistic conducts, protect fair market competition, enhance economic efficiency, safeguard the interests of Chinese consumers and society as a whole, and promote the healthy development of its socialist market economy.[11] It also applies to monopolistic conducts outside the territory of China but serves to eliminate or restrict competition in the domestic market of China.[12] In terms of substantive provisions, it mainly transplants from those of the European Union (**'EU'**) and the US, while also keeping Chinese characteristics.

Until now, a supporting system consisting of administrative regulations, guidelines, and provisions enacted by the State Council and the SAMR[13] has been established.

AML also regulates administrative dominance (Article 8 and Chapter 5). The AML itself only covers civil and administrative liabilities, without criminal liability, provision of the civil liability being very vague (Article 50) and the administrative liability being capped with punishment of CNY 500,000 (Article 48). Only bidders and bid-inventors acting in collusion with each other might be sentenced.[14](p. 7) Furthermore, senior executives are not liable for anti-monopoly infringement of business operators.

From the perspective of subject and procedure, the implementation of Chinese anti-monopoly laws and regulations could be divided into public enforcement and private enforcement.[15] Public enforcement refers to administrative actions taken by Chinese competition authorities to investigate and punish monopolistic conducts, while private enforcement is civil litigation initiated by undertakings or consumers against monopolistic conducts for civil liabilities. Equipped with professional enforcers, statutory authority, and national coerce force, public enforcement plays the leading role. One of the most important reasons why plaintiffs have lost a large number of civil monopolistic litigations is the huge burden of proof they have to bear. In order to provide clearer answers to the series of questions put forward during anti-monopolistic civil litigation and to ease burden of plaintiffs, *Provisions of the Supreme People's Court on Certain Issues Relating to the Application of Law in Hearing Cases Involving Civil Disputes Arising out of Monopolistic Acts* were promulgated on 3 May 2012 and came into effect on 1 June 2012.[16]

Another arrangement which separates the Chinese anti-monopoly legal system from the others is the enforcement agencies. Under direction of the Anti-Monopoly Commission, being in charge of organizing, coordinating, and guiding anti-monopoly work,[17] it used to be the Price Supervision and Anti-Monopoly Bureau (**'PSAMB'**) under the NDRC, the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (**'AMAUCEB'**) under the SAIC, and the Anti-Monopoly Bureau (**'AMB'**) under the MOFCOM who enforced anti-monopoly rules in practice, while branches of relevant authorities from levels of province, autonomous region, or municipality could also be empowered to enforce anti-monopoly or anti-unfair competition laws and regulations.[18] The Program approved by the 1st Session of the 13th National People's Congress has changed this triumvirate. The SAMR, directly under the State Council, was established on the basis of the SAIC, the GAQSIQ, and the China Food and Drug Administration, absorbing competence of the PSAMB under the NDRC, the AMB under the MOFCOM, and the Anti-Monopoly Commission. The SAIC is no longer reserved.[19]

## (p. 8) 3. Anti-Unfair Competition Law

Over a long period of time ever since the founding of PRC, China ran a planned economy in which competition was recognized as the special fruit of a capitalistic economy and was not given enough attention by the then government. China's competition policy and legislation entered an important era from 1992, in which the aim of establishing a market economy with Chinese characteristics was put forward by the 14th Congress of Communist Party of China.[20] In order to ensure the healthy development of the socialist market economy, encourage and protect fair competition, prevent acts of unfair competition, and safeguard legitimate rights and interests of business operators and consumers,[21] the Anti-Unfair Competition Law was promulgated in 1993 (**'1993 AUCL'**). There was a dispute with respect to what legislation model should be applied in China's competition legal system ever since the legislative initiation in 1987. Finally, there was consensus that China lacked a mature practice foundation for the promulgation of a systematic anti-monopoly law, while certain monopolistic conducts had already brought side effects to the market which shall be regulated by law. This explains why the 1993 AUCL not only regulates unfair competitive

conducts, but also cover certain monopolistic acts—unfair competitive conducts taken by public utilities, administrative monopoly, price dumping, tie-in, and bid-rigging.[22]

With the transformation from a planned economy to a market economy, the gradual establishment of a market self-regulatory mechanism, fiercer competition in the market, more prominent conducts which could destroy order of a market economy, infringe legitimate rights and interests of consumers, and damage public interests, promulgation of AML only came fourteen years later in 2007. The 1993 AUCL was amended in 2017 and came into effect on 1 January 2018 (**'2018 AUCL'**). Since then, China's competition system clearly consists of anti-unfair competition law and anti-monopoly law, between which no intersection exists any more in theory.

In general, the 2018 AUCL introduces provisions in relation to internet and e-commerce (Articles 6 and 12). What's worth mentioning is that 'consumer rights and interests' were introduced in Article 2(2), which means that the status of consumers is estimated to be upgraded in the future competition enforcement. The 2018 AUCL continues to pay high attention to and fully implement the notion of (p. 9) limited intervention and market efficiency, chiefly with regard to counterfeiting, misleading propaganda, business discredit, commercial bribes, business secrets, and improper prize-giving sales. Besides the AML and 2018 AUCL, certain anti-monopoly and anti-unfair competition provisions could also be found in Product Quality Law, Law on the Protection of Consumer Rights and Interests, Advertising Law, Foreign Trade Law, Price Law, Tender Law, and other administrative regulations, such as Telecommunications Regulations.

## 4. Relationship between the Anti-Monopoly Law and IP Law

In June 2008, the *State Intellectual Property Strategic Outline* (**'Strategic Outline'**) was released by the State Council. The Strategic Outline requires the legislator to promulgate relevant laws and regulations to define boundaries of IP rationally, prevent abuse of IP, and maintain the fair and competitive market order and legitimate rights and interests of the public.[23] As early as March 2009, the SAIC had started to work on drafting *Anti-Monopoly Enforcement Guidelines Regarding Intellectual Property*. However, considering that it was less than one year since promulgation of AML, and the authorities only had limited experience in enforcing anti-monopoly law in IP areas, it was premature to enact all-round and complete anti-monopoly guidelines against abuse of IP which conform to Chinese practice. After years of research, the SAIC released *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate, Restrict Competition* (**'Provisions'**) on 7 April 2015,[24] which came into effect on 1 August 2015.[25] Nevertheless, the Provisions cannot replace anti-monopoly guidelines against abuse of IP, since the Provisions belong to department regulation promulgated by only one of the then three Chinese competition agencies, relevant application scope only covers anti-monopoly enforcement activities undertaken by the SAIC, and excludes those of the NDRC and the MOFCOM.

On the basis of Article 55 of AML ('AML is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative (p. 10) regulations on intellectual property rights; however, AML shall be applicable to the undertakings who eliminate or restrict market competition by abusing their intellectual property rights') and Article 9 of AML ('The State Council shall establish an anti-monopoly commission to be in charge of organizing, coordinating and guiding anti-monopoly work and to perform the following duties: … (3) formulating and releasing anti-monopoly guidelines; …'), the Anti-Monopoly Commission initiated drafting work of the *Anti-Monopoly Guidelines Against Abuse of Intellectual Property Rights* (**'Guidelines'**) in the first half of 2015. The NDCR, SAIC, and MOFCOM drafted certain part of the Guidelines in accordance with their respective competence (SAIC—non-price related anti-competitive agreement, non-price related abuse of dominant market position, and administrative dominance; NDRC—price related anti-competitive agreement and price related abuse of dominant market position;

MOFCOM—concentration which has or probably will have the ability to eliminate or restrict competition), after which it would be the Anti-Monopoly Commission who shall compile, amend different drafts, and release the final official version. Moreover, the SIPO 1.0 also provided its own draft.

Mr. Handong Zhang, the Director General of the then PSAMB under the NDRC commented that it is just the time to strengthen IP protection, while anti-monopoly enforcement against IP abuse shall also be adhered to.[26]

Intellectual property was the subject of early anti-unfair competition law. Even if the modern anti-unfair competition law is far from being limited to IP, protection of IP is still one of the basic tasks. Anti-unfair competition law shall apply where there is no explicit IP provisions. Under influence of the *Paris Convention for the Protection of Industrial Property*, Chinese anti-unfair competition law is included in IP enforcement. The most popular IP textbooks and comprehensive monographs regard AUCL as a component; while competition law textbooks also include AUCL. In practice, anti-unfair competition cases are categorized under IP cases in Chinese courts. Most of the judges applied AUCL in accordance with thinking and method of IP protection.[27] The 2018 AUCL amended the previous IP-related provisions. To name Article 6 as an example, the scope of confusion has been expanded, including unauthorized use of influential domain names, website names, and web pages of others. Furthermore, Article 12 also prohibits business operators from forcing redirection, forcing uninstalling and malicious incompatibility when engaging in production and business activities through the internet.

## (p. 11) 5. Case Analysis

This section presents some typical cases concerning the intersection of anti-monopoly and IP already dealt with by previous Chinese competition authorities and judged by the Chinese people's court. SAIC used to be the main body which enforced AUCL among the three Chinese competition authorities. In practice, the SAIC preferred the AUCL to the AML. Compared with the SAIC, the NDRC seemed to be more powerful and its decisions have also attracted wider international attention, such as the Qualcomm Case. The MOFCOM is much more active in reviewing concentrations concerning IP, and at least fourteen conditionally cleared decisions in this respect have been released. As for the judgment made by the Guangdong High People's Court in the *Huawei Technology Co. Ltd. v. InterDigital Technology Corp*. case (**'*Huawei v. IDC*'**), it reflects Chinese people's court's attitude towards abuse of IP which could constitute a monopoly, responding to the most heatedly discussed questions in standard-essential patent (**'SEP'**) licence, such as how to define the relevant market, how to determine the FRAND royalties, and whether an injunction sought by the licensor is with goodwill or not.

### 5.1 NDRC

In November 2013, the NDRC initiated an anti-monopoly investigation into Qualcomm Incorporated (**'Qualcomm'**) in response to a complaint. After collecting evidence, analysing conduct, and listening to Qualcomm's statement and defence opinions, the NDRC concluded that Qualcomm had abused its dominant market position in CDMA, WCDMA, and LTE wireless communications, SEP licence market, and baseband chipset market through: (1) charging unfairly high royalties; (2) tying in wireless communication non-SEP licence; and (3) attaching unreasonable conditions in baseband chipset sales. Taking into consideration the seriousness, scope, and duration of Qualcomm's abuse, the NDRC ordered Qualcomm to cease illegal conducts, and punished Qualcomm with fines of 8 per cent of its turnover obtained in China in 2013, amounting to CNY 6.088 billion.[28] What is worth noting is that the NDRC is not the only competition authority who has taken action: the Korea Fair Trade Commission,[29] and the EU (p. 12) Commission[30] fined Qualcomm 1.03 trillion won and EUR

997 million in December 2016 and January 2018 respectively for abuse of its dominant market position.

Since conducts of Qualcomm had restricted competition, obstructed and inhibited technological innovation and development, and harmed consumer rights and interests, the NDRC concluded that Article 17 of AML (selling commodities at unfairly high prices; conducting tie-in sale of commodities without justifiable reasons, and adding other unreasonable trading conditions to transactions) had been breached. During the investigation, Qualcomm cooperated and proactively put forward a package of remedies, namely: (1) to provide a list of patents when licensing wireless communications SEPs and not charge for expired patents; (2) not to require the licensee to grant back its non-SEPs against its will and not to compel the licensee to grant back relevant patents without paying reasonable royalties; (3) as for wireless communications terminals sold and used in China, not to charge SEP royalties on the basis of wholesale retail price of the terminal, when sticking to relatively high licence rate; (4) not to tie in non-SEP when licensing SEPs to the Chinese licensees; and (5) not to set accepting and paying for expired patents, granting back for free, tying in non-wireless-communications-SEPs, not challenging the licence agreement as pre-conditions for supply of baseband chipsets.[31]

The Qualcomm case set a record high with respect to the amount of fines since the AML came into effect on 1 August 2008. It not only attracted international attention, but also had an effect on both legislation and practice. The Guidelines (Article 14—Charge Excessive High Royalties for IP License, Article 15—Refuse to License IP, Article 16—Tie in Concerning IP, and Article 17—Unreasonable Trading Conditions Concerning IP) respond to lessons learnt from the Qualcomm case. After the punishment decision, Qualcomm declared to have gradually signed new 3G and 4G Chinese patent licence agreements with more than 100 companies, including the largest Chinese mobile device suppliers, in accordance with the rectification plan submitted to and approved by the NDRC,[32] among which ten of the top ten largest Chinese original equipment manufacturers had accepted the new licence agreements until 26 December 2016.[33] Even if having to go through (p. 13) patent infringement litigations, invalidity proceedings, and other related litigations in China, Germany, France, and the US, Qualcomm and Meizu still settled in the end, reaching a patent licence agreement whereby Qualcomm would grant Meizu a worldwide royalty-bearing patent licence, which is consistent with remedies submitted by Qualcomm to the NDRC.[34]

## 5.2 MOFCOM

Ever since implementation of the AML in August 2008, the MOFCOM has conditionally cleared thirty-six concentrations, fourteen among which involved IP.[35] Remedies in relation to IP can be classified into four categories: (1) requiring undertakings concerned to stick to fair, reasonable, and non-discriminatory (**'FRAND'**) commitments already made to the standard setting organization (**'SSO'**); (2) ordering the licensor not to apply for SEP injunctions against potential licensee with goodwill; (3) prohibiting SEP licensor from making acceptance of non-SEP by the licensee as the pre-condition; and (4) requiring the SEP assignee to continue to abide by commitments already made by the SEP assignor to SSOs and the MOFCOM, or else transfer of SEP shall not be undertaken.[36] Below, four typical concentrations in this regard would be further analysed.

### *5.2.1 Conditional clearance of Bayer's acquisition of Monsanto*

On 5 December 2016, MOFCOM received notification from Bayer Aktiengesellschaft Kwa Investment Co. (**'Bayer'**) of its acquisition of Monsanto Company (**'Monsanto'**).[37] MOFCOM defined non-selective herbicide, vegetable seed, corn seed sterilization coating agent, corn seed insecticide coating agent, hybrid corn seed, trait of different crops, and digital agriculture as relevant product markets. As for non-selective herbicides, vegetable seed, corn seed sterilization coating agent, corn seed insecticide coating agent, and hybrid

corn seed, the relevant (p. 14) geographical market is China, while the relevant geographical market for trait of different crops and digital agriculture is the global market.[38] MOFCOM found that the concentration would eliminate or restrict competition in the Chinese non-selective herbicide market, Chinese long-day onion seed market, Chinese carrot seed sales market after cutting and machining, Chinese fruit tomato seed market, international corn, soybean, cotton, and rape trait market, and international digital agriculture market.[39]

In the end, MOFCOM required Bayer, Monsanto, and the new undertaking to be established (**'New Undertaking'**) to perform the following obligations:[40]

> (a) To divest Bayer's vegetable seed business on a global scale, including relevant facilities, personnel, IP (patent, know-how and trademark), and other tangible and intangible assets;
>
> (b) To divest Bayer's non-selective herbicide business (glufosinate-ammonium business) on a global scale, including relevant facilities, personnel, IP (patent, know-how and trademark), and other tangible and intangible assets;
>
> (c) To divest Bayer's corn, soybean, cotton, and rape's trait business on a global scale, including relevant facilities, personnel, IP (patent, know-how, and trademark), and other tangible and intangible assets; and
>
> (d) Within five years ever since Bayer, Monsanto, and the New Undertaking's commercialized digital agricultural products enter the Chinese market, to permit digital agricultural software applications developed by all the Chinese digital agricultural software application developers to connect to Bayer, Monsanto and the New Undertaking's digital agricultural platforms applied in China in accordance with FRAND provisions, and to permit all the Chinese users to register so as to make use of Bayer, Monsanto, and the New Undertaking's digital agricultural products or applications.

### *5.2.2 Conditional clearance of Nokia's acquisition of Alcatel Lucent*

On 21 April 2015, Nokia Oyj (**'Nokia'**) notified to MOFCOM for its acquisition of Alcatel Lucent with EUR 15.6 billion.[41] On 15 April 2015, both parties entered into a memorandum of understanding (**'MOU'**). In accordance with the MOU, the transaction would be completed through public offer in both French and American stock exchanges. After the transaction, Nokia would hold 100 per cent of shares in Alcatel Lucent, while previous shareholders of Alcatel Lucent (p. 15) would hold 33.5 per cent of shares in the new undertaking to be established.[42] The investigation showed that Nokia and Alcatel Lucent had horizontal overlap in wireless communications network equipment and services markets. Wireless communications network equipment could further be divided into radio access network (**'RAN'**) and core network systems (**'CNS'**).[43] After investigation and analysis, the MOFCOM found that the acquisition would eliminate or restrict competition in the Chinese wireless communications SEP licence market.[44]

The MOFCOM accepted commitments proposed by Nokia and required Nokia to abide by the commitments under its supervision. To be more specific, as for 2G, 3G, and 4G cellular communications SEPs already obtained by Nokia on the closing day of the acquisition, including Alcatel Lucent's 2G, 3G, and 4G cellular communications SEPs:[45]

> (a) Nokia confirms to support the following principle: on condition of equality, Nokia shall not apply for SEPs injunction to prohibit implementation of FRAND standards, unless the licensor has already offered FRAND license conditions, while potential licensees do not have the good will to sign and observe the FRAND license provisions. In determining whether the licensor or the licensee is with good will or not, one

element is advised to be taken into account: without undue delay, one party is willing to initiate the dispute in relation to whether license conditions put forward by Nokia is consistent with the FRAND commitment to an independent adjudicator reasonably accepted by both parties, to be bound by the decision made by the adjudicator, sign FRAND license agreement in accordance with the decision and pay for compensations and FRAND license fees which might be required by the decision and agreement.

(b) When transferring SEPs to third parties in the future, Nokia shall keep Chinese licensees and other Chinese companies who are during active negotiation for the license informed of conditions of the transfer in time, especially detailed information of name and address of the assignee, effective date of the transfer and specific rights which will be transferred. For transfer of certain SPEs to third parties which would significantly affect value of Nokia's SEPs package to be licensed by Nokia to potential Chinese licensees, any Chinese licensee already existed before the transfer is entitled to negotiate for a new royalty rate before the previous (license) agreement would expire. Similarly, for the potential Chinese licensees who will be in negotiation with Nokia during Nokia's transferring certain SEPs to third parties, if the transfer would significantly (p. 16) affect value of Nokia's SPEs package, Nokia agrees to consider license fees. In order to avoid ambiguity, besides certain SEPs potentially to be transferred, the re-negotiation or new license fees shall also take into account new SEPs to be included in Nokia's SEPs package.

(c) When transferring certain SEPs to new assignees in the future, the new assignees shall continue to abide FRAND commitments already made by Nokia to SSOs. In another word, FRAND obligations shall also be transferred together with certain SEPs to the assignee.

(d) The MOFCOM is entitled to supervise whether Nokia will obey the commitments mentioned above. Nokia shall report to the MOFCOM the performance circumstances of obligations above within forty-five days upon end of each Chinese financial year. The report obligation shall be borne by Nokia from effective date of the decision (19 October 2015) to 18 October 2020.

### *5.2.3 Conditional clearance of acquisition by Microsoft of Nokia's devices and services business*

On 13 September 2013, MOFCOM received notification of the acquisition. In accordance with the stock and asset purchase agreement signed between Microsoft International Holdings B.V. (**'Microsoft'**) and Nokia Corporation (**'Nokia'**) on 2 September 2013,[46] Microsoft would buy out Nokia's devices and services business for EUR 5.44 billion, while Nokia would keep all the patents in relation to communications and smartphones. The target business included all the entities and assets of Nokia's devices and services business department, including mobile phone, intelligent device business, a design team, and sales of Nokia's devices and services production facility, equipment and services, marketing and relevant supporting operation. Devices and services department of Nokia had manufacturing plants of mobile phones and smart phones in China, Korea, Vietnam, Finland, Brazil, Mexico, and other countries. After the transaction, all the manufacturing plants would be transferred to Microsoft, which meant that Nokia would no longer manufacture mobile phones or smart phones by itself.[47]

Microsoft and Nokia are vertically related in many relevant product markets. To be more specific, Microsoft manufactures and supplies the Surface series laptop PC; develops and licences mobile intelligent terminal operating systems, including smart phone operating systems (Windows Phone) and laptop PC operating systems (Windows RT and Windows 8); and develops and licences technology (p. 17) patents in relation to mobile smart terminals. As for Nokia, it not only manufactures and sells functional phones and smart phones, but

also obtains huge amount of 2G, 3G, and 4G communications technology patents. In accordance with businesses which were covered by the transaction, the MOFCOM mainly analysed markets of smart phone, mobile intelligent terminal operating system, and patent licence in relation to mobile intelligent terminal. The MOFCOM defined relevant geographical market as China.[48]

MOFCOM found that the vertical relationship between Microsoft's mobile intelligent terminal operating system and Nokia's smart phone would not eliminate or restrict competition. Nevertheless, Microsoft might abuse its dominant market position in Android operating system licence to eliminate or restrict China's smart phone market. Furthermore, the transaction could also trigger Nokia to abuse its communications SEPs.[49] In the end, MOFCOM concluded that the concentration might eliminate or restrict competition in China's smart phone market, and required undertakings concerned with adherence to the following commitments:[50]

## Microsoft's commitments:

(a) As for Microsoft's SEPs applied in smart phones, which are essential for industrial standards and would be licensed on FRAND conditions as already committed to SSOs by Microsoft, as of the closing date of this transaction, Microsoft shall continue to obey the principles below:

i. To continue to abide by commitments already made to the SSOs and license its SEPs under FRAND conditions;

ii. Not to apply for injunctions or exclusion order against smart phones manufactured by undertakings located in China pertaining to the SEPs mentioned above;

iii. Not to require the licensee to license its patents back to Microsoft when licensing the SEPs above, unless the licensee possesses patents essential for the same industry; and

iv. To only transfer SEPs above to the new assignee when the latter agrees to continue to follow the principles above.

The four principles mentioned above (i–iv) shall be bound by reciprocity principle. That is to say, for a potential licensee, to whom the commitments mentioned above are applicable, if it possesses SEPs which not only have connection with Microsoft's products (such as Windows smart phone) but are also bound by FRAND commitments, it shall also abide by the same principles with respect to the SEPs.

(b) As for 'project patents' (patents licensed by Microsoft under the Android, EAS, RDP and exFAT patent projects, including but not limited to patents listed in Annex 1 and corresponding Chinese patents, **'non-SEPs'**), as of closing date of the concentration, Microsoft shall: (p. 18)

i. Continue to non-exclusively licence the non-SEPs above to smart phone manufacturers located in China under its current Android, EAS, RDP and exFAT project licence, covering smart phones manufactured, used or sold in China;

ii. When continue to license the non-SEPs above,

- patent royalty rate shall neither be higher than the royalty rate charged by Microsoft before the concentration, nor higher than the royalty rate stipulated by current agreement for current licensees;
- other non-price provisions and conditions shall keep essentially the same after the transaction; within the scope of (b) ii., Microsoft could consider providing more favorable treatment to new or existing licensees because of specific circumstances and market environment.

iii. Within the five years since effective date of the decision (8 April 2014) to 8 April 2019, not transfer any non-SEPs listed in Annex 1 or Annex 2 to any new assignee. After the five years, Microsoft will transfer its non-SEPs to a new assignee only if the latter agrees with all the licence commitments already made by Microsoft before.

iv. After the closing day, shall only apply for the non-SEPs injunctions after having confirmed that the potential licensees will have not negotiated with good will. Nevertheless, actions to be taken shall be in line with existing business practice.

(c) Unless otherwise explicitly required by the commitments above, this commitment shall not be understood as requiring Microsoft to licence its patents in a way not consistent with the business practice before Microsoft's acquisition of Nokia's Devices and Services business. To avoid ambiguity, any expression in this paragraph shall not impair or change the validity of the whole commitments.

(d) Except for certain conditions, the commitments mentioned above will be effective for eight years until 8 April 2022.

(e) The MOFCOM is entitled to supervise whether Microsoft will obey the commitments mentioned above.

## Nokia's commitments:

(a) Nokia confirms to continue implementing commitments already made to the SSOs, and to license SEPs in accordance with FRAND principles which are in line with the SSOs' IP policy.

(b) Nokia confirms to abide by the following principle: with pre-condition of equity, not to prohibit implementation of the standards with FRAND commitments through applying for injunctions against SEPs, unless the licensor has already provided licence conditions in line with FRAND principle, while the potential licensee does not sign and abide by the FRAND licence provisions with good will.

(c) When deciding whether a licensor or licensee is with goodwill or not, with pre-condition of equity, in line with SSOs' IP policies and constant development of relevant judicial interpretation, one of the elements to be considered could be: without undue delay, one party is willing to initiate the dispute in relation to whether licence conditions put forward by Nokia is consistent with its FRAND commitment to an independent adjudicator reasonably accepted by both parties, to be bound by decisions made by the adjudicator, to sign FRAND licence (p. 19) agreement in accordance with the

decision and to pay for compensations and FRAND licence fees which might be required by the decision and agreement.

(d) Under equal condition, Nokia shall continue to abide by FRAND commitments already made to SSOs, licence SEPs in accordance with the SSOs' IP policies, without compelling the licensees to accept Nokia's licence of patents which do not have to abide by FRAND commitments.

(e) Nokia shall transfer SEPs to the new assignee only when the latter agrees to continue to follow the FRAND commitments already made by Nokia to SSOs (reiterated hereby), so as to transfer the FRAND commitments to the new assignee at the same time.

(f) When valuing each FRAND licence, Nokia shall take into consideration of all the elements concerned, including but not limited to patent licence or patent package, licence period, licenced product, business model of selling or distributing these products, standards concerned, adoption scope by the market of the standardization function, agreement structure, any reverse license or other non-currency compensation value, arrangement for fees payment and application scope under any circumstances. After completion of this concentration, unless it is reasonable to make a change due to alteration of the elements above, under equal condition, Nokia shall not deviate from the current FRAND royalty rate of various cellular communications SEPs packages.

(g) The commitments above shall not be understood as would

i. affect rights and obligations of Nokia beyond the scope of the current FRAND obligations in relation to SEPs;

ii. restrict Nokia's legitimate rights and interests to license or transfer any of its patents;

iii. lead to any amendment to agreement between Nokia and any third parties; or

iv. require Nokia to obtain licence of any technology which is not needed.

(h) (f) is not applicable to any company who claims any patents for mobile communications products or services manufactured, sold, or provided by Nokia, even if Nokia has already made commitments above.

(i) The MOFCOM is entitled to supervise whether Nokia will obey the commitments mentioned above.

### *5.2.4 Conditional clearance of Google's acquisition of Motorola Mobility*

On 30 September 2011, the MOFCOM received notification from Google Inc. (**'Google'**) for its acquisition of Motorola Mobility, Inc. (**'Motorola Mobility'**).[51] MOFCOM paid much of its attention to the Chinese market, and concluded that the concentration would eliminate or restrict competition in relevant market and required Google to bear the following obligations:[52]

(a) It is in line with the current business practice for Google to license the Android platform on the basis of open-source for free. Nevertheless, this should not (p. 20) affect Google's right to keep close-source or close the source of software (including but not limited to applications offered by the Android platform) in relation to Android

platform. This obligation shall neither affect Google's ability to charge for products or services in relation to the Android platform.

(b) Google shall treat all the original device manufacturers non-discriminatorily with respect to the Android platform, which is only applicable to original device manufacturers who have already agreed not to differentiate or derive the Android platform. This obligation is neither applicable to the way for Google to provide, license, or distribute Android platform related products and services (including but not limited to applications offered by the Android platform).

(c) Google shall continue to bear the FRAND commitments already made by Motorola Mobility for its patents.

## 5.3 Chinese People's Courts

On 6 December 2011, Huawei Technology Co. Ltd. (**'Huawei'**) initiated a suit against InterDigital Technology Corporation, InterDigital Communications, Inc., and InterDigital Inc. (**'IDC'**) to Shenzhen Intermediate People's Court for abusing its dominant market position in the 3G wireless communications SEPs licence market. To be more specific, compared with royalties of SEPs charged to Apple, Samsung, and other companies,[53] IDC discriminately charged excessively high licence fees to Huawei. Moreover, IDC required Huawei to license its global wide patents to IDC for free, which constituted attaching unreasonable trade conditions. Huawei held that a licence package, consisting of both SEPs and non-SEPs, as well as 2G, 3G, and 4G SEPs, constituted tie-in. During the negotiation, IDC suddenly initiated suits against Huawei in a US federal court and the US International Trade Commission.[54] It could be regarded as refusal to deal. Accordingly, Huawei requested the court to order IDC to cease the excessive high pricing, discriminate pricing, tie-in, attaching unreasonable trading conditions and refusing to deal. In addition, compensation of CNY 20 million was also claimed.

Shenzhen Intermediate People's Court concluded that IDC had abused its dominant market position in each 3G wireless communications SEP licence market, required IDC to stop charging excessive high royalties, and compensate Huawei with CNY 20 million for commercial losses.[55] Nevertheless, the court of first instance did not support the tie-in claim put forward by Huawei with respect to licensing (p. 21) the 2G, 3G, and 4G SEPs, as well as international patents together as a package, but sustained the tie-in of non-SEPs to SEPs. Both Huawei and IDC appealed the judgments of first instance to Guangdong High People's Court, who made the final binding judgments in October 2013, dismissing the appeal and upholding judgments of the court of first instance.[56] The more detailed analysis below is based on the judgments made by the Guangdong High People's Court.

Relevant geographical markets are the US and China. Each SEP licence market under Chinese and American 3G communications technology standards (WCDMA, CDMA2000, and TD-SCDMA) constitutes a separate relevant product market.[57] Taking into consideration the uniqueness and irreplaceability of each SEP within the 3G standard, IDC enjoys 100 per cent of shares in each SEP licence market, so as to have the ability to hinder or affect other business operators from entering the relevant market. The court agrees with Huawei's proposition that IDC has a dominant market position in relevant market.[58] During negotiations of SEP licence, the patentee shall sign and perform the contract in accordance with FRAND principles,[59] since it is the patentee who controls almost all the information in relation to SEP licence while the counterparty knows little in this regard. Irrespective of the terms of a lump sum royalty or patent licence royalty rate, royalties required by IDC to Huawei were excessively higher than those required of Apple, Samsung, and other companies. It constituted both excessive high and discriminative pricing. Since Huawei was

always with good will during the negotiation, the reason why IDC initiated lawsuits in the US could be explained by compelling Huawei to accept the excessive high royalties.[60]

*Huawei v. IDC* is not only the first anti-monopoly civil case almost totally won by the plaintiff, but also the first anti-monopoly lawsuit triggered by SEPs licence. It concerned the most cutting-edge and complicated legal issues and has attracted attention both home and abroad. It is also one of the ten most discussed cases in 2013 among all the cases dealt with by people's courts all across China. Chinese people's courts tried to find a reasonable balance between patent protection and anti-monopoly and explored complicated issues. Even if certain issues remain to be discussed, the judgments made by the Chinese people's courts set up their own trial standards, which is of great significance.

(p. 22) China has gathered certain experience in regulating abuse of IP which might constitute monopoly both in legislation and practice. Some of the cases have also triggered heated discussion all over the world, such as the *Qualcomm* case and the *Huawei v. IDC* case, which corresponds not only with the historical trend that China has become one of the three most influential anti-monopoly jurisdictions all over the world, but also with the increasingly important role played by the Chinese economy.

## 6. Way Forward

In the last few years we have seen an intense enforcement record of the People's Republic of China Anti-Monopoly Law by the Chinese competition authorities—the Ministry of Commerce, the State Administration for Industry & Commerce, and the National Development and Reform Commission. They actively enforced the AML through voluminous investigations and the courts have issued several thorough and intriguing judgments with respect to AML disputes.

In relation to IP enforcement, all of China's IP laws are being transformed—patent, trademark, and copyright laws—as well as numerous other IP-related regulations, including standards measures; service invention regulations; and regulations related to criminal enforcement. In addition, other more general laws have been amended or are under reform with important implications for global IP enforcement. The civil procedure law was recently amended, with potentially important repercussions for IP rights holders, particularly in terms of provisional measures for trade secrets.

Some of the cases have triggered heated debate all over the world, such as the *Qualcomm* case and the *Huawei v. IDC* case. With the State Council institutional reform, the new State Administration for Market Regulation will be the only competition authority at central level in China, which means that the vagueness in the competence allocation between the previous three competition authorities and other problems brought by institutional arrangement should be solved. Furthermore, since law enforcement responsibilities of trademark and patent shall also be borne by the comprehensive law enforcement team of the State Administration for Market Regulation, we believe that it will be much easier and more efficient for IP-related anti-monopoly and competition-related legislation and enforcement to go hand-in-hand in the future.

### Footnotes:

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**1** Handong Wu, 'Policy and Science Research into China's Intellectual Property Policy' (2006) 7 China Intellectual Property News, 2–3.

**2** ANNEX 1C, AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, PART III ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS, SECTION 4: SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES, available at <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf> accessed 8 May 2018.

**3** The 1st Session of the 13th National People's Congress's Decision on the State Council's Institutional Reform Program [2018], available at <http://www.gov.cn/xinwen/2018-03/17/content_5275072.htm> accessed 8 May 2018.

**4** 2(1) Establishing the State Administration for Market Regulation, Statement on the State Council's Institutional Reform Program [2018], available at <http://www.gov.cn/guowuyuan/2018-03/14/content_5273856.htm> accessed 8 May 2018.

**5** Provisions on Function Configuration, Internal Organization and Staff of the State Administration for Market Regulation, Article 3(4) In Charge of the Unified Anti-Monopoly Enforcement, 10 September 2018, available at <http://www.gov.cn/zhengce/2018-09/10/content_5320813.htm> accessed 13 September 2018.

**6** As of 30 August 2018 the official website of the National Intellectual Property Administration, PRC (**'CNIPA'**) has become <http://www.cnipa.gov.cn/>while the abbreviation of the state intellectual property office (SIPO) has been exchanged with the CNIPA since 28 August 2018.

**7** Provisions on Function Configuration, Internal Organization and Staff of the National Intellectual Property Administration, Article 3(2) In Charge of the Protection of Intellectual Property Rights, 11 September 2018, available at <http://www.scopsr.gov.cn/bbyw/qwfb/201809/t20180911_308252.html> accessed 13 September 2018.

**8** 2(9) Re-Structuring the State Intellectual Property Office, Statement on the State Council's Institutional Reform Program [2018], available at <http://www.gov.cn/guowuyuan/2018-03/14/content_5273856.htm> accessed 8 May 2018.

**9** The Supreme People's Court of China, 'Outline of the Juridical Protection of IP Released by the Supreme People's Court for the First Time, Together with the White Paper of IP Protection and Ten of the Most Typical IP Cases' [2017], available at <http://www.court.gov.cn/zixun-xiangqing-41872.html> accessed 8 May 2018.

**10** Part I Status of Development, Outline of the Juridical Protection of Intellectual Property in China (2016–2020) [2017].

**11** Article 1 of the *Anti-Monopoly Law of the People's Republic of China* (**'AML'**).

**12** Article 2 of the AML.

**13** In fact, the administrative institutes enacting relevant regulations, guidelines, and provisions were the State Council, the Anti-Monopoly Commission, the MOFCOM, the NDRC, and the SAIC. On 28 September 2018, *Decision of the State Council on Revising Certain Administrative Regulations* (Order No. 703 of the State Council) was promulgated. Article 7 of the Order amended Articles 3 and 4 of the *Provisions of the State Council on the Thresholds for Notifying Concentration of Business Operators*, exchanging 'the department in charge of commerce of the State Council' with 'the agency in charge of anti-monopoly enforcement of the State Council'. Available at <http://www.gov.cn/zhengce/content/2018-09/28/content_5326316.htm> accessed 30 September 2018. On 29 September 2018, the SAMR released seven guidelines pertaining to anti-monopoly notification of concentration of business operators. The main amendment is to exchange 'Anti-Monopoly

Bureau of the MOFCOM' with 'the Anti-Monopoly Bureau of the SAMR'. Available at <http://samr.saic.gov.cn/xw/yw/wjfb/> accessed 30 September 2018. Please be noted that the SAIC has been absorbed by the SAMR and ceased to exist.

**14** Article 223 of the *Criminal Law of the People's Republic of China*.

**15** Xianlin Wang, 'Economic Reform Driven by the Market and Emergence & Development of China's Anti-Monopoly Law' (Vol. 1, 2015) Competition Law and Policy Review, 8–10.

**16** Available at <http://www.court.gov.cn/fabu-xiangqing-3989.html> accessed 8 May 2018.

**17** Article 9 of the AML.

**18** Article 10 of the AML.

**19** 2(1) Establishing the State Administration for Market Regulation, Statement on the State Council's Institutional Reform Program [2018], available at <http://www.gov.cn/guowuyuan/2018-03/14/content_5273856.htm> accessed 8 May 2018.

**20** Ex-President Zemin Jiang, 'Speed up Reform and Opening up to the Outside World and Modernization Construction, and Achieve the Great Success of Socialist Cause with Chinese Characteristics' [1992], available at <http://cpc.people.com.cn/GB/64162/134902/8092276.html> accessed 8 May 2018.

**21** Article 1 of the *Anti-unfair Competition Law of the People's Republic of China* (**'1993 AUCL'**).

**22** Articles 6, 7, 11, 12, and 15 of the 1993 AUCL.

**23** The State Council, Part I Preface, 'State Intellectual Property Strategic Outline' [2008], available at <http://www.gov.cn/zwgk/2008-06/10/content_1012269.htm> accessed 8 May 2018.

**24** Order of the State Administration for Industry and Commerce No. 74 [2015], available at <http://old.saic.gov.cn/fldyfbzdjz/zcfg/zcfg/201507/t20150724_159428.html> accessed 8 May 2018.

**25** The State Administration for Industry and Commerce ('SAIC'), 'Promote Competition and Innovation, Create a Sound Market Environment—To Understand the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate, Restrict Competition' [2015], available at <http://old.saic.gov.cn/fldyfbzdjz/zcfg/zcfg/201508/t20150803_159661.html> accessed 8 May 2018.

**26** Yiming Liu, 'The SIPO Introduces Situation of IP Protection, while Relevant Experts Believe that Abuse of IP will Become the New Target of Anti-Monopoly Enforcement' [2018] *Legal Daily*, available at <http://www.legaldaily.com.cn/index/content/2018-04/26/content_7530538.htm?node=20908> accessed 8 May 2018.

**27** Xiangjun Kong, 'Competition Law Orientation of Anti-Unfair Competition Law' (2017) 5 Law Review, 24.

**28** The National Development and Reform Commission ('NDRC'), 'The NDRC Ordered Qualcomm with Rectification and Fine of CNY 6 Billion for Abuse of Dominant Market Position' [2013], available at <http://www.ndrc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html> accessed 8 May 2018.

**29** Korea Fair Trade Commission, 'KFTC Imposes Sanctions against Qualcomm's Abuse of SEPs of Mobile Communications' [2016], available at <http://www.ftc.go.kr/solution/skin/doc.html?

fn=50ba93a6149acc5be3cae03dc2f4de97e254681689def7a42b2e4ae6eaaf1924&rs=/fileupload/data/result/BBSMSTR_000000002402/> accessed 8 May 2018.

**30** EU Commission, 'Antitrust: Commission Fines Qualcomm €997 Million for Abuse of Dominant Market Position' [2018], available at <http://europa.eu/rapid/press-release_IP-18-421_en.htm> accessed 8 May 2018.

**31** Part III Legal Basis of the Administrative Penalty and the Decision, NDRC Administrative Penalty Decision [2015] No. 1, available at <http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html> accessed 8 May 2018.

**32** Qualcomm, 'Qualcomm builds momentum in China with Oppo licensing agreement' [2016], available at <https://www.qualcomm.com/news/onq/2016/07/31/qualcomm-builds-momentum-china-oppo-licensing-agreement> accessed 8 May 2018.

**33** Qualcomm, 'Qualcomm Signs 3G/4G China Patent License Agreement with Gionee—10 of the top 10 largest Chinese OEMs have accepted NDRC terms' [2016], available at <https://www.qualcomm.com/news/releases/2016/12/26/qualcomm-signs-3g4g-china-patent-license-agreement-gionee> accessed 8 May 2018.

**34** Qualcomm, 'Qualcomm and Meizu Sign 3G/4G Global Patent License Agreement - Agreement Resolves All Patent Disputes Between the Companies' [2016], available at <https://www.qualcomm.com/news/releases/2016/12/30/qualcomm-and-meizu-sign-3g4g-global-patent-license-agreement> accessed 8 May 2018.

**35** Anti-Monopoly Bureau under the MOFCOM, 'Notice and Announcement', available at <http://fldj.mofcom.gov.cn/article/ztxx/> accessed 8 May 2018.

**36** Speech delivered by ex-Director General, Mr. Ming Shang, of the Anti-Monopoly Bureau under the MOFCOM during the 4th 'China Competition Policy Forum' and the International Symposium on Intellectual Property and Anti-Trust in October 2015.

**37** MOFCOM Announcement No. 31 of 2018 on Anti-Monopoly Review Decision concerning the Conditional Approval of Concentration of Undertakings in the Case of Acquisition of Equity Interests of Monsanto Company by Bayer Aktiengesellschaft Kwa Investment Co. (**'MOFCOM Announcement No. 31 of 2018'**), available at <http://fldj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml> accessed 8 May 2018.

**38** Part III Relevant Markets, MOFCOM Announcement No. 31 of 2018.

**39** Part IV Competitive Analysis, MOFCOM Announcement No. 31 of 2018.

**40** Part VI Decisions, MOFCOM Announcement No. 31 of 2018.

**41** MOFCOM Announcement No. 44 of 2015 on Anti-Monopoly Review Decision concerning the Conditional Approval of Concentration of Undertakings in the Case of Acquisition of Alcatel Lucent by Nokia Oyj (**'MOFCOM Announcement No. 44 of 2015'**), available at <http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml> accessed 8 May 2018.

**42** Part II General Information of the Case, MOFCOM Announcement No. 44 of 2015.

**43** Part III 1 Relevant Product Markets, MOFCOM Announcement No. 44 of 2015.

**44** Part IV Competitive Analysis, MOFCOM Announcement No. 44 of 2015.

**45** Part VI Decisions, MOFCOM Announcement No. 44 of 2015.

**46** MOFCOM Announcement No. 24 of 2014 on Anti-Monopoly Review Decision concerning the Conditional Approval of Concentration of Undertakings in the Case of Acquisition of Nokia Corporation's Devices & Services Business by Microsoft Corporation (**'MOFCOM**

**Announcement No. 24 of 2014'**), available at <http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml> accessed 8 May 2018.

**47** Part II General Information of the Case, MOFCOM Announcement No. 24 of 2014.

**48** Part III Relevant Markets, MOFCOM Announcement No. 24 of 2014.

**49** Part IV Competitive Analysis, MOFCOM Announcement No. 24 of 2014.

**50** Part VI Decisions, MOFCOM Announcement No. 24 of 2014.

**51** MOFCOM Announcement No. 25 of 2012 on Anti-Monopoly Review Decision concerning the Conditional Approval of Concentration of Undertakings in the Case of Acquisition of Motorola Mobility, Inc. by Google Inc. (**'MOFCOM Announcement No. 25 of 2012'**), available at <http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml> accessed 8 May 2018.

**52** Part IV Decisions, MOFCOM Announcement No. 25 of 2012.

**53** Part VI General Information of the License Agreements between IDC and Apple, Samsung, and the Others, (2013) YUE GAO FA MIN SAN ZHONG ZI No. 305, 8–9.

**54** Part V General Information of License Negotiation between Huawei and IDC, (2013) YUE GAO FA MIN SAN ZHONG ZI No. 305, 5–8.

**55** (2011) SHEN ZHONG FA ZHI MIN CHU ZI No. 857 and (2011) SHEN ZHONG FA ZHI MIN CHU ZI No. 858.

**56** (2013) YUE GAO FA MIN SAN ZHONG ZI No. 306 and (2013) YUE GAO FA MIN SAN ZHONG ZI No. 305.

**57** Part II Definition of Relevant Markets, Observations of the Court, (2013) YUE GAO FA MIN SAN ZHONG ZI No. 306, 18–20.

**58** Part III Whether IDC Has Dominant Position in Relevant Markets, Observations of the Court, (2013) YUE GAO FA MIN SAN ZHONG ZI No. 306, 20.

**59** Part IV Whether IDC shall License SEPs to Huawei in Accordance with the FRAND Commitment, (2013) YUE GAO FA MIN SAN ZHONG ZI No. 305, 16.

**60** Part IV Whether IDC Has Abused Its Dominant Market Position, Observations of the Court, (2013) YUE GAO FA MIN SAN ZHONG ZI No. 306, 20–21.