Interpretation of New Anti-monopoly Provisions in the Field of Intellectual Property Rights: a Corporate Compliance Perspective

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[Abstract] As the first legal document specially making provisions on anti-monopoly issues in the field of intellectual property rights, the Provisions of the SAIC are of great significance. For various reasons, the Provisions have a narrow scope of application and are yet to be improved in respect of operability and predictability. Enterprises shall not understand and apply the Provisions in an isolated manner, but grasp provisions of relevant laws comprehensively and accurately with systematic thinking mode to ensure compliance in respect of anti-monopoly in the field of intellectual property rights.

I. Introduction

On April 13, the State Administration for Industry and Commerce (hereinafter referred to as the "SAIC") promulgated the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition (hereinafter referred to as the "Provisions") for implementation as of August 1, 2015.

As special provisions on anti-monopoly issues in the field of intellectual property rights, the Provisions may be dated back to the Guidelines on Anti-monopoly Enforcement in the Field of Intellectual Property Rights (hereinafter referred to as the "Guidelines") compiled by the SAIC since 2009. Considering the complexity and sensitiveness of the issue and limited experience in law enforcement, the SAIC decides to temporarily give priority to the development of a rule focused on prominent problems existing in the practice instead of all-inclusive law enforcement guidelines. Since 2013, SAIC has solicited comments from all circles in respect of the draft Provisions for many times; in June 2014, SAIC also solicited public comments online (hereinafter referred to as the "Draft for Comment").

The Provisions make provisions mainly in six aspects: the first is to define concepts such as monopolistic behaviors of abusing intellectual property rights to exclude or restrict competition and relevant markets; the second is to prohibit operators from reaching among themselves any monopoly agreement by way of exercising intellectual property rights, with provisions made on the "Safe Harbor Rule" as well; the third is to prohibit operators who are of dominant market position from abusing the dominant market position when exercising intellectual property rights, with prohibitive provisions made on specific abusive conduct; the fourth is to make further provisions on monopolistic behaviors in patent pool as well as in the formulation and

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1 See the Drafting Notes to the Provisions of the Administrations for Industry and Commerce on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition (Draft for Comment) of the SAIC at: http://www.saic.gov.cn/gzhd/zqyj/201406/t20140610_145803.html.
implementation of standards; the fifth is to define the analysis principles and framework of administrations for industry and commerce in anti-monopoly enforcement in the field of intellectual property rights; and the sixth is to make provisions on administrative penalties.

This document is a preliminary interpretation of the Provisions from a corporate compliance perspective, in combination with reading of several recent cases.

II. Must-know Background

Firstly, anti-monopoly in the field of intellectual property rights has been a hot spot of anti-monopoly enforcement and judicature in China. The National Development and Reform Commission (hereinafter referred to as the "NDRC") has successively investigated and settled the cases of abuse of patent rights by IDC and Qualcomm Incorporated of America since 2013; the High People's Court of Guangdong Province heard the case of abuse of dominant market position based on standard essential patent: Huawei v. IDC; the Ministry of Commerce imposed restrictive conditions in respect of patent license when approving two undertakings concentration cases concerning Microsoft's acquisition of the mobile phone business of Nokia and Merk's acquisition of Android; and now Microsoft is under the anti-monopoly investigation by the SAIC. Under such background, the introduction of the Provisions will surely attract extensive attention.

Secondly, it is not the fact that the Chinese law has no provisions on anti-monopoly in the field of intellectual property rights before the introduction of the Provisions; actually, there are many. In legal aspect, as provided in Article 55 of the Anti-monopoly Law of the People's Republic of China (hereinafter referred to as the "Anti-monopoly Law"), "if an Operator misuses its intellectual property rights in order to eliminate or restrict competition, this Law applies." In other words, provisions in the Anti-monopoly Law in respect of monopoly agreement, abuse of dominant market position and concentration of undertakings all potentially apply to the field of intellectual property rights. In the Contract Law of the People's Republic of China, Article 329 provides that a technology contract which "illegally monopolizes technology and impedes technological progress" shall be null and valid; Article 343 provides that a technology transfer contract "may not restrict technological competition and technological development"; and Article 344 provides that "A patent licensing contract shall be valid only within the term of the patent right. The patentee may not conclude a patent licensing contract with another person in relation to a patent once the term of the patent right expires or the patent right is declared invalid". Article 30 of the Foreign Trade Law of the People's Republic of China (hereinafter referred to as the "Foreign Trade Law") provides that, as for "such acts as forbidding the concessionaire from questioning on the effectiveness of the intellectual property rights in the concession contract, imposing package concession or inserting terms of exclusive re-granting in the concession contract" in foreign trade, the Ministry of Commerce may take necessary measures to eliminate the negative effects. In the aspect of administrative regulations, Articles 27 through 29 of the Administrative Regulations of the People's Republic of China on Technology Import and Export (hereinafter referred to as the "Administrative Regulations on Technology Import and Export") and Article 43 of the Implementing Regulations of the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures also have provisions on such issue. In aspect of judicial
interpretation, Article 10 of the *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Technology Contract Dispute Cases* (hereinafter referred to as the "Judicial Interpretation") provides for six circumstances under which a contract shall be null and void as the contract "illegally monopolizes technology and impedes technological progress". As the departmental rules of the SAIC, *the Provisions are just refining the provisions of the Anti-monopoly Law in certain fields rather than excluding the application of the aforesaid laws, regulations and judicial interpretation*. In other words, a monopolistic behavior shall not be taken for granted as consistent with the *Anti-monopoly Law* and/or relevant laws just because it is not explicitly mentioned in the *Provisions*.

Thirdly, in the field of anti-monopoly, China adopts dual-track system under which administrative enforcement runs parallel with courts' administration of justice; and in administrative enforcement, the architecture of "separate enforcement" by the NDRC, the Ministry of Commerce and the SAIC is adopted. As the *Provisions* are developed by the SAIC alone, they only apply to enforcement activities of the SAIC and provincial administrations for industry and commerce authorized thereby. For people's courts, they generally try cases solely based on laws and regulations, and usually take departmental rules for reference only; therefore, the *Provisions* may or may not be referred to in the trial of anti-monopoly cases in the field of intellectual property rights. As for administrative enforcement, monopolistic behaviors in the field of intellectual property rights may be found mainly in three areas: monopoly agreement, abuse of dominant market position, and concentration of undertakings. The concentration of undertakings under the responsibility of the Ministry of Commerce is not mentioned in the *Provisions*, for example, whether the patent pool (especially when a joint venture is specially established for it) is a concentration of undertakings, whether it is required to be declared, and how to make investigations. It is worth noting that, although abuse of intellectual property rights is usually a combination of price behavior and non-price behavior, the *Provisions*, restricted by the division of responsibilities between the SAIC and the NDRC, only make provisions on monopoly agreement and the abuse of dominant market position that are unrelated to price. The comparison with the *Draft for Comment* in 2014 makes it more illustrative: a pair of brackets added in Article 3 of the *Provisions*, explicitly stating "except for the price monopoly"; and in Article 12, the requirement on prohibiting exchange of "price" is deleted from the provision that it is prohibited to reach monopoly agreements by way of patent pool. Based on the aforesaid, it is further indicated that, to ensure compliance, enterprises shall not only observe the requirements of the *Provisions*, but also pay attention to judicial practices of courts, provisions or enforcement examples of the NDRC and the Ministry of Commerce in relevant fields.

In general, the *Provisions* play an important guiding role in the anti-monopoly compliance in the field of intellectual property rights, but shall not be regarded as a "Master Key". Only keeping systematic thinking mode and following the whole system of anti-monopoly law and relevant laws of China as well as the unique institution of anti-monopoly enforcement and judicature of China can we grasp the legal requirements comprehensively and accurately to ensure anti-monopoly compliance in the field of intellectual property rights.

Based on the aforesaid, we have made analysis of main articles of the *Provisions*. 
III. Analysis of Main Articles of the Provisions

(I) Basic concepts and scope of application

The headings and most articles of the Provisions show that the Provisions seem to apply to various acts of abusing "Intellectual Property Rights". However, the term "technology" frequently appears in such articles as Articles 3, 5, 10, 12 and 13 and Articles 12 and 13 are only limited or mainly specific to patent issues. It may be deemed that what the Provisions mainly govern is the abuse of technological intellectual property rights, including patent, software copyright, and layout designs of integrated circuits; and provisions on copyright other than trademark rights, geographical indications and software are hardly found.

As provided in Article 3, abuse of intellectual property rights to exclude or restrict competition refers to exercise of intellectual property rights, implementation of monopoly agreements, abuse of dominant market position and conduct of other monopolistic behaviors (except for the price monopoly) in violation of the Anti-monopoly Law. The definition is not directly helpful in identifying relevant monopolistic behaviors; instead, it mainly works to: i. generally reveal that the monopolistic behaviors in the field of intellectual property rights may be manifested in the form of monopoly agreement and abuse of dominant market position; ii. price monopoly is beyond the scope of application of the Provisions, for example, the "monopoly agreement" in Articles 4 and 5, "differential treatment" in Article 11 and "treating differently" in Article 12, and other terms originally having extensive sense all have excluded the price behavior in the Provisions.

Paragraph 2 of Article 3 also makes provisions on the definition of "relevant markets". In this paragraph, it is required to "consider the effects of intellectual property rights, innovation and other factors", but no detailed explanation on how to give such consideration is given. It only states that "the relevant commodity markets may be either technology markets or markets of products containing specific intellectual property rights"; relevant technology markets refer to "the markets formed through the competition between technologies involved in the exercise of intellectual property rights and alternative similar technologies". In our opinion, in judging whether two or more technologies are "alternative to each other" and "competitive with each other", we possibly need to consider the nature, purpose, license fee and other factors of those technologies.

In the Qualcomm Incorporated case, relevant commodity markets defined by the NDRC include both relevant technology markets (namely, "a collection of relevant product markets solely constituted by various wireless standard essential patent licenses" or "market of wireless standard essential patent portfolio licenses" held by Qualcomm Incorporated) and markets of products containing intellectual property rights (namely, CDMA baseband chip market, WCDMA baseband chip market and LTE baseband chip market).

See the Administrative Penalty Decision (Fa Gai Ban Jia Jian Chu Fa [2015] No.1) of the NDRC against Qualcomm Incorporated at: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

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(II) Monopoly agreement and "Safe Harbor"

The Provisions are characterized by governance focus thereof on abuse of dominant market position (Articles 6 to 11, and Articles 12 to 13), and few references to monopoly agreements which are described only in two articles (Articles 4 and 5) as well as Paragraph 2 of Article 12.

Among them, Article 4 is only a quotation of Articles 13, 14 and 15 of the Anti-monopoly Law, and indicates that the three articles apply to the field of intellectual property rights, except which, there is no new or detailed provision. In other words, the right to identify "other monopoly agreements" granted to the SAIC by Item 6 of Article 13 and Item 3 of Article 14 of the Anti-monopoly Law is not exercised in the Provisions to make provisions on the field of intellectual property rights, especially the types of other monopoly agreements that are highly possible to occur in technology development cooperation and technology licensing. In this term, Article 4 seems to fail to achieve the effect expected by the drafter "to further implement relevant requirements of the Anti-monopoly Law, standardize the enforcement practices of administrations for industry and commerce, and instruct operators to exercise intellectual property rights in accordance with the law"3, and the definiteness and predictability are yet to be improved.

Notwithstanding the foregoing, by reference to the aforesaid Judicial Interpretation and Administrative Regulations on Technology Import and Export, the following agreements are at risk of being regarded as "other monopoly agreements": (1) restraining one party to a contract from making new research or development based on the underlying technology of the contract, or restraining such party from using the improved technology, or making agreement on exclusive grant-back free of charge; (2) restraining one party to a contract from obtaining a technology similar to or competitive with that of the technology provider from other sources; (3) obviously unreasonably restricting the quantity, types, price, sales channels and export markets of the products produced or services provided by the technology receiver with the underlying technology of the contract; (4) requiring the technology receiver to accept additional conditions that are not necessarily required in implementing the technology, including purchase of unnecessary technology, raw materials, products, equipment and services and receiving of unnecessary personnel; (5) unreasonably restricting the channels or sources for the technology receiver to purchase raw materials, spare parts, products, or equipment; (6) prohibiting the technology receiver from questioning the validity of the intellectual property rights of the underlying technology of the contract or putting forward additional conditions on such questioning; and (7) requiring the assignee to pay royalties or undertake relevant obligations for the technology whose patent right has expired or is declared invalid.

Article 5 is about the "Safe Harbor" Rule, that is, if the market share is below a particular threshold or there are several alternative technologies, those agreements will not be regarded as "other monopoly agreements" in principle. This article shall be understood from the following

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3 See the SAIC Releases New Provisions: Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition, a news release dated April 14, 2015 at the website of the SAIC.
Firstly, as Article 4 or other articles of the Provisions has no specific provisions on the types of "other monopoly agreements", the provisions in Article 5 are actually like "a tree without roots" to some extent. As stated above, agreements falling under seven circumstances including exclusive grant-back are at risk of being regarded as "other monopoly agreements"; therefore, if those circumstances meet the conditions of "Safe Harbor", they may not be deemed as monopoly agreements.

Secondly, Article 5 has neither stated that relevant behaviors do not constitute monopoly agreements, nor that they are "inferred" not to constitute monopoly agreements, but only specified that relevant behaviors "may not be regarded" as monopoly agreements. In other words, even though the conditions of "Safe Harbor" are met, they still have the possibility to be regarded as monopoly agreements. The SAIC has extensive discretionary power in this aspect, while the actual value of "Safe Harbor" is greatly reduced.

Thirdly, the calculation method for "market share" in relevant technology markets is not specified in Article 5. In practice, two methods may be adopted: one is the market share of the technology per se, for example, in terms of technology licensing, the market share occupied by the technology of an operator in competitive relevant technology markets; the other is, in markets of relevant products containing the technology or alternative similar technology, the share of the products containing the technology in terms of sales volume. In the Qualcomm Incorporated case, the NDRC adopted the first method to calculate the share of Qualcomm Incorporated in relevant wireless standard essential patent license markets, confirming that Qualcomm Incorporated took up 100% market shares in the license markets of every wireless standard essential patent, and also in the portfolio license market of its wireless standard essential patents, on the grounds that the standard essential patents are "unique" and "irreplaceable"; in calculating the market share of Qualcomm Incorporated in baseband chip market, it adopted the second method.⁴

(III) Abuse of dominant market position

Article 6 is mainly related to the provisions on identification of dominant market position; compared with the Anti-monopoly Law, Article 6 provides in detail that an operator can not be inferred to have dominant market position only because such operator owns intellectual property rights. However, according to the final judgment of the case of Huawei v. IDC⁵ and the penalty decision against Qualcomm Incorporated rendered by the NDRC, an operator with standard essential patents is more possible to be identified to have dominant market position.

Articles 7 to 11 define five specific behaviors of abuse of dominant market position, namely denial of license, placement of restraints on transactions, tied sale, addition of unreasonable conditions, and differential treatment respectively.

⁴ See the Administrative Penalty Decision of the NDRC against Qualcomm Incorporated.
⁵ Civil Judgment Yue Gao Fa Min San Zhong Zi [2013] No.306 issued by the High People's Court of Guangdong Province
The common essential constituent condition of such five behaviors is the possession of dominant market position by the doer. *An operator has less actual possibility of being identified to have dominant market position with no standard essential patent involved.* and correspondently is at low risk of being considered to violate Articles 7 to 11 of the *Provisions*. It is noticeable again that, *while Articles 7 to 11 provide that an operator who is of dominant market position shall not conduct a number of behaviors, it does not mean that an operator without such dominant market position can definitely conduct such a number of behaviors.*

Save as aforesaid, an operator without dominant market position abusing intellectual property rights (including placement of restraints on transactions, exclusive grant-back, and prohibition of transaction with a third party) is at risk of being considered as having concluded "other monopoly agreements".

Other essential constituent conditions of such five behaviors are respectively outlined as follows.

1. Denial of license

The following conditions shall be met to constitute "denial of license": (1) the intellectual property rights of an operator constitute "a necessary facility" for the production and operating activities of other operators, that is, such intellectual property rights can not be replaced reasonably (such intellectual property rights can not be reasonably replaced by a third party's intellectual property rights, and such intellectual property rights can not be developed independently or the cost therefor is too high), and become necessary elements for other operators to participate in competition on the relevant market; (2) an operator refuses to give licenses to other operators, or refuses the license in disguised form by imposing unreasonable conditions; and (3) an operator refuses the license without justification. Though "justification" is not directly defined in Article 7, in fact, by reference to the provisions of Article 8 of the *Provisions of the Administrations for Industry and Commerce on Prohibition of Abuse of Dominant Market Position*, whether justification exists can be considered from positive and negative aspects: one is to decide whether the denial of license will affect competition or innovation, and then damage consumer interests or public interests, and the other is to decide whether the grant of license will cause unreasonable damage to the right holder.

It is noticeable that "reasonable terms" include reasonable price conditions at first. However, because the *Provisions* do not apply to price monopoly, whether the denial of license by requiring unreasonably high price falls into the range of application of the *Provisions* may need to be cleared by the law enforcement agencies in the future.

2. Placement of restraints on transactions

Essential constituent conditions of placement of restraints on transactions include: (1) the counterpart can only trade with the intellectual property rights holder or traders designated by such holder; (2) placement of restraints on transactions has no justification; and (3) placement of
restraints on transactions excludes or restricts competition. It is doubtful that whether competition is definitely excluded or restricted by placement of restraints on transactions shall be determined in addition by analyzing the impacts on competition in accordance with Article 16; if the impacts on competition need to be analyzed, the scope of application of Item 4, Paragraph 1 of Article 17 of the Anti-monopoly Law may seem to be reduced.

It is noticeable that Article 8 does not define "justification", or the provisions of Article 8 of the Provisions of the Administrations for Industry and Commerce on Prohibition of Abuse of Dominant Market Position, namely comprehensively taking into account whether placement of restraints on transactions was adopted by the operator on the basis of its own normal business operations and for its normal economic return and the impact of such placement on economic efficiency, public interests and economic development, shall be applied mutatis mutandis to the definition thereof. (Tied sale and differential treatment must also have the essential condition "without justification" with the same identification methods, similarly hereinafter)

3. Tied sale

Article 9 refines the tied sale in the field of intellectual property rights, that is, in the tied sale, different products are compulsorily bundled for sales in violation of trade practices or consumption habits, or by ignoring the function of products; and the tied sale will extend the operator's dominant market position from the tying product market to the tied product market, which excludes or restricts the competition in the tying product market or tied product market. It is noticeable that both of such two conditions need to be met at the same time. In other words, forcible tied sale not "extending" the dominant position will not be prohibited by the Provisions. We believe that the extension of dominant position referred here does not mean that an operator has dominant position both in the tying product market and the tied product market, but that an operator excludes or restricts the competition in the tied product market by using its dominant position in the tying product market.

In the Qualcomm Incorporated case, the NDRC affirmed that Qualcomm Incorporated conducted patent tied sale. Qualcomm Incorporated gave three reasons, two of which are as follows: most of the licensees independently chose licenses in their entirety and it is difficult to distinguish standard essential patent and nonstandard essential patent. But the NDRC held that "non-wireless standard essential patent and wireless standard essential patent have different nature and are mutually independent", and separate licensing does not affect their respective application and value; that the party concerned "set single license fee and conducted lump-sum license", which constituted "tied sale of non-wireless standard essential patent license in the wireless standard essential patent license market without justification by using its dominant position in wireless standard essential patent license market".6

4. Addition of unreasonable restrictive conditions

Article 10 clearly lists five prohibited behaviors of adding unreasonable restrictive conditions,

6 See the Administrative Penalty Decision of the NDRC against Qualcomm Incorporated.
namely requiring exclusive grant-back, forbidding the challenge against the validity of intellectual property rights, limiting the utilization of competitive commodity or technology after the expiration of license without infringing upon intellectual property rights, continuing to exercise the rights to the intellectual property the protection period of which has expired or which has been determined to be invalid, and forbidding the transaction counterpart from trading with any third party.

In the Qualcomm Incorporated case, the NDRC affirmed conditions such as "charging the license fee against the overdue wireless standard essential patent" and "requiring the licensee to conduct free reversed license". As for the former, Qualcomm Incorporated expressed that there are several overdue patents every year, and new patents in larger quantity will join in the patent package, so it never collected patent licensee fee against the overdue patents; however, the NDRC held that "the proposition that new patents can supplement the value of overdue patents can not be proved." As for the latter, Qualcomm Incorporated gave some reasons such as the reversed license formed a part of the overall value exchange with the licensee, but the NDRC thought that the facts and evidence in such aspect were insufficient.7

It is noticeable from the compliance perspective that an operator without dominant market position conducting the above-mentioned behaviors will also possibly be considered as having concluded "other monopoly agreements". In particular, the Foreign Trade Law, the Administrative Regulations on Technology Import and Export, and the Judicial Interpretation have made prohibitive provisions against exclusive grant-back and exercise of rights to invalid intellectual property.

5. Differential treatment

Article 11 only copies the provisions of the Anti-monopoly Law to a great extent, which is shown particularly from the absence of guidelines on the determination of the "same conditions" therein. Under the context of technology licensing, whether the conditions are the same shall be determined by the overall consideration of the intended use or usage field of the technology by the transaction counterpart, and property, sales scope (such as a certain country or the world), sales volume, turnover and profit of the products produced by using licensed technology.8

(IV) Two special conditions

If Articles 4 to 11 are general provisions concerning abuse of intellectual property rights to exclude or restrict competition, Articles 12 and 13 provide for two special conditions respectively: one is patent pool; the other is standard essential patent.

1. Patent pool

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7 See the Administrative Penalty Decision of the NDRC against Qualcomm Incorporated.
8 Page 201 of the Feedback on the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition (Draft for Comment) by Liu Xu (July 2014)
Paragraph 2 of Article 12 prohibits horizontal monopoly agreements and vertical monopoly agreements by using patent pool. Compared with the *Anti-monopoly Law*, Paragraph 2 of Article 12 mainly adds such contents: "Members of patent pool may not exchange the yield and market segmentation and other sensitive information in relation to competition" in combination with the practical situation of patent pool. **It seems that the exchange of certain information (such as the amount, value and validity of patents of each participant) which is not "sensitive information in relation to competition" is inevitable for the establishment and operation of patent pool.**

Paragraph 3 prohibits any patent pool administration organ who is of dominant market position to implement the abuse of its dominant market position. Specifically, Items 3 and 4 mainly copy the provisions of Article 10 whereas Items 1, 2 and 5 focus on making provisions on the specific problem of patent pool, that is, a patent pool administration organ shall not constrain the members of patent pool from "licensing patents as independent licensors beyond the patent pool", shall not constrain the members of patent pool or licensees to develop, independently or jointly with any third party, technologies competing with the parent pool, nor shall it treat differently in terms of the transaction conditions the members of patent pool with the same conditions.

It is noticeable that, as for the conduct referred to in Items 2, 3 and 4 above, a patent pool organ without dominant market position may also violate provisions of the *Anti-monopoly Law* concerning prohibition of monopoly agreements.

2. Standard essential patent

In the IDC case and Qualcomm Incorporated case investigated by the NDRC, the case of Huawei v. IDC judged by the High People’s Court of Guangdong Province and the case of Microsoft’s acquisition of the mobile phone business of Nokia investigated by the Ministry of Commerce, standard essential patent is the focus.

Paragraph 1 of Article 13 is a general provision. As the follow-up paragraphs and items only make provisions on the dominant market position, the meaning of Paragraph 1, that is, operators shall not conclude any monopoly agreement by using the standard, can not be ignored.

There is an introduction of "standard" in the brackets of Paragraph 1. There may be different understanding towards the content in the brackets: one is that standard refers to the mandatory requirements for national technical specifications; and the other is that the standard includes but is not limited to the mandatory requirements for national technical specifications. We prefer the second understanding, that is, **apart from national mandatory technical standard, normative documents formulated and issued by standard setting organizations or alliances through negotiation and commonly used and reused in the industry**, or "standard technical solutions".

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9 See the *Announcement on the Anti-monopoly Review Decision on Conditional Approval of Concentration of Undertakings regarding Microsoft’s Acquisition of Nokia’s Devices and Services Business* issued by the Ministry of Commerce.
jointly formulated in the industrial circle through cooperation are also categorized as such standard.

Paragraph 2 prohibits an operator who is of dominant position to conduct two following acts without justification: first, the "patent ambush" act during the formulation of standard; and second, nonperformance of principle of Fairs Reasonable and Nondis (FRAND) after the operator’s patent becomes standard essential patent. FRAND principle is an internationally recognized principle, but people do not reach a consensus on what concrete behavior rules are under such principle, which needs to be analyzed as the case may be. In addition, in this paragraph, the attributive clause "who is of dominant market position" following the "operator" seems to be inappropriate. It seems that an operator shall not conduct the acts above, regardless of whether it has the dominant market position or not before.

(V) Administrative penalty

Article 17 provides that the law enforcement agencies may order an operator to stop the illegal act, confiscate the illegal income or impose a fine concurrently or separately. Article 17 mainly copies the provisions of Articles 46, 47 and 49 of the Anti-monopoly Law, and does not reinforce the operability and predictability of penalty provision. Particularly, as for the amount of a fine, issues in two aspects are yet to be clarified by subsequent provisions or in practice:

(1) Meaning of "turnover": specifically, whether turnover refers to the turnover of an operator that directly carried out the monopolistic behavior of abusing intellectual property rights, or that of all affiliated operators under the group to which such operator belongs, or that achieved globally or within the territory of China, or that achieved in all markets or in a single (or several) relevant markets.

(2) As for fine proportion, there is a large span from 1% to 10%, and there is no guideline to be referred to when it comes to determining which kind of illegal acts may be subject to a fine of low proportion or high proportion. As for monopoly agreement, many countries impose a mitigated punishment for the abuse of dominant market position. Meanwhile, from the perspective of innovation stimulation, it seems that the intensity of punishment for the monopolistic behavior of abusing intellectual property rights may be different from that for ordinary monopolistic behaviors.

In the Qualcomm case, the NDRC adopted two punishment modes: ordering the operator to stop the illegal act and imposing a fine. The amount of the fine is 8% of the turnover of Qualcomm Incorporated within the territory of China in 2013.

IV. Conclusions

As the first legal document in China specially making provisions on anti-monopoly issues in the field of intellectual property rights, the issuance of the Provisions is of great significance. As

10 See the Administrative Penalty Decision of the NDRC against Qualcomm Incorporated.
the departmental rules of the SAIC, the Provisions have a narrow scope of application and can not
detail all monopolistic behaviors in the field of intellectual property rights; and the operability and
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