THE PAST AND FUTURE OF SEP ANTITRUST IN CHINA

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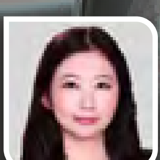

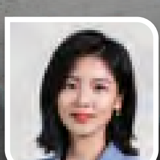

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By Alexandra (Pu) Yang & Fan Guo

Chinese antitrust laws remain an effective legal weapon against SEP abuses. Unlike in the U.S. and E.U. where antitrust laws are fading away at least in SEP/FRAND disputes, Chinese antitrust laws remain strong and active. They are effective tools against SEP abuses, in parallel with FRAND obligations. The Chinese courts and antitrust enforcement have shown their willingness to enforce antitrust laws in FRAND disputes, and recent competition rules provide additional angles to address new rising disputes.

I. INTRODUCTION

Standard-setting organizations ("SSOs") have long played a critical role in the advancement of some of the most important technology sectors, particularly that of the information and communication sector. When people still need different chargers for different electrical standards, a cell phone applying Wi-Fi and telecommunication standards will work all the same across the globe. With such great convenience comes grave danger of monopoly, and standard setting has been the focus of international authorities and courts for the past few decades. With China's enormous market, the Chinese FRAND and antitrust enforcement is critical to any SEP owners' licensing activities.

Over the years, major international antitrust authorities and respective national courts have taken different positions regarding the antitrust issue involving standards and Standard-Essential Patents ("SEPs"). Among them, the Chinese antitrust authorities and legal regime have been increasingly active in the past decade and have been adopting a unique approach. We argue in this paper that the current Chinese antitrust regime still offers a direct and forceful legal remedy under the antitrust laws against SEP abuses, while other major antitrust authorities' enforcement related to standard setting has focused largely on the interpretation and implementation of the Fair, Reasonable and Non-Discriminatory ("FRAND") commitment made by the patent holders.[3]

Mandatory FRAND is used by the current standard-setting regimes (such as ETSI) to deal with the monopoly issues of standardization. The major threat perceived by SSOs in the standard setting process is patent holdup, where without some checks, SEP owners would essentially have veto power over implementers and be incentivized to impose exorbitant terms in licensing patents. FRAND exists to ensure that the licensing terms are fair, reasonable, and non-discriminatory. Reasonable and fair make sure the compensation to SEP owners does not exceed its technical contribution, and non-discriminatory ensure equal treatment of similarly situated licensees. FRAND eventually protect consumers from bearing excessive cost for a solution devised by profit-driven parties. FRAND applies to all SSO members, and naturally becomes the center of standard related enforcement and litigations, including antitrust disputes.

While FRAND is critical, it is not only a remedy for SEP implementers, at least not in China. In China's judicial practice, a breach of FRAND duties could directly raise antitrust issues, for example a supra-FRAND royalty could be found constituting excessive pricing – an abuse of market dominance practice. By contrast, antitrust laws in the U.S. or the EU have not attempted to define the breach of FRAND principle as antitrust behaviors, despite continuous allegations by implementers. A joint policy statement from the United States Patent and Trademark Office, the National Institute of Standards and Technology and the Department of Justice clarified the U.S. position is that F/RAND licensing disputes do not raise antitrust concerns.[4] The CJEU also ruled that SEP owners seeking injunctions in certain situations could be violating anti-competitive law, but FRAND disputes do not otherwise raise such concerns.[5] The U.S. and E.U. positions gained support from some Chinese legal scholars who argue against a public antitrust enforcement of private FRAND commitments.[6] However, recent Chinese antitrust rules issued by competition authorities still directly prohibit the violation of FRAND principle and a close reading of these rules provides additional angles in applications against FRAND disputes.

II. DUTIES ON SEP OWNERS

SEP owners' duties regarding licensing terms of their patents come from two sources: FRAND commitments made to SSOs, and antitrust laws and regulations imposed by the government. The latter is mostly unique to China.

The FRAND commitments made to SSOs are similar in their languages and courts around the world have developed similar standards in applying FRAND principles. While FRAND disputes do not raise antitrust concerns in the U.S., the Chinese Antimonopoly Law ("AML") and regulations have been applicable in FRAND violations.

Specifically, Articles 17-19 of the Chinese AML prohibit the abuse of dominant position, which has been applied by Chinese courts against FRAND-violating licensing terms.[7] In late 2020, the State Administration for Market Regulation ("SAMR") issued the *Rules of Prohibiting the Abuse of*

3 See A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 Yale L. J. 2110 (2018).

4 U.S. Patent & Trademark Office, Nat'l Inst. of Standard and Tech., U.S. Dep't of Justice, Antitrust Div., policy statement on remedies for standards-essential patents subject to voluntary F/RAND Commitments, (Dec. 2019), https://www.justice.gov/atr/page/file/1228016/download.

5 See *Huawei Techs. Co. Ltd. v ZTE Corp.*, 2014 E.C.R. 2391, Case C-170/13, (July 16, 2015).

6 See Du Ning, *Criticism on the Intrinsic Correlation between Violation of the FRAND Principle and That of Antimonopoly Law*, 4 Tech. & Law 37 (2021).

7 See *Huawei Technologies Co. v. InterDigital* Technology Inc. et al, Guangdong High People's Ct. Oct. 21, 2013.

Intellectual Property Rights to Limit or Restrict Competition ("Rules Against the Abuse of IPRs").[8] The SAMR is the State Antimonopoly Bureau responsible for administrative antitrust enforcement. Before, this responsibility was taken by the National Development and Reform Commission ("NDRC") who investigated InterDigital and Qualcomm's SEP licensing practices. The Rules Against the Abuse of IPRs have a provision – Article 13 – specifically deal with the abuse-of-market-dominance issues in SEP licensing. Article 13.2 prohibits competition-restrictive FRAND violations, including refusal to license, tying and unreasonable licensing terms.[9] Article 13.1 is special, as it prohibits participants' late disclosure (patent ambush) in standardization process.

Articles and provisions other than those prohibiting abuse of market dominance may also apply to FRAND disputes, though no actions of such have been filed in China. Articles 13-15 of the Chinese AML prohibit monopoly agreements and concerted actions.[10] Article 12 of the Rules Against the Abuse of IPRs prohibit the same reached by patent pools.[11] Both articles would have a play in SEP disputes involving patent pools holding portfolios of SEPs.

As most SEP owners engage in patent licensing in China, they will eventually fall under the additional duties and direct antitrust compliance risks imposed by Chinese AML and relevant regulations.

III. SEP/FRAND RELATED ANTITRUST CASES

A. Leading Chinese Cases

The leading cases in China are still *Huawei v. InterDigital*[12] and *NDRC v. Qualcomm*,[13] which are years old. Subsequent SEP/FRAND antitrust-related cases either were quickly settled or are still under review, e.g. *Qualcomm v. Meizu* (settled), *Apple v. Qualcomm* (settled) and *Apple v. IWNCOMM* (under review).

Huawei v. InterDigital remains one of the most important cases in China on SEP and antitrust law. In 2011, Huawei brought an antitrust suit against InterDigital for abuse of dominant market position, where the Chinese court applied Article 17 of the AML and found InterDigital in violation. In 2013, Guangdong High Court found InterDigital to be in violation of the FRAND commitments made to ETSI, charged unreasonably high licensing fee and committed tied selling.[14] On these grounds, Guangdong High Court found that InterDigital had violated Article 17 of the AML and abused its dominant market position.[15] This landmark case is ground-breaking in several aspects, first, private parties could bring and win antitrust suits against unreasonably high licensing fees requested by SEP owners; second, FRAND violations would be violations *per se*, or at the very least, prima facie violations of the AML, which differs greatly from the U.S. approach of not connecting FRAND issues with antitrust law; last but not least, as manifested in the NDRC's following investigation against InterDigital, a successful private antitrust suit will bring antitrust enforcement agencies upon the defendant. The NDRC ceased the antitrust review against InterDigital after it had made a list of commitments.

The NDRC's antitrust review and later 6 billion RMB penalty decision against Qualcomm in 2015 was, at the time, the biggest antitrust penalty China's enforcement agencies had made.[16] This decision, however, is rather different from the later European Commission penalty decision against Qualcomm for abuse of market power.[17] The European Commission decision is based on Qualcomm's anti-competition behaviors in the sale of baseband chips, which is also touched upon in the NDRC decision.[18] However, in addition to attaching unfair conditions in the sale of baseband chips, the NDRC also found Qualcomm in violation of the AML for charging unreasonably high licensing fee and involving in tied

8 Guan Yu Jin Zhi Lan Yong Zhi Shi Chan Quan Pai Chu, Xian Zhi Jing Zheng Xing Wei de Gui Ding (Prohibiting the Abuse of Intellectual Property Rights to Limit or Restrict Competition) (promulgated by State Admin. For Market Regulation, Oct. 23, 2020, effective Oct. 23, 2020).

9 *Id.*

10 Fan Long Duan Fa [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (China).

11 See Rules against abuse of IPRs, *supra* note 8.

12 *Supra* note 7.

13 Fa Gai Ban Jia Jian Chu Fa 2015 No. 1 [Sanction Decision] (promulgated by the Nat'l Dev. and Reform Comm'n of P.R.C., effective Feb. 9, 2015), http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html. (China)

14 *Supra* note 7, at 58.

15 *Id.* at 57.

16 *Supra* note 13.

17 ANTITRUST PROCEDURE, Council Regulation (EC) 1/2003, Case AT.40220.

18 *Id.* at 116.

selling.[19] The decision did not make any explicit reference to the FRAND commitment in finding Qualcomm's licensing fee unreasonably high and constituted violation of Article 17 of the AML.[20] Among other things, the NDRC found the unreasonable pricing "increased the cost of wireless communication end products manufacturers, passed down to the consuming end, and harmed the interests of the consumers."[21] Much as this decision is similar to Huawei v. InterDigital, that the defendant was found in violation of the AML for charging unreasonably high price and involving in tied licensing, the NDRC decision made it clear that FRAND violation is not necessary to find antitrust enforcement.

The NDRC stated that using the wholesale price of the end equipment as the base for calculating a licensing fee, when the overall licensing fee is high, could be "obviously unfair," which would be a factor in determining AML violation.[22] The NDRC decision also set several important standards in SEP related antitrust law issues in China, including first, the application of antitrust law to SEP practices does not necessarily need FRAND violations; second, factors beyond the FRAND commitments such as consumer interest would also be basis for AML violations; and third, every single SEP was a market where the SEP owner had 100% market share, thus constituting market dominant position under Article 19 of the AML. The NDRC decision is arguably more important in the sense of predictability, as Chinese courts are not bind by Huawei v. InterDigital (provincial High Court Case), while competition authority would likely have more consistency within the agency.

B. Leading U.S. and EU Cases

As compared to the Chinese authorities applying antitrust law in cases involving SEP and unreasonably high licensing fee, the U.S. courts take a very different approach. In a line of SEP/FRAND antitrust cases, including *Rambus, Inc., v. F.T.C.*,[23] *Qualcomm Inc. v. F.T.C.*,[24] and *Continental Automotive Systems v. Avanci*,[25] the U.S. courts have made it clear that a breach of FRAND commitments, standing alone, is not enough to find antitrust violation. Breach of FRAND commitments could hurt consumers; however, it is not an antitrust concern if competition is not foreclosed.

In *Rambus, Inc., v. F.T.C.*,[26] the DC circuit Court overturned FTC's finding that deliberate late disclosure, or in other words deception of standard setting organizations constitute Sherman Act section 2 violations.[27] The court required anticompetitive effect to be basis of a monopolization claim, and therefore required proof that the SSP would not have included the patented technology but for the deception of the SEP owner.[28] This is a case that is arguably impossible for the prosecution to prove, especially when the SEP owner is well counseled. In some way, this has shut the door for antitrust enforcement against late disclosure in standard setting in the U.S.

In *Qualcomm Inc. v. F.T.C.*, the Ninth Circuit reversed the FTC's district court victory in challenging Qualcomm's SEP licensing practice. Applying Aspen and *Trinko*, the Ninth Circuit rejected the FTC's theory that Qualcomm's refusal to license chip competitors in breach of FRAND commitments constitute an unlawful refusal to deal, a Sherman Act §2 violation.[29] The Ninth Circuit further rejected the FTC's antitrust claim against Qualcomm's "no license, no chip" policy. The reasoning is that even if the policy allowed Qualcomm to charge exorbitant royalties in breach of FRAND, the FTC fails to state a competition harm, that is, the policy impaired the opportunities of rivals (all licensees have paid the same).[30] Lastly, the FTC's exclusive dealing claims based upon Qualcomm's volume discount to Apple also failed for lack of foreclosure effect.[31]

Continental Automotive Systems v. Avanci had a similar outcome before the Northern District of Texas. Continental alleged Sherman Act §§ 1 and 2 violations because the defendant is a patent pool whose members are competitors in the market. Its central claim is that Avanci's

19 *Supra* note 13, at 11.

20 *Id.*

21 *Id.* at 10.

22 *Id.*

23 *Rambus Inc. v. F.T.C.*, 522 F.3d 456 (D.C. Cir. 2008).

24 *Qualcomm Inc. v. F.T.C.*, 969 F.3d 974 (9th Cir. 2020).

25 *Continental Automotive Systems v. Avanci*, 485 F.Supp.3d 712 (N.D. Tex. 2020).

26 *Supra* note 23, at 464.

27 *I Claire Guo, Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes*, 18 J. Marshall Rev. Intell. Prop. L. 259 (2019), 270, at 276.

28 *Supra* note 23, at 465.

29 *Supra* note 24, at 994.

30 *Id.* at 1002.

31 *Id.* at 1005.

pooling arrangement is a horizontal monopoly agreement among competitors to charge supra-FRAND terms. Again, Continental's antitrust claims were all rejected. During the review, DOJ filed an amicus brief to the Court of the Northern District of Texas stating that Continental's complaint failed to state a harm to the competitive process, which was agreed by the Taxes Court.[32] In the U.S., it is clear that a FRAND breach does not constitute an antitrust violation unless there is foreclosure (almost impossible to prove). As for Continental's § 1 claim, the Court also rejected for reasons that Avanci's pooling arrangement allows individual licensee to license outside the pools.[33]

Thus, though there remain theoretical possibilities in applying U.S. antitrust laws against competition-restrictive FRAND breach by SEP owners, such cases could be very hard to prove. The U.S. antitrust laws allow monopolists to enjoy their monopoly profit on SEPs. Disputes over exorbitant royalties are only resolvable through FRAND enforcement.

The European practices in SEP and antitrust laws lean towards the U.S. approach. In the CJEU's decision in *Huawei v. ZTE*, CJEU decided that it is not in violation of Article 102 TFEU, that is, not abuse of dominant position, for a SEP owner to seek injunctive relief in the case which the SEP owner engaged in FRAND negotiations in good faith and the alleged infringer failed to diligently respond to such negotiation.[34] This is largely consistent with U.S. case laws where courts often refuse to grant injunctions for FRAND-encumbered SEPs.[35] In the Advocate General's opinion regarding the case, the Advocate General made two clear statements that distinguish from the Chinese approach: first, the Advocate General noted that the fact a company holds a SEP does not necessarily mean that it holds a dominant position; second, the Advocate General made it clear that competition law has no role in determining FRAND terms.[36] Overall, the European approach on SEP and antitrust/competition laws is similar to that of the U.S., where FRAND disputes per se do not raise antitrust concerns.

To conclude, while U.S. and EU authorities are separating FRAND and antitrust issues in practice, Chinese authorities have taken very different approaches. Where being a SEP owner does not necessitate dominant market position in the EU, the Chinese NDRC has found Qualcomm's dominant position based exactly on it being an SEP owner. Where U.S. DOJ has clarified that FRAND disputes do not raise antitrust concerns, Chinese courts and antitrust enforcement agencies (including in particular the SAMR) have included FRAND principles in determining the existence or not of anticompetitive actions.[37]

IV. CURRENT AND POTENTIAL ANTITRUST LAW HANDLES AGAINST SEP OWNERS

A. The Conventional Antitrust Handles

As one could see from the cases above, recent applications of antitrust law in FRAND disputes mainly involve three issues: first, excessive pricing (coupled by injunctions); second, tied selling; and third, refusal to deal. Although tied selling could also raise antitrust issues under the Sherman Act[38], it has not been applied in FRAND disputes in the U.S. for years. Among the recent applications, the first two occurred in China, and the unfair pricing cause of action is a unique and powerful weapon for implementers against SEP owners. Outside of China, there are no readily available antitrust remedies that would penalize unfair pricing by SEP owners, where the most they would get is a court-set FRAND rate. More importantly, the Chinese precedents have shown that FRAND violation in pricing could make a *prima facie* case for abuse of dominant position[39], and such violation of the AML could be found independent of FRAND related findings. (see *NDRC v. Qualcomm*).[40]

Under Chinese law, the most commonly applied antitrust provisions in FRAND and SEP disputes include Article 17 of the AML, under Chapter 3. Specifically, Article 17 regulates abuse of dominant position, and Article 17.1.1 and 17.1.5 address overpricing issue and tied

32 *Supra* note 25, at 736.

33 *Id*. at 732.

34 *Supra* note 5, at 11.

35 Nat'l Research Council, *Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communications Technology*, (2013), at Chapter 6.

36 Advocate General's Opinion in Case C-170/13 (Nov.25, 2014).

37 See *Huawei v. InterDigital*, supra note 7, at 58.

38 See Melamed & Shapiro, *supra* note 3, at 2135.

39 See *Huawei v. InterDigital*, *supra* note 7, at 57.

40 See NDRC Decision, *supra* note 13, at 11.

selling issue respectively.[41] These two provisions are applied in both *Huawei v. InterDigital and NDRC v. Qualcomm*. Article 17.1.1 could be a very far-reaching provision as it only has two elements, that the undertaking has dominant market position, and the undertaking abuses such dominant position by selling products at an unfairly high price, or buying products at an unfairly low price. While Article 17.1.5, tied selling, is more clear in its scope and interpretation.

With regard to these two elements, dominant market position is defined in Article 17.2, Article 18 and 19 of the AML, and the Guangdong High Court and the NDRC took identical approaches in defining dominant market position in SEP disputes. Namely, they both found that each SEP constitutes an individual market, where the respective SEP owner has 100% share of the market. The Guangdong High Court, under Article 17.2 of the AML, partially based its dominant market position finding on InterDigital being a non-practicing entity, where Huawei would not be able to balance the bargaining power through cross licensing.[42] Therefore, InterDigital has the power to dictate the terms in the transactions which constitutes dominant position under Article 17.2. The NDRC went a step further, presumed Qualcomm's dominant position, under Article 19, by the very fact that it owns SEPs in various wireless communication standards.[43] In either case, each SEP owner is deemed to have 100% market share in the specific SEP.

With regard to the determination of excessive pricing, however, the Chinese authorities have been rather liberal. Similar to the court in *Microsoft v. Motorola*,[44] where the court conducted an exhaustive process in determining what would have been a FRAND rate, the Chinese authorities listed factors that contributed to excessive pricing. It is worth noting that the only common factor used by the Guangdong court and NDRC was the SEP owner forced the implementer to cross-license patents to the SEP owner, while all other factors are different. The Guangdong court compared the licensing fee charged against other comparable implementers and took into consideration the non-practicing entity status of the SEP owner,[45] while the NDRC focused on practices including charging against expired patents and the using the wholesale price of the end products as basis for royalties.[46]

These two different sets of factors both resulted in finding of violation of Article of 17.1.1 of the AML. Particularly for *NDRC v. Qualcomm*, instead of setting a "reasonable" price first, then determine whether there is excessive pricing, the Chinese approach reflects the underlying logic of punishing wrongdoing. Excessive pricing is deduced from the SEP owners' wrongdoing that would result in excessive profit.[47] While it could be harder for private parties to establish excessive pricing violation under the AML without a clear and finite list of factors, it also gives both the enforcement and private parties more liberty to allege and try to prove such violation.

Notably, after the conclusion of *Huawei v. InterDigital and NDRC v. Qualcomm*, there are voices against defining FRAND violations as antitrust behaviors, in particular about excessive pricing. One line of argument is that antitrust enforcement requires a proof of competition harm. Though this burden may be less under the Chinese antitrust regime, it is still not satisfied in a SEP/FRAND antitrust-related case where the plaintiff only has evidence of exorbitant licensing terms but not harms to rival's opportunities.[48] Another line is that FRAND is offering sufficient protection and remedies to implementers and consumers against monopolistic behaviors, the additional antitrust scrutiny of the same behavior of licensors seems superfluous.

Various court guidelines and administrative regulations have since then been limiting the application of AML to SEP disputes. Guangdong High Court issued its *Guidelines for Judicial Review of Cases concerning Disputes on Standard Essential Patents* in 2018, providing that "FRAND violations do NOT necessarily give rise to AML violations"; however, it is still clear that excessive pricing in SEP terms will be subject to AML sanctions if there is "retracting and exclusionary effect to competition."[c] Similarly, Article 6 of *Rules Prohibiting Abuse of IPR* (2020) provides that, an undertaking should not be presumed to have dominant position just for owning intellectual property.

The limitations are by no means denying the AML grounds for FRAND disputes in China, but rather confirming the validity of such grounds by limiting their otherwise very broad scope. FRAND violations are not sufficient evidence *per se*, but still constitutes important basis

41 See *AML, supra* note 10, at Article 17.

42 *Supra* note 7, at 58.

43 *Supra* note 13, at 2.

44 *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217 at *2 (W.D. Wash. Apr. 25, 2013).

45 *Supra* note 6, at 56.

46 *Supra* note 13, at 9.

47 *Id*. at 6.

48 See Du Ning, *supra* note 6.

if not creates strong presumption for AML violations in China. Article 13 of the *Rules Against Abuse of IPRs* lists breach of FRAND principles as elements in determining actions excluding or limiting competition. It is clear that in China, SEP actions such as excessive pricing, refusal to deal and tie-in licenses [c guideline] are still basis for AML violation, though the plaintiff in future actions may bear a higher burden of proof of "retracting and exclusionary effect to competition." AML violation resulting from SEP licensing, as alleged by either private or public entities, will remain a feasible threat against SEP owners in China.

B. Additional Antitrust Handles Under Chinese law

Beside the conventional basis, antitrust laws offer other basis for SEP implementer to challenge competition-restrictive behaviors of SEP powers in standardization and SEP licensing, including issues of late disclosure and patent pool agreements.

The first is the application of antitrust laws in *Rambus*-like disputes. *Rambus* involves the late disclosure of SEP owners in standardization process.[49] Late disclosure includes, first, a failure to disclose patent information essential to a standard until after the standard is published, and then, a demand for royalties for late-disclosed patents. The potential consequence of late disclosure is that it prevents SSOs from adopting a non-proprietary solution in the standard. By not disclosing its patent information, the owner may also have acquired a monopoly for having its patented solution incorporated into the standard. Late disclosure is bad because it raises the cost of acquiring licenses for standards, which are eventually borne by consumers. All IPR policies of SSO dis-encourage or prohibit late disclosure. For example, Article 4.1 of the ETSI IPR Policy requires *"a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted."*

In U.S., late disclosure could give rise to an equitable defense (which renders the asserted SEP non-enforcement), but not Sherman Act Section 2 violations.[50] The *Rambus* court make it clear that failure to disclosure is not sufficient to prove required anticompetitive effect, which is the basis of a monopolization claim.[51] In China, late disclosure is actionable under antitrust laws, and claimants have a greater prospect of success under this claim. Article 13.1 of the *Rules Against Abuse of IPRs* prohibits *"undertaking having a dominant position, without justifiable reasons, carry out the following anti-competitive conduct, i) deliberately withholding its patent information to SSOs during standardization, or explicitly give up its right, but later."* The word *"deliberate"* stresses a knowing failure.[52] A typical fact pattern could be the participants in the working group who sets standard are applicants/inventers of patents. The antitrust analysis of late disclosure applies the rule of reason, the SEP owner could defeat the claim on ground of justifiable causes. While no wording in Art. 13.1 requires the challenger to provide specific proof of competition harm because of the late disclosure, such as that alternative non-patented solution is excluded, but such proof would certainly strengthen the antitrust claim.

Secondly, articles regarding monopoly agreements and concerted actions now have a play in SEP/FRAND disputes. The conventional antitrust challenges against SEP licensing rest solely on the abuse-of-market-dominance claims. This will change as patent pools are taking a greater role in SEP licensing. An SEP patent pool gathers a portfolio of SEPs owned by different owners and licenses them to implementers on behalf of these owners. Pools enhances the efficiency of SEP licensing by offering a "one-stop-shop" where implementers can acquire SEPs owned by multiple owners; however, they also raise a number of competition-restrictive concerns. First and foremost, the pooling arrangements of patent pools are reached among SEP owners which are direct competitors in the market. If the arrangements hide intentions of price fixing, market division, or output restraints, they would be challenged as monopoly agreements under Art. 13 of the Chinese AML. Even if the pooling arrangement is clear of competition-restrictive provisions, there is still risk that members to patent pools act concertedly in individual's licensing practice for cartel purposes. Besides, there is greater risk for SEP pools to carry out abuse-of-market-dominance by charging exorbitant terms when they have the combined power of multiple SEP owners.

As mentioned earlier, Continental Automotive Systems, a supplier of control units enabling cellular communication of cars, already challenged Avanci and several of its licensors (e.g. Qualcomm, Nokia, Sharp) for Sherman Act §§ 1 and 2 violations in 2019.[53] However, none of the antitrust claims were supported. The Northern District of Texas conclude that Avanci's arrangement allows individual licensees to license outside

49 *Supra* note 23, at 478.

50 See Guo, *supra* note 27, at 275.

51 *Supra* note 23, at 464.

52 See Rules against abuse of IPRs, *supra* note 8.

53 *Supra*, note 25.

the pools, suggesting that SEP implementers have to option to obtain license from individual licensers.[54] Also because of there is no proof that the licensers would act concertedly outside the pools, there is no finding of conspiracy to restrain trade. The Court acknowledged that its decision may have differed had the arrangement stipulated otherwise.[55]

Continental Automotive Systems may have a greater chance of success if its action were filed before a Chinese court. Chinese antitrust laws explicitly prohibit patent pools from restricting competition. Beside the general provisions in Art. 13 of the *AML, the Rules Against Abuse of IPRs* have the Article 12 enumerate the typical competition restrictive arrangement of patent pools, of which the first is restricting pool members from licensing outside the pools, either in an agreement or tacit consent. Other explicit prohibitions in Art. 13 include restricting R&D to foreclose innovation, mandatory grant-back, prohibition of validity challenge, and discriminatory treatment of similarly situated licensees. Notably, there is an exemption provision for monopoly agreement in the AML, which is Art. 15. If members to the patent pools could prove their arrangements are "(those) for the purpose of upgrading product quality, *reducing costs, improving efficiency*, unifying product specifications or standards, or carrying out professional labor division," and additionally "do not substantially restrict competition in the relevant market and can enable the consumers to share the benefits from the agreement," they are exempted from Article 13.[56]

However, Article 15 does not change that cartels are per se illegal. It can be interpreted as imposing an active duty for parties attempting to benefit from the exemption to ensure their arrangement have no substantial restriction of competition despite their contribution to market efficiency. Article 15 also has this unique clause requiring parties to enable consumers share the benefits of the exempted monopoly agreement.[57] This is another proof showing the difference between China and U.S. antitrust laws. Chinese antitrust laws disallow monopolists from acquiring monopolistic profit which essentially transfer wealth from consumers to monopolistic. This also explains why excessive pricing is regulated. The antitrust authorities intervene on excessive pricing not for the defense of the implementer, but to increase the welfare of the consumers.

V. THE INTERSECTION OF CHINESE ANTITRUST LEGISLATION AND FRAND PRINCIPLES AND BEYOND

Over the years, courts and antitrust enforcement agencies over the world have largely settled on their position regarding the application of antitrust law in SEP/FRAND related disputes. The U.S. and EU approach is to leave the disputes to the parties, and use patent and contract law to interpret and oversee the enforcement of the FRAND principle.[58] Such approach has a strong presumption, that patent and contract law would be sufficient to enforce the FRAND commitments, and such enforcement would be sufficient to counter the monopoly power and effects that come naturally with standard-setting.[59] However, from both court proceedings involving private parties, to public antitrust enforcement, to antitrust legislation, the Chinese authorities have demonstrated a different approach to the issue.

First, the Chinese legislators have explicitly put FRAND principles into antitrust laws and regulations. As much as the compliance requirements for SEP owners could be similar, such laws and regulations provide unique antitrust causes of action against FRAND violations in China. The Rules against IPRs defines late disclosure and certain actions in violation of FRAND as anticompetitive actions; and be precedents, Article 17 of the AML is clearly applicable in excessive pricing cases against SEP owners. In addition, as of Huawei v. InterDigital, which has not been overturned in any way and remains the landmark case for SEP/FRAND disputes in China, the Chinese practice largely conforms to a synchronized FARND and antitrust law enforcement.[60] That is, FRAND violations are deemed as per se violations under antitrust laws. Even after the later NDRC decision not involving FRAND principle and the Guangdong High Court guidelines stating that FRAND violations do not necessarily raise AML violations, FRAND violations would still make strong prima facie cases for antitrust violation under the laws and regulations incorporating FRAND principles.

Second, the Chinese antitrust regime provides additional protection against SEP owners with dominant position beyond FRAND. NDRC decision against Qualcomm made it clear that Chinese AML alone, without referencing to FRAND principle, is sufficient to penalize SEP owners

54 *Id*. at 732.

55 *Id*.

56 See AML, *supra* note 10, at Article 15.

57 *Id*.

58 See Melamed & Shapiro, *supra* note 3, at 2111.

59 *Id*. at 2132.

60 See Guo, *supra* note 27, at 270.

for actions that would otherwise be FRAND violations.[61] Chinese authorities have also demonstrated that actions such as excessive pricing, that usually only falls under patent and contract law in other jurisdictions, are also subject to AML. This is particularly worth noting as FRAND disputes regarding pricing usually only results in a re-negotiation or a court-set rate in other jurisdictions, while in China it could raise antitrust issues regarding excessive pricing. The Chinese AML has explicit provisions (Article 17) against excessive pricing and, just the existence of such provision, could provide implementers with additional bargaining power in the otherwise imbalanced negotiation with SEP owners.

Lastly, a close reading of the Chinese AML also provides additional potential causes of actions against SEP owners as well SSOs, where Article 15 could be used to compel patent pools to adopt extra measures to ensure the protection of competition and consumer interests, which, in turn, protects the SEP implementers.

VI. CONCLUSION

As antitrust law is fading away in SEP/FRAND disputes in the U.S. and the EU, the Chinese Anti-Monopoly Law and relevant antitrust laws and regulations remain strong and active in cases against SEP abuses. The Chinese antitrust regime imposes additional duties on SEP owners and clearly defines actions, that do not usually fall under antitrust law in other jurisdictions, as anticompetitive. The Chinese courts and antitrust enforcement have also shown their willingness to enforce antitrust laws in FRAND disputes where their U.S. and EU counterparts are leaving the issues to patent and contract law. With the ever-growing Chinese market, the importance of the unique Chinese antitrust causes of actions against SEP owners would only increase. Before FRAND evolves into its perfect form and can effectively constrain the monopoly power comes with standardization, which does not the Chinese antitrust laws and regulations will continue to feasible, if not some of the most effective legal weapons against SEP abuses.

61 *Supra* note 13.