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Series Analysis on New Anti-Monopoly Judicial Interpretation (I): Impacts on IPR-Related Monopoly Civil Disputes

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June 24, 2024 sees the second anniversary of the adoption of the *Anti-Monopoly Law of the People's Republic of China (Amended in 2022)* ("**2022 *AML***"). On the same day, the Supreme People's court of China ("**SPC**") held a press conference to release the long-awaited[1] *Interpretation of Supreme People's court on Several Issues Concerning the Application of Law in the Hearing of Civil Monopoly Dispute Cases* ("***2024 Anti-Monopoly Judicial Interpretation***") and five recent typical anti-monopoly cases heard by the people's courts, and answered reporters' questions. The *2024 Anti-Monopoly Judicial Interpretation* is adopted to guide the application of the *2022 AML* in anti-monopoly judicial proceedings, strengthen the connection between private and public anti-monopoly enforcement, and reflect the experience and good practices achieved in the past years. The *2024 Anti-Monopoly Judicial Interpretation* addresses a wide range of anti-monopoly judicial issues, Lifang & Partners antitrust team will analyse the principles and approaches dealing with core issues adopted by the *2024 Anti-Monopoly Judicial Interpretation* from different perspectives through a series of articles of to deal with the focal issues, beginning with the topic on IPR-related monopoly civil disputes. This article focuses on the potential impacts on the field of IP rights (especially standard essential patents ("**SEPs**") and de facto SEPs), which is one of the focal points standing at the intersection of the new types of business and the new challenges of international competition. We will briefly analyse how the *2024 Anti-Monopoly Judicial Interpretation* balance anti-monopoly and IP rights protection from six dimensions, namely, the effect of an arbitration clause on the exercise of anti-monopoly litigation rights, the jurisdictional nexus about filing an anti-monopoly lawsuits in China against overseas parties, the considerations for determining the IP rights holder's dominant market position, the judicial principles relevant to assessing compliance with FRAND principles, and the principles dealing with parallel private and public enforcement procedures.

Key Point 1: Clarifying that the Arbitration Clause in the License Agreement shall not Impede the Filing of Anti-Monopoly Litigation

Despite the judicial consensus that "arbitration clause shall not be an ex-officio basis for excluding

1. The SPC in 2021 set up a project for a new anti-monopoly judicial interpretation, and five rounds of consultation were conducted with internal and external units and local courts, and several expert argumentation meetings were held, and on November 18, 2022, public consultation was conducted with the community. On the basis of the comprehensive opinions from all aspects, 2024 Anti-Monopoly Judicial Interpretation was further discussed, revised, researched and demonstrated for many times, and then formed into a draft for trial, which was submitted to the Trial Committee of the SPC for deliberation and later adopted. See the transcript of the press conference, https://www.chinacourt.org/chat/fulltext/listId/53265/template/courtfbhnewcommon/subjectid/MzAwNCjONYABAA.shtml.

the jurisdiction of people's courts over monopoly disputes" has been gradually explored by local people's courts and confirmed by the SPC during the previous practices. However, this issue is left unanswered in legal texts such as the *2022 AML*, the *Arbitration Law* and its exposure draft (2021 revision), and the current *Anti-Monopoly Judicial Interpretation*. The *2024 Judicial Interpretation Rules* have for the first time given a clear response to this issue in Article 3: "Where a party files a monopoly civil case with the people's court, and the other party claims that the people's court shall not accept the case on the grounds that the two parties have a contractual relationship and there is an arbitration agreement between them, the people's court shall not uphold such a claim." In addition, compared to the exposure draft of the *2024 Judicial Interpretation*, the newly adopted version of the *2024 Judicial Interpretation* gives a clearer negative answer to the question that whether the arbitration clauses can exclude the jurisdiction of the people's court[2].

With respect to IPR-related monopoly disputes, as some of the IPR-related anti-monopoly litigations center on the renewal and performance of existing licensing agreements, and the exclusive dispute resolution clause (for example, stipulating that any disputes arising from the agreements shall be settled by a specific arbitration institution) are frequently included in the relevant licensing agreements, therefore, when one party intends to protect the legitimate rights and interests through anti-monopoly litigation, while the other party often refers to the arbitration clause to raise an objection to the jurisdiction of the people's court, which may become a major concern of the people's court in accepting the case in the practices. Article 3 of the *2024 Anti-Monopoly Judicial Interpretation* will provide a more sufficient and practical institutional basis for the judicial consensus that "arbitration clause shall not be an ex-officio basis for excluding the jurisdiction of people's courts over monopoly disputes", and will reduce the institutional barriers for raising anti-monopoly litigation by implementing parties of IP rights. However, it should be specially noted that, the denial of the impediment effect of an arbitration clause does not mean that the competent people's courts must accept such litigation brought by implementing parties, which should also depend on whether the conditions for filing a litigation as provided in Article 122 of the *Civil Procedure Law of the People's Republic of China (Amended in 2023)* ("*Civil Procedure Law (Amended in 2023)*") can be effectively satisfied.

Key Point 2: Clarifying the Jurisdictional Nexus for Anti-monopoly Litigation against Overseas Parties

Before the promulgation of the *2024 Anti-Monopoly Judicial Interpretation*, for IPR-related anti-monopoly litigation filed against the defendants without domicile in China (especially against NPEs and patent pools), there have been no explicit stipulation in laws or judicial interpretations concerning the jurisdictional nexus. The *2024 Anti-Monopoly Judicial Interpretation* summarizes years of judicial practices and confirms in Article 6 that the provisions of Article 276 of the *Civil Procedure Law (Amended in 2023)* governing foreign-related civil disputes can apply when filing anti-monopoly litigation against overseas parties. In addition, it is worth noting that, compared with Article 7 of the exposure draft of the *2024 Anti-Monopoly Judicial Interpretation*, Article 6 of the newly adopted version of the *2024 Judicial Interpretation* expands the jurisdictional nexus and connects itself with the current *Civil Procedure Law*, expanding the jurisdictional nexus from "the place where the result occurs", "the place of appropriate connection", and "the place of plain-

2. Article 3 of the exposure draft *2024 Judicial Interpretation*: "Where a plaintiff files a civil lawsuit with a people's court in accordance with the Anti-Monopoly Law, and the defendant raises an objection on the ground that there is a contractual relationship and an arbitration agreement between the two parties, the acceptance of the civil monopoly dispute by the people's court will not be affected. However, if the people's court finds upon investigation after accepting the case that it does not constitute a civil dispute involving monopoly, the people's court may order to dismiss the litigation according to law."

tiff's domicile" to "the place of contract execution", "the place of contract performance", "the place where the litigation subject matter is located", "the place where the property available for seizure is located", "the place of infringement behavior", and "the place of the representative office domicile" under Article 276 of the *Civil Procedure Law*, reflecting the focus of China judicial authorities on the anti-monopoly conduct of overseas parties.

Key Point 3: Clarifying the Consideration Factors for Determining the IP rights Holders' Dominant Market Position

The *2024 Anti-Monopoly Judicial Interpretation*, for the first time, clarifies the factors that the judicial authorities shall consider when determining a IP rights holder's dominant market position. Compared with the factors for considering provided in the *Provisions on the Prohibition of Abuse of Dominant Market Position*[3], the *Provisions on the Prohibition of Abuse of IP Rights to Exclude or Restrain Competition*[4], the *Anti-Monopoly Guidelines in the field of IP Rights of the Anti-Monopoly Commission of the State Council*[5], the *Anti-Monopoly Guidelines in the field of SEPs (Exposure Draft)*[6], and the exposure draft of the *2024 Anti-Monopoly Judicial Interpretation*, Article 33 of the newly adopted version of the *2024 Anti-Monopoly Judicial Interpretation* provides

3. Article 6 The term "market dominance" refers to the market position of an undertaking which enables the undertaking to control the price or quantity of a commodity or other trading conditions in the relevant market, or to hinder or affect other undertakings to enter the relevant market. For the purpose of this Article, "market trading conditions" refer to other factors, other than commodity price and quantity, that can materially affect market transactions, including commodity varieties, commodity quality, payment terms, delivery methods, after-sales services, trading options, and technical constraints, among others. For the purpose of this Article, "to hinder or affect other undertakings to enter the relevant market" includes excluding other undertakings from entering the relevant market, or delaying other undertakings from entering the relevant market within a reasonable period of time, or causing greatly increased entry cost of other undertakings entering the relevant market, making it impossible for other undertakings to compete effectively with existing undertakings
4. Article 8 An undertaking who is of dominant market position may not abuse such position to exclude or restrict competition when exercising its intellectual property.
   A dominant market position shall be identified and presumed in accordance with the Anti-Monopoly Law and the Provisions on the Prohibition of Abuse of Dominant Market Positions. An undertaking owning intellectual property may constitute one of the factors that contribute to the identification of dominant market position of the undertaking, but an undertaking shall not be presumed to have dominant market position in the relevant market merely based on its ownership of the intellectual property.
   In order to determine whether an undertaking who owns intellectual property has the dominant position in the relevant market, the following factors may also be considered: the possibility of the transaction counterparty switching to substitutable technologies or products and the transfer costs in the relevant market, the dependence of the downstream market on the products provided by applying the intellectual property, and the capability of the transaction counterparty to check and balance the undertaking.
5. Article 14 Identification of Intellectual Property Rights and Market Dominant Position
   If an undertaking own intellectual property rights, it does not necessarily mean that it has dominant market position. In order to identify whether an undertaking which owns intellectual property rights has dominant market position in the relevant market, analysis shall be made according to the factors and circumstances of the dominant market position of the undertaking as prescribed in Articles 18 and 19 of the Anti-monopoly Law, in light of the characteristics of the intellectual property rights; in addition, the following factors may be specifically considered: (I) the possibility of the transaction counterparty switching to substitutable technologies or commodities and the switching costs; (II) the dependency of the downstream market on the products provided by applying intellectual property rights; and (III) the capability of restricting and balancing the undertaking by the transaction counterparty.
6. Article 11 Methods and Considerations for Identification of Market Dominance
   To identify whether a SEP holder has a dominant market position in the relevant market, the factors and circumstances of identifying or presuming the dominant market position of the undertakings shall be analysed in accordance with the Anti-monopoly Law, the Anti-monopoly Guidelines for the Field of Intellectual Property Rights and other provisions, in light of the characteristics of SEPs; in addition, the following factors may be specifically considered: (1) the market share of the SEP holder in the relevant market, and the competition situation of the relevant market. Generally, the SEP holder shall have 100% of the market share in the market of licensing the SEPs held by it, and there shall be no market competition; (2) the ability of the SEP holder to control the relevant market, mainly including the ability of the SEP holder to decide the licensing conditions such as the royalty rate and mode, the ability of hindering and affecting other undertakings to enter the relevant market,

provisions with more different levels and dimensions on the factors for considering basing on the evolution cycle and value chain of IP rights, which include but not limited to (1) the substitutability of specific IP rights objects in the relevant market, the number of substitutable objects and the costs for switching to substitutable objects, (2) the substitutability of the products provided by applying such specific IP rights and the market shares of such products, (3) the capability of balances of the transaction counterparty against the business operator who holds such specific IP rights, (4) factors such as innovation and technological changes in the relevant market. In addition, consistent with the *Provisions on the Prohibition of Abuse of IP Rights to Exclude or Restrain Competition* and the *Anti-Monopoly Guidelines in the field of IP Rights of the Anti-Monopoly Commission of the State Council*, the *2024 Anti-Monopoly Judicial Interpretation* clearly provides that "Where a business operator claims that it is not sufficient to presume its dominant market position merely based on its ownership of IP rights, the people's courts shall uphold the claim."

In view of the particularity of IP rights, the respective characteristics of IP rights in different areas, the different organizational and operational structures of patentees and patent pools and other organizations, as well as China's industrial development stages in different areas of IP rights, the more detailed and diverse approach for determining dominant market position in the *2024 Anti-Monopoly Judicial Interpretation* may bring about institutional impacts with different level on the burden of proof for the plaintiff in different cases.

Key Point 4: The Judicial Responses to the FRAND Principles

Although the *2024 Anti-Monopoly Judicial Interpretation* does not explicitly mention in its entire text the important principle of "fair, reasonable and non-discriminatory" ("**FRAND**") in disputes over IP rights (especially SEPs), except for the issue of whether "random transactions implemented based on platform rules" involves "differential treatment"[7], and the violation of the FRAND Principles itself is not equivalent to violation of the *Anti-Monopoly Law*, the *2024 Anti-Monopoly Judicial Interpretation* summarizes previous trial experiences, refers to departmental regulations or anti-monopoly guidelines published by the administrative enforcement authorities, and delivers respective analytical approaches to the judicial authorities on how to analyse common controversial conduct in IPR-related monopoly disputes such as overpricing, refusal to trade, tying, imposing unreasonable transaction conditions and differential treatment. It is worth noting that, as stated by the judge of the SPC in the press conference, the *2024 Anti-Monopoly Judicial Interpretation* responds to the new challenges of international competition, and fully incorporates domestic and overseas theoretical research results. Therefore, the precedents of other mainstream jurisdictions will be an important reference to the application of the FRAND Principles left open by the *2024*

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and the objective conditions and actual ability of the standard implementing party to restrict the SEP holder; (3) the degree of dependency of the downstream market on the SEPs, mainly including the evolution, substitutability and switching costs of the corresponding standards, etc.; (4) the degree of difficulty for other patent holders to enter the licensing market, mainly including the possibility of substitution of the SEP technology; and (5) other factors relating to the determination of the dominant market position, such as the financial resources and technical conditions of the SEP holder.

7. Article 41 Where an undertaking with a dominant market position meets the following conditions, the People's Court may preliminarily determine that it has "discriminated against transaction counterparties with identical conditions in terms of transaction conditions such as transaction price" as set forth in Item 6, Paragraph 1, Article 22 of the AML:

……

Under any of the following circumstances, the People's Court may determine that it is a justifiable cause as set forth in Item 6, Paragraph 1, Article 22 of the AML: (1) Implement differential treatment in accordance with the actual needs of its transaction counterparties, and conform to proper transaction practices, consumption habits or business practices; (2) Carry out promotional activities within a reasonable period targeting at initial transactions of new users; (3) Random transactions implemented on the basis of fair, reasonable and non-discriminatory platform rules; and (4) Any other reasons that can prove justifiable conducts of the undertaking. .

Anti-Monopoly Judicial Interpretation.

1. Overpricing

Compared with departmental regulations or anti-monopoly guidelines published by the administrative enforcement authorities, Article 36 of the *2024 Anti-Monopoly Judicial Interpretation* introduces more economic and accounting methods, and proposes three kinds comprehensive considerations (in eight items) for the unfairly high price (and unfairly low price), namely the rate of return analysis method (the first item of the Article), the cost-price analysis method (the second item) and the comparable price analysis method (the third item to the sixth item), which are reflected in both the top-down approach and the comparable agreement approach frequently used in disputes over SEPs. However, the *2024 Anti-Monopoly Judicial Interpretation* does not rank the priority and weight of the different considerations, leaving it to individual cases.

2. Refusal to Trade

Article 38 of the *2024 Anti-Monopoly Judicial Interpretation* first analyses the elements for preliminary determination of refusal to trade, which shall meet all of the following conditions: (1) the business operator directly refuses to trade with the transaction counterparty, puts forward trading conditions that are obviously unacceptable to the transaction counterparty, or unreasonably delays the transaction, resulting in the failure to conclude the transaction; (2) it is economically, technically, legally and safely feasible for business operators to conduct transactions with transaction counterparty; (3) the refusal to trade excludes or restricts competition in upstream or downstream market. With regard to refusal to trade in licensing IP rights, Article 38 of the *2024 Anti-Monopoly Judicial Interpretation* also has specific provisions, considering: (1) the economic, technological, legal and safety feasibility of the business operator to license; (2) the substitutability of the IP rights and the reconstruction cost; (3) the reliance of other business operators on the IP rights in order to carry out effective competition in the upstream or downstream market; (4) the impact of refusal to license on innovation and the launch of new commodities; (5) the impact of implement licensing on the business operator's own business activities and legitimate rights and interests; and (6) whether the refusal to license substantially eliminates or restricts effective competition in the relevant market and other factors.

It is worth mentioning that, compared with the relevant provisions in the exposure draft of the *2024 Anti-Monopoly Judicial Interpretation*, Article 38 of the *2024 Anti-Monopoly Judicial Interpretation* deletes the relevant expressions of "obviously" and "effective" in the sentence "the behavior of refusing to trade obviously eliminates or restricts effective competition in the upstream or the downstream market". It can be seen that the *2024 Anti-Monopoly Judicial Interpretation* aims to ensure the practicability of the analytical path of refusal to trade and moderately reduce the burden of proof for the plaintiff. At the same time, considering that the *2024 Anti-Monopoly Judicial Interpretation* has clearly stipulated the scenario of refusal to license IP rights, refusal to license in the field of SEPs is likely to become a major issue in judicial practice in the future.

3. Tying and Imposing Unreasonable Transaction Conditions

Since the *2024 Anti-Monopoly Judicial Interpretation* is not a special judicial interpretation in the field of IP rights (let alone SEPs), Article 40 of the *2024 Anti-Monopoly Judicial Interpretation* regulating tying and imposing unreasonable transaction conditions is simpler than the provisions of the *Provisions on the Prohibition of Abuse of IP Rights to Exclude or Restrain Competition* and the *Anti-monopoly Guidelines in the Field of IP Rights of the Anti-monopoly Committee of the State Council* and does not respond to the commonly seen issues of tying and imposing unreasona-

ble transaction conditions in SEPs disputes, such as package license, sole or exclusive grant-back, provision of claim charts, compulsory cross license, and restrictions on R&D and implementation of IP rights. However, in principle, there is no substantive conflicts. Given that some principle differences between judicial and administrative enforcement in *Anti-Monopoly Law* are gradually bridging with the promulgation of *the 2022 AML* and the SPC has clearly indicated that the enforcement practice and the rules, regulations, guidelines and other normative documents promulgated by the anti-monopoly enforcement authorities provide rich reference materials for people's courts to improve the judgment rules for anti-monopoly civil disputes, it can be expected that the judicial analysis framework and enforcement analysis approaches will not be substantially different within the existing legal framework, if there is no major difference between the facts.

4. Differential Treatment

In terms of differential treatment, the *2024 Anti-Monopoly Judicial Interpretation* has the same tone as the *2022 AML*, *the Provisions on the Prohibition of Abuse of IP Rights to Exclude or Restrain Competition* and the *Anti-monopoly Guidelines in the field of IP Rights of the Anti-monopoly Committee of the State Council*, but for the first time, the *2024 Anti-Monopoly Judicial Interpretation* puts forward the concept of "equally efficient" transaction counterparty. When determining differential treatment, it must be proved that "the extrusion of profit on the transaction counterparty is sufficient to exclude or restrain an equally efficient transaction counterparty from conducting effective competition in the relevant market." However, the *2024 Anti-Monopoly Judicial Interpretation* does not give any provisions or clues as to what constitutes an "equally efficient transaction counterparty" and what evidence is sufficient to prove it, which to some extent increases the burden of proof for the plaintiff and the uncertainty of winning the litigation. In addition, in overseas SEPs litigations[8], a relatively more patentee or patent pool friendly judicial consensus has gradually been formed: compared with the "fair" and "reasonable" dimensions of the FRAND Principles, the "non-discriminatory" dimension is not hard-edged. As long as the issue of patent hijacking is overcome by resolving the patent availability through a fair and reasonable royalty rate, it may not necessarily violate the non-discriminatory requirement under the FRAND Principles even if different SEPs royalties are charged for similarly situated implementers. Article 41 of the *2024 Anti-Monopoly Judicial Interpretation* does not respond to this consensus, and is consistent with the tone of the rules and guidelines issued by the aforesaid enforcement authorities, which in principle, still examines "whether the business operator gives differential treatment for the same commodities to its transaction counterparty in terms of transaction conditions such as transaction price", without distinguishing whether the different competitive effects caused by differential treatment will affect the determination of the illegality of monopoly. Certainly, Article 41 also stipulates that the four factors shall be comprehensively taken into account to determine whether differential treatment has the effect of eliminating or restricting competition, including "whether it eliminates or restricts competition between the business operators and its competitors; whether the differential treatment leads the transaction counterparty to be at a competitive disadvantage, and eliminates or restricts competition in the relevant market". However, the "justifiable reasons" does not state whether the fairness and reasonableness of the royalty and the availability of the patent can mitigate the liabilities of differential pricing.

Key Point 5: Clarifying the Handling of Concurrent Anti-monopoly Litigation and Anti-monopoly Investigation

According to Article 13 of the *2024 Anti-Monopoly Judicial Interpretation*, where the plaintiff

8. For example, *Unwired Planet v. Huawei* in the United Kingdom and *Sisvel v. Haier* in Germany.

files an anti-monopoly litigation before the court, while the anti-monopoly enforcement authority has already conducted the investigation on the claimed monopolistic behavior ex officio or upon the complaint, the people's court accepting the anti-monopoly litigation may rule to suspend the litigation based on the specific circumstances of the case. Therefore, in the IP rights field, if an implementer files an anti-monopoly litigation before the court and file a complaint to the anti-monopoly law enforcement authority at the same time, the people's court may rule to suspend the anti-monopoly litigation ex officio or upon the application.

Conclusion

The *2024 Anti-Monopoly Judicial Interpretation* provides better transparency on how to analyses and hear monopoly disputes (including IPR-related monopoly disputes) for the judicial authorities, and lays a foundation for the judicial authorities to align their analytical framework and standards internally. Meanwhile, because judicial power is superior to administrative power, the promulgation of the *2024 Anti-Monopoly Judicial Interpretation* will inevitably lead the anti-monopoly administrative enforcement authorities to align the standards, and keep consistent with the major analytical framework and principles with the judicial authority to the largest extent, in order to avoid being placed in a passive position in potential anti-monopoly administrative litigation. Due to limitations of its length, topic and timing, the *2024 Anti-Monopoly Judicial Interpretation* does not provide clear directions on several major issues in the field of IP rights, especially SEPs (e.g. whether the patent holder is obliged to license all bona fide implementers of the value chain, international parallel litigations, basis for calculating royalty and the precondition of injunctions.). It can be seen that certain issues have already been partly resolved in the anti-monopoly enforcement and judicial practices, while we also look forward that the unsettled issues will gradually become clearer under the game of different parties.

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