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Balancing IP Protection and Antitrust

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Main Points

- I. Relationship between IP protection and antitrust
- II. Interpreting Art 55, AML
- III. Chinese antitrust court decisions involving IP

I. IP Protection vs. Antitrust

- **The relationship** is actually one between **IP law and antitrust law**.
- The two bodies of laws belong to different fields, but they both are fundamental to a nation's economic policy and legal institution.
- They have **commonality** in terms of purpose and functionality, but they also have apparent **differences** in specific aspects, and may **conflict** with each other.

Commonality: different paths to the same destination

- They share the same goal and purpose:
  - promote competition and innovation
  - protect consumer interest

- **“carol and stick”, “two sides of the coin”**

- Based on such commonality, antitrust law should respect the lawful exercise of IP, and tolerate certain restriction in competition as the necessary cost to pay in order to promote innovation.
- Hence the first half of Art 55, AML: This law does not apply to undertaking's exercise of IP rights in accordance with IP-related laws and regulations.
- But there is different understanding about this half sentence, because in certain circumstances, a conduct which does not violate IP law may be condemned by antitrust law. A reasonable balance must therefore be stricken.

Differences and Possible Conflicts

- In **appearance**, IP law and antitrust law have obvious difference: the former confers and protects certain exclusive right, meaning limitation on competition; while the latter is against monopoly and protect competition.
- In **substance**, the actual conflict does not arise out of the **ownership** of IP, but the **unlawful exercise (abuse)** of IP.
- In order to prevent abuse of IP to exclude/restrict competition, antitrust law should regulate conduct of exercising IP.

- Protecting IP and against anticompetitive abuse of IP is consistent.
- This does not mean denial of IP right itself, but just define the boundary of lawful exercise of IP.
- So Art 55 also states in the second half: this law applies to undertaking's abusive exercise of IP right to exclude or restrict competition.
- This reflects the respect as well as the necessary limitation of IP rights, and a proper balance.

II. Interpreting Art 55

- The different scholarly interpretations of Art 55 provoke debates and doubts on the legitimacy and reasonableness of its existence.
- There is therefore urgent need to clarify this provision in the form of guidelines or regulations.

- Art 55 is a clear and necessary clarification based upon previous and current different views and practices on the crossroad relation, so as to avoid misunderstanding and extreme practice.。
- Compared with Art 21 of the Japanese Anti-Monopoly Act and Art 45 of the Taiwan region Fair Trading Act which require “reverse understanding”, Art 55 provides a clearer statement by giving both a permissive statement and a prohibitive statement.

- Art 55 is **declaratory and explanatory**, i.e. it does not provide specific elements and therefore should not be applied mechanically in determining specific cases. Instead, when deciding the lawfulness of IP exercise, specific cases, other provisions of the AML should be applied.
- As a result, the unlawful exercise of IP right, if becomes anticompetitive, is not a new type of AML violation; rather, it needs to be evaluated under the conventional rules in Chapter 2, 3 and 4 of the AML.

- Interpreting Art 55 involves understanding the relation of abuse of IP rights and violation of AML.
- Neither Chinese law nor international treaties define abuse of IP right. We can therefore use scholarly analysis, comparative approach and statutory construction approach to define it.
- From the perspective of **general jurisprudence**, abuse of IP right is abuse of civil rights and therefore should be policed by general civil law or even general legal principles which prohibit abuse of rights.
- In a broad sense, "abuse of IP right" is contrast to **lawful** exercise of IP right.

- From **comparative** perspective, different countries/regions give different definition, or none at all, on “abuse of IP right”.
- We should not use **any other country’s definition** of “abuse of IP right” to understand Art 55 of AML. It should be understood by looking at the general picture and the **legislative intent and logics**.
- From the perspective of statutory construction, different approaches including literate construction, systematic construction and legislative spirit construction can be employed.

- Under the literate construction approach, abuse of IP right means the rightholder's undue exploitation of its IP right.
- Under the systematic construction approach, the "abuse" under Art 55 has the same meaning of the "abuse" of market dominance and the "abuse" of administrative power. Absent specific law definition, it should not be construed with a different set of elements.
- Under the legislative spirit construction approach, the "Annotation of the PRC Anti-Monopoly Law (draft)" did not limit Art 55 to the interpretation in any particular country. Rather, it was based upon general understanding of abuse of rights.

- In summary, Art 55 should not be confined to the narrow interpretation of the case laws in certain countries. It should be understood in a general sense, i.e. contrasting abuse against lawful exercise of IP rights.
- As a result, as long as an IP holder trespasses the permissive boundary of the law (including antitrust law), leading to an undue exploitation of such right and harm the interest of others and the social good, it is deemed abuse of IP right.

- Abuse of IP right is very broad concept. It involves, but does not limit to, antitrust law issue.
- When an exercise of IP right violates antitrust law and become monopolistic, it is necessarily an abuse of IP right. However, **it does not necessarily so happen the other way round**: some, or even a majority of, abuses of IP rights do not constitute an antitrust violation.
- When understanding Art 55 it is not necessary to determine a so-called "abusive of IP right violation" and then to evaluate whether such violation restrict or exclude competition; rather, as long as the exercise of IP rights unduly restrict competition (as against lawful restriction/exclusion of competition), it can be determined that such exercise is anticompetitive.

III. Chinese Antimonopoly Court Cases Involving IP Right

- Very rare expemplary AML decisions involving IP rights in China; but the issue did come up in either charges or defenses.
- **Before the adoption of AML:** Sichuan Dexian Tech vs. Sony;
- **After the adoption of AML**:Beijing Shusheng vs. Shanghai Shengda;
- Unlike in foreign jurisdictions where abuse of IP is usually a defense or a cross-complaint arising out of IP infringement action, it is more often in China that defendants raise IP as a defense in an antitrust action.
- But recently, a Chinese Intermediary Court handed down a foreign-related AML decision which directly addressed Defendant's abuse of IP right issue.

A Chinese Company vs. An American Tech Company

- The complaint alleged that, Plaintiff is a major telecom equipment supplier in the world, and Defendant possesses dominant position in the relevant market. The relevant goods are the SEPs in 3G wireless communication standards, with the relevant product market as the SEP licensing market and the relevant geographic market being the China SEP licensing market and the U.S. licensing market.
- Defendants were allegedly abusing their dominant positions and harm competition and AML, including setting **excessively high price, discriminating** trading partners, **imposing unreasonable conditions, tying and refusal to deal**.
- Defendant's conduct is allegedly affect competition and threatens Plaintiff's normal operation. Therefore, Plaintiff is asking for civil compensation.

Implication of this decision

- The court handed down a decision in February 2013, upholding all of Plaintiff's requests. The court defined each SEP as an individual relevant market, and the relevant geographic market as a China specific market and an American market. Defendant is dominant since it is the only entity in the relevant markets. On this basis, the court found Defendant's conduct was excessively high and constitute tying, and order RMB20 million awarde.
- Defendant has appealed. Regardless of its outcome, this case is very important in China's antitrust/IP cross-road arena.
- Since the proceeding was not made public and it is still on appeal, I will not comment on it today. Yet it is very important to balance IP protection and antitrustin this case.

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Thank you !

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