SAIC Guidance on abuse of IP rights enters into force

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The Chinese State Administration for Industry and Commerce (SAIC)’s Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition (the SAIC IPR Rules), published on 7 April 2015, has now entered into force (on 1 August 2015). This comprehensive set of guidelines regulates IP agreements and practices related to the exercise of intellectual property rights (IPRs) under the Chinese Anti-Monopoly Law (the AML). This is the culmination of several years of consultations with stakeholders both within and outside China (see our briefing).

The SAIC IPR Rules regulate non-price related anti-competitive conduct, including refusal to license IPRs which amount to “essential facilities,” unjustified tying and bundling practices, attaching unreasonable trading conditions to an IP agreement, discrimination, and conduct that is inconsistent with FRAND (fair, reasonable and non-discriminatory) principles with respect to the licensing of standard essential patents (SEPs).

Ahead of the entry into force of the SAIC IPR Rules, the SAIC has published a document (Interpretation) to explain how it intends to enforce its guidance. The Interpretation emphasises a number of key points:

- Whilst the SAIC recognises that protecting IPRs is important to encourage innovation and competition, it will not hesitate to intervene where it considers that IPRs are being exercised in a manner that harms innovation and competition and thereby the consumer interest and social welfare in China.
- Abuse of IPRs by a company that eliminates or restricts competition will not be considered as a new or different kind of anti-competitive conduct under the existing AML provisions governing anti-competitive agreements; abuse of a dominant market position; and control of concentrations (i.e. mergers and acquisitions).
- It is expressly recognised that mere possession of IPRs does not necessarily mean that a company is dominant. The SAIC will consider various factors and the specific circumstances of a case to determine whether a company is dominant in a relevant market.
- The market share-based safe harbour thresholds are aimed at providing certainty and predictability to companies and serve to encourage innovation and competition.

The Interpretation also highlights forms of anti-competitive conduct related to patent pools and refusals to license IPRs, particularly SEPs. This may indicate areas of enforcement priority for the SAIC.

The Chinese National Development and Reform Commission (the NDRC) appears also to be focusing on IP licensing practices. The NDRC, which has authority to investigate price-related infringements of Chinese competition law, has reportedly opened several investigations concerning IP licensing practices. The NDRC has also announced that it is preparing further guidance for the State Council’s Antimonopoly Commission on the interface between IP and antitrust. The State Council sits above all three of China’s competition agencies, the NDRC, the SAIC and the Anti-monopoly bureau of the Ministry of Commerce (MOFCOM).