



Potential for Conflict Anti-Suit Injunctions in Europe and China

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Disclaimer: The views expressed are personal and do not represent the official position of the European Union.

Where we are coming from: Clear established EU policy

- Competition Law Horizontal Guidelines&Decisions
 - 2009: Rambus, Patent ambush
 - 2014: Motorola and Samsung decisions on injunctions based on standard essential patents
- 2015: European Court of Justice, Huawei v ZTE, C-170/13
- 2017: Commission Communication, *"Setting out the EU approach to Standard Essential Patents"*

Chinese anti-suit injunctions

On 28 August 2020 first anti-suit injunction by Supreme People's Court in Huawei v Conversant followed by 4 more.

- *23 September, Wuhan Intermediate People's Court*
Xiaomi v InterDigital
- *28 September, Shenzhen Intermediate People's Court*
ZTE v Conversant
- *16 October, Shenzhen Intermediate People's Court*
OPPO v Sharp
- *25 December, Wuhan Intermediate People's Court*
Samsung v Ericsson

Numerous policy documents

- Supreme People's Court Report on Intellectual Property Cases of 2020
- Supreme People's Court Intellectual Property Court - Report on 10 typical cases of technical intellectual property in 2020
- Supreme People's Court, 10 "big, typical" intellectual property cases and 50 "typical" intellectual property cases in Chinese courts in 2020
- Supreme People's Court Intellectual Property Court - Adjudication guidelines of intellectual property cases (2021)
- Guangdong High Court annual report (2021)
- Guangdong China Communist Party Political and legal committee (2021)
- Hubei High Court's annual report (2021)
- Supreme People's Court 'Report on People's Courts' IP trial work' 2021
- National People's Congress Standing Committee Opinions and Suggestions on People's Courts' IP trial work Report, of 21 October 2021
- Supreme People's Court Report on the Implementation of the "Decision of the Standing Committee of the National People's Congress" establishing the SPC Intellectual Property Court" of 27 February 2022
- Standing Committee of the National People's Congress Opinions and Suggestions on the SPC Report of 27 February 2022
- Standing Committee 2022 Work Report to National People's Congress

Where can we find the Chinese rules?

Supreme People's Court judicial interpretation

But only the Supreme People's Court Decisions in Huawei v Conversant can be found on the official website "China Judgements Online"

EU attempts at resolution

- Bilateral cooperation mechanism
 - **EU China IP Working Group (June 2021)**
 - **Technical cooperation exchanges**
- Multilateral institutions
 - **TRIPS Information request (July 2021)**
 - **China trade policy review (October 2021)**
 - **WTO Request for consultations (February 2022)**

Legal basis for the WTO complaint -1

- Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.1 of the TRIPS Agreement, because China's measures restrict, or seek to restrict, the exercise by patent owners of their exclusive rights to prevent third parties not having the owner's consent from making, using, offering for sale, selling, or importing the product that is the subject matter of a patent or that is obtained directly by a patented process.
- Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 28.2 of the TRIPS Agreement, because China's measures, by prohibiting access to non-Chinese courts for the owners, of the type of patents at issue, restrict, or seek to restrict, the exercise by patent owners of their right to conclude licensing contracts.

Legal basis for the WTO complaint -2

- Article 41.1, second sentence, of the TRIPS Agreement, because China's measures create barriers to legitimate trade and fail to provide for safeguards against the abuse of enforcement procedures. China's measures create barriers to legitimate trade because they prevent, or seek to prevent, patent owners in other Members from availing themselves of enforcement procedures that permit effective action against any act of infringement of intellectual property rights covered by the TRIPS Agreement, including expeditious remedies to prevent infringements and remedies, which constitute a deterrent to further infringements. Moreover, by granting worldwide anti-suit injunctions with little consideration of their impact on the enforcement procedures in other Members, China fails to provide for safeguards against the abuse of litigation procedures.

Legal basis for the WTO complaint -3

- Article 1.1, first sentence, of the TRIPS Agreement, in conjunction with Article 44.1 of the TRIPS Agreement, because China's measures prevent, or seek to prevent, the judicial authorities of the other Members from ordering a party to desist from an infringement at the request of patent owners involved in patent litigation in China.
- Section 2(A)(2) of the Protocol on the Accession of the People's Republic of China, as China, by issuing worldwide anti-suit injunctions for act preservation in patent litigation and imposing maximum penalties on a daily basis, has not applied and administered its laws, such as, inter alia, the Civil Procedure Law of the People's Republic of China, in a uniform, impartial and reasonable manner.

Legal basis - Transparency issues

- China's failure to publish final decisions pertaining to the subject matter of the TRIPS Agreement appears to be inconsistent with China's obligations under the TRIPS agreements, in particular Article 63.1 of the TRIPS Agreement, because China has not published, or made publicly available, in such a manner as to enable governments and right holders to become acquainted with them, final judicial decisions of general application, made effective by China pertaining to the subject matter of the TRIPS Agreement.
- China's failure to supply information on final judicial decisions of general application pertaining to the subject matter of the TRIPS Agreement appears to be inconsistent with China's obligations under the TRIPS agreements, in particular Article 63.3 of the TRIPS Agreement, because China, in response to the European Union's written request, failed to provide a complete description of the measures that it applies.

After the request for consultations

- On 6, 7 and 12 April the EU and China held consultations
- On 27 June China published competition law implementing provisions, with an article rendering requesting an injunction by standard essential patent holders, worldwide, a potential competition law infringement

Next steps