

July was a lucky month for some foreign-invested enterprises, but not for all. Lenovo's proposed deal to buy IBM's X86 server business was approved. Apple lost a patent case. Shanghai Hushi was shut down due to the alleged sale of expired meat. Microsoft China was targeted by the State Administration for Industry and Commerce ("SAIC") for an anti-monopoly investigation. This bulletin provides a snapshot of the above events and the legal implications for the foreign-invested enterprises.

## **1. Lenovo: Ministry of Commerce's Anti-Monopoly Bureau Approved the Proposed Deal to Buy IBM's X86 Server Business**

On July 4, 2014, according to Reuters, the Chinese Ministry of Commerce's Anti-Monopoly Bureau approved Lenovo Group's ("Lenovo") proposed \$2.3 billion deal to buy IBM Corporation's ("IBM") X86 server business.<sup>1</sup> The announcement has not yet been published on the website of the Ministry of Commerce.

### **1.1 Background**

On January 23, 2014, Lenovo announced that it had entered into a definitive agreement with IBM to acquire IBM's X86 server hardware and maintenance business. The deal includes System x, BladeCenter, Blade, FlexSystem, Pure Flex, Blade Network Technology, related networking products, other tangible assets, related intellectual property, related contracts and inventory. Consideration for the acquisition is approximately \$2.3 billion, including \$2.07 billion in cash and \$182 million in Lenovo shares to be issued to IBM.<sup>2</sup>

### **1.2 Legal Review**

The Chinese Anti-Monopoly Law ("AML") applies to activities outside mainland China that eliminate or restrict competition in the domestic market. If one operator obtains controlling rights in another operator by means of an asset acquisition and reaches the reporting threshold, such operator must report this information to the Ministry of Commerce. Without such report, the proposed acquisition cannot proceed.

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<http://www.reuters.com/article/2014/07/04/lenovo-ibm-idUSB9N0P601G20140704>

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Discloseable Transaction-Acquisition of the X86 Server Hardware and Related Maintenance Services Business of International Business Machines Corporation and Resumption of Trading

### 1.3 Next Steps

In addition to approval from the Ministry of Commerce's Anti-Monopoly Bureau, the proposed deal requires the approval of the Committee on Foreign Investment in the United States ("CFIUS"), the Council of Europe, and the Competition Bureau of Canada. We will continue to monitor the progress of these approvals.

## 2. Apple: Patent Case Defeat

In the morning of July 8, 2014, the Beijing First Intermediate Court announced its judgment in the case brought by Apple Computer Trading (Shanghai) Co., Ltd. ("Apple") against the Patent Reexamination Board of SIPO and Shanghai Zhizhen Internet Technology Co., Ltd. ("Zhizhen"). The court upheld Zhizhen's patent and decision number 21307 rendered by the Patent Reexamination Board of SIPO. Zhizhen's voice system patent (number ZL200410053749.9) is still valid. Apple said it would appeal the judgment to the Beijing Higher People's Court.<sup>3</sup>

### 2.1 Background

In June 2012, Zhizhen sued Apple in the Shanghai First Intermediate People's Court, alleging that Apple's Siri devices infringe Zhizhen's voice system patent. This case has

not been concluded.

In November 2012, Apple asked the Patent Reexamination Board of SIPO to invalidate the patent in question on the ground that Zhizhen's patent did not fulfill the requirements of the Patent Law and the Implementing Rules of the Patent Law. Apple's main allegations were that the invention did not satisfy the requirements of novelty and creativity, the relevant functions had not been fully disclosed, the scope of patent protection was not clear, and the patent claim could not be supported by the disclosure.

After review, the Patent Reexamination Board of SIPO upheld the validity of Zhizhen's patent on September 3, 2013.<sup>4</sup> Apple challenged the decision and sued the Patent Reexamination Board of SIPO and Zhizhen (as a third party) in the Beijing First Intermediate Court.

### 2.2 Legal Review

In order to reduce the risk that a new product will infringe a patentee's rights, companies should conduct patent searches in the relevant jurisdictions, before commencing research and development. If a company must utilize a patented invention in a new product, it may attempt to secure a transfer of or a license to use the patent. In the event that the patent meets

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<sup>3</sup>

<http://www.sipo-reexam.gov.cn/xwgg/dxalbd/10512.htm>

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<sup>4</sup>

[http://app.sipo-reexam.gov.cn/reexam\\_out/searchdoc/decidedetail.jsp?jdh=21307&lx=](http://app.sipo-reexam.gov.cn/reexam_out/searchdoc/decidedetail.jsp?jdh=21307&lx=)

the requirements for invalidation, the company may ask the Patent Reexamination Board of SIPO to invalidate the patent.

### 2.3 Next Steps

The validity of Zhizhen's voice system patent will directly impact the ongoing patent infringement case between Zhizhen and Apple in the Shanghai First Intermediate People's Court. We will continue to follow the progress of Apple's administrative proceedings and Zhizhen's patent infringement case.

## 3. Shanghai Husi: Accused of Producing Food with Expired and Poor Quality Materials

### 3.1 Background

In the evening of July 20, 2014, Shanghai Dragon Television reported that Shanghai Husi Food Co., Ltd. ("Shanghai Husi") supplied food produced, in whole or in part, with expired chicken and beef. The Shanghai Municipal Food and Drug Administration and the Shanghai Public Security Bureau immediately and took measures to remove the food from the distribution chain.<sup>5</sup>

On July 23, 2014, the Shanghai Public Security Bureau detained five executives of Shanghai Husi, including the person in charge and the quality control manager. Food containing

products produced by Shanghai Husi has been removed, sealed, or otherwise controlled.<sup>6</sup>

OSI Group, LLC ("OSI Group"), the parent company of Shanghai Husi, announced a recall of all food produced by Shanghai Husi. In addition, OSI Group will appoint a new team in China. OSI Group also started an internal investigation into the misconduct of current and former executives and stated that it would cooperate in the investigations of the Shanghai Municipal Food and Drug Administration, the Shanghai Public Security Bureau, and other authorities.<sup>7</sup>

Although the joint investigation of the Shanghai Municipal Food and Drug Administration and Shanghai Public Security Bureau is ongoing, Shanghai Husi is suspected of producing food with expired materials, labeling old meat as new meat, changing production and expiration dates, changing the packaging of frozen meat, and other misbehavior.<sup>8</sup>

### 3.2 Legal Review

Operators that engage in food production, food distribution, and catering must establish a food safety management system and follow a number

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<sup>6</sup>

<http://www.shfda.gov.cn/gb/node2/node3/node253/node270/node2765/userobject1ai41165.html>

<sup>7</sup>

[http://news.xinhuanet.com/2014-07/28/c\\_1111827933.htm](http://news.xinhuanet.com/2014-07/28/c_1111827933.htm)

<sup>8</sup>

<http://www.shfda.gov.cn/gb/node2/node3/node253/node270/node2765/userobject1ai41201.html>

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<http://www.shfda.gov.cn/gb/node2/node3/node253/node270/node2765/userobject1ai41125.html>

of laws including the Food Safety Law, Product Quality Law, and Protection of Consumers' Rights and Interests Law. During procurement, in addition to inspecting the Certificate of Compliance and inspecting the product in accordance with food safety standards, the food operator should conduct on-site investigations of suppliers from time to time.

If the food operator produces food that is rotten, rancid, moldy, decayed, unclean, mixed with other objects, adulterated, doped, offensive to the senses, or expired, the food operator is at risk of incurring penalties (e.g., cessation of production, confiscation of products illegally produced or sold, confiscation of illegal gains, fines from five to ten times of the value of the products). In the case of a serious offense, the food operator's license will be revoked. In the case of a crime, the food operator will incur criminal liability.

### 3.3 Next Steps

Even though the authorities have not finished their investigations into Shanghai Hushi, fast food chains such as Yum!, McDonald's, and Burger King have announced that they will cease purchasing from Shanghai Hushi.<sup>9</sup>

We will continue to watch for any investigation results and any penalty imposed on Shanghai

Hushi. We will also monitor the impact of this food scandal on domestic food operators, consumers, legislation, and the enforcement of food safety laws.

## 4. Microsoft China: Anti-monopoly Probe

On July 28, 2014, nearly 100 officials from local offices of the SIAC in nine provinces and cities, including Shanghai, Guangdong, Sichuan, Fujian, Hubei, Jiangsu, Chongqing, and Hebei, raided Microsoft (China) Co., Ltd. and its Shanghai, Guangzhou, and Chengdu subsidiaries (collectively, "Microsoft China") in connection with the SAIC's anti-monopoly probe.<sup>10</sup>

### 4.1 Background

In June 2013, the SAIC commenced its review of Microsoft China based on reports that Microsoft China was suspected of violating the AML due to issues arising from the partially-disclosed Windows operating system and Office software (e.g., compatibility, tie in sales, file verification).

During the review, the SAIC met with Microsoft China and other related companies. Microsoft China submitted a report to the SAIC on its concerns. Other related companies also submitted reports to the SAIC.

In the course of the preliminary review, the SIAC

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[http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729\\_147122.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html)

<sup>9</sup>

<http://finance.sina.com.cn/chanjing/gsnews/20140724/163419809071.shtml>

concluded that it could not eliminate the possibility that Microsoft China's behavior could be regarded as monopolistic. The SAIC accordingly commenced the anti-monopoly probe of Microsoft China.<sup>11</sup>

## 4.2 Legal Review

Despite the fact that the SAIC did not disclose the nature of Microsoft China's behavior, it can be inferred that Microsoft China is suspected of abuse of dominant market position because the SAIC enforces rules on monopoly agreements (excluding price monopoly agreements), abuse of dominant market position, and abuse of administrative power to eliminate or restrict competition (excluding price monopoly agreements).

A "dominant market position" refers to a market position where an operator can manipulate the prices or volume of products or other transaction conditions and/or can hinder or affect the entry of other operators into the relevant market. Without a justifiable reason, an operator with a dominant market position cannot, *inter alia*, refuse to trade with counterparties, restrict trading, require tie in sales, attach unfair conditions to transactions, or apply different terms to counterparties.

In determining whether the operator holds a

dominant market position, the SAIC will take the following factors into consideration: the operator's market share in the relevant market, competition in the relevant market, the operator's ability to control the market for the sale or purchase of the product, the operator's financial and technological abilities, the level of reliance of other operators on the operator in terms of trading, and the degree of difficulty for other operators to enter the market. If the operator reaches certain thresholds of control in the relevant market, it may be deemed to hold a dominant market position.

If the operator abuses its dominant market position, the SAIC may require that the operator cease its offending conduct, may confiscate any illegal gains, and may impose a fine equivalent to 1% to 10% of the operator's sales revenue in the previous year. The fine will be determined based on the nature, extent, duration, and other facts of the misbehavior. If the operator, on its own initiative, stops abusing its dominant market position, the SAIC may exercise its discretion to reduce or rescind the fine.

## 4.3 Next Steps

This is the first time that Microsoft China has been targeted in an anti-monopoly probe. Since 1990, Microsoft has been involved in anti-monopoly investigations in the United States, the European Union, Korea, and Japan and has

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<sup>11</sup>

[http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729\\_147122.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html)

incurred numerous fines. We will continue to monitor the progress of the anti-monopoly probe of Microsoft China.

*A subsequent Foreign Investment Bulletin will cover key commercial events in China in August 2014.*

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2014年7月对于外商投资企业可谓几家欢喜几家愁，联想收购 IBM X86 服务器业务获批、苹果专利无效行政诉讼败诉、福喜因涉嫌销售过期肉类产品被停止生产、微软遭到国家工商总局的反垄断审查等等。以下我们将对本月外商投资企业要闻逐一梳理。

## 一、 联想：商务部反垄断局批准联想收购 IBM X86 服务器业务

2014年7月4日，据路透社报道，中国商务部反垄断局批准了联想 23 亿美元收购 IBM X86 服务器的交易<sup>1</sup>。但是我们在商务部的网站上尚未查找到相关的公告。

### （一） 背景

联想集团有限公司于今年 1 月 23 日宣布与 IBM 就收购 X86 服务器硬件及相关维护服务业务订立总资产购买协议。联想集团有限公司将向 IBM 购买包括 System X、BladeCenter、Blade、FlexSystem、Pure Flex 产品、Blade Network Technology 等系统网络产品及若干其他有形物业；与业务相关的若干知识产权；以及与业务相关的若干已转让合约及业务存货。联想集团有限公司支付的对价为 23 亿美元，其中包含 20.7 亿美元现金和向 IBM 发行的 1.82 亿股股份<sup>2</sup>。

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<http://www.reuters.com/article/2014/07/04/lenovo-ibm-idUSB9N0P601G20140704>

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联想集团有限公司收购国际商业机器股份有限公司的 X86 伺服器硬件及相关维护服务业务及恢复买卖公告（2014 年 1 月 23 日）

### （二） 法律点评

我国《反垄断法》具有域外适用效力，即境外的并购行为，对境内市场竞争产生排除、限制影响的，也需适用该法。如果经营者通过取得资产的方式取得对其他经营者的控制权达到法律规定的申报标准的，经营者应当事先向商务部申报；未经申报的，不得实施。

### （三） 关注要点

除了需要获得商务部批准外，联想收购 IBM X86 服务器的交易还需获得美国外资委员会、欧洲委员会、加拿大反垄断机构的批准。我们将继续关注联想收购 IBM X86 服务器获得美国外资委员会、欧洲委员会、加拿大反垄断机构的批准的进展情况。

## 二、 苹果：专利无效行政纠纷败诉

2014 年 7 月 8 日上午，北京市第一中级人民法院公开宣判苹果电脑贸易（上海）有限公司（下称“苹果公司”）诉国家知识产权局专利复审委员会、上海智臻网络科技有限公司（下称“智臻公司”）专利无效行政纠纷案件，判决维持国家知识产权局专利复审委员会作出的第 21307 号无效宣告决定，涉案的“一种聊天机器人系统”发明专利权（ZL200410053749.9）继续有效。宣判后，苹果公司当庭表示将向北京市高级人民法院提起上诉<sup>3</sup>。

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<http://www.sipo-reexam.gov.cn/xwgg/dxalbd/10512.htm>



## （一）背景

2012年6月，智臻公司以苹果公司Siri技术涉嫌侵犯其智能语音系统“一种聊天机器人系统”的专利权，向上海市第一中级人民法院提起诉讼，该案目前尚未审结。

2012年11月，苹果公司就涉案专利向国家知识产权局专利复审委员会提出无效宣告请求。苹果公司认为，涉案专利不符合专利法和专利法实施细则的规定，主要存在相关功能公开不充分、权利要求请求保护的范围不清楚、权利要求得不到说明书支持等问题，特别是在新颖性和创造性方面存在明显瑕疵，因此请求宣告该专利无效。

经审理，国家知识产权局专利复审委员会于2013年9月3日作出维持该项专利权有效的决定<sup>4</sup>。苹果公司对决定不服，将国家知识产权局专利复审委员会诉至北京一中院，并将智臻公司列为第三人。

## （二）法律点评

企业在研发新产品前需要对现有的专利权进行检索，以避免新产品可能侵犯他人现有的专利权。如果新产品确实需要使用他人专利权的，可以根据实际需要选择专利权转让或者专利许可使用。如果现有的专利权符合无效条件的，可以向国家知识产权局专利复审委员会请求宣告专利权无效。

## （三）关注要点

“一种聊天机器人系统”的专利权能否最终被维持有效将直接影响智臻公司诉苹果公司专利侵权的案件。我们将继续关注苹果公司的行政诉讼及与智臻公司民事侵权诉讼的进展情况。

# 三、福喜：涉嫌用过期等劣质原料生产加工食品

## （一）背景

2014年7月20日晚，上海东方卫视曝光了上海福喜食品有限公司（下称“上海福喜”）将过期鸡肉、牛肉“翻新”后继续使用的新闻。上海市食品药品监督管理局会同上海市公安局立即对上海福喜进行连夜彻查，并对已销往下游相关企业的涉案产品采取控制措施<sup>5</sup>。

7月23日，上海市公安局依法对上海福喜负责人、质量经理等5名涉案人员予以刑事拘留。对经营、使用福喜公司产品的企业的问题食品，均已采取下架、封存等控制措施<sup>6</sup>。

美国福喜集团宣布，召回其子公司上海福喜食品有限公司生产的所有产品，并着手针对现任及前任高管可能存在的失职行为进行内部调查。此外，该集团还向中国公司派遣新的管理团队。美国福喜集团表示将继续全力配合上海食品药品监督管理局及其他监管机构的工作<sup>7</sup>。

经上海市食品药品监督管理局、上海市公安局联合调查，上海福喜涉嫌用过期原料生产加工食品、利用回收食品生产经营食品、篡改生产日期和保质期、更换冷冻畜禽制品外包装等违法行为<sup>8</sup>。

## （二）法律点评

从事食品生产、食品流通、餐饮服务的经营者应该严格遵守《食品安全法》、《产品质量法》、《消费者权益保护法》等规定，建立健全食品安全管理制度。在采购时，除了查验产品合格证明并依照食品安全标准进行检验，还应对供应商进行不定期的现场核查。

如果食品生产经营者生产经营腐败变质、油脂

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<http://www.shfda.gov.cn/gb/node2/node3/node253/node270/node2765/userobject1ai41125.html>

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[http://news.xinhuanet.com/2014-07/28/c\\_1111827933.htm](http://news.xinhuanet.com/2014-07/28/c_1111827933.htm)

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<http://www.shfda.gov.cn/gb/node2/node3/node253/node270/node2765/userobject1ai41201.html>

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[http://app.sipo-reexam.gov.cn/reexam\\_out/searchdoc/decidedetail.jsp?jdh=21307&lx=](http://app.sipo-reexam.gov.cn/reexam_out/searchdoc/decidedetail.jsp?jdh=21307&lx=)



酸败、霉变生虫、污秽不洁、混有异物、掺假掺杂或者感官性状异常的食品；超过保质期的食品的，将面临责令停止生产；没收违法生产、销售的产品；没收违法所得；并处货值五倍以上十倍以下罚款；情节严重的，吊销食品生产许可；构成犯罪的，依法追究刑事责任。

### （三）关注要点

虽然针对上海福喜的调查工作尚未结束，但连锁快餐企业百胜、麦当劳、汉堡王已经宣布停止与上海福喜的合作<sup>9</sup>。我们将继续关注上海福喜违法行为的调查结果及处罚情况，以及该事件对国内食品生产经营者、消费者、食品安全的立法及执法等带来的影响。

## 四、 微软：反垄断调查

2014年7月28日，国家工商总局组织由北京、上海、广东、四川、福建、湖北、江苏、重庆、河北等9省市近百名工商执法人员对微软公司在中国大陆的四个经营场所，即微软（中国）有限公司（下称“中国微软”）及其上海、广州、成都分公司同时进行反垄断突击检查<sup>10</sup>。

### （一）背景

2013年6月，国家工商总局根据企业举报反映的中国微软存在对其 Windows 操作系统和 Office 办公软件相关信息没有完全公开造成的兼容性问题、搭售、文件验证等问题，涉嫌违反中国《反垄断法》的情况，进行了核查。

核查中，国家工商总局先后约谈了中国微软和有关企业，中国微软就总局关注的问题提交了报告。期间，相关企业也不断向国家工商总局反映情况。

国家工商总局认为，经过前期核查不能消除中国微软上述行为具有反竞争性的嫌疑。根据法律规定，国家工商总局已对中国微软涉嫌垄断行为立案调查<sup>11</sup>。

### （二）法律点评

虽然国家工商总局尚未公布中国微软涉嫌垄断行为的类型，但是由于工商行政管理机关负责垄断协议（价格垄断协议除外）、滥用市场支配地位、滥用行政权力排除限制竞争（价格垄断协议除外）的反垄断执法工作，因此中国微软可能涉嫌滥用市场支配地位。

市场支配地位，是指经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位。具有市场支配地位的经营者没有正当理由不得拒绝与交易相对人进行交易、限定交易、搭售商品、附加不合理交易条件、对交易相对人在交易条件上实行差别待遇等。

工商行政管理机关将根据经营者在相关市场的市场份额，以及相关市场的竞争状况；该经营者控制销售市场或者原材料采购市场的能力；该经营者的财力和技术条件；其他经营者对该经营者在交易上的依赖程度；其他经营者进入相关市场的难易程度等认定经营者具有市场支配地位。经营者在相关市场份额达到一定市场份额的，也可以被推定具有市场支配地位。

如果经营者滥用市场支配地位的，由工商行政管理机关责令停止违法行为，没收违法所得，并处上一年度销售额百分之一以上百分之十以下的罚款。工商行政管理机关确定具体罚款数额时，应当考虑违法行为的性质、情节、程度、持续的时间等因素。经营者主动停止滥用市场支配地位行为的，工商行政管理机关可以酌情减轻或者免除对该经

9

<http://finance.sina.com.cn/chanjing/gsnews/20140724/163419809071.shtml>

10

[http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729\\_147122.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html)

11

[http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729\\_147122.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html)

营者的处罚。

### (三) 关注要点

虽然微软第一次在中国接受反垄断调查，但是从 1990 年以来微软已经在美国、欧盟、韩国、日本接受反垄断调查并被处以巨额罚款。我们将继续关注微软中国反垄断调查的进展。

*更多资讯，请继续关注下一期外商投资要闻简讯。*

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