

China Releases Antitrust Guidelines for Intellectual Property

Article By:

Aaron Winger

China's [State Administration for Market Regulation](#) released the Antitrust (also referred to as Anti-Monopoly) Guidelines of the Antitrust Committee of the State Council on the Field of Intellectual Property (??). The guidelines are dated January 4, 2019 but only officially released on September 18, 2020. The guidelines cover Intellectual Property Agreements That May Exclude or Restrict Competition; Abuse of Dominant Market Position Involving Intellectual Property Rights; Concentration of Operators Involving Intellectual Property Rights; and other Circumstances, such as patent pooling.



Intellectual Property Agreements That May Exclude or Restrict Competition Joint Research and Development (R&D)

Joint R&D may eliminate or restrict market competition. The following factors can be considered per Article 7:

- (1) Whether operators are restricted from conducting R&D independently or in cooperation with a third party in fields unrelated to joint R&D;
- (2) Whether operators are restricted from conducting follow-up R&D after the joint R&D is completed;

(3) Whether to restrict the ownership and exercise of intellectual property rights involved in new technologies or new products developed by operators in fields unrelated to joint research and development.

Cross Licensing

Cross licensing generally lowers the cost of licensing but may also impact competition. Factors to be considered per Article 8:

- (1) Whether it is an exclusive license;
- (2) Whether it constitutes a barrier for a third party to enter the market;
- (3) Whether to exclude or restrict competition in the downstream market;
- (4) Whether the cost of related commodities has been increased.

Grant-backs

Exclusive grant-backs can have restrictive effects on market competition. Per Article 9, the following factors should be considered:

- (1) Whether the licensor provides substantial consideration for the grant back;
- (2) Whether the licensor and the licensee mutually require exclusive grant-backs in across-license;
- (3) Whether the grant-back will lead to improvements or the concentration of new results to a single operator, so that it can gain or enhance market control;
- (4) Whether the grant-back affects the licensee's enthusiasm for improvement.

Other agreements or clauses of concern to the SAMR include no-challenge clauses, standard formation agreements (as distinct from licensing of standard essential patents, which is discussed in more detail in Article 27), and the restriction on use, dissemination channels, sales volume, and restricting the use of competitive technologies.

Safe harbors are provided based on market share.

Abuse of Dominant Market Position Involving Intellectual Property Rights

Determination of Dominant Market Position

Owning intellectual property does not automatically mean a patentee has a dominant market position. Articles 18 and 19 of the [Anti-Monopoly Law](#) and the following factors should be considered:

- (1) The possibility that the counterparty of the transaction will switch to a technology or commodity with a substitute relationship and the conversion cost;
- (2) The degree of dependence of the downstream market on the commodities provided by the use of intellectual property rights;
- (3) The ability of the counterparty to check and balance the operator.

Licensing of intellectual property rights at unfairly high prices

Whether licensing fees constitute an abuse of market dominance, the following factors can be considered per Article 15:

- (1) The calculation method of license fees and the contribution of intellectual property rights to the value of related commodities;
- (2) Promises made by the business operator for intellectual property licensing;
- (3) The licensing history of intellectual property rights or comparable licensing fees;
- (4) Licensing conditions that lead to unfair high prices, including licensing fees that exceed the geographical scope of intellectual property rights or the scope of goods covered;
- (5) Whether to charge a license fee for expired or invalid intellectual property rights in a package license.

Refusing to license intellectual property rights

Refusing to license intellectual property rights may comprise abuse of a dominant market position to exclude or restrict competition. Factors to be considered per Article 16:

- (1) The undertaking made by the licensor on the intellectual property license;
- (2) Whether other business operators must obtain a license for the intellectual property rights to enter the relevant market;
- (3) The impact and extent of the refusal to license the relevant intellectual property rights on market competition and innovation by operators;
- (4) Whether the denied party lacks the willingness and ability to pay reasonable license fees, etc.;

(5) Whether the licensor has ever made a reasonable offer to the rejected party;

(6) Whether the refusal to license the relevant intellectual property rights will harm the interests of consumers or the public interest.

Tying

Licensors with dominant market positions may eliminate or restrict market competition via tying sales to licensing. Factors to consider include per Article 17:

(1) Whether it violates the wishes of the counterparty in the transaction;

(2) Whether it conforms to transaction or consumption habits;

(3) Whether it ignores relevant intellectual property rights or differences in the nature of commodities and their mutual relations;

(4) Whether it is reasonable and necessary, such as necessary measures to achieve technical compatibility, product safety, product performance, etc.;

(5) Whether to exclude or restrict other business operators' trading opportunities;

(6) Whether to restrict consumers' right to choose.

Additional Abuse of Market Dominant Position

Licensors with dominant market position may eliminate or restrict competition by, per Article 18: requiring exclusive grant-backs, prohibiting counterparty from questioning validity of intellectual property, restricting a counterparty from implementing its own intellectual property, license rights that are declared invalid or have expired, requiring a cross-license without providing reasonable consideration, and conditions for forcing or prohibiting transactions between a counterparty and third parties.

Differential Treatment

Per Article 19, licensors with dominant market positions may impose different licensing conditions on substantially similar counterparties to eliminate or restrict competition. Factors to consider if this constitutes an abuse of market dominance include:

(1) Whether the conditions of the counterparties of the transaction are substantially the same, including the scope of use of the relevant intellectual property rights, and whether there is a substitute relationship for the commodities provided by different counterparties using the relevant intellectual property rights;

(2) Whether the license conditions are substantially different, including the number of

licenses, region, and period. In addition to analyzing the terms of the license agreement, it is also necessary to comprehensively consider the impact of other commercial arrangements reached between the licensor and the licensee on the license conditions;

(3) Whether the differential treatment has a significant adverse effect on the licensee's participation in market competition.

Concentration of Operators Involving Intellectual Property Rights

Article 20 states:

Operators gaining control over other operators or being able to exert decisive influence on other operators through transactions involving intellectual property rights may constitute operator concentration. Among them, the following factors can be considered when analyzing the transfer or licensing of intellectual property rights that constitute a concentration of undertakings:

- (1) Whether intellectual property rights constitute an independent business;
- (2) Whether the intellectual property has generated independent and calculable turnover in the previous fiscal year;
- (3) The method and period of intellectual property licensing.

Other Circumstances

Patent Pooling

Article 26 discusses patent pooling, which the guidelines define as “two or more licensors jointly license their patents to pool members or third parties.” However, while patent pooling can reduce transaction costs, it may also exclude or restrict competition. Factors to consider include:

- (1) The market share of the business operator in the relevant market and its control over the market;
- (2) Whether the patent in the joint venture involves technology that has a substitute relationship;
- (3) Whether to restrict joint venture members from licensing patents or R&D technologies independently;
- (4) Whether the operators exchange information such as commodity prices and output through joint ventures;
- (5) Whether the operator conducts cross-licensing, exclusive grant back or exclusive grant

back through joint ventures, enters into no-question clauses and implements other restrictions, etc.;

(6) Whether the business operator licenses patents at unfairly high prices through joint ventures, tie-in sales, imposes unreasonable trading conditions or implements differential treatment, etc.

Standard Essential Patents (SEPs)

Per Article 27, to determine whether an operator with a SEP has a dominant market position, it should be analyzed in accordance with Article 14 of the guidelines, and the following factors can also be considered:

- (1) The market value, application scope and extent of the standard;
- (2) Whether there are alternative standards or technologies, including the possibility of using alternative standards or technologies and conversion costs;
- (3) The degree of industry reliance on relevant standards;
- (4) The evolution and compatibility of relevant standards;
- (5) The possibility that the relevant technology included in the standard will be replaced.

A SEP holder with dominant market position may force a licensee to accept an unfairly high license fee via filing for injunctions. This may exclude or restrict competition and the following factors should be considered:

- (1) The behavior of the negotiating parties in the negotiation process and their true wishes;
- (2) Relevant commitments borne by relevant standard essential patents;
- (3) The licensing conditions put forward by both parties in the negotiation process;
- (4) The impact of requesting the court or relevant department to make or issue a judgment, ruling or decision prohibiting the use of relevant intellectual property rights on licensing negotiations;
- (5) Requesting the court or relevant departments to make or issue judgments, rulings or decisions prohibiting the use of relevant intellectual property rights on the impact on downstream market competition and consumer interests.

Collective Copyright Management

Article 28 briefly discusses collective copyright management and that organizations that perform management may abuse their intellectual property to eliminate or restrict competition.

© 2024 Schwegman, Lundberg & Woessner, P.A. All Rights Reserved.

National Law Review, Volumess X, Number 272

Source URL: <https://natlawreview.com/article/china-releases-antitrust-guidelines-intellectual-property>