Published on *The National Law Review* https://natlawreview.com

China to Amend Anti-Monopoly (Antitrust) Law

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On June 11, 2021, the General Office of the State Council released the Notice of the State Council's 2021 Legislative Work Plan (????2021????????) covering 18 draft laws or draft amendments to existing laws and 28 administrative regulations. Of potential interest to intellectual property practitioners out of these 46 items is the Draft Amendment to the Anti-Monopoly Law (????????) to be drafted by the State Administration for Market Regulation (SAMR). This will be the first update since the law was promulgated in 2007. The SAMR has already released Guidelines of the Antitrust Committee of the State Council on the Field of Intellectual Property (??????????????????????) and the Regulations on prohibiting abuse of intellectual property rights to exclude and restrict competition (??????????????????????) in 2020. Some of the provisions from these Guidelines and Regulations re intellectual property may be incorporated into or expanded on in the amended law. No date has

been specified for when the draft amendment to the Anti-Monopoly will be available for comment.

The **Guidelines** cover the following:

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 comprises 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.

A partial translation of the **Regulations** follow:

> Article 3 The abuse of intellectual property rights to exclude or restrict competition as mentioned in these regulations refers to monopolistic behaviors such as the violation of the "Anti-Monopoly Law" by operators to exercise intellectual property rights, implement monopoly agreements, and abuse their dominant market position.
>
> Relevant markets referred to in these regulations include relevant commodity markets and relevant geographic markets, and are defined in accordance with the Anti-Monopoly Law and the "Guidelines for the Definition of Relevant Markets by the Anti-Monopoly Committee of the State Council", and consider the influence of factors such as intellectual property rights and innovation. In anti-monopoly enforcement work involving intellectual property licensing, the relevant commodity market can be a technology market or a product market containing specific intellectual property rights. The relevant technology market refers to a market constituted by competition between technologies involved in the exercise of intellectual property rights and similar technologies that can replace each other.
>
> Article 4 Business operators shall not use the exercise of intellectual property rights to reach monopoly agreements prohibited by Articles 13 and 14 of the Anti-Monopoly Law, unless the business operator can prove that the agreement reached is in compliance with Article 15 of the Anti-Monopoly Law.
>
> Article 5: An operator's exercise of intellectual property rights under any of the following circumstances may not be recognized as a monopoly agreement prohibited by Article 13, Paragraph 1, Paragraph 6, and Article 14, Paragraph 3 of the Anti-Monopoly Law, except where there is evidence to the contrary that the agreement has the effect of eliminating or restricting competition:
>
> (1) The total market share of competitive business operators in the relevant market affected by their actions does not exceed 20%, or there are at least four other independently controlled alternatives that can be obtained at reasonable cost in the relevant market;
>
> (2) The market share of the business operator and the counterparty of the transaction in the relevant market does not exceed 30%, or there are at least two other independently controlled alternative technologies available in the relevant market at a reasonable cost.
>
> Article 6 Operators with dominant market positions shall not abuse their dominant market positions in the process of exercising intellectual property rights to exclude or restrict competition.

The dominant market position is determined and presumed in accordance with Article 18 and Article 19 of the Anti-Monopoly Law. An operator's possession of intellectual property rights can constitute one of the factors in determining its dominant market position, but it cannot be presumed that it has a dominant market position in the relevant market based on the fact that the operator owns intellectual property rights.

Article 7 Operators with dominant market positions shall not refuse to authorize other operators to use the intellectual property rights under reasonable conditions to eliminate or restrict competition if their intellectual property rights are necessary for production and business activities without proper reasons.

The following factors need to be considered at the same time when determining the behavior in the preceding paragraph:

(1) The intellectual property right cannot be reasonably substituted in the relevant market and is necessary for other operators to participate in the competition in the relevant market;

(2) Refusal to license the intellectual property rights will adversely affect competition or innovation in the relevant market and harm the interests of consumers or the public interest;

(3) Licensing the intellectual property rights will not cause unreasonable damage to the operator.

Article 8: Operators with dominant market positions, without legitimate reasons, may not conduct the following restricted transactions in the process of exercising intellectual property rights to exclude or restrict competition:

(1) Restrict the counterparty of the transaction to only conduct transactions with it;

(2) Restrict the transaction counterparty to only conduct transactions with a designated business operator.

Article 9 An operator with a dominant market position, without justified reasons, may not, in the process of exercising intellectual property rights, implement tie-in sales that meet the following conditions at the same time to eliminate or restrict competition:

(1) Violating trading conventions, consumption habits, etc., or ignoring the functions of commodities, compulsorily bundling or combining different commodities for sale;

(2) The implementation of tying behavior enables the operator to extend its dominant position in the tying product market, excluding or restricting other operators from competing in the tying product or the tying product market.

Article 10 Operators with dominant market positions shall not perform the following actions with unreasonable restrictions in the process of exercising intellectual property rights without justifiable reasons to exclude or restrict competition:

(1) Require the counterparty of the transaction to give exclusive licenses back on the improved technology;

(2) The counterparty of the transaction is prohibited from questioning the validity of its intellectual property rights;

(3) Restricting the counterparty of the transaction from using competitive products or technologies without infringing on intellectual property rights after the expiration of the license agreement;

(4) Continue to exercise rights over intellectual property rights whose term of protection has expired or is deemed invalid;

(5) Prohibition of transactions between counterparties and third parties;

(6) Impose other unreasonable restrictions on the counterparty of the transaction.

Article 11 : Operators with a dominant market position, without justifiable reasons, shall not, in the process of exercising intellectual property rights, impose differential treatment on counterparties in transactions with the same conditions to exclude or restrict competition.

Article 12: Operators shall not use patent pooling to engage in activities that eliminate or restrict competition in the process of exercising intellectual property rights.

The members of the patent pool shall not use the patent pool to exchange sensitive information related to competition such as output and market division, and reach a monopoly agreement prohibited by Article 13 and Article 14 of the Anti-Monopoly Law, unless the business operator can prove that the agreement reached is in compliance with Article 15 of the Anti-Monopoly Law.

A patent pool management organization with a dominant market position shall not use the patent pool to implement the following behaviors that abuse its dominant market position without justifiable reasons to exclude or restrict competition:

(1) Restrict associate members from licensing patents as independent licensors outside of the joint venture;

(2) Restricting associate members or licensees independently or jointly with a third party to develop technologies that compete with pooled patents;

(3) Forcing the licensee to exclusively grant back its improved or developed technology to the patent joint management organization or joint members;

(4) The licensee is prohibited from questioning the validity of the pooled patents;

(5) Practicing differential treatment in terms of trading conditions to associate members with the same conditions or licensees in the same relevant market;

(6) Other acts of abuse of market dominance recognized by the State Administration for Market Regulation.

The term “patent pooling” as mentioned in these Regulations refers to an agreement arrangement whereby two or more patentees jointly license their respective patents to a third

party in some form. It can be in the form of a special joint venture company established for this purpose, or it can be managed by an associate member or an independent third party.

Article 13 Business operators shall not use the formulation and implementation of standards (including the mandatory requirements of national technical regulations, the same below) to engage in activities that eliminate or restrict competition in the process of exercising intellectual property rights.

Operators with dominant market positions must not implement the following actions to exclude or restrict competition in the process of standard formulation and implementation without legitimate reasons:

(1) In the process of participating in the formulation of standards, deliberately not disclose its rights information to the standard-setting organization, or explicitly waiving its rights, but after a certain standard develops to include the patent, the implementer of the standard exercises its patent right.

(2) After its patent has become a standard essential patent, it violates the principles of fairness, reasonableness and non-discrimination, and conducts acts that exclude or restrict competition, such as refusing to license, tying goods, or adding other unreasonable trading conditions in the transaction.

The standard-essential patent mentioned in these regulations refers to the patent that is indispensable for the implementation of the standard.

Article 14: Where a business operator is suspected of abusing intellectual property rights to exclude or restrict competition, the anti-monopoly law enforcement agency shall conduct investigations in accordance with the Anti-Monopoly Law, the Interim Provisions on Prohibition of Monopoly Agreements, and the Interim Provisions on Prohibition of Abuse of Dominant Market Positions.

The anti-monopoly law enforcement agencies referred to in these regulations include the State Administration of Market Supervision and Administration and the market supervision and administration departments of all provinces, autonomous regions, and municipalities directly under the Central Government.

Article 15 When analyzing and determining that an operator is suspected of abusing intellectual property rights to exclude or restrict competition, the following steps can be taken:

(1) Determine the nature and manifestation of the operator’s exercise of intellectual property rights;

(2) Determining the nature of the mutual relationship among business operators exercising intellectual property rights;

(3) Define the relevant market involved in the exercise of intellectual property rights;

(4) Identify the market position of the operator who exercises the intellectual property rights;

(5) Analyze the impact of operators' exercise of intellectual property rights on relevant market competition.

…

Article 16 The following factors shall be taken into consideration when analyzing and determining the impact of an operator's exercise of intellectual property rights on competition:

(1) The market position of the operator and the counterparty;

(2) Market concentration of relevant markets;

(3) The difficulty of entering the relevant market;

(4) Industrial practice and the development stage of the industry;

(5) The time and scope of effectiveness of restrictions on output, region, and consumers;

(6) Impact on promotion of innovation and technology promotion;

(7) The innovation ability of the operator and the speed of technological change;

(8) Other factors related to the impact of determining the exercise of intellectual property rights on competition.

Article 17: Where a business operator's abuse of intellectual property rights to exclude or restrict competition constitutes a monopoly agreement, the anti-monopoly law enforcement agency shall order it to stop the illegal activity, confiscate the illegal income, and impose a fine not less than 1%, but not more than 10%, of the previous year's sales. If the monopoly a greement as concluded has not been implemented, a fine of not more than 500,000 yuan may be imposed.

Where the operator's abuse of intellectual property rights to exclude or restrict competition constitutes an abuse of market dominance, the anti-monopoly law enforcement agency shall order ceasing the illegal activity, confiscate the illegal income, and impose a fine of not less than 1% but no more than 10% of the previous year's sales.

When determining the amount of a specific fine, the anti-monopoly law enforcement agency shall consider the nature, circumstances, extent, and duration of the violation.

National Law Review, Volume XI, Number 168