New rules for monopolies
Jurisdiction report: China

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Regulations on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights took effect on August 1, 2015. The regulations give the Administration for Industry and Commerce (AIC) the power to use Chinese anti-monopoly law to deal with IP issues.

The regulations clarify that a dominant market position should be determined according to articles 18 and 19 of the anti-monopoly law and further clarify that ownership of IP rights is one of the factors in determining a dominant market position, but it should not be presumed solely because of such ownership.

The regulations provide market share safe harbours. Specifically, unless it can be proved to have the effect of eliminating or restricting competition, agreements between business operators will not be determined as monopolistic agreements, if:

- The combined market share of the competing business operators is less than 20%, or there are at least four other independently controlled substitutable technologies that can be obtained at reasonable cost; or
- The market share of neither the business operator nor its trading partner exceed 30%, or there are at least two other independently controlled substitutable technologies that can be obtained at reasonable cost.

Article 7 of the regulation prescribes that a business operator in a dominant market position should not, without justified reasons, refuse to license its IP under reasonable conditions to eliminate or restrict competition, if its IP constitutes a facility essential for production and business operations.

This article also specifies the conditions that must be met for the application of this provision, namely:

- The IP cannot be reasonably substituted and is indispensable for other business operators to compete;
- The refusal to license will have a negative impact on competition or innovation and is detrimental to the welfare of consumers or public interest; and
- Licensing such IP will not cause unreasonable harm to the licensor.

The regulations also have detailed provisions regarding licence clauses that prohibit a business operator in a dominant market position from, without justified reasons:

- Restricting trading partners to dealing exclusively with itself or designated business operators;
- Tying or bundling different goods for sale, which results in the extension of its dominant position in the tying product market into the tied product market;
- Requiring trading partners to exclusively grant back their improved technology;
- Prohibiting trading partners from challenging the validity of their IP rights;
- Restricting trading partners from using competing goods or technologies after the expiry of the licence;
- Continuing to enforce its IP rights after the IP rights expired or are invalidated;

- Prohibiting trading partners from dealing with third parties;
- Imposing other unreasonable restrictions on trading partners; and
- Giving discriminatory treatment to equivalent trading partners.

Article 12 prescribes that members of a patent pool should not reach monopolistic agreements through exchange of information regarding production volume, markets division, etc.

A patent pool organisation in a dominant market position should not, without justified reason:

- Restrict members from becoming independent licensors outside the pool;
- Restrict members or licensees from independently, or in conjunction with a third party, developing technology that competes with the pooled patents;
- Force licensees to exclusively grant back the technology they improved or developed to the organisation or its members;
- Prohibit licensees from challenging the validity of the pooled patents; and
- Give discriminatory trading conditions to equivalent members or licensees.

Article 13 prescribes that in a standard setting or implementing process, a business operator in a dominant market position should not, without justified reasons:

- Deliberately fail to disclose information regarding its IP rights to the standard-setting organisation or give up its IP rights but then enforce its patent against users of the standard when the standard involves the patent; or
- When its patent becomes essential to the standard, engage in conduct in violation of the fair reasonable and non-discriminatory principle, such as refusal to license, tying products or imposing unreasonable trading conditions.

The regulations further prescribe that if a monopolistic agreement or abuse of dominant market position is found, the AIC may order a business operator to stop the relevant conduct, confiscate illegal earnings and impose a fine of 1 to 10% of its annual revenue, or a fine of no more than RMB500,000 ($80,000) when the agreement has not been implemented.

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