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Anti-Monopoly

Major Features of Guidelines on Intellectual Property Abuse (Draft for Comments)

On March 23, 2017, the Anti-Monopoly Committee of the State Council issued its latest "*Anti-Monopoly Guidelines on Intellectual Property Abuse (Draft for Comments)*" ("**Draft for Comments**") for public comment. The Draft for Comments is based upon "*Anti-Monopoly Guidelines on Intellectual Property Abuse (Suggested Draft)*" respectively prepared by the National Development & Reform Committee ("**NDRC**"), Ministry of Commerce ("**MOFCOM**"), State Administration of Industry and Commerce ("**SAIC**") and the State Intellectual Property Office ("**SIPO**"). Once the Draft for Comments is formally published, it shall act as the common guidelines for the NDRC, MOFCOM, and the SAIC (collectively, the "**antitrust agencies**"). The framework will provide guidance in areas such as the application of *the Anti-monopoly Law of People's Republic of China* ("**AML**") and the abuse of intellectual property ("**IP**"), while also improving the predictability of antitrust agencies enforcement actions.

The Draft for Comments consists of five Chapters and 27 Articles. The layout and contents largely reflect NDRC's Suggested Draft, while also incorporating elements of both the SAIC's Suggested Draft and *the Provisions on the Prohibition of Intellectual Property Abuse to Eliminate or Restrict Competition* issued by SAIC in 2015 (the "**Regulations**").

Below is a brief summary of the key issues and relevant provisions contained within the Draft for Comments.

I. General Issues

Chapter One addresses issues surrounding the analysis of activities related to IP abuse such

as principles of analysis, analytical approaches, relevant markets and factors to be considered for analysis on both the pro- and anti-competitive effect. Chapter One largely follows the provisions of NDRC's Suggested Draft, with some minor differences in language and structure.

1. Principles of analysis and analytical approaches

In scenarios of IPrelated abusive conduct, the principles of analysis provide general guidance for antitrust agencies. These principles require antitrust agencies to (i) "*follow the same standard of regulation as other forms of property rights within the basic legal framework of analysis under the AML"* and (ii) "*take into account the specific features of the IP rights"* (for example, where the IP rights are easily infringed, the pro-competitive effect of relevant conduct should be taken into account). In addition, although the IP rights are an exclusive right, the guidelines stipulate that "*an undertaking shall not be presumed to be in dominance in the relevant market merely for holding the IP rights*". The above-mentioned principles are consistent with those of the *Antitrust Guidelines for the Licensing of Intellectual Property* (the "**Antitrust Guidelines**") recently issued by the U.S. Department of Justice and the Federal Trade Commission.[1]

2. Definition of the Relevant Markets

This section largely follows NDRC's Suggested Draft rules, including:

The two types of markets that may need to be defined when analyzing IP-related abusive conduct (*the relevant product market* and *the relevant technology market*). It should be noted that the Draft for Comments does not address *the relevant innovation market* provided for in SAIC's Suggested Draft;

(i) Detailed guidance in relation to the definition of *the relevant technology market*. *The relevant technology market* refers to the market formed either by a group or a type of technology with close substitution from the demand side. The Draft for Comments details several factors in defining *the relevant technology market*. In short, *the relevant technology market* may consist of the licensed technology for producing downstream goods, other technologies for producing such downstream goods and the technologies for producing other commodities that compete with the downstream goods;

[1] Compared to the Draft for Comments, the Antitrust Guidelines contains one more principle that "the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive".

(ii) Regional elements of IP that are to be considered when defining *the relevant geographic market*.

3. Factors to consider when analyzing the pro- or anti-competitive effects.

Under the Draft for Comments, analysis of potential anti-competitive effects of IP-related abusive conduct largely involves:

(i) Assessing the competition landscape in the relevant market. The factors to consider include both traditional and IP specific ones, such as advances, development trends and current research and development in the relevant technology. As for the calculation of market share in the relevant technology market, the Draft for Comments adopts the comments from the American Bar Association and other agencies. In addition to the three approaches detailed in the guidelines[2], the Draft for Comments also leaves the matter open to additional approaches by including "etc." thereafter.

(ii) Analyzing alleged conduct. When analyzing alleged conduct, the following factors are to be considered: (i) whether the undertakings concerned are competitors; (ii) the market share of the undertakings concerned and their market power; (iii) the possibility to set or increase market entry barriers by the alleged conduct; (iv) the possibility of impeding the technical innovation, diffusion and development by the alleged conduct; (v) the possibility of blocking the industry development by the alleged conduct; and (vi) the impact on potential competition, etc.

In relation to competing undertakings, the Draft for Comments takes the same position as that of the NDRC's Suggested Draft, namely that the competition is more likely to be eliminated or restricted if the undertakings concerned are competitors.

As to how to determine pro-competitive effect, the Draft for Comments takes a stricter approach, explicitly stating that the alleged conduct shall only be deemed as having a pro-competitive effect if: (i) the conduct lead to the promotion of innovation and improvement of efficiency; (ii) it has less of an anti-competitive effect on the conduct compared to other innovation-facilitating and efficiency-improving conduct; (iii) no serious restriction of competition in the relevant market exists; (iv) there is no obstruction of innovation of other undertakings; and (v) consumers can share the benefits generated from the

[2] Three approaches detailed are 1) the proportion of the products produced in exploiting the related IP in downstream market; (2) the ratio of the royalty fee of the related IP to the overall royalty fee in the relevant technology market; (3) the amount of alternative technologies.

pro-competitive effect.

II. IP-related Monopoly Agreements

In this Chapter, joint research and development arrangements, cross-licensing, grant-backs, development of standards, safe harbor as well as other types of restrictions are addressed. Unlike the NDRC's Suggested Draft, the Draft for Comments does not distinguish between agreements concluded between "competitors" and "non-competitors". The Draft for Comments largely incorporates the content of the NDRC's Suggested Draft with only minor revisions, such as deleting the price restrictions and also moving patent pool issues to Chapter Five under other conduct related to IP.

1. Basic Introduction

The Draft for Comments acknowledges the pro-competitive effect of the above-mentioned conducts, suggesting that they would not normally trigger any antitrust concerns. However, if an undertaking takes advantage of such conduct to eliminate or restrict competition in the relevant market, such conduct would be subject to the AML.

2. Safe Harbor

In order to improve the efficiency and predictability of IP-related antitrust enforcement, the Draft for Comments provides a safe harbor by referring to the SAIC's Suggested Draft and the Regulations with minor revisions.

While the safe harbor provides substantial directions for IP owners to exploit their IP while also avoiding any violation of the AML, some practical issues still need to be verified in practice. For instance, how one determines whether costs are reasonable so as to satisfy the threshold detailed in the Draft Comments namely "*obtaining relevant technology with reasonable costs*" or how one determines the market share and alternative technologies which are subject to further explanation by the antirust agencies and courts in practice.

III. IP-related Abuse of Dominant Market Position

With the exception of predatory pricing, all other types of abuse prescribed by the AML are covered in this Chapter, including licensing IP at an unfairly high price, refusing to license IP, IP-related tying, imposing unreasonable IP-related trading conditions and IP-related discriminatory treatment. The Draft for Comments discusses the factors to be considered in determining the aforementioned abuses and provides practical guidance for administrative enforcement, which is also likely to be a reference for judicial practice.

In relation to the determination of dominant market position, the Draft for Comments largely

follows the approach taken by NDRC's Suggested Draft, differentiating undertakings with common IP and undertakings with SEPs [3] when assessing dominance. It also views undertakings owning IP as not being presumed to have dominance, a similar position to the U.S. Antitrust Guidelines.

IV. IP-related Concentration of Undertakings

The Suggested Drafts of the NDRC and the SAIC are silent in relation to the IP-related concentration of undertakings. The Draft for Comments only regulates the special issues of IP-related concentration of undertakings, which include trigger events of concentration of undertakings, factors to be considered in the course of review and remedies to be imposed.

The Draft for Comments provides that an undertaking could acquire control or become capable of having decisive influence over another undertaking by virtue of transferring or sole licensing of IP and therefore trigger concentration of undertakings. When assessing whether the aforementioned transfer or licensing of IP could be deemed a concentration of undertakings, the following factors are to be considered: (i) whether such IP constitutes an independent business; (ii) whether such IP generated independent and calculable turnover in the preceding fiscal year; and (iii) the term for sole licensing of such IP.

One issue requiring further clarification is whether an undertaking could acquire control or become capable of having decisive influence over another undertaking by virtue of exclusive licenses and as a result trigger a concentration of undertakings.

In relation to remedies, the Draft for Comments provides for structural remedies, behavioral remedies, and synthetic remedies. Structural remedies refer to divestment of IP or IP-related business. Behavioral remedies may refer to but not limited to the licensing of IP, holding IP-related business operated independently, charging reasonable fees, and complying with FRAND commitments. Synthetic remedies refer to a combination of both structural conditions and behavioral conditions.

V. Other IP Related Conduct

Under this Chapter, patent pool, injunctive relief and relevant issues relating to copyright collective administration organizations are discussed. Generally, the Draft for Comments follows the SAIC's Suggested Draft structure. In relation to content, it largely reflects the NDRC's Suggested Draft (particularly for patent pool and injunctive relief) with a few references to the SAIC's Suggested Draft and the

[3] SEPs refer to patents essential to implement a specific industry standard.

Regulations. The Chapter also discusses IP-related abusive conduct of copyright collective administration organizations, with reference to SAIC's Suggested Draft.

1. Patent Pool

In relation to patent pool, the Draft for Comments addresses the definition, management and specific forms of patent pools. According to the Draft for Comments, exercise of IP in a patent pool may involve both monopoly agreements and the abuse of dominance. For instance, where a managing organization of a patent pool has a market dominant position, it may be deemed as an abuse of dominance if for example the pool organization requests a licensee to exclusively grant back its own patents or conclude non-assertion clause; otherwise, such conduct without dominant position may only be regarded as monopolistic agreements.

It should be noted that the Draft for Comments addresses one additional factor in considering whether a patent poll has an anti-competitive effect on the basis of the NDRC's Suggested Draft, i.e. whether the undertakings exchange information of products' price, output etc. This factor indeed comes from the SAIC's Suggested Draft and the Regulations.

2. Injunctive Relief

Under the Draft for Comments, injunctive relief means that a patent owner requests the judicial authorities or quasi-judicial bodies to issue an order restricting the use of a certain patent, which is in nature a reflection of cessation of infringement liability. Nevertheless, if SEP owners with a dominant position seek an injunction to force the licensee to accept an unreasonably high license fee or other unreasonable licensing conditions, it may eliminate or restrict competition. Below are relevant factors to be considered in analyzing whether seeking an injunction by a SEP owner will eliminate or restrict competition: (i) the performance of the parties during negotiation and their genuine intention [4]; (ii) the commitments of injunctive relief assumed by the relevant SEP; (iii) the licensing conditions proposed by the parties during negotiation; (iv) the impact of seeking an injunction on the licensing negotiations; and (v) the impact of seeking an injunction on the competition of the relevant downstream markets and consumers' interests.

VI. Conclusion

[4] We refer to EU practice for identification of genuine intention. The European Commission ("EC") has determined on what circumstances seeking injunctions by a SEP holder will be deemed as abuse of dominance in Google/Motorola Mobility Inc. case. The EC in the statement of objection against to MMI raised its opinion on the standard to determine the willing licenses and the unwilling licensees. The EC was the opinion that, a potential licensee which remains passive and unresponsive to a request to enter into licensing negotiations or is found to employ clear delaying tactics cannot be generally considered as "willing". In addition, in the EC's preliminary view, the fact that the potential licensee challenges the validity, essentiality or infringement of the SEP does not make it unwilling where it otherwise agrees to be bound by the determination of FRAND terms by a third party.

In practice, IP-intensive industries have become the antitrust agencies priority for enforcement. According to the unofficial statistics, the key antitrust cases involving international companies in 2015 include QUALCOMM, IDC, Vringo, Hitachi Metals, Dolby, Microsoft, and Tetra Pak. As a result, for IP-related abusive conduct, unified anti-monopoly guidelines will play a significant role in enhancing the predictability of the AML enforcement. This will increase an undertaking's predictability during operation and facilitate competition in a healthy market.

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