

State Administration for Industry & Commerce of PRC



Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau

**Abusing IPRs to Eliminate or Restrict
Competition under *AML*
&
The Matching Rules Developed by SAIC**

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OUTLINE



- **Section I.** Abusing IPRs to eliminate or restrict competition under *AML*
- **Section II.** *The Regulation of Administrative authorities for industry and commerce on the prohibition of abusing IPRs to eliminate or restrict competition ('Regulation')*
- **Section III.** Basic principles and main content of the *'Regulation'*

Abusing IPRs to eliminate or restrict competition under *AML (i)*



Art. 55 of *Anti-monopoly Law of PRC*

‘With respect to business operators' acts of exercising intellectual property rights according to the provisions of laws and administrative regulations, this Law shall not apply; however, with respect to business operators' acts of abusing intellectual property rights to exclude or limit competition, this Law shall apply.’



Abusing IPRs to eliminate or restrict competition under AML(ii)

- **Relationship between IPR protection and anti-monopoly**
 - **Consistency:** facilitate competition and innovation, promote efficiency, protect interests of consumers and the public;
 - **Conflict:**
 - IPR system: grants certain exclusive rights;
 - Anti-monopoly Law: forbids the creation of anti-competitive issues resulted from exclusivity.

Abusing IPR to eliminate or restrict competition under *AML* (iii)



- Activities of abusing IPRs needs to be regulated by relevant laws, and anti-monopoly law is responsible for adjusting the ones that may harm competition.
- Basic stance on the implementation of anti-monopoly law in IPR field:
 - recognize the justification that IPR owners have the right to exercise their rights under IPR system, and only impose necessary governance on activities of abusing IPRs, having effects of eliminating or restricting competition.

Background on the establishment of *'Regulation'* (i)

- At the end of 2012, SAIC launched the draft work.
 - On the basis of Administrative authorities for industry and commerce 's obligation to anti-monopoly;
 - On the basis of previous draft of *Guidance on enforcement of anti-monopoly law in the field of IPR*;
 - Conducting national investigation and research, holding colloquia;
 - Collecting relevant cases and materials deriving from both domestic and abroad.

Background on the establishment of *'Regulation'* (ii)

- In June 2014, SAIC solicited public opinions on *'Regulation'* (Draft for Comments) .
- In August 2014, SAIC solicited opinions of 12 national departments, including Law Committee of National People's Congress, Supreme People's Court, National Development and Reform Commission, Ministry of Commerce, etc.
- At present, *'Regulation'* has been submitted to SAIC, waiting for deliberation.

Basic principles of ‘*Regulation*’



- Anti-monopoly and IPR protection have consistent objectives;
- Operators’ conducts of abusing IPRs to eliminate or restrict competition still fall in the categories of acts listed in anti-monopoly law;
- The mere fact of owning IPRs can’t directly be used to presume that the owner enjoys a dominant position on relevant markets, but owning a IPR can be one of the elements for determining the establishment of a dominant position.
- Put IPR under the same treatment as other property rights in the course of anti-monopoly enforcement.

Main content of ‘*Regulation*’ (i)



- Objectives and basis of formulating the ‘*Regulation*’; ‘*Regulation*’ clarifies key concepts, such as acts of abusing IPRs, relevant market, etc.
 1. Acts of abusing IPRs to exclude or limit competition shall mean operators violate *Anti-monopoly Law* by exercising IPRs to conduct monopolistic behaviors(except for the price monopoly conduct), including monopoly agreements, the abuse of a dominant position, etc.
 2. Relevant market shall include relevant product and geographical markets. Relevant product market shall cover the market for technology and the market for the products incorporating specific IPRs.

Main content of ‘*Regulation*’ (ii)



- Operators are prevented from utilizing IPRs to conduct monopoly agreements, and ‘*Regulation*’ creates “safe harbors”.

Criteria for the application of ‘safe harbors’:

- An act shall not pertain to one of conducts listed in named provisions in the section of monopoly agreements of *Anti-monopoly Law*;
- In accordance with the requirements of market share and relevant substitutability in particular markets;
- No elimination or restriction of competition.

Main content of ‘*Regulation*’ (iii)



- Business operators with market dominant positions are prohibited from abusing their market dominant positions during the process of exercising IPRs.
 - Identification and presumption of market dominant positions in question will be carried out in line with Art.18 and Art.19 of *Anti-monopoly Law*;
 - Stipulation of certain acts of abusing market dominant positions during the process of exercising IPRs, including refusing to license IPRs, restricting transactions, adding unreasonable trading conditions, discriminatory treatment, tie-in sale, etc.

Main content of '*Regulation*' (iv)



- Abusive conducts concerning patent pools and standards
 - Abuse issues in patent pools:
 - (1) members may enter into monopoly agreements by making use of a patent pool;
 - (2) organizations may abuse a dominant position.
 - Abuse issues in standards:
 - (1) setting stage.
 - (2) enforcement stage.



Main content of '*Regulation*' (v)



- Principles and framework of analysis: the authority will comply with the general steps for identifying an abusive conduct, based on taking into consideration the specificities of IPRs.
 - confirming the nature and forms of the exercise of IPRs;
 - determining the nature of relationships between operators;
 - defining the relevant market;
 - affirming the market position possessed by operators;
 - assessing the effects of competition on that relevant market.



Main content of '*Regulation*' (vi)

- Legal Liability:
 - confiscate the operator's illegal gains;
 - impose a fine of not less than one percent and not more than ten percent of the operator's sales revenue of the previous year;
 - If the business operator has yet to implement the monopoly agreement, it may be imposed a fine of not more than RMB500,000.





Thank you

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