

China's Regulation on Abuse of Market Dominance related to Intellectual Property

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ABSTRACT. As China's protection of intellectual property rights continues to increase, the process of anti-monopoly legislation related to intellectual property rights has also continued to advance. Due to the uniqueness of intellectual property rights, it has formed a basis for judgment different from ordinary anti-monopoly enforcement. Form unique methods in identifying relevant markets, market dominance, etc. Operators conducting market operations in China should avoid touching these prohibitions.

KEYWORDS: Intellectual property, Anti-monopoly Law, Abuse of Market Dominance

1. Introduction

In the high-tech era, intellectual property rights are an important force to promote economic development. The status of the operation of intellectual property in the market also determines the development trajectory of the enterprise. Due to the "exclusivity" characteristics of intellectual property rights, it is very easy to form a monopoly when it enters the market. Therefore, the laws of various countries provide appropriate regulations on the dominant market position formed by intellectual property rights, and market operators are not allowed to abuse intellectual property rights while possessing such a dominant position.

As the second largest economy in the world, China has attached great importance to the protection of intellectual property rights after reform and opening up. Since

the Anti-Monopoly Law was enacted in 2008, it has continuously explored anti-monopoly regulations related to intellectual property rights to encourage intellectual property holders to correctly exercise their rights, thereby ensuring the healthy and orderly operation of intellectual property rights in the market. This article will mainly discuss how China regulates the abuse of such dominant position by operators who have formed a dominant position in the market by virtue of intellectual property rights, hoping to provide some help to companies operating in China.

Although intellectual property rights are considered to be "monopoly rights", possession of intellectual property rights is not considered to have a market dominant position and ordinary exercise of intellectual property rights will not be considered an abuse of market dominance. When determining whether the exercise of an intellectual property rights constitutes an abuse of market dominance, first determine whether the operator has market power, and then determine whether it is an abuse of market dominance. Among them, the relevant market needs to be considered to determine whether it has market power. Only when the relevant market is dominant and the abuse of intellectual property rights in the relevant market can be regarded as an abuse of market dominance. Let's discuss this in detail below.

2. Related markets involving intellectual property

The definition of the relevant market is a key part of judging whether an enterprise has a monopoly position in the market. "In most cases, the definition of the relevant market is actually the starting point and basic premise of competition analysis. Although its content is not necessarily stipulated in the specific provisions of the anti-monopoly law, it is contained in the major systems of the anti-monopoly law. [1]" China's "Anti-Monopoly Law" defines the relevant market as "the range of commodities and geographic areas within which operators compete for specific commodities or services within a certain period of time." The law generally provides for the relevant market. As long as the relevant market is judged, it is necessary to judge the relevant commodity market and the relevant geographic market. Due to the particularity of intellectual property rights after entering the market, the Anti-Monopoly Committee of the State Council formulated in 2009 the "Guidelines

for the Definition of Related Markets by the Anti-Monopoly Committee of the State Council" on the relevant markets involving intellectual property rights. "In technology trade, licensing agreements and other anti-monopoly enforcement work involving intellectual property rights, it may also be necessary to define the relevant technology market and consider the influence of factors such as intellectual property rights and innovation." With the in-depth implementation of the anti-monopoly law and the increasing development of intellectual property rights in China, the State Administration for Industry and Commerce promulgated the "Provisions on Prohibition of Abuse of Intellectual Property Rights to Eliminate and Restrict Competition" in 2015, which will include anti-monopoly-related products related to intellectual property rights. The market is divided into "related technology market" and "product market containing specific intellectual property rights." At the same time, the regulations further explain the relevant technology market, and the market constituted by the competition between the technologies involved in the exercise of intellectual property rights and the similar technologies that can be substituted is the relevant technology market. [2] When judging the substitutability between technologies, one needs to consider the attributes, uses, licensing fees, term of intellectual property. As well as the cost and possibility of relevant demanders abandoning the original technology and choosing other alternative technologies.

3. Determination of market dominance

When judging whether a behavior is an abuse of market dominance, it is necessary to first determine whether the subject of the behavior has a market dominance. The issue of "relevant markets" has been clarified above, and then we will discuss how to determine whether a market entity has a market dominant position in the relevant market.

3.1 General rules for determining market dominance

In the "Anti-Monopoly Law", whether a market operator has a dominant market position in the relevant market has a clearer judgment standard. Among them, there are flexible standards and presumed judgment standards.

Details as follows:

(1) To determine whether a market operator has a dominant market position, we must first determine its share in the relevant market and the state of competition in the relevant market where the operator is located.

(2) Whether the market operator has the power to control the sales market or the raw material market in terms of the sales market or the raw material market.

(3) The status of the funds owned by the market operator when operating in the relevant market and the technical conditions available.

(4) In the relevant market, the degree of dependence of other market operators on a market operator in all aspects.

(5) Degree of difficulty for market operators outside the relevant market to enter the relevant market.

(6) Other factors of related to the determination of market dominance of market operators.

(7) Where the market share of one operator in the relevant market reaches one-half, and the total market share of two operators in the relevant market reaches two-thirds, and the total market share of three operators in the relevant market reaches three-quarters, it's presumed to have a dominant market position in the relevant market.

(8) In the first two situations in (6), if there is a market operator whose share in the relevant market is less than one-tenth, it is not presumed to have a "dominant market position".

(9) Even if it is presumed to have a market dominant position in (6), there is still room for maneuver. If the presumed market operator has evidence to prove that it does not have a market dominant position, then it is not deemed to have a dominant market position.

3.2 Determination of market dominance involving intellectual property

Due to the particularity of intellectual property rights, the following factors need to be considered when judging the market dominance related to intellectual property.

(1) Because the operator does not trade with the counterparty, the possibility for the counterparty to trade with the operator with alternative intellectual property rights, and the cost of such a shift.

(2) Whether the downstream market of the goods operated by the operator has a strong dependence on the goods provided by the intellectual property owned by the operator.

(3) In the process of trading with the operator, whether the counterparty of the transaction has a big say in the transaction process.

(4) In determining whether the standard essential patent operator has a market dominant position, the following factors can also be considered: [3]

1) Market value and degree of marketization of patent standards.

2) Is there an alternative patent standard.

3) The degree of reliance on the patent standard in the industry where the patent standard is located and the cost of using alternative standards.

4) The evolution of related patent standards of different generations and their compatibility.

5) The possibility that the technology determined as a patent standard will be replaced.

4. Abuse of dominant market position

After clarifying the method of determining market dominance related to intellectual property rights, let's discuss what kind of behavior is an abuse of market dominance.

4.1 License intellectual property at unfairly high prices

When a business operator is deemed to have a "dominant market position", it cannot license the intellectual property rights to others at an unfairly high price. Licensing intellectual property at unfairly high prices will eliminate and restrict competition and disrupt market order. [4] Its main manifestations are:

(1) The owner of the intellectual property licenses the intellectual property at a high price that is obviously not in line with the value of his intellectual property.

(2) The license fee claimed by the operator is significantly higher than the previous license fee for similar intellectual property rights.

(3) Operators take advantage of their advantageous position to collect license fees for products beyond the geographical scope and intellectual property coverage.

(4) When the business operator conducts a "package" license, whether to charge a license fee for invalid or expired intellectual property rights.

(5) The license agreement contains substantive unfair high price clauses.

(6) The operator takes improper means to force the licensee to accept the license fee.

4.2 Deny permission

Generally speaking, the market respects the willingness to trade, and refusal to trade is allowed. However, market operators with a market dominant position cannot refuse to license their intellectual property rights to others without justified reasons. Because operators are in a dominant position in the market, if they are allowed to refuse permission, it will lead to unfair transactions in the market, disrupt market order, and are not conducive to stimulating innovation and developing technology. The following factors should be considered when determining the reasonableness of the refusal:

(1) Does the licensee have to obtain the intellectual property license to enter the relevant market for business activities, or whether there are alternative intellectual property rights?

(2) The degree of impact of intellectual property licensing on the innovation activities of the operators.

(3) Whether the licensee lacks the willingness and ability to pay reasonable license fees.

(4) Does the denied party lack the necessary quality and technical guarantees to ensure the proper use of intellectual property rights or the safety and performance of the product?

(5) Whether the licensee will harm the public interest when using the intellectual property.

4.3 Bundled transaction

According to the definition in the "Guidelines on the Abuse of Intellectual Property Rights (Draft for Comment)" formulated by the Anti-Monopoly Committee of the State Council, bundled transaction means that when the operator licenses or transfers intellectual property rights, the counterparty of the transaction is required to accept the license or transfer of other intellectual property rights, or accept other commodities. If the bundling transaction violates the wishes of the counterparty, and does not conform to the trading conventions and consumption habits, the bundling transaction is not allowed.

4.4 Attach unreasonable trading conditions

In the process of trading, an operator who has a dominant market position because of his intellectual property cannot require the counterparty of the transaction to grant exclusive feedback after obtaining the intellectual property rights and improving the technology. The counterparty of the transaction cannot be prohibited from questioning the validity of his intellectual property rights or filing intellectual property infringement lawsuits against him. Nor can it restrict the counterparty of the transaction from using competitive technologies or commodities, claim rights on expired or invalid intellectual property rights. It is also not allowed to prohibit the counterparty of the transaction from trading with a third party, or restrict the transaction between the counterparty and the third party in terms of object selection, transaction area and other transaction conditions

4.5 Differential treatment

An operator with a dominant market position cannot treat the counterparty of the transaction differently in the process of dealing with others. One or more transaction counterparts who are the same in all respects shall be treated equally. One or more of the counterparties of the transaction cannot be treated differently without proper reason to ensure fairness of the transaction. It must not adversely affect the order of competition in the relevant market.

4.6 Abuse the injunctive relief

According to the definition in the "Guidelines on the Abuse of Intellectual Property Rights (Draft for Comment)" formulated by the Anti-Monopoly Committee of the State Council, injunctive relief means that the patentee requests a judicial or quasi-judicial organization to issue an order restricting the use of related patents. Operators with dominant market positions cannot use injunctive relief applications to force licensees to accept unfairly high license fees or other unreasonable license conditions.

5. Conclusion

In China, to determine whether a market operator's intellectual property rights exercise constitutes an abuse of dominant market position, first consider whether it has a dominant market position in the relevant market, and then determine whether the behavior is an abuse of dominant market position. When market operators conduct business activities in China, they should determine whether they are in a dominant position in the market. If you are in a dominant position in the market, you should avoid trading with counterparties at unfairly high prices in trading activities. Do not refuse authorization, bundling transactions, discriminatory treatment, and attach unreasonable conditions without justified reasons. Of course, injunctive relief cannot be abused to achieve illegal purposes.

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