

Understanding the New Antitrust Law in China

ABUSE OF DOMINANT
POSITION and THE
IP/ANTITRUST INTERFACE

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濫用市場支配地位 – Abuse of Dominant Market Position

Chapter 3

Article 17 – Prohibited Conduct

1. unfairly high prices
2. selling below cost
3. refusing to deal
4. exclusive dealing
5. unreasonable trade terms
6. price discrimination
7. other

滥用市场支配地位 – Abuse of Dominant Market Position

- Prohibited conducts 2 to 6 are modified by:
“没有正当理由” – can be translated as
“without legitimate or justifiable reason”

For example:

反不正当竞争法 - Anti-Unfair Competition Law

Could also be summarized as “unless you are competing on the merits”

濫用市場支配地位 – Abuse of Dominant Market Position

- Other Comments

- The concept of “selling at unfairly high prices” also appears in Article 82(a) of the E.C. Treaty
- The addition of other actions to be identified by the Anti-Monopoly Enforcement Authority of the State Council is typical of Chinese civil law drafting. Laws express general principles; not precise prohibitions.
- This provision is also intended to allow for evolution in the law

濫用市場支配地位 – Abuse of Dominant Market Position

Determination of a “Dominant Position of Market Power” –
市場支配地位 - Article 18

Based on the Following Factors:

1. market share and competitive status
2. ability to control sales or access to raw materials
3. financial and technical status
4. extent of reliance on other business
5. significance of the barriers to entry
6. other

濫用市場支配地位 – Abuse of Dominant Market Position

Determination of a “Dominant Position of Market Power” – 市場支配地位 - Article 19

- Market share alone will give rise to a rebuttable presumption of a dominant position in certain cases, unless the firm has less than a 10% market share
- onus is on the firm to rebut the presumption

知识产权 – Intellectual Property

Article 55 – This Law does not apply to action taken by undertakings to protect their legitimate intellectual property rights in accordance with the intellectual property laws and regulations;

however, this Law does apply to action taken by undertakings that **eliminates or restricts competition** by **abusing** intellectual property rights.

知识产权 – Intellectual Property

Other IP Provisions:

Prohibited monopoly agreements

Art. 13(4) – Restricting the purchase of new technology and equipment, or restricting the research and development of new technology and products.

Exemptions to Prohibited Monopoly Agreements

Art. 15(1) – For the purpose of improving technologies, research, and the development of new products.

知识产权 – Intellectual Property

Other IP Provisions (cont'd):

Factors to consider when reviewing Concentrations
(Mergers)

Art. 27(3) – The proposed concentration's influence
on market access and technology development.

知识产权 – Intellectual Property

What is an “abuse of intellectual property rights”?

- Microsoft was accused of unfairly bundling a Chinese handwriting recognition system (2000)
- Critics in both China and the U.S. accuse firms in the other party of misusing patent pools and standard setting – Philips DVD3C, MPEG-2, ATSC

知识产权 – Intellectual Property

Case - 德先 诉 索尼 (Dexian v. Sony)

上海市第一中级人民法院 (Shanghai No. 1 Intermediate People's Court) commenced 2004 – heard January 17, 2007 – no decision yet

Dexian accused Sony of adopting a technology that prevents batteries made by other companies from being used in Sony's digital cameras. The complaint was made under the Anti-Unfair Competition Law.

Sony said it had a patent on the technology relating to signals between a camera and its battery

知识产权 – Intellectual Property

Existing Guidelines:

Interpretation of the Supreme People's Court concerning some issues on the Application of Law in the Trial of Cases on Disputes over Technology Contracts – December 16, 2004

Article 10 – illegal monopolization and impairing technological progress

1. restricting one party from undertaking new research and development on the technology; requiring non-reciprocal grant-backs or sole-ownership of jointly developed IP

知识产权 – Intellectual Property

2. restricting a party from obtaining similar technology from other origins

3. impeding one party's exploitation of the market

4. requiring the licensee to also acquire raw materials and other items from the licensor

5. unreasonably restricting the source of raw materials and other items

6. prohibiting the licensee from making objections as to the validity of the IP

Impact of the AML on IP ?

- Article 55 and Articles 13(4) and 15(1) suggest that the intellectual property laws are viewed as something separate but equal to the Anti-Monopoly Law, similar to the U.S.
- Some in China and elsewhere would argue that intellectual property laws are subordinate to the antitrust laws

Impact of the AML on IP ?

- Zhang Qin – Deputy Director – SIPO 2007-03-13
 - Commented that a visiting DOJ official in charge of IP abuse only emphasized IP protection, not prohibition of IP abuse
 - But “a prohibition on IP abuse is urgently needed”

Impact of the AML on IP ?

- Ask yourself why is the restriction being used in China? Is it reasonable and proportionate for that purpose?
- Consider the principles when interpreting the rules
- Use the Supreme People's Court 2004 Interpretation as a guide; European practice may also help
- Monitor the forthcoming regulations and guidelines, and be prepared to adapt to changes in the rules

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