



July 27, 2022

Anti-monopoly Division 1
State Administration for Market Regulation
No. 8 Sanlihe East Road
Xicheng District
Beijing, People's Republic of China 100820

Via Email: fldys@samr.gov.cn

Re: Consultation for the "Provisions on Prohibiting Abuse of Intellectual Property Rights to Exclude and Restrict Competition"

Dear State Administration for Market Regulation:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments on the Provisions on Prohibiting Abuse of Intellectual Property Rights to Exclude and Restrict Competition (Draft for Comments) ("Draft Provisions") published on 27 June 2022.

IPO is an international trade association representing a "big tent" of diverse companies, law firms, service providers and individuals in all industries and fields of technology that own, or are interested in, intellectual property (IP) rights. IPO membership includes over 125 companies and spans over 30 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; supporting and advocating for diversity, equity, and inclusion in IP and innovation; and disseminating information to the public on the importance of IP rights.

IPO's vision is the global acceleration of innovation, creativity, and investment necessary to improve lives. The Board of Directors has adopted a strategic objective to foster diverse engagement in the innovation ecosystem and to integrate diversity, equity, and inclusion in all its work to complement IPO's mission of promoting high quality and enforceable IP rights and predictable legal systems for all industries and technologies.

IPO is grateful for this opportunity to share feedback and appreciates the aim of the Draft Provisions to protect the legitimate rights and interests of patentees and the public. Our organization hopes that our comments below will be helpful during the process of finalizing the Draft Provisions.

General Comments

IPO believes that clarity in the Draft Provisions is critical to help ensure that parties understand the difference between proper conduct and anticompetitive behavior. The Draft Provisions mention some "other" situations identified by the State Administration for Market Regulation, without providing information on what these

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“other” situations are. Examples include “other abuse of dominant market position” in Article 14, “other monopoly agreements” in Article 15, “other acts of abusing dominant market position” in Articles 16 and 17, and “other factors related to identification of the impacts of exercise of IPR on competition” in Article 20. IPO appreciates that including such “other” situations may be intended to allow flexibility to cover unforeseen situations, and suggests, as a way to balance flexibility and clarity, that the Provisions provide criteria or a specific basis to be used when identifying each of these “other” situations, such as by referring to other laws/provisions.

Below are comments on specific articles of the Draft Provisions:

Article 4

The concept of “market for innovation (research and development)” is introduced in Article 4 in determining anti-monopoly activities relevant to intellectual property licensing etc. However, it is not clear what competitive factors among undertakings are taken into account in determining the “market for innovation (research and development).”

To avoid any confusion, IPO recommends clarifying under Article 4 what specific factors shall be considered when determining the dominant market position of an undertaking in a “market for innovation (research and development)” (for example, for further developments of standards with in-force patents).

Article 5

Article 5, first paragraph, precludes the exercise of intellectual property rights in reaching a monopoly agreement prohibited under Article 17 and Article 18, paragraph 1 of the Anti-Monopoly Law (AML). Article 5, second paragraph, precludes organizing other undertakings to reach a monopoly agreement or provide substantial assistance for other undertakings to reach a monopoly agreement through the use of intellectual property rights. Article 5, third paragraph, sets forth that the preclusions of the first two paragraphs do not apply where the undertakings can prove the agreement reached complies with the provisions of AML, Article 20.

IPO respectfully submits that Article 5 be further amended to make clear that a cross license is, in and of itself, not a monopoly agreement and does not, in and of itself, apply to the preclusions set forth in the first two paragraphs of Article 5. For example, the owner of an intellectual property right may use different means of compensation when licensing its intellectual property rights. One such means can include cross-licensing, and that is in no way representative of anti-competitive activities.

Article 6

Article 6, third paragraph, identifies factors to be considered in determining whether an undertaking in the field of intellectual property has a dominant market position including the “substitutability of intellectual property.” It is respectfully submitted that in order to make more clear whether an acceptable substitute exists that this factor be

amended to read “substitutability of technology that does not infringe the undertaking’s intellectual property.”

Article 7

Article 7 discusses the factors to be considered when determining whether or not an undertaking excludes or restricts competition when an IP right constitutes a necessary facility for relevant production and operating activities.

Factor 1 addresses whether there are reasonable substitutes in the relevant market. To avoid ambiguity, it is respectfully requested that this factor be amended as follows to make more clear that this factor is addressing reasonable “non-infringing” substitutes relevant to the intellectual property rights “of the undertaking” and that the “license of” the intellectual property rights is therefore necessary:

1. *There are no other reasonable non-infringing substitutes for the intellectual property rights of the undertaking in the relevant market and license of the intellectual property rights are necessary for other undertakings to participate in competition in the relevant market.*

Factor 2 addresses when refusal to license the intellectual property rights has an adverse impact on competition or innovation in the relevant market and harms the consumer or public interests. It is respectfully submitted that any refusal to license can arguably have an adverse impact, making this factor difficult to work with in determining whether an undertaking has a dominant market position. To avoid such ambiguity, IPO urges that this factor be amended by requiring that impact on competition or innovation in the relevant market and resulting harm to the consumer or public interests be “substantial.” Such clarity will make this factor more clear.

In assessing whether an undertaking with a dominant market position has refused to license without justification, it is also respectfully submitted that the circumstances under which negotiations between the undertaking and potential licensee have taken place should be taken into account. Such an assessment can be undertaken through addition of the following factor (i.e., factor 4) which requires the licensee to engage in timely, good faith negotiations including making a reasonable offer for license:

- 4. the potential licensee has, without unreasonable delay, engaged in good faith licensing discussions including making a reasonable offer for license of the undertaking’s required intellectual property rights.*

Article 14

IPO proposes adding a definition of “patent pool”. The Draft Provisions delete the definition of patent pool that was included in the last version (released in October 2020). That 2020 definition stated:

For the purpose of the Provisions, “patent pool” refers to an agreement arrangement under which two or more patentees license the patents they own

respectively to a third party in a certain manner, such as establishing a special joint venture for such purpose and entrusting a member of the patent pool or an independent third party to administrate.

For comparison, the European Commission defines “technology pools” as:

Technology pools are defined as arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. In terms of their structure technology pools can take the form of simple arrangements between a limited number of parties or of elaborate organisational arrangements whereby the organisation of the licensing of the pooled technologies is entrusted to a separate entity. In both cases the pool may allow licensees to operate on the market on the basis of a single licence.

See European Commission’s Communication “Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements,” COM (2014/C 89/03), 28 March 2014, para. 244.

Due to the absence of a definition of patent pools, the precise scope of the current draft Article 14 is unclear, as there is no precise definition of patent pools to use in interpreting the article. For example, it is unclear whether the article also covers licensing arrangements not merely between the contributors to the pool but also with third parties.

Adding the 2020 definition of “patent pool” back to the current draft of this article would help remedy this unpredictability. Alternatively, the European Commission’s definition of technology pools, or some other definition, could be used.

Below please find a redline showing the changes IPO proposes to the current draft:

Article 14 An undertaking may not make use of patent pool to exclude or restrict competition in exercising intellectual property rights.

...

For the purpose of the Provisions, “patent pool” refers to an agreement arrangement under which two or more patentees license the patents they own respectively to a third party in a certain manner, such as establishing a special joint venture for such purpose and entrusting a member of the patent pool or an independent third party to administrate.

Article 15

IPO believes that excluding a specific undertaking from joining the organization of a standard without justification is anticompetitive. IPO suggests that a provision to that effect should be added to this article, shown in redline below:

Article 15 An undertaking shall not use the formulation and implementation of the standards to implement the following acts so as to exclude or restrict competition in exercising intellectual property rights:

1. *jointly excluding a specific undertaking from participating in the formulation of standards or excluding a specific undertaking's relevant standard technical solutions with competing undertakings without justifications, or excluding a specific undertaking from joining the organization of a standard without justification;*
2. *jointly excluding other specific undertakings from implementing relevant standards with competing undertakings without justifications;*
3. *agreeing with competing undertakings not to implement other competitive standards; and*
4. *other monopoly agreements identified by the State Administration for Market Regulation.*

Article 16

Article 16 identifies certain acts of excluding or restricting competition in the course of formulation and implementation of a standard which an undertaking with a dominant market position shall not engage in.

Under paragraph 2, it is respectfully submitted that one of these acts, namely, “applying differential treatment” should be amended to reflect that applying differential treatment shall not be engaged in unless such treatment can be justified (i.e., “applying differential treatment without justification”). More particularly, differential treatment may be justified when licensees have differences in terms of their sales volume, total revenue, financial strength and/or other licensee characteristics. Differential treatment also may be justified based on how the respective licensees are required to pay for the license (e.g., through payment of a running royalty, an up-front payment, a combination of up-front payment and running royalty, or some other payment arrangement).

The factors listed in Paragraph 2 are understood to be, after the patent has become an essential patent of a standard, in violation of the fair, reasonable and non-discriminatory (FRAND) promises made. Because some standards do not have an IPR policy in place requiring FRAND promises to be made, but instead have an IPR policy based on FRAND principles, it is respectfully suggested that paragraph 2 be amended to cover both FRAND promises or principles.

Accordingly, IPO respectfully suggests paragraph 2 be amended as follows:

2. *after the patent has become an essential patent of the standards, in violation of the fair, reasonable and non-discriminatory promises or principles, licensing at unfairly high prices, refusing to license without justification, tying and bundling products, applying differential treatment without justification or imposing other unreasonable restrictions;*

IPO thanks the State Administration for Market Regulation for its attention to IPO's comments submitted herein, and welcomes further dialogue and opportunity to provide additional comments. IPO has enclosed this letter as translated herewith.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karen Cochran', is centered below the word 'Sincerely,'. The signature is fluid and cursive.

Karen Cochran
President