

## Global Antitrust Institute comments on China State Council's IPR guidelines

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The Global Antitrust Institute (GAI) at Scalia Law School, George Mason University, submitted on 13 April the following comment to China's State Council on its 'Anti-Monopoly Guidelines Against Abuse of Intellectual Property Rights'.

The comment provides comprehensive recommendations on the various specific provisions, raising the following five overall concerns:

First, the draft guidelines do not explicitly recognize an IPR holder's core right to exclude.

The right to exclude is a central feature of IPRs, and economic theory and empirical evidence show that IPRs incentivize the creation of inventions, ideas, and original works. Relatedly, the draft guidelines also do not incorporate throughout the well-accepted methodological principle that, when assessing the possible competitive effects of the use of IPRs, agencies should compare the competitive effect of the IPR use against what would have happened in the "but for" world in which there is no license.

This important analytical approach, which has been used by the US antitrust agencies for the last 20 years, is absent from the draft guidelines.

Second, the draft guidelines do not incorporate throughout the point that licensing is generally procompetitive. This modern economic understanding of licensing has informed the approach of the US agencies, for example, for more than 20 years. The result is an approach that, with the exception of naked restraints such as price-fixing, requires an effects-based analysis under which licensing restraints will be condemned only when any anticompetitive effects outweigh any procompetitive benefits.

Third, and relatedly, the draft guidelines appear to create a number of presumptions that certain conduct (such as charging for expired or invalid patents and prohibiting a licensee from challenging the validity of its IPR) will, or is likely to, eliminate or restrict competition.

The GAI has urged the elimination of such presumptions and recommended that the State Council instead adopt an effects-based approach. This approach would benefit Chinese consumers because presumptions that are not appropriately calibrated are likely to capture conduct that is procompetitive, which is likely to have a chilling effect on potentially beneficial conduct. Adopting an approach that incorporates these revisions is likely to best serve

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competition and consumers, as well as China's goal of becoming an innovation society.

Fourth, the draft guidelines appear to create special rules for conduct involving standard essential patents (SEPs).

The GAI has urged the State Council to reconsider this approach. Instead, whether particular conduct involving SEPs, including evasion of a FRAND [fair, reasonable, and non-discriminatory] assurance, has net anticompetitive effects should require the same case-by-case, fact-specific analysis as is required for non-SEPs.

Imposing special rules for SEPs, including creating presumptions of harm based on breach of contractual commitments such as a FRAND assurance, is not only unwarranted as a matter of competition policy, but also likely to deter participation in standard setting.

Lastly, it has suggested that the State Council adopt a more compliance-based approach that sets forth basic principles that would allow parties to self-advise. The draft guidelines instead set forth a list of factors that the AML [Anti-monopoly Law] agencies will consider when analyzing specific conduct, yet do not explain the significance of each of the factors or how they will be weighed in the AML agencies' overall decision-making process.

This approach allows the AML agencies broad discretion in enforcement decision-making without providing the guidance stakeholders need to protect incentives to innovate and transfer technology that could be subject to AML jurisdiction. To this end, the GAI recommends that the State Council include throughout the guidelines examples similar to those found in other guidelines -- for example, the US antitrust agencies' recently updated 2017 Antitrust Guidelines for the Licensing of Intellectual Property and the Canadian Bureau of Competition's Intellectual Property Enforcement Guidelines -- to illustrate how the AML agencies will apply the basic principles.

View the complete submission [here](#).

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