



# Key Development of SEP-related Legislation and Case Review in China

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# CONTENTS

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- 01 The Importance of SEP Protection in China**
- 02 Recent Developments of SEP-related Legislation in China**
- 03 SEP-related Antitrust Cases in China**

# PART 01

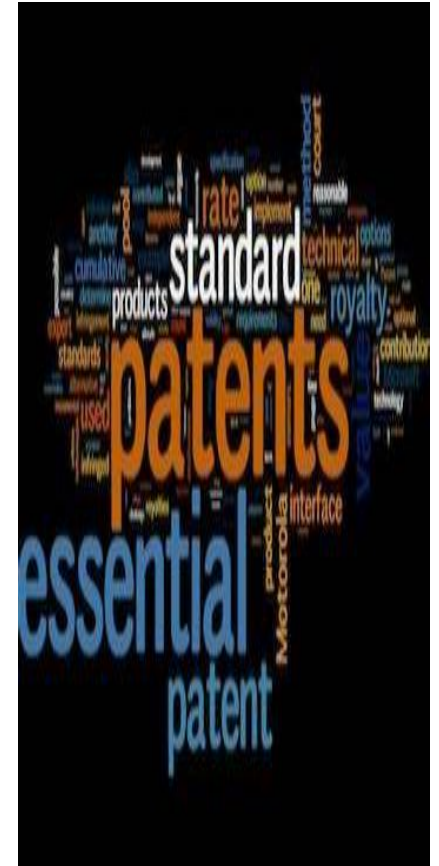
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## The Importance of SEP Protection in China



## *China: an important Place for:*

- *SEP Applications*
  - *Solving International SEP Disputes*
- 
- Among the world's top 15 patent applications, China takes up **7 berths**.
  - Up to 2022, among 46,879 the patent families, 18,728 were declared by China, accounting for **39.9 %** of the world's total.
  - China has already become an important battlefield for international SEP disputes by establishing its own standards of reviewing the **substantive and procedural issues**.
  - More than **75 %** of SEP cases accepted **by Chinese courts occurred between Chinese and foreign entities**. This highlights the enormous stakes involved with how China approaches SEPs in advanced technology sectors.



# PART 02

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## Recent Developments of SEP-related Legislation in China



Rule Enactment Agency	Name
State Council	<i>Anti-Monopoly Guidelines for the Field of Intellectual Property Rights (2019.1.4)</i>
SAMR	<i>Provisions on Prohibition of Abuse of Market Dominance (2023.4.15)</i>
	<i>Provisions on Prohibition of the Abuse of Intellectual Property to Exclude or Restrict Competition (2023.6.25)</i>
	<i>SAMR Announcement on Seeking Public Comments for the Anti-monopoly Guidelines for the Field of Standard Essential Patents (SEP Draft Guidelines) (2023.6.30)</i>

- The introduction of the draft guideline reflects SAMR's heightened attention to the potential abuse of SEPs.
- The draft highlights SAMR's future focus on antitrust enforcement in the information communication technology sector as well as in emerging sectors such as the **new energy automotive industry**, where SEPs have become critical **for the development of intelligent and connected vehicles**.

## Highlights of the SEP Draft Guidelines

*This is the first time SAMR has sought to regulate SEP licensing conduct through a comprehensive document dedicated to SEP related antitrust issues.*

### “Good Faith”

#### 1. Information disclosure procedure

- o Patent holders **shall disclose their own patents** in a timely and sufficient manner during the standard setting process.
- o If they fail to do so, but still seek to assert patent rights against implementers after the promulgation of the standard, their conduct would have anticompetitive effects in the market.

#### 2. Good faith negotiation

- o The SEP owner and the implementer shall negotiate in good faith based on **the FRAND principle**.
- o Requirements for the negotiation: (a) an SEP owner must make a clear and specific offer to an implementer; (b) the implementer must express its willingness to take a license within a reasonable period; (c) the SEP owner must provide licensing **terms compliant with its FRAND commitments**; (d) The implementer must accept the SEP owner’s licensing terms within a reasonable period, Otherwise, the implementer shall provide a FRAND solution within a reasonable period.

## Abuse of Dominance

### 1. Establishment of dominance

- o Each SEP holder is assumed to have a dominant position by **owning 100% market share** in the SEP licensing market.
- o Other factors to be considered in determining dominance: the SEP owner's ability to control the relevant market, the degree of dependence of the downstream players, the difficulty of entrance into the licensing market, and SEP owner's financial and technical conditions, etc.

### 2. Excessive pricing

- o The draft guidelines confirm that SEP owner should receive reasonable licensing fee that reflect their R&D costs.
- o Factors to determine excessive pricing:
  - whether the parties negotiated in good faith;
  - whether the fee is significantly higher than **R&D cost** or **historical fees**;
  - Whether the license fee exceeds the geographical scope of the SEP or the scope of good;
  - whether the fee covers **expired or invalid patents**
  - whether the fee reflects the **quantitative and qualitative changes in the SEP portfolio**; and
  - whether the fees involves double charging through a non-practicing entity (NPE).

### 3. Unreasonable trading conditions

- o Requiring a mandatory royalty free cross license;
- o Demanding royalty free grant-backs;
- o Prohibiting challenges to the validity or essentiality of the SEP;
- o Limiting the choice of dispute resolution forum;
- o Restricting or forbidding transactions with a third party.
- o ...



## Monopoly Agreements

- o Both anticompetitive agreements among SEP owners, as well as anticompetitive agreements between SEP owners and SEP implementers shall be prohibited.
- o **Standard-setting organizations** shall refrain from facilitating or assisting monopoly agreements involving SEPs.
- o The criteria for identifying monopoly agreements involving SEPs in the process of standard setting and implementation, patent pools of SEPs:
  - SEP owners use patent pool arrangements to exchange competitively sensitive information, fix or change licensing rates, or
  - SEP owners limit implementers' production, sale or innovation of products involving SEPs.



# PART 03

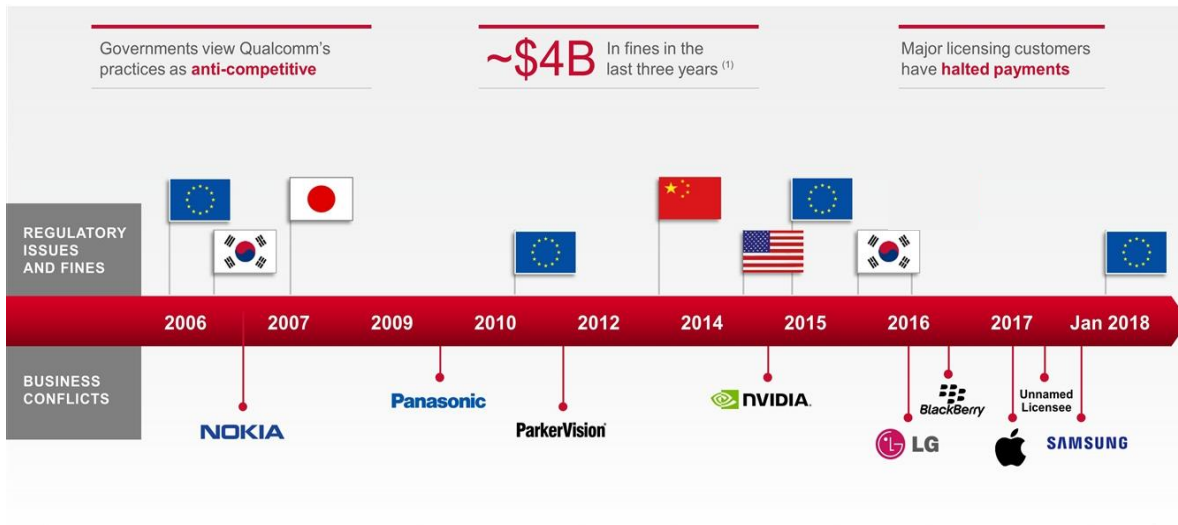
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## SEP-related Antitrust Cases in China



NDRC's investigation of Qualcomm began in **November 2013** with a dawn raid at the company's Beijing and Shanghai offices, and took more than **15 months** to complete.

## Qualcomm's Business Model Has Been Broken for a Long Time



<sup>1)</sup> Includes NDRC fine of \$975M, KFTC fine of \$927M, TFTC fine of \$778M and European Commission fine of \$1.2B

## Market definition and Dominance

- (i) Upstream market: a collection of relevant SEP licensing markets – Qualcomm can be presumed having 100% shares ;
- (ii) Downstream market : CDMA baseband chips, WCDMA baseband chips, and LTE baseband chips.

## Anticompetitive Conducts

- (i) Charging excessive royalties
- (ii) Bundling SEPs and non-SEPs without justifications
- (iii) Imposing unreasonable sales terms on baseband chip customers.

## Decision

- (i) Lower royalty rate/No charge the royalty based on selling price of the whole device
- (ii) No charge for expired patents
- (iii) No cross-license of non-SEPs against licensees' will and no cross-license without fair consideration
- (iv) Eliminating tying SEPs and non-SEPs without justification
- (v) Modifying unreasonable sales terms for baseband chips
- (vi) Fine of RMB 6.09 billion Yuan (8% of Qualcomm's turnover in China in 2013)

## 2014: Complaint Filed

Four local rare earth magnet companies filed complaints against Hitachi Metal (later renamed as Proterial), claiming that Proterial abused dominance when it refused to license patents re sintered NdFeB

## 2021: First Instance Judgment

Ningbo Intermediate Court ruled that Proterial's patents were “de facto” SEPs, and that the company's refusal to license them without reasonable justification was an abuse of dominance.

## Ongoing (SPC): Trial of Second Instance

### Questions

- How to define the relevant product market involving both technology and product precisely?
- Does a non-SEP holder obliged to license the patent?
- Whether appropriate to apply ‘Essential Facilities Doctrine’ to non-SEPs?



## The Importance of SEP Protection for China

- **China: The role from an implementer to an patent holder.**
- China has already become an important battlefield for international SEP disputes by establishing its own standards of reviewing the substantive and procedural issues.



## Recent Developments of SEP-related Legislation in China

- Provisions on Prohibition of Abuse of Market Dominance
- Provisions on Prohibition of the Abuse of Intellectual Property to Exclude or Restrict Competition
- SAMR Announcement on Seeking Public Comments for the Anti-monopoly Guidelines for the Field of **Standard Essential Patents (SEP Draft Guidelines)**



## SEP-related Antitrust Cases in China

- NDRC: **Qualcomm case (2013)**
- Ningbo Intermediate Court & SPC: **Four Rare Earth Magnet Companies v. Proterial (On-going)**

# THANK YOU



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