

Provisions on Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition

(Promulgated by Decree No. 74 of the State Administration for Industry and Commerce on 7 April 2015)

Article 1 In order to protect fair market competition, encourage innovation and curb undertakings' abuse of intellectual property rights to eliminate or restrict competition, these provisions are formulated in accordance with the *Anti-monopoly Law of the People's Republic of China* (hereinafter the "**AML**").

Article 2 Anti-trust and protection of intellectual property rights share the same objective, *i.e.*, promoting competition and innovation, improving economic efficiency and maintaining consumer benefits and public interests.

The AML shall not apply if an undertaking exercises its intellectual property rights pursuant to laws and administrative regulations relating to intellectual property. However, the AML shall apply to the conduct of an undertaking which eliminates or restricts competition by abusing intellectual property rights.

Article 3 For purposes of these provisions, abuse of intellectual property rights to eliminate or restrict competition refers to an undertaking's exercise of intellectual property rights in violation of the AML, implementation of monopoly agreements, abuse of a dominant market position and other monopolistic acts (excluding price-monopoly conduct).

For the purpose of these provisions, a relevant market, which includes the relevant product market and the relevant geographical market, shall be defined in accordance with the AML and the *Guidelines of the Anti-Monopoly Commission of the State Council on Definition of Relevant Market* and take account of factors such as intellectual property rights and innovation. For the purpose of anti-monopoly enforcement involving the license of intellectual property rights, a relevant product market can be a technology market or a product market involving particular intellectual property rights. A relevant technology market is the market where a technology that is the subject matter of intellectual property rights competes with substitutable homogenous technologies.

Article 4 Undertakings shall not, by way of exercising intellectual property rights, conclude monopoly agreements prohibited under Articles 13 and 14 of the AML, unless the undertakings involved are able to prove that the concluded agreements satisfy Article 15 of the AML.

Article 5 An undertaking's exercise of intellectual property rights under any of the following circumstances may be held to not constitute a monopoly agreement prohibited under Article

13(6) or Article 14(3) of the AML, unless evidence to the contrary proves that such agreement has the effect of eliminating or restricting competition:

- (1) the combined market share of competing undertakings in the relevant market affected by their conduct does not exceed twenty per cent, or there are at least four other independently controlled substitutable technologies in the relevant market which are available at reasonable costs;
- (2) the market share of the undertaking and each of its trading partners in the relevant market does not exceed thirty per cent, or there are at least two other independently controlled substitutable technologies in the relevant market which are available at reasonable costs.

Article 6 An undertaking with a dominant market position shall not abuse its dominant market position to eliminate or restrict competition in the course of exercising intellectual property rights.

A dominant market position shall be determined and presumed in accordance with Articles 18 and 19 of the AML. Ownership of intellectual property rights can be one of the factors in holding an undertaking to have a dominant market position, but such undertaking shall not be presumed to have a dominant market position merely for its ownership of intellectual property rights.

Article 7 An undertaking with a dominant market position, being aware that its intellectual property rights constitute an essential facility for production and operation activities, shall not, without any justification, refuse to license other undertakings to use its intellectual property rights on reasonable terms to eliminate or restrict competition.

All of the following factors shall be considered in determining an act described in the preceding paragraph:

- (1) such intellectual property right is not reasonably substitutable in the relevant market and is essential for other undertakings to compete in the relevant market;
- (2) refusal to license such intellectual property right will have an adverse effect on competition or innovation in the relevant market, and be detrimental to consumer benefits or public interests; and
- (3) the licensing of such intellectual property rights will not result in unreasonable damages to the undertaking.

Article 8 In the course of exercising intellectual property rights, an undertaking with a dominant market position shall not, without any justification, engage in any of the following

exclusive dealing conduct to eliminate or restrict competition:

- (1) requiring trading partners to exclusively deal with it; or
- (2) requiring trading partners to exclusively deal with undertaking(s) designated by it.

Article 9 In the course of exercising intellectual property rights, an undertaking with a dominant position shall not, without any justification, engage in tying that satisfies all of the following conditions to eliminate or restrict competition:

- (1) different products are tied or bundled for sale in breach of transaction practices, consumer habits, etc. or regardless of the functions of the products; and
- (2) such tying will allow the undertaking to extend its dominant market position in the tying product market to the tied product market, thereby eliminating or restricting competition of other undertakings in the tying product market or tied product market.

Article 10 In the course of exercising intellectual property rights, an undertaking with a dominant market position shall not, without any justification, impose any of the following unreasonable restrictive conditions to eliminate or restrict competition:

- (1) requiring trading partners to exclusively grant back the technologies improved by them;
- (2) prohibiting trading partners from challenging the validity of its intellectual property rights;
- (3) prohibiting trading partners from using competing products or technologies, which do not infringe the intellectual property rights, after the licence period expires;
- (4) continuing to exercise its right to the intellectual property rights after the protection period of such intellectual property rights expires or such intellectual property rights are held invalid;
- (5) prohibiting trading partners from dealing with any third party; or
- (6) imposing other unreasonable restrictive conditions on trading partners.

Article 11 In the course of exercising intellectual property rights, an undertaking with a dominant market position shall not, without any justification, apply differential treatment to equivalent trading partners to eliminate or restrict competition.

Article 12 In the course of exercising intellectual property rights, undertakings shall not eliminate or restrict competition by means of a patent pool.

Patent pool members shall not, by means of the patent pool, exchange competitively sensitive information in relation to output and market sharing, so as to conclude monopoly agreements prohibited by Articles 13 and 14 of the AML, unless the undertakings are able to prove that the concluded agreements satisfy Article 15 of the AML.

A patent pool management organisation with a dominant market position may not, without any justification, engage in any of the following conduct of abuse of a dominant market position by means of the patent pool to eliminate or restrict competition:

- (1) restricting patent pool members on licensing their patents outside the patent pool as an independent licensor;
- (2) restricting patent pool members or licensees on, either independently or in collaboration with third parties, researching or developing technologies competing with the patents in the patent pool;
- (3) forcing licensees to exclusively grant back the technologies improved or developed by such licensees to the patent pool management organisation or patent pool members;
- (4) prohibiting licensees from challenging the validity of the patents in the patent pool;
- (5) differentiating transaction terms applicable to patent pool members or licensees in the same relevant market under the same conditions; or
- (6) other abuses of a dominant market position determined by the State Administration for Industry and Commerce.

For the purpose of these provisions, patent pool refers to a contractual arrangement under which two or more patent owners, in a certain form, jointly license their patents to third parties. A patent pool can take the form of a joint venture company specifically established, or can be managed by a patent pool member or an independent third party engaged thereby.

Article 13 In the course of exercising intellectual property rights, undertakings shall not eliminate or restrict competition by setting or implementing standards (including mandatory requirements in national technical specifications).

An undertaking with a dominant market position shall not, without any justification, engage in any of the following conducts in the course of setting or implementing standards to eliminate or restrict competition:

- (1) in the course of participating in setting standards, intentionally refraining from disclosing information on the patent to the standards-setting organisation, or

explicitly waiving its patent right but nevertheless claiming for patent rights against undertakings implementing the standard after the patent is involved in the standard; and

- (2) refusing to grant a licence, tying products or imposing other unreasonable conditions on transactions in violation of the principles of fairness, reasonableness and non-discrimination in order to eliminate or restrict competition, after such patent becomes a standard essential patent.

For the purpose of these provisions, standard essential patents refer to patents that are indispensable in implementing standards.

Article 14 For undertakings' suspected of an abuse of intellectual property rights to eliminate or restrict competition, administrative authorities for industry and commerce shall undertake investigations in accordance with the AML and the *Procedural Provisions of the Administrative Authorities for Industry and Commerce on Investigating and Sanctioning Monopoly Agreements and Abuse of A Dominant Market Position*.

Article 15 The following steps can be taken in analysing and determining whether an undertaking has abused intellectual property rights to eliminate or restrict competition:

- (1) determining the nature and manner of the undertaking's exercise of intellectual property rights;
- (2) determining the nature of the relationship between undertakings exercising intellectual property rights;
- (3) defining the relevant market involved in the exercise of intellectual property rights;
- (4) determining the market position of the undertaking exercising intellectual property rights; and
- (5) analysing the impact of the undertaking's exercise of intellectual property rights on competition in the relevant market.

The particular features of exercising intellectual property rights need to be taken into consideration in analysing and determining the nature of the relationship between undertakings. Where the license of intellectual property rights is involved, companies that are already competitors have a trading relationship under the license contract, while the licensor and licensee have a competing relationship in the market where both the licensor and licensee use intellectual property rights to manufacture products. However, if a competing relationship arises after a license contract has been entered into rather than when it was being concluded between the parties, such contract shall not be deemed to be an agreement between

competitors, unless a substantial change occurs to the original contract.

Article 16 The following factors shall be taken into consideration in determining the impact on competition of an undertaking's exercise of intellectual property rights:

- (1) market positions of the undertaking and trading partners;
- (2) degree of concentration in the relevant market;
- (3) difficulty in entering the relevant market;
- (4) industry practice and stage of development of the industry;
- (5) duration and strength of the constraints on output, territory, consumer and other aspects;
- (6) impact on furthering innovation and promoting technology;
- (7) the undertaking's ability of innovation and speed of technology evolution; and
- (8) other factors relevant to determining the impact on competition of the exercise of intellectual property rights.

Article 17 If an undertaking's abuse of the intellectual property rights to eliminate or restrict competition constitutes a monopoly agreement, the Administrative Authorities for Industry and Commerce shall order the undertakings to cease such conduct, shall confiscate the illegal gains and shall impose fines between 1% and 10% of the total turnover in the preceding year. If the monopoly agreement is not implemented, a fine of less than RMB 500,000 may be imposed.

If an undertaking's abuse of the intellectual property rights to eliminate or restrict competition constitutes an abuse of a dominant market position, the Administrative Authorities for Industry and Commerce shall order the undertaking to cease such conduct, shall confiscate the illegal gains and shall impose a fine between 1% and 10% of the total turnover in the preceding year.

The Administrative Authorities for Industry and Commerce shall take into account factors such as the nature, circumstance, gravity and duration of the illegal conduct in determining the specific amount of the fines.

Article 18 The State Administration for Industry and Commerce is responsible for interpreting these provisions.

Article 19 These provisions are effective from 1 August 2015.