The Anti-monopoly Commission of the State Council

Anti-monopoly Guideline on Abuse of Intellectual Property Rights

(Exposure Draft)

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Preamble

Anti-monopoly and intellectual property system share the same goal of promoting competition and innovation, improving efficiency of economic operation, protecting consumer benefits and improving social benefits. The Anti-monopoly Law ("**AML**") promotes innovation, facilitates technology transfer and utilization through protecting market competition; the intellectual property regime promotes market competition via its direct aim of protecting and stimulating innovation. Therefore, the AML is not applicable to the undertakings' behaviors of legitimately exercising the intellectual property rights ("**IPR**"). However, the exercise of IPR may sometimes go against the original goal of the intellectual property regime, eliminate or restrict competition, and impede innovation. As a basic law of maintaining free and fair market competition, the AML regulates the behaviors that eliminate or restrict competition, including the behaviors that abuse IPR to eliminate or restrict competition.

In anti-monopoly enforcement practices, the analysis and identification of abuse of IPR that eliminates or restricts competition is characterized by specificity; on the basis of applying basic analysis framework of the AML, there are a series of specific issues that need to be further clarified. As a result, in accordance with the AML, this Guideline is formulated for the purpose of establishing directive rules of anti-monopoly law enforcement against abusing intellectual property; improving the transparency of anti-monopoly enforcement; providing the market with more explicit and reasonable expectation; and, guiding the practitioners to exercise the IPR in an legitimate manner.

I. Basic Issues

(I) Law Enforcement Principles

During the anti-monopoly law enforcement process involving IPR, anti-monopoly law enforcement agencies shall adhere to four principles:

1. In the anti-monopoly regulation on the behavior of exercising IPR, the IPR shall be subject to the same regulatory framework as other property rights, and the basic analytical framework of the AML shall be followed, while the specific features of the IPR shall be taken into account;
2. The undertaking shall not be directly presumed to hold a dominant market position in the relevant market only based on the fact that it owns the IPR;
3. When conducting analysis on the behavior of exercising IPR that may eliminate or restrict competition, the enforcement agencies

shall give full consideration of the positive effects of exercising IPR on competition and innovation on an ad hoc basis;

4. Maintaining justice and transparency, the enforcement agencies shall fully consider the facts, evidence and reasons submitted by the undertakings for justifying their exercising of IPR.

(II) Definition of Relevant Market

When defining relevant market involving IPR, the general principles and methods for relevant market definition shall be followed, i.e. the relevant product market and relevant geographic market usually need to be defined, while the particularity of IPR also needs to be considered.

IPR can either be used directly as the object of trade, or be used for the provision of commodity or services (hereinafter referred to as "**commodity**"). Therefore, when conducting anti-monopoly analysis involving IPR, if it is hard to comprehensively evaluate the competitive effect of relevant behavior of exercising IPR only by defining relevant commodity market, the definition of relevant technology market shall be introduced. According to the need of a specific case, the influences of behaviors of exercising IPR on R&D investment, innovation activity can also be considered.

Relevant technology market refers to the market constituted by competition between the technology involved in the exercise of IPR and its substitutes. When determining the substitutability of the technologies, the following factors can be considered: technical attributes, use, license fee, the time limit of IPR and the possibility and costs of its demanders in transferring to other alternative technologies, etc. When commodities with substitutional relation can be supplied by using different technologies, these different technologies may have substitutability.

Relevant commodity market and relevant technology market involving IPR both need to define relevant geographic market. When defining the geographic market of relevant technology market, regionalism of the IPR shall be considered. When relevant trade involves IPR of many countries and regions, the influence of relevant trading terms on the definition of relevant geographic market shall also be considered.

(III) Overall Analyzing Framework

When analyzing and determining whether an undertaking has violated the AML and eliminated or restricted competition by abusing IPR, anti-monopoly law enforcement agencies shall comprehensively adopt the analytical methods used in subjects such as law, economics etc. to conduct specific analysis on the monopoly behavior type which may be constituted by relevant behavior of exercising IPR. The following factors can be taken into consideration: competition situation in relevant market, whether relevant behavior of exercising IPR eliminates or restricts competition, and whether relevant behavior of exercising IPR promotes innovation and improves efficiency.

1. Analysis of competition situation in the relevant market

When conducting analysis on the competition situation in relevant market, the following factors can be taken into consideration:

1) The market position of the undertakings, relevant competitors and trading counterparts;
2) The concentration degree of the relevant market;
3) The difficulty level of entering relevant market;
4) The degree of dependence of trading counterparts on relevant IPR;
5) Industrial characteristics and industry development situation;
6) Technical condition in relevant market, including the update of technologies, substitute technologies and their market share, etc.

When calculating market shares of the relevant technology market, according to individual cases, the following methods can be adopted:

1) The ratio of license fee income of relevant IPR in the total income of license fee of relevant market;
2) Using the market share ratio in the downstream market of the commodity which is provided by relevant IPR to calculate market share;
3) Considering the quantity ratio of relevant IPR in all IPR with substitutional relation.

2. Analysis of eliminating and restricting competition

When conducting analysis on whether the behavior of exercising IPR eliminates or restricts competition, the following factors can be taken into consideration:

1) The elimination or impediment on existing competition and potential competition in the relevant market by the behavior;
2) The possibility of controlling resources such as key technology, setting up or raising the barriers for entering into relevant market by the behavior;
3) The barriers imposed by the behavior on technological innovation, promotion and development;
4) The barriers on the development of relevant industry by the behavior;
5) The period, scope and degree of the restrictions on aspects such as output, region, consumers etc. imposed by the behavior.

3. Analysis of promoting innovation and improving efficiency

When conducting analysis on whether the behavior of exercising IPR promotes innovation and improves efficiency, the following factors shall be taken into consideration:

1) The causal relationship between the behavior of exercising IPR and innovation promoting and efficiency improving;
2) The degree of promoting innovation and improving efficiency by the behavior of exercising IPR;
3) The behavior of exercising IPR will not severely restrict competition in relevant markets or impede the innovation of other undertakings;

4) Consumers can share the benefits generated by the promoted innovation and improved efficiency;

II. Intellectual Property Agreements that may Restrict or Eliminate Competition

When determining whether relevant intellectual property agreements reached by undertakings eliminate or restrict competition, specific analysis on individual cases shall be conducted with the consideration of the characteristics of IPR. Generally, the intellectual property agreements reached by undertakings with competitive relation are more likely to eliminate or restrict competition than those reached by undertakings without competitive relation. When determining whether competitive relation exists among the undertakings reaching the agreements, it needs to be considered whether actual or potential competitive relation exists among undertakings in the relevant market before the conclusion of such agreements. It also needs to be considered that after the conclusion of such agreements whether the commodities or services the undertakings supplied in the relevant market by exercising or using IPR will constitute competition relation.

(I) The agreements reached by undertakings with competition relationships

Combined with the monopoly agreements provided by Item (i) to item (v) of the Paragraph 1 of Article 13 of the AML, the following

IPR agreements reached by the undertakings with competition relationships may also eliminate and restrict competition.

1. Joint R&D

For the purpose of this Guideline, joint R&D means that two or more than two undertakings research and develop products or technologies jointly.

Generally, joint R&D can save R&D costs, improve R&D efficiency, promote innovation, and make effects of promoting competition. However, it is also likely to restrict and eliminate competition and the specific analysis can take the following factors into consideration:

1) Whether restricting the undertakings from doing independent R&D on new technologies or new products in the fields in no relation with the joint R&D;

2) Whether restricting the undertakings from doing joint R&D with the third parties on new technologies or new products in the fields in no relation with the joint R&D;

3) Whether limiting the ownership and use of the IPR involved in the new technologies and new products researched and developed in the fields in no relation with the joint R&D.

2. Patent Pool

For the purpose of this Guideline, patent pool means that two or more than two patentees jointly license their respective patents to third parties. Patent pool can be conducted in the form of establishing a special company, authorizing special member to manage or managing through an independent third party etc.

Generally, patent pool can reduce transaction costs, improve efficiency, and have the effect of promoting competition. However, it is also likely to restrict and eliminate competition. Specific analysis can take the following factors into consideration:

1) Whether the patents in the patent pool are consisted completely or mainly by substitutable technologies;

2) Whether restricting the members of the patent pool from individually licensing its patents in the patent pool;

3) Whether leveraging patent pool to exclude substitutable technologies, or impede the entry of other undertakings into the relevant market;

4) Whether the members of the patent pool exchange information related to competition (such as the information of price, output, market segmentation etc.) which are not necessary to the patent pool through the patent pool;

5) Whether restricting the members of the patent pool from doing R&D of new technologies.

3. Cross License

For the purpose of this Guideline, cross license means that undertakings license each other to use their respective IPR.

Generally, cross license can reduce the IPR licensing cost, inspire innovation and promote the implementation of IPR. However, it is also likely to restrict and eliminate competition. Specific analysis can take the following factors into consideration:

1) Whether cross license is an exclusive license;

2) Whether cross license constitutes entry barriers into the relevant markets for the third parties;

3) Whether cross license has impeded the competition of the downstream relevant commodity markets.

4. Standard Establishment

For the purpose of this Guideline, standard establishment means undertakings jointly formulate the standards involving IPR which will be implemented uniformly in a certain scope.

Standard establishment is conductive to realize the commonality of different products, reduce costs, improve efficiency, ensure the product quality, promote competition and enhance the social benefit. However, standard establishment in which the undertakings with competition relationships joint take part is also likely to eliminate and restrict competition. Specific analysis can take the following factors into consideration:

1) Whether eliminating other specific undertakings;

2) Whether excluding the relevant solutions of specific undertakings;

3) Whether agreeing not to implement other competing standards;

4) Whether there is necessary and reasonable restricting mechanism for the IPR contained in the standards executed.

The above mentioned analytical factors can also be considered when analyzing whether the IPR agreements including joint R&D, patent pool, cross license and standard establishment etc. reached by undertakings with no competitive relationships will eliminate and restrict the competition or not, while the significant factor i.e. the undertakings reaching the above IPR agreements have no competition relationships with each other shall be taken into full consideration.

(II) The agreements reached by undertakings with no competition relationships

In accordance with the monopoly agreements provided by Item (1) to item (5) of the Paragraph 1 of Article 13 of the AML, the following IPR agreements reached by the undertakings with no competition relationships may also eliminate and restrict competition

1. Price Restriction

Fixing the price of the commodities provided by the licensee to a third party utilizing the IPR of the licensor, or the restriction of its minimum sales price shall fall within the regulatory scope of the AML in terms of fixing of resale price and restriction of minimum resale price.

2. Exclusive Grant-back

For the purpose of this Guideline, grant-back refers to a licensee license the IPR, which is created by follow-up improvement based on the licensed IPR or the new result developed by using the licensed IPR, to the previous licensor. Exclusive grant-back referred to that only the licensor can implement the advanced or the initiative results granted back by the licensee.

Generally, grant-back can reduce the licensing risks for licensors, promote the investment and application of new results, and increase innovation and competition. However, exclusive grant-back may allow licensors to be able to control the advances or the innovative results and reduce licensors' motivation of innovation so as to eliminate or restrict competition. The following elements may be considered when analyzing whether a grant-back restricts and eliminates competition:

1) Whether the licensor provides substantial consideration to the grant-back;

2) Whether the licensor and the licensee mutually request for exclusive grant-back in cross licensing;

3) Whether the grant-back leads to concentrates of IPR to one single entity, resulting in the acquiring or strengthening of the control of the relevant market by the entity;

4) Whether the grant-back damages the initiative of the licensee to make further advance.

If the licensor requires the licensee to transfer the above follow-up improvements or new results to the licensor, either having it all to the licensor itself or transferring it to a designated third party, the above elements may also be considered when analyzing whether a grant-back restricts and eliminates competition.

3. Non-challenge Clause

Non-challenge clause referred to in this Guideline refers to that the licensor requires the licensee to raise no challenge to the validity of its IPR.

Non-challenge clause can generally avoid lawsuit abuse and enhance transaction efficiency. However, non-challenge clause restricts the rights of the licensee to challenge the validity of the IPR of the licensor, which may eliminate and restrict competition. The following elements may be considered when analyzing individual cases:

1) Whether the licensor requires each of its licensees not to challenge the validity of its IPR;
2) Whether the IPR involved in the non-challenge clause is a license for compensation or may constitute the entry barrier to the downstream market;
3) Whether the IPR involved in the non-challenge clause prevents the implementation of other competitive IPR;
4) Whether the licensor obtains the IPR by providing incorrect or misleading information;
5) Whether the licensor makes the licensee to accept the non-challenge clause by improper means.

4. Other restrictive clause

IPR agreements entered into between or among undertakings that are not in competitive relationships may include the following restrictive clauses:

1) Restricting the licensee to use the IPR in certain areas;

2) Restricting the sales channels, sales scope or transaction counterparts of the licensee's products utilizing the IPR;

3) Restricting the quantity of the commodities produced or sold by the licensee utilizing the IPR;

4) Restricting the licensee to obtain license from a third party and use the competitive IPR of the third party, or restricting the licensee to produce and sell the products that compete with the commodities of the licensor.

The above restrictions are generally commercially reasonable and can raise efficiency and promote the implementation of the IPR. However, under special circumstances, the above restrictions may eliminate and restrict competition. The following elements may be considered when analyzing the individual cases:

1) The content, degree and method of implementation of the restriction;

2) The characteristics of the commodities that are provided by utilizing the IPR;

3) Whether other undertakings that own competitive IPR impose the same or similar restrictions;

4) Whether the restrictions promote the implementation and development of the licensor's IPR;

5) Whether the restrictions hinder the implementation and development of other IPR.

When analyzing whether the exclusive grant-back, non-challenge clause and other restrictive clause reached by undertakings that have competitive relationships in IPR agreements eliminate and restrict competition, the above elements can also be considered, though it is necessary to fully consider the important element that the undertakings reaching the above IPR agreements have competitive relationships. If the above agreements essentially constitute the monopoly agreements regulated by Paragraph 1 to 5 of Article 13 of the AML, the provisions of the AML with regard to the above monopoly agreements should be applied.

(III) Exemption of Agreement

When analyzing whether the relevant IPR agreements may be exempted pursuant to Article 15 of the AML, the focus should be whether the agreements may bring positive effects such as enhancing competition and raising efficiency, etc. Generally, the relevant intellectual property agreements reached by undertakings with less market share may not seriously restrict or eliminate competition. In order to improve the efficiency of antimonopoly enforcement, and provide clearly anticipation to market entity, if one of the following conditions is met by undertakings entering into intellectual property agreements, the IPR agreement can be presumed as exempted in accordance with the provisions of Article 15 of AML:

1. The total market share of the undertakings with competitive relationships in relevant market is below 15%;
2. The market share of each undertaking without competitive relationship in relevant market involved by agreement is no more than 25%.

If the relevant intellectual property agreement reached by undertakings constitutes the monopoly agreement clearly prescribed by Article 13 and Article 14 of the AML, as well as the price restrictions listed in this Guideline, the above presumption is not applicable.

On the condition that although the relevant IPR agreement is in accordance with the above presumption, if there is evidence to prove it violates the provisions of Article 15 of the AML, the exemption is not applicable.

III. The abuse of dominant market position involving Intellectual Property

To analyze whether the exercising IPR behaviors conducted by the undertakings constitutes the abuse of dominant market position, the first is to define the relevant market and determine whether the undertakings have the dominant market position in relevant market, then analyzing whether the IPR exercising behaviors constitutes the abusing dominant market position in individual cases based on the specific circumstances.

(I) Determination of dominant market position

An undertaking owns IPR, which does not means it certainly has the dominant market position. To determine whether the undertakings holding IPR has the dominant market position in the relevant market, it shall analyze based on the factors and conditions specified by the AML(either by assertions or presumption), combined with the characteristics of IPR, the following factors shall also be considered:

1. The possibility of counterpart of transaction to transfer to substitutive intellectual property and the switching cost;
2. The degree of dependence of downstream market on the products provided by the related IPR;
3. The ability of counterbalance of counterpart of transaction to undertakings.

To determine whether the Standard Essential Patent ("**SEP**") undertaking has the dominant market position, the following factors shall be further considered:

1. The market value and application degree of related standards;
2. Whether there is any alternate standard;
3. The degree of dependence on related standards of the industry and the switching cost to apply the alternative standard;
4. The evolution and compatibility between different generations of related standards;
5. The possibility of switching the related technology absorbed in the standard.

(II) Abusive behaviors of dominant market position

Article 17 of the AML prohibits the abusive behaviors of dominant market position, to determine whether the IPR exercising behavior by undertakings with dominant market position in the relevant market constitutes abusive behaviors, the characteristics of IPR and the effect towards competition shall be considered in individual cases based on the specific circumstances.

1. Licensing IPR at unfair high price

An IPR undertaking has the right to gain reasonable economic compensation for its IPR, to compensate for the cost of R&D investment and encourages innovation. The collection of licensing fee by IPR holders are usually not regulated by the AML. However, if an IPR holder abuses its dominant market position and licensing IPR at unfair high licensing fee, it would restrict or eliminate competition and impair the interests of consumers.

The analysis and determination of whether an IPR holder licensing IPR at unfair high licensing fee may take into consideration the following factors:

1) Whether the licensing fee claimed by undertakings obviously discrepant with the value of its IPR;
2) The licensing commitment beard by related IPR;
3) The history of licensing relevant IPR or comparable licensing fee standard;
4) Whether the undertaking exceeds the geographical scope and product scope covered by the IPR when collecting licensing fee;
5) In the case of package licensing, whether the undertaking collects licensing fee on expired or invalid IPR;
6) Whether the IPR licensing agreement contains other licensing conditions leading to unfairly high licensing fee;
7) Whether the undertaking compels the licensee to accept the licensing fee proposed by it by improper means.

When analyzing and determining whether the undertaking licenses SEP at unfairly high licensing fee, the overall licensing fee undertaken by the product conforming to related standard and the effect on the normally development of related industry shall be considered.

2. Refusal to license

Refusal to license is a form of exercising the IPR by the undertaking. Normally, an undertaking does not have the obligation to trade with its competitors or trading counterparts. However, if an undertaking with a dominant market position refuses to license its IPR without justifiable reasons may restrict or eliminate competition, and impair the consumers' benefits or public interest.

The following factors can be considered in individual cases based on the specific circumstances when analyzing whether the refusal to license has justifiable reasons:

1) Licensing commitment undertaken by relevant IPR;
2) Whether the relevant IPR is necessary for entering into the relevant market, and if there is an alternative IPR that can be reasonably obtained;
3) The impact and its degree on undertakings' innovation of licensing relevant IPR;
4) Whether the refused licensee lacks the willingness and ability to pay reasonable licensing fee;
5) Whether the refused licensee lacks the necessary quality, technical support to ensure the fair use of the technology or the safe and performance of the products;

6) Whether the refused licensee will bring negative influence on energy conservation and environment protection by using the IPR.

3. Tie-in sales

The tie-in sales alleged in the Guideline refer to the case in which the trading counterpart is required to accept the license or transfer of other IPRs or to buy other products when the undertaking licenses or transfers IPR.

Tie-in sales can reduce transaction costs and promote the consummation of the product functions to a certain extent. However, undertakings with dominant market positions may restrict and eliminate competition by tie-in sales without justifiable reasons.

The following factors can be considered when analyzing whether tie-in sales constitute the abuse of dominant market position:

1) Whether violating the willingness of the trading counterpart;
2) Whether complying with the transaction practices or consumption customs;
3) Whether ignoring the nature difference of relevant IPR or commodities as well as their interrelationships;
4) Whether it is the essential measure to achieve technology compatibility, product safety, product performance etc.;
5) Whether the transaction opportunities of other undertakings are eliminated or restricted.

4. Imposing unreasonable trading conditions

An undertaking with a dominant market position may restrict and eliminate competition by imposing the following restrictive conditions in its transactions related to IPR:

1) Requiring the trading counterpart to exclusively grant back its improved technology;
2) Prohibiting the trading counterpart from challenging the validity of its IPR or initiating IPR infringement litigation against it;
3) Restricting the use of competitive technology or goods by the trading counterpart;
4) Claiming rights on expired or invalid IPR;
5) Prohibiting the trading counterpart from trading with third parties, or applying restrictions on the trading behavior of the trading counterpart with third parties with respect to trade terms including choice of counterpart, trading area, etc.

5. Discriminative treatment

Undertakings have the right to apply discriminative licensing conditions towards different licensees. However, an undertaking with a dominant market position may restrict and eliminate competition by applying discriminative licensing conditions on licensees with trade terms that are substantially the same without justifiable reasons.

The following factors can be considered when determining whether the discriminative treatment constitute the abuse of dominant market position:

1) Whether the trade terms of a licensee are substantially the same, it can be considered the scope of licensed IPR, and whether there is alternative relationship between the product or service provided by different licensees using relevant IPR ;
2) Whether the trade terms of a licensee are substantially different, in addition to analyzing the terms of the license agreement itself, it also needs to consider comprehensively the substantial impact on license terms of other business arrangements between licensor and licensee;
3) Whether the significant adverse impact will be caused towards the licensee who participates in competition the relevant market

6. Injunctive Relief

Injunctive relief alleged in the Guideline refers to the restrictive order issued by judicial authorities or quasi-judicial authorities against the usage of related patents.

Injunctive relief is a relief method to safeguard the legal rights entitled to SEP holders by law. However, if a SEP holder with a dominant position makes use of injunctive relief to force the licensee to accept unfairly high royalties or other unreasonable conditions raised by the SEP holder, it may eliminate or restrict competition.

When analyzing and determining whether undertakings as SEP holders applying for injunctive relief exclude or restrict competition, the following factors can be considered:

1) The behavior performance and real intention for negotiation revealed by the parties during the negotiation;

2) The injunctive relief related commitment made by the relevant SEP;

3) The licensing conditions raised by the parties during the negotiation;

4) The influence of applying the injunctive relief to the license negotiation, competition in the relevant market and downstream market and the consumers' welfare.

IV. The concentration of undertakings related to IPR

(omitted)