

Anti-Monopoly Guidelines in the Field of Intellectual Property Rights of the PRC

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Contents

Table of Contents	1
Chapter I — General Provisions	1
Chapter II — Intellectual Property-Related Monopoly Agreements	2
Chapter III — Abuse of Dominant Position Involving IP Rights	2
Chapter IV — Concentration of Undertakings Involving IP Rights	3
Chapter V — Supplementary Provisions	3

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Table of Contents

- Chapter I — General Provisions
- Chapter II — Intellectual Property-Related Monopoly Agreements
- Chapter III — Abuse of Dominant Position Involving IP Rights
- Chapter IV — Concentration of Undertakings Involving IP Rights
- Chapter V — Supplementary Provisions

Chapter I — General Provisions

Article 1 — These Guidelines are formulated for the purpose of preventing and restraining monopolistic conduct in the field of intellectual property rights, protecting fair market competition, encouraging innovation, and promoting the construction of a strong intellectual property country and high-quality economic and social development.

Article 2 — Undertakings shall exercise intellectual property rights in accordance with the provisions of relevant laws and administrative regulations. Intellectual property rights exercised in accordance with the law shall not be subject to the application of the Anti-Monopoly Law. However, where undertakings abuse intellectual property rights to exclude or restrict competition, the Anti-Monopoly Law shall apply.

Article 3 — The analysis of monopolistic conduct involving intellectual property rights shall adhere to the principle of individual case analysis. The Anti-Monopoly Law Enforcement Agency shall comprehensively analyze factors such as the characteristics of intellectual property rights, market structure, the business model of the undertaking, and the relationship between the exercise of intellectual property rights and market competition.

Article 4 — When defining the relevant market in cases involving intellectual property rights, the relevant goods market and relevant geographic market may be defined in accordance with the general principles for defining the relevant market under the Anti-Monopoly Law. Where necessary, the relevant technology market and innovation market may also be defined.

Chapter II — Intellectual Property-Related Monopoly Agreements

Article 5 — Agreements between undertakings involving intellectual property rights that constitute monopoly agreements as specified in the Anti-Monopoly Law are prohibited. The determination of whether an agreement constitutes a monopoly agreement shall take into account factors such as the relationship between the parties to the agreement, the content, mode, and purpose of the agreement, and the impact on market competition.

Article 6 — Joint research and development agreements between undertakings involving intellectual property rights may be exempted from the application of the Anti-Monopoly Law in accordance with the law. When analyzing joint research and development agreements, the Anti-Monopoly Law Enforcement Agency shall consider factors such as whether the agreement restricts the independent research and development of the parties.

Article 7 — Patent pools may constitute monopoly agreements. When analyzing patent pools, the Anti-Monopoly Law Enforcement Agency shall consider factors such as whether the members of the pool compete with each other, the market position of the patents in the pool, the conditions and procedures for entering the pool, and whether the pool restricts the parties from licensing independently.

Article 8 — Standard-setting organizations shall formulate intellectual property rights policies and require participants to disclose in a timely manner the intellectual property rights information they possess that may be included in the standards. Where participants in standard-setting violate their disclosure obligations, causing the standard to include their intellectual property rights, and then assert such intellectual property rights, such conduct may constitute monopolistic conduct.

Chapter III — Abuse of Dominant Position Involving IP Rights

Article 9 — Owning intellectual property rights does not in itself mean that an undertaking has a dominant market position. In determining whether an undertaking with intellectual property rights has a dominant market position, factors such as the substitutability of the technology in question, the market share of the relevant technology, and the degree of dependence of downstream markets on the intellectual property rights shall be comprehensively considered.

Article 10 — The licensing of intellectual property rights on unfair and unreasonable terms such as exclusive grant-back of improvements, prohibition of validity challenges, and tying may constitute abuse of a dominant market position. When analyzing such conduct, factors such as whether it has the effect of excluding or restricting competition and whether it promotes innovation and efficiency shall be considered.

Article 11 — Where an undertaking with a dominant market position seeks injunctive relief for its intellectual property rights, such conduct may constitute abuse of a dominant market position if it coerces the counterparty into accepting unfair and unreasonable licensing conditions. Whether the undertaking applying for the injunction has complied with the FRAND (Fair, Reasonable, and Non-Discriminatory) commitments it made in the standard-setting process shall be considered.

Article 12 — The refusal to license intellectual property rights may constitute an abuse of a dominant market position. When analyzing such conduct, the Anti-Monopoly Law Enforcement Agency shall consider whether the intellectual property right in question constitutes an essential facility, whether the refusal prevents the emergence of new products, and whether it excludes or restricts innovation.

Chapter IV — Concentration of Undertakings Involving IP Rights

Article 13 — The transfer or exclusive licensing of intellectual property rights constitutes a concentration of undertakings and shall be subject to declaration if the declaration thresholds are met. When reviewing concentrations involving intellectual property rights, factors such as whether the concentration has the effect of excluding or restricting competition in the upstream technology market and downstream product market, and its impact on innovation, shall be considered.

Chapter V — Supplementary Provisions

Article 14 — These Guidelines shall take effect from the date of promulgation. The Anti-Monopoly Guidelines in the Field of Intellectual Property Rights promulgated on January 4, 2019 shall be repealed on the same date. The Anti-Monopoly Commission of the State Council shall be responsible for interpretation.

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