Provisions on the Prohibition of Abuse of Intellectual Property Rights to Exclude or Restrict Competition of the People’s Republic of China

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Article 1 — These Provisions are formulated in accordance with the Anti-Monopoly Law of the People's Republic of China for the purpose of preventing and prohibiting the abuse of intellectual property rights to exclude or restrict competition, protecting fair competition in the market, and encouraging innovation.

Article 2 — These Provisions apply to the anti-monopoly law enforcement work concerning the abuse of intellectual property rights to exclude or restrict competition within the territory of the People's Republic of China. For the purposes of these Provisions, "intellectual property rights" includes patent rights, trademark rights, copyrights, trade secrets, and other intellectual property rights.

Article 3 — Undertakings shall exercise their intellectual property rights in accordance with the relevant laws and administrative regulations, and shall not abuse intellectual property rights to exclude or restrict competition. Where an undertaking's exercise of intellectual property rights constitutes a monopoly agreement, abuse of dominant market position, or a concentration of undertakings with the effect of eliminating or restricting competition, the Anti-Monopoly Law shall apply. The lawful exercise of intellectual property rights within the scope prescribed by laws and regulations on intellectual property rights shall not be subject to the application of the Anti-Monopoly Law, unless the undertaking abuses intellectual property rights to exclude or restrict competition.

Article 4 — The State Administration for Market Regulation (SAMR) shall be responsible for the anti-monopoly law enforcement work concerning the abuse of intellectual property rights to exclude or restrict competition. When analyzing and determining whether an undertaking abuses intellectual property rights, the following factors shall generally be considered: (1) the nature and scope of the intellectual property rights involved; (2) the interrelationship and competitive dynamics between the undertakings involved; (3) the substitutability of the relevant technologies or products; (4) the market position of the relevant undertakings in the relevant market; and (5) other factors that affect competition in the relevant market.

Article 5 — The relevant market for a technology may be a technology market or a product market containing specific intellectual property rights. The relevant technology market refers to a market composed of a group or class of technologies that are closely substitutable for each other in terms of their characteristics, royalties, and intended use. Where intellectual property rights permits are involved, the relevant market may also include the relevant technology market and the relevant innovation market.

Article 6 — Monopoly agreements involving intellectual property rights include horizontal monopoly agreements and vertical monopoly agreements. Where undertakings reach or implement agreements, decisions, or other concerted practices that exclude or restrict competition through the exercise of intellectual

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property rights, the provisions of Chapter II of the Anti-Monopoly Law shall apply. Monopoly agreements involving intellectual property rights that constitute a prohibited monopoly agreement as specified in Article 13(6) or Article 14(3) of the Anti-Monopoly Law shall be specifically analyzed and determined by the anti-monopoly law enforcement authority, taking into account the characteristics of intellectual property rights and the actual impact on market competition.

Article 7 — The following agreements involving intellectual property rights shall be prohibited as horizontal monopoly agreements: (1) undertakings with a competitive relationship jointly fix or change the royalties for intellectual property rights without justifiable reasons; (2) undertakings with a competitive relationship restrict the quantity of products produced using intellectual property rights; (3) undertakings with a competitive relationship divide the market for the exploitation of intellectual property rights; (4) undertakings with a competitive relationship jointly restrict research and development or the adoption of new technologies without justifiable reasons; and (5) undertakings with a competitive relationship jointly boycott transactions without justifiable reasons.

Article 8 — The following agreements involving intellectual property rights shall be prohibited as vertical monopoly agreements: (1) fixing the price of goods incorporating intellectual property rights for resale to a third party; (2) restricting the minimum price of goods incorporating intellectual property rights for resale to a third party; and (3) other monopoly agreements involving intellectual property rights as determined by the anti-monopoly law enforcement authority under the State Council.

Article 9 — In determining whether an undertaking with a dominant market position abuses intellectual property rights in violation of the Anti-Monopoly Law, the anti-monopoly law enforcement authority shall first determine the market position of the undertaking in the relevant market in accordance with the relevant provisions of the Anti-Monopoly Law, taking into account the characteristics of intellectual property rights. The following factors may be considered in determining whether an undertaking has a dominant market position: (1) the possibility of market substitution of the intellectual property rights; (2) the reliance of downstream undertakings on the intellectual property rights; and (3) the countervailing power of the counterparty to the transaction.

Article 10 — An undertaking with a dominant market position shall not abuse intellectual property rights to engage in unfairly high pricing of intellectual property rights. In determining whether royalties are unfairly high, the following factors may be considered: (1) the calculation method of royalties and the contribution of the intellectual property rights to the value of the goods; (2) the royalty commitments undertaken by the undertaking; (3) the historical level of royalties or comparable royalties; and (4) other factors that may be considered in determining unfairly high pricing.

Article 11 — An undertaking with a dominant market position shall not, without justifiable reasons, refuse to license intellectual property rights during the exercise of intellectual property rights, thereby excluding or restricting competition. The following factors may be considered in determining whether such refusal constitutes an abuse: (1) whether the intellectual property right involved is indispensable for the relevant market; (2) the impact of the refusal on competition and innovation in the relevant market; (3) the impact on consumers; and (4) whether the undertaking has made any commitment with respect to the licensing of the intellectual property right.

Article 12 — An undertaking with a dominant market position shall not engage in exclusive dealing during the exercise of intellectual property rights without justifiable reasons. An undertaking with a dominant market position shall not, without justifiable reasons, impose unreasonable conditions on the exercise of intellectual property rights by the counterparty to the transaction, such as requiring exclusive grant-back of improvements. An undertaking with a dominant market position shall not, without justifiable reasons, bundle or tie the sale of intellectual property rights.

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Article 13 — An undertaking with a dominant market position shall not apply differential treatment to counterparties with the same conditions during the exercise of intellectual property rights without justifiable reasons. An undertaking with a dominant market position shall not, without justifiable reasons, prohibit the counterparty to the transaction from challenging the validity of the intellectual property right or from exercising intellectual property rights thereafter.

Article 14 — Where a concentration of undertakings involves intellectual property rights and meets the filing thresholds, the undertakings shall file a declaration with the anti-monopoly law enforcement authority in accordance with the Anti-Monopoly Law. When reviewing a concentration of undertakings involving intellectual property rights, the anti-monopoly law enforcement authority shall consider factors such as whether intellectual property rights constitute a significant barrier to entry into the relevant market.

Article 15 — Standard-setting organizations shall establish intellectual property rights policies, and where intellectual property rights are involved in the standard-setting process, the holders of intellectual property rights shall be required to make fair, reasonable, and non-discriminatory (FRAND) commitments in a timely manner. Where an undertaking with a dominant market position violates FRAND commitments made during the standard-setting process without justifiable reasons, the anti-monopoly law enforcement authority shall prohibit such conduct in accordance with the law.

Article 16 — Where an undertaking is suspected of violating these Provisions and voluntarily reports to the anti-monopoly law enforcement authority and provides important evidence, the anti-monopoly law enforcement authority may mitigate or exempt the penalties in accordance with the law. The application for leniency shall be submitted before the anti-monopoly law enforcement authority makes a formal decision.

Article 17 — Where an undertaking under investigation undertakes to take specific measures to eliminate the consequences within the time limit approved by the anti-monopoly law enforcement authority, the anti-monopoly law enforcement authority may decide to suspend the investigation. Where the anti-monopoly law enforcement authority decides to resume the investigation, it may take into account the fulfillment of the undertaking when imposing penalties.

Article 18 — Where an undertaking reaches and implements a monopoly agreement through the exercise of intellectual property rights, the anti-monopoly law enforcement authority shall order it to cease the illegal act, confiscate the illegal gains, and impose a fine of not less than 1% but not more than 10% of the sales revenue in the previous year. Where the monopoly agreement has not been implemented, a fine of not more than 500,000 yuan may be imposed.

Article 19 — Where an undertaking abuses a dominant market position through the exercise of intellectual property rights, the anti-monopoly law enforcement authority shall order it to cease the illegal act, confiscate the illegal gains, and impose a fine of not less than 1% but not more than 10% of the sales revenue in the previous year.

Article 20 — Where an undertaking conceals, destroys, or transfers evidence, refuses to provide relevant materials or information, provides false materials or information, or obstructs or refuses an anti-monopoly investigation, and the circumstances are serious, the anti-monopoly law enforcement authority shall impose a fine in accordance with the provisions of the Anti-Monopoly Law.

Article 21 — Where an undertaking violates the Anti-Monopoly Law and causes damage to others, it shall bear civil liability in accordance with the law. Undertakings may also resolve disputes involving intellectual property rights through consultation, arbitration, or other means.

Article 22 — The anti-monopoly law enforcement authority may make public the decisions on penalties in accordance with the law. Where divulging trade secrets is involved, the trade secrets of the relevant undertakings shall be protected in accordance with the law, and information involving national security shall be kept confidential.

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Article 23 — These Provisions shall come into force on April 20, 2020. The Provisions on the Prohibition of Abuse of Intellectual Property Rights to Exclude or Restrict Competition issued by the former State Administration for Industry and Commerce on April 7, 2015, shall be repealed simultaneously.

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