

国务院印发《关于支持沿边重点地区开发开放若干政策措施的意见》（以下简称“《支边意见》”），提出31条举措支持沿边重点地区开发开放。

为了促进电信业务发展，中华人民共和国工业和信息化部（以下简称“工信部”）第三次调整《电信业务分类目录》。

国家发展和改革委员会（以下简称“国家发改委”）发布《关于滥用知识产权的反垄断指南》（征求意见稿）（以下简称“《知识产权指南》”），针对多类有关知识产权的协议和行为是否违反《中华人民共和国反垄断法》（以下简称“《反垄断法》”）的认定提供了指引。

一、国务院印发《支边意见》

2015年12月24日，国务院印发《支边意见》，从深入推进兴边富民行动、改革体制机制、调整贸易结构、促进特色优势产业发展、提升旅游开放水平、加强基础设施建设、加大财税支持力度、鼓励金融创新与开放等8个方面提出了31条政策举措，支持沿边重点地区开发开放。《支边意见》强调，实行有差别的产业政策，研究设立沿边重点地区产业发展（创业投资）基金，支持沿边重点地区大力发展特色优势产业。此外，《支边意见》还明确，要通过有序发展边境贸易，完善边贸政策，支持边境小额贸易向综合性多元化贸易转变，探索发展离岸贸易。

《沿边重点地区名录》作为《支边意见》附件

与《支边意见》一同公布。进入《沿边重点地区名录》的123个沿边重点地区分布在我国与他国有陆地国界的桂、滇、藏、新、陇、蒙、黑、吉、辽等全部九个省级行政区。沿边重点地区中，包括重点开发开放试验区5个，沿边国家级口岸72个，边境城市28个，边境经济合作区17个，跨境经济合作区1个。

（一）背景

改革开放后，第七届人民代表大会第四次会议通过的《国民经济和社会发展十年规划和第八个五年计划纲要》首次提出选择一些内陆边境城市和地区作为对外开放的窗口，促进这些地区对外贸易和经济技术交流的发展。而“沿边”开发开放正式揭开序幕，始于国务院在1992年3月颁布的《关于进一步对外开放黑河等四个边境城市的通知》。此后，国家逐步增加沿边开放城市数目以及设置边境经济合作区，先后提出西部大开发和振兴东北老工业基地战略，以及发起兴边富民行动等，通过财政、税务、金融等多方面政策倾斜大力扶持沿边地区。

但是，受区位制约、基础薄弱、人才匮乏等因素影响，沿边地区的开发开放与全国和沿海地区相比，还存在较大差距，迫切需要出台新政策、新措施加以推进。随着国家逐步加大“走出去”战略的力度，由国家发改委、外交部、商务部联合发布了《推动共建丝绸之路经济带和21世纪海上丝绸之路的愿景与行动》，而沿边地区的进一步发展需求与中国加快和周边国家的经济合作愿景发生契合。新一轮沿边地区开发开放将以互利共赢作为着力

点，把沿边地区同周边国家和地区的各自优势结合起来，实现产业链联动，促进相邻地区的共同振兴和发展。

（二）法律点评

《支边意见》提出诸多改善沿边重点地区投资环境的举措。例如，就制度体制改革方面，《支边意见》指出扩大投资领域开放，借鉴国际通行规则，支持具备条件的沿边重点地区借鉴上海等自由贸易试验区可复制可推广试点经验，试行准入前国民待遇加负面清单的外商投资管理模式；落实商事制度改革，推进沿边重点地区工商注册制度便利化。

而就外资准入方面，《支边意见》明确提出，推进沿边重点地区金融、教育、文化、医疗等服务业领域有序开放，逐步实现高水平对内对外开放；有序放开育幼养老、建筑设计、会计审计、商贸物流、电子商务等服务业领域外资准入限制；积极发展体育旅游、旅游演艺，允许外资参股由中方控股的演出经纪机构；支持符合条件的外资金融机构到沿边重点地区设立分支机构。

此外，就为外籍人士提供出入境、就业的便利方面，《支边意见》也提出促进方案，包括在符合条件的沿边国家级口岸实施外国人口岸签证政策，委托符合条件的省（区）、市（州、盟）外事办公室开展领事认证代办业务；加强与毗邻国家协商合作，推动允许两国边境居民持双方认可的有效证件依法在两国边境许可范围内自由通行；为涉外重大项目投资合作提供出入境便利，建立周边国家合作项目项下人员出入境绿色通道；结合外方意愿，综合研究推进周边国家在沿边重点地区开放设领城市设立领事机构；推进跨境运输车辆牌证互认，促进交通便利化；允许按规定招用外籍人员。

（三）关注要点

《支边意见》仅作为国家级政府层面发布的政策性文件，其中各项便利政策还有待通过国家和地方在可执行层面上相应地制定相关法规、规章和规定。

二、工信部调整《电信业务分类目录》

2015年12月25日，工信部公布了《电信业务分类目录（2015年版）》，并将于2016年3月1日起施行。

（一）背景

我国对电信业务经营按照电信业务分类，实行许可制度。电信业务分类的具体划分体现在《电信业务分类目录》。

自2000年9月第一版《电信业务分类目录》作为《中华人民共和国电信条例》的附件颁布实施以来，信息产业部（工信部前身）于2001年、2003年对《电信业务分类目录》进行了两次调整。

为了适应电信新技术、新业务的发展，工信部对《电信业务分类目录》进行了第三次调整，并于2013年5月23日公布了《电信业务分类目录（2013版）》（征求意见稿）公开征集意见。工信部征求各方意见后再次对《电信业务分类目录》做出调整，并于2015年12月25日公布了《电信业务分类目录（2015年版）》。

（二）法律点评

此次调整仍维持原《电信业务分类目录》的基本分类框架，将电信业务分为基础电信业务和增值电信业务两类。

1. 基础电信业务

基础电信业务仍分为第一类基础电信业务和第二类基础电信业务。《电信业务分类目录（2015

年版)》对 IP 电话、蜂窝移动通信业务、卫星通信业务、互联网数据传送业务、网络接入设施服务业务等进行了调整和细化¹。

2. 增值电信业务

《电信业务分类目录（2015 年版）》将原第一类增值电信业务和第二类增值电信业务所含业务子类重新调整、合并，确定第一类增值电信业务为基于设施和资源类的业务，第二类增值电信业务为基于公共应用平台类的业务。同时明确了内容分发网络业务、编码和规程转换业务，并对互联网数据中心业务、呼叫中心和信息服务业务进行细化。其中，为了进一步鼓励离岸呼叫中心业务发展，《电信业务分类目录（2015 年版）》将呼叫中心业务（B24）细分为国内呼叫中心业务（B24-1）和离岸呼叫中心业务（B24-2）。

为了适应信息服务业务的发展，《电信业务分类目录（2015 年版）》以业务的具体形态为基础，按照信息服务的组织、传递等技术特征，将信息服务业务细分为信息发布平台和递送服务、信息搜索查询服务、信息社区服务、信息即时交互服务、信息保护和处理服务 5 个业务形态。

（三）关注要点

我国在 2001 年加入世界贸易组织时并未承诺开放呼叫中心业务。2014 年 1 月 6 日起，中国（上海）自由贸易试验区（以下简称“上海自贸区”）试点开放呼叫中心业务，对于外资股比不设限制。鉴于 2015 年修订的《外商投资产业指导目录》仅将以承接外包方式从事离岸呼叫中心列入鼓励类外商投资项目，并未提及国内呼叫中心业务，因此《电信业务分类目录（2015 年版）》实施后，外商

能否在全国范围内设立外商独资或中外合资电信企业从事国内呼叫中心业务值得关注。

我国在加入世界贸易组织时承诺开放在线信息和/或数据处理（包括交易处理）。由于信息服务业务的迅速发展，《电信业务分类目录（2015 年版）》中的部分信息服务业务的类型可能超出在线信息和/或数据处理（包括交易处理）的范畴。外国投资者能否在全国范围内设立外商独资或中外合资电信企业从事在线信息和/或数据处理（包括交易处理）以外的信息服务业务取决于国家将来公布的规定。我们注意到，2014 年 1 月 6 日起，上海自贸区试点开放信息服务业务中的应用商店业务，对于外资股比不设限制。我们预计未来在上海自贸区的试点得到肯定的基础上，将有望在全国范围内允许设立外商独资或中外合资电信企业从事信息服务业务中的应用商店业务。

三、 国家发改委发布《知识产权指南》

2015 年 12 月 31 日，国家发改委发布《知识产权指南》，就知识产权领域的反垄断执法中相关市场的界定及市场支配地位的认定作出说明；针对七类知识产权协议是否排除、限制竞争，列明了在具体案件中可考虑的各项因素；提出可推定适用《反垄断法》第十五条的豁免规定的判断标准；同时，针对与知识产权相关的六种形态的行为，列明了判断其滥用市场支配地位时可考虑的各项因素。

（一）背景

2015 年，国家发改委根据《反垄断法》第九条的授权及国务院反垄断委员会的工作计划，进行六部反垄断指南的起草工作，《知识产权指南》是其中之一。

¹
<http://www.miit.gov.cn/n1146285/n1146352/n3054355/n3057709/n3057714/c4564319/content.html>

国家工商行政管理总局（以下简称“**工商总局**”）曾于2015年4月7日发布《国家工商行政管理总局关于禁止滥用知识产权排除、限制竞争行为的规定》（以下简称“**《知识产权规定》**”，已于2015年8月1日实施）。然而，由于工商总局在反垄断领域的职责不包括针对价格垄断行为的执法，《知识产权规定》不适用于价格垄断行为。《知识产权规定》也未就各类型的知识产权协议和滥用市场支配地位的行为分别说明认定其违反《反垄断法》时可以考虑的因素。国家发改委发布的《知识产权指南》则包括了价格垄断行为，并具体、详细的列明了判断知识产权领域的垄断行为的考虑因素。

（二）法律点评

《知识产权指南》所涵盖的范围较《知识产权规定》更广，纳入了价格垄断行为，其内容也更为详细，区分了多种协议和行为的类型做说明。

1. 市场界定和市场支配地位

针对相关市场的界定，《知识产权指南》强调除考虑利用知识产权的商品所构成的相关商品市场外，还需关注知识产权所属的相关技术市场。针对市场支配地位的认定，《知识产权指南》除了重申“拥有知识产权不必然具有市场支配地位”的原则外，还增列了在涉及知识产权的案件中认定市场支配地位可以考虑的其他因素，并且针对涉及标准必要专利的情形，列举了可以进一步考虑的因素。

2. 价格垄断行为

针对价格垄断行为，在《知识产权指南》颁布之前，就知识产权协议对于被许可人销售利用知识产权的商品的价格做限制，是否应当适用《反垄断法》关于固定转售价格或限定最低转售价格的规定的问题，相关的立法规定并不明确。《知识产权指

南》则明确规定该等行为应当适用《反垄断法》关于固定转售价格或限定最低转售价格的规定。

3. 可能排除、限制竞争的知识产权协议

《知识产权指南》将知识产权协议具体分为七类：（1）联合研发；（2）专利联营；（3）交叉许可协议；（4）标准制定；（5）独占性回授；（6）不质疑条款；以及（7）对于被许可人使用知识产权的领域、利用知识产权生产或销售的商品的数量、销售渠道、销售范围、交易对象设有限制、或禁止被许可人从第三方获得许可使用竞争性知识产权、或禁止被许可人生产、销售与许可人商品相竞争的商品的协议。《知识产权指南》并就每一类协议分别列举了判断其是否排除、限制竞争时可以考虑的因素。

4. 推定豁免的协议

《知识产权规定》规定，在不构成《反垄断法》第十三条、第十四条明确列举的垄断协议的情形下，具有竞争关系的经营者在相关市场的市场份额合计不超过20%，或经营者与交易相对人在相关市场的市场份额均不超过30%的，可以不被认定有垄断协议。《知识产权指南》则对于推定豁免采取了更为严格的标准，进一步规定，具有竞争关系的经营者在相关市场的市场份额合计不超过15%，或不具有竞争关系的经营者在相关市场的市场份额均不超过25%的，推定其可以依据《反垄断法》第十五条的规定获得豁免。

5. 滥用市场支配地位行为

《知识产权指南》将“滥用市场支配地位的行为”具体归纳为六种：（1）以不公平的高价许可知识产权；（2）拒绝许可；（3）搭售；（4）附加不合理的交易条件；（5）差别待遇；以及（6）标准必要专利权人利用禁令救济压迫被许可人，并分别列

明了判断其是否构成滥用市场支配地位时应考虑的因素。

（三）关注要点

目前公告的《知识产权指南》包含“涉及知识产权的经营者集中”的章节标题，但未公告其内容；最终实施的《知识产权指南》对于集中将有哪些规定，值得我们继续关注。

另外，《知识产权指南》就立法层级而言仅是国家发改委根据《反垄断法》制定的规范性文件，其与工商总局早前颁布的《知识产权规定》规定有不一致之处，未来法律实践中，该两个反垄断执法部门就滥用知识产权的反垄断行为分别执法时是否会存在一定的冲突，也是一个值得关注的问题。

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The State Council issued the Opinions on Certain Policies and Measures Supporting the Development and Opening-up of Key Border Areas (“**Opinions on Supporting Border Areas**”), where 31 measures were put forward to support the development and opening-up of key border areas.

To facilitate the development of the telecommunication industry, the Ministry of Industry and Information Technology (“**MIIT**”) readjusted the Classification Catalogue of Telecommunication Services for the third time.

The National Development and Reform Commission (“**NDRC**”) issued the Anti-monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comments) (“**IPR Guidelines**”), which provides guidance as to whether IPR-related agreements and behaviors of various kinds contravene the Anti-monopoly Law of the People’s Republic of China (“**Anti-monopoly Law**”).

1. State Council issued the Opinions on Supporting Border Areas

On December 24, 2015, the State Council issued the Opinions on Supporting Border Areas, where 31 measures were put forward to support the development and opening-up of key border areas

in 8 aspects: (i) further promotion of the “Thriving the Economy of Border Areas and Enriching the Residents’ Lives” program; (ii) reform of administrative system and regime; (iii) adjustment of trade structure; (iv) promotion of featured and competitive industry; (v) further opening-up of the tourism industry; (vi) improving infrastructure construction; (vii) increase of financial and tax support; and (viii) encouraging financial innovation. The Opinions on Supporting Border Areas highlights that different policies should be applied to different industries, studies should be made in terms of establishing funds for industrial development (venture capital) of border areas, and support should be given to the development of featured and competitive industries in border areas. Additionally, the Opinions on Supporting Border Areas specified that, by making orderly progress on border trade and improving border policies, it is encouraged to transform border trade in small amount into comprehensive and diversified trade and to explore possible development of offshore trade.

The List of Key Border Areas is published as an attachment to the Opinions on Supporting Border Areas. The 123 key border areas included in the List of Key Border Areas are spread out over 9 provincial administrative regions bordered other countries on land, including Guangxi, Yunnan,

Tibet, Xinjiang, Gansu, Inner Mongolia, Heilongjiang, Jilin, and Liaoning. Within these key border areas, there are 5 key development and opening-up pilot areas, 72 national border ports, 28 border cities, 17 border economic cooperative zones and 1 cross-border economic cooperative zone.

1.1 Background

After implementation of the Reform and Opening-up Program, the Fourth Meeting of the Seventh National People's Congress approved the "Ten Year Layout for National Economy and Social Development and the Eighth Five Year Plan". Proposals were introduced for the first time to select certain cities and areas bordering other countries on land for the Reform and Opening-up Program and to promote the foreign trade and economic and technical exchanges in these cities and areas. These development programs for border cities were first announced in the Circular of Further Opening-up of Heihe and 3 Other Border Cities issued by the State Council in March 1992. Since then, the numbers of border cities joining development programs have been increasing, and border economic cooperative zones have been established. China also announced policies of "Development of the Western Regions" and "Revitalization of the Old Industrial Base in Northeast Regions", launched the program of "Thriving the Economy of Border Areas and Enriching the Residents' Lives", and strongly supported development of border areas by implementing preferential financial and tax policies.

However, due to the geographical restrictions, weak foundations, a lack of talent and various other factors, the level of development and opening-up in border areas lags that of the country as a whole and the coastal regions. New policies and measures became a pressing demand. With expansion of the "Go Global" strategy, the NDRC, Ministry of Foreign Affairs and Ministry of Commerce ("**MOFCOM**") jointly issued the "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road", further aligning development in border areas with China's visions to facilitate its economic cooperation with neighboring countries. With the focus of mutual benefits, the new round of development and opening-up of border areas will combine the advantages of border areas and neighboring countries and regions, and build an industrial linkage, through which adjacent regions will share common prosperity and development.

1.2 Legal Review

The Opinions on Supporting Border Areas introduces various measures to improve the investment environment in key border areas. For example, in terms of reform of the administrative system and regime, proposals of such Opinions include: (i) further opening-up of areas for investment; (ii) introduction of international rules and standards; (iii) supporting well-conditioned key border areas to learn from applicable and useful trial experiences of Pilot Free Trade Zones including the China (Shanghai) Pilot Free Trade Zone ("**Shanghai FTZ**"); (iv) conducting trial of the foreign investment management model of

"Pre-establishment National Treatment Plus Negative List"; and (v) implementation of commercial system reform to facilitate the improvement of business registration with administrations for industry and commerce in key border areas.

In terms of foreign access, the Opinions on Supporting Border Areas specifically provides that: (i) financial, educational, cultural, and medical service sectors in key border areas should be gradually opened to domestic and foreign investors; (ii) restrictions on foreign investment in service sectors such as nursing services for children and elder people, architectural design services, accounting and auditing services, trading and logistics services, and e-commerce should be gradually relaxed; (iii) sport tourism and touring performing arts should be actively developed, and foreign investors should be allowed to hold shares of performing arts brokerage companies controlled by Chinese investors; and (iv) eligible foreign-funded financial institutions should be supported to set up branch offices in key border areas.

In addition, the Opinions on Supporting Border Areas also introduces measures to provide convenience to foreigners in their exit and entry of and their employment in China. Specifically, these measures include: (i) implementation of visa-on-arrival policy at national border ports and authorization to well-conditioned foreign affairs offices at the provincial (regional) or municipal (prefectural) levels to complete legalization formalities; (ii) enhancing commercial negotiation

and cooperation with neighboring countries, boosting and allowing border residents who hold valid documentation recognized by both countries to freely access designated areas around the borders of both countries; (iii) provision of entry and exit convenience for investors of major foreign-related projects, and setting up "green channels" for personnel engaged in cooperative projects between China and neighboring countries; (iv) exploring the possibility of and facilitating the establishment of consular offices in border cities by neighboring countries; (v) promoting mutual recognition of license plates of vehicles engaged in cross-border transportation to facilitate transportation; and (vi) allowing employment of foreigners in accordance with PRC laws.

1.3 Next Step

As a policy document issued by the national-level governments, policies contained in the Opinions on Supporting Border Areas still require promulgation of practical regulations, rules and provisions by authorities at both national and local levels.

2. MIIT readjusted the Classification Catalogue of Telecommunication Services

On December 25, 2015, MIIT issued the Classification Catalogue of Telecommunication Services (2015 Edition) which will come into force on March 1, 2016.

2.1 Background

China adopts a classification system on

telecommunication services operation based on telecommunication services types. Governmental approvals are required for telecommunication service operation.

Since the first edition of Classification Catalogue of Telecommunication Services issued in September 2000 as an attachment to the Telecommunication Regulations of the PRC, the Ministry of Information Industry (the predecessor of MIIT) had twice readjusted the Classification Catalogue of Telecommunication Services in 2001 and 2003.

To accommodate development of new technology and new business in the telecommunication industry, the MIIT readjusted the Classification Catalogue of Telecommunication Services for the third time, and publicized the Classification Catalogue of Telecommunication Services (2013 Edition) (Draft for Comment) on May 23, 2013 for public comments. After collecting and considering public comments, the MIIT further readjusted the Classification Catalogue of Telecommunication Services and issued to the public the Classification Catalogue of Telecommunication Services (2015 Edition) on December 25, 2015.

2.2 Legal Review

The readjustment maintains the fundamental classification structure of the previous version, namely, telecommunication services are divided into two main categories of basic telecommunication services and value-added telecommunication services.

a. Basic telecommunication services

The basic telecommunication services remained its previous division of Class 1 and Class 2. The Classification Catalogue of Telecommunication Services (2015 Edition) has adjusted and subdivided the services of IP phones, cellular mobile communication, satellite communication, internet data transmission, internet access facilities.¹

b. Value-added telecommunication services

The Classification Catalogue of Telecommunication Services (2015 Edition) has combined and readjusted the subcategories under the previous Class 1 and Class 2 of value-added telecommunication services. The new Class 1 value-added telecommunication services is defined as services based on facilities and resources, while the new Class 2 value-added telecommunication services is defined as services based on public application platform. In the meantime, the Classification Catalogue of Telecommunication Services (2015 Edition) clarifies details of the content distribution internet services, the encoding and code conversion services, and subdivides the internet data center services, call center and information services. Specifically, the call center services (B24) has been divided into domestic call center services (B24-1) and offshore call center services (B24-2) for the purposes of further encouraging development of offshore call center services.

To accommodate development of new technology and business in telecommunication industry, the

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<http://www.miit.gov.cn/n1146285/n1146352/n3054355/n3057709/n3057714/c4564319/content.html>

Classification Catalogue of Telecommunication Services (2015 Edition) subdivides the information services into 5 subcategories: (i) the information dissemination platform and delivery services; (ii) the information searching services; (iii) the information community services; (iv) the information instant interaction services; and (v) the information protection and processing services, based on the specific forms of services and in accordance with the organization, delivery and other technical characteristics of information services.

2.3 Next Step

China did not commit to open call center services when it joined WTO in 2001. Since January 6, 2014, call center services in Shanghai FTZ were opened to foreign investors for trial purposes without limiting foreign ownership. Considering that the Catalogue for Guidance on Foreign-invested Industries (Revised in 2015) only identified offshore call center services through outsourcing as the “encouraged” class without mentioning domestic call center services, it is worth noting whether foreign investors will be allowed to set up wholly foreign-owned enterprises or joint ventures to provide domestic call center services after implementation of the Classification Catalogue of Telecommunication Services (2015 Edition).

China committed to open online information and/or data processing (including transaction processing) in the Protocol on the Accession of China. Given the rapid development of information service, certain types of information

services set out in the Classification Catalogue of Telecommunication Services (2015 Edition) may be beyond the scope of “online information and/or data processing (including transaction processing)”. In such cases, it depends on future legislation whether foreign investors will be allowed to establish wholly foreign-owned enterprises or joint ventures in China to provide information services that are beyond the scope of “online information and/or data processing (including transaction processing)”. We noticed that there have been no restrictions on foreign ownership of one of the information services opened for trials in Shanghai FTZ – the application store services – since January 6, 2014. We expect that in the future, if and when pilot projects in Shanghai FTZ are admitted, wholly foreign-owned enterprises or joint ventures may be allowed to establish and provide application store services in China.

3. The NDRC published the IPR Guidelines

On December 31, 2015, the NDRC published the IPR Guidelines, which explain the definition of relevant markets and determination of dominant market positions in the context of anti-monopoly law enforcement in the domain of IPR, enumerate with respect to seven types of IPR agreements the factors which may be considered when determining whether competition is excluded or restrained in concrete cases, provide the criteria for the presumption of applicability of the exemption under Article 15 of the Anti-monopoly Law, and enumerate with respect to six types of conducts involving IPR the factors which may be

considered when determining an abuse of a dominant market position.

3.1 Background

In 2015, the NDRC engaged in the drafting of six anti-monopoly guidelines pursuant to the delegation in Article 9 of the Anti-monopoly Law and the work plan of the Anti-monopoly Committee of the State Council. The IPR Guidelines are one of the six guidelines.

The State Administration for Industry and Commerce (“**SAIC**”) promulgated the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition (“**IPR Provisions**”) on April 7, 2015 (effective on August 1, 2015). However, since the responsibilities of the SAIC regarding anti-monopoly do not cover law enforcement with respect to price-related monopolistic activities, the IPR Provisions do not apply to such activities. The IPR Provisions also stopped short of explaining the various factors which may be considered when determining a violation of the Anti-monopoly Law with respect to different types of IPR agreements and abuses of dominant market positions. The IPR Guidelines issued by the NDRC cover price-related monopolistic conducts and specify in detail the factors to be considered in determining monopolistic activities in the domain of IPR.

3.2 Legal Review

The IPR Guidelines have a broader scope than the IPR Provisions as the IPR Guidelines cover price-related monopolistic activities. The IPR Guidelines are also more detailed than the IPR

Provisions in that the IPR Guidelines provide particular explanations for different types of agreements and activities.

a. Market definition and dominant market positions

With respect to the definition of relevant markets, the IPR Guidelines emphasize that the relevant technology markets of the IPR should be considered in addition to the relevant product markets of the products in which the IPR are utilized. With respect to the determination of dominant market positions, in addition to restating the principle that ownership of IPR alone does not constitute a dominant market position, the IPR Guidelines further enumerate the factors which may be considered when determining dominant market positions in cases involving IPR and also enumerate the factors which may be further considered where standard-essential patents are involved.

b. Price-related monopolistic activities

With respect to price-related monopolistic activities, before the issuance of the IPR Guidelines, the relevant legal provisions were unclear as to whether the provisions on fixing resale prices or setting minimum resale prices in the Anti-monopoly Law shall be applied to IPR agreements that restrict the prices which the licensee may sell the products in which the IPR are utilized; the IPR Guidelines expressly stipulate that the provisions on fixing resale prices or setting minimum resale prices in the Anti-monopoly Law shall apply to such activities.

c. IPR agreements that might exclude or restrain competition

The IPR Guidelines separately discuss seven types of IPR agreements: (i) joint Research and Development, (ii) patent pool, (iii) cross-licensing, (iv) formulation of standards, (v) exclusive grant-back, (vi) no-challenge clause, and (vii) agreements that confine the use of IPR by a licensee to a particular field, that restrict the quantities, sales channels, sales scope or transaction counterparties of the products whose production or sale involve the use of IPR, that prohibit a licensee from obtaining a license of competitive IPR from a third party or using such competitive IPR, or that prohibit a licensee from producing or selling products that compete against the products of the licensor. For each type of agreement, the IPR Guidelines enumerate the factors which may be considered when determining whether competition is excluded or restrained.

d. Agreements presumed to be exempted

According to the IPR Provisions, so long as the relevant agreement does not belong to any kind of monopolistic agreement enumerated in Articles 13 and 14 of the Anti-monopoly Law, an agreement **may be deemed** as not monopolistic if its parties compete against each other and together possess a market share of no more than 20% in the relevant market or if its parties are trading counterparties and each possesses a market share of no more than 30% in its respective market. The IPR Guidelines adopt higher criteria for an agreement to enjoy a

presumption of exemption; it is stipulated that an agreement is **presumed** to be exempted under Article 15 of the Anti-monopoly Law if its parties compete against each other and together possess a market share of no more than 15% in the relevant market, or if its parties do not compete against each other and each possesses a market share of no more than 25% in its respective market.

e. Abuses of dominant market positions

The IPR Guidelines separately discussed six types of abuses of dominant market positions: (i) licensing at unfairly high prices, (ii) refusal to grant licensing, (iii) tying, (iv) imposing unreasonable transaction terms, (v) discriminatory treatment, and (vi) coercion by an owner of standard-essential patents upon a licensee by means of injunctive relief. For each type of abuses, the IPR Guidelines enumerate the factors which may be considered when determining whether there is an abuse of a dominant market position.

3.3 Next Step

The published IPR Guidelines contain a chapter heading of "IPR Involved Concentration of Business Operators", but the content of that chapter is not published. It is worth our continued attention as to what provisions pertaining to concentration will be in the IPR Guidelines that will be eventually implemented.

Moreover, in terms of the hierarchy of legislations, the IPR Guidelines are merely a normative document the NDRC promulgates pursuant to the

Anti-monopoly Law, and the IPR Guidelines are not entirely consistent with the IPR Provisions, which the SAIC previously promulgated. We shall pay attention to whether there will be a certain

level of tension between the two anti-monopoly law enforcement departments when they separately enforce the law against monopolistic activities that abuse IPR in the future.

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