

Reflection on Activities of Governing the Abuse of Intellectual Property through Anti-trust law

National Development and Reform Commission (NDRC)

Outline

- ◆ Section I

 - Basic knowledge of IPR abuse governed through anti-trust law

- ◆ Section II

 - Reflection on activities of governing the licensing of SEP through anti-trust law

Section I

Basic knowledge of IPR abuse governed through anti-

Relationship between IPR system and anti-trust regime

□ Consistent Objectives

- **IPR system:** grants exclusive rights and offers interests incentives, as well as facilitates innovation and social progress.
- **Competition rules:** protect market competition and maintain the mechanism of promoting innovation.

□ Conflicting Routes

- **IPR system:** grants exclusive rights and restricts market competition.
- **Competition rules:** forbid monopolistic conducts and safeguard sufficient competition.

Section I

Basic knowledge of IPR abuse governed through anti-

Coordination of IPR system and anti-trust regime

□ Two aspects of existing conflicts

- ◆ IPR as such owns the effect of eliminating or restricting competition
- ◆ Misusing of IPR may eliminate or restrict competition
 - possibility of abuse of rights
 - boundaries of rights are obscure
 - having beneficial motivation to conduct abusive behaviours

□ Two aspects of coordination mechanism

- ◆ Legitimate exercise of IPR: interface and balance between the two different legal regimes.
- ◆ The abuse of IPR: regulates those behaviors which fall out of the scope of legitimate protection.

Section I

Basic knowledge of IPR abuse governed through anti-

Governance against the abuse of IPR through anti-trust law

- Supplement and improve the balance or constraint mechanisms owned by IPR system itself
- Specific institutionalization of the principle that rights shall not be abused (a view from competition)
 - ◆ relationship between the whole social benefits and individual rights
 - ◆ relationship between the public power and private rights
 - ◆ relationship between the existence of rights and exercise of rights

Art. 55 of *Anti-monopoly Law of PRC*

- ◆ Clarifying the principles of regulation
- ◆ Accordingly matching relevant monopolistic conducts; the concept of abuse
- ◆ ~~Whether the exercise of rights is legitimate or not~~

Section I

Basic knowledge of IPR abuse governed through anti-

Four principles of governance against IPR abuse through anti-trust law

- ❑ Law enforcement first, improving regimes during the exploration
- ❑ Based on local considerations, attaching importance to both protection and regulation
- ❑ Boundary is finite, embodying coordination in the course of regulation
- ❑ Effect-based analysis, keeping an eye on competition in the course of identification

Avoid alienation (excessive intervention) :

- ◆ strick competitors
- ◆ gain leverage in the negotiations
- ◆ settle specific disputes

Section II

Reflection on activities of governing the licensing of SEP through anti-trust law

Analysis of the nature of SEP

- Standardization enhances competition of products and promotes social welfare. A SEP holder, as a contributor of technology, shall be rewarded accordingly.
- Standardization can also weaken competition of technologies and ‘lock-in’ industrial standards, thus strengthens the SEP holders’ market power.

Need external regulation , due to the lack of effective constraints.

A SEP has the nature of a public good, an essential element for competition, the licensing should be open and fair.

FRAND principle

- Higher-level value choice; Fair, Reasonable and Non-

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- ~~Poor guidance and enforceability; relevant disputes occur~~

frequently

Section II

Reflection on activities of governing the licensing of SEP through anti-trust law

Types of abuse (Art. 17 of *Anti-monopoly Law of PRC*)

- Unfairly high prices or low prices
- Refusing to enter into transactions
- Exclusively dealings
- Discriminatory treatment
- Tie-in sale
- Adding unreasonable trading conditions

Section II

Reflection on activities of governing the licensing of SEP through anti-trust law

Conditions for the establishment of abuse

- Possess a dominant position (premise)
- Abusive conducts
- Without justifications (core)
- Harm competition

Noteworthy

- ◆ Injunction: judge a licensee whether in good faith or not
- ◆ PAE: a SEP holder separates its patent

Section II

Reflection on activities of governing the licensing of SEP through anti-trust law

Regulation on royalties

❑ Whether shall be regulated?

- ✓ **Pro:** To protect consumers' benefits, intervene is rooted in the fact that market has no self-correcting function.

(If there are high and non-transient entry barriers in the relevant market? The higher the entry barriers are, the longer they last, the more legitimate to carry out law enforcement)

- ✓ **Con:** Intervention may exert negative effects on dynamic efficiency, and enforcement authorities may face significant difficulties during their identification, assessment and proposing remedies on excessive pricing.

❑ How to regulate?

- ✓ Traditionally analysis methods: 1. profitability analysis; 2.

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profit analysis; 3. historic or geographic comparison; 4 . royalties stacking.

Section II

Reflection on activities of governing the licensing of SEP through anti-trust law

Regulation on excessive royalties

- ❑ Quantitatively identify reasonable royalties (rates)

Considering factors: patent value, comparable patent royalties (rates), accumulative royalties (rates).

- ❑ Qualitatively identify unreasonable royalties (rates).

Considering factors: the way to charge royalties, whether having unreasonable conducts.

- ❑ Relationship between quantitative and qualitative

- ❑ The choosing of quantitative route and qualitative route

- ◆ Quantitative methods: comparative methods; pay attention to royalties (rates)

- ◆ Qualitative methods: pay attention to behaviors, and focus on fairness and rationalization.

- ❑ The choosing of remedies: change conducts; make voluntary commitments.

Thank you