“Using Economic Concepts and Principles in Judging Competition Cases”

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Issues to be addressed

Background: The Qihoo/Tencent case

Unfair trade practices, restrictive trade practices, anticomppetitive practices

Economic theory

Relevant market definition

Abuses

What are the tests

Bundling

Sanctions

The Qihoo/Tencent case: facts

Tencent provides a popular instant messaging product, “QQ”, and Qihoo is a leading Chinese free antivirus software provider.

In September 2010, Tencent encouraged users of QQ to download an upgrade to Tencent’s security software.

That month, Qihoo launched a software called “360 Privacy Protector”, and alleged in an article on its website that its 360 Privacy Protector had recently detected that some instant messaging software (though it did not name which software, the article shows a webshot of QQ’s logo) was violating the privacy of users. It implicitly accused Tencent of scanning its users’ computers for private data and claimed that its own newly security software could speed up QQ and protect users’ privacy.

In response, Tencent warned its users that the Qihoo software had caused QQ to malfunction and that its users should uninstall the Qihoo software, otherwise Tencent would cease to provide QQ software services.

The Qihoo/Tencent case: legal developments

Qihoo accused Tencent of **abusing its dominance** in the market of on line instant communications services and claimed damages of RMB 150,000,000.

In October 2010, **Tencent filed a suit** with the Beijing Chaoyang District People's Court, **alleging that Qihoo breached Article 14** of the Anti Unfair Competition Law by **spreading false facts** to damage QQ's reputation in the market.

The Qihoo/Tencent case (1): unfair competition

On April 26 2011, Beijing Chaoyang District People's Court corroborated the claims of the plaintiff (Tencent) that the respondent **(Qihoo) damaged the plaintiff's reputation.**

The court ordered Qihoo to:

1)stop distributing and using the "360 Privacy Protector",
2)delete the relevant web content which infringed the plaintiff's rights from its webpage,
3)apologize publicly on Qihoo's website and on Legal Daily for 30 days,
4) pay a damages award of RMB 400,000 (about 61,244 USD) to Tencent.

The Qihoo/Tencent case (2) abuse of dominance case

On 28 March 2013, the Guangdong High Court handed down its ruling in the first instance civil trial involving two Chinese Internet companies. Qihoo 360 Technology Co., Ltd. (Qihoo) brought a claim against Tencent Technology (Shenzhen) Co., Ltd and Shenzhen Tencent Computer System Co., Ltd (together, Tencent) for Tencent's alleged abuse of dominance in the Chinese integrated instant messaging software and services market in breach of the Anti-Monopoly Law (AML).

The Guangdong High Court declared that Tencent did not engage in abuse of dominance as defined in the AML and dismissed Qihoo's claim for RMB 150 million in damages. Qihoo was ordered to pay RMB 796,800 in costs.

The main issues in the case were: (i) **definition of the relevant market**; (ii) **whether Tencent possessed a dominant position** in the relevant market; and (iii) **whether Tencent abused its market dominance so as to restrict and eliminate competition.**

Issues to be addressed

The Qihoo/Tencent case

Unfair trade practices, restrictive trade practices, anticomppetitive practices

Elements of economics useful in judicial proceedings

Economic theory, competition and competition law

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Legal constraints on business practices: unfair trade practices

-1) Practices forbidden by unfair trade laws: (because they are "unfair" they discourage competitors from investing or entering into a transaction) :

Ex:

1) **diversion of a competitor's customers through means other than competition on the merits** (such as hiring away the competitor's employees, inducing the competitor's employees to leak strategic documents of their employer such as customer lists, business plans and other records);

2**) attempts to induce selective dealers of a competitor into breaches of contracts** or exploitation of a breach of contract or covert acquisition of a branded good by dealers not part of the distribution system of the manufacturer of the branded goods;

3**) dissemination of unjustified derogatory comments about a competitor's ability**

Legal constraints on business practices: restrictive practices

2- Practices forbidden by commercial law (restrictive practices, for example because they do not allow transactions to deliver the expected benefits) :

ex: resale price maintenance
ex: misleading advertising,

Legal constraints on business practices: anticompetitive practices

-3) Practices forbidden by competition law (if anticompetitive that is if they restrain or eliminate competition on the market):

Anticompetitive collusive practices

ex: price fixing,
ex: market sharing,
ex: collective boycotts

Anticompetitive abuses of dominant positions

Exclusionary practices

ex: tying, bundling,
ex: refusal to deal
ex price discrimination
ex: predatory pricing ,

Exploitative practices

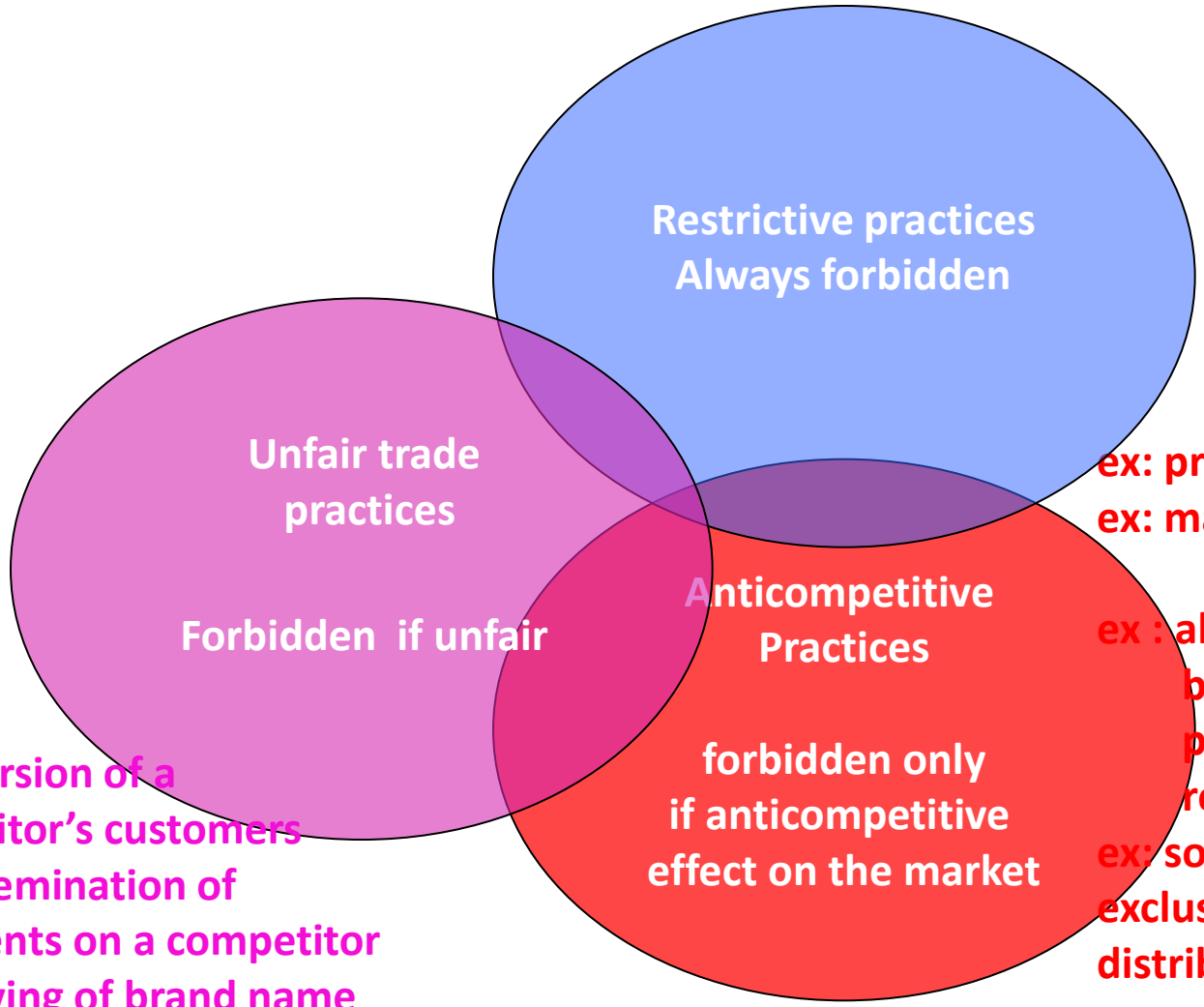
ex: abusively high prices etc….

Unfair competition, restrictive practices and anticompetitive practices

Unfair trade practices are **targeted at a competitor** and are seeking to gain an advantage to the detriment of a competitor; they may not have an effect the market equilibrium (price and quantity)

Restrictive practices are **business practices** which are prohibited **independently of their effect** on competitors or on the market

Anticompetitive practices are **aimed at lessening competition on the market** (and are seeking change the market equilibrium); they may have an effect on all competitors (actual or potential) and consumers.



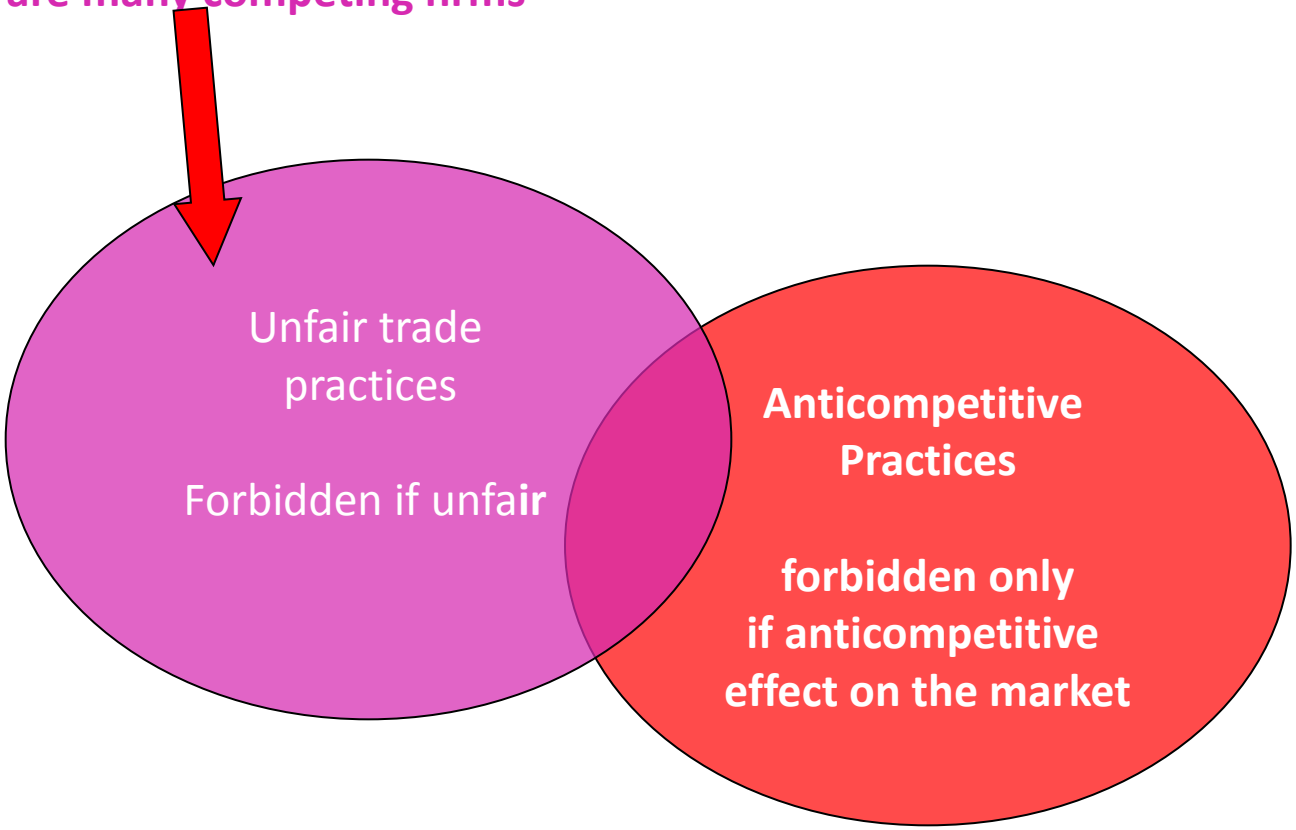
Ex: Resale price maintenance
Ex: Refusal to deal

ex: price fixing
ex: market sharing
bid rigging
ex : abuse of dominance
bundling
predatory pricing
refusal to deal
ex: some (but not all) exclusive or selective distribution arrangements

ex: diversion of a competitor's customers
ex: dissemination of comments on a competitor
ex copying of brand name or product

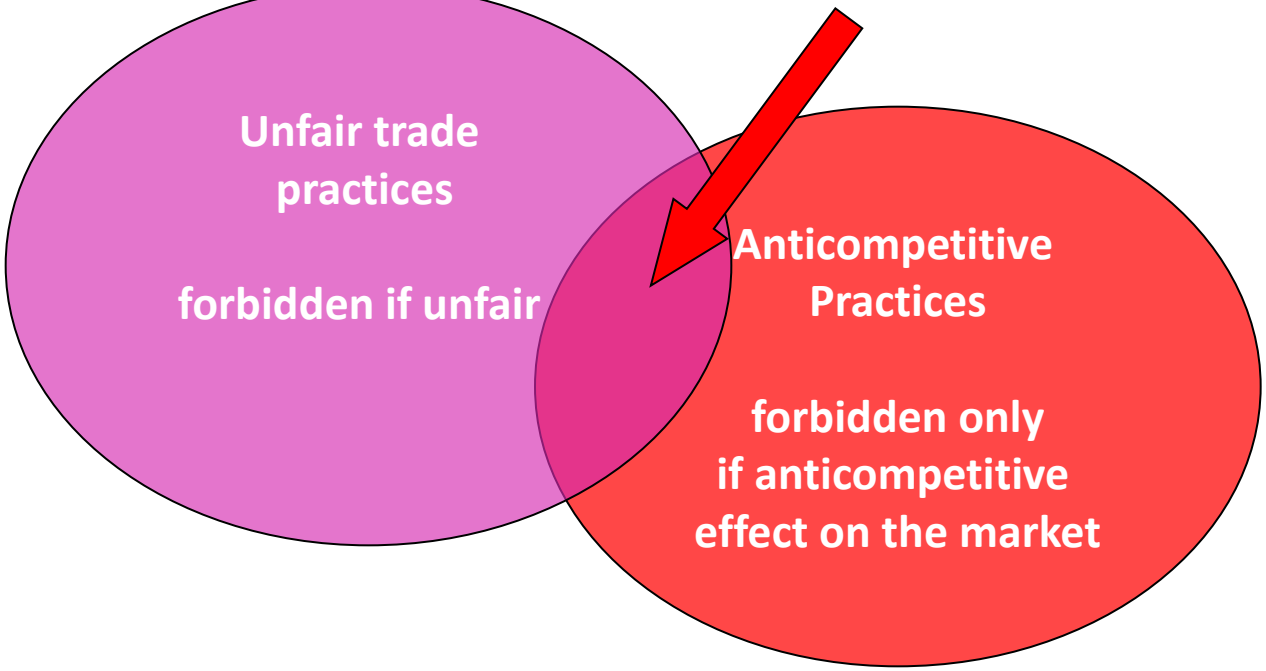
Unfair trade practices are not necessarily anticompetitive practices

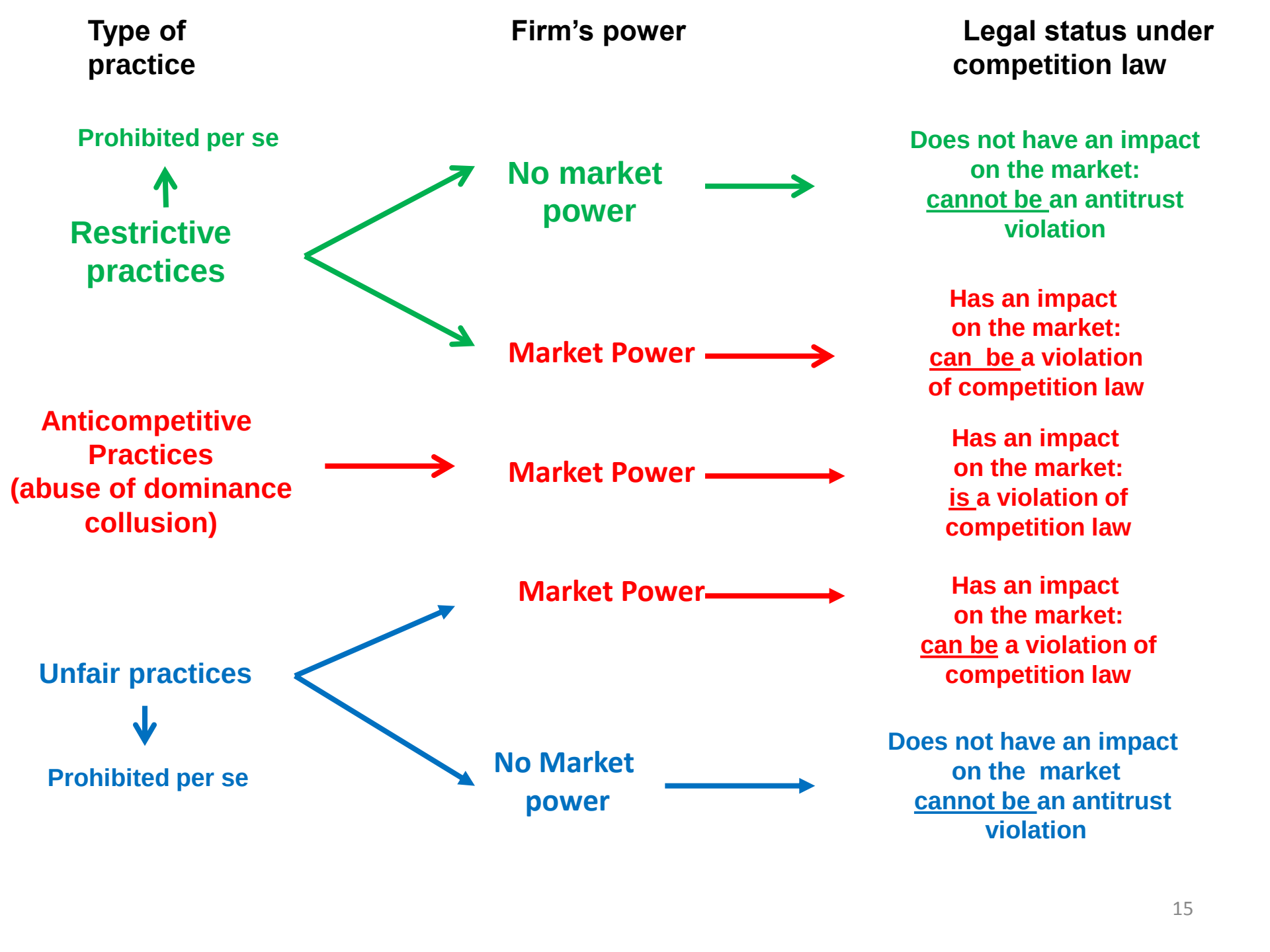
ex: the diversion of a competitor's customers by unfair means (means other than competition on the merits) may have no effect on the market if there are many competing firms



But unfair trade practices may also be anticompetitive practices

ex: the diversion of a competitor's customers by unfair means (means other than competition on the merits) can be an abuse of the dominant position of the firm engaging in the practice if it prevents its only competitor from competing.




Type of practice
Firm's power
Legal status under competition law
Prohibited per se
Restrictive practices
No market power
Does not have an impact on the market: cannot be an antitrust violation
Market Power
Has an impact on the market: can be a violation of competition law
Anticompetitive Practices (abuse of dominance collusion)
Market Power
Has an impact on the market: is a violation of competition law
Market Power
Has an impact on the market: can be a violation of competition law
Unfair practices
Prohibited per se
No Market power
Does not have an impact on the market cannot be an antitrust violation

Issues to be addressed

The Qihoo/Tencent case

Unfair trade practices, restrictive trade practices, anticomppetitive practices

Elements of economics useful in judicial proceedings

Economic theory, competition and competition law

Relevant market definition

Abuses

What are the tests

Bundling

Sanctions

The role of the judiciary in competition law

a) Ensure the robustness of the contractual system (contract law) and of the system of private proprerty (property law) : necessary condition for a market economy

b) Assess the external effects of contracts or transactions or firm's behaviour on the market and on the competitive process: necessary condition for the market economy to deliver its benenfits.
   - Sanction anticompetitive horizontal practices (such as cartels)
   - Sanction anticompetitive abuses of dominance

(Requires consideration of economic analysis: did the exclusive distribution agreement entered into by the dominant firm with a distributor exclude all competition on the market ?)

c) Impose sanctions and remedies against violators

(Requires consideration of economic analysis: what is a proportionate and deterrent system of sanctions against abuses of dominance ?)

d) (Require consideration of economic analysis: what was the overcharge to consumers ? What would have been the profit of excluded firms?)

e) Review administrative decisions of competition authorities

(Requires consideration of economic analysis: what was the theory of harm? Is it robust ?)

Elements of economics useful in judicial proceedings

1) the economist's method of analysis used in applied work. This consists essentially in a combination of the inductive and the deductive to form a syllogism which purports to model reality. The steps required are: first, to scan the raw facts (here, the raw evidence) second, to abstract the relevant facts third, to construct a model, using available theory, which has the form: since A + B are present, C follows.

Maureen Brunt, Judicial Enforcement of Competition Law, OECD, Competition committee, 1997

Elements of economics useful in judicial proceedings

2) The second way in which economics can be useful to the law is in supplying various economic concepts such as « profits » , « markets », "economic efficiency", "opportunity cost", "cross-subsidization" etc.

An economist can advance matters by explaining their meaning.

Whereas with the first contribution of the economist, it is a matter of debate or argument as to whether the model truly represents reality - something for the court to assess - with the second contribution it is a matter of right or wrong – something for the economist to assess.

Maureen Brunt, Judicial Enforcement of Competition Law, OECD, Competition committee, 1997

Measurement techniques

3) Economics can also be useful in providing measurement techniques.

For example, economic methodologies to assess economic damage are relatively straightforward. When no documentary evidence, the measurement of the harm will require the use of a counter factual (open to discussion).

In antitrust, the proper economic methodology to assess the harm from some practices, such as tying and bundling, is much more complex and open to debate (indeed, in the absence of the tying, the tying product would presumably have been sold at a higher price and the tied product would have been sold at a lower price).

Similarly, the area of oligopolistic markets assessing the impact of tacit agreements or exchanges of information is particularly complex because of the interdependence between the market equilibrium, the number of players, and the individual strategies of each player.

Thus, for a number of violations, the economic methodology to assess damages is open to scientific controversies.

Issues to be adressed

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Competition: Relevant market definition

Abuses

What are the tests

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Issues to be addressed

1) The Qihoo/Tencent case

2) Unfair trade practices, restrictive trade practices, anticomppetitive practices

3) Elements of economics useful in judicial proceedings

4) The economic approach:

Ex Abuse of dominance

What is a relevant market ?

Abuses

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Market	Dominance Market Power	Exploitative Abuse	Exclusion. Abuses	compensation
Product market Substitution Potential entry				
Geographical market Substitution Potential entry				
What market are we talking about ?	*Can firms price above their costs without attracting entry?*	*Are these practices anticompetitive?*	*Are these practices anticompetitive ?*	*What was the harm to consumers or suppliers ?*
Which firms compete or could compete with which?	-Market share - Concentration - Barriers to entry	-Abusively high prices -Tying -Bundling	-Refusal to deal -Tying -Bundling -Predation	
Methods/Tests Observations Hypothetical Monopolist Test	Observations C4 Lerner index HHI	-Comparison with similar situations	-Profit Sacrifice -No Econ Sense -E. Eff Test -Cons surplus test	*Econometrics simulation*

The Qihoo/Tencent case: Methodology

《国务院反垄断委员会关于相关市场界定的指南》（下称《指南》）第二条规定,任何竞争行为（包括具有或可能具有排除、限制竞争效果的行为）均发生在一定的市场范围内。科学合理地界定相关市场，对识别竞争者和潜在竞争者、判定经营者市场份额和市场集中度、认定经营者的市场地位、分析经营者的行为对市场竞争的影响、判断经营者行为是否违法以及在违法情况下需承担的法律责任等关键问题，具有重要作用。本案中，原告指控被告利用QQ软件及服务进行了限制竞争及捆绑销售，构成滥用市场支配地位。

“The Anti-Monopoly Committee of the State Council guidelines on the definition of relevant market" (the "Guidelines") stipulates that any anticompetitive behaviour (which has or may have the effect of restricting competition) should be assessed on a relevant market.

In the assessment to be made using a scientific and rational method , the key issues are the **definition of the relevant market**, the **identification of competitors and potential competitors**, the **determination of the operators market share and the concentration of the market**, the **assessment of the operator's position in the market**, the **analysis of the behavior of the operators on market competition**, the **determination of whether the behavior of operators is illegal and the assignment of legal responsibility**.

Issues to be addressed

1) The Qihoo/Tencent case

2) Unfair trade practices, restrictive trade practices, anticomppetitive practices

3) Elements of economics useful in judicial proceedings

4) The economic approach:

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China: the Qihoo/Tencent case
Assessment of the court on market definition

要确定被告是否具有市场支配地位，前提是准确界定QQ软件及其服务所在的相关市场。《中华人民共和国反垄断法》第十二条规定，相关市场是指经营者在一定时期内就特定商品或者服务（以下统称商品）进行竞争的商品范围和地域范围。《指南》 第三条规定，在反垄断执法实践中，通常需要界定相关商品市场和相关地域市场。相关商品市场，是根据商品的特性、用途及价格等因素，由需求者认为具有较为紧密替代关系的一组或一类商品所构成的市场。这些商品表现出较强的竞争关系，在反垄断执法中可以作为经营者进行竞争的商品范围。相关地域市场，是指需求者获取具有较为紧密替代关系的商品的地理区域。这些地域表现出较强的竞争关系，在反垄断执法中可以作为经营者进行竞争的地域范围。

To determine whether the defendant has a dominant market position, one must first accurately define the relevant market for QQ software and its services.

Article 12 of the Anti-Monopoly Law of the People's Republic of China provides that the relevant market is defined with respect to a moment in time, with respect to a set of competing particular goods or services and with respect to a geographical scope.

The relevant product market is a group or class of products which considering their characteristics, their use and their price and other factors are close substitutes.
The relevant geographic market is the geographic area where the goods arerelatively close substitutes goods.

What is a market ?

What is the market on which Coca Cola is ?

Possible answers:

1)Coca Cola is a market

2)There is a cola based drinks market (Coca Cola and Pepsi Cola)

3)There is a market for carbonated drinks (cola based drinks and orange drinks)

4) There is a market for thirst quenching drinks (cola based drinks and orange drinks and tap water)

A market is defined as a set of products (or services) which compete with each other in the sense that consumers would shift from one product to the other if there was an appreciable price difference between them.
If a producer (A) is on the same market with producer (B), B's pricing strategy would normally (barring an anticompetitive agreement between A and B) constrain A's pricing.

Eu market definition

Product market:

Para 7 RMN

"all those products and/or services […] regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

Geographical market :

Para 8 RMN

The RMN defines the geographic market as:
"

[t]he area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area."128

Time dimension ?

EU: The Continental case established the importance of market definition

In *Continental Can the CJEU held **market definition** as:*

"of **essential significance** for […] **competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products**."

EU focuses (largely) on demand side substitutability to define markets

The tendency has been for the Commission to apply only demand-side substitutability, making supply-side substitutability secondary, only considered when “its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy” and potential competition not being considered until “at a subsequent stage”.

In these cases, supply-side substitution and potential competition would still be considered, but later on, when considering market power, as is the tendency in most Competition jurisdictions.

Product market definition in the EU

1) Own price elasticity

2) Cross price elasticity

3) Switching data

4) Stability of demand

5) Switching costs

6) Order data

7) External shocks

8) Differences in prices

9) Price correlations

10) Product characteristics

11) Consumer perceptions

12) Price discrimination

Geographic markets

Transport costs and delivery time

Pricing data

National preferences

Purchasing patterns

Shock Analysis

Market structures

Views of customers and competitors (not so useful)

Product characteristics

It is essential, that products share characteristics and have functional interchangeability for them to be considered part of the same market.

Case T-395/94 Atlantic Container v Commission [2002] ECR II-875 paras 269-290– **Containerised liner shipping was deemed a separate market from other forms of trans-Atlantic trade, most notably air-transport and conventional bulk-break liner transport as these alleged substitutes were only practical alternatives for very few, specific, types of goods.**

But: 1) practical substitutability indicated by similar characteristics and intended use might well be offset by customers' switching costs and brand loyalty. 2) the mere element of similar physical characteristics does not necessitate customers viewing them as interchangeable. 3)physically very different products, matches and lighters a typical example, may be close substitutes if customers use them for similar purposes.92

Differences in prices

Different prices on two products would be indicative of consumers considering them not to be interchangeable, valuing the more expensive ones higher for their purposes (no vice versa inference can be drawn however). Clearly separated price strata, will thus reduce the likelihood for customers to switch from a lower quality product to a higher quality one, as long as the former can satisfy their needs.87

87 **Case *Microsoft paras 369-382*** – ***Higher-level operating systems were considered part of a separate market from lower-level ones as there were clear bands of prices, where the more expensive ones could carry out functions that were unnecessary for users of the lower priced systems.***

Some clear **exceptions** to this rule can be identified however. Firstly, even where price levels are different due to perceived differences in quality, it will not be decisive on market definition if customers will switch anyway. Secondly, **price differences might correspond to differences in content, as is the case if a kitchen roll of 80 sheets is twice as expensive as one with 40 sheets.** Thirdly, chains of substitution might make two differently priced products part of the same market. In each case one has to consider these and a range of other issues before making a decision.

Consumer perceptions

Although characteristics might objectively be very be very close between two products, customers might perceive them to be very different, thus counteracting substitution. Where this has been established however, corroborative evidence, e.g. looking at surveys and absolute price levels has also been deemed necessary.

Case Nestlé/Perrier – **Water, tea and milk, though they were considered to have thirst-quenching characteristics and were used in that purpose, were deemed a separate markets as consumers did not perceive them to be interchangeable;**

Nestlé/Perrier para 10 – This issue proved decisive as perceptions of mineral water as a "natural product" and "its association with purity, cleanliness, absence of contamination and, in general, health and a healthy style of life", in surveys proved more dominant in the minds of consumers than the actual characteristics or functions of the beverage in question;

Case Airtours, para 20 – One reason for the Commission considering long-haul package holidays and short-haul ones as separate markets was the "exotic image" of long-haul destinations, showing their image as more suitable for couples whereas the other type were better for families with children, evidenced by the substantial price differences between the two types.

EU : use of the SSNIP test for the definition of product markets

A major innovation introduced via the RMN (1997) was the SSNIP test, aiming to measure the effect of a **Small but Significant Non-transitory Increase in Price on demand.**

The test is the following:

Question: are Apples Oranges and Pears in the same market ?

Answer

1)If in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase of Apples, substitution by consumers for Oranges were enough to make the price increase unprofitable for the producers of Apples because of the resulting loss of sales, then Oranges are in the same market as Apples.

1)If a hypothetical small (in the range of 5% to 10%) but permanent relative price increase of Apples and Oranges was profitable for the producers of Apples and Oranges because of very few loss of sales to Pears, then Apples and Oranges are not in the same market as Pears.

Demand side and supply side substitutability

Ex: **the shoe market**, the tube market,

Should demand-side substitutability be the only factor of importance in delineating it, there would be no general market for shoes. Only highly deviant consumers would buy a size 45 shoe should the price of the 39 size shoe that they were originally looking for exceed their shopping budget. Rather, he/she would only look at shoes within a very narrow size range, restricting demand-side substitutability and thus the relevant market to just these sizes.

The impracticality that such an approach poses makes it apparent why supplier aspects should be determinant in many situations.

The fact that a producer of one size shoes will typically have the "key competence" to quickly switch production to any other size of shoe. This constraint on the behaviour of competitors is thus very real.

Reasoning such as this has led German and EU institutions to define **wide markets for law books, rather than narrow markets for books on family law**

China: the Qihoo/Tencent case: substitutability and relevant market

本院认为考虑到需求替代，消费者能够轻易、立刻、免费的在文字、音频和视频即时通讯三种服务间转换；从供给替代出发，大部分服务商都能够同时提供该三种功能的服务。故不应当依据功能来区分文字即时通讯、语音和视频通话，从而将该三种产品和服务分别视为独立的通讯服务，而应当把它们作为更广阔市场的一部分；它们中的任何一种都不构成一个独立的市场，把即时通讯市场分成更小的在功能上又没有重叠的市场是非常困难的。同时，本案证据显示消费者对即时通讯产品及服务具有很高的价格敏感度，不愿意为使用即时通讯的基础服务支出任何费用，如果被告 持久地（假定为 1 年） 从零价格改为小幅度收费的话，本院有理由相信 需求者完全有可能转而选择免费的文字即时通讯、音频或者视频通话中的任何一种服务，从而使被告的收费行为无利可图。

The Court finds that taking into account substitutability on the demand side, consumers can easily and immediately switch between free text messaging, audio messaging and video messaging ;

From supply substitution standpoint , most of the service providers are able to provide the three different types of services.

The three services should not be considered to be independent communications services, constituting separate markets but should be seen as part of a broader market;

If the defendant increased its price by a small amount, the Court has reason to believe that consumers are likely to switch to audio or video call services, so that the defendant's increase in price would be unprofitable.

China: the Qihoo/Tencent case: Dynamic consideration on market definition

4. 关于QQ与社交网站、微博服务之间的可替代性。(…) 本院认为竞争是一个动态的过程，在一个滥用市场支配地位的反垄断诉讼中对相关市场进行界定时，必须考虑本案商品或者服务所在产业的发展现状及未来一段时间的趋势，总体上应当对那些有可能延续一段时间的滥用市场支配地位的行为予以制止，以有效维护市场竞争机制。互联网行业具有网络技术创新能力强、经营模式变化日新月异的显著特点，微博和社交网站从2010年之后在较短的时间内迅速表现出与即时通讯高度融合的经营现状。(…) 综上，QQ与社交网站、微博服务属于同一相关市场的商品集合。

4. Substitutability between QQ and social networking sites, microblogging service.

(…) The Court finds that competition is a dynamic process;

To define the relevant market in an abuse of market dominance antitrust lawsuit, one must consider the goods and services being developed(…).

The Internet industry is characterized by a high level of technological innovation and frequent changes in the business models. Microblogging and social networking sites have developed rapidly since 2010 and have exhibited a high level of substitutability with instant messaging services . (…)

In short, QQ, social networking sites, and micro-blogging service belong to the same relevant market

China: the Qihoo/Tencent case
Substitutability and relevant market

5. 关于传统电话、传真与即时通讯产品服务之间的可替代性。
(…)
但其与传统的电话、手机、短信等通讯服务相比，不仅在技术上存在较大差异，更为重要的是固定电话、手机及短信均进行收费服务，而即时通讯则进行免费服务，因此QQ与传统的短信、手机通话、固定电话通话之间不存在较为紧密的产品替代关系，相互之间不构成可替代商品。
(…) 虽然目前各电子邮箱服务商大多开发了好友聊天等即时通讯功能并将其内嵌在电子邮箱界面上，但该功能在语音通讯、视频通讯、外挂游戏、截图等功能方面和工具操作的便捷性方面与即时通讯软件还存在巨大差异。(…) 由于功能和用途的差异较大，即使后者开始长期小幅收费，消费者也很难转向选择使用前者，因此电子邮箱与QQ不属于同一相关商品市场的商品集合。

5. The substitutability between traditional telephone, fax and instant messaging products and services.

(…) Free instant messaging services are not close substitutes of the services offered by operators of fixed line telephony or mobile telphony (such as voice telephony, mobile telephony and SMS fee-based services or e-mails).

China: the Qihoo/Tencent case: Geographical market definition

（二）相关地域市场的界定*
(…) 由于互联网的开放性和互通性，经营者和用户均无国界，本案证据显示境外经营者可向中国大陆地区用户提供即时通讯服务，被告也同时向世界各地的用户提供服务。有一定数量的香港、澳门、台湾地区以及分布在世界各国的中文用户在使用被告提供的即时通讯产品服务；同时也有分布在各国的外文用户在使用被告提供的外文版本的即时通讯服务。
中国大陆用户经常会选择境外经营者提供的即时通讯服务（例如 MSN、ICQ、雅虎通、Skype等），用户语言偏好不会导致国外即时通讯服务的经营者无法与中国大陆经营者进行竞争。(…) 综上所述，本院认为本案相关地域市场应为全球市场。

(B) the definition of the relevant geographic market
(…) Due to the openness of the Internet and interoperability, operators and users have no national boundaries. The evidence in this case shows that foreign operators can provide instant messaging services to mainland China users; the defendant also provide services to users around the world. (….)

Mainland Chinese users often choose the service provided by foreign operators of instant messaging services (such as MSN, ICQ, Yahoo Messenger, Skype, etc.); Linguistic differences will not prevent competition between foreign providdders and the Chinese mainland operators of instant messaging service operators.(…)

In conclusion, the Court finds that the present case the relevant geographic market is the the global market.

China: the Qihoo/Tencent case
Assessment of the court on market definition

（一）被告不具有控制商品价格、数量或其他交易条件的能力.
如前所述几乎所有的即时通讯软件及服务都是免费向用户提供的，用户不愿意为即时通讯软件的基础服务支付任何费用，被告的市场领先地位不能使其拥有超越其他竞争者的产品定价权。(…)
其次，被告不具备控制商品数量和其他交易条件的能力。互联网上的即时通讯软件种类众多，用户选择余地较大。
第三，从其他经营者对被告的依赖程度来看，交易相对方可以轻易地选择与其它企业进行交易，对被告的依赖性较弱。

A) the defendant does not have the ability to control the price, quantity or other trading conditions.

As mentioned above almost all instant messaging software and services are provided free of charge to users, the users do not want to pay any fees for instant messaging software, basic services, market leading position of the defendant can not make it over other competitors pricing rights.

Secondly, the defendant does not have the ability to control the number of commodities and other trading conditions. A wide variety of instant messaging software on the Internet, the user choice.

Third, the view from the other operators on the defendant's reliance trading counterparties can easily select transactions with other businesses, a weak dependence of the accused.

Issues to be addressed

1) The Qihoo/Tencent case

2) Unfair trade practices, restrictive trade practices, anticomppetitive practices

3) Elements of economics useful in judicial proceedings

4) The economic approach:

Ex Abuse of dominance

What is a relevant market ?

What is dominance ?

Abuses

What are the tests

Bundling

Sanctions

Market	Dominance Market Power	Exploitative Abuse	Exclusion. Abuses	compensation
Product market Substitution Potential entry				
Geographical market Substitution Potential entry				
What market are we talking about ?	***Can firms price above their costs without attracting entry?***	***Are these practices anticompetitive?***	***Are these practices anticompetitive ?***	***What was the harm to consumers or suppliers ?***
Which firms compete or could compete with which?	**-Market share - Concentration - Barriers to entry**	**-Abusively high prices -Tying -Bundling**	**-Refusal to deal -Tying -Bundling -Predation**	
Methods/Tests Observations Hypothetical Monopolist Test	**Observations C4 Lerner index HHI**	**-Comparison with similar situations**	**-Profit Sacrifice -No Econ Sense -E. Eff Test -Cons surplus test**	***Econometrics simulation***

The goal of competition law and the use of market share

In EU law dominance is defined as : **:"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"**

How do we know that a firm on a market is dominant (has market power)?

Dominance and Market Share

If a firm has a share of 80% of a market there is a rebuttable presumption that it has the ability to behave independently of its customers, competitors and consumers.

But:

14. The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. **The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market.** However, there may be **specific cases** below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face **serious capacity limitations**. Such cases may also deserve attention on the part of the Commission .(1)

(1) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking

Market Shares Can Be a Misleading Indicator of Market Power

Market shares can be misleading:

Example: compare

a)Firm A has a 50% market share; the other 50% is occupied by 100 firms of equal size each having a 0.5% market share
b)Firm A has a 50% market share; the other 50% is held by one other firm (firm B)

In both cases the market share of firm A is 50% but does it have more market power in the first case than in the second ?

The Qihoo/Tencent case: Market dominance

（一）被告不具有控制商品价格、数量或其他交易条件的能力

（二）被告不具备阻碍、影响其他经营者进入相关市场的能力

该市场的 进入门槛低，扩张阻碍小。

由此可见网络效应和用户锁定效应对于即时通讯产品和服务来说并非不可逾越的壁垒。

3.相关市场竞争充分。即时通讯市场处于高度竞争和高度不稳定状态，新技术、新商业模式层出不穷，没有证据显示有任何一家企业可能长期操纵市场。

(A) the defendant does not have the ability to control the price, quantity or other trading conditions

(B) the defendant does not have to block or affect the ability of other operators to enter the relevant market

1. The market has low barriers to entry and expansion barriers to small.

2. The network effects and user lock-in effect do not constitute insurmountable barriers for real-time communications products and services.

3. Full market competition. Instant messaging market is highly competitive and highly unstable state, new technologies, new business models emerging, there is no evidence to suggest that any company may have the power to manipulate the market.

The Qihoo/Tencent case: Market share and Dominance

综上所述，由于互联网行业特殊的市场状况，尤其不能将市场份额作为认定经营者市场支配地位的决定性因素。 即使在原告所主张的最窄的相关市场内，正如CNNIC报告所述，腾讯的市场优势地位并未抑制和缩小其他即时通讯产品的市场发展空间，亦不构成该市场整体发展的阻碍因素。

In conclusion, because of the Internet industry special market conditions , the market share cannot be the decisive factor to establish the existence of a dominant market position.

Even if one takes the narrowest definition of the relevant market, the market dominance of Tencent's has not been established.

Issues to be addressed

1) The Qihoo/Tencent case

2) Unfair trade practices, restrictive trade practices, anticomppetitive practices

3) Elements of economics useful in judicial proceedings

4) The economic approach:

Ex Abuse of dominance

What is a relevant market ?

What is dominance ?

What constitutes an (excklusionary) abuse of market power ?

What are the tests

Bundling

Sanctions

Market	Dominance Market Power	Exploitative Abuse	Exclusion. Abuses	compensation
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Methods/Tests Observations Hypothetical Monopolist Test	Observations C4 Lerner index HHI	-Comparison with similar situations	-Profit Sacrifice -No Econ Sense -E. Eff Test -Cons surplus test	*Econometrics simulation*

Relevant test for exclusionary abuses of dominance: the profit sacrifice (« but for ») test

The profit sacrifice test states that conduct should be considered unlawful when it involves a profit sacrifice that would be irrational if the conduct did not have a tendency to eliminate or reduce competition.

Illustration :

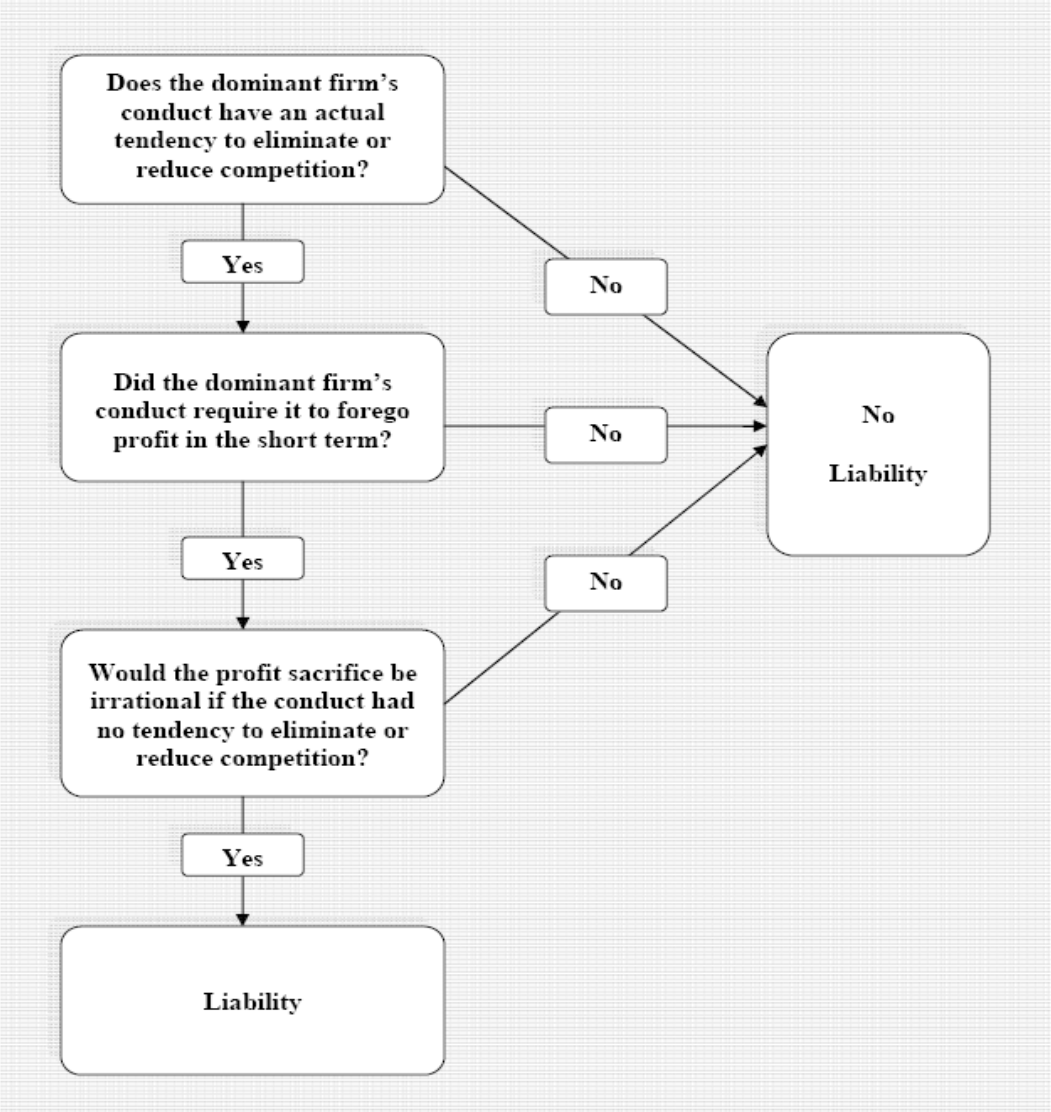
Assume that a dominant firm is making a profit of $1,000 per week.

If it engages in certain conduct that requires a one-time expenditure of $600, it can permanently exclude its rivals from the market.

Thereafter, it will earn a profit of $1,200 per week.

It is rational for the firm to spend the $600, but it would not have been rational without the exclusionary effect. The PS test captures this kind of conduct whenever there is no other rational reason for engaging in the conduct that excluded the rivals.

The profit sacrifice test



Use of the profit sacrifice test

Most jurisdictions currently use a loose form of the profit sacrifice test to assess predatory pricing.

The profit sacrifice test captures predatory pricing because the strategy involves absorbing short-run losses in anticipation of eliminating or disciplining rivals, thereby making it possible to earn higher profits and recoup the short-term losses.

The profit sacrifice test could condemn not only below-cost prices, but also limit-pricing.

Discounts that leave price above cost, on the other hand, pass the test because they do not rely on eventual profits from greater market power for their profitability.

Limitations of the profit sacrifice test

1) The benchmark is not a cost but the (unknown) price that the dominant firm would have charged in a hypothetical, "but-for" world where it engaged in the allegedly unlawful conduct, but that conduct did not have the effect of excluding or disciplining rivals. Thus the profit-sacrifice test does not provide guidance for making the decision on how to choose the correct benchmark. Hence, the determination will be "extremely subjective" and thus "prone to error."

2) The profit-sacrifice test is over-inclusive. It breaks down when it is applied to certain types of behaviour that increase consumer welfare even though they also exclude competitors. For example, the test would catch a firm which invests in research and development to develop a drug that will be profitable only if it is so effective that it excludes competitors and gives the firm market power. Is it sound policy to discourage such investments? Is it not contradictory with IP laws?

3) The profit-sacrifice test is under-inclusive. Some conduct may entail no short run profit sacrifice yet still be exclusionary and harmful to competition. "Cheap exclusion" falls into this category, as does raising rivals' costs. If, for example, a monopolist lies to potential customers about the quality of a new entrant's product. This is essentially costless behaviour, yet it still has the potential to be exclusionary if the incumbent manages to manoeuvre the entrant into a position where it must either exit without a fight or make expenditures that it cannot afford to counter the negative publicity.

Pricing behaviour of dominant firms

Ex : A major telecommunication company (firmA) has a legal monopoly in a region . The telecommunication sector is open to competition and a new competitor (firm B) enters the telecommunication market in the same region.

Firm B offers lower prices than firm A and gains quite a signficant market share (say 20%).

Firm A reacts by lowering its price and firm B (the new entrant) starts losing customers.

Firm B goes to court arguing that it is the victim of an abuse of dominant position by firm A.

The court has to decide whether firm A's pricing behaviour isanticompetitive or pro-competitive?

- Is a price reduction by a dominant firm always or sometime anticompetitive ?
- If you think that it is not always anticompetitive what does it depend on ?

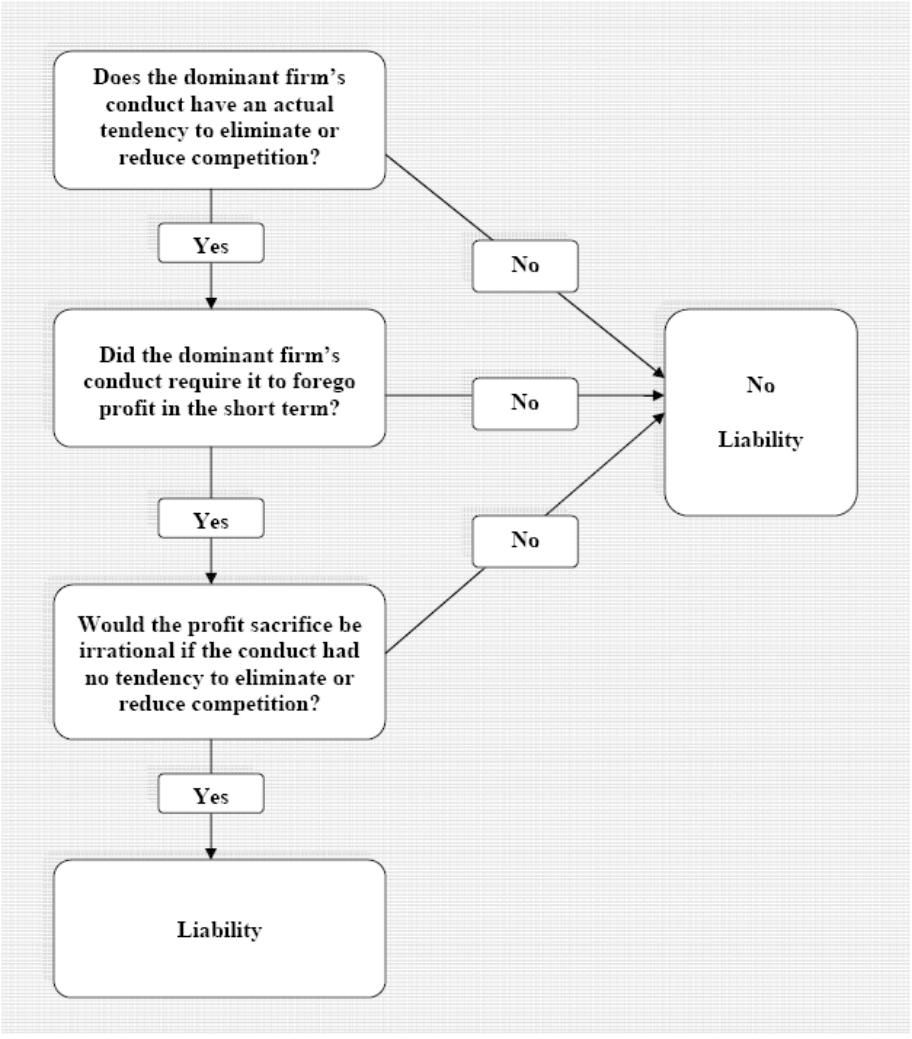
Relevant tests for abuses of dominance: the no economic sense test

The no economic sense test states that conduct should be unlawful if it would make no economic sense without a tendency to eliminate or lessen competition.

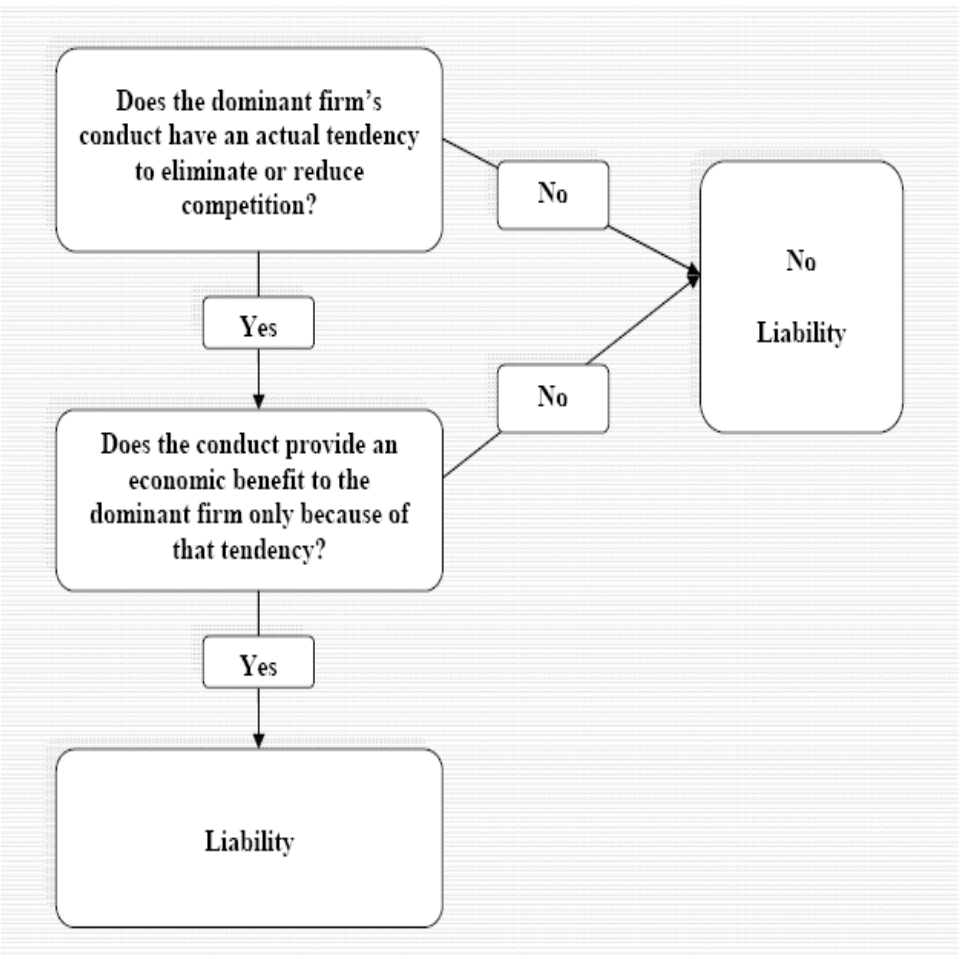
This test avoids under-inclusiveness because it does not require profit sacrifice. It seems, however, that over-inclusiveness and an inability to deal well with conduct that has mixed effects are characteristic of this test, too.

The profit sacrifice test and the no economic sense test: comparison

The profit-sacrifice test



The no economic sense test



Limits of the no economic sense test

The no economic sense test prohibits conduct that has an actual tendency to eliminate competition when that conduct provides an economic benefit to the defendant only because of that tendency, regardless of whether the conduct is costless.

Thus the no economic sense test is not under-inclusive like the profit sacrifice test, because it can capture cheap exclusion cases.

But the test may be over-inclusive in that, like the profit sacrifice test, it would prohibit a firm from investing in research and development to develop a drug that will be profitable only if it is so effective that it excludes competitors and gives the firm market power.

Also, like the profit sacrifice test, the no economic sense test prohibits conducts which reduce competition and increase efficiency.

The no economic sense test in practice

« The US Supreme Court recently addressed the standard for determining when single-firm conduct is exclusionary in the Trinko case(1).

In that case the DoJ and the FTC advocated a standard under which a refusal to assist rivals cannot be exclusionary unless the conduct makes no economic sense but for its tendency to reduce or eliminate competition (the no economic sense test).

Although the US Supreme court did not explicitly adopt this standard, the Court's analysis was consistent with agencies'approach and provides important guidance on the fundamental principles of US monopolization law »(2).

1)Verizon Communications Inc v. Law offices of Curtis V. Trinko, LLP, 540 US.398 (2004)

2)R. Hewitt Pate « International trend of competition policy: enforcement trends regarding cartels, single dominance, single firm conduct and intellectual property rights »,Taiwan 2006 International Conference on Competition Laws/Policies: The Role of Competition Law/Policy in the Socio-Economic Development, Taipei June 20-21, 2006

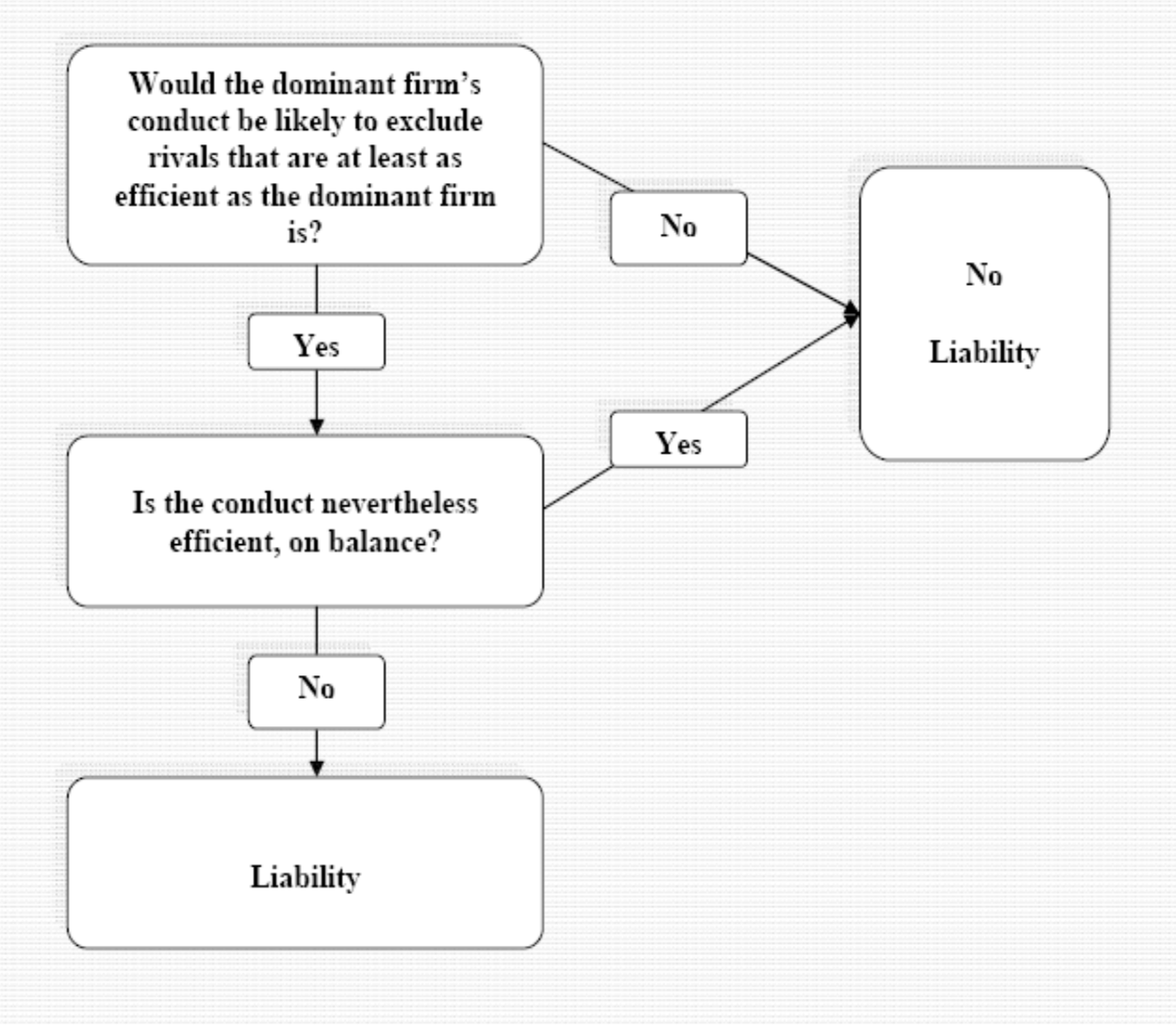
Relevant tests for abuses of dominance: the equally efficient firm test

The equally efficient firm ("EEF") test aims to identify dominant firm conduct that harms competition by asking whether the conduct would be likely to exclude rivals that are at least as efficient as the dominant firm.

If the answer is that EEFs would probably be excluded, then the conduct is considered harmful to competition. Otherwise, the conduct is considered lawful.

This test guards against the danger of protecting competitors rather than competition because, under competitive conditions, a market will be served only by the most efficient firms. Therefore, it is not considered harmful for less efficient firms to be driven out.

The equally efficient firm test



Limits of the equally efficient firm test

The equally efficient firm test may treat dominant firms too leniently.

Some argue that even when an entrant is less-efficient than the incumbent firm, it may still improve social welfare by forcing the market price downward (and quantity upward). If the allocative efficiency gain from lower pricing/higher quantity outweighs the reduction in productive efficiency due to the presence of the higher-cost entrant, these critics note, then it is better to use a stricter test to protect that entrant. However this view is disputed.

A difficult question to be answered regards the scale of operation at which one should assess the hypothetical equally efficient firm's efficiency. New entrants tend to enter at a relatively small scale and therefore have not worked their way down the marginal cost curve yet. Consequently, they may be less efficient than the dominant firm in the short run, but if they were able to survive long enough they might become equally or even more efficient.

This tendency of the test to give false negatives appears to be a serious drawback.

LePage's v. 3M and the equally efficient firm test

3M's rebates were calculated based on the customer's level of purchases from six of 3M's product lines, ranging from health care products to retail automobile products. Customers were given targeted growth rates in each line, and the more targets the customer met, the larger were its rebates across all of the product lines. 3M conceded that it had a monopoly in the transparent tape market, with a market share of 90 percent.

LePage's claimed that it was foreclosed from selling tape because it could not cover its costs and still compensate customers for the rebates lost on other products in 3M's discount program when customers bought LePage's tape instead of 3M's.

3M argued that its pricing was above its costs regardless of how its costs are calculated, and that LePage's did not contest that assertion. 3M therefore reasoned that the bundled discounts could not be anti-competitive.

LePage's v. 3M and the equally efficient firm test

The court did not expressly use any particular test to determine whether 3M's conduct was unlawful.

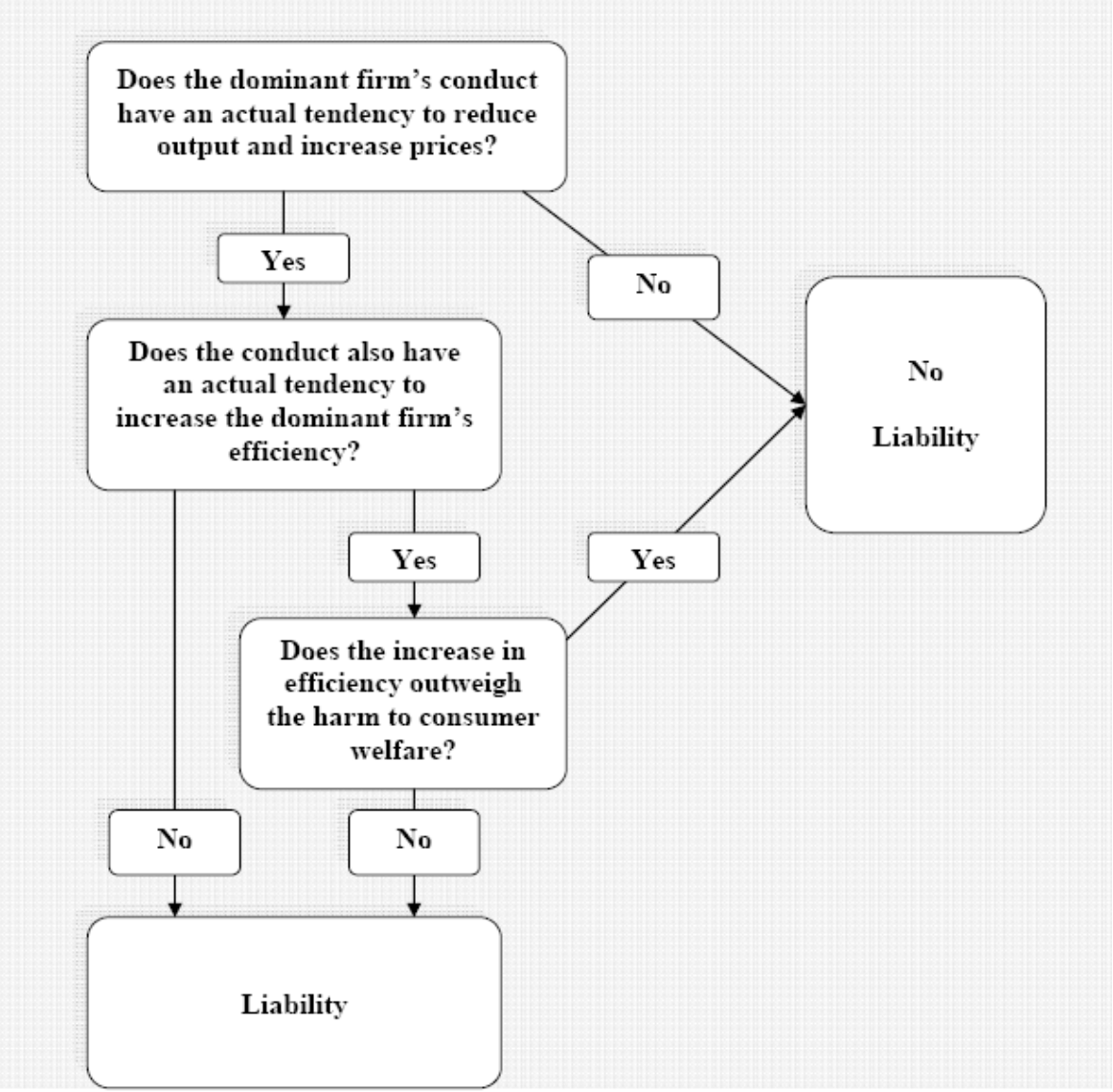
Without specifically endorsing the EEF test, the court did allude to it in its description of the potential harm of bundled rebates. That harm, the court explained, occurs when a customer buys the defendant's product B rather than plaintiff's B not because defendant's B is better or cheaper, but because doing so will enable the customer to receive a larger discount on A which the plaintiff does not produce. Thus the plaintiff can compete in the market for B only by lowering its price enough to compensate for the customer's forfeited discount on A. Depending on how many other products like A the defendant wraps in to the bundled discounts, and on how much the customer buys, "even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce."

However, there was no examination of whether 3M's rebates would have forced an equally efficient firm to price below cost. As the dissenting opinion stated, the court simply presumed that the defendant had acted unlawfully because LePage's had suffered. In other words, the dissent accused the majority of protecting a competitor and not necessarily protecting competition.

Relevant tests for abuses of dominance: consumer welfare test

There are several varieties of consumer welfare tests. They all have a certain amount of appeal because they attempt to use consumer welfare effects themselves, rather than indirect factors such as profit sacrifice, as the gauge of dominant firm conduct. Unfortunately, it is one thing to be able to tell whether conduct enhances or reduces consumer welfare, and quite another to try to measure the magnitude of those changes. The latter can be extremely difficult, if not impossible. Yet when conduct has both positive and negative effects on consumer welfare, a balancing step is necessary to determine which effect is stronger. It is difficult to have confidence that balancing can be done accurately, objectively, and consistently.

Consumer welfare test



Consumer welfare test and efficiency

When the firm's conduct has the potential both to reduce consumer welfare and to enhance the defendant's efficiency, there seem to be four possibilities:

1. always condemn conduct if it is likely to have any negative effect on consumer welfare, regardless of any efficiencies;
2. always allow conduct if it is likely to have any positive effect on efficiency, regardless of harm to consumer welfare;
3. balance the two effects against each other to determine which one is likely to be stronger, and prohibit the conduct if likely harm to consumer welfare outweighs likely improvements in performance; or
4. balance the two effects and consider conduct unlawful only if it is likely to produce harm to consumer welfare that is disproportionate to the improvement in efficiency.

Welfare balancing is hard to do well.

Issues to be addressed

1) The Qihoo/Tencent case

2) Unfair trade practices, restrictive trade practices, anticomppetitive practices

3) Elements of economics useful in judicial proceedings

4) The economic approach:

Ex Abuse of dominance
- What is a relevant market ?
- What is dominance ?
- What constitutes an (exclusionary) abuse of market power ?
- How to assess whether tying is abusive ?

The EAGCP report

"An economics-based approach implies that competition authorities will need **to identify a competitive harm, and assess the extent to which such a negative effect on consumers is potentially outweighed by efficiency gains.** The identification of competitive harm requires **spelling out a consistent business behavior based on sound economics and supported by facts and empirical evidence.** Similarly, efficiencies, and how they are passed on to consumers, should be properly justified on the basis of economic analysis and grounded on the facts of each case.

An economics-based approach will naturally lend itself to a « **rule of reason** » approach to competition policy, since careful consideration of the specifics of each case is needed, and this is likely to be especially difficult under « per se » rules".

Tying and bundling

In theory tying and bundling can (under different hypotheses)

-1) Create cost efficiencies
-2) Allow price discrimination
-3) Avoid double marginalization
-4) Undercut rivals
-5) Raise rivals costs
-6) Deter entry
-7) Mitigate competition after entry
-8) Make products more valuable
-9) Create network externalities
-10)Deny competitors the benefit of network externalities

When dealing with a case it is important to assess which of these effects is relevant to the case at hand.

Once the likely scenario has been identified, it should be examined under the various tests described previously (profit sacrifice, no economic sense, barrier to an equally efficient firm and consumer surplus test) and one should examine , if it is found to be anticompetitive whether it has efficiency benefits which offset the anticompetitive effect.

The Qihoo/Tencent case: The court analysis of tying

本案中被告QQ软件的主 要功能是即时通讯，与QQ医生、QQ管家、安全管家、安全管理等一系列软件确属单独的软件产品；但首先被告在即时通讯市场中不具有市场支配地位。

其次，被告没有限制用户的选择权

第三，被告的相关行为具有经济合理性.

First, **the defendant does not have a dominant market position** in the instant messaging market.

Second, **the defendant did not limit the user's choice** (the QQ software was not compulsory and could be uninstalled)

Third, the **defendant's behavior was economically rational**. (QQ software enhanced the value of QQ service).

Thank you very much

Frederic.jenny@gmail.com

Background

3/2/2012

So far, private enforcers are quite active in abuse of dominance litigation, although successful private actions continue to be absent[2]. Courts have proven relatively conservative in their decision-making and **require the parties to establish a high level of proof of a dominant market position to support a claim**. They demand substantial evidence to be produced by the parties and **refuse to base a finding of a dominant position solely on media reports or the parties' own statements about relevant market shares.**

On the administrative side, NDRC by means of a penalty decision, imposed fines of approximately 1.07 million USD on two companies: the **Shandong Weifang Shuntong Medicine Co., Ltd. and the Shandong Weifang Huaxin Medicine Trading Co., Ltd. Fines related to the companies' exclusive supply arrangements with downstream customers involving compound reserpine tablets, a kind of anti-high pressure medicine taken by millions of Chinese.**

This is the highest fine NDRC imposed for antitrust infringements since the commencement of AML in China. Significantly, the investigation into price discrimination practices by China Telecom and China Unicom was announced by NDRC in November, 2011,

Background

February 2012 SOEs and competition law

The abuse of dominance area saw the biggest surprises. The targets under the abuse of dominance rules were mostly Chinese companies, both privately-owned (ie, **Baidu**, Shanda) and state-owned companies (ie, **China Netcom, China Mobile,** Hubei Salt). Most of these cases were private actions before courts, with a few exceptions. Interestingly, to the best of my knowledge, all of these actions were ultimately dismissed or settled; as far as I know, there has not been a judgment finding an abuse of dominance under the AML. (Meanwhile, an investigation that SAIC was rumoured to be conducting against a Europe-based multinational does not appear to have led anywhere.)

Background

February 2012 SOEs and competition law

Perhaps most importantly, NDRC started tackling SOEs. Even before the China Telecom and China Unicom case, NDRC published a decision against the local salt distributor in Hubei province, which had an “exclusive right” (as within the meaning of Article 106 TFEU) to distribute edible salt at the wholesale level in the entire province. The issue NDRC had was that the salt company bundled the sale of edible salt with cloth washing powder. However, NDRC only warned, but did not fine, the salt company for a variety of reasons, namely the company’s willingness to cooperate during the investigation and to take back unwanted washing powder from retailers, the limited sales volume and value involved (only 200 pieces of powder, worth RMB 20,000 – around EUR 2,500), and the company’s formal commitment to cease the infringement and subject itself to temporary monitoring by the authority.

Background

The SISTIC Case in Singapore

Decision of the Competition Appeals Board SISTIC appealed against the finding of liability and on the level of financial penalties. SISTIC argued that it did not hold a dominant position in the market for open ticketing services and
that its exclusive contracts were not abusive as they did not give rise to an anticompetitive effect.

The CAB agreed with CCS' finding that SISTIC's **persistently high market share over time** is indicative of its dominant position and that there are **no exceptional circumstances shown by SISTIC to rebut the said indication**. Also, the CAB found that CCS was justified in relying on the evidence of **SISTIC's increase in booking fee from $2 to $3 in 2008 (for tickets with a face value of above $20) to conclude that SISTIC has the ability to profitably sustain prices above competitive levels.**

The CAB held that the credible threat from SSC and TECL to constrain SISTIC was unrealistic as TECL's and SIS' commercial interest in SISTIC was likely to affect their decision to switch to other ticketing services providers. In respect of SSC's and TECL's incentive to exercise countervailing power against SISTIC, the CAB found that even though TECL and SIS did have strong bargaining power, they have weak incentives to exercise that power with respect to price.

Background

The SISTIC Case in Singapore

The CAB also found that the **exclusive agreements** constituted a barrier to entry into the market for open ticketing services in Singapore.

The CAB affirmed CCS' finding that SISTIC holds a dominant position in the market for open ticketing services in Singapore. The CAB found that with the exclusive agreements "SISTIC achieved virtually complete monopoly of providing ticketing service for all the events held in the Esplanade venues and at the SIS.

By these agreements, SISTIC effectively foreclosed any competition whether for or in the Relevant Market as the Esplanade venues and the SIS are concerned during the contractual duration of these agreements. There is no way any competitor can compete for any share of the market with respect to these venues."

The CAB found that CCS has established that the exclusive agreements are explicitly exclusionary in nature and have led to substantial foreclosure effects on competition in the market for open ticketing services, as market entry, market access and growth opportunities for existing or potential competition are stifled.

The CAB found that these exclusive agreements have an appreciable adverse effect on competition in Singapore and do not have any net economic benefit, other than, from SISTIC's point of view, foreclosing competition and that that SISTIC's strategy and conduct by way of the exclusive agreements were intended to effectively restrict or foreclose competition in the Relevant Market or were capable of so doing, and amounted to an abuse of dominance.

Background

March 2012

NDRC Investigating China Unicom and China Telecom's Abuse of Dominant Position

In an interview with China Central TV Station, Li Qing, deputy director of the Price Supervision, Inspection and Anti-Monopoly Bureau of NDRC, revealed that NDRC is investigating **China Telecom** and **China Unicom** for abuses of their dominant market position in the broadband internet market. The two telecom state-owned enterprises (SOEs) are being investigated for discriminatory pricing for access to their broadband network by charging competitors more than what they charge non-competitors. The investigation therefore concerned Article 17.6 of the Anti-Monopoly Law, which provides that enterprises with dominant market positions may not apply, without justification, differential prices or other discriminatory transaction terms with their trading parties.

This is a significant development, as it shows that, contrary to many foreign commentators' views, the NDRC is prepared to take action against powerful SOEs. Until this case, it was assumed that because large SOEs were so close to the government, no government agency would subject these companies to investigations or public criticism. Clearly, however, the NDRC has not taken this approach. According to an announcement published on China Telecom's website on 2 December 2011, China Telecom had submitted a correction

Background

April 2012 Norton Rose

Abuse of dominance probe into China Telecom and China Unicom likely to end with settlement *(settlements)*

Six months after the National Development and Reform Commission (NDRC) announced its investigation into allegations that China Telecom and China Unicom had abuse of their dominance through the application of discriminatory broadband interconnection fees, the deputy director of the **NDRC's Price Supervision**, Inspection and Antimonopoly Bureau reportedly revealed at a forum on 18 April that, since the two State-owned telecoms operators had improved their interconnection efficiency by 40 per cent and promised to significantly reduce broadband fees within three to five years, "the investigation may not necessarily result in heavy penalties as the ultimate goal of our enforcement is to ensure rectification".

Last **December, China Telecom and China Unicom announced that they had submitted settlement applications to the NDRC under Article 45 of the Antimonopoly Law, with commitments to enhance interconnection among backbone networks, adjust interconnection fees according to market principles, increase broadband coverage and speed while reducing fees charged on public users.** The press reported that at the time, the NDRC found the commitments vague and unmeasurable, and requested the two companies to submit more specific remedial plans. It is not clear whether new proposals have been made and if so whether the NDRC has now formally decided to close its investigation.

Background

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Abuse of dominance probe into China Telecom and China Unicom likely to end with settlement *(settlements)*

if the China, Telecom and China Netcom investigation were to end in a settlement – which most observers think is the most likely outcome – then this would be already the second time (after the Hubei Salt case and, perhaps, a similar investigation in Jiangsu) that commitments are used to terminate an investigation against an SOE. The message sent by NDRC to market players could be that SOEs are subject to the AML from the substantive point of view but, procedurally, commitments are enough to put the investigation to an end.

Background

March 2012 Henry Chen

Civil Litigation Under China's Anti-Monopoly Law

Since the introduction of the China AML in August 2008, Chinese courts have experimented with various methods of civil dispute adjudication based on breach of the AML. In general, China's courts have very limited judicial experience with such cases. A number of civil cases have been brought before the courts, but very few, if any, have resulted in a successful judgment for breach of the AML.

According to incomplete statistics, there have been no less than 13 civil lawsuits based on the AML brought before China's courts since the AML came into force. Only two of the thirteen cases concern an agreement allegedly prohibited by the AML. The remainder concern abuse of dominant market position.

Companies sued as defendants include China Mobile, China NetCom and Tencent for abuse of dominance. Cases in which the defendant was sued for entering into and performance of prohibited monopoly agreements include the **Chongqing Insurance Association case** and the **Johnson & Johnson case for alleged resale price maintenance.**

Three cases were settled, which includes the case involving the Chongqing Insurance Association.

Background

March 2012 Henry Chen

Civil Litigation Under China's Anti-Monopoly Law

none of the defendants in the above cases ever won a single case, for which there seem to be common reasons. One of the common reasons given is that it is difficult for a plaintiff to meet its burden of proof, which is very well illustrated by the case of Renren v. Baidu.

- **Renren v. Baidu**

Baidu, the Chinese flagship search engine provider, was sued by Renren, a Chinese corporate client, for alleged abuse of Baidu's dominant market position.

In this first private lawsuit brought under the AML of China, Renren lost the case. **Baidu has become the largest website and search engine in the Chinese language, handling hundreds of millions of internet search requests on a daily basis.** Baidu has been referred to as a "Chinese Google", but Baidu operates a **ranking-by-bidding mechanism that differs from Google's search ranking results.** Under ranking-by-bidding, when an internet user searches through Baidu using a keyword, the company that has paid Baidu for a better ranking would show up in a priority position in Baidu's search results. If the internet user clicks the website of the company, Baidu would then charge the company an agreed-upon sum.

Background

March 2012 Henry Chen

- Supreme People's Courts Reform on the *Burden of Proof*

To address the apparent imbalance in the failure ratio between plaintiffs and defendants, in April 2011, China's Supreme People's Court (SPC) issued a call for comments on a draft regulation titled "Relevant Issues Concerning the Application of Law in the Trial of Civil Monopoly Dispute Cases" (Draft Regulation).

The proposed Draft Regulation seeks to build a working judicial framework for civil disputes under the AML. However, the Draft Regulation does not totally shift the burden of proof required of a plaintiff in an abuse of dominance case.

According to Article 9 of the Draft Regulation, the plaintiff in an abuse of dominance case nonetheless bears the burden to prove what constitutes the relevant market, whether the defendant has dominance, and the monopolistic conduct of the defendant that amounts to abuse of its dominance. Once the plaintiff proves the aforementioned facts, the defendant then bears the burden of proof to show the legitimacy of and/or justification for its actions. It remains to be seen whether or not the SPC will alleviate the burden of proof required of plaintiffs in the finalized regulation.

Background

March 2012 Henry Chen

- Supreme People's Courts Reform on the *Burden of Proof*

It seems that plaintiffs in civil litigation alleging a prohibited monopoly agreement would have fewer evidentiary obstacles than plaintiffs in abuse of dominance cases. With respect to monopolistic agreements that are obviously intended to eliminate or restrict competition, the **aggrieved party does not bear the burden of proof to show that the effect of the alleged monopolistic agreement eliminates or restricts competition, unless the defendant has provided sufficient proof to the contrary.** However, it is not clear what constitutes an obvious intention to eliminate or restrict competition.

Background

March 2012 Henry Chen

- **Renren v. Baidu**

From March to September 2008, Tangshan Renren Information Service Company (Renren) purchased ranking-by-bidding services from Baidu for its Quanmin Medicine Net website (www.qmyy.com). In June 2008 Renren began scaling down its payments for the ranking-bybidding service. As a result, the links presented by Baidu to Renren's website decreased sharply from more than 80,000 down to four per page. The daily traffic on Renren's website dropped precipitously. Its website had only 701IP on 10 July 2008, as compared with 2,961IP the previous day. As compared with the 4 pages listed on Baidu, a search of the Renren website on Google produced a listing of 6,690 pages.

Renren sued Baidu in the Beijing First Intermediate People's Court, alleging that Baidu had abused its dominant market position in violation of the AML.mArticle 17 of the AML provides for seven prohibited violations in respect of abuse of dominant market position; however, news reports did not indicate what provision Renren was citing under Article 17. Renren sought to require Baidu to de-block its website and demanded compensation of just over RMB 1,100,000 in damages.

Background

March 2012 Henry Chen

- **Renren v. Baidu**

In support of its claims, Renren pointed to several industry reports that state that Baidu's market share is well above the 50 per cent level that gives rise to a presumption of dominance under the AML. Most notably, **Renren cited a press release issued by Baidu itself in October 2008 in which Baidu asserted that its market share exceeded 70 per cent.** Renren went on to argue that, as a consequence of Baidu's dominance, it had no choice but to seek a listing on Baidu and that Baidu's ranking-by-bidding architecture is the kind of forced transaction prohibited under the AML.

Baidu countered that the "search engine market" alleged by Renren is not a cognizable antitrust market since most search engine activity is free of charge. ***(wht is a two sided market)*** Baidu also argued that, in all events, Renren's market share evidence was defective since the cited **industry reports were unreliable, amongst other reasons, because they merely captured snapshots over limited periods of time.*(what is the right timle frame to assess market share)*** Baidu also asserted that any claim that it has a dominant market position is rebutted by the fact that competition among fast-emerging search engines is fierce and users can easily switch between competing service providers.

Background

March 2012 Henry Chen

- **Renren v. Baidu**

Finally, Baidu argued that it had a legitimate business justification for blocking Renren's website because the site was full of spamming links, which effectively resulted in cheating. The news report was not clear about how these spamming links result in cheating or about whom Renren was cheating.
Renren lost its case because, **from the perspective of the court, it failed to prove what constituted the relevant market or the market share of Baidu on that supposed relevant market.** Although Baidu asserted that its market share exceeded 70 per cent, the court did not take the assertion as "self-admission" evidence in favor of Renren because Baidu made the assertion prior to, and other than in the course of, the court proceedings. In addition, **the court held that the determination of relevant market and market share is to be made on the basis of a scientific and objective analysis, by which the court hinted that mere "assertion or bragging" would not be accepted as evidence in lieu of a scientific and objective analysis.*(market definition)***

Background

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Similarly, in another case where the defendant was sued for abuse of dominance in the relevant market of the internet e-book and literature market of China, the court did not admit the “bragging” information of the defendant as the evidence against the defendant; in this case, the defendant had previously declared that it had more than 80 or 95 per cent of the internet e-book market of China.

Issues to be addressed

1) What do economists tell us and what is the role of the judiciary in market mechanisms?

1) Legal constraints on business practices
   - Unfair trade practices
     - Example : unfair competition in Mongolia and China
   - Restrictive practices
   - Anticompetitive practices
     - Example: anticompetitive practices in Mongolia

3) Relationship between unfair trade practices and anticompetitive practices

4) Effects based approach and rule of reason

5) Judicial enforcement of competition laws against anticompetitive practices

6) Methodology of a competition investigation
   - Example the Renren v. Baidu case
   - Example the Qihoo/Tencent case

7) Dominance and relevant tests for exclusionary abuses

8) Bringing economic expertise to the courtroom

Mongolia: unfair competition

Law of Mongolia on prohibiting **unfair competition**

Article 10 An entity conducting business activites are prohibited to carry out the following activites harmful to competition :

-10.1.1. **disseminating false, inaccurate, or misleading information** that may diminish reputation of competitors or his/her goods and products, or result to cause losses to competitors;

-10.1.2. **misinforming or disseminating false or inaccurate information about their own or competitors‘ enterprises,** their location, their methods of manufacturing goods, principal specifications and instructions for use of the goods;

-10.1.3**. advertising their own goods as identical to those produced by others**;

-10.1.4. demanding by sponsoring entity to carry out activities harmful to competition from a person being sponsored;

Mongolia: unfair competition

-10.1.5. **violating terms and sequence of orders for advertisement of goods and products**;

-10.1.6. using arbitrarily trademarks, labels, names and quality guarantees of others' goods, or **copying brand names or packages**;

- 10.1.7. **selling, publishing or disseminating scientific, technological, industrial or trade information and secrets without permission of the patent owner or author.** This provision shall not apply to the re-engineering of goods which are marketed freely without restriction under the patent and copyright laws
of Mongolia;

-10.1.8. **concealing quality deficiencies** or the dangerous features of goods.

Mongolia: unfair competition

The prohibitions of Article 10 focus on unfairness of the means of competition in the market

They are **applicable not only to dominant entity but to all entities engaged in business activities and these categories of violations basically do not contain provisions concerning impact (negative influence) on the market.**

Consequently, **business entities that are too small to have a negative impact on the market are also bound by the provisions of Article 10.1.1 through Article 10.1.8 and are subject to administrative sanctioning by the Mongolian Competition Authority in case of violation.**

China: the Qihoo/Tencent case
Abuse: Bundling

2.两被告滥用市场支配地位，排除、妨碍竞争，违反了反垄断法的规定。010年11月3日被告发布《致广大QQ用户的一封信》，明示禁止其用户使用原告的360软件，否则停止QQ软件服务；拒绝向安装有360软件的用户提供相关的软件服务，强制用户删除360软件；采取技术手段，阻止安装了360浏览器的用户访问QQ空间，在此期间大量用户删除了原告相关软件；2010年11月20日工业与信息化部以具体行政行为，谴责并禁止了被告前述行为。被告将QQ软件管家与即时通讯软件相捆绑，以升级QQ软件管家的名义安装QQ医生，构成捆绑销售。
3.两被告应对其垄断民事侵权行为承担相应法律责任。

2 both defendants abuse of market dominance, eliminate barriers to competition, in violation of the provisions of the antitrust laws. November 3, 2010, the defendant published a letter "To the majority of QQ users, the user expressly prohibited the use of plaintiff's 360 software, otherwise stop the QQ software services; refused to provide software services to 360 software users, forceddelete 360 software; take the technical means to block the installation of a 360 browser user access QQ space, during which a large number of users to delete the plaintiff; November 20, 2010 the Ministry of industry and Information Technology to the specific administrative act, condemned andprohibit the aforementioned behavior of the defendant. The conduct of the defendant constitutes a restriction of trading. Defendant QQ software housekeeper and instant messaging software bundle to install the upgrade on behalf of the QQ software housekeeper QQ doctors, constitute bundling.
3. Two defendants shall to its monopoly tort bear the corresponding legal responsibility.

China: the Qihoo/Tencent case

The Guangdong High Court **rejected Qihoo's definition of the relevant market, stating that it was too narrow.**

The Guangdong High Court found, in addition to integrated instant messaging software and services, products such as social networking services and other services such as Weibo (the Chinese equivalent to Twitter) are within the same relevant product market and that the relevant geographic market was global.

The Guangdong High Court also found that **Qihoo had not provided sufficient evidence to prove that Tencent had monopoly power in the relevant market**. It stated that **market share alone is not sufficient to make a finding of dominance**. Other factors to consider include the **ability to control price, quantity, or other transaction or to prevent others from entering the market, and the competitiveness of the relevant market.** It also stated that, even if Qihoo's market definition was adopted, Tencent did not have monopoly power.

Finally, the Guangdong High Court commented that, if Qihoo had established that Tencent had monopoly power, Tencent's conduct in forcing its customers to choose between QQ and Qihoo's software would have constituted an abuse of dominance but that Tencent had not engaged in anticompetitive tying.

China: the Qihoo/Tencent case

This is a landmark decision as it involves much more sophisticated and detailed competition analysis than previous court decisions involving anti-monopoly disputes.

It is also the first antimonopoly case where economic experts, in particular foreign experts, provided evidence to a Chinese court.

It is also the first anti-monopoly case relating to a commercial dispute between large companies.

Further, on 25 April 2013, the Guangdong High Court handed down its decision in a related case. In response to Qihoo's claims of abuse of dominance, Tencent filed a claim with the Guangdong High Court, alleging that Qihoo had engaged in unfair competition in breach of Article 14 of the Anti-Unfair Competition Law. It claimed damages of RMB 125 million. The Guangdong High Court found in favour of Tencent and ordered that Qihoo pay Tencent compensation of RMB 5 million and issue an apology to Tencent on its website and other major websites and newspapers.**(Unfair competition / anticompetitive practices)**

The Intel Case

On 13 May 2009, the Commission adopted a decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement addressed to Intel Corporation.

The product concerned

(14) The products concerned by the Decision are Central Processing Units (CPU) of the x86 architecture. The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's "brain". The manufacturing process of CPUs requires high-tech and expensive facilities.

(15) CPUs used in computers can be sub-divided into two categories: CPUs of the x86 architecture and CPUs of a non-x86 architecture. The x86 architecture is a standard designed by Intel for its CPUs. It can run both the Windows and Linux operating systems. Windows is primarily linked to the x86 instruction set.

Prior to 2000, there were several manufacturers of x86 CPUs. However, most of these manufacturers have exited the market.
Since 2000, Intel and AMD are essentially the only two companies still manufacturing x86 CPUs.

The Intel case: the market concerned

(16) The Commission's enquiry led to the conclusion that the relevant product market was not wider than the market of x86 CPUs.

The Decision leaves open the question whether the relevant product market definition could be subdivided between x86 CPUs for desktop computers, notebook computers and servers since given Intel's market shares under either definition, there is no difference to the conclusion on dominance.

(17) The geographical market has been defined as worldwide.

The Intel case: dominant position of Intel

(18) In the 10 year period covered by the Decision (1997-2007), Intel held consistently very high market shares in excess of or around 70%.

(19) Furthermore, there are significant barriers to entry and expansion present in the x86 CPU market. They arise from the sunk investments in research and development, intellectual property and production facilities that are necessary to produce x86 CPUs. Intel's strong (must-stock) brand status and the resulting product differentiation also constitute a barrier to entry.

(20) On the basis of Intel's market shares and the barriers to entry and expansion, the Decision concludes that at least in the period covered by the Decision (October 2002 to December 2007), Intel held a dominant position in the market.

The Intel case: conditional rebates

(21) The Decision describes two types of Intel conduct vis-à-vis its trading partners: conditional rebates and so-called naked restrictions.

(22) Intel awarded major OEMs rebates which were conditioned on these OEMs purchasing all or almost all of their supply needs. This is the case for:

- Intel rebates to Dell during the period ranging from December 2002 to December 2005 (exclusivity);
- Intel rebates to HP during the period ranging from November 2002 to May 2005 (conditioned on HP purchasing no less than 95% of its CPU needs for its business desktop segment from Intel)
- Intel rebates to NEC during the period ranging from October 2002 to November 2005, (conditioned on NEC purchasing no less than 80% of its CPU needs for its desktop and notebook segments from Intel;
- Intel rebates to Lenovo during year 2007, (conditioned on exclusivity for Lenovo notebook segment).

The effect of conditional rebates

Hypothesis: the competitor cannot supply more than 25.000 to the consumer

Unit price of microchips for Intel **10**

Average cost of microchips for Intel 8

Quantity bought by NEC 100.000

Rebate for NEC if it buys 80% of its Demand from Intel = 10%

Cost for NEC of 100.000 units = **900.000**

Unit price of microchip for AMD **7**

Average cost of microchips AMD 6,5

Quantity bought by NEC
with Intel 75.000
with AMD 25.000

Rebate for NEC granted by Intel = 0% (The condition that it buys 80% from Intel is not met)

Total cost of getting 100.000 units for NEC :
75000x10= 750.000 +
25000x 7= 175.000
Soit **925.000**

The Intel case: paying retailers to sell exclusively Intel based PCs

(23) Similarly, Intel awarded payments to Media Saturn Holding (MSH), Europe's largest PC retailer, which were conditioned on MSH selling exclusively Intel-based PCs. These payments are equivalent in their effect to the conditional rebates to OEMs.

The Intel case: Jurisprudence on conditional rebates

(24) The Court of Justice of the EC has consistently ruled that "an undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements - whether the quantity of its purchases be large or small - from the undertaking in a dominant position.“

1 Case 85/76 Hoffmann-La Roche, [1979] ECR 461, paragraph 89.
5

The Intel case: Intel's conditional rebates

(25) The Decision concludes that the conditional rebates granted by Intel constitute fidelity rebates which fulfil the conditions of the Hoffmann-La Roche case-law. It establishes that the economic mechanism of Intel's conditional payments to MSH, is equivalent to that of the conditional rebates to OEMs. The Decision therefore concludes that they also fulfil the conditions of the Hoffmann-La Roche case-law.

(26) There was uncertainty as to the exact proportion of the rebates or payments that would be lost in case of (increased) sourcing from Intel's competitor, AMD. It was expected that the proportion would be significant and disproportionate to the number of units switched to AMD. Furthermore, there was also a possibility that the rebates withdrawn would be allocated by Intel to rival OEMs. As a result of the rebates therefore, the freedom of the OEMs in question and of MSH to source CPUs from AMD was restricted.

The Intel case:

(27)The decision shows that OEMs, IT managers and Intel considered that AMD products had a number of positive innovative attributes and were a viable alternative to those of Intel. Although the Decision makes no absolute judgment on the technical performance of the Intel and AMD products at stake, OEMs' submissions and contemporaneous documents show that OEMs considered that AMD x86 CPUs were suitable for at least a part of their respective supply needs.

The Intel case: The as efficient competitor test

(28) On top of showing that the conditions of the case-law for finding an abuse are fulfilled, the Decision also conducts an economic analysis of the capability of the rebates to foreclose a competitor which would be as efficient as Intel, albeit not dominant.
In essence, the test establishes at what price a competitor which is 'as efficient' as Intel would have to offer CPUs in order to compensate an OEM for the loss of any Intel rebate.

(29) This as efficient competitor analysis is a hypothetical exercise in the sense that it analyses whether a competitor which is as efficient as Intel but which seeks to offer a product that does not have as broad a sales base as that of Intel is foreclosed from entering. This analysis is in principle independent of whether or not AMD was actually able to enter.

The Intel case: The as efficient competitor test and conditional rebates

(30) The analysis takes into consideration three factors: the contestable share (the amount of a customer's purchase requirements that can realistically be switched to a new competitor in any given period), a relevant time horizon (at most one year) and a relevant measure of viable cost (average avoidable costs).

If Intel's rebate scheme means that given the contestable share, in order to compensate an OEM for the loss of the Intel rebate, an as efficient competitor has to offer its products below a viable measure of Intel's cost, then it means that the rebate was capable of foreclosing the as efficient competitor. This would thereby deprive final consumers of the choice between different products which the OEM would otherwise have chosen to offer were it to make its decision solely on the basis of the relative merit of the products and unit prices offered by Intel and its competitors.

The Intel case: the as efficient competitor test and payments to retailers

(31) The same kind of analysis has been conducted for the Intel payments to MSH. The analysis of the capability of these payments to foreclose an as efficient competitor also takes account of the fact that these payments are made at another level of the supply chain, and that their effect is additional to that of conditional rebates to OEMs.

The Intel case: The strategic importance of the main OEMs

(32) The Decision also indicates that certain OEMs, and in particular Dell and HP, are strategically more important than other OEMs in their ability to provide a CPU manufacturer access to the market. They can be distinguished from other OEMs on the basis of three main criteria: (i) market share; (ii) strong presence in the more profitable part of the market; and (iii) ability to legitimise a new CPU in the market. As a consequence, smaller OEMs are not able to legitimise new CPUs in the same way as HP and Dell, in particular in the corporate segment, which is the most profitable.

The Intel case: Harm to competition and consumers

(33) The evidence gathered by the Commission led to the conclusion that Intel's conditional rebates and payments induced the loyalty of key OEMs and of a major retailer, the effects of which were complementary in that they significantly diminished competitors' ability to compete on the merits of their x86 CPUs. Intel's anticompetitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

The Intel case: efficiencies

Intel submitted two different sets of arguments in order to attempt to justify its rebate schemes: (i) that by using a rebate, Intel has only responded to price competition from its rivals and thus met competition; and (ii) that the rebate system used vis-à-vis each individual OEM was necessary in order to achieve important efficiencies that are pertinent to the CPU industry.

With respect to the latter, Intel argued that there were 4 different types of efficiencies that were attained by any exclusivity requirements of its rebates: lower prices, scale economies, other cost savings and production efficiencies and risk sharing and marketing efficiencies. Moreover, Intel claimed that conditions attached to the rebates were indispensable to attain these efficiencies and their impact on competition was minor since AMD grew during the investigation period.

The Intel case: Efficiencies

(35) The Commission analysed how far Intel's conduct would be suitable to attain the efficiencies argued by Intel in a proportionate way. However, the Commission found that Intel's arguments relating to objective justification are flawed because they relate more generally to conduct to which the Commission did not object (i.e. discounting/provision of rebates), and not to conduct to which the Commission did object (i.e. conditions associated with the discounts/rebates) and none of the efficiency defences provide a relevant justification for the conduct in question.

(36) The Decision concludes that the conditional rebates granted by Intel to Dell, HP, NEC and MSH constitute an abuse of a dominant position under Article 82 of the Treaty and Article 54 of the EEA Agreement.

The Intel case: Naked restrictions

(37) Intel awarded major OEMs payments which were conditioned on these OEMs postponing or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of AMD-based products.

This is the case for:

– Intel payments to HP which were conditioned on HP selling AMD-based business desktops only to small and medium enterprises, only via direct distribution channels (as opposed to through distributors), and on HP postponing the launch of its first AMD-based business desktop in Europe by 6 months; the duration of this abuse is from November 2002 to May 2005;

– Intel payments to Acer which were conditioned on Acer postponing the launch of an AMD based notebook from September 2003 to January 2004;

– Intel payments to Lenovo which were conditioned on Lenovo postponing the launch of AMD-based notebooks from June 2006 to the end of 2006.

The Intel case: Case law

(38) In Irish Sugar, the Court of First Instance concluded that a dominant undertaking agreeing “with one wholesaler and one retailer to swap competing retail sugar products, i.e. Eurolux 1 kilogram packet sugar of Compagnie française de sucrerie, for its own product“ constituted an abuse. Through the swap arrangement in question, the dominant firm prevented the competitor's brand from being present on the market since the retailers no longer had a stock of “Eurolux” branded sugar and instead replaced those volumes with the sugar of the dominant undertaking.

In this regard, the CFI found that “the applicant undermined the competition structure which the Irish retail sugar market might have acquired through the entry of a new product, sugar of the Eurolux brand, by carrying out an exchange of products, in the circumstances referred to above, on a market in which it held more than 80% of the sales volume.”

The Intel case: Conclusion

(39) The Decision concludes that the Intel conducts directly harmed competition. A product which a supplier had been actively planning to release was delayed or constrained from reaching the market. Consumers therefore ended up with a lesser choice than they otherwise would have had. Intel's conduct does not constitute normal competition on the merits. Moreover, payments of Intel money to OEMs to delay, cancel or otherwise restrict the launch of an AMD-based product or restrict its distribution was not linked to any legitimate objective justification or efficiency.

The Intel case: Conclusion

(42) (…)the Commission also recalls the case-law according to which "where one or more undertakings in a dominant position actually implement a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterized as an abuse of a dominant position within the meaning of Article 86 [now Article 82] of the Treaty".

The Intel case: Decision

(43) The Decision establishes that Intel has infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by engaging in a single and continuous infringement of Article 82 of the Treaty and article 54 of the EEA Agreement from October 2002 until December 2007 by implementing a strategy aimed at foreclosing competitors from the x86 CPU market.

(44) A fine of EUR 1 060 000 000 has been imposed on Intel Corporation for the infringement.

(45) Intel Corporation shall immediately bring the infringement to an end to the extent that it is ongoing and shall refrain from any act or conduct having the same of equivalent object or effect.

Relevant market definition and market shares: the Renren v. Baidu case

Baidu, the Chinese flagship search engine provider, was sued by Renren, a Chinese corporate client, for alleged abuse of Baidu's dominant market position in the **Beijing First Intermediate People's Court**. In this first private lawsuit brought under the AML of China, Renren lost the case.

Baidu operates **a ranking-by-bidding mechanism** that differs from Google's search ranking results. Under ranking-by-bidding, when an internet user searches through Baidu using a keyword, **the company that has paid Baidu for a better ranking would show up in a priority position in Baidu's search results**. If the internet user clicks the website of the company, Baidu would then charge the company an agreed-upon sum.

From March to September 2008, **Tangshan Renren Information Service Company** (Renren) purchased ranking-by-bidding services from Baidu for its Quanmin Medicine Net website (www.qmyy.com).

In June 2008 Renren began scaling down its payments for the ranking-bybidding service. As a result, the links presented by Baidu to Renren's website decreased sharply from more than 80,000 down to four per page.

Relevant market definition and market shares: the Renren v. Baidu case

Renren sued Baidu, alleging that Baidu had abused its dominant market position in violation of the AMLto coerce Renren to use more of its search advertising service, violating Article 17(4) of the AML which prohibits exclusive dealing without justifiable cause..

Renren sought to require Baidu to de-block its website and demanded compensation of just over RMB 1,100,000 in damages.

In support of its claims, **Renren pointed to several industry reports that state that Baidu's market share is well above the 50 per cent level that gives rise to a presumption of dominance under the AML**. Most notably, Renren cited a press release issued by Baidu itself in October 2008 in which Baidu asserted that its market share exceeded 70 per cent.

Renren went on to argue that, **as a consequence of Baidu's dominance**, it had no choice but to seek a listing on Baidu and that Baidu's ranking-by-bidding architecture is the kind of **forced transaction prohibited under the AML**.

Relevant market definition and market shares: the Renren v. Baidu case

Baidu countered that **the "search engine market" alleged by Renren is not a cognizable antitrust market since most search engine activity is free of charge**.

Baidu also argued that, in all events, **Renren's market share evidence was defective** since the cited industry reports were unreliable, amongst other reasons, because they merely captured snapshots over limited periods of time.

Baidu also asserted that any claim that it has a dominant market position is rebutted by the fact that competition among fast-emerging search engines is fierce and users can easily switch between competing service providers.

Finally, Baidu argued that it had a legitimate business justification for blocking Renren's website because the site was full of spamming links, which effectively resulted in cheating.

Relevant market definition and market shares: The Renren v. Baidu case

Renren lost its case because, from the perspective of the court, it failed to prove what constituted the relevant market or the market share of Baidu on that supposed relevant market.

Although Baidu asserted that its market share exceeded 70 per cent, the court did not take the assertion as “self-admission” evidence in favor of Renren because Baidu made the assertion prior to, and other than in the course of, the court proceedings.

In addition, the court held that the plaintiff failed to provide sufficient information to prove the alleged dominant market position of the respondent. Specifically, the court commentated that media exposures or popular perceptions cannot substitute for rigorous economic analysis in establishing market dominance in relevant markets.

Similarly, in another case where the defendant was sued for abuse of dominance in the relevant market of the internet e-book and literature market of China, the court did not admit the “bragging” information of the defendant as the evidence against the defendant; in this case, the defendant had previously declared that it had more than 80 or 95 per cent of the internet e-book market of China.

Relevant market definition and market shares: The Renren v. Baidu case

However, the court rebutted Baidu's argument that the search engine market is not a relevant market in the context of the AML because it provides free search engine services to internet users. Based on Article 12(2) of the AML on defining relevant markets, the court identified the relevant market in this case as China's search engine market. Even though it is free to internet users, the search engine service is interdependent with other services and markets that charge consumers, thus the fact that it is free does not render the search engine market as not constituting a relevant market for antitrust purposes(1).

In Renren vs. Baidu, consistent with international standards, the court explicitly imposed an evidential threshold on the plaintiffs. They had to bear the burden of proof for their claims.

In particular, the court's emphasis on rigorous economic analysis in order to identify a dominant position status in relevant markets, on the one hand, is important to avoid enforcement errors, be they type I or type II errors; but on the other hand this sets a high threshold for individual consumer plaintiffs.

NDRC fines two pharmaceutical distributors for monopolistic practice

14 November 2011

After **controlling the supply** for promethazine hydrochloride, the **two distributors raised the price from less than RMB 200 to a range of between RMB 300 and RMB 1,350**. Many producers of compound reserpine tablets could not afford such price increases and were forced to cease production in July 2011.

The NDRC ordered the two distributors to terminate the exclusive agreements immediately and imposed fines of RMB 6.877 million (approximately US$ 1.08 million) on Shuntong (including confiscating illegal gains of RMB 3.77 million) and RMB 152,600 on Huaxin (including confiscated illegal gains of RMB 52,600).

NDRC fines two pharmaceutical distributors for monopolistic practice

14 November 2011

Limiting consumer surplus

Two pharmaceutical distributors, Shandong Weifang Shuntong Pharmaceutical Co. Ltd. and Weifang Huaxin Medicine Trading Co. Ltd., were found to have dramatically raised the price and monopolized the supply of promethazine hydrochloride, a raw material of the compound reserpine, which is a medicine included in China's essential drug list for high blood pressure treatment. Annually in China, more than ten million patients, mostly low- and middle-income earners, consume in total eight to nine billion reserpine tablets.

The two pharmaceutical distributors are related companies and are controlled by the same individual shareholder. Each concluded separate, exclusive distribution agreements with the only manufacturer of promethazine hydrochloride in China. The two companies (although actually "one operator") obtained a dominant position by means of such exclusive arrangements.

Exploitative abuses

Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is liable to infringe competition law.

Example: Malaysian Guidelines

Exploitative Conduct

3.2. Exploitative conduct such as excessive pricing may result from structural conditions in the market. For example, if a dominant enterprise believes there are no new entrants likely, then it will set a high price to exploit consumers. The resulting excessive profits are not a reward for innovation.

3.3. **The MyCC may only be concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market. This situation is not likely to be common and there are some sectors which are covered by price control legislation.**

3.4. In determining whether prices are excessive, the MyCC will use several criteria, the details of which may differ from market to market. In principle, the MyCC may consider the actual price set in relation to the costs of supply and other factors such as the dominant enterprises profitability.

Excessive prices in Europe

Very few cases :

General Motors in 1974,

United Brands in 1975,

British Leyland in 1984

Deutsche Post II in 2001

But misleading as -a number of questions préjudicielles
-several cases where the Commission initiated
other cases which did not lead to formal decisions but led to price adjustments in formerly regulated sectors (such as airline, electricity and telecommunications)
-

Excessive prices in the EC

Joliet (1970: 243) considered that a price is unfair when a dominant firm has actually taken advantage of its dominant position to set prices significantly higher than those which would result from effective competition.

Ex in United Brands, the Court held that:

249. It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.

250. In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product would be an abuse.

Proof of excessive prices in the EC

In United Brands, the ECJ held that:

251. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its costs of production, which would disclose the amount of the profit margin (. . .).

253. Other ways may be devised—and economic theorists have not failed to think up several—of selecting the rules for determining whether the price of a product is unfair (emphasis supplied).

An excessive price may be proved by comparing the price under review with different indicators:
-cost measures of the dominant firm;
-other prices applied by the dominant firm;
-or prices of other firms offering products similar to the one of the investigated firm.

Proof of excessive prices in the EC

Table 1: Proof of exploitative excessive pricing

	Cost of the dominant firm	Other prices of the dominant firm (Discrimination)	Price of other firms offering similar products
Same relevant market (product and geographic)	United Brands 1978 CICCE 1985 SACEM II 1988 Ahmed Saeed 1989		(Competitor comparison) United Brands 1978 Parke, Davis 1968 Renault 1988
Other relevant market in the same Member State		General Motors 1975 British Leyland 1986	General Motors 1975 Bodson 1988
Other relevant market in another Member State		United Brands 1978	(Benchmarking) Sirena 1971 Deutsche Grammophon 1971 SACEM I 1989 SACEM II 1989

Proof of excessive prices in the EC: price cost comparisons

In United Brands the ECJ held that an antitrust authority should first try to get cost data and to compare such data with the alleged excessive price. Only if it is too difficult the authority may decide to compare the investigated prices with benchmarked prices.

In CICCE, the ECJ established that in case of similar products having different cost structures, an approach based on the use of averages should be ruled out.

In SACEM II,the Court held that the production costs to be considered are those of an efficient firm, and not necessarily those of the investigated firm which may have inflated production costs because of its dominant position (X inefficiency).

in Ahmed Saeed, the Court held that tariffs must be reasonably related to the long-term fully allocated costs of the product or service (in case of common costs).

Proof of excessive prices in the EC: price cost comparisons

Difficulties:

- When is is the ‘fair’ price above which the price charged by a dominant firm is excessive?

- How does one compute the level of costs ?

Proof of excessive prices in the EC: comparisons of different price charged by the dominant firm

Ex 1) The same price is charged for two services having different costs.

Ex 2) Two different but profitable prices are charged for the same product, and that the price charged to some customer is excessive, as a profitable lower price has been charged to others.

Proof of excessive prices in the EC: comparisons of different price charged by the dominant firm

Ex 1) The same price is charged for two services having different costs.

Case General Motors Continental has the legal monopoly to issue conformity certificates for vehicles used in Belgium. Thus, the cars sold in one Member State but re-imported into Belgium had to obtain this certificate. GMC charged initially €146 for this service, then decreased its price to €25 for the European models.

The Commission considered the price unfair for different reasons including the fact that the price of approving American models imported in Belgium was the same as the price of approving European models, whereas the cost of the former was higher than the latter.

Proof of excessive prices in the EC: comparisons of different price charged by the dominant firm

Ex 2) Two different but profitable prices are charged for the same product, and that the price charged to some customer is excessive, as a profitable lower price has been charged to others.

Ex British Leyland had a legal monopoly to issue national certificates of conformity. Initially, BL charged £25 for right-hand drive and for left-hand drive cars charged £150 for dealers and £100 for private individuals. The Court upheld the Commission D And considered there was no significant cost differences and that the fees were fixed solely to make the re-importation of left-hand drive cars less attractive.

Proof of excessive prices in the EC: comparisons of different price charged by the dominant firm

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Ex 3 (similar to ex 2) comparison of the prices charged by the dominant undertaking in two different Member States.

Approach followed by the Commission and implicitly endorsed by the Court in United Brands

To prove unfair pricing, the Commission has to show that the prices are different (without justification) for the same product, and that both prices are profitable.

To prove that prices are discriminatory, the Commission has to show that the prices are different (without justification) and that they place some buyers at a competitive disadvantage

Proof of excessive prices in the EC: comparison with prices of other firms

The other firms may be active on the very same relevant market as the dominant firm (ie, it may be a competitor);

The other firm may be active on another geographic market but may still operate in the same Member State as the dominant firm;

The other firm may be active in another Member State.

Proof of excessive prices in the EC: comparison with prices of other firms

1) The other firms is active on the same relevant market as the dominant firm

In United Brands, the Commission compared the price of Chiquita bananas with the prices of branded bananas of similar quality. The Court implicitly endorsed the approach but held that a 7% difference is not enough to be regarded as excessive.

Difficulty : risks of misjudging difference in quality between the Products. Motta "If the dominant firm has attained its leadership through superior products, then it will also be able to command higher prices, without this being abusive".

Proof of excessive prices in the EC: comparison with prices of other firms

Ex comparing the price of a patented product with the price of a similar unpatented product offered by competitors.

In Parke Davis, the Court held that the comparison between the prices of a patented product in one Member State and the price of a similar unpatented product in another Member State was not sufficient to prove excessive pricing because investment incentives in intellectual property need to be safeguarded.

Similar Ex Renault

Proof of excessive prices in the EC: comparison with prices of other firms in another geographic market

2) The other firm may be active on another geographic market but may still operate in the same Member State as the dominant firm

In Bodson the ECJ held that:

"(. . .) it must be possible to make a comparison between the prices charged by the group of undertakings which hold a concession and prices charged elsewhere. Such a comparison could provide a basis for assessing whether or not the prices charged by the concession holders are fair".

Proof of excessive prices in the EC: comparison with prices of other firms in another geographic market

The other firm may be active in another Member State

In Deutsche Gramophon, the ECJ was asked whether a German manufacturer of sound recordings would abuse its exclusive right of distribution by imposing a selling price in Germany that is higher than the price of the original product sold in France and re imported in Germany.

The ECJ held that:

“19. The difference between the controlled price (ie, in Germany) and the price of the product reimported from another Member State (ie, France) does not necessarily suffice to disclose an abuse; it may however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse”.

Proof of excessive prices in the EC: comparison with prices of other firms in another geographic market

In SACEM II , Sacem was charging (in France) a fixed rate of 8.25% of the turnover of the discotheques, which was revealed by a Commission study to be much higher than the European average.

The ECJ held that:
25. When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position.
In such a case, it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.

Proof of excessive price: other evidence

In Deutsche Post II34 of 2001, DPAG (which enjoyed at the time a legal monopoly for internal mail) considered that mail coming from abroad but containing a reference to Germany circumvented domestic mail, and consequently applied the domestic tariff (ie, €0.51).

The Commission determined that charging domestic tariffs to the disputed pieces (which did not circumvent domestic mail) was above cost.

No reliable accounting data for the relevant period, but the Commission estimated the cost of delivering of incoming international mail on the basis of DPAG's own estimate in its notification of the REIMS II agreement (cost related to distribution of international traffic was only 80% of the cost of processing domestic mail . Accordingly, it imposed a fine

Arguments against antitrust control of excessive prices

First, where there are no legal barriers, exploitative practices are self-correcting because excessive prices will attract new entrants. The use of excessive price actions to increase consumer welfare might lead to a trade-off (short run benefit long term cost as disincentive to invest and innovate)

Second, establishing the ‘excessiveness of prices’ is complex. computing the relevant measures of costs is also complex: (allocation of common costs to different products, choice of accounting methods (historic costs, current costs), measure of costs where there are important fixed costs)

Arguments against antitrust control of excessive prices

Third, a competition authority's role is not to set prices,

Fourth, the intervention of the competition authority occurs only at a given point in time, and leaves open the issue of how prices should evolve over time.

When is control of excessive price justified ?

Cumulative conditions:

First, presence of high and non-transitory barriers to entry (weak self regulation). Ex non contestable monopoly (or near monopoly), or control an essential facility

Second necessary condition is dynamic and limits intervention to monopoly (or near monopoly) that is due to current or past exclusive or special rights.

Third, in a dynamic setting, incontestable monopoly should not be condemned for excessive pricing because fear of antitrust intervention may undermine investment incentive .

When is control of excessive price justified ?

Cumulative conditions:

Fourth, there is no effective means for the competition authority to eliminate the entry barriers.

Fifth, there should be no sector-specific regulator. A specific regulator usually has better knowledge of the sector.

China: the Qihoo/Tencent case
Assessment of the court on market definition

通过前述关于相关市场界定、市场份额计算标准以及市场份额并非市场支配地位的决定性因素等一系列分析，本院认为原告无法证明被告在本案相关市场中具有支配地位。故无论被告相关行为是否符合非法限定交易行为的要件，均不能认定其属于《反垄断法》第十七条所禁止的无正当理由限制交易行为和搭售行为

By the aforementioned on the definition of the relevant market, the market share standards, and market share is not a decisive factor in a dominant market position analysis, the Court finds that the plaintiff can not prove that the defendant has a dominant position in the relevant market in this case. So regardless of the defendant acts with the elements of such transactions illegal behavior, can not say that it belongs to the "anti-monopoly law," without good reason restrictive trade practice prohibited by Article 17 of the tying behavior