Proving A Monopolistic Agreement Case

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Legitimacy standard of monopolistic agreement: positive effects vs. negative

- 1、Plaintiff bears the burden to prove existence of monopolistic agreement, but sometimes happens the other way round;
- 2、Defendant may prove efficiency;
- 3、Plaintiff rebuts efficiency, indispensability, or proves elimination of competition;
- 4、Defendant then cross-rebut.

I、Proof of “monopolistic agreement”

(1) Proof of “agreement”

- Art 13, AML:
- “Agreement, decision or concerted practice”
- ——standard of proof must be clarified;
- ——decision and concerted practice may not be a contract

——Decision: binding decisions of trade associations; do not satisfy the number of parties requirement;

- ——Concerted practice: may not prove the offer/acceptance element;
- Mainly presumptions:
- （a）act in concert;
- （b）in coordination, otherwise
- ——against actor’s interest, or
- ——technically impossible.

（2）Proof of “monopoly”

- **1、Art 13, AML: six elements**
- **2、Art 7, Judicial Interpretation: Defendant must prove the non-restrictive effects;**
- ——reverse burden of proof, but not *per se* illegal;
- ——For other horizontal agreements, Plaintiff must prove “monopoly”.

3、Art 14, AML

- Prohibition of vertical restrictions;
- **——Ideally, Art 7 of the JI should also apply to RPM;**

4、“Exclude or restrict competition”: neutrality

- （1）**Exclusion and restriction in purpose:**
- ——Essentially tantamount to Art13(1)~(5), no need to look at effects;
- ——Does not serve any other legitimate purposes;
- ——If the agreement is cloaked with other legitimacy, then evaluation of contents, goals, enforceability and alike becomes necessary; 。

（2）“appreciable”effects

- EU *de minimus* notice:
- —horizontal: combined market share less than 10%;
- —vertical: less thn 15%;
- —if network effect present: 5%.

- Above these threshold, need to evaluate parties’ market power.

II、Efficiency: Defendant' proof

- **TFEU 101(1):**
- Efficiency in production, sales and innovation
- ——cost efficiency
- ——non- cost efficiency

Art 15, AML: seven scenarios

- Defendant must prove:
- 1、which efficiency exactly;
- 2、direct causation (indirect link does not count);
- 3、probability of realizing these efficiency
- ——for cost efficiency, must calculable and demonstrable;
- ——for other efficiencies, must show their nature.

- 4、time and methods of realizing efficiency
- ——must prove it is not artificial;
- Realizing efficiency takes time, which does not preclude determination of passing a fair share to consumers; but the longer the time interval, the bigger efficiency there must be.

5、Passing over efficiency gains to consumers: efficient to whom?

- Merely beneficial to undertaking is not an “efficiency”: must be possible to pass over to consumers (in totality);
- E.g. lower price, better service, greater choice; consumers must not be worse off;
- ——If the agreement provides better quality but also higher price, then must balance: if consumers value quality over price, it is a fair share passing over.

III、Restriction vs. efficiency

- Plaintiff can rebut the proof of efficiency:
- Even if efficiency is established, plaintiff can disapprove by arguing:
- ——a less restrictive means can be adopted instead; and
- ——the restrictive agreement can eliminate competition in the relevant market;
- Defendant shall then continue to rebut.

Negative Exemption Conditions

- **TFEU 101(3)**
- ——only indispensable restrictions allowed
- ——will not confer the ability to eliminate competition in the relevant market
- **Art 15(2) of AML:**
- **“will not severely restrict competition**

IV、Plaintiff must prove injury

- Must be “antitrust injury”
- ——comes from Defendant’s “illegal monopolistic conduct”
- If caused by multiple causes, then the monopolistic agreement must be one of the “important causes”.
- If direct purchaser is an intermediary, then its loss of profit is the injury;
- If Plaintiff is an indirect purchaser, then the overpaid price is the injury.

V、Evidence

- **1、Art 10, JI: Defendant's publicly-released information which is capable of proving its dominance can be produced by Plaintiff as evidence. People's Court can determined dominance accordingly, unless rebuttal evidence is produced.**
- ——only limited to dominance proof
- ——if agreement cases need to prove parties' market power, this rule can also be followed.

- **2、Art 12, JI: expert witness**

- ——Lawyers, economists, tech specilists;
  ——“expert testimony must be supported by facts and able to persuade others, including other experts, to reach similar conclusion”;
- ***Yet for “follow-on actions”, Plaintiff only needs to prove “antitrust injury”.

U.S. Daubet decision：court must consider the following when evaluating expert testimony

- 1、whether it is “verifiable” or “verified”
- 2、has it been peer-reviewed…
- 3、known or potential errors must be considered;
- 4、whether the technology’s operating standards exist or complied with;
- 5、whether it is “generally accepted” in its field;
- Expert’s experience, normal methodology, etc. must also be considered.

Thank you

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