



ANTI-MONOPOLY AND ANTI-UNFAIR COMPETITION ENFORCEMENT BUREAU
STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE
国家工商行政管理总局反垄断与反不正当竞争执法局

EU-China Competition Week

Defenses of Tying and Anti-Monopoly Enforcement Practices in China

Anti-Monopoly and Anti-Unfair Competition Enforcement
Bureau of the SAIC, Enforcement Division II SHI Nan
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The Law and Concepts

“Anti-Monopoly Law” Article 17 Section 1(5):

Tying products without justifiable causes, or imposing other unreasonable transactional terms in the transaction.

“Rules of State Administration for Industry and Commerce on Prohibition against Abuse of Dominant Market Position” Article 6, Section 1:

A company with a dominant market position is prohibited from engaging in the tying of products or imposing any other unreasonable trade terms in a transaction without justifiable cause, such as:

(i) Forcing different products to be sold as a bundle or package against common practices of the transaction, or consumer habits, etc., or without regards to the functions of the products;

Article 8 The State Administration for Industry and Commerce (“SAIC”) shall comprehensively consider the following factors when determining the justifiable causes referred in Article 4 through Article 7:

- (i) Whether or not the relevant conduct was adopted by the company on the basis of its own normal course of business operations and normal economic returns.
- (ii) The effect of the relevant conduct on the economic operation efficiencies, social public benefits and economic developments.

The Law and Concepts

Tying and Bundling

Theoretically there are differences. From legislation and enforcement, there are no substantive differences under the legal framework of China.

Tying and the Imposition of Other Unreasonable Transactional Terms

There are differences, but the nature of their acts is similar, and sometimes they are intertwined.

For enforcement, the industry and commerce administrations normally do not determine tying or imposition of other unreasonable transactional terms separately. They make an overall determination.

Tying and Restrictions on the Transaction

There are differences. The similarities are that they all limit the options of the counterpart of the transaction. There are also similarities in their defenses.

Directions of Defenses of Tying

“Defense for no violation” and “Defense for Lesser Punishment”

Defense for violation: rebut on the determination of the constituent elements by the enforcement agencies regarding the tying behaviors

relevant market and its market dominance----- rebut on its relevant market or dominant

Separate products ----- Technical factors, systematic, integration, etc.

No justifiable causes -----Policy basis, security, efficiency, etc.

Anti-competitive effect (the scope and effect of the foreclosure) -----not in violation of the intents of the counterpart of the transaction, not mandatory, etc.

Directions of Defenses of Tying

Defense for Lesser Punishment: Lessen the determination of the enforcement agencies regarding the anti-competitive effects of the tying behaviors, and mitigate the degree of punishment.

Scope and effect of the foreclosure ---- reasonable components of a market foreclosure.

Objective factors ---- affiliated enterprises, corporate burdens, etc.

Confiscation of illegal income ---- cannot calculate illegal income

Penalty ---- Sales of the previous year (whether sales is from main operation income or total revenue, etc.)

Anti-Monopoly Enforcement Practices of Tying Behaviors in China

[A list of tying case studies of anti-monopoly agencies in China and their defenses](#)

SAIC: water supply, power supply, tobacco, salt, telecom operators, cable TV operators, Tetra Pak

NDRC: Qualcomm, Telecom operators

Typical Case – Case of Tetra Pak Abusing Its Dominant Market Position

Relevant market and its dominant position

The commissioning period requirements are in compliance with the common practice

Performance requirements are vendor's commitment to customers in order to increase customer loyalty and it was not required for all users to include a performance period

There is no limit to the guarantee period. The technical service of the 1000-packet agreement does not cover all users

There are reasonable factors in the foreclosure of tying

Issues related to the calculation of illegal revenue

The determined range of the sales income related to the degrees of penalties

Typical Case— A case related to restrictions of transactions of a power supply company

Defense for No liability

1. To ensure the **quality and safety of the water supply project**. For many years, it is **an industrial common practice** to prioritize the local water company or its subsidiary project company to be responsible for the constructions of the water pipelines, as it is believed that it could prevent real estate development companies from using water supply facilities and materials that have a short lifetime or are in poor qualities during their constructions, as well as the difficulty in maintenance and high costs in later stages for the water supply company. It could also prevent water supply safety incidents.
2. It is believed that its actions complied with two regulatory documents, the "City and Village Water Supply Management Regulations of Jiangsu Province" implemented on March 1, 2011, as well as the "City and Village Water Supply Management Methods of Suqian City" implemented on April 1, 2012. These two documents provided that "after it passed the inspection by the construction company, the secondary water supply facilities of residential users are to be operated, maintained, and managed by the water supply companies". Constructing and managing secondary water supply projects complied with the **national policy directives** and also complied with industry requirements.
3. It is believed that the three types of water supply project contracts signed with the real estate development companies are based on the result of **free discussions** of both parties, and are the reflections of true intentions of the two parties of the contract.

Typical Case— A case related to restrictions of transactions of a power supply company

Defense for Lesser Punishment

- (1) The party did not force the real estate development company to engage in the transaction
- (2) The party's behavior in the water project market did not cause negative effects to the society
- (3) The data that the punishment relied on are not completely accurate
- (4) The degree of punishment to the party was too severe

Addition(Depends on time) Typical Case - WU Xiaoqin vs. Shaanxi Radio and Television Network Media (Group) Co., Ltd Regarding the Bundling Fee Arrangement

This Anti-Monopoly Civil Litigation Case Went through Trial of First Instance, Trial of Second Instance and Re-trial

Trial of first instance: Shaanxi Province Xi'an Middle People's Court decided for plaintiff

Trial of second instance: Shaanxi Province High People's Court decided for defendant

In Re-trial, the Supreme People's Court decided for plaintiff again

WU Xiaoqin

Law Official of Shaanxi Xianyang Bureau of Industry and Commerce, Weicheng Branch

A very typical case for the defense of tying and its legal determination

Conclusion and Thoughts

It is very meaningful to pay attention and to study the defenses of reasonableness by the party and it can help the enforcement agencies to see issues from a different angle.

If the party did not voluntarily submit its reasonable defenses, it does not mean that the law enforcement agencies does not need to consider its justifiable causes.

The determination for a monopoly behavior is a balancing process between efficiency and fairness, and there is no absolute fairness, nor absolute efficiency.

Thank you!

Welcome comments and suggestions!

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