A Rational Approach towards Abuse of Collective Market Dominance in Antitrust Law

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1. Introduction

The concept of abuse of collective market dominance (**"Collective Abuse**")stems from Article 102 of the Treaty on the Functioning of the European Union (**"TFEU"**), (formerly Article 82 of the European Community Treaty) and was first acknowledged by the EU General Court in 1992.[1]

According to Article 102 of the TFEU, Collective Abuse refers to two or more undertakings abusing their concentrated market dominance based upon some kind of connection between/among them. However, since there are no specific applicable rules for this concept under EU competition laws or guidelines, and with the concept being applied in only a few cases under EU competition law practice, from an antitrust perspective, the relevant competition issues have to some extent not been solved. Hence, there is still plenty of theoretical and practical space to discuss those issues. For these reasons, this article is written from three aspects of this topic as follows, with the intention of shedding light on the rationale behind this concept, and the precautions to take when applying Collective Abuse.

2. The Relevant Competition Issues for Abuse of Collective Dominance

2.1 The Anti-Competitive Effects of Abuse of Collective Dominance

Theoretically, undertakings usually take advantage of two anti-competitive paths to achieve, maintain and then exercise their market power. One is collusion, which could be described as" marrying" your competitors, and to which the anti-competitive effects of horizontal monopolistic conductor cartels are related. The other is exclusion, which could be described as "killing" or "maiming" your competitors, accounting for the anti-competitive effects of the majority of vertical monopolistic conduct, especially the abuse of market dominance.[2]In theory, the determination of collective

[1] The General Court's judgment in Italian Flat Glass (joined cases T-68, 77 & 78/89).
[2] See Thomas G. Krattenmaker and Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, Vol. 96 THE YALE LAW JOURNAL 209, 238-242 (1986).

dominance requires some kind of connection or coordination between/among multiple undertakings. However, in terms of actual anti-competitive effects, Collective Abuseis still founded upon the anti-competitive path of exclusion, as is invariably the case where multiple undertakings conduct abusive behavior to exclude their common competitors by means of foreclosure.

Consequently, it is rational to prohibit such types of behavior through the application of antitrust laws. While it may be the case that the market shares of the respective undertakings do not reach the statutory threshold for market dominance when considered individually, in practice, the strong link between/among the undertakings may result in an integration of market power that enables them to effectively act in the same manner as a single undertaking with market dominance.

2.2 The Competition Focus on Abuse of Collective Dominance

2.2.1 Internal Relationship between/among Multiple Undertakings: The Economic Link and its Applicable Rules in Practice

One of the significant preconditions for determining Collective Abuses the existence of a strong link between/among separate undertakings. Following the first acknowledgement of this concept in the Italian Flat Glass case in1992, the EU courts have, in successive cases, further elaborated upon the interpretation to be given to the meaning of "link"in practice. For example, the Court of First Instance (Fifth Chamber)in the Companies Maritime Belge Transports case held that two or more undertakings must, from an economic point of view, present themselves or act together on a particular market as a collective entity, for the purpose of determining Collective Abuse.[3]In addition, the Court of First Instance (Third Chamber)'s opinion in the Irish Sugar case was that the undertakings concerned are not required to have adopted identical conduct in the market in every respect.[4]Rather, as per the judgment of the European Court in the France Republic Case, what matters is that the concerned undertakings are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, customers, and ultimate consumers.[5]

In order to establish the existence of such a collective entity on the market, it is necessary to examine the factors that give rise to a connection between the

[3]Joined Cases C-395/96 P and C-396/96, paragraph 36.
[4]Case T-228/97, paragraph 66.
[5]Joined Cases C-68/94 and C-30/95, paragraph 221.

undertakings concerned.[6] Such factors may flow from the nature and terms of an agreement between the undertakings in question, or from the way in which it is implemented,[7] provided that the agreement leads the undertakings in question to present themselves or act together as a collective entity. This may, for instance, be the case if undertakings have concluded cooperation agreements that lead them to coordinate their conduct on the market. It may also be the case if ownership interests and other links in law lead the undertakings concerned to coordinate.[8]

However, the existence of such an agreement or links in law, is not indispensable to a finding of collective market dominance. Such a finding may be based on other connecting factors, as well as depending on an economic assessment, and in particular, on an assessment of the structure of the market in question.[9] It follows that the structure of the market, and the way in which the undertakings interact on the market, may also give rise to a finding of collective market dominance.[10]

2.2.2 External Relationship Beyond Multiple Undertakings：Foreclosure and Market Economic Factors

In order to evaluate the extent of market foreclosure that such abusive behavior may bring, we should, based on the Rule of Reason, analyze several market economics factors that would similarly be applied when considering traditional abuse of dominance by a single undertaking.

Firstly, with accord to market structure, it will be much easier to satisfy a finding of Collective Abuse if multiple undertakings "compete" with one another in an oligopolistic market whose market structure still affords those undertakings with sufficiently competitive conditions. For instance, to demonstrate Collective Abuse, each undertaking must be able to monitor whether or not the other undertakings are adhering to common policy. There must, therefore, be sufficient market transparency, which is frequently the case in oligopolistic market, for all the undertakings concerned to become aware, with sufficient precision and speed, of the market conduct of the others.[11]In addition, and more generally, market signals in the

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[6] Id.
[7]Case C-393/92 Almelo, paragraphs 41 to 43.
[8] See DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005), para 45.
[9]*Supra* note 3
[10] See the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004), para 39-57.
[11] See Case T-342/99, Airtoursplc v Commission [2002] ECR II-2585, paragraph 62, and Case T- 193/02 Piau, paragraph 111.

oligopolistic market allow multiple undertakings to carry out abusive behaviors solely through relying on tacit cooperation or coordination together, rather than by way of a real agreement.

Secondly, the difficulty level for new entrants to enter the market should be considered, as it would when assessing the strength of potential rivals in the case of single market dominance. In doing so, the relationship between the collective entities and other potential competitors should be analyzed, since an easy new entry could always destroy the collective entities "Nash Equilibrium"[12]and even render such abusive behavior ineffective for the purpose of distorting market competition.

Thirdly, the duration of the abuse behaviors should be considered, since implementation of a common policy amongst undertakings must be sustainable over time to be effective. This presupposes the existence of sufficient deterrent mechanisms, which are sufficiently severe to convince all the undertakings concerned that it is in their best interest to adhere to the common policy.[13] Otherwise, if the duration of the abusive behavior is not sustainable over a relatively long time period, the undertakings won't have sufficient incentive to stick with the common policy, since breaking rank may lead to greater profitability.

Finally, certain other factors may be critical for evaluating the competitive effects of abusive behaviors on a case-by-case basis, such as the ability of the undertakings to control the trade terms in the market, the financial and technical status of the undertakings, and the extent of undertakings' reliance on other undertakings for transactions, by which the foreclosure brought by abusive behaviors would lead to other competitors in the relevant market losing essential trading opportunities, and their subsequent exclusion from the relevant market.

2.3 Current Issues with the Implementation of Rules on Collective Abuse

2.3.1AShortfall in Applicable Law and Regulations

As mentioned above, the rules for Collective Abuse are generally stipulated in Article 102 of the TFEU. It has however been more than 25 years since it was firstly acknowledged as a concept by the EU General Court in 1992, yet there are still

[12] In game theory, the Nash equilibrium is a solution concept of a non-cooperative game involving two or more players in which each player is assumed to know the equilibrium strategies of the other players, and no player has anything to gain by changing only his own strategy. See Osborne, Martin J., and Ariel Rubinstein. A Course in Game Theory. Cambridge, MA: MIT, 1994. Print.

[13] *Supra* note 11.

neither enforcement guidelines nor other forms of regulations issued by EU competition authorities to clarify how to apply this rule in practice. Although the EU Commission's Directorate General for Competition issued the *Discussion Paper on the application of Article 82 of the Treaty to Exclusionary Abuses* in 2005, which includes some minor content regarding Collective Abuse, it largely summarizes the findings of previous cases, and presents them as an announcement on the general attitude of the Directorate General for Competition.

In addition, based upon the title of this document, we can conclude that it is not intended to give legal effect to the implementation of the relevant rules, since it is merely a public consultation version of a discussion paper. Furthermore, when considering the *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02)*issued by EU Commission in 2009, a similar problem is evident, since this document only relates to abuses committed by an undertaking holding a single dominant position.[14]For all of the reasons above, measures for implementing the relevant rules on Collective Abuse are to a large extent vague, lacking and without a common standard in practice.

2.3.2 The Different and Distinct Applicable Standards of Precedents

Other than as mentioned above, the EU has not provided a clear means fore valuating Collective Abuse, since distinct legal standards were applied in different cases.[15] Moreover, the EU's enforcement authority has yet to initiate a single investigation regarding Collective Abuse. Thus, from this perspective, there are too little references for public review and comment to apply the rules of Collective Abuse in practice.

2.3.3 The Potential for Misapplying the Rules

Based upon our previous understanding, if the competition authorities or courts fail to elaborate or prove the existence of some kind of economic link between/among multiple undertakings, they may misunderstand the essential competitive effects of

[14] See the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), para 4.

[15] Some judgments apply two conditions for finding a collective dominant position (1. the undertakings must be able to adopt a common policy on the market and, 2. they must be able to act to a considerable extent independently of their competitors, customers and consumers) while other judgments refer to a third condition, which is that there must be some kind of an economic link between the undertakings (high degree of transparency, tacit coordination must be sustainable over time, no or little actual and potential competition).

Collective Abuse and the rationality behind this rule. This may extend as far as recognizing as pro-competitive, the behavior of separate undertakings whose individual market shares do not by themselves position them as having a market dominant position, when behavior constituting Collective Abuse of a market dominant position could be established through simply combining their respective market shares. This demonstrates the potential for antitrust law to be misapplied in practice.

While, it is worth noting the relatively low frequency and small number of cases of Collective Abuse in the EU, we may insinuate that the EU Commission and/or the EU Courts carry a cautious attitude towards this type of behavior.

3. Recent Cases Issued by National Development and Reform Commission("NDRC") in China, and the Relevant Issues

In China, there were recently two investigation cases initiated by the antitrust enforcement authority regarding this issue. More specifically, on July 28, 2017, NDRC issued the *2017 NO.1 and NO.2 Decision on the Administrative Penalty*, for which two Chinese pharmaceutical undertakings were punished for alleged Collective Abuse in the Isoniazid Active Pharmaceutical Ingredient ("APIs") market. This is in fact the first time that the Chinese Anti-Monopoly Law ("AML") enforcement authorities have applied the rules according to *PRC AML* to a case concerning Collective Abuse.

As stipulated in Article 19 of the *PRC AML;"Undertakings are assumed to have a dominant market position if any one of the following conditions is fulfilled:(i)The market share of one undertaking accounts for 1/2 in the relevant market;(ii) The joint market share of two undertakings amounts for 2/3 in the relevant market; or(iii) The joint market share of three undertakings amounts for 3/4 in the relevant market. In case that the circumstances of the undertakings fall under the conditions (ii) or (iii) and any of the undertakings has a market share of less than 10%, that undertaking shall not be assumed to have a dominant market position. Undertakings that are assumed to have a dominant market position shall not be considered to have a dominant market position provided that there is opposite evidence."*Accordingly, NDRC applied this article in its assessment of the behavior of the two pharmaceutical undertakings in question.

However, although NDRC used the Rule of Reason to evaluate the competitive effects of abusive behaviors according to an assessment of the economic factors listed

in Article18 *PRC AML*, an analysis of whether there exists a connective link, and the relationship between each undertaking in question, are missing in its decision, as can be considered a significant condition and foundation for the application of this rule as previously emphasized.

4. Suggestions and Advice for the Application and Implementation of Rules on Collective Abuse

4.1 To Establish and Improve the Corresponding Guidelines

As mentioned above, from a legislative perspective, the provisions covering Collective Abuse in the *PRC AML* are based rationally upon competition theory. How to establish a practical standard and other means for applying this concept, and making incremental improvements thereon, is another level of question. Based upon the character of the Constitution in Law and Economics for Antitrust Law, it is suggested that detailed applicable standards and means for a competitive evaluation in enforcement regulations or antitrust guidelines, be issued by governments rather than promulgated in Antitrust Law. More specifically, we may also draw lessons from the relevant approaches to assessment, and the standard of proof applied for such conduct, from the perspective of horizontal antitrust agreements, since the relationship between/among multiple undertakings in Collective Abuse case is, to some extent, similar to that between/among multiple parties in the case of concerted conduct (Cartels).[16]

4.2Competitive Legal Risks for Enterprises at Present

Although it is the first and only time to apply the rule of Collective Abuse by Chinese enforcement authority in the cases above issued by NDRC after the effectiveness and implementation of the PRC AML in 2008, enterprises in China should be still remain conscious of the prescient need to avoid relevant legal risks in antitrust area.

Due to the provisions in the *PRC AML*, cases investigated by NDRC and the potential for the reapplication of these rules in the future, full consideration and monitoring of the relevant legal risks should be an indispensible part of every

[16] See Ning Du, Demonstration of the Standard of Proof for Concerted Conduct, Price: Theory & Practice, Vol.1, 2016.

company's compliance function. More specifically, if enterprises are involved in in oligopolistic markets, and the joint market share of multiple undertakings exceedsthe proportionsstipulated in Article 19 of the *PRC AML*for the relevant market, and the relevant undertakings all have a market share of more than 10%, those enterprises should act as soon as possible to avoid the corresponding behaviors listed in Article 17 of the *PRC AML*, such as for refusal to deal, exclusive dealing, and so forth. In practice, if your company is involved in an oligopolistic market where essentialtrading information may be easily transferredthrough a relatively transparent market mechanism,and even if there are no cooperative agreements at all between/among your company and your competitors, it remains pertinent to focus closely on the market share of your company in relation to those of your competitors. In addition, remainalert, seek toestablishappropriate firewalls to isolate sensitive information from the competition and never share the same distribution network with your competitors.