Research on Unilateral Practices

Abstract

Keyword(s): monopoly, unilateral practice, Fair Trade Law, tying, loyalty discount, bundled discounts, predatory pricing, equally efficient competitors

For a firm to obtain significant market power and business profits through efficient competition are not only acceptable under free-market economy, but also a mechanism for stimulating continuous competition necessary for the advancement of overall social welfare. However, it is also undeniable that a firm would have stronger incentive under this circumstance to use abusive unilateral practices to maintain or expand its market power. From both theoretical and practical perspectives, this project introduces and investigates how current competition law is applied to review tying arrangements and loyalty and bundled discounts. We then propose some policy suggestions based on the initial research results from this project. In sum, we suggest that the current analytical framework of the TFTC focuses unduly on the asymmetrical bargaining position between parties in a specific contractual relationship to determine the legality of those three types of unilateral practice. In contrast, a more appropriate reviewing standard would be to evaluate their market impacts by incorporating and considering market-structure factors such as market power within the relevant market, entry barriers, price-cost relationship, and the excluded competitors' ability to compete more or equally efficiently.

More specifically for discount cases, we suggest in this project the following reviewing criteria:

1. Market power test.

Under this test, the enforcement agency could review whether the discounters have dominant position in the relevant markets, whether they are the indispensable trading counterparts for downstream firms, whether similar discount strategies could be adopted by competitors, whether the strategies have in effect foreclosed a substantial part of the market, and the possibilities of recouping predatory losses.

2. Cost test.

Under this test, the agency could review whether competitors could secure sufficient products to meet competition, whether they are forced to adopt below-cost pricing to attract customers from firms practicing discount strategies, whether the discounters are pricing below their costs, whether the imputed prices for individual products in bundled packages are below their costs, and whether the competitors are still unable to attract sufficient customers given that the package prices are above their costs.

3. Efficiency test

Under this test, the agency should review whether the competitors are relatively inefficient firms in the markets and whether the discounts are simply feedbacks to consumers from discounters' efficient gains.

4. Entry test

The agency should examine whether there are high entry barriers in the market to prevent potential competitors from competing with the incumbents.

5. Discount schemes test

Under this test, the agency should review whether the discounters are offering same discounts to purchasers with different amounts purchased or are offering different discounts to buyers who purchase the same amounts of the discounted products. Also, the agency might examine whether the thresholds for discounts are set based upon the consideration of quantities of purchase within a specific period of time in the past. Equally important is the evaluation of whether the discount schemes have resulted in discriminatory treatment and led to unfair competition. Finally, the agency should evaluate whether the quantities for discounts are calculated on all the products included in the scheme, whether the thresholds have been set so high that they in effect are equivalent to the total expected demands of the purchasers, whether smaller buyers would be disadvantaged by higher average costs due to lower purchased quantities.