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How does China Prohibit the Abuse of Market Dominance? A Comparative Analysis with the US and EU Approaches

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How does China Prohibit the Abuse of Market Dominance? A Comparative Analysis with the US and EU Approaches

Peicheng Wu*

Abstract: Section 2 of the US Sherman Act forbids monopolisation and attempted monopolisation. The US now holds a Chicago School attitude towards Section 2 of the Sherman Act, relying on an effects-based approach. By contrast, Article 102 of the TFEU proscribes the abuse of market dominance affected by Ordoliberalism. The modern EU abuse of dominance law experiences a probable game-changer from the form-based approach to the effects-based approach. China's Anti-Monopoly Law also regulates the abuse of dominance, the framework and provisions of which are analogous to those of the EU law. However, the US approach has influenced the enforcement of China's Anti-Monopoly Law in many ways. The attitudes towards whether a form- or effects-based approach prevails were different before and after the Qihoo case in China. Influenced by both the US and EU approaches, this paper presents the current ways in which Chinese courts and competition agencies cope with abuse of dominance cases.

Keywords: Abuse of Market Dominance; Monopolisation; US; EU; China

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1 Introduction

The abuse of market dominance is one of the three anti-competitive practices prohibited in modern competition law. Although whether there is an international norm of competition law remains a tricky question, antitrust laws, as Fox argued, substantially diverge in the area of monopolisation/abuse of dominance.[1] The United States ('US') and the European Union ('EU') are the two primary competition law jurisdictions that have majorly influenced the enforcement of competition law in many countries. Indeed, the US antitrust community usually considers its antitrust policy as the best in the world. The EU, whose member states are almost all civil law jurisdictions, has also successfully incorporated its competition law framework into many jurisdictions, particularly those with codified law traditions. China enacted its competition law – Anti-Monopoly Law ('AML') in 2007. As a jurisdiction with civil law traditions, the law of the abuse of dominance in China was strongly influenced by the EU competition law. Meanwhile, due to a close economic relationship between China and the US, the US-style rationale also affects the enforcement of China's AML, including the implementation of the law of abuse of dominance. As a consequence, this paper examines how China prohibits the abuse of market dominance through the AML, at the same time comparing it with the US and EU approaches.

This paper is divided into three parts which discuss the US antitrust law, the EU competition law and China's AML, respectively. Firstly, it discusses how the US Sherman Act treats cases of monopolisation and attempted monopolisation (section 2 of Sherman Act). This part first of all examines the changing philosophies (such as Harvard School, Chicago School and Post-Chicago School) that impacted the enforcement of the US antitrust law after the Second World War. It then analyses how US regulators and courts apply section 2 of the Sherman Act in practice, mostly guided by Chicago School, which represents the current dominant antitrust thinking. Secondly, this paper examines the application of article 102 of the TFEU in Europe. This part begins with the assessment of German Ordoliberalism, a legal theory affecting the establishment and application of article 102 of the EU competition law. It then evaluates conditions of the application of article 102 in specific cases. This part also sheds light on a probable game-changer in moving from the traditional form-based approach to the US-style effects-based approach in the application of article 102. Subsequently, this paper reviews the Chinese legal practices in regard to the AML. The first part of this section provides the conditions for determining the abuse of dominance in the anti-monopoly law. Next, this part introduces a landmark case – *Qihoo v. Tencent* – which exemplifies the application of competition law in the cases of abuse of dominance. The attitudes towards whether a form- or effects-based approach prevails were different before and after this landmark case. This part also scrutinises the application of the abuse of dominance in China after the *Qihoo v. Tencent* case. A conclusion is presented at the end.

2 The US approach to prohibiting completed and attempted monopolisation

Section 2 of the US Sherman Antitrust Act is one of the earliest statutory provisions prohibiting unilateral anti-competitive conduct all over the world. However, Section 2 of the Act is a general prohibition, leaving interpretations of the wording to courts. Economic theories play an essential role when US courts handle antitrust cases. Thus, changes to economic theories in the antitrust field often trigger different approaches to antitrust cases. Hence, this section first analyses various economic theories in the US which may affect the application of the Sherman Act.[2] It then concentrates on the current approach to the application of Section 2 prohibiting monopolisation and attempted monopolisation in certain cases.

1 Eleanor Fox, 'Should China's Competition Model be Exported?: A Reply to Wendy Ng' (2019) 30 (4) European Journal of International Law 1431, 1432.

2 Professor Deborah Healey summarised US theories of Harvard School, Chicago School and Post-Chicago School when discussing the goals of competition law. The following analysis draws significantly on Healey's article. See Deborah Healey, 'The Ambit of Competition Law: Comments on its Goals' in Deborah Healey, Michael Jacobs and Rhonda L. Smith (eds), *Research Handbook on Models and Methods of Competition Law* (EE 2020) 12-37.

2.1 Philosophies of unilateral anticompetitive practices in the US

2.1.1 Harvard School

As noted by the antitrust academia, the Sherman Act was merely aimed at combatting industrial trusts, high concentration and abuses of market power, and maintaining an open market in the enactment of the Act in 1890.[3] It regulated industrialists who were 'building business empires at the expense of farmers, buyers and other small players and were undermining the vision of the social good'.[4] However, the approach to antitrust thinking has always been closely tied to the prevailing economic theory in the US.

By the middle of the twentieth century (after the Second World War), the Harvard structuralist School of thought dominated antitrust thinking in the US. Initially, Harvard University scholars, like Edward Mason[5] and Joe Bain[6], introduced the Structure –Conduct – Performance (S-C-P) paradigm. They were of the opinion that the structure of a certain market influences an undertaking's conduct, which, in turn, determines a firm's market performance (such as efficiency and technical progress).[7] Under such an assumption, Harvard economists argued that a highly concentrated structure will result in poor market performance, reduced output and extremely high prices.[8] In summary, market structure regulation was the core element of antitrust law. Secondly, John Clark argued that Harvard School should seek for 'the closest available working approximation' to perfect competition, defined as 'workable competition'.[9] Additionally, Bain, in his influential book, attached much importance to barriers to entry and claimed that barriers for new undertakings can be easily controlled by dominant firms.[10]

In the 1950s and 1960s, antitrust authorities and then the US Supreme Court (Warren Court) were convinced by the Harvard structuralist School. As a result, the court tended to take an interventionist antitrust approach and preferred structural rather than behavioural remedies.

2.1.2 Chicago School

Economists and lawyers at the University of Chicago (known as Chicago School) criticised Harvard School severely due to its overregulation. Demsetz distrusted the 'S-C-P' paradigm because the market structure can change rapidly as a more efficient firm tends to become large.[11] In contrast to Warren Court, which held that antitrust policy can foster fairness and equity goals, Richard Posner argued that the sole objective of competition law should be to promote economic efficiency.[12] Chicagoans also believed that enterprises in the market are rational profit-maximisers and the market can be self-corrected without government intervention.[13] To summarise, Chicago School follows a kind of laissez-faire-oriented thinking.

3 See Eleanor Fox, 'Against Goals' (2013) 81 (5) Fordham Law Review 2157, 2157

4 Eleanor Fox and Deborah Healey, 'When the State Harms Competition – The Role for Competition Law' (2013) 79 (3) Antitrust Law Journal 769, 769.

5 Edward Mason, *Economic Concentration and the Monopoly Problem* (Atheneum, 1964).

6 Joe Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (HUP 1956).

7 Deborah Healey, 'The Ambit of Competition Law: Comments on its Goals' in Deborah Healey, Michael Jacobs and Rhonda L. Smith (eds) *Research Handbook on Models and Methods of Competition Law* (EE 2020) 12-37.

8 Ibid.

9 John M. Clark, 'Toward a Concept of Workable Competition' (1940) 30 (2) The American Economic Review 241.

10 Joe Bain, *Barriers to new competition: The character and consequences in manufacturing industries* (HUP 1956) 1-42, 114-143.

11 Harold Demsetz, 'Industry Structure, Market Rivalry, and Public Policy' (1973) 16 (1) The Journal of Law and Economics 1, 1.

12 Deborah Healey, 'The Ambit of Competition Law: Comments on its Goals' in Deborah Healey, Michael Jacobs and Rhonda L. Smith (eds), *Research Handbook on Models and Methods of Competition Law* (EE 2020) 12-37.

13 Herbert Hovenkamp, 'The Harvard and Chicago Schools and the Dominant Firm' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP 2008) 110.

In the view of the Chicagoans, antitrust law (or policy) 'became a branch of economics'.[14] It uses the consumer welfare standard in assessing anti-competitive effects. Since the 1980s, US antitrust regulators and courts have gradually departed from Harvard School and have embraced Chicago School, moving to a so-called 'law-and-economics' movement. They found that Chicago School's exclusive aim to enhance economic efficiency was rather more measurable in practice. The standard for determining an anti-competitive practice was to assess whether such a practice could reduce output and raise prices. As a consequence of Chicago School of thought dominating the antitrust enforcement, the US nowadays attaches little importance to most forms of anti-competitive conduct other than cartels. For example, as Gerber noted, the US antitrust community disparages the system of abuse of market dominance owing to its vast restrictiveness on trade.[15]

2.1.3 Is Chicago School perfect?

Many critics believe that Chicago School consumer welfare approach is not perfect. Dworkin even criticised Posner (the US leading figure of the economics analysis of law) for promoting purely 'protestant' political values, questioning Chicago School: 'Is wealth a value?'[16] Others, often called Post-Chicago School, were more sceptical about the market itself and the self-correction function of market failures. In practice, markets do not self-correct rapidly, and so firms could illegally exploit market imperfections to generate inefficiency even in a competitive market. However, Post-Chicagoans only put forward questions but do not provide any reliable answers. Therefore, their approach is of limited practical utility.[17]

More recently, with the development of new economies, advocates of what is regarded as 'Populist Antitrust', 'Hipster Antitrust' and 'New Brandies' School have also been critical of Chicago economists. Their focus is on the market structure and they doubt the narrowness of consumer welfare standard. The consumer welfare standard itself, as Eleanor Fox stated, is not a unified theory. She also questioned whether it really exists ('There is no such thing.').[18] Josef Drexl also believed that the consumer-welfare approach relies on 'collective' consumer interests but ignores the fact that consumers may have colliding interests.[19]

Despite all the criticism levelled at Chicago School, it still dominates the US antitrust enforcement. In fact, recent discussions in the US primarily concentrate on the most appropriate efficiency and welfare standards.

2.2 Section 2 of the Sherman Act: monopolisation and attempted monopolisation

From the wording of Section 2, the Sherman Act condemns monopolisation, attempts at monopolisation and conspiracy of monopolisation.[20] Nonetheless, the US antitrust community agrees that prohibition of conspiracy has 'never enjoyed the distinctive status held by monopolisation and attempt'.[21] Accordingly, this Section will put emphasis on the established and attempted monopolisation.

2.2.1 Monopolisation

Monopolisation in Section 2 of the Sherman Act refers to active practices by a dominant firm in the relevant market that

14 Michael Jacobs, 'An Essay on the Normative Foundations of Antitrust Economics' (1995) 74 (1) North Carolina Law Review 219.
15 David Gerber, 'Comparative Competition Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019) 1169, 1175.
16 Ronald Dworkin, 'Is wealth a value?' (1980) 9 (2) The Journal of Legal Studies 191, 211-212.
17 Daniel Crane, 'Chicago, post-Chicago, and neo-Chicago' (2009) 76 (4) The University of Chicago Law Review 1911, 1911.
18 'Interview with Eleanor M Fox', *CPI Talks* (7 November 2019).
19 Josef Drexl, *Competition Policy and the Economic Approach: Foundations and Limitations* (EE 2011) 316.
20 Section 2 of the Sherman Act provides that 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…'
21 Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and Its Practice* (West Academic Publishing 2016) 378.

are worthy of condemnation. The provisions of Section 2 are rather general prohibitions; therefore, it is the court's obligation to interpret the elements constituting a monopolisation. The US Supreme Court once held a 'no fault' approach when Harvard School prevailed, claiming in *Griffith* that monopoly power itself constitutes an evil stance.[22] After the 1960s, the US Supreme Court changed its position in *Grinnell.* Hovenkamp points out that a defendant's conduct falls into the scope of monopolisation if the defendant (1) has 'monopoly power' and (2) has exercised the power.[23] Such exercise of market power is also defined as 'exclusionary' conduct.

Merely having monopoly power is lawful. Hovenkamp argues that the existing US case has set a standard of banned exclusionary practices as those that '(1) are reasonably able to generate, increase and maintain substantial market power by deterring competitors; and (2) either (2a) are not beneficial to consumers at all, or (2b) are needless for the particular consumer benefits claimed for them, or (2c) lead to disproportionate losses to any resulting advantages.'[24] These criteria imply that the assessment of a completed monopolisation is based on its economic impacts on consumers. Some commentators have also suggested a so-called 'sliding approach' to define the relationship between monopoly power and exclusionary conduct.[25] That is, a company with greater market power is more likely to take advantage of relatively minor behaviours to restrict competition and vice versa. This approach makes sense because a firm with little market power can exclude its rivals from the market via misuse of government processes (e.g. bad faith patent litigations).

2.2.2 Attempted Monopolisation

Aside from substantive monopolisation, Section 2 also forbids attempted monopolisation, which is unusual in civil law jurisdictions. Based on Justice Holmes's judgement in *Swift & Co.*,[26] it is now generally accepted that a plaintiff should prove the following elements for an attempted breach: (1) specific intent to control prices or eliminate competition;[27] (2) anti-competitive practices in pursuit of illegal objectives; and (3) a dangerous probability of success.[28] It should be noted that the conditions of an attempted breach should be stricter than those of substantive monopolisation; otherwise any unfair business practices could fall within the scope of attempt. As a result, some limitations are necessary in the application of the attempt statue. For example, most courts are of the view that the intent of merely vanquishing rivals does not suffice and that the intent to accomplish monopoly power should be involved.[29] Furthermore, the premise of successfully proving the existence of 'a dangerous probability of success' is to define a relevant market and assess the market power.[30]

3 Lessons from the EU competition law

3.1 Philosophy affecting the EU law of the abuse of dominance

3.1.1 An overview of Ordoliberalism

In the EU, Ordoliberal thinking is the predominant philosophy that guides the establishment and application of law prohibiting the abuse of market dominance. As Möschel argued, Ordoliberal thinking supported an 'economic constitution' where competition and economic freedom are incorporated into the law, so that there is neither unconstrained private power nor destructive government power (e.g. Hitler) in the market.[31] The Ordoliberal School stems from German

22 United States v. Griffith, 334 U.S. 100 (1948).
23 Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and Its Practice* (West Academic Publishing 2016) 355.
24 Ibid 356.
25 Ibid 359.
26 Swift & Co. v. United States, 196 U.S. 375 (1905).
27 While the Supreme Court in *Aspen* claimed that the intent is relevant to both attempted and completed monopolisation, most case law upheld that a monopolisation breach does not require the intent.
28 Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and Its Practice* (West Academic Publishing 2016) 370.
29 See for example 668 F. 2d 1014 – William Inglis Sons Baking Co v. Itt Continental Baking Company Inc William.
30 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).
31 Wernhard Möschel, 'Competition policy from an Ordo point of view' in Alan Peackok and Hans Willgerodt (eds), *German neo-liberals and the social market economy* (Palgrave Macmillan 1989) 142.

economists and lawyers at the University of Freiburg during the Nazi occupation.[32] When European countries decided to become united after the 1950s, ordoliberalism was introduced in the theoretical foundations of the EU, particularly in competition law and policy. In Möschel's view, competition law is aimed at protecting the competitive process (freedom of competition), instead of caring for economic results of practices.[33] In contrast to Chicago School, Böhm, one of founders of Ordoliberism, argued that competition law is a branch of law, not economics.[34] As stated by Drexl, many competitor lawyers and courts adhere to the Ordoliberal thinking today, particularly in the German-speaking world.[35]

3.1.2 Ordoliberalism and the abuse of market dominance

The Ordoliberal thinking, especially the concept of the freedom of competition, affects the doctrine of the abuse of market dominance in the EU. In Hoppmann's opinion, competition law only condemns forms of practices that substantially limit freedom of competition by fostering unreasonable market power.[36] Eucken divided illegal abusive practices into exclusionary practices (such as predatory pricing) and exploitative practices (such as excessive pricing).[37] Ordoliberals view competition as a dynamic process in which the producers can decide what to produce on their own and consumers have the chance to choose between products. Also in line with Mestmäcker's approach, a dominant firm should not perform practices that are only likely because of its market dominance.[38]

The Court of Justice of the European Union (CJEU) included ordoliberal thinking in its interpretations on Article 102 of TFEU (former Article 86 of Rome Treaty and Article 82 of EC Treaty), which prohibits the abuse of a dominant position, and developed a legal theory – the 'special responsibility' of a dominant firm. As is clearly stated in Article 3(3) TFEU, one of the aims of establishing the EU is to achieve an 'internal market'. The 'internal market' is further interpreted as 'a system ensuring that competition is not distorted.' Behrens argues that this approach in TFEU reflects the ordoliberal approach to competition.[39] The CJEU then affirmed in the *Michelin* case[40] that a dominant firm 'has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.' This means that it is necessary to impose an obligation on dominant firms to act 'as if' they were in a complete competition scenario.[41]

3.2 Article 102 TFEU: prohibition of the abuse of a dominant position

Article 102 forbids a firm from abusing its dominant position. However, TFEU does not provide any further explanations on relevant essential components, such as the criteria for dominance and what constitutes an abuse. It has to be noted that although this provision provides a list of certain prohibited acts, the list is by no means exhaustive, offering merely examples.[42] Compared with Article 101 (3) which provides an exemption for concerted agreements, there have been no statutory defences under article 102. Notwithstanding, the CJEU shaped the law allowing a dominant firm to justify its practice in two conditions by claiming that: (1) the practice is 'objectively justified' and (2) the efficiency-enhancing effects can overweigh anti-competitive effects.[43] The party alleging an infringement of article 102 will satisfy

32 The leading representatives of the Ordoliberals were Walter Eucken, Franz Böhm and Hans Grossmann-Doerth. See Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (OUP 2019) 27-28.

33 Quoting: 方小敏 [Fang Xiaomin], 《竞争法视野中的欧洲法律统一》 [Unifications of European Laws from the Perspective of Competition Law] (中国大百科全书出版社,2010) [Encyclopedia of China Publishing House, 2010] 185.

34 Franz Böhm, 'Das Problem der privaten Macht' (1928) Ein Beitrag zur Monopolfrage 324-345.

35 Josef Drexl, *Competition Policy and the Economic Approach: Foundations and Limitations* (EE 2011) 325-326.

36 E. Hoppmann, 'Das Konzept der optimalen Wettbewerbsintensitat' (1966) Jahrbücher für Nationalökonomie und Statistik 286.

37 Eucken Walter, 'Die Wettbewerbsordnung und ihre Verwirklichung' (1949) 2 Ordo, Jahrbuch für die Ordnung von Wirtschaft uns Gesellschaft.

38 Heike Schweitzer, 'The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC' in Dieter Ehlermann and Mal Marquis (eds), *European Competition Law Annual 2007: A reformed approach to Article 82 EC* (OUP-Hart 2008) 139-140.

39 Peter Behrens, 'The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU' in Fabiana Di Porto, Rupprecht Podszun and Heinrich Heine (eds), *Abusive Practices in Competition Law* (EE 2018) 10.

40 *NV Nederlandsche Banden-Industrie Michelin v Commission* (Case 322/81) [1983] ECR 3461, para. 57.

41 Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010) 45-47.

42 Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (OUP 2019), 279.

43 C-209/10 Post Danmark AS v. Konkurrenceradet [2012]. It is observed that the second justification (efficiency defence) has always been rejected. See Gianluca Faella, 'The Efficient Abuse: Reflections on the EU, Italian and UK Experience' (2016) 2 (1) Competition Law and Policy Debate 33.

the following requirements: (a) the parties are undertakings; (b) the alleged party has market dominance (in the relevant market); (c) the dominant position must be held within the internal market or a substantial part of it; (d) there are abuses; and (e) the abuse has an effect on inter-State trade.[44] As Gormsen points out, while article 102 has never been changed since the times of the Rome Treaty, the EU legal environment alters rapidly. The Treaty is a 'living instrument' which depends on courts to further shape the provisions.[45]

3.3 Has the EU accepted an effects-based approach?

3.3.1 Introducing an effects-based approach to article 102

Case law of EU courts has shown the preference for a formalistic approach in terms of Article 102 instead of assessing actual economic effects. However, there has been a continuous 'modernisation' of EU competition law since the 1990s. The modernisation efforts in Europe have been largely influenced by the law-and-economics movement and Chicago School which sees efficiency-enhancing as the exclusive goal of competition law on the other side of the Atlantic. Gerber noted that in the EU, a question still remains as to whether the effects-based approach can apply to the law prohibiting the abuse of dominance (Article 102).

The EU Commission is the main driving force to include the effects-based approach in the interpretation of article 102. In 2005, the Directorate-General (DG) for Competition of the Commission released a Discussion Paper which stated that enhancing consumer welfare is the ultimate goal of article 82 of the EC Treaty (now Article 102 TFEU).[46] The Discussion Paper was an informal document of the Commission for public discussions. In 2009, the EU Commission issued a Guidance Paper concerning the unilateral exclusionary conduct assessment.[47] The Guidance Paper adopted a more economic approach rather than a mere form-based approach.[48] According to the Guidance Paper, the Commission will accept the 'as efficient competitor-test' (AEC-test) to determine if the competitors are prevented from entering the market because they are less efficient than the dominant firm.[49] The EU Commission has suggested its formal position that it will not investigate those practices that do no direct harm to consumers.

3.3.2 Hesitant attitudes towards an effects-based approach

Despite the Guidance Paper that clearly announces an economic effects-based approach, there is a lot of criticism about the document as it may not comply with traditional Ordoliberalism. For example, Josef Drexl noted that objectives of article 102 TFEU encompass not only political goals but also non-political aims (economic and social ones).[50] Therefore, whether the Commission is justified to alter them to a pure economic-oriented objective remains doubtful.

Challenges are mostly from EU courts. The Guidance Paper does not belong to secondary legal sources. It is persuasive but not binding for any institutions or member states. Witt noted that established case law of EU courts condemns abusive practices that not only directly harm consumers but are detrimental to effective competition structure.[51] The EU courts reveal more conservative tendencies to depart from their own established jurisprudence. For example, the Court

44 Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (OUP 2019), 280.
45 Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (CUP 2010) 11.
46 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses para 4 (Web Page) <https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed 11 December 2021
47 Commission Communication (EC) of 24 February 2009 on Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45.
48 Anne Witt, 'The Commission's Guidance Paper on Abusive Exclusionary Conduct-More Radical than it Appears?' (2010) 35 (2) European Law Review 214.
49 Peter Behrens, 'The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU' in Fabiana Di Porto, Rupprecht Podszun and Heinrich Heine (eds), *Abusive Practices in Competition Law* (EE 2018) 15.
50 Josef Drexl, *Competition Policy and the Economic Approach: Foundations and Limitations* (EE 2011) 316.
51 Anne Witt, 'The Commission's Guidance Paper on Abusive Exclusionary Conduct-More Radical Than It Appears?' (2010) 35 (2) European Law Review 214, 223.

also stressed in the *Deutsche Telekom* case that 'equality of opportunity was not observed on the relevant market and, therefore, that a system of undistorted competition was not assured'.[52] However, in the recent *Intel* case,[53] the CJEU approved the Commission's AEC-test and claimed that enterprises have no obligations to protect less efficient competitors from leaving the market.[54]

Despite these controversies, the effects-based approach has more or less influenced the application of Article 102 TFEU, and it is unlikely to discuss the abuse of market dominance in the EU without reference to the Guidance Paper.

4 China's approach influenced by the US and EU law

4.1 Provisions of abuse of market dominance in the Anti-Monopoly Law

When China decided to implement the 'reform and opening-up' policy in the 1980s, many economic-related laws, including competition rules on the abuse of market dominance, were transplanted from Continental Europe.[55] In 2007, in order to address anti-competitive concerns, China enacted the AML[56], chapter 3 of which regulates prohibited unilateral conduct.

The structure of the AML is similar to that of article 102 TFEU in terms of unilateral practices. The AML states in the 'General Principles' that it prohibits an undertaking from abusing a dominant market position.[57] More specifically, chapter 3 of the AML specifies the framework which addresses the abuse of a dominant market position, with article 17 being the fundamental provision and both articles 18 and 19 further explaining some of the concepts. The AML defines a dominant market position (dominance) as the ability to control prices, quantities or any other trade conditions in the relevant market, or to obstruct market entry.[58] Inspired by the traditions of the EU competition law, article 17 of the AML also provides an inclusive list of prohibited conduct with a catch-all provision. Most Chinese competition law scholars agree that market dominance itself is not illegal in the market. However, it is difficult or even impossible for an undertaking to attain market power through illegal conduct if competition rules work well. As a consequence, a dominant market position acquired in a competition rules-based market is basically legal.[59] According to article 17, a court or competition agency ought to identify a company abusing market dominance if (1) the company employs market dominance in the relevant market and (2) the company has abused such dominance to restrict competition. Also listed in this article are six detailed abusive practices, which are divided into exploitative and exclusionary conduct. It is worth noting that the US Sherman Act does not prohibit exploitative abuses, such as excessive pricing, because US academia believes that monopoly profits can entice new entrants into a market, and thereby make competitive pricing possible.[60] Nevertheless, Wang (Xiaoye) claims that the Chinese are highly reluctant to accept excessively high prices and unfair trading conditions, which makes the prohibition of exploitative abuses in China very popular.[61] In addition to the listed behaviours,

52 *Deutsche Telekom AG v. European Commission* (C-280/08) [2010] ECR 09555, para. 240.
53 *Intel Corporation Inc v European Commission* (Case- C-413/14 P), ECLI:EU:C:2017:632
54 Despite this, it is still too early to conclude that the ECJ has abandoned its form-based approach because it also clarified that the test can be applied only 'in the cases where the undertaking concerned submits [...], on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects'.
55 Liyang Hou, 'The Influence of EU and US Legal Theory on Competition Law in China: Divergence and Convergence' (March 30 2015) <https://ssrn.com/abstract=2586859> accessed 11 December 2021
56 Competition law has different names in various jurisdictions. For instance, it is called antitrust law in the US, competition law in the EU and anti-monopoly law in China. In some other countries, such as France, competition rules are in the commercial code. China's AML was promulgated in 2007 and has been in effect since 1 August 2008.
57 Article 6 of the AML.
58 Article 17 of the AML.
59 王晓晔 [Wang Xiaoye], 《反垄断法》 [Chinese Anti-Monopoly Law] (法律出版社2011) [Law Press China 2011] 192-193.
60 Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and Its Practice* (West Academic Publishing 2016) 355-356.
61 王晓晔 [Wang Xiaoye], '禁止滥用市场支配地位' [Prohibition of the Abuse of Market Dominance] (2008) 1 《中国商界》 [Business China] 27.

the catch-all provision of article 17 authorises the Chinese competition agency[62] to identify other abusive practices. The Chinese competition agency has successfully utilised the catch-all provision to prohibit abusive behaviours other than the listed ones. For instance, in the *Tetra Pak* case, the SAIC declared certain kinds of loyalty rebates as a type of abusive practices,[63] although literally speaking the AML does not prohibit royalty rebates.

The precondition for determining the abuse of dominance is that the undertaking has to be dominant in a relevant market. Therefore, articles 18 and 19 are concerned with how to determine a dominant market position under the AML. A distinction between the EU competition law and the AML is that article 19 contains presumptive thresholds for dominance based on market shares, whereas the TFEU does not.[64] This is because the AML makes a reference to the German Act against Restrains of Competition (ARC) in its enactment.[65] The AML also allows the alleged dominant undertaking to rebut the market share presumption by other evidence. The lawmakers of the AML explained that the reason for such a presumption is to achieve legal certainty.[66] However, Wang (Xianlin) claims that market share sometimes is not reliable because other elements like barrier to market entry or product substitution could be decisive in certain cases.[67] Likewise, the SPC held in the *Qihoo v. Tencent* case[68] and reiterated in the *Xu Shuqing v. Tencent*[69] case that market share is a relatively crude and potentially misleading indicator for evaluating dominance, particularly in the internet-based sector.

4.2 Enforcement of the AML in China: Qihoo v. Tencent as a landmark case

The most controversial issue when dealing with cases of the abuse of dominance in China, which is almost the same as that in the EU, is determining whether unilateral conduct assessment is form-based or effects-based. The AML does not state positively whether an economic anti-competitive effect is essential, particularly for those unilateral practices that are already listed. Emch's research shows that, before 2014, neither competition agencies nor courts considered the evidence of anti-competitive effects a requirement.[70] Nevertheless, a Shanghai local court ruled in *Tonghua v. China* Mobile that by interpreting article 6 of the AML, only those practices that had the consequence of eliminating or restricting competition are prohibited.[71]

62 After the AML came into effect in 2008, there were three competition agencies in China at the central government stage. The Ministry of Commerce was responsible for merger control. The National Development and Reform Commission (NDRC) investigated monopoly agreements and the abuse of dominance which was related to prices. The State Administration for Industry and Commerce (SAIC) took responsibility for other anti-competitive practices. However, the public enforcement of the AML is the accountability of the State Administration for Market Regulation (SAMR) when China reformed the institutions in 2018. That is, there is only one competition agency (SAMR) in China now at the central government stage.

63 Xiao Fu and Guofu Tan, 'Abuse of market dominance under China's Anti-monopoly Law: The case of Tetra Pak' (2019) 54 (2) Review of Industrial Organization 409, 409.

64 Dominance is presumed in article 19 where: the relevant market share of one company consists of one half or more of the relevant market; the joint market share of two companies as a whole accounts for two thirds or more in the relevant market; or the aggregate market share of three companies as a whole accounts for three quarters or more of the relevant market.

65 The German ARC presumes a company with more than 40% market share in a relevant market as a dominant undertaking. See Marco Hartmann- Rüppel, 'Germany' in Pranvera Këllezi, Bruce Kilpatrick and Pierre Kobel (eds) *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How* (Springer, 2017) 109-120, 119.

66 曹康泰[Cao Kangtai], 关于《中华人民共和国反垄断法（草案）》的说明 [Statement on the Anti-Monopoly Law (Draft)], available at: http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm

67 王先林 [Wang Xianlin], 《竞争法学》[Chinese Competition Law] (中国人民大学出版社,2018) [Press of Renmin University of China 2018] 243.

68 《北京奇虎科技有限公司诉腾讯科技（深圳）有限公司、深圳市腾讯计算机系统有限公司滥用市场支配地位纠纷案》[Beijing Qihoo Technology v Shenzhen Tencent Technology – Abuse of Market Dominance Case], 最高人民法院 [Supreme People's Court], 2013民三终字第4号[Economic Judgement No 3], 8 October 2014.

69 《徐书青诉深圳市腾讯计算机系统有限公司滥用市场支配地位纠纷案》[Xushuqing v Shenzhen Tencent Technology – Abuse of Market Dominance Case], 最高人民法院 [Supreme People's Court], (2017) 最高法民申4955号 [SPC Economic Judgement No 4955], 14 September 2018.

70 Adrian Emch, 'Effects Analysis in Abuse of Dominance Cases in China – Is Qihoo 360 v. Tencent a Game-Changer' (2016) 12 Competition L. Int'l 11, 12.

71 《童华与中国移动通信集团上海有限公司滥用市场支配地位纠纷案》[Tonghua v. China Mobile (Shanghai) – Abuse of Mar-

In 2014, the SPC, China's supreme court, finally faced these problems in its first case regarding the abuse of market dominance – *Qihoo v. Tencent*.[72] The case is quite influential not only because it was adjudicated directly by the SPC but also because it is a Guiding Case (No. 78)[73], which makes the judgement binding for lower courts. The facts and ruling were as follows:[74]

Qihoo (the plaintiff) was the market leader in the area of security software in China. 'QQ' was the flagship product of Tencent (the defendant) intended to offer an instant messaging (IM) service. Tencent sent a public letter to its users on 3 November 2010, requesting them to stop running QQ on computers which had Qihoo's 360 (security software) installed. Just a day later, Qihoo announced that the two software applications were compatible with each other. In September 2010, Tencent offered QQ IM software and QQ Software Management as an online package without prompt notice to its users. Tencent then issued a notice that the current version of QQ Software Management and its security software, QQ Doctor, would be automatically updated to QQ Computer Housekeeper. Therefore, Qihoo filed a lawsuit against Tencent for the abuse of market dominance constituting exclusive dealing[75] and tying. The SPC dismissed the case by upholding that Tencent did not hold a dominant market position in the relevant market, and its practices did not impede competition.

The SPC highlighted and analysed the effects of practices in this judgement. The court clarified that it is essential to assess the potential positive and adverse effects of alleged unilateral conduct on consumers and competition when determining whether the practice of a dominant firm is prohibited. For example, when the SPC judged whether Tencent's 'from-two-choose-one' policy constituted an abuse of dominance, the court emphasised the effects on consumer welfare, competition as such and the intention of Tencent. The court pointed out that the AML does not care about the interests of certain undertakings but checks whether healthy competition framework is distorted or deterred. What's more, the SPC affirmed that a dominant firm can justify its behaviour, with justifications being distinct from the requirement of economic effects. The AML, nonetheless, does not provide an exemption clause for prohibited unilateral conduct as article 15 provides for monopoly agreements.[76] Wang (Xianlin) argues that a justification provision for the abuse of dominance is necessary as it can help maintain interest balance between a dominant firm and other competitors. He also believes that justification requirements can be inferred from article 17, which says only that if the accused party has no legal justifications, abuse can be identified.[77] It is obvious that this was the argument that the SPC adopted in the Qihoo case. The court further ruled that the burden of proof rests with the plaintiff proving the anti-competitive effects of the alleged conduct and the accused dominant party justifying its behaviour.

Another hotly debated issue that arose in the Qihoo case is whether a market definition is indispensable when assessing market dominance. Traditionally, Chinese courts would define a relevant market first in an abuse of dominance case.[78] The State Council's Guidelines on market definitions also posit that a market definition should be the first step of a competition agency when investigating the abuse of dominance cases.[79] However, the US scholars, particularly economists,

ket Dominance Case], 上海市第二中级人民法院 [Second Intermediate People's Court of Shanghai Municipality, PRC], (2014)沪二中民五(知)初字第59号 [Economic No 59], 2 September 2014.

72 In fact, it is the first case with respect to anti-monopoly issues adjudicated by the SPC.

73 As a civil law jurisdiction, judicial cases in China, even though judged by the SPC, are not binding on other courts. However, Guiding Cases which are selected by the SPC have the legal binding effects on other courts. Article 7 of *Rules of the Supreme People's Court on Guiding Cases* provides that '[P]eople's courts of all levels shall carry out trials of similar cases with reference to the guiding cases issued by the Supreme People's Court.

74 World Intellectual Property Organization (WIPO) and SPC (2019) *WIPO Collection of Leading Judgments on Intellectual Property Rights: People's Republic of China (2011-2018)*, 113-121. WIPO: Geneva; SPC: Beijing.

75 Article 17 (4) which prohibits exclusive dealing is often referred to in China as the restrictive trade practice.

76 Article 15 of the AML provides some justifications for a horizonal or vertical monopoly agreement.

77 王先林 [Wang Xianlin], 《竞争法学》 [Chinese Competition Law] (中国人民大学出版社,2018) [Press of Renmin University of China, 2018] 247.

78 刘贵祥 [Liu Guixiang], '滥用市场支配地位的司法考量' [How can Courts Handle Cases of the Abuse of Market Dominance] (2016) 5中国法学 [China Legal Science] 260.

79 Article 2 of the Guidelines of the Anti-Monopoly Commission of the State Council on the Definition of a Relevant Market.

always argue that where 'direct' evidence of market power exists, market definition is unessential.[80] The US attitude influenced Chinese judges in the *Qihoo* case. Judge Zhu, one of the panel members in the *Qihoo* case, argued in his article that if market power can be inferred from the firms' behaviours, it is unnecessary to define what the relevant market is.[81] Therefore, in the *Qihoo* case, the SPC held that if there exists direct evidence to assess market power (dominance) and anti-competitive effects, market definition is not required (although the SPC defined the relevant markets in this case). Wang (Xiaoye) criticised this ruling as she believed that defining a relevant market is indispensable in cases of abuse of dominance unless the market is directly controlled by the government.[82] Arguably, there could be the so-called direct evidence that can reflect market power in the economic theory. Nevertheless, such direct evidence, which is mainly based on the presumption of a company pricing its product freely, is really hard to detect in legal practice. Neither the competition agency nor the plaintiff can calculate the marginal cost of a product precisely, making it difficult to determine whether the selling price is reasonable. Accordingly, this paper argues that market definition is still necessary in most abuse of dominance cases.

4.3 Post-Qihoo v. Tencent: effects-based approach

The SPC seems to provide a very definite answer that alleged behaviour should be analysed on the basis of its pro- and anti-competitive effects. After the *Qihoo* case, the SPC reiterated the effects-based approach in the *Xu Shuqing v. Tencent* case. Although these cases are civil competition cases, the attitude of China's supreme court does affect the competition agency in administrative procedure. In 2019, the SAMR issued an administrative order[83], article 21 of which states that the SAMR will consider the following four conditions when determining the abuse of market dominance: (1) the undertaking is dominating the market; (2) the undertaking has undertaken abusive practices; (3) the undertaking has no legitimate justifications; and (4) acts of the dominant firm have an effect of restricting competition. Accordingly, Chinese courts and competition agencies have now reached a consensus on the effects-based approach in cases of abuse of dominance after the landmark *Qihoo* case.

Controversies are still far from over. The SPC's ruling did not specify the benchmark for assessing anti-competitive effects.[84] Unlike Chicago School or the 'more economic approach' set out in the EU Guidance Paper, the SPC, in different cases, has concentrated on various effects, which are not limited to consumer welfare. For example, the SPC paid attention to consumer welfare, the intention of Tencent and competition as such in the *Qihoo* case, to the choice of consumers in a tying case (*Wu v. Shaanxi Broadcast & TV Network*),[85] and to other rivals as a whole in the *Yingding Corp. v. Sinopec Group* case.[86] These cases demonstrated the substance of the effects-based approach, and that the meaning of 'effects' in Chinese legal practices is different from (or at least not the same as) that favoured by the US and EU (Commission), but similar to what the CJEU holds now. Additionally, the available justifications enable the courts to focus on not just the economic efficiency in an abuse case. The SPC held in the *Xu Shuqing v. Tencent* case that if a refusal to deal is under the requirement of other laws (advertisement law), such conduct can be justified.[87] In the *Yingding Corp. v. Sinopec Group*

80 Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and Its Practice* (West Academic Publishing, Fifth edition., 2016) 358.

81 朱理 [Zhu Li], '互联网领域竞争行为的法律边界：挑战与司法回应' [Legal Boundaries of Competition in Internet Area: Challenges and Responses] (2015) 7 竞争政策研究 [Competition Policy Research] 17.

82 王晓晔 [Wang Xiaoye], '论相关市场界定在滥用行为案件中的地位和作用' [Functions of Market Definition in Cases of the Abuse of Market Dominance] (2018) 3 现代法学 [Modern Law Science] 65; 王先林 [Wang Xianlin], '3Q垄断纠纷案终审判决的行业意义与法律影响' [Meanings and Legal Effects of *Qihoo v. Tencent*] (2014) 11 《中国审判》 [China Trial] 79.

83 See Interim Provisions on Prohibition of the Abuse of Market Dominance. The administrative order is binding on the competition agency but not on the courts.

84 Emch, Adrian. "Effects Analysis in Abuse of Dominance Cases in China – Is Qihoo 360 v. Tencent a Game-Changer." Competition L. Int'l 12 (2016): 11, 24.

85 World Intellectual Property Organization (WIPO) and SPC (2019) *WIPO Collection of Leading Judgments on Intellectual Property Rights: People's Republic of China (2011-2018)*, 121-122. WIPO: Geneva; SPC: Beijing.

86 《云南盈鼎生物能源股份有限公司、中国石化销售有限公司云南石油分公司拒绝交易纠纷》 [Yunnan Ying Ding v. Sinopec Group – Refusal to Deal Dispute Case], 最高人民法院 [Supreme People's Court], (2017)最高法民申5063号 [Economic No 5063], 11 November 2019.

87 王先林，吴佩乘 [Wang Xianlin and Wu Peicheng], '滥用市场支配地位案例评析' [Assessment of Cases of the Abuse of Market Dominance in China] 《中国竞争法律与政策研究报告2018-2019年》 [Report on Competition Law and Policy of China 2018-2019].

case, the SPC affirmed that where the plaintiff only sent an invitation to offer, the dominant firm not having obligations to accept the invitation can be a justification for a refusal to a deal. Ding concluded that the justification clause for the abuse of dominance, which is not enacted clearly like article 15 for monopoly agreements, contains a broad sense of elements.[88] Arguably, the AML imported the framework of abuse of dominance from traditional EU competition law, yet the enforcement in China is now greatly affected by the US effects-based approach. However, considering that the social and political backgrounds of China do not support laissez-faire economics, it is quite difficult to imagine that China will accept the US Chicago School in its entirety. In view of these reasons, although enhancing efficiency and consumer welfare is what competition policy should pursue, the direct goal of competition law, at least in China, is to promote free competition and economic democracy.[89] In short, Chinese courts will continue to consider economic results as well as other potential effects on a case-by-case basis.

5 Conclusion

Today, many jurisdictions have their own laws against the abuse of market dominance. These laws may share some similarities but can vary in many different aspects. There is little doubt that the US and the EU are the two major competition law jurisdictions that have influenced competition frameworks in both developed and developing countries. On the other hand, China's codified competition law is relatively young as it was established in 2007.

The US community views antitrust law as a branch of economics. The Harvard School dominated the US antitrust thinking after the Second World War and adhered to market structure-based interventionism. The Chicago School, which was considered to be laissez-faire, criticised the Harvard Structuralist School. It posited that the exclusive goal of antitrust was to protect consumer welfare. Since the 1980s, Chicago School has gradually been following the dominant antitrust thinking. Nevertheless, the Chicago School is not perfect. Many of its critics argue that the assumptions of Chicago economists do not necessarily comply with the conditions of modern market, and that its consumer welfare standards are too narrow. Certainly, section 2 of the Sherman Act, which prohibits monopolisation and attempted monopolisation, is quite simple in terms of its wording. The interpretation of its application rests with the courts. The antitrust law does not prohibit the possession of market power, but it condemns the wilful acquisition or maintenance of such power, i.e. illegal exclusionary conduct. Influenced by the Chicago School, the assessment of whether an exclusionary practice is anti-competitive or not is only based on the impact of consumer welfare. In addition to monopolisation, the Sherman Act also prohibits attempted monopolisation. An attempted breach needs evidence of the specific intent to restrict competition, anti-competitive practices for illegal purposes, and a dangerous probability of success.

The EU competition law framework, in particular its provisions against the abuse of market dominance (article 102 of TFEU now), was substantially influenced by German Ordoliberal thinking. Ordoliberals believed that the competition process as such deserves protection. The EU courts, guided by Ordoliberal thinking, argued that the dominant firm in the market has a 'special responsibility'. Hence, it required a dominant firm not to pursue certain practices even if other non-dominant firms can engage in the same. By analogy to the US Sherman Act, Article 102 of TFEU does not condemn the dominant position but it condemns illegal abusive practices. It has to be noted that, with the invasion of US economic-oriented antitrust thinking, the EU is undertaking a reform in competition law of a more economic approach. Although the EU Commission published a Guidance Paper to express its effects-based attitude towards laws of abuse of market dominance, the EU courts are reluctant to depart from the existing case law. However, the adoption of the effects-based approach in laws against the abuse of dominance is an irreversible trend. The question is to what extent the EU courts will apply the effects-based approach, or in other words, whether the EU courts will recognize the protection of consumer welfare as the exclusive goal of article 102 as is the case in the US. Given the fact that the EU competition law is not shaped by economic thinking only, it is more likely that EU courts will take consumer welfare into consideration, but not only that.

88 丁茂中 [Ding Maozhong], '我国《反垄断法》的修订路径'[Analysis on Revisions of China's Anti-Monopoly Law] (2020) 5《法学》[Law Science] 139.

89 Professor Wang Xiaoye claimed this view in her preface to Professor Fang Xiaomin's book, in which Fang discussed the relationship between law and economics of competition law in Europe. See 方小敏[Fang Xiaomin],《竞争法视野中的欧洲法律统一》[Unifications of European Laws from the Perspective of Competition Law] (中国大百科全书出版社,2010) [Encyclopedia of China Publishing House, 2010] 2.

Laws against the abuse of dominance in China are a combination of the EU and US models. On the one hand, the AML framework has been inspired by the EU competition law, which is based on dominance. Provisions in the AML are more prescriptive than those in article 102 TFEU as they provide factors to be assessed in determining dominance, including a detailed market share presumption. On the other hand, since the SPC's ruling in the *Qihoo v. Tencent* case, there have been few debates in China that abuse must exhibit the effects of restricting competition. However, China's approach to the assessment of such effects considers elements other than consumer welfare. Since a defendant can justify its practices in many ways, Chinese courts will survey the effects of certain practices on consumer welfare, other competitors, and choices of consumers or competition as such, depending on the particular case. In spite of huge influences from the US antitrust law, it is believed that China will not accept the US-style consumer-welfare standard as the sole requirement for the examination of an anti-competitive practice, but will determine it on a case-by-case basis.