Issues concerning Excessive Pricing

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Identifying excessive pricing is the focus and a challenge in law enforcement

Basic principles in law enforcement

Factors to take into consideration in identifying excessive pricing
I. Identifying excessive pricing is the focus and a challenge in law enforcement
1. An overview of excessive pricing

1) Concept

Excessive pricing

- Exploitative excessive pricing
- Exclusionary excessive pricing

A dominant undertaking which charges excessive prices for its products.

A dominant undertaking which conducts business in both upstream and downstream industries and supplies input to both its own business and that of its competitors, however, the price it charges its competitors is much higher.
1. An overview of excessive pricing

2) Identifying excessive pricing is the focus and a challenge in law enforcement

Focus
Excessive pricing is a common issue found among dominant undertakings which significantly excludes and restricts competition.

Challenges
The rules and regulations within the Anti-Monopoly Law, especially the part that concerns the abuse of a dominant position in the market, are generally very complex. The provisions that address unfair excessive pricing are even more complicated. The main challenge is that the standard for excessive pricing can not be easily defined. It is more complex to define the standard for excessive pricing in the area of Intellectual Property Rights. Another challenge is how to evaluate the situation where innovators use intellectual properties to gain reasonable return.
2) Identifying excessive pricing is the focus and a challenge in law enforcement

Where is the limit for government action?
Freedom of pricing: Businesses' will be discouraged from investing and achieving innovation if anti-monopoly authorities interfere in the undertaking 's pricing process.

What price is considered excessive? How to reasonably identify excessive prices?
The determination of whether a price is 'too high' can be quite subjective. How to decide whether a price is excessive?
II. Basic principles of law enforcement
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There is a limit to law enforcement: The relevant authority shall not directly intervene in market pricing, it should determine whether the prices set by undertakings would make the market price unfair or unreasonable. Law enforcement should focus on regulating abuse instead of intervening in price levels.

Comprehensive analysis: Upholding the principle of competition effect analysis, behaviors damaging competition shall be the prerequisite for regulation. In areas concerning Standard Essential Patents and intellectual property rights, factors such as the value, innovative nature, contribution and term of validity of the patents shall be analysed. Alternatively, a comparative approach could be employed to determine whether the price set by the patent holder is excessive, discriminatory or has included unreasonable transaction conditions.
II. Basic principles of law enforcement

Article 11 of the *Provisions against Price Fixing* stipulates that the following factors should be taken into consideration in the determination of an 'excessive price':

1. whether the *selling price* or *buying price* is clearly higher than the price at which other business operators sell or buy the same commodities;

2. whether the selling price is increased or the buying price is lowered *beyond the normal range* when costs are basically stable;

3. whether the markup rate of the sold commodities is clearly higher than the growth rate of costs;

4. other relevant factors that need to be considered.
II. Basic principles of law enforcement

1. Compare flat prices
Determine whether the undertaking has set discriminatory prices by comparing the license fees Qualcomm set for downstream mobile phone manufacturers.

2. Analysis of anti-competition effects
In the process of setting the final license fee, has the undertaking included additional unreasonable conditions? Was the process completely fair and reasonable? E.g. combining SEP and non-SEP, free cross-licensing, charging for expired patents, etc.
III. Factors to take into consideration in identifying excessive pricing (SEP)
III. Factors to take into consideration in identifying excessive prices (SEP)

Factors to take into consideration when identifying excessive prices in SEPs include:

1. The calculation method of the license fee’s and patent's contribution to the product value;
2. The commitments the undertaking has made with regards to SEPs.
3. The licensing history of SEPs or comparable standards for license fees.
4. Whether expired or invalid SEP license fee shall be charged when providing combination of licenses.
III. Factors to take into consideration in identifying excessive prices (SEP)

5. Whether situations including the abuse of injunctions, threat with shortage of supply or other abnormal commercial agreements exist.
6. Whether cross licensing could be found between the licensors and licensees.
7. Whether situations of unfair excessive pricing including tie-in sales, requirements for free cross licensing or grand-back, adding non-challenging clauses or other unreasonable transaction conditions exist.
8. ......
Thank you!