

Day 2

EU Competition Law

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1. The general concept of abuse

2. Forms of abusive conduct

3. Objective justification

Starting points

- Article 102 prohibits the abuse of a dominant position
- The holding of a dominant market position is not, by itself, objectionable under Article 102
- Practices that are legitimate when carried out by non-dominant undertakings may be unlawful for dominant ones
- Need to distinguish abusive from legitimate market behaviour

Policy dilemma (background)

- «[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.»
 - United States v Microsoft, 253 F.3d34 (D.C. Cir. 2001)
- Aim 1 - accuracy
 - Avoid false positives/type 1 errors – the concept of abuse should not be applied in a way that prevents dominant undertakings from competing fiercely and effectively to the benefit of consumers, even if competitors are harmed
 - Avoid false negatives/type II errors – the concept of abuse should not permit dominant undertakings to engage in anti-competitive behaviour that harms consumers
- Aim 2 - clear and predictable legal situation to provide legal certainty and administrative ease
- Trade-off between aim 1 and 2?
 - Increased accuracy may (potentially) best be achieved by defining abusive conduct by reference to its economic effects
 - Administrability and legal certainty may (potentially) best be achieved by defining abusive conduct by reference to its specific types of market behaviour
- Options
 - Universal approach - one-size-fits-all standard
 - Non-universal approach – different legal tests for different forms of conduct
 - Effect-based approach
 - Form-based approach

Structuring and categorizing various forms of potentially abusive conduct

- Exclusionary/anti-competitive abuses
 - Practices that exclude competitors from the relevant market and restrict competition
 - May be beneficial for consumers in the short term, but may have long term detrimental effects due to reduced competition
 - E.g. Article 102 (b): «limiting production, markets or technical development to the prejudice of consumers»
- Exploitative abuses
 - Practices that exploit consumers directly
 - Directly harmful to consumers
 - E.g. Article 102 (a): «directly or indirectly imposing unfair selling prices or other unfair conditions»
- Discriminatory abuses
 - Practices that discriminate between various customers
 - E.g. Article 102 (c): «applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage»

Enforcement emphasis on exclusionary/anti-competitive abuses

- Possible explanations
 - The market mechanism may self-correct exploitative abuses
 - Excessive prices attract competition
 - Competition authorities reluctant to act as market regulators
 - What is a “fair” price?
 - Excessive intervention against consumer exploitation may reduce long-term competition
 - Supra-competitive profits drive competition
- But: Sound economic reasons may lead to a regulation of exploitative abuses (e.g. natural monopolies)

«Special responsibility» of dominant undertakings not to impair competition

- “[Article 102] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure”
 - Case 6/72, Continental Can v Commission
- “A finding that an undertaking has a dominant position ... simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market”
 - Case 322/81, Michelin v Commission, para 70

Exclusionary abuse – ECJ definition

- “The concept of an abuse is an *objective concept* relating to the behaviour of an undertaking in a dominant position which is *such as to influence the structure of a market* where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to *methods different from those which condition normal competition* in products or services on the basis of the transactions of commercial operators, has *the effect* of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”
 - Case 85/76, Hoffman-La Roche v Commission
- Objective concept
 - Intent not required
 - But evidence on intent has nevertheless been considered relevant in certain cases
- “methods different from those which condition normal competition “
 - What is “normal” competition?
 - Competition on the merits? Legitimate to compete on price and quality etc. even when competitors are disadvantaged?
- “such as to influence the structure of a market” / “effect” of hindering competition
 - Which is it?
 - What kind of effect is it exactly?
 - Actual, likely, potential effects?
 - Standard of significance?
 - What about effects on other markets than the dominated one?
 - What about efficiencies?
- Is this a workable definition of exclusionary abuse?

Critique of the general concept of abuse (background)

- «[c]ompetition policy would be strengthened if courts and agencies were to abandon the use of empty phrases like ‘competition on the merits’. At the same time, they should redouble their efforts to identify clear criteria to be used in abuse of dominance/monopolisation cases. With more transparent, predictable standards in place, compliance with the laws would likely improve because companies would be better able to police themselves.»
 - OECD, ‘Roundtable on Competition Policy’

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Examples of potentially abusive conduct

- Exclusionary abuses
 - Predatory prices
 - Margin squeeze
 - Exclusivity agreements
 - Refusals to deal/refusals to license IPRs
 - Tying/bundling
- Exploitative abuses
 - Unfair/excessive pricing
- Discriminatory abuses
 - Price discrimination
- The list is not exhaustive!

Predatory pricing

- Two-step strategy
 - Low prices in an initial period to force competitors out of the market or prevent market entry (predation phase)
 - Higher prices in a subsequent period to compensate for the losses suffered in the predation phase and to extract supra-competitive profits (recoupment phase)
- Price-cost comparison standards – cost concepts
 - AVC - Average Variable Costs
 - ATC - Average Total Costs
- Case C-62/86, AKZO v Commission
 - Prices below AVC must be regarded as abusive
 - Prices below ATC, but above AVC, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor
- Case C-333/94, Tetra Pak II
 - Confirmed the legal test in AKZO
- Case C-202/07, France Télécom v Commission
 - Confirmed AKZO
 - Confirmed that recoupment of losses was not a precondition for a finding of abusive predatory pricing

Margin squeeze

- Potential strategy for vertically integrated dominant undertakings
 - Reduction of the profit margin between the price of an input and the price of a derived product
 - Charging a high price for the input and/or charging a low price for the derived product
 - The strategy may reduce the profit margin of competitors that are both customers of the dominant firm and rivals on the market for the derived product – and restrict competition
- Case C-52/09, TeliaSonera v Konkurrensverket
 - As efficient competitor-test
 - “Where an undertaking introduces a pricing policy intended to drive from the market competitors who are perhaps *as efficient as* that dominant undertaking but who, because of their smaller financial resources, are incapable of withstanding the competition waged against them, that undertaking is, accordingly, abusing its dominant position” (para 40)
- Methodology
 - Determine the dominant undertaking’s margin between its input price and its price for the derived product
 - Compare the margin with the dominant undertaking’s own costs of processing the input to the derived product
 - A margin lower than the dominant undertaking’s processing costs indicates an abuse
 - Rationale – even a competitor as efficient as the dominant firm may not compete effectively because it will not incur any profits

Exclusivity agreements

- Contractual obligations that require customers to purchase specific goods or services exclusively from a particular supplier
 - Customers are prevented from buying products or services from competitors of the dominant undertaking
- Case 85/76, Hoffmann-LaRoche v Commission
 - A dominant undertaking that ties purchases, even if does so at their request, by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking, abuses its dominant position
- Case T-155/06, Tomra v Commission
 - References to Hoffmann-LaRoche
 - “in order to determine whether exclusivity agreements, (...) are compatible with Article [102], it is necessary to ascertain whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, those practices *are intended to restrict or foreclose competition on the relevant market or are capable of doing so.*”
 - Effect-analysis required?
 - Upheld in Case C-549/10, Tomra v Commission

Loyalty rebates

- Rebates that induce exclusivity
 - Exclusivity rebates
 - Target rebates
 - Rebates for customers that reach certain sales targets thereby inducing exclusivity
- Case C-549/10, Tomra v Commission
 - A dominant “undertaking abuses that position where, (...), it applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer’s obtaining – whether the quantity of its purchases is large or small – all or most of its requirements from the undertaking in a dominant position” (para 70)
 - “it is necessary to consider *all the circumstances*, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition” (para 71)

Refusals to deal

- Potential strategy for vertically integrated dominant undertakings
 - By refusing to supply or give competitors access to an input (e.g. a raw material, or a harbour facility or a pipeline) a dominant firm may eliminate competitors from the downstream market and thereby prevent effective competition
- Joined cases 6 and 7-73, Commercial Solvents v Commission
 - “An undertaking which has a dominant position in the market in raw materials which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position”. (para 25)
- Case C-7/97, Bronner v Mediaprint
 - The refusal concerns an input indispensable to do business, inasmuch as there is no actual or potential substitute
 - The refusal is likely to eliminate competition
 - The refusal is not objectively justified

Refusals to licence IPRs

- Case C-418/01, IMS Health v NDC Health
 - “in order for the refusal by an undertaking which owns a copyright to give access to a product or service *indispensable* for carrying on a particular business to be treated as abusive, it is sufficient that *three cumulative conditions* be satisfied, namely, that that refusal is *preventing the emergence of a new product* for which there is a potential consumer demand, that it is *unjustified* and such as to *exclude any competition* on a secondary market.” (para 38)
- Case T-201/04, Microsoft v Commission
 - “the refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right *cannot in itself constitute* an abuse of a dominant position within the meaning of Article 82 EC. It is only in *exceptional circumstances* that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse.”
 - “the following circumstances, in particular, must be considered to be exceptional: *in the first place*, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; *in the second place*, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; *in the third place*, the refusal prevents the appearance of a new product for which there is potential consumer demand.
 - “Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC unless the refusal is *objectively justified*.”

Tying/bundling

- Article 102 (d) “making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”
- Hilti
 - The sale of nail cartridge strips (for nail guns) conditional upon the customer buying a corresponding complement of nails
 - The Commission: Hilti’s practices “leave the consumer with no choice over the source of his nails and as such abusively exploit him.” (IV/30.787 and 31.488 – Hilti, para 75)
 - Upheld by the General Court in Case T-30/89, Hilti v Commission
- Tetra Pak II
 - Obligation that only Tetra Pak cartons were to be used in Tetra Pak packaging machines and that cartons were to be obtained exclusively from Tetra Pak
 - General Court in Case T-83/91, Tetra Pak v Commission: “where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market.”
 - Upheld by ECJ in Case C-333/94, Tetra Pak v Commission
- Microsoft
 - Technological integration of Windows operating system and Windows Media Player
 - Commission decision COMP/C-3/37.792 Microsoft – five step test
 - Dominance in the tying market
 - The tying and tied goods must constitute two separate products
 - Coercion: customers have no choice of obtaining the tying product without the tied product
 - Foreclosure effect on competition
 - No objective justification
 - Upheld by the General Court in Case T-201/04, Microsoft v Commission

Excessive pricing

- Article 102 (a)
 - “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;”
 - Exploitation of customers, not exclusion of competitors
- Case 27/76, United Brands v Commission
 - Two-step test
 - “the questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.” (para 252)
 - Step 1: price-cost comparison – excessive ?
 - Step 2: price comparison – unfair?
 - “Other ways may be devised, and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair.” (para 253)
- Challenges
 - When is a price “excessive”?
 - When is a price “unfair”?
- Relatively few cases – the threshold for finding abusive excessive pricing probably quite high

Price discrimination

- Article 102 (c)
 - “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;”
- “dissimilar conditions to equivalent transactions”
 - Comparison of prices charged to different customers
 - Comparison of whether transactions are “equivalent”
 - Not only the products/services involved, but any other circumstances that may affect the costs of the transaction (transport, taxes, customs, payment conditions etc.)
- “placing [trading parties] at a competitive disadvantage”
 - Relevant effect – inter partes, not competition or consumers
 - Case C- 95/04, British Airways v Commission
 - There must be a finding that the discrimination “tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others.” (para 144)
- Article 82 (c) rarely often been applied as a stand-alone abuse, but rather in combination with exclusionary practices, discrimination on the basis of nationality or with resale restrictions preventing trade between Member States.

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Objective justification

- Pursuant to the case law of the ECJ, *prima facie* abusive practices may be “objectively justified” and therefore legitimate
- Comparison with Article 101 (3)
 - The wording of Article 102 does not contain a provision equivalent to the exception in Article 101 (3)
 - The doctrine of objective justification nevertheless resembles Article 101 (3)
 - In practice, the possibility for dominant firms to objectively justify otherwise abusive conduct is rather limited.
- Burden of proof
 - Case T-201/04, Microsoft v Commission
 - “although the burden of proof of the existence of the circumstances that constitute an infringement of Article [102] is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.”

Valid justifications

- Protection of commercial interests
 - Case 27/76, United Brands v Commission
 - «the fact that an undertaking is in a dominant position cannot disentitle it from protecting its commercial interests if they are attacked»
- Technical or commercial constraints
 - E.g. in relation to refusals to supply
- Efficiencies
 - Case C-95/04, British Airways v Commission
 - “It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.”
- Public interests
 - General Treaty objectives

Proportionality

- «the question of whether conduct is justified or not is assessed on the basis of the principle of proportionality.» (AG Cosmas, C-344/98, Masterfoods)
- Case C-95/04, British Airways v Commission
 - “It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or *outweighed*, by advantages in terms of efficiency which also *benefit the consumer*. If the exclusionary effect of that system *bears no relation* to advantages for the market and consumers, or if it goes beyond what is *necessary* in order to attain those advantages, that system must be regarded as an abuse.”
- Case C-209/10, Post Danmark
 - “it is for the dominant undertaking to show that the *efficiency gains* likely to result from the conduct under consideration *counteract* any likely negative *effects on competition and consumer welfare* in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is *necessary* for the achievement of those gains in efficiency *and* that it *does not eliminate effective competition*, by removing all or most existing sources of actual or potential competition”