

European Competition Law Update

Abuse of Dominance

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Abuse of Dominance

Art. 102 TFEU: A Quick Recap

- Dominance
 - Market shares >40% possible, >50% presumed
 - Competitors' size, barriers for new entrants, over a period of time
- Abuse
 - Exclusionary, e.g. bundling, loyalty rebates, refusal to supply
 - Exploitative, e.g. excessive pricing, discrimination
- Need for more economic approach?
 - “Clear cut” rules (form) v. actual consumer harm (effect)
 - Relative ease of finding dominance and “special responsibilities” attached → condemnation of dominance itself

Commission's "Guidance on Enforcement Priorities"

- Part of the long road to reform: Announced (2003); Discussion Paper (2005); Enforcement Guidance (Feb 2009)
- Overall positive development - focus on economics and “effects based” analysis
- But prosecutorial discretion, not law. Is it safe to rely on them?
 - EC Courts: some acceptance of principles (*DT, para. 186, BA, paras. 68-79*)
 - National regulators/courts
 - Best practice, persuasive impact
 - Positive indications from some “majors”(UK, FR, NL, ITL, SP)
 - But inevitable hold outs (Germany)

Areas of Significant Development

- Rebates (Intel)
- Extensive Use of Commitment Decisions (Article 9)
 - Rambus
 - Microsoft
- Removing Bottlenecks in Telecoms & Predatory Pricing
- Removing other Bottlenecks
 - Energy
 - Pharma
 - Financial Sector
 - Ex State Monopolies

Rebates – Intel Decision – Background

- Very difficult area of competition law
- European Courts have established *quasi per se rules*: foreclosure is presumed when customer's choice is restricted
- AMD allegation: “Intel's rebates and other targeted payments prevented or made it more difficult for customers to source CPUs from AMD”
- Intel's practices were challenged globally
- European Commission fined Intel EUR 1.06 billion. Fine could have been higher!

Rebates – Intel Decision – Substance (I)

- Two types of problematic conduct, part of a single strategy:
 - Targeting customers of strategic importance by offering rebates *de facto* conditional upon exclusive purchasing
 - “Naked Restrictions”
- Cartel Style Investigation :
 - Evidence gathering very difficult and heavily criticised (even by EU Ombudsman)
 - Importance placed upon:
 - circumstantial evidence
 - customers’ understanding of the relationship: **FEAR** that switching will result in loss of rebates and attract punishment
 - Is that enough in light of **negotiation dynamics**?

Rebates – Intel Decision – Substance (II)

- Although “not necessary” under EC law, the Commission felt the need to test the likelihood of foreclosure
- Applying the “as efficient competitor test”:
 - Hypothetical exercise used in case of a “must stock item”
 - Possibility of competition in the share of the customer’s demands which is “up for grabs” (i.e. **contestable share**)?
 - **Absent income from non-contestable share**, will **DomCo** have to offer a price for products within the **contestable** share which is below *its* “costs”? If yes → foreclosure
 - Critical elements of the test: Contestable share, time horizon and measure of viable cost
- *Cf:* Case against Velux: no foreclosure found

Rebates – Take away points

- Some effects based analysis gradually recognised:
 - *de minimis* impact (e.g. individual retailers)?
 - all or nothing market (no opportunity for leveraging)?
 - is the pricing of DomCo viable absent the benefit of a non-contestable share?
- **BUT:** risk of challenge/litigation and some conservative countries (e.g. Germany, Brazil)
- Designing a safe global rebate scheme not easy:
 - Explore safer options: non retroactive, objective volumes, short duration, small steps
 - Impression given to customers when negotiating matters; avoid suspicious language
 - Control arbitrary use of legitimate discount schemes

Extensive Use of Commitment Decisions

- 9 decisions under Article 9, predominately in Energy and notably in:
 - Microsoft (end of the saga?)
 - Tying → “Choice Screen” for web browsers
 - [Refusal to Supply → Far-reaching interoperability disclosures]
 - Rambus (end of another saga)
 - Patent ambush → lower royalty rates (without finding of abuse)
Cf Qualcomm: case closed
- Cost-benefit analysis of the practice:
 - Fast resolution **v.** creation of legal rules

Removing Bottlenecks in Telecoms & Predatory Pricing

– ECJ in France Télécom

- Does finding of predation requires the Commission to prove at least the possibility of DomCo to recoup losses?
- ECJ (cf AG's opinion): Not necessary; could be part of the analysis, if the Commission thinks it is relevant.

– Commission continues its “ex ante regulation” exercise:

- Slovak Telecom a.s.
- Telekomunikacja Polska

Removing bottlenecks in other industries

- Energy (majority of commitments decisions)
 - ENI, Electrabel, EDF, Svenska Kraftnaet, E.ON (x2), RWE, Gaz de France
→ Common market without vertical integration against “national state champions”
 - Follow on from the sector inquiry
- Pharma
 - Boehringer, Les Laboratoires Servier and Lundbeck
→ Give generics to the people
 - Follow on from the sector inquiry
- Essential Services in the Financial Sector
 - Clearstream (General Court)
 - Standard & Poor’s and Thomson Reuters under investigation
- Ex State Monopolies (106(1) in conjunction with 102)
 - Slovakian Post
 - Greek lignite