

Seventh Annual Conference of the Global Competition Law Centre (College of Europe)

Ten Years of the Effects-Based Approach in EU Competition Law
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The Effects-Based Approach under Article 102 TFEU

History and State of Play

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Competition Appeal Tribunal

Agenda

1. The Elements of an Effects-Based Approach
2. Challenges for Unilateral Behaviour
3. Development of EU law
4. Significance of the Commission's Guidance
5. Specific Practices
6. Exploitative abuses

Note: Any opinions expressed in this paper are personal views and do not represent the opinion of the Competition Appeal Tribunal or prejudice the outcome of any pending or future case.

An effects-based model:

EAGCP

1. Assess outcomes rather than practices;
2. Assess legitimacy by reference to consumer impact;
3. Preference for rule of reason over per se analysis;
4. Preference for limited intervention targeted at exclusionary conduct (barriers to entry).

Institutional challenges

	EUMR	Art 101 TFEU	Art 102 TFEU
Statutory language	SIEC	Object/effect	Abuse

Michelin II “... [F]or the purposes of applying Article 102 EC, **establishing the anti-competitive object and the anti-competitive effect are one and the same thing** If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect.”

France Télécom “As regards the conditions for the application of Article 82 EC and the distinction between the object and effect of the abuse, it should be pointed out that, for the purposes of applying that article, showing an anti-competitive object and an anti-competitive effect **may, in some cases, be one and the same thing**. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect.”

Institutional challenges III

	EUMR	Art 101 TFEU	Art 102 TFEU
Statutory language	SIEC	Object/effect	Abuse
Basis for justification		Art 101(3)	Objective justification
Exemptions, guidance and decisions	Guidelines Extensive body of decisions	Block exemptions Guidelines	Enforcement Priorities Limited body of decisions

Institutional challenges III

	EUMR	Art 101 TFEU	Art 102 TFEU
Exemptions, guidance and decisions	Guidelines Extensive body of decisions	Block exemptions Guidelines	Enforcement priorities Limited body of decisions

	Energy	Telco	IT	Other	Total	Prohib	Commit
Single branding			1	2	3	2	1
Tying			1		1		1
Refusal to supply	6	1	1 (IBM)		8	1	7
Margin squeeze		1			1	1	
Long term supply	2				2		2
Other			1	1	2		2
Total	8	2	4	3	17	4	13

Policy challenges I

1. Objectives

“In applying Article [102] to exclusionary conduct by dominant undertakings, the Commission will focus on **those types of conduct that are most harmful to consumers**. ... The Commission ... will direct its enforcement **to ensuring that markets function properly and that consumers benefit** from the efficiency and productivity which result from effective competition between firms.”

- Enforcement Guidance, para 5

“Article [102] EC ... is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but **to protect the structure of the market and thus competition as such (as an institution)**, In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.”

- AG Kokott *Virgin/British Airways*

Policy challenges II

1. objectives
2. diversity of legislative goals in Art 102:
 - a. conventional division: exclusionary/exploitative;
 - b. other influences
 - i. single market;
 - ii. regulatory interface.

Policy challenges III

1. objectives
2. diversity of legislative goals in Art 102:
 - a. conventional division: exclusionary/exploitative;
 - b. other influences
 - i. single market;
 - ii. regulatory interface.
3. diversity of views as to risks and benefits of enforcement action

History:

the *Hoffman-La Roche* standard

“The concept of 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.”** (emphasis added)

History:

Pricing Abuses

“In order to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice **tends**:

- to **remove or restrict the buyer's freedom to choose** his sources of supply,
- to **bar competitors from access** to the market,
- to apply **dissimilar conditions to equivalent transactions** with other trading parties, or
- to **strengthen the dominant position** by **distorting competition.**”

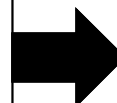
~ *Deutsche Telekom* (para 175)

History:

Pricing Abuses

Precautionary principle

“In order to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition.” *Deutsche Telekom*



Operational tests (eg’s)

Predation (Akzo as developed):

- Price below AAC
- Price between AAC and LRAIC + plan to exclude

Rebates (eg British Airways):

- Retrospective
- Individualised
- Substantial market power

Margin Squeeze (Deutsche Telekom, TeliaSonera)

- (Third party wholesale price + own retail costs) > Own retail price.

History:

Commission review

Staff Discussion paper (2005)

- “The essential objective of Article [102] when analysing exclusionary conduct is **the protection of competition** on the market **as a means of enhancing consumer welfare** and of **ensuring an efficient allocation of resources.**” (para 54)
- “[The *HLR* standard] implies that the conduct in question must in the **first** place have **the capability, by its nature, to foreclose competitors from the market.** To establish such capability it is in general sufficient to investigate the form and nature of the conduct in question. It **secondly** implies that, **in the specific market context, a likely market distorting foreclosure effect** must be established.” (para 56)

History:

Commission review II

Staff Discussion paper (2005)

- “The essential objective of Article [102] when analysing exclusionary conduct is **the protection of competition** on the market as a means of **enhancing consumer welfare** and of **ensuring an efficient allocation of resources.**” (para 54)

Enforcement Priorities (2009)

- “In applying Article [102] to exclusionary conduct by dominant undertakings, the Commission will **focus on those types of conduct that are most harmful to consumers.** ... The Commission, therefore, will direct its enforcement to ensuring that **markets function properly** and that **consumers benefit from the efficiency and productivity** which result from effective competition between undertakings.”
- “The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on **safeguarding the competitive process** in the internal market ...”
(paras 5 and 6)

History:

Commission review III

Staff Discussion paper (2005)

- “[The *HLR* standard] implies that the conduct in question must in the first place have the capability, by its nature, to foreclose competitors from the market. ... It secondly implies that, in the specific market context, a likely market distorting foreclosure effect must be established.”

Enforcement priorities (2009)

- “The Commission will normally intervene under Article [102] where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure.” (para 20)
- ‘Anti-competitive foreclosure’ means “a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.” (para 19)

Enforcement Priorities: General Approach

1. Market power?
2. Anti-competitive foreclosure?
 - a. In price-based cases, “as efficient competitor” test;
3. Objective justification?

Enforcement Priorities:

Market Power

1. Market definition

- “the definition of the relevant market is carried out, in the context of the application of Article [102 TFEU], in order to define the boundaries within which it must be assessed whether a given undertaking is able to behave, to an appreciable extent, independently of its competitors, its customers and, ultimately, consumers”

~ *AstraZeneca*, GC (para 30)

Enforcement Priorities:

Market Power

1. Market definition

2. Market shares

a. Dominance threshold?

b. Safe harbour?

3. Indications:

a. Guidance: below 40% unlikely

b. Commitment decisions:

i. Distrigaz: 40% and more than 20% above nearest rival;

ii. EdF: 40%

Enforcement Priorities: Anti-competitive Foreclosure

1. position of the dominant firm
2. conditions on the relevant market
3. position of competitors
4. position of customers or input suppliers
5. extent of the allegedly abusive conduct
6. possible evidence of actual foreclosure
7. direct evidence of any exclusionary strategy

~ para 20

Enforcement Priorities: Position of Customers/Suppliers

Enforcement Priorities:

“This may include consideration of the **possible selectivity of the conduct in question**. The dominant undertaking may apply the practice only to selected customers or input suppliers **who may be of particular importance for the entry or expansion of competitors**, thereby enhancing the likelihood of anti-competitive foreclosure. In the case of customers, they may, for example, be **the ones most likely to respond to offers from alternative suppliers, ...**”

Enforcement Priorities: Extent of the conduct



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Enforcement Priorities: “In general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect”

Tomra: “In fact, the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, **the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it.** Second, **it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.**” (para 241)

“It would ... be **artificial to establish without prior analysis the** portion of the tied market beyond which the practices of a dominant undertaking may have an exclusionary effect on competitors” (para 242)

Enforcement Priorities: Evidence of Actual Foreclosure



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Enforcement Priorities: the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure

Tomra: It must also be stated that, for the purposes of establishing an infringement of Article 82 EC, **it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets.** It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.

In light of the foregoing, ... it is not necessary to consider whether the evidence adduced by the Commission demonstrated that the agreements in question had actually eliminated competition. In fact, **even if the Commission had made a manifest error of assessment, as the applicants allege, in holding that those agreements actually eliminated competition, the legality of the contested decision would not be affected.** (paras 289 – 290)

Enforcement Priorities: As efficient Competitor

Enforcement Priorities

“... Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, **the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.**

However, the Commission recognises that in certain circumstances **a less efficient competitor may also exert a constraint** which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. ...” (paras 23/24)

Enforcement Priorities: As efficient Competitor

1. Judicial treatment of the test

- a. compare single branding (*Tomra*) and margin squeeze (*TeliaSonera*)

2. Non-price factors

- a. unsuccessful defences: *Tomra*, *Telefonica* and *Intel*

Enforcement Priorities:

Direct Evidence

Enforcement Priorities:

“This includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.”

Enforcement priorities:

Objective justification

"It is noteworthy that paragraph 90 of Case 85/76 *Hoffmann-La Roche*, to which Case C-95/04 *British Airways*, paragraph 84 refers, **excludes in principle an efficiency defence for fidelity rebates**, given that "they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market" and because a fidelity rebate, "unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers"

- *Intel*, note 1935.

"Obligations ... to obtain supplies exclusively from a particular undertaking ... are incompatible with the objective of undistorted competition within the common market, because – **unless there are exceptional circumstances which may make an agreement between undertakings in the context of Article 101 and in particular paragraph (3) of that Article permissible** - they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market."

- *Hoffman-La Roche*, para 90

The significance of ex ante intervention

1. The appropriate threshold for intervention (*Microsoft*);
2. The significance of actual market effects (*Tomra*); and
3. The relevance of recoupment in an assessment of predation (*France Telecom*).

Single branding

	Prohibition decisions			Commitment decisions	
	<i>Solvay</i>	<i>Tomra</i>	<i>Intel</i>	<i>Coca Cola</i>	<i>Distrigaz</i>
Commission	Dec. 00	March 06	May 09	June 05	Oct. 07
General Court	Dec. 10	Sept. 10	pending		
Court of Justice	pending (AG April 11)	pending			

Single branding: Coverage

1. No safe harbour? See *Tomra*
2. Practical indications?
 - a. Compare *Tomra* and *Coca Cola*

“The applicants’ practices foreclosed, on average, a considerable proportion (**two fifths**) of total demand during the period and in the countries under consideration. Consequently, **even accepting the applicants’ proposition that foreclosure of a small portion of demand does not matter, that portion was far from being small in the present case.**” (para 243)

““Countries” means all Relevant European Countries and future EU Member States in which TCCC-Branded CSDs accounted **for more than 40%, and more than twice the share of the nearest competitor**, of national CSD sales in either the Take-Home Channel or the On- Premise Channel in the previous year.’ (Section I)

Single branding: Coverage

1. No safe harbour? See *Tomra*
2. Practical indications?
 - a. Compare *Tomra* and *Coca Cola*
 - b. VBE analogy?

Single branding: Rebate Structures

1. Cases:

	Retrospective	Prospective	Individualised	Standardised
The norm	✓	✗	✓	✗
<i>Michelin II</i>	✓	✗	✗	✓
<i>Coca Cola</i>	✓	✓	✓	✗

2. Open issues

- a. Does Article 102 prohibit any rebate structure that is ***either retrospective or individualised***?
- b. Does the prohibition apply to *standardised* and *prospective* rebate structures that are *not otherwise predatory*?

Single branding: *Coca Cola*

Prohibited rebates	Permitted requirements
exclusive and percentage-based requirement commitments	exclusivity in relation to rent-free beverage coolers where outlet has access to second cooler
growth-based or otherwise individualised target rebates	80% utilisation requirement where that is the sole cooler in the outlet

Predation

1. Criteria
2. Recoupment
3. Meeting competition defence

Tying

1. Substance

a. *Microsoft WMP*

b. Guidance Paper

“Technical tying occurs when the tying product is designed in such a way that it **only works properly with the tied product** (and not with the alternatives offered by competitors).” (note 33)

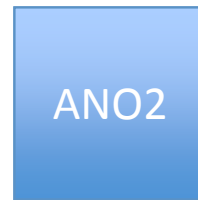
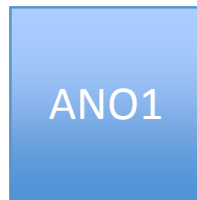
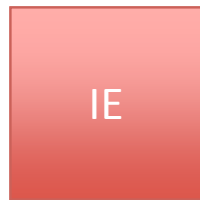
“Two products are distinct if, **in the absence of tying or bundling**, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product.” (para 51)

Tying

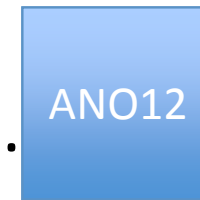
1. Substance

- a. Microsoft WMP
- b. Guidance Paper

2. *Microsoft IE* commitments



....



Refusal to supply and margin squeeze

	Energy	Telco	Media	Transport	Post	Water	Commercial	Total
Commission	6 + 0	1 + 1					1 + 0	8 + 1
National (ECN brief)	1 + 0	1 + 2	1 + 0	2 + 0	1 + 0		1 + 0	7 + 2
National (ICN study)	6 + 0	1 + 7		8 + 0		1 + 0	9 + 3	25 + 10
Total	13 + 0	3 + 10	2 + 0	10 + 0	1 + 0	1 + 0	10 + 4	40 + 13

Note: first number in each cell refers to refusal to supply cases and second number refers to margin squeeze cases

Refusal to supply

1. EU enforcement practice concentrated on commitment decisions in utility cases
2. Significance for other sectors?

Margin squeeze

TeliaSonera



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1. Sub-set of refusal to supply or stand-alone abuse?
2. Significance of the distinction?

“It follows that, in order to establish whether such a practice is abusive, **that practice must have an anti-competitive effect on the market**, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which **may potentially exclude competitors who are at least as efficient as the dominant undertaking.**” (para 64)



“**Where access to the supply of the wholesale product is indispensable** for the sale of the retail product, ... **the at least potentially anti-competitive effect of a margin squeeze is probable.**” (paras 70 and 71)

“However, taking into account the dominant position of the undertaking concerned in the wholesale market, **the possibility cannot be ruled out** that, **by reason simply of the fact that the wholesale product is not indispensable** for the supply of the retail product, **a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially.**” (para 72)

Exploitative abuses

1. Text of Article 102
2. Enforcement practice
3. Excessive pricing
4. Discrimination
 - a. Legal standard
 - b. Open questions