Pricing abuses after *Tomra*, *Telefónica*, and *Post Danmark*

Robert O'Donoghue

GCLC Lunchtime talk

18 July 2012

BRICK COURT CHAMBERS

BARRISTERS

Agenda

- The mood music from the Community Courts
- Predation
- Rebates
- Discounts for exclusive dealing (*de facto* and *de jure*)
- Price discrimination

BRICK COURT CHAMBERS

BARRISTERS

Improvements in mood music?

- *Tomra* (GC):
  - "*Internal documentation…may indicate whether the exclusion of competition was intended*" (para 350)
  - "…*if technology was really so markedly superior…it becomes even more difficult to explain the use of exclusivity agreements*" (para 37)
  - "…*fidelity rebates…are not based on an economic transaction which justifies this burden or benefit*" (para 209)
  - "…*a loyalty rebate…is contrary to Article [102]*" (para 210)
  - "…*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*" (para 241)

Improvements in mood music?

- *Tomra* (AG):
  - "*I cannot stress enough…The (likely) existence of such exclusionary effects in a particular case should not be merely presumed, it should be assessed and demonstrated*" (para 44)
  - "…*it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking…However, in the absence of any effect on the competitive situation of competitors a pricing practice cannot be classified as exclusionary if it does not make their market penetration any more difficult*" (para 45)

Improvements in mood music?

- *Post Danmark* (ECJ):
  - "*Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of…price, choice, quality or innovation*" (para 22)
  - "…*the fact that the practice of a dominant undertaking may…be described as 'price discrimination'…cannot of itself suggest that there exists an exclusionary abuse*" (para 30)
  - "…*to the extent that a dominant undertaking sets it prices at a level covering the great bulk of the costs…it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete*" (para 38)

BRICK COURT CHAMBERS

BARRISTERS

Predation

- *Post Danmark* (ECJ):
  - Prices below ATC but above AIC cannot of itself suggest an exclusionary abuse (para 30).
  - Arguably does no more than apply *AKZO* to USO situation as was done in *Deutsche Post*
  - Interesting comments on common cost allocation (paras 33-34) but case specific
  - Interesting comments at para 39 on lack of exclusionary effects
  - Fact that internal documents do not mention efficiency is not a reason not to assess it (para 43)
  - Para 42 endorses Guidance Paper on objective justification

Rebates (1)

- Position remains muddled following *Tomra* (ECJ)
- ECJ ostensibly anxious to steer away from *per se* approach to retroactive rebates and exclusive dealing (see para 80)
- But "plus factors" (para 81) likely to be true of all retroactive rebate cases
- Price/cost test (LRIC) and negative prices "*not a prerequisite*" (para 73)
- Oversimplified characterisation of retroactive rebates (para 78)
- Some good sense:
  - Intent may be relevant (paras 16, 20)
  - Sliding scale of dominance and effects (para 39)
  - Guidance Paper for future cases (para 81)

BRICK COURT CHAMBERS

BARRISTERS

Rebates (2)

- Commission has undoubtedly imposed self-restraints beyond the case law requirements:
  - Analysis of effects in *Tomra* and *Intel* far in excess of past case law/decisional practice
- But schizophrenic attitudes between DG COMP and Legal Service
- More non-infringement cases needed (*Velux*)
- *Tomra* and *Post Danmark* suggest that Courts look to Commission for intellectual lead and likely to follow price/cost test plus at least light touch effects analysis
- *Intel* appeal the litmus test on AEC/effects?

Discounts and exclusive dealing

- Discounts linked to express or implied exclusive or *de facto* dealing continue to be considered as akin to *per se* illegal under Art. 102
- Commission expressly argued so in *Intel* and that "*all the circumstances*" does not apply to *Hoffmann-La-Roche* rebates
  - AEC pass a defence for dominant firm?
- Facultative use of "plus factors" in *Tomra* and *Intel* still effects-lite: amorphous refs. to important customers, transparency *etc*
- But Tomra (ECJ and AG) confirmed that 40% "coverage" significant factor
- Impossible to reconcile Arts. 101 and 102 dichotomy on exclusive dealing/discounts

Price Discrimination

- Major developments in secondary-line discrimination:
  - Case T-301/04 *Clearstream*: detailed analysis of comparable transactions criterion
  - Case C-52/07 *Kanal 5*: makes clear that favoured and disfavoured parties must compete on the same market for "*competitive disadvantage*". See also comments on role of objective justification
- Limited development on primary line discrimination other than helpful comment in *Post Danmark* (para 30) that price discrimination does not = exclusion