EU Courts: Contribution to Shaping Article 102 TFEU

Krystyna Kowalik-Bańczyk
JUDGE & PRESIDENT OF 7TH CHAMBER, EU GENERAL COURT

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Historical outline – Basic principles

- **Competition must not be eliminated**

6/72 Continental Can

- **Dominance as lack of concern for clients, consumers, competitors**

26/76 Metro S.B. Grossmärkte GmbH, 85/76 Hoffmann La-Roche

- **Special responsibility**

322/81 Nederlandsche Banden Industrie Michelin (Michelin I)

- **Both Arts 101 and 102 can be infringed**

85/76 Hoffmann-La Roche, T-51/89 Tetra Pak, T-480/15 Agria Polska

- **Competition law is applicable to regulated sectors**

T-336/07 Telefónica v Commission (also: transport, insurance, sport)

- **Competition on the merits**

T-286/09 Intel

Recent Application of Art. 102

- **Types of cases:**
  - **Mainly appeals vs EC decisions: more annulments of decisions with ever-increasing fines**
  - **In preliminary rulings: judgments summarising basic principles or follow-up (in damage actions)**
- **Types of practices:**
  - **Since 2008, mainly exclusionary practices – but « exclure aujourd'hui, c'est exploiter demain » (N. Petit, Droit européen de la concurrence, 3rd edition, Paris 2020, p. 405)**
  - **Some on price practices (Intel, Qualcomm), some on non-price practices (SEN, Google)**
  - **Cumulative application of Arts 101 and 102 (T-691/14 Servier)**

Recent Application - overview

Art. 267
Court of Justice

Decentralisation
C-375/09 Tele 2 Polska
C-617/17 PZU
C-857/19 Slovak Telekom (ne bis in idem)

Different practices
C-377/20 Servizio Elettrico Nazionale
C-680/20 Unilever Italia Mkt Operations
C-252/21 Meta Platforms and Others
C-333/21 Superleague

Art. 263
General Court

Exclusivity rebates/Exclusivity
Intel
T-235/18 Qualcomm
pending T-334/19 Google AdSense

Refusal of access? Forclosure effect
T-814/17 Lietuvos geležinkeliai
T-136/19 Bulgarian Energy Holding
T-612/17 Google Shopping
T-604/18 Google Android

Appeals
Court of Justice

C-466/19 P Qualcomm et Qualcomm Europe
C-152/19 P Deutsche Telekom
C-165/19 P Slovak Telekom
C-42/21 P Lietuvos geležinkeliai
C-124/21 P International Skating Union

Pending appeals:
C-14/24 P Commission/Bulgarian Energy Holding
C-255/22 P PKN Orlen
C-48/22 P Google Shopping
C-738/22 P Google Android
C-221/22 P Commission/Deutsche Telekom

Recent assessment principles

- **More economic approach** – since **C-23/14 Post Danmark**
- **If competition on the merits – no abuse : C-413/14 P Intel § 133-134**
- **Capacity to exclude:**
  - **Assessment of effects, not infringment by object** – **C-680/20 Unilever Italia**
  - **Actual capacity to exclude** in light of evidence submitted by dominant undertaking – **C-680/20 Unilever Italia**
  - **As-efficient-competitor test (AEC)** – notion refers to efficiency and consumer value in terms of **price, choice, quality or innovation** – **C-413/14 P Intel, § 134, C-680/20 Unilever, § 37**
  - **AEC can serve as a defence**
    - **Art. 102 is about protecting competition, not competitors themselves** - **C-680/20 Unilever § 36-39, C-377/20 Servizio Elettrico Nazionale § 73**
  - **State action defence might work – T-136/19 Bulgarian Energy Holding**

Talking points I – room for precisions?

- **Competition on the merits** applies to all unilateral practices (exclusionary and exploitative): combats risk of “over-condamnation”?
- There is **no de minimis rule**, even if assessment of effects appears necessary **–** only for discrimination in art. 102 c)? **C-525/16 MEO § 29**
- Is the notion of **„unavoidable” partner » (C-85/76 Hoffman-La Roche § 41; T-336/07 Telefonica § 149**) – replaced by the notion of « **super dominant operator** »?
- Decline of **essential facilities** – instead of changing the conditions for finding abuse **–** an „Ettiquettenschwindel”

C-42/21 P Lietuvos geležinkeliai : removal of the track is an independent form of abuse, not refusal to grant access

pending C-233/23 Alphabet : changing access and use of resources even if they are not essential – **what is essential**?

Talking points II: when to apply AEC test?

- AG Rantos in **Unilever** – nothing wrong in excluding the competitor who is less efficient; practice should be evaluated based on AEC test – but **C-23/14 Post Danmark?** → New Version of Guidance Paper on the Application of Art. 102 to exclusionary practices –a dominant firm can harm the functioning of the market even when it excludes a less efficient or innovative competitor, § 23
- Competition authorities are **under no obligation** to use AEC test applied in Intel in relation to fidelity rebates
- AEC test is **only one of many available** (already in **C-23/14 Post Danmark § 52, 61**). It can even sometimes be inappropriate, like in the cases of refusal to supply
- Should price and non-price exclusionary practices be assessed using the same test?
- **Mere exclusion is not enough**? there may/must be other negative effects on: **price, variety, quality, innovation**

Talking points III: no more per se?

- Previously some practices **presumed** abusive: no longer the case – fidelity rebates – **Intel**
- Analysis by effects, **in concreto**, required, not in abstract form (AG Wahl in **C-525/16 MEO**, **C-538/18 P Ceske Drahy § 67, Intel**)
- "Merit competition" – is being most efficient and innovative on market sufficient to guarantee immunity from Art. 102? Rather not - **notion of indirect liability** – **Unilever** – it drafted contracts that forced its dealers to engage in harmful conduct
- Notion of **special responsibility** – will be used if **freedom** of other market participants is limited or if they are **discriminated against**
- Always an ethical judgment – some forms of behaviour are part of **normal competition**, some not – **C-457/10 P Astra Zeneca**

Looking ahead

- **Many cases on Art. 102 about obligations to supply/grant access**
- **E.g. pending case C-233/23 Alphabet and Others - refusal to supply if access must be indispensable to the exercise of a particular activity or just for a more convenient use of the product or service offered**
- **Autonomy as regards other regimes (sector regulation, DMA, DSA) – for DMA pending cases on access to infrastructure**
- **Tendency for concentrated markets - blurring of lines between Art. 102 and merger control – C-449/21 Towercast**
- **Art. 102 will remain avenue of last resort where there are issues of market structure and access**

Thank you for your attention