Abuse of Dominant Position in EU Law: Historical development; Current Doctrine; Comparison with U.S. Antitrust Law

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Outline of Presentation

- Framework of analysis in EU through 102 case law abuse of dominance & Competition on the Merits
  - Definition of "*dominance*" (not same as m*arket power*)
  - Definition of abuse
- Origin of *performance-based competition* under German Competition Law
- Parameters for *competition on the merits:*
  - Relationship of *"competition on the merits"* to *"effective competitive structure"*
- Case law development of competition on the merits: *HLR*, *Post Danmark I* & *Post Danmark II*
- Modern approach and post-*Intel*
- Comparing US "*consumer welfare standard*" to current EU approach

Dominant Position under Article 102 TFEU

- Definition of Dominant Position under *Michelin I*
- A position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.
  - Ability to act independent of full competitive constraint (with)
  - Potential impact on maintenance of effective competition

Dominant Position v. Market Power

- Market Power : ability to increase price above competitive level without losing sales
- Dominant Position: ability to act independently
  - "act independently" not subject to constraints that exist in conditions of effective competition
- Firms with substantial market power will usually have dominant position
  - But firm with limited power over price can still be dominant

Examples of Dominant Position Without Market Power

- *United Brands* (1977): seller of bananas dominant even after though five-year price war (and substantial losses)
  - ‘‘an undertaking’s economic strength is not measured by its profitability; a reduced profit margin or even losses for a time are not incompatible with a dominant position, just as large profits may be compatible with a situation where there is effective competition’’,
- *Hoffmann-La Roche* (1979): dominant in market for vitamin C
  - Even though prices for vitamins in general had declined over time
  - Market was subject to substantial overcapacity

Dominant Position v. Market Power in Digital Markets

- Dominance provides an effective basis for intervention in digital markets
  - “Big Tech” not always focused on short-term profitability
  - Theories of harm in tech cases tend to rely on bundling or market-leveraging
- Market share in dominated market (in traditional cases a proxy for market power) remains key factor for proving dominance

Defining Abuse in *Hoffmann-la Roche* ("HLR")

- The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position
- (1) 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
- (2) and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction(performance) of commercial operators, has the effect of hindering the maintenance of competition still existing in the market or the growth of that competition
- "*transaction*" is translation error, Corrected in subsequent judgments (*Michelin I, Post Danmark I*) replace transaction with *performance*

Conduct – different from those which condition normal competition" what does it mean?

- **German origins of "*Leistungswettbewerb"or "performance–based competition"***
- The two-part test for abuse in *Hoffmann-La Roche* closely follows a test for exclusionary abuse under German *GWB* proposed by Professor Peter Ulmer (University of Heidelberg)
  - Applied in judgments of the Berlin Kammergericht in the period prior to *Hoffmann-La Roche* judgment
- Ulmer's abuse test invoked the German law concept of "*Leistungswettbewerb"* ("performance based competition")

German Origin of performance–based competition

- Concept developed in law of unfair competition(or business tort) in 19th century.
- Some conduct is *"fair"* without regard for injury to rivals because it is essential to operation of a competitive market
  - **Vital Competition inevitably cause damage or disadvantage for the third party**.
- Competition based on performance = winning customers based on a firm's own efforts
    - Lower (non-predatory) prices
    - Innovation and improvements in product quality
    - Superior services
    - Effective advertising

Competition on the Merits (HLR) under EU competition law

- As performance-based competition is imported to EU Competition law, as competition on the merits, conduct within the scope of competition on the merits, need to consider structure, conduct(competitive process) and performance comprehensively as competitive parameter, since:

- Only protecting performance is not enough in some situation
- Exclusive rebate or price cutting to may exclude more attractive products by eliminating competition
- Need protection of structure or competitive process,
- Question is how far?

Key elements of abuse in *Hoffmann-la Roche*

Abusive Conduct – different from those which condition normal competition in products or services on the basis of the transaction(performance)) of commercial operators

- Anticompetitive Effects – reducing residual competition or limiting new competition
  - Effect on structure of market = form of anticompetitive effect (by reducing constraints on dominant firm)

HLR test and Exclusivity Obligations

- *HLR*: dominant firm's exclusive dealing arrangements (including rebates for exclusivity) not competition on merits
  - Efficiency benefits (if any) are result of reducing uncertainty about future customer behaviour – inherent characteristic of market economy
- Criticism:
  - Exclusive purchasing obligations allow dominant firm to predict production requirements
    - This allows more efficient use of production facilities and purchase/production of necessary inputs
  - Exclusivity rebates could have similar effect

Commission view (Pre 2005 Discussion Paper)

- Art.82 meant to protect competition as ‘‘a structural process of rivalry.’’
- Where pricing practices ‘‘artificially foreclose business opportunities’’ for the competitors of a dominant firm, those practices may ‘‘harm the competitive process.’’
- Intervention by an antitrust enforcer to protect this process is justified because of a faith that the process of rivalry will contribute ‘‘in the longer run’’ to customer and consumer welfare.

Post *HLR* View of Rebates: *Michelin* I

- Volume rebate : competition on the merits
- Fidelity rebate: not competition on the merits (illegal per se)
- Target Rebate: probably not competition on the merits (illegal because it cause uncertainty and pressure for trading partners) *Michelin I*:

  a target rebate system based on relatively long reference periods the ‘‘inherent effect at the end of that period of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period.

Modernized Approach to Abuse

- Shift to economics-based assessment in Article 101 and merger cases made formalistic approach untenable
- Revised approach: enforcement authority (plaintiff) must put forward credible theory of harm
  - Consistent with accepted economic principles
- Guidance Paper (2010) asserted that anticompetitive effects means harm to consumers (higher prices)
- Subsequent case law (*Post Danmark I*; *Post Danmark II* (2016) suggest that exclusionary effect on equally efficient rivals is sufficient
- Renewed attention to nature of exclusionary conduct – competition on merits

Competition on the Merits in *Post Danmark I*

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, among other things, price, choice, quality or innovation. (Para. 22)

Competition on the Merits in *Post Danmark I*

- *Post Danmark I* suggests that "*by definition*" competition on the merits involves specific forms of conduct:
  - Competitive pricing (above cost)
  - Expanding product choice
  - Improving product quality
  - Product innovation

Competition on the Merits and the "*Competitive Process*"

- *Post Danmark* creates a clear link between competition on the merits and protecting the "*competitive process*"
- Competitive markets are generally preferred to State control of pricing and production
  - More efficient allocation of scarce resources
  - Better incentives for innovation
- Markets generate these benefits because they allow consumers in aggregate to "*reveal their preferences*" in response to offers of rival firms

Competition on the Merits and the "*Competitive Process*"

- The interface of the offerings of rival firms and the purchase decisions of potential buyers is the competitive process
- The forms of seller conduct identified in *Post Danmark I* are key parameters for choice between product offerings
  - Central to the effective functioning of market
- Limiting ability of dominant firms to compete on basis of these parameters would itself distort competition
- This is policy basis for allowing competition on merits
  - Regardless of effects

Role of AEC test
Post Danmark I & II and *Intel* (EUCJ)

- Equally efficient competitor test: tool for assessing whether conduct is capable of anticompetitive effects
  - Could rival with same product-specific costs as dominant firm profitably match discounts?
- Negative AEC Test: hypothetical competitor with same relevant costs as dominant firm would be excluded
  - Anticompetitive effects can be presumed
- Positive AEC Test: A hypothetical equally efficient competitor could match discounts of dominant firm
  - Further assessment of market conditions required to assess effects

AEC test in *Post Danmark I & II*

- *Post Danmark I*
  - Main competitor was equally efficient
  - Pricing above average incremental cost by dominant firm would not necessarily lead to exclusion
  - Further assessment required to establish exclusionary effects
- Opinion of Advocate General in *Post Danmark II*
  - AEC test not relevant where no competitors equally efficient
  - Competition regulator not required to conduct AEC test
  - Positive AEC result in test performed by dominant firm would not preclude finding of exclusionary effects

AEC test in *Intel* (EUCJ & GC (2016; 2022))

- Positive AEC test served to rebut presumption that loyalty-enhancing rebate scheme had anticompetitive effects (*Intel* EUCJ)
  - Reaffirmed by GC in the *Intel* (renvoi) judgment (2022)
- No conduct is inherently abusive.
  - It is always necessary to show anticompetitive effect
  - Although some conduct may be presumed to have such effects unless evidence to the contrary is introduced)
- In these circumstances the Commission is required to make a full economic assessment of anticompetitive effects to establish abuse

EU Treatment of rebates post-*Intel:* Role of AEC Test

- *Intel* does not:
  - Require AEC test in all cases
  - Mean that less efficient competitors are not worthy of protection
- If hypothetical equally efficient competitor *could* match pricing by dominant firm, full economic analysis would need to consider
  - Whether the actual competitors in the market could do so
  - Whether other features of the market would limit ability of customers to switch

Competition on the Merits in *Google Shopping*

- Google (dominant in markets for internet search services) introduced its own price comparison shopping product
  - Favourable display where users make shopping-related searches
  - Changes to adjustment algorithm demoted rival price comparison services
- Weakened competition in related market for price comparison shopping services
  - Also strengthened Google market position in search services
- Google argued that changes to display were product improvements
  - Competition on merits – not abuse

Google Shopping – Innovation is not always competition on the merits

- Abusive conduct here not just favoured display for Google shopping product
  - Google also adjusted display algorithm to disfavour rival price comparison services
- Each innovation separately might be competition on merits
  - Better product for consumers
- But introducing them together magnifies anticompetitive effect
  - Not competition on merits
- Also shift from a neutral display of results responding to user queries *degrades* performance of Google general search product
  - Making product less responsive to user needs is not a product improvement

Google Shopping – Does "*competition on the merits*" require equal treatment of competitors?

- General Court also developed alternative test for competition on the merits based on "*equality of treatment*"
- GC observed that purpose of Art 102 – to promote undistorted competition
  - Basis for concept of "*competition on the merits*"
- Undistorted competition requires "*equality of treatment*" for all competitors
  - Principle developed in cases involving regulation by EU Member States
- Therefore (according to GC) dominant firm conduct that leads to unequal treatment cannot be competition on merits

Google Android, Case T-604/18 (14.09.2022)

- Commission Decision (2018) €4,342,865,000 fine (highest ever)
- Strategy to extend Google position as dominant provider of search services to mobile internet access
  - Acquisition of Android (mobile OS) –2005
- Agreements with OEMs / mobile service providers

Google Android: Market Definition / Dominance

- GC accepted COM description of the Android "*ecosystem*" as comprising "*interconnected but distinct*" markets
- GC also approved COM use of "SSNDQ" test to assess competitive constraint from Apple iOS
  - SNIIP test not appropriate because no distinct price for OS
  - *SSNDQ = Small but significant non-transitory decrease in quality* – also described as *"Quality degradation test"*
- COM found that significant reduction in comparative quality of Android OS would not lead to consumer switch to Apple

Restrictive Provisions in Agreements with OEMs and Mobile Providers

- Mobile application Distribution Agreement(MADA) – Pre-installation of Google Search and Google Chrome required for access to Google app store
- Anti-Fragmentation Agreements(AFA) – no installation of open-source Android based applications
- Revenue share agreements(RSA) – share of Google ad revenue for agreement not to pre-install competing general search service

Google Android -- Abuse and Fine

- GC confirmed COM conclusions regarding pre-installation agreements and antifragmentation agreements
  - Pre-installation agreements within scope of tying abuse found in 2009 *Microsoft* case
  - Cumulative effects of RSA & MADA were considered and therefore not within the competition on the merits
  - Efficiency justification for antifragmentation agreements rejected
- GC ruled COM had failed to demonstrate anticompetitive effects of revenue share agreements
  - Market foreclosure less than 20%
  - Illustrates post *Intel* requirement to consider actual effects

EU Policy on Proving Anti-Competitive Effects: Revision of Enforcement Priorities Guidelines

- EU has revised discussion of anticompetitive effects in its Art 102 Enforcement Priorities Guidelines (27.03.2023)
- New wording clarifies that anticompetitive effects not limited to "*full exclusion or marginalisation of competition*"
- Also include adverse impact on "*effective competitive structure*"
  - Reduction in constraint from rivals in relation to "*various parameters of competition*" (price, production, innovation, variety, quality of goods or services)

"Competition on the merits" vs. *"effective competition"*

- The term "*competition on the merits*" should not be confused with the general term "*effective competition*"
- Effective competition describes a level or intensity of competition sufficient to meet the goals of the EU treaties
  - It relates to the *effects* of competitor interaction
  - Contrast with *"competition on the merits"* which relates to dominant firm conduct
- *Google Shopping* judgment suggests that *combining* multiple forms of conduct can be abusive where it leads to lessening of competition
  - Even where each form of conduct might qualify as competition on merits
  - But here it is the combination (a form of conduct) that constitutes the abuse

How does EU approach diverge from US consumer welfare standard?

- For 50 years the accepted goal of US antitrust law and policy has been maximization of "*consumer welfare*" as that term is understood in welfare economics
  - On this basis a showing that conduct will have demonstrable negative effects on consumer welfare is requirement for intervention
  - "*Neo-Brandeisian*" critics argue for more focus on controlling economic power, but in practice advocate less rigorous standards of proof – not different analytical models

How does EU Concept of "*Competition on the Merits*" diverge from US consumer welfare standard?

- The US consumer welfare standard is an approach to defining anticompetitive effects
- Competition on the merits in EU law is an approach to defining anticompetitive conduct
  - U.S. approach to predatory pricing reflects similar concerns

How does EU approach diverge from US consumer welfare standard?

- In EU law, enhancing consumer welfare is goal of Treaties as a whole
  - Maintaining a fully functional internal market is central task of EU
  - Many commentators (mostly German) reject US approach as fundamentally unjust on jurisprudential grounds
- The goal of EU competition law is to ensure that the internal market can function effectively
  - Market function is harmed where competition is distorted
- Welfare analysis is an economic tool for identifying distortions of competition (in counterfactual assessment)