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Exploitative abuses in the pharma and digital markets

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Exploitative abuses under Art. 102 TFEU

- **Exploitative abuses:** dominant firm directly **harms its customers, rather than excluding its competitors.**
- Exploitative abuses mentioned **in Art. 102:**
 - 1) ‘directly or indirectly imposing unfair purchase or selling prices’ ➤ **excessive prices.**
 - 2) **‘unfair trading conditions’.**
 - 3) ‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’ ➤ **discriminatory prices.**

CJEU case law – excessive prices

- **United Brands (1978):**

2 cumulative conditions:

- 1) **Excessive limb:** the difference between price and costs is ‘excessive’.
- 2) **Unfair limb:** the price is ‘unfair in itself’ OR ‘unfair when compared to competing products’.

- **AKKA/LAA (2017):**

First limb United Brands test: the price/cost difference has to be ‘appreciably high’, ‘significant’ and ‘persistent’ ➤ ‘no minimum threshold’.

Benchmarking approach: price charged by ‘other firms’ in other EU Member States for the same type of product ➤ **alternative to United Brands test**

- 1) EU Member States have to be selected on the basis of ‘objective, appropriate and verifiable criteria’
➤ ‘consumption habits.... GDP per capita, cultural and historical heritage’.
- 2) NO minimum number of EU Member States to take in consideration for the comparison.

CJEU case law – unfair trading conditions

- **NO exhaustive definition/test in CJEU case law.**
- **General conditions** elaborated by CJEU case law:
 - 1) **‘Unilateral’**: dominant firm is an un-avoidable trading partner for the customer (*Porto di Genova*, 1991).
 - 2) **‘Unfair’**: clauses NOT related to the performance of the contract (*BRT v. SABAM*, 1974).
- CJEU has analysed possible objective justifications, BUT rarely accepted them in practice (*AAMS*, 2001).

Non-enforcement paradigm

- Under CJEU case, the enforcement of Art. 102 *vis-a-vis* exploitative abuses is subject to **strict conditions, BUT not impossible**.
- However, the EU Commission and NCAs have rarely sanctioned exploitative abuses under Art. 102
➤ **traditional non-enforcement paradigm**.
- **Reasons of the non-enforcement paradigm:**
 - 1) Unclear and complex test ➤ risk of losing the case on appeal.
 - 2) Overlap with sector regulation ➤ risk of market regulation via competition policy.
 - 3) Risk of discouraging new investments by the dominant firm ➤ disincentive for innovation.

Economists' view on exploitative abuses

- Most of the economists have argued against the enforcement of Art. 102 *vis-a-vis* exploitative abuses.

1) Excessive prices ➤ competition enforcement only in exceptional circumstances (Motta & De Streel, 2007):

- a) High and non-transitory entry barriers in the relevant market.
- b) Super dominance caused by exclusive monopoly rights.
- c) Market does NOT self-adjust in the long term.
- d) NO price regulation by NRA.

2) Unfair trading conditions: consumers law is a better tool than competition policy.

Revival of exploitative abuses

- During the recent years, EU Commission and NCAs have sanctioned an increasing number of exploitative abuses in different industries ➤ **revival of exploitative abuses?**
- Excessive prices:
 - 1) **Generic drugs manufacturer (*Pfizer-Flynn* in UK; *Aspen* in Italy).**
 - 2) Copyright society (*AKKA-LAA*, Latvia).
 - 3) Gas supplier, by linking the price of gas to oil (*Gazprom*, EU Commission).
 - 4) Electricity generator, by withholding capacity in wholesale markets (*ENEL Sicily*, Italy).
 - 5) Owner of a Standard Essential Patent (SEP), via patent ambush (*Rambus*, EU Commission).
 - 6) Credit card, by imposing high Multilateral Interchange Fees (*Mastercard*, EU Commission).
- Unfair trading conditions:

Social platform, by using personal data without the users' consent (*Facebook*, Germany).
- Discriminatory pricing: NO enforcement.

Excessive prices by generic drugs manufacturers

- **Substantial price increase** introduced by **generic drugs manufacturers** in relation to **off-patent drugs**
 - **NO R&D investments.**
- **Aspen, Italy:**
 - 1) In 2016, AGCM sanctioned Aspen for:
 - a) having substantially increased the price of anti-cancer drugs.
 - b) having threatened the Italian health care agency (AIFA) to withdraw the products from the Italian market if the agency did not agree with the proposed prices increase.
 - 2) In 2017, the Regional Tribunal of Latium upheld the AGCM decision on appeal.
- **Pfizer – Flynn, UK**
 - 1) In 2016, CMA sanctioned Flynn and Pfizer for having substantially increased the price of phenytoin sodium capsules after having re-branded the product.
 - 2) In 2018, CAT quashed the decision: CMA failed to properly apply *United Brands* test.
 - 3) Case pending at the Court of Appeal of England and Wales.

Unfair trading condition by Facebook

- **Facebook saga in Germany:**

- 1) In February 2019, *Bundeskartellamt* adopted an infringement decision:
 - a) Facebook abused its dominant position in relation to **‘off-Facebook’ activities**: users were NOT aware that Facebook collected data from third-party websites ➤ unfair trading condition.
 - b) New theory of harm: Facebook behaviour harmed the privacy of its users.
 - c) Decision based on Art. 19(1) GWB ➤ German competition law equivalent to Art. 102 TFEU.
 - d) Remedy: NO fine, BUT Facebook will NOT be able to merge the data collected on-Facebook and off-Facebook without the users’ consent.
- 2) In August 2019, **Düsseldorf Court** adopted a **preliminary injunction to stop the enforcement of *Bundeskartellamt* decision** ➤ serious doubts about the legality of the decision, BUT the case is still pending.

Questions for the panelists

- Are we witnessing a **‘revival’ of exploitative abuses in Europe?** Is such trend limited to specific industries? What are the possible reasons?
- In case of NCA intervention *vis-a-vis* exploitative abuses, what are the most suitable **remedies?** Commitments? Fines? Infringement decisions?
- Why are many NCA decisions concerning exploitative abuses **quashed on appeal** (e.g. CAT in *Pfizer-Flynn*, Düsseldorf Court in *Facebook*)?
High burden of proof; complex economic assessment; lack of clarity under CJEU case law?
- What should be the **relationship between competition and sector-regulation in relation to exploitative abuses?**
 - 1) Regulatory gap ➤ competition policy should be enforced only in the absence of sector regulation.
 - 2) Co-existence ➤ NCA should actively cooperate with data protection, health care and consumer protection agencies like with the NRAs (i.e. joint investigations and exchange of info...).

Thank you for your attention!