FLORENCE COMPETITION PROGRAMME

Economic analysis in the recent case law of the EU Court of Justice

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Outline

- **Focus of the panel: ’very’ recent case law of the EU Court of Justice on Art. 102.**

- **Structure of the presentation:**

1) 2009 EU Commission Guidance Paper on Art. 102.
2) Recent ECJ/GC case law on Art. 102:
   a) Case T-286/09 RENV, *Intel v. Commission.* 26 January 2022.
   b) Case C-377/20, *Servizio Elettrico Nazionale v. AGCM.* 12 May 2022.
3) Questions for the debate.

2009 Guidance Paper on Art. 102

- **Guidance Paper**: defines the **Commission enforcement priorities under Art. 102** ➢ formally, the Guidance Paper did NOT modify the CJEU case law on Art. 102.
- Commission will investigate only abuses that "are most harmful for consumers".
- Commission will investigate abuses that have 'foreclosure effect' ➢ rejection *per se* approach.
- Dominant company can justify its abuse via efficiency defences ➢ benefits for consumers.
- **As Efficient Competitor (AEC) test.**

AEC test – 2009 Commission Guidance Paper

- **AEC logic**: EU Commission 'will normally only intervene' where the conduct 'is capable of hampering competition from competitors … as efficient as the dominant undertaking.' (para. 23).
- **Question**: would a competitor 'as efficient as' the dominant firm (i.e., BUT NOT dominant) 'match the price' charged by the dominant firm (e.g., conditional rebate; predatory pricing):
  1) YES ➢ conduct does NOT have foreclosure effect = NO abuse.
  2) NO ➢ conduct might have a foreclosure effect = abuse?

- **Ambivalent ECJ approach:**

1) *Post Danmark II* (C-23/14):
   a) Application AEC test in a market fully controlled by dominant firm is 'practically impossible'.
   b) AEC test is 'one tool amongst others for the purpose of assessing whether there is an abuse'.

2) *Intel* (C-413/14): GC should have reviewed the application of the AEC test by the Commission.

- **Ambivalent EU Commission approach** : AEC test applied in 2009 *Intel* Decision, BUT not in 2018 *Qualcomm* Decision.

Intel – legal saga

- Intel: dominant firm in the market of x86 central processing units (CPUs).
- AMD: Intel's main competitor.

- 2009, the EU Commission imposed a fine on Intel of 1.06 billion € for breach of Art. 102:

1) **Conditional rebates**: rebates granted to OEMs which purchased CPUs only from Intel.
2) **Naked restrictions**: direct payments to OEMs and distributors, in order to postpone/cancel the release of products which had installed AMD CPUs.

- 2014, GC upheld the decision ➢ EU Commission carried out AEC test 'for the sake of completeness'.

- **2017, ECJ annulled the previous GC ruling:**

1) Conditional rebates are NOT *per se* prohibited ➢ revision *Hoffmann La Roche* case law.
2) Since the AEC 'played an important role' in the Commission Decision, the GC should have reviewed the application of the test.

- **26 January 2022, second GC ruling in the case ➢ annulment 2009 Commission decision.**
- 30 March 2022, EU Commission appealed the second GC ruling to the ECJ ➢ the saga goes on…

Intel RENV, second GC ruling

- **Naked restrictions (para. 90-92):**

1) ECJ did NOT assess the legality of naked restrictions ➢ Commission decision is *res iudicata?*
2) ECJ ruling concerning effect-based analysis and AEC test applicable only to conditional rebates.
3) Conditional rebates and naked restrictions may be subject to '**different legal tests**' under Art. 102.
4) Question: are naked restrictions still subject to a *per se* prohibition under Art. 102??

- **GC's take-aways from 2017 ECJ ruling in *Intel*** (para. 123-127):

1) Conditional rebates are NOT *per se* infringement of Art. 102 ➢ 'mere presumption'.
2) Commission has to assess the 'foreclosure capacity' of the conditional rebate on the basis of the 5 criteria identified by the ECJ in para. 139 of the *Intel* ruling.
3) AEC test is NOT compulsory; BUT if the Commission has carried out the test, it should be reviewed by the GC.

- **GC judicial review extends 'to all elements of the Commission decision… in law and in fact'** (para. 150) ➢ NO Commission margin of discretion for complex economic analysis??

Intel RENV, second GC ruling

- **Review AEC test carried out by the Commission in the 2009 Decision** (para. 152 – 482):

1) Objective AEC test: assessing **foreclosing capacity of the rebate scheme *vis a vis* potential new entrants** in the market ➢ NOT case priority setting.
2) Several **factual errors committed by the Commission** in the application of the AEC test.
3) The GC rejected 'additional analyses' submitted by the Commission to support the validity of the AEC test in the 2009 Decision ➢ beyond scope of GC's judicial review.

- **2009 Commission Decision did NOT properly assess the foreclosure effect of the rebate in light of the conditions identified by the ECJ in para. 139 of *Intel* ruling:**

1) Market coverage ➢ NOT analysed by the Commission Decision.
2) Duration and amount of the rebate scheme ➢ NOT analysed by the Commission Decision.
3) Extent of the company's dominant position on the relevant market.
4) Conditions and arrangement for granting the rebates.
5) Exclusionary strategy by the dominant firm.

Servizio Elettrico Nazionale - Facts

- ENEL: electricity incumbent and former legal monopoly in Italy.
- *Servizio Elettrico Nazionale* (SEN): ENEL's subsidiary in charge of the electricity distribution to householers who had NOT switched to liberalized electricity markets yet.
- 2018, *Autorità Garante per la Concorrenza ed il Mercato* sanctioned ENEL/SEN under Art. 102: SEN refused to share the householders' data with ENEL competitors.
- ENEL main defence: only 478 clients switched from SEN to ENEL ➢ NO foreclosure effect.
- 2019, Tar Lazio upheld the AGCM decision.
- **2020, *Consiglio di Stato* referred 5 questions for preliminary ruling to the ECJ:**

3) Assessment foreclosure effect of an abusive conduct?
1) Steps in the assessment of an abusive conduct ➢ clarification *Intel* framework of analysis?

- **12 May 2022, ECJ's preliminary ruling in the case.**

Servizio Elettrico Nazionale – ECJ ruling

- **Question 3: assessment foreclosure effect of the abusive conduct:**

1) NCA should assess the foreclosure '**capacity**' of an abusive conduct ➢ NO quantification (para. 50).
2) Lack of actual foreclosure effect does NOT exclude *a priori* Art. 102 (para. 55) ➢ the fact that only 478 clients switched from SEN to ENEL did NOT prove the lack of abuse (para. 57).

- **Question 1: steps in the assessment of an abusive conduct:**

1) Abusive conduct:
   a) Conduct has the '**capacity**' to exclude competitors ➢ NOT only hypothetical effects (para. 70-71).
   b) Conduct is '**abnormal**' = NO rationale, other than excluding competitors (para. 75) ➢ **AEC test**:
      i. Price abuses: 'important' to show lack of replicability by an efficient competitor (para. 82).
      ii. Non-price abuses: *Bronner* conditions reflect AEC 'logic' (para. 83).

2) **Objective justifications** put forward by the dominant firm: lower price; more choice for consumers; better services (para. 85-86).

3) **Abuse of dominance in the case**: in view of its dominant position, SEN should have offered to householders information about offers from ENEL's competitors in a non-discriminatory way (para. 96) ➢ data sharing obligation for the incumbent in a market subject to liberalization?

Questions for the debate

- After *Cartes Bancaires* and *Intel/Servizio Elettrico Nazionale,* is there a 'symmetry' in the effects-based analysis under Art. 101 and 102? Similar to object restrictions under Art. 101, are there abuses still *per se* prohibited under Art. 102 (e.g., naked restrictions)*?*

- What should be the role of AEC test in abuse of dominance cases? Case priority setting v. analysis of foreclosure capacity? AEC test in price v. non-price abuses?

- What are possible efficiency justifications under Art. 102? 'Feasible' burden of proof for the dominant firm?

- Has the standard of judicial review applied by the EU General Court become 'more intense' after *Intel RENV* and *CK Telekoms?* Going beyond *Tetra Laval* standard of judicial review?

- Is the standard of judicial review applied by national courts in reviewing the NCA's decisions in line with the standard applied by the EU Courts?

Thank you for your attention!

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