Preliminary rulings in EU Competition Law

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Agenda

• Annulment actions v. preliminary rulings
• Article 102 TFEU: conceptual mess
• Article 101 TFEU: greater conceptual clarity
• Why is the case law on Article 102 so confused?
• How well do dominant firms fare in annulment proceedings?
• The growing number of commitment decisions
• Consequence: The case law on Article 102 no longer evolves
CJEU and competition law

• The CJEU deals with competition law in two distinct scenarios where its role is different:
  – **Annulment actions**: CJEU deals with the appeals of judgments adopted by the GC. The judgments of the GC review the legality of Commission decisions pursuant to Article 263; and
  – **Preliminary rulings**: CJEU provides guidance to national courts on issues relating to Articles 101 and 102.

• Preliminary rulings are thus a good opportunity for the CJEU to set principles on the applications of Articles 101 and 102.
Article 102 TFEU: Conceptual Mess

• Notion of abuse:
  – “methods different from those governing normal competition” (Hoffman-La Roche)
  – Conduct that does not represent “competition on the merits” (Astra Zeneca)
  – Conduct not in line with the “special responsibility” that bears on dominant firm (Atlantic Container Lines)

• None of the above definitions encapsulates a normative concept capable of satisfying the basic requirements of the rule of law and legal certainty.

• The Guidance Paper offers a sharper definition of the notion of exclusionary abuse, but it has not been fully taken on board by the CJEU.
Article 101: Greater Conceptual Clarity

• Greater clarity of the notion of restriction of competition resulting in greater consistency in the EU courts’ case law.
  – Ex: *Premier League* (C-403/08) (territorial restrictions), *Pierre Fabre* (Case C-439/09) (internet sales), *T-mobile* (C-8/08) (information exchange among competitors), *GSK Spain* (C-501/06 P) (agreement to restrict parallel trade)

• Effects-based approach now seems well in place.
  – Although there is a movement to a “by object” approach

• CJEU did not hesitate to place clear limits on the powers of the Commission.
  – Ex: *Bayer* (Cases C-2/01 and C3/01) (limiting meaning of “agreement”).
Why is the case law on Article 102 so confused?

• Formalism v. economic approach?
  – On the one hand, one of the few merits of formalism is its conceptual clarity.
  – On the other hand, many have realized that a formalistic approach is not in line with economic theory.

• Article 102 raises particularly complex issues.
  – That is particularly true as most cases can be argued both ways.
  – However, the lack of clarity even relates to the most basic principles.
In a recent paper, Ibanez Colomo advances an “procedural-institutional” hypothesis.

Preliminary rulings offer a better setting to develop principles of law.

Article 101:

– Fundamental insights as to the scope and meaning of Article 101 were developed on three seminal judgments rendered in the context of preliminary rulings:
  • *Société Technique Minière* (1966)
  • *Brasserie de Haecht* (1967)
  • *Völk v. Vervaecke* (1969)

– On this solid basis, the case law developed incrementally.
• Article 102:
  – Between 1964 and 1984, 13 preliminary references dealing with Article 103 reached the ECJ: “Of these, only the question referred in the last one (CBEM-Telemarketing) was capable of providing useful guidance for future cases.” (Ibanez Colomo)
  – The notion of abuse was developed in a series of annulment proceedings (Continental Can, Commercial Solvents, United Brands, Hoffman-La Roche, Michelin I, Akzo, Magill, etc.) that did not create the conceptual unity found in the early Article 101 case-law.
# Overview of the main Court of Justice
## Judgments in Article 102 cases

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How well do dominant firms fare in annulment proceedings?

• Not very well ... Statistics show that over the past couple of decades almost all appeals against Article 102 decisions have been dismissed by the GC and the CJEU.

• For several categories of conduct (e.g., loyalty rebates, tying and margin squeeze) dominant firms may waste their money going to Luxembourg even if they have a good case.

• Judgments adopted in relation to preliminary rulings do not necessarily help.
  – Ex: TeliaSonera which makes no logical and economic sense as, for instance, it treats “constructive” refusal to supply/margin squeeze more severly than “pure” refusal to supply.
The growing number of commitment decisions

• Article 9 of Regulation 1/2003 allows the Commission to adopt binding commitment decisions.
  – When this possibility came out with Regulation 1/2003, few believed that it would become so successful.
  – Most scholars at the time considered that reliance on commitment decisions should be exceptional.
• However, the growing adoption of gigantic fines combined with the low prospects in winning on appeal leave no choice to dominant firms but to accept commitment decisions.
• The Commission finds the procedure attractive as it delivers faster results (although this is a bit of a myth), it is a way to extort remedies that companies would otherwise never accept, and the dominant firm will not appeal.
## Overview of Commission Infringement and Commitment Decisions since 2004

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Consequence: The case law on Article 102 no longer evolves

• There are very few Article 102 decisions and thus very few annulment proceedings
• The dated case-law (exclusive dealing, loyalty rebates, etc.) remains as it is.
• The reach of Article 102 has become extremely wide (e.g., *Astra Zeneca* and “competition on the merits”), which that almost any conduct by a dominant firm can potentially be considered as an abuse.
• The only remaining avenue for progress are preliminary rulings.
THANK YOU FOR YOUR ATTENTION!

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