Preliminary rulings in EU Competition Law

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Agenda

- Annulment actions v. preminary 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.

Alternative explanation (1)

- 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.

Alternative explanation (2)

- 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

Article 102 Abuses	Preliminary Rulings	Appeals to ECJ
Exclusive Dealing		Hoffman-La Roche; BPB Industries
Rebates		Hoffmann-La Roche; Michelin I; British Airways; Tomra
Tying		Hilti; Tetra Pak II
Predatory Pricing	Post Danmark	Akzo; France Telekom; Tetra Pak II; Companie Maritime Belge; Irish Sugar
Margin Squeeze	TeliaSonera	Deutsche Telekom; Telefonica; Napier Brown/British Sugar
Refusal to Supply	Bronner; IMS Health	Magill, Commercial Solvents
Excessive Prices	Bodson	General Motors; United Brands; British Leyland
Price Discrimination	Corsica Ferries	Italian Republic v Commission; United Brands; Suiker Unie; Deutsche Bahn; Aéroports de Paris; Portuguese Republic v Commission

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 queeze) 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

	Infringements	Commitments
2004	PO/Clearstream	
2005		Coca-Cola
2006	Prokent/Tomra	ALROSA ; REPSOL
2007	Telefonica S.A. (broadband)	Distrigaz
2008		German electricity wholesale market ; German electricity balancing market
2009	Intel	RWE gas foreclosure ; Ship Classification ; GDF foreclosure ; Rambus ; Microsoft (Tying)
2010		Long term electricity contracts in France ; Swedish Interconnectors ; E.On gas foreclosure ; BA/AA/IB ; ENI
2011	Telekomunikacja Polska	Standard and Poor's ; IBM - Maintenance services
2012		Rio Tinto Alcan ; Reuters Instrument Codes
2013		CEZ ; Deutsche Bahn ; A++

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.

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