Rule-making in the context of Article 102 TFEU

Bill Allan

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Why should we care? Legal certainty

• Art 7, ECHR:
  “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”

• Common law *(R v Rimington per Lord Bingham)*:
  “No one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.”
Why should we care? Legal certainty

• The *Obscene Publications Act 1959-64* prohibits any article “the effect of [which] ... is ... such as to tend to deprave and corrupt ...”

• *Blasphemous libel* embraced “every publication ... which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God”

• *Manslaughter by gross negligence.*
Why should we care?

- Legal certainty
- Commercial certainty
- System-wide certainty
What should be done?

• Limit fines to cases that satisfy legal certainty?

• Prioritisation?
Why do we have a problem?

• Inherent difficulties in control of unilateral behaviour
• Article 102 = unique control mechanism
• Broad terms and unclear purpose
• No mechanism for delegated legislation
• Rule-making dialogue
Why do we have a problem? Rule-making dialogue

• Role of Court:
  – “That [Guidance] has no bearing on the assessment of the present appeal. ... What is more, even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by the Treaties as interpreted by the Court of Justice.”

  ~ AG Kokott in *Solvay v Commission*
Why do we have a problem? Rule-making dialogue

- Role of the Court
- Court’s approach
Why do we have a problem? Rule-making dialogue

- Role of the Court
- Court’s approach

“It is not possible to uphold the objections made against those arguments by Michelin NV, supported on this point by the French Government, that Michelin NV is thus penalized for the quality of its products and services. A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.” ~ Michelin I
Why do we have a problem? Guidance

• Status
• Explicit reliance
  – TeliaSonera
  – IDEXX
Why do we have a problem? Guidance

“According to the case law cited above, the conduct of a dominant firm infringes Article 102 TFEU if the conduct is capable of restricting competition and of making market entry more difficult or impossible for equally efficient actual or potential competitors. However, in its analysis of the facts of this case, the OFT has not only considered whether the conduct of IDEXX is capable of or tends to restrict competition by foreclosing actual or potential competitors, but also, in line with the Commission's Guidance, whether the conduct of IDEXX is also likely to foreclose competition in the relevant markets.

In light of the above, the OFT analysed three theories of harm and sets out the methodology it has adopted when considering whether each of these three theories of harm are likely to foreclose competition. Overall, ... the OFT considers that ... it is unlikely that IDEXX's conduct would lead to the foreclosure of actual or potential competitors such as to impair effective competition in the market(s) in question at this point in time.”

~ IDEXX, paras 6.9 and 6.10
Why do we have a problem? Guidance

• Status
• Explicit reliance
  – TeliaSonera
  – IDEXX
• Tacit influence
  – positive
    • as efficient competitor
    • Article 102(3)
  – negative
    • TeliaSonera
    • Post Danmark
Why do we have a problem? Guidance

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  – negative
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“114 The prices charged by AKZO to its own customers were above its average total costs, whereas those offered to customers of ECS were below its average total costs.

115 AKZO is thus able, at least partly, to set off losses resulting from the sales to customers of ECS against profits made on the sales to the "large independents" which were among its own customers. This behaviour shows that AKZO’s intention was not to pursue a general policy of favourable prices, but to adopt a strategy that could damage ECS. The complaint is therefore substantiated.”

~ AKZO
Why do we have a problem? Guidance

• Status

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• Tacit influence
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• Guidance v Guidelines: significance
## Why do we have a problem? Decisions

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* + patent ambush
Solutions? Substance

• Overall objectives

“...The protection of competition is of course not an end in itself. As a means of both enhancing consumer welfare and ensuring an efficient allocation of resources competition helps to prevent other welfare decreasing effects (such as environmental degradation or a rise in prices of production input factors). Thus not only consumers benefit from the protection of competition, at least in the medium or long term. Consumers are indirectly protected, as they would have to face disadvantages such as little innovation or higher prices if competition was harmed.”

~ Bundeskartellamt (2005)
Solutions? Substance

- Overall objectives
- Normative structure
Solutions? Substance

- Overall objectives
- Normative structure

- Standard for exclusionary abuse
  - Sufficiency of market effect
    - Intensity of effect
    - Probability of effect
      - Relevance of actual market effects
      - Standard of probability
Solutions? Substance

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“561 The Court finds that Microsoft's complaint is purely one of terminology and is wholly irrelevant. The expressions 'risk of elimination of competition' and likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. ...”

~ Microsoft
Solutions? Substance

• Overall objectives
• Normative structure

• Standard for exclusionary abuse
  – Sufficiency of market effect
    • Intensity of effect
    • Probability of effect
      – Relevance of actual market effects
      – Standard of probability
  – Competition on the merits
Solutions? Process

- Rejection decisions?
- Article 10 decisions?
- Consistency with Guidance
- Evangelism ...