The role of the analysis of anticompetitive effects for abusive conduct

A. Context

Article 102 TFEU prohibits undertakings from engaging in “abuse of a dominant position.” “Abuse” may be understood in several ways: exploitative abuse has a direct effect on consumers, for example through unfair prices charged to them, or through discrimination. Exclusionary abuse, on the other hand, affects market structures and harms consumers indirectly. For instance, in predator pricing, very low prices charged to consumers are not abusive as such[2] but this practice may have an anticompetitive aim of foreclosing one or more competitors.[3] It is this exclusionary abuse which is the focus of this summary.

B. Analysis of anticompetitive effects

There are two ways to analyze exclusionary abuse: one may either automatically presume harm to competition arising from certain exclusionary conduct (for example, each instance of predatory pricing equals abuse), or one may require a finding of actual, or likely, harm from a specific conduct in specific circumstances.[4] In other words, the analysis of anticompetitive effects in establishing abuse may either be concrete and case-specific, or simply presumed/ proven in the abstract. Both the EU Commission and EU courts have dealt with the nature of this analysis.

C. Approach of the Commission

In 2009, the EU Commission published a Guidance Paper on its “enforcement priorities” in applying what is now article 102 TFEU.[5] This Paper is not a legal interpretation of the Treaty article (as that is an exclusive task of the European Court of Justice[6]), but is nevertheless important for enforcement predictability[7]. In the Paper, the Commission clearly states that it “will normally intervene under Article [102] where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure.”[8] (emphasis added).

As such, the Commission appears to require, as a prerequisite for abuse, an evidence-supported finding that a dominant undertaking’s conduct would foreclose “actual or potential competitors”[9]. Specifically for pricing-based conduct, such as rebates, the Commission sets out a cost/price test to determine whether suspected abuse would foreclose an equally efficient competitor, in addition to “taking into account other relevant quantitative and/or qualitative evidence.”[10] This implies a rejection of automatic inference of anticompetitive effects from the mere finding of conduct that is classified as exclusionary.[11]

D. Approach of the Courts

The jurisprudence of the EU courts, on the other hand, appears to be less clear or consistent in its analysis of anticompetitive effects. Certain judgments appear to infer anticompetitiveness of the conduct under consideration. For example, in British Airways v. Commission, which dealt with discriminatory treatment by the airline of its travel agent partners, the Court held that “in such a situation, it cannot be required ... that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually” because such discrimination would “tend” to distort competition.[12] Similarly, in Solvay CA v. Commission, the Court found fidelity rebates to be in and of themselves harmful to competition, without any further proof required to that effect.[13]

On the other hand, Post Danmark AS v. Konkurrencerådet establishes that in the case of selective price reductions, “[i]n order to assess the existence of anticompetitive effects ... it is necessary to consider whether that pricing policy ... produces an actual or likely exclusionary effect, to the detriment of competition ...”[14] Likewise, in dealing with alleged abuse by margin squeezing in Deutsche Telekom v. European Commission, the Court required concrete evidence of anticompetitive effects of the conduct,[15] as it did in Konkurrensverket TeliaSonera Sverige AB.[16] As such, it appears that there is currently no consistent analysis of anticompetitive effects by the European courts across the types of exclusionary abuses.

[5] Supra note 3
[7] Supra note 3, para. 2.
[8] Supra note 3, para. 20
[9] Supra note 3, para. 19 and supra note 6, p. 5
[10] Supra note 3, paras. 23-27
[11] Supra note 4, p. 234
[12] Case C-95/04, British Airways v. Commission[2007], para. 145