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Competition Law and Pricing Mechanisms

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The Treaty of the Functioning of the European Union (TFEU) does not define the core elements of Article 102. Rather, their meaning has been elucidated through case law. Until recently, it could comfortably be argued that the law of Article 102 had not developed much since the early judgments in *Continental Can*,[1] *Commercial Solvents*,[2] *United Brands*,[3] *Hoffmann-La Roche*[4] and *Michelin I*.[5] This can no longer be said to be the case, and the importance of studying competition law and pricing mechanisms has been reinforced by the latest string of pricing cases. With the Article 267 TFEU references in *TeliaSonera*[6] and *Post Danmark I*,[7] the CLaSF XXII workshop, *Competition Law and Pricing Mechanisms*, in May 2014, came at an appropriate point in time as the law is evolving. Studying this topic now is particularly important for three reasons. First, the policy review of Article 102 generated much debate as to whether the European Commission is required to show effects in its economic analysis of exclusionary abuses under Article 102. Secondly, there have recently been some highly significant examples of the EU Courts both supporting and rejecting the effects-based approach in their economic analysis to Article 102. Finally, the outcome of recent case law is likely to have some widespread implications for enforcement policy. Former Competition Commissioner Joaquin Almunia argued that *Intel*,[8] which came out in June 2014, "will likely have implications on current policy on rebates and exclusive-dealing arrangements, and the type of economic analysis to be conducted".[9] The *Intel* case is without a doubt one of the most significant cases in EU competition law since *Microsoft*.[10] *Intel* is on appeal to the Court of Justice, so we will live with this case for years to come.

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1 Case 6/72 *Europemballage Corpn and Continental Can Co Inc v Commission* [1973] ECR 215, [1973] CMLR 199.

2 Cases 6/73 and 7/73 *Commercial Solvents Corporation v Commission* [1974] ECR 223, [1974] 1 CMLR 309.

3 Case 27/76 *United Brands v Commission*, [1978] ECR 207.

4 Case 85/76 *Hoffmann-La Roche AG v Commission* [1979] ECR 461.

5 Case 322/81 *Nederlansche Banden-Industrie Michelin NV v Commission (Michelin I)*, [1983] ECR 3461.

6 Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83.

7 Case C-209/10 *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2012:172.

8 Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547.

9 Joaquin Almunia, 'Looking back at five years of competition enforcement in the EU', Speech/14/588, page 6.

10 Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

Due to this appeal and the second Article 267 reference in *Post Danmark*,[11] which raises similar issues about effects, appreciability and the 'as efficient competitor' test, the pricing issues discussed in the four interesting essays in this Issue of the *Competition Law Review* are particularly timely. Following *Deutsche Telekom, TeliaSonera* and *Post Danmark I*, there is, in principle, judicial support for an effects-based approach in the form of an as efficient competitor test on exclusionary pricing practices such as margin squeeze and selectively low prices, although this is not the only approach that those cases allow for. The Court of Justice is careful not to require a price cost test for a finding of an infringement of harmful effects in pricing practices under Article 102.

Both *TeliaSonera* and *Post Danmark I* came after the European Commission issued its *Guidance Paper* in February 2009,[12] which focuses on the as efficient competitor test. The terminology of an as efficient competitor is nowhere to be found in the old case law with the exemption of *AKZO*[13] and indirectly *Oscar Bronner.*[14] It is hardly coincidental that in both *TeliaSonera*, which refers to *Deutsche Telecom*, and in *Post Danmark I*, the court repeatedly emphasises the importance of an as efficient competitor. This goes back to the old accusation that the EU is protecting competitors instead of competition. The law under Article 102 may have the effect of protecting competitors, but only if they are as efficient as the dominant undertaking. Not every exclusionary effect is necessarily detrimental to competition – competition on the merits may by definition led to the departure or marginalisation of less efficient competitors.

Derek Ridyard's paper explains that the concept of the as efficient competitor is used as a way to provide a more concrete dividing line between the protection of *competition* and the protection of *competitors*. The as efficient competitor test plays a crucial role in the establishment of a more effects-based approach to the enforcement of Article 102, and Ridyard examines how the test relates to the various price cost tests set out in the *Guidance Paper* by distinguishing between (i) short and long run costs and (ii) incremental and average costs. The paper is packed with helpful illustrative examples, which makes those price cost distinctions easily accessible. Ridyard argues – from a strictly economic perspective – that the as efficient competitor test applies uniformly across all categories of exclusionary conduct, since the possibility that a dominant firm will evade effective competition by eliminating rivalry is the same in all cases. Despite this, the General Court found in *Intel* that there is no role for the as efficient competitor test where the exclusionary conduct takes the form of exclusivity incentives, because such conduct is by its very nature abusive when carried out by a dominant undertaking. It is the 'loyalty-inducing' effect that rebates are capable of having that distinguishes them from other price-based exclusionary conduct. It is clear from the judgment in *Intel* that the court sees such rebates as a form of exclusivity rather than a low price. Thus,

[11] *Post Danmark*, n 7.

[12] Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ 2009 C 45/7 (hereafter the 'Guidance Paper').

[13] Case C-62/86 *AKZO v Commission* [1991] ECR I-3359.

[14] Case C-7/97 *Oscar Bronner GmBH&Co.KG v Mediaprint Zeitungs- and Zeitschriftenverlag GmBH&Co.KG and Others* [1998] ECR I-7791.

the approach taken to such rebates is to be distinguished from the approach taken to predatory pricing. The court justifies its strict view on exclusivity on the grounds that competition is distorted whenever access to the market is made more difficult for rivals.[15] Although Ridyard concludes that the as efficient competitor test plays a crucial role in establishing a more effects-based approach to the enforcement of Article 102, he points out that the test still leaves great uncertainty as to how dominant firms need to behave in order to come out on the right side of the test.

Özkan's paper also discusses the as efficient competitor test and questions whether the leading cases on margin squeeze such as *Deutsche Telekom*,[16] *TeliaSonera* and *Telefonica*[17] can be taken as evidence that the formalistic approach to Article 102 has been abandoned in favour of the effects-based approach. In *Deutsche Telekom*, the General Court endorsed the existence of a separate margin squeeze offence when the spread between wholesale and retail prices is either negative or insufficient to cover the dominant firm's product specific costs. However, it did rule that the Commission had been wrong to conclude that the very existence of the margin squeeze constituted an abuse, without the need for demonstration of anticompetitive effects. This was upheld on appeal. As Özkan points out, the Court of Justice found that a pricing practice constitutes and abuse under Article 102 if it has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking. The *TeliaSonera* case confirmed that margin squeeze must have an anti-competitive effect on the market. This was confirmed in the *Telefonica* case. This does not mean that the Commission has to prove that a competitor has actually been eliminated, as that would emasculate Article 102, because sometimes the conduct has not yet had its undesirable effects. In both *TeliaSonera* and *Deutsche Telecom*, the court repeatedly emphasised the importance of an as efficient competitor, which is in line with the *Guidance Paper*. The latter recognises the need for a more nuanced approach to margin squeeze cases, and states that the Commission will analyse them in the same way as it analyses refusals to supply, license or to grant access to an essential facility or network. Özkan concludes that there are some indications in favour of a more effects-based approach to Article 102 although he is hesitant to conclude that the form-based approach to Article 102 has been replaced.

There is a difference in the way Article 102 and Sherman Act Section 2 operate, because the economic circumstances are very different in the two jurisdictions. In the EU, there are still countries where you will find big companies, which used to be former state monopolies. The US does not have that. This became obvious in the *Telefonica* case. The considerable divergence of the treatment of margin squeeze in the EU and the US respectively is subject to analysis in McMahon's paper. Following her analysis of US case law, she concludes that it is difficult to see whether any liability for margin squeeze remains in the US under Section 2 of the Sherman Act following the case in *Linkline*.[18] Her analysis of margin squeeze in the EU is done within the context

[15] *Intel*, n 8, paragraph 88.

[16] Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-955.

[17] Case T-336/07 *Telefonica and Telefonica de Espana v Commission* ECLI:EU:T:2012:172.

[18] *Pacific Bell Telephone Co. v Linkline Communications INC.*, 129 S. Ct. 1109 (2009).

of a broadening role for competition law in liberalized and regulated markets and the purported shift in the *Guidance Paper* towards a more economic approach to Article 102. With reference to *Deutsche Telekom* where the Community Courts claimed that undistorted competition could only be guaranteed if 'equality of opportunity' was secured as between the various economic operators, she questions whether the concept of equality of opportunity is a useful antitrust standard. It has usually been linked to Article 106 where the conferral of exclusive rights may distort competition through an absence of competitive neutrality. McMahan argues that equality of opportunity is incapable, in itself, of providing a standard for the substantive assessment of abusive conduct under Article 102, as it is not linked to a theory of harm, and argues it becomes superfluous to the application of the as efficient competitor test.

In the final paper, Strader makes *Post Danmark I* the focal point of analysis. He argues that by requiring proof that price-cuts produce actual or likely exclusionary effects that harm competition and 'thereby' consumers, the Court of Justice arguably grafted a recoupment element into EU predation law, at least for prices between incremental costs and average total costs. Going back to *AKZO*, the Court of Justice did not expressly deal with the question of whether the test of predation required proof that recoupment of losses was possible or likely. In *Tetra Pak II*, however, the Court of Justice held that, "it would not be appropriate, in the circumstances of the present case, to require ... proof that Tetra Pak had a realistic chance of recouping its losses".[19] In *France Télécom*, the Court of Justice confirmed the General Court's understanding that, "demonstrating that it is possible to recoup losses is not a necessary precondition for a finding of predatory pricing".[20] These judgments do not mean that the likelihood of recoupment is irrelevant in EU law. Rather, it seems implicit in at least some of these cases that a dominant firm, having disciplined or excluded its rivals from the market, will be able to raise prices, recoup losses made during the predatory siege and harm consumers. As acknowledged by Strader, the risk of consumer harm from the predatory strategy is thus presumed. A finding of dominance is a finding that the undertaking is unconstrained by competitors and if the undertaking is unconstrained then of course the company can increase price. However, in *TeliaSonera*, the Court of Justice rejected that evidence of actual recoupment is necessary,[21] which is in line with its previous judgment in *France Telecom*. Strader fully acknowledges the position in jurisprudence, but argues that by requiring proof in *Post Danmark I* that price-cuts above incremental costs but below average total costs produce actual or likely anticompetitive effects, the Court of Justice mandates the Commission to establish the existence or likelihood of recoupment. It is important to stress that Strader argues from a pricing point of view, as the court often finds exclusionary conduct to harm consumer in terms of choice or lack thereof.

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[19] This was confirmed in case T-83/91 *Tetra Pak International v Commission* [1994] ECR II-755, paragraph 44 and upheld on appeal to the Court of Justice.

[20] Case C-202/07P *France Télécom SA v Commission* [2009] ECR I-2369, paragraph 113.

[21] *TeliaSonera*, n 6, paragraphs 96-103.

The clear picture emerging from the four papers, in this volume of the *Competition Law Review*, is that the court seems to support the principle of the as efficient competitor test in *Deutsche Telekom*, *TeliaSonera, Telefonica* and *Post Danmark I*. However, the question remains how to turn the test into operational rules. It will without doubt take a long time to work out how to actually apply this test in practice. Moreover, with *Intel* on appeal to the Court of Justice and with the request for a preliminary ruling in *Post Danmark II*, the debate is likely to continue for a considerable time yet.