ABUSE OF A DOMINANT POSITION: A POST-*INTEL* CALM?

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I. INTRODUCTION

The publication of the Guidance Paper on Exclusionary Abuse in 2009 raised expectations of a paradigm-shift in the application of Article 102.[2] Broadly speaking the EU's abuse of dominance doctrines have been criticized for two reasons: the first is the focus on the form of conduct rather than on developing a theory of harm; the second is the appearance that the application of the law was likely to protect rivals of the dominant firm without a showing that this would improve economic welfare. Several commentators considered the Guidance Paper brought a paradigm shift to the analysis of Article 102, one so significant as to ask whether we would ascend from hell to heaven.[3] Observers have queried how far the Court's jurisprudence would embrace the (non-binding) Guidance Paper, which applies an effects-based approach and places emphasis on consumer welfare, and thus legitimate this new approach.

The Court's case-law has produced effects like those of a see-saw. In *Telia Sonera* the ECJ confirmed that margin squeeze would constitute a distinct form of abuse, contrary to the Guidance Paper's intimation that such cases could be analyzed within the framework of refusals to deal. The Court also restated the generous breadth of Article 102 indicating that the function of the competition rules is to prevent distortions of competition to the detriment of "the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union."[4] Then in *Post Danmark 1*, the ECJ refused to find that above cost discounts could be abusive absent proof of likely anticompetitive effects in a judgment whose rhetoric accepted that Article 102 only protected firms as efficient as the dominant undertaking.[5] It appeared the policies in the Guidance Paper might finally take root. However, in *Post Danmark 2*, the Court appeared to return to a more traditional stance in assessing loyalty rebates, and doubted the general applicability of the as-efficient-competitor test.[6]

In this optic, is the judgment in *Intel* just another move of the see-saw in the direction of the Guidance Paper or might we see a more stable shift? This paper asks this question from three different perspectives: first it asks if post-*Intel* the European Courts are more cohesive; second it considers whether the enforcement efforts by the Commission and certain National Competition Authorities may relish an aggressive stance that might

2 Communication from the Commission, Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7. Monti, "Article 82 EC: What Future for the Effects-Based Approach?," (2010) 1(1) Journal of European Competition Law & Practice 2.

3 Akman, "The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?," (2010) 73(4) MLR 605; Marquis & Rousseva, "Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct Under Article 102 TFEU," (2013) 4(1) Journal of European Competition Law and Practice 32; Venit, "Making Sense of Post Danmark I and II: Keeping the Hell Fires Well Stoked and Burning," (2016) 7(3) Journal of European Competition Law & Practice 165.

4 *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09 ECLI:EU:C:2011:83 para. 22.

5 *Post Danmark A/S v. Konkurrencerådet*, C-209/10 ECLI:EU:C:2012:172.

6 *Post Danmark A/S v. Konkurrencerådet*, C-23/14 ECLI:EU:C:2015:651.

be at odds with the post-*Intel* settlement, and might instead be searching for a different paradigm to apply abuse of dominance. Finally, the paper asks how *Intel* might affect our thinking on remedies and sanctions of dominant firms. The purpose of this discussion is to provide a high-level account of post-*Intel* developments and explore the challenges these raise.

II. A POST-*INTEL* ORTHODOXY?

The *Intel* judgment is the most subtle reformulation of an existing legal standard that is possible short of formally overruling a line of cases.[7] It will be recalled that this was an infringement decision where the Commission spent considerable efforts applying the as-efficient competitor test to determine whether the rebates Intel granted were likely to have anticompetitive exclusionary effects. On appeal, after restating the general rule under which loyalty-inducing rebates constitute an abuse of a dominant position, the Court suggested that a "further refinement" was necessary in cases where the dominant firm submits evidence that its conduct is not capable of having anticompetitive effects.[8] In such cases, the ECJ continued, the Commission has a duty to look for evidence of likely foreclosure effects, and if appropriate to apply the as-efficient-competitor ("AEC") test.[9] This test is a mechanism to determine whether the real prices paid are predatory: It is a resource-intensive exercise which the Commission committed itself to in the Intel decision.

The *Intel* investigation took place as DG Competition was drafting the Guidance Paper. The Commission's choice to apply the AEC test provided for in the Guidance Paper in the decision was curious. The Commission explained that it did not consider that applying this test was necessary to condemn Intel,[10] but used it anyway, probably as a way of signaling its commitment to such an approach. However, this came back to haunt the Commission for the ECJ held that the AEC test played an important role in the Commission decision and so the General Court was bound to examine whether the AEC test was carried out correctly in order to determine if Intel had indeed infringed Article 102 TFEU. At the time of writing, the case is back with the general Court to test whether the effects-analysis, including the AEC test, carried out by the Commission may be upheld.

The significance of the Court's very brief reformulation of the rebates case law cannot be under-estimated. There may be debates as to how much evidence the applicant will need to bring to require the Commission to carry out an effects-based assessment, but the tenor of the judgment indicates a willingness to shift away from a line of case-law that has been roundly criticized for facilitating an overly aggressive stance on discounting practices which may well enhance competition by reducing retail prices. Henceforth, an effects-based assessment will have to be carried out, whether by application of the AEC test, or by other means.[11] Of course, it may be suggested that by raising the Commission's costs of bringing such cases one errs the other way, towards under-enforcement. Yet, this is the policy choice the Court made.

Nor is *Intel* an aberration. Perhaps galvanized by AG Wahl's clear and crisp Opinions the Court has agreed to an effects-based assessment in testing whether price discrimination constitutes an abuse. The judgment in MEO concerned a complaint that the Portuguese collective management society for artists had set discriminatory prices to one of two pay-TV stations. For the purposes of this discussion, two points should be noted. First, the Court makes it pellucid that price discrimination is an exclusionary abuse.[12] Second, it clarifies the kinds of evidence that might help in diagnosing whether price discrimination is likely to harm a downstream player: The bargaining power of the licensee, the legal framework that applies to such bargains (in Portugal disagreements over license fees are solved by arbitration, which may remove the risk of exclusion), the amount of the fees relative to the costs of operating the business (the lower this is the less likely that there is an exclusionary impact), and any evidence of the dominant firm's intention to exclude the complaining firm. On the last point, since the dominant firm is not active on the downstream market it looks hard to see why a dominant firm might wish to exclude one of the two purchasers.[13]

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7 A less subtle reformulation is *Coty's* reinterpretation of *Pierre Fabre* where the court is at pains to explain away a carelessly lapidary formulation in the earlier judgment. See *Coty Germany GmbH v. Parfümerie Akzente GmbH*, C-230/16 ECLI:EU:C:2017:941, paras. 30-36.

8 *Intel v. Commission*, C-413/14P ECLI:EU:C:2017:632, para. 138.

9 *Ibid.* paras. 139-141.

10 Case COMP/37.990, *Intel*, (May 13, 2009), para. 925.

11 Fumagalli, Motta & Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance*, (2018) ch.2 suggests an alternative approach.

12 *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, C-525/16 ECLI:EU:C:2018:270 para. 30.

13 *Ibid.* para. 31.

Moreover, in giving further guidance on determining whether prices are excessive, the *AKKA/LAA* judgment (concerning again, collecting societies) appears set to increase the rigor with which National Competition Authorities must confront such claims.[14] The Latvian NCA had compared prices set by the collecting society in Latvia with neighboring Baltic states and with all other Member States. The ECJ advised that this looked appropriate provided the methods for comparison were convincing. It also added that high fees must be appreciable by reference to the significance of the difference as well as the persistence of such higher prices. Some aberrations remain in the manner in which exclusionary tactics are analyzed in newly liberalized markets, with the General Court recently justifying what may be seen as looser standards by reference to the fact that the dominant player has enjoyed a legal monopoly.[15]

III. DESTABILIZING TRENDS

The discussion above suggests that the ECJ might have now set the course of abuse of dominance doctrine along a path where one tests for likely anticompetitive effects with convincing evidence as opposed to form-based classifications of abuse. For exclusionary conduct, likely effects on efficient competitors must be shown. No comments are offered here as to whether this policy choice is desirable. It is however worth noting that alternative visions for how to read abuse of dominance may be on the horizon.

First, digital markets might lead competition agencies to look to establish novel concepts of market power or abuse that will require refinement though the courts and will entail an expansion of the abuse doctrine. In Germany, for example, the *Facebook* case which will help explore the relationship between antitrust and privacy. Moreover, a Report for the Federal Ministry for Economic Affairs and Energy entitled *Modernising the law on abuse of market power* identifies gaps in antitrust when it comes to digital markets.[16] One of its recommendations is that in markets with network effects, an antitrust agency should be able to intervene before the market tips (i.e. one firm monopolizes it). Another is that in markets where actors provide intermediation services (e.g. platforms) there is a case for recognizing intermediation as a source of market power. Likewise, the report identifies data as a source of market power. While these recommendations are made to amend German antitrust law only, it is likely that others may emulate these approaches.

Likewise, the Commission's restatement of Article 102 in the *Google Shopping* case evinces a recognition that a dominant platform poses certain risks that a firm like Intel does not. In restating the principles underpinning the concept of abuse of dominance, the Commission enumerates a number of well-known aphorisms, but also indicates that "[a] system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators."[17] Moreover, the Commission adds that such operators should be free to compete for the entirety of the market.[18] Accordingly, a remedy ensuring equal treatment as between the dominant firm and all its downstream rivals is justifiable.[19]

These observations merit reflection. First, the notion of equal opportunities is found only in case of privileged undertakings: former state monopolies or undertakings that still benefit from exclusive rights.[20] Including a firm like Google in this group evinces a concern that certain forms of private power might create such serious risks to warrant the same kind of strict scrutiny that we find when regulating holders of exclusive rights. If this is what is intended then stronger justification is warranted and more discussion is required as to the scope of Article 102 in the framework of these manifestations of market power. The right to compete for the entire market is at odds with the recognition in the AEC test for rebates that a dominant firm may well hold a non-contestable share of the market and that therefore a rival may not, at least in the medium term, expect more than being able to compete for part of the relevant market. Why should one raise the expectation of Google's rivals higher?

14 *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v. Konkurences padome*, C-177/16 ECLI:EU:C:2017:689.

15 *Slovak Telekom v. Commission*, T-851/14, ECLI:EU:T:2018:929 para. 153.

16 H. Schweitzer, J. Haucap, W. Kerber & R. Welker, "Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)," (September 17, 2018), available at https://ssrn.com/abstract=3250742 or http://dx.doi.org/10.2139/ssrn.3250742.

17 Case AT.39740, *Google Search (Shopping)*, (June 27, 2017), para. 331.

18 *Ibid.* para. 339.

19 *Ibid.* para. 671.

20 See, e.g. *European Commission v. Dimosia Epicheirisi Ilektrismou AE (DEI)*, C-553/12 P ECLI:EU:C:2014:2083 paras. 43-47.

Thus, while *Intel* may have now stabilized how we apply abuse of dominance to old economy markets, this occurs at a time when new economy markets pose different kinds of challenges which will require a retooling of our analytical framework and another round of dialectic between agencies and courts will be needed to settle the emerging legal order. Another reading might be that the steps just described are about invoking a different idea about the role of antitrust: rather that applying the law when there is a risk that efficient competitors are excluded, there is a (ordo-liberal? neo-Brandeisian?) policy to keep markets open to all entrants and to control the power of large firms, lest private power spills over into public power.

A second risk might be that the demands of an effects-based test leads agencies to rediscover form-based abuses. As has been noted in the context of Article 101, the so-called effects-based approach, which culminated in the *Cartes Bancaires* judgment, has led to the disappearance of effects-based cases and a resort to finding restrictions by object.[21] A development that might go in a similar direction may be found in Italy, with an emerging jurisprudence on abuse of rights as an abuse of a dominant position. There are traces of this also in the ECJ's early case-law, and one might see a re-engagement with this approach if the effects-based analysis proves unwieldy.[22]

IV. REMEDIES AND SANCTIONS

There are two notable differences between remedies in infringement decisions and remedies in commitment decisions.[23] First, procedurally, remedies proposed by the parties in commitment decisions are subjected to a market test, whereby third parties are able to participate in the process. They are also sometimes designed to secure compliance via third party monitoring and might contain review clauses.[24] None of these attributes are to be found in most infringement decisions: parties are simply required to cease their conduct. In *Google Shopping* the governance of remedies was more sophisticated: The dominant firm had to explain to the Commission its proposed compliance path, it was then obliged to issue regular reports.[25] One might wonder if, in a setting where what matters are the anticompetitive effects of conduct, the process by which a dominant undertaking complies could be subjected to the kind of structure found in commitment decisions, in particular whether a public process by which remedies are market tested could be considered. This would be particularly helpful in fast-moving high technology markets, where obtaining information from a range of stakeholders can improve the precision of remedies. Clauses for reviewing and perfecting an agreed remedies package can also assist in perfecting remedies should circumstances change. Finally, a time-limit is often set for commitments and it may be appropriate to provide a timescale also for remedies in infringement decisions, if only to give the Commission and the parties a date to take stock whether the abusive conduct is no longer problematic given other market developments, or whether further supervision is required. For instance, if there is new entry, a previously-condemned rebates policy may no longer raise concerns.

Given that infringement and commitment decisions have been issued to address similar types of conduct, there seems to be no compelling reason why the process of identifying remedies could not be aligned. This recommendation might well be extended to many forms of abuse, even to a rebates case. For example, after the *British Airways/Virgin* decision, BA and the Commission cooperated to identify a set of principles to secure that BA's discounting strategy did not infringe Article 102.[26] In instances where welfare effects are ambiguous, an agreed safe harbor for the dominant firm would appear a helpful means of securing compliance.

Abuse of dominance decisions normally make the headlines because of what appear to outsiders as very high fines. AG Wathelet has suggested that the way to assess the basic amount of a fine should also take a leaf out of *Intel*. By analogy with the reasoning there, if an applicant raises evidence to indicate that the exclusionary impact is unlikely when challenging the fine, then the Commission should explore such claims and base the fines on the likely effects rather than on abstract formulations.[27]

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21 Witt, "The Enforcement of Article 101 TFEU: What has happened to the Effects Analysis?," (2018) 55 Common Market Law Review 417.

22 Siragusa, "Italy – New Forms of Abuse of Dominance and Abuse of Law," in Parcu, Monti & Botta (eds) *Abuse of Dominance in EU Competition Law – Emerging Trends* (Edward Elgar, 2017).

23 For a significant reflection on remedies, see Lianos, "Competition Law Remedies in Europe," in Lianos & Geradin (eds.) *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar, 2013).

24 Svetiev, "Settling or Earning: Commitment Decisions as a Competition Enforcement Paradigm," (2014) 33 Yearbook of European Law 466.

25 *Intel*, supra, note 18, Article 4.

26 European Commission, XXIXth Report on Competition Policy 1999, pp.139-140.

27 *Orange Polska v. Commission* C-123/16 P ECLI:EU:C:2018:87 Opinion of AG Wathelet, paras. 79 et seq.

One might supplement this recommendation (which the Court did not follow-up) by suggesting that, while the fining guidelines might be appropriate for cartel cases, they appear ill-suited to ensure a proportionate fine in abuse of dominance cases. For example, in cases where the conduct of the dominant firm makes no economic sense but for the exclusion of a rival a fine should be higher than in instances where proof of anticompetitive impact requires a detailed assessment of exclusionary potential. In the latter case it may at times even be harsh to conclude that the undertaking's conduct is negligent, or it may be a factor that mitigates the fine. The aggravating and mitigating circumstances in the Guidelines are targeted at cartel conduct, but there ought to be analogous examples for unilateral conduct, for instance exclusionary intent or the disrespect of sector-specific regulations might aggravate an infringement. Granted, the Commission may develop sensible fining principles without guidelines, but the legitimacy of such fines might be bolstered by a soft law document that constrains its discretion. One might also discuss whether, in cases where a behavioral remedy is imposed, a fine could be dispensed with and only levied in case of a repeat offense or when an undertaking "games the system" and circumvents the remedy.

V. CONCLUSION

Perhaps the ECJ has now settled that exclusionary conduct is penalized so as to protect as-efficient competitors, and that this as-efficient competitor principle underpins a vast swath of conduct to be scrutinized under Article 102. If so, then the Guidance Paper might have matured into Guidelines, as had originally been hoped. At the same time, we have signaled that there may be countervailing forces that push for a more aggressive stance as the challenges of digital markets may call for a more extended scope of application, requiring more obligations on certain market players to keep markets open to rivals. A further risk is of a retreat to formalism if the effects-based tests prove too costly to run to ensure effective enforcement. Regardless of how abuse of dominance develops, further reflection is called for on designing remedies and finessing fining policies.[28] In particular, if agencies increasingly focus on newly emerging markets, where welfare effects from conduct are ambiguous, then some of the procedures in commitment decisions could usefully be replicated in facilitating the design of remedies. Moreover, guidelines on fines could be supplemented by specific criteria relating to dominant firms. Focusing on remedies can also serve to sharpen one's concerns about the impact of conduct on competition and thus consolidate a more robust approach to developing a theory of harm.

28 Not least given some early dissatisfaction, see S. van Dorpe, "How to make Google stronger: Punish it," Politico, January 30, 2019.

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