Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

Reykjavik, 19 May 2011

Richard Whish, King’s College London

STRUCTURE OF PRESENTATION

• INTRODUCTORY COMMENTS ABOUT ARTICLE 102
• BRIEF DISCUSSION OF MARKET DEFINITION AND MARKET POWER
• ABUSE
  • WHAT IS THE PURPOSE OF ARTICLE 102?
  • THE ‘REFORM’ OF ARTICLE 102
  • THE EUROPEAN COMMISSION’S GUIDANCE ON ARTICLE 102 ENFORCEMENT PRIORITIES
  • THE MOVE TOWARDS A ‘CONSUMER WELFARE’ STANDARD
  • THE PROTECTION OF COMPETITION, NOT CONSUMERS
• CONCLUSIONS

Richard Whish
King’s College London
INTRODUCTORY COMMENTS

• ARTICLE 102 APPLIES TO THE UNILATERAL BEHAVIOUR OF A DOMINANT FIRM

• IT CAN ALSO APPLY TO THE BEHAVIOUR OF COLLECTIVELY DOMINANT FIRMS, THOUGH THIS HAS BEEN RELATIVELY LITTLE EXPLORED – MOST CASES ON COLLECTIVE DOMINANCE OR ‘TACIT COLLUSION’ HAVE ARISEN UNDER MERGER CONTROL RATHER THAN ARTICLE 102

MARKET DEFINITION AND MARKET POWER

• MARKET DEFINITION IS AN ESSENTIAL STARTING POINT IN ANY ARTICLE 102 CASE: SEE THE COURT OF JUSTICE IN CONTINENTAL CAN V COMMISSION (1973)

• HOWEVER MARKET DEFINITION IS A TOOL: ULTIMATELY THE QUESTION TO BE DETERMINED IS WHETHER A FIRM HAS SIGNIFICANT MARKET POWER (‘A DOMINANT POSITION’)

• DOMINANCE IS A BINARY CONCEPT – EITHER YOU HAVE IT OR YOU DO NOT
MARKET DEFINITION AND MARKET POWER

- MARKET SHARE FIGURES CAN BE ASCRIBED TO FIRMS WITHIN THE RELEVANT MARKET: DOMINANCE IS ASSUMED AT A MARKET SHARE OF 50% OR MORE, BUT THIS IS REBUTTABLE

- MARKET SHARES TELL US NOTHING ABOUT POTENTIAL ENTRANTS – NOTE THE SIGNIFICANCE OF BARRIERS TO ENTRY

- AND MARKET SHARES TELL US NOTHING ABOUT BUYER POWER

ABUSE

- TEXTBOOKS TEND TO DIVIDE ABUSE INTO ‘EXPLOITATIVE’ AND ‘EXCLUSIONARY’ ABUSES

- SOME CASES ARE CONCERNED WITH EXPLOITATION – FOR EXAMPLE CHARGING HIGH PRICES, DISCRIMINATION, INEFFECTIVENESS. THESE CASES ARE RARE

- AND NOTE THAT SOMETIMES CHARGING HIGH PRICES MAY ACTUALLY BE EXCLUSIONARY WHEN THEY ARE, IN EFFECT, A REFUSAL TO SUPPLY
Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

ABUSE

• MOST CASES ARE CONCERNED WITH EXCLUSIONARY ABUSES. EXAMPLES ARE
  
  > LONG-TERM EXCLUSIVE AGREEMENTS AND/OR CONDITIONAL REBATES
  
  > ‘TIE-INS’ AND BUNDLING

• FURTHER EXAMPLES OF ABUSE
  
  > PREDATORY PRICING
  
  > REFUSALS TO SUPPLY

• NOTE THAT THIS LIST IS NOT EXHAUSTIVE (SEE EG ASTRAZENECA)
Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

ABUSE

• BUT WHAT DO WE MEAN BY AN EXCLUSIONARY ABUSE? MORE FUNDAMENTALLY, WHAT IS THE PURPOSE OF ARTICLE 102?
  ➢ TO KEEP MARKETS OPEN AND PROTECT ECONOMIC FREEDOM?
  ➢ TO ACHIEVE FAIRNESS?
  ➢ TO PREVENT UNDUE DISCRIMINATION?
  ➢ TO PROTECT THE SINGLE MARKET?
  ➢ TO PROTECT COMPETITORS?
  ➢ TO PROTECT THE PROCESS OF COMPETITION?
  ➢ TO PROTECT CONSUMER WELFARE?

Richard Whish, King’s College
London

9

Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

ABUSE

• A DIFFERENT ISSUE: WHATEVER THE PURPOSE OF ARTICLE 102, IS IT POSSIBLE TO DEVISE ADMINISTRATABLE RULES, CAPABLE OF APPLICATION BY BUSINESSES, ADVISERS, COMPETITION AUTHORITIES AND COURTS?

• AND SHOULD WE BE MORE WORRIED ABOUT FALSE POSITIVES OR FALSE NEGATIVES?

Richard Whish, King’s College
London

10
Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

ABUSE

• AN ADDED CONCERN: THE US FEDERAL COURTS HAVE ‘SHRUNK’ THE SCOPE OF SECTION 2 OF THE SHERMAN ACT OVER MANY YEARS (SEE RECENTLY TRINKO, LINKLINE)

• PRACTICES THAT WOULD BE LEGAL IN THE US CAN BE ILLEGAL IN THE EU (REFUSAL TO SUPPLY, MARGIN SQUEEZE, PREDATORY PRICING)

Richard Whish
King’s College London

Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

ABUSE

• THE US IS MORE WORRIED ABOUT FALSE POSITIVES THAN FALSE NEGATIVES

• IS THE EU THE OTHER WAY AROUND?

Richard Whish
King’s College London
Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

• IN THE 1990s AND 2000s MUCH OF EU COMPETITION LAW WAS REFORMED, AND A ‘MORE ECONOMIC APPROACH’ WAS TAKEN

  ➢ VERTICALS REFORM UNDER ARTICLE 101
  ➢ EUMR REFORM AND GUIDELINES ON HORIZONTAL AND NON-HORIZONTAL MERGERS
  ➢ TECHNOLOGY TRANSFER GUIDELINES, HORIZONTAL COOPERATION AGREEMENTS ETC.

Richard Whish, King’s College London 13

Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

• ARTICLE 102 CANNOT BE ‘REFORMED’ IN THE SAME WAY AS OTHER ASPECTS OF COMPETITION LAW, SINCE THERE IS NO DELEGATED LEGISLATION: THE LAW IS WHAT THE EU COURTS SAY IT IS

• THE CASE-LAW ON ARTICLE 102 CONTAINS MANY ‘RULES’ OF A FORMALISTIC, ‘PER SE’ NATURE

• ECONOMIC INSIGHTS HAVE SHOWN THAT SOME OF THESE RULES MAY BE PERVERSE

Richard Whish
King’s College London 14
Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

• THE EUROPEAN COMMISSION CANNOT ‘UNSAY’ THE JURISPRUDENCE OF THE EU COURTS BY WRITING GUIDELINES THAT ARE INCONSISTENT WITH IT

• THE COMMISSION INITIATED A REVIEW OF THE LAW ARTICLE 102 IN 2004

• A WIDE-RANGING DEBATE FOLLOWED

ABUSE

• THIS CULMINATED IN THE COMMISSION’S GUIDANCE ON ENFORCEMENT PRIORITIES IN RELATION TO EXCLUSIONARY ABUSES OF 2009

• NOTE: GUIDANCE NOT GUIDELINES

• THE GUIDANCE DOES NOT ALWAYS FOLLOW THE LAW: WHERE DOES THIS LEAVE A COURT THAT IS HEARING AN ARTICLE 102 CASE?
ABUSE

- THE COMMISSION CONSISTENTLY SAYS THAT THE PURPOSE OF THE COMPETITION RULES IS TO PROMOTE CONSUMER WELFARE

- IT SPECIFICALLY SAYS THAT ARTICLE 102 PROTECTS THE PROCESS OF COMPETITION, NOT COMPETITORS

- AND THAT ARTICLE 102 IS PREDOMINANTLY ABOUT PROTECTING ‘AS EFFICIENT’ COMPETITORS, NOT LESS EFFICIENT COMPETITORS

ABUSE

- IN THE CASE OF PRICING ABUSES, THIS INVOLVES EXAMINING THE PRACTICES OF THE DOMINANT UNDERTAKING AGAINST AN APPROPRIATE MEASURE OF COST

- SEE PARAGRAPHS 23-27 ON AVERAGE AVOIDABLE COST AND LONG-RUN AVERAGE INCREMENTAL COST
Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

CONCLUSIONS

• THE TREND OF COMPETITION LAW ENFORCEMENT IS TOWARDS AN EFFECTS-BASED STANDARD

• UNILATERAL CONDUCT IS TOO COMPLEX TO BE DEALT WITH BY PER SE OR FORMAL RULES

• A FORMALISTIC APPROACH LEADS TO FALSE POSITIVES

Richard Whish
King’s College London

Article 102 TFEU: Modern Enforcement and the Commission’s Guidance Paper

CONCLUSIONS

• THE GUIDANCE DOES NOT STATE THE LAW; BUT IT CAN HELP TO SHAPE THE LAW

• LET’S REVIEW THE POSITION IN 2021!

Richard Whish
King’s College London