INTERNATIONAL COMPETITION LAW SERIES

Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law

The Spectrum of Tests

Eirik Østerud

Wolters Kluwer
Law & Business

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Eirik Østerud
Oslo, June 2010

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Chapter 1
Introduction

Tom Smith and His Incredible Bread Machine

You're gouging on your prices if
You charge more than the rest.
But it's unfair competition
If you think you can charge less.
A second point that we would make
To help avoid confusion:
Don't try to charge the same amount:
That would be collusion!
You must compete. But not too much.
For, if you do, you see,
Then the market would be yours
And that's monopoly!

R. W. Grant, 1963

1.1. SUBJECT AND PURPOSE

R.W. Grant's poem from 1963 tells the story of Tom Smith who invented a machine that could bake, slice and wrap bread for under a penny. The machine fed the world and made Smith a millionaire, until he was sentenced to five years in jail for breaching the antitrust rules. In the extract from the poem quoted above, a lawyer explains the operation of the antitrust rules. The poem illustrates the subtle and confusing distinction between lawful and illegitimate competition. As the lawyer in Grant's poem says, you must compete, but not too much. The Nobel Prize laureate, *Ronald Coase*, found the rules similarly frustrating, allegedly saying

he had become tired of antitrust because when the prices went up the judges said it was monopoly, when the prices went down they said it was predatory pricing, and when they stayed the same, they said it was tacit collusion.[1]

In EU Competition Law, an important and topical problem is the distinction between exclusionary abuses of a dominant market position and legitimate market behaviour. Article 102 of the Treaty on the Functioning of the European Union (TFEU) states: 'Any *abuse* by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.'[2] The prohibition is part of a system ensuring that competition in the internal market is not distorted. Needless to say, the term 'abuse' is inherently vague and unclear. There is no statutory definition of abuse in the TFEU. The provision lists examples of abusive practices, but the European Court of Justice (ECJ) has held that the list is not exhaustive.[3] The wording of Article 102 TFEU neither explains what an abusive restriction of competition is, nor how such a practice can be identified. Dominant firms are allowed to compete, but only to the extent that their market behaviour does not constitute an abuse. A further understanding of the distinction between abusive conduct and lawful competition requires a closer examination of the case law of the ECJ and the General Court (ex Court of First Instance).

The application of Article 102 TFEU to practices by dominant undertakings that may exclude competitors from the market requires a careful balancing of interests. A dominant undertaking has a position of economic strength that enables it to prevent effective competition on the relevant market.[4] However, a dominant firm should still be allowed to compete effectively. If the concept of abuse is interpreted too narrowly, a dominant undertaking may use its market power to harm the competitive process, to the prejudice of consumers. But if the concept of abuse is interpreted too broadly, Article 102 TFEU may itself 'chill' competition as dominant undertakings will be prevented from competing effectively. Paradoxically, both too much and too little intervention in the market may reduce competition.

The economic effects of particular practices on market outcomes are hard to predict. There is a fine line between pro- and anti-competitive market behaviour by dominant firms. A specific form of conduct may have different effects in different circumstances. A practice that harms the competitive process may appear almost identical to one that constitutes vigorous and effective competition. Different types of practices may also have similar effects. To make things even more complicated, a particular type of conduct will often have both pro- and anti-competitive effects,

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1. W. Landes, 'The Fire of Truth: A Remembrance of Law and Economics at Chicago 1932–1970', ed. E. W. Kitch, *Journal of Law and Economics* 26, no. 1 (1983): 193.
2. Emphasis added. Art. 102 TFEU has replaced Art. 82 of the EC Treaty.
3. Case 6/72, *Continental Can v. Commission* [1973] ECR 215, para. 26, Joined cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports SA and others v. Commission* [2000] ECR I-1365, para. 112.
4. Case 27/76, *United Brands v. Commission* [1978] ECR 207, para. 65.

even in the same case. For example, a specific practice may have different short-term and long-term effects. An analysis of the effects of a specific type of conduct needs to take into account both pro- and anti-competitive effects and resolve possible tradeoffs. Information will be required about the dominant firm, the application of the practice in the specific market context, the effects on the dominant firm's rivals and the effects on consumers. Acquiring this information is not costless. Even if such information is available, markets and market outcomes may fail to develop in accordance with predictions. One of the advantages of competitive markets is the development of products and services which no one has thought of before.[5] Especially in high technology sectors, the market may develop very differently from what might have been predicted. For these reasons, accurately measuring the effects of any particular practice is difficult.[6]

Given the challenges involved in determining the effects of specific forms of market behaviour by dominant undertakings, the process of carrying out a legal analysis may be simplified by the articulation of clearer and more easily administrable rules. Dominant undertakings, competition authorities and courts should be able to distinguish abusive practices from legitimate competitive behaviour with adequate legal certainty. Instead of attempting to calculate the effects of the conduct of a dominant firm in each and every case, the legal analysis may rely on more generalized assumptions. Unfortunately, achieving a clearer and more predictable form of legal analysis may require the sacrifice of economic precision. The choice between clear and rigid rules with a potentially higher risk of leading to economically incorrect decisions and vague and open-ended legal standards which allow for individual assessments of economic effects creates a dilemma.

This book examines how exclusionary or anti-competitive abuses are distinguished from legitimate market behaviour under Article 102 TFEU. The book aims to unravel and discuss the approaches and legal techniques developed in the case law of the EU Courts that determine how exclusionary abuses of a dominant position are identified under Article 102 TFEU.

The book will demonstrate that exclusionary abuses are not distinguished from legitimate competition through the application of a single, one-size-fits-all test applicable to all forms of market behaviour by dominant firms. The EU Courts have set out objectives, general concepts and definitions guiding the identification of exclusionary abuses of a dominant position. The objectives may, however, be achieved by various means and the general concepts are so flexible that the courts have been able use them as the basis for developing specific operational tests for

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5. Report by the Economic Advisory Group for Competition Policy (EAGCP), 'An Economic Approach to Article 82', <http://ec.europa.eu/competition/antitrust/art82/index.html>, July 2005, 11–12.
6. See also W. Wurmnest, 'The Reform of Article 82 EC in the Light of the 'Economic Approach', in *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, ed. Mackenrodt, Conde Gallego & Enchelmaier (Berlin: Springer, 2008), 16: 'competition is a (messy) process of exploration, i.e., of trial and error, in which different transactions have varying effects on each other. As no one can gather all relevant information on complex real-world markets, it is practically impossible to measure the results of such a process in advance with precision.'

individual categories of potentially abusive conduct. Exclusionary abuses of a dominant position are distinguished from legitimate competition by a system of different tests for separate categories of market behaviour.

The book will analyse the distinction between legitimate and abusive competition by dominant firms by examining the design of the different conduct-specific tests, i.e., the conditions that must be fulfilled for a particular practice to be abusive within the meaning of Article 102 TFEU. The nature of these conditions will determine the structure of the analysis that needs to be carried out to identify abusive behaviour. The book will identify similarities and differences in the design of the different conduct-specific tests. By comparing the various tests, the book will show that the case law has developed a spectrum of different tests to distinguish exclusionary abuses from legitimate competition under Article 102 TFEU. The tests range from strict and formalistic legal tests governing certain forms of conduct to tests requiring more comprehensive analyses of the effects on competition and consumers for other categories of market behaviour. The tests vary in the extent to which they risk either allowing anti-competitive conduct or prohibiting pro-competitive conduct. They also vary in clarity and administrability. The book will further consider the implications of a system that applies differentiated tests to distinct classes of conduct as opposed to an approach that assesses all forms of market behaviour by dominant firms according to a universal, one-size-fits-all, standard.

Legal commentators, as well as economists, have carried out extensive analyses to examine how the concept of abuse is, and/or should be, applied to specific forms of potentially abusive conduct. Instead of examining the application of Article 102 TFEU to one specific form of potentially abusive conduct, this book examines how the EU Courts distinguish exclusionary abuses from legitimate market behaviour under Article 102 TFEU through a system of differently designed legal tests. By examining and comparing the design of the different conduct-specific tests, the book will clarify the Courts' approaches to individual forms of conduct as well as the Courts' overall approach to the identification of exclusionary abuses under Article 102 TFEU.

1.2. SCOPE AND MATERIALS

Under Article 102 TFEU several cumulative conditions must be satisfied for there to be an infringement. First, the situation must involve one or more undertakings. Second, the undertaking(s) must hold a dominant position within the internal market or in a substantial part of it. Third, there must be an abuse of the dominant position. Fourth, the abuse must affect trade between Member States. The meaning of 'undertaking' and the requirement that trade between Member States must be affected will not be dealt with in this book.

A more elaborate analysis of the concept of dominance also falls outside the scope of the book. The dominant position referred to in Article 102 TFEU 'relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it