

ARTICLE 102 AND THE « *TEST DEBATE* »

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IBC Conference, 29 April 2015

TODAY'S PRESENTATION

After 50 years of Article 102 enforcement, the law should be mature

Yet, in each Article 102 case, discussion over « *case-type* »: *Google, Gazprom, etc.*

- Case-type discussions exist because distinct tests of abuse are applicable (#1)
 - Strict v light tests: eg, refusal to deal v margin squeeze
 - Structure v un-structured tests
 - Quantitative v qualitative tests
 - Appreciability v non-appreciability

And within a given « *case-type* », several tests of abuse may co-exist (#2)

- DG COMP test (Guidance paper)
- Legal Service test (ancient case-law of the CJEU)

In sum, enduring discussion on the test of abuse => we call this the « *test debate* »

GOALS AND OUTLINE

Positive issue: the vivid « *test debate* » in 2014

Prospective issue: do we really need to have this « *test debate* » in practice?

1. The *Intel* judgment
2. The smartphone war: *Samsung, Motorola* and AG Wathelet in *Huawei v ZTE*
3. The *Google* investigation
4. How to approach the « *test debate* » in the future?
5. Conclusion

THE *INTEL* JUDGMENT

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INTEL

Explicit test debate: what is the test of abuse applicable to fidelity rebates? (#2)

Hidden test debate: is the Guidance Paper dead?

THE TEST DEBATE ON APPEAL (#2)

Commission

“*De facto conditional*” rebates

Test is set out in *Hoffmann-La Roche* case-law (see §90, C-85/76) => “*fidelity rebates*”

No need to establish “*actual or potential effects on a case-by-case basis*” (§71) => ≠
Commission does not plead the Guidance Paper test

Akin to exclusivity obligations, “*designed to deprive the purchase of ... his choices and deny other producers access to the market*” (see §90, C-85/76)

Applicant

Commission should have assessed “*all the circumstances*” (*Michelin I*, §73) to see whether the rebates and payments “*were capable of restricting competition*”;

Where conduct is historic, Commission to prove that there was “*actually*” foreclosure

JUDGMENT'S PROPOSED TYPOLOGY, §74

Type of rebate	Guidance paper test	<i>Intel</i> test
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality (refers to <i>Michelin II</i>)
Fidelity “ Exclusivity ” rebates (§76)	Rule of reason (implied predation + objective justification)	<i>Per se</i> illegality (refers to <i>Hoffmann La Roche</i>)
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (implied predation + objective justification)	Rule of reason (“consider <i>all the circumstances</i> ” refers to <i>Michelin I</i>)

PER SE APPROACH?

The question whether it is abusive “*does not depend on an analysis of the circumstances of the case aimed at establishing potential foreclosure effects*”, §80

Exclusivity rebates are “*by their very nature capable of restricting competition*”, §85

Competitors' “*access is made more difficult*”, §88

Not “*necessary to assess their effects on the market in their specific context*” when there is dominance, §89 (see also, §143)

OR CONFINED *PER SE* APPROACH?

Meanwhile, the GC imports some Guidance Paper reasoning

§§92-93: strict prohibition rule on exclusivity rebates because the dominant firm can use the “*non contestable share*” of demand as leverage to capture “*contestable share*”. Rivals must offer “*compensation for the loss of exclusivity rebate*”, which makes their life “*more difficult*” (see also, §§103, 178)

Implication: non-leveraging rebates excluded from the *per se* prohibition rule

Per se prohibition rule only applies to conditional “*retroactive rebates*”

“*Incremental rebates*” in the GP sense fall within the 3rd category

THE JUDGMENT, REFINED READING

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality (<i>Michelin II</i>)
Conditional retroactive rebates (§76)	Rule of reason (quantitative price test + objective justification)	<i>Per se</i> illegality (<i>Hoffmann La Roche</i>)
Conditional incremental rebates	Rule of reason (quantitative price test + objective justification)	Rule of reason
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (quantitative price test + objective justification)	Rule of reason (“ <i>consider all the circumstances</i> ” <i>Michelin I</i>)

LEVERAGING (OR EXCLUSIVITY) REBATES

Harm

Presumed

Absolute presumption, irrelevance of:

- tied market share
- customer coverage
- rebate size
- Lack of actual effects

See R. Whish, on the problematic elimination of appreciability requirement, *JECLAP* (§123 of *Hoffmann-La Roche*)

Efficiencies?

§94: potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers

- Reference to CJEU *Post Danmark*
- Applies to three categories of rebates
- Already in *Hoffmann-La Roche* at §90 through reference to Article 101(3) TFEU

Practicality? How to balance with pro-competitive effects if anticompetitive effects have not been quantified in the first place? All the more so, since Domco's costs are no longer a relevant benchmark

Asymmetric rule of reason: Domco to argue efficiencies in the dark

THE JUDGMENT, REFINED READING

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality (<i>Michelin II</i>)
Conditional retroactive rebates (§76)	Rule of reason (quantitative price test + objective justification)	Modified <i>per se</i> illegality (no harm verification + objective justification)
Conditional incremental rebates	Rule of reason (quantitative price test + objective justification)	Rule of reason
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (quantitative price tests + objective justification)	Rule of reason

IS THE GUIDANCE PAPER ZOMBIE LAW?

Formal applicability in *Intel* proceedings?

Judgment suggests Guidance Paper may remain relevant outside the specifics of the “*present case*”, §158

Keeping the Guidance Paper alive is no contempt of court, for the Guidance Paper “*is not intended to constitute a statement of the law*” and “*without prejudice to the interpretation [of the EU courts]*”, §3 of GP

Substantive authority of *Intel* ruling?

Doubtful

The quotes’ disease

§99: *TeliaSonera* is inapplicable to the case, because it “was limited to pricing practices”

- §103 pursuant to *TeliaSonera* the Commission was under no duty to prove actual effects!



§94: *Post Danmark* is authority for efficiency defense

- §99: *Post Danmark* is inapplicable, because only applies to pricing practices, and it does not cover exclusivity rebates...



§97: *Van den Bergh Foods* “did not concern a practice by which a financial incentive”

- *VdBF*, §159 an “offer to supply freezer cabinets to the retailers and to maintain the cabinets free of any direct charge to the retailers” 🤪🔫

SAMSUNG, MOTOROLA AND HUAWEI

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SAMSUNG, MOTOROLA AND HUAWEI

Worldwide discussion on whether it is antitrust-abusive for the holder of FRAND-encumbered SEPs to seek injunctions in court (start patent infringement proceedings)

Underlying rethoric is that injunctions are used by the patentee as a bargaining device to extract onerous licensing or cross-licensing terms => « *hold-up* »

If so, what is the applicable test of abuse?

TEST DEBATE (#1)

Test	Source
Abusive refusal to license: “ <i>exceptional circumstances</i> ” and 4 (or 3) conditions	<i>Magill/IMS Health</i>
Abusive litigation: “ <i>wholly exceptional circumstances</i> ”	<i>ITT Promedia, Protégé International</i>
Generic anticompetitive foreclosure	<i>Guidance Paper, Post Danmark</i>
Abuse if injunction sought against a “ <i>willing licensee</i> ” <ul style="list-style-type: none">• licensee is willing if he made an offer that cannot be refused;• and he behaved like an effective licensee	German Supreme Court, <i>Orange Book Standard</i>

RECENT CASES

Commission Decision, *Samsung – Enforcement of UMTS Standard Essential Patents*, 29 May 2014, AT 39939 (Article 9) (Apple complaint)

Commission Decision, *Motorola – Enforcement of GPRS Standard Essential Patents*, 29 May 2014, AT 39985, (Article 7) (Apple complaint)

Commission Letter under Article 15 of Regulation 1/2003, reply to Judge Andreas Voß request in *Motorola v. Apple*, November 2013

Preliminary reference before the CJEU, *Huawei v ZTE*, C-170/13, Opinion of AG Wathelet, 20 November 2014

THE *SAMSUNG-MOTOROLA* TEST

Revised Magill-IMS Health

§55: “The seeking of injunctions cannot therefore, in itself, constitute an abuse of a dominant position”

§56: *but* injunction seeking can be abusive in (i) “exceptional circumstances” and (ii) absent an “objective justification”

- Exceptional circumstances: “Standard setting process” + FRAND commitment
- Lack of objective justification (§67): inability to pay, licensee assets in IP heaven, licensee unwilling (other justifications are restrictively interpreted)

Reversed Orange Book Standard

Unlawful for the holder of FRAND encumbered SEPs to seek injunctions if licensee is “not unwilling” (>< “willing licensee”)

Very licensee-friendly => onus of proof on SEPs holder that licensee is unwilling

OBS was very patentee-friendly => onus of proof on licensee that he is willing:

- offer cannot be refused;
- made payments into escrow

GUIDANCE PAPER « *MORE ECONOMIC* » TEST?

Sandwiched

Section specifically devoted to « *Anti-competitive effects* » in both decisions

Motorola decision insists more on « *anticompetitive effects* » in addition to exceptional circumstances

For the sake of it? Section comes after exceptional circumstances have been found under the two-pronged test: no operative relevance?

Or necessary component?

Hybrid

Risk of exclusion of Apple from RM, §62

Apple to accept disadvantageous licensing terms, compared to those which it may have accepted in the absence of injunctions, §62

+ in *Motorola*, §§415 and following, risk of “undermining confidence in the standard-setting process”

ITT PROMEDIA-PROTEGE TEST?

The Court already limited the availability of IP injunctions in *IMS-Health*, without referring to *ITT Promedia* and *Protégé* test, §531 => legal basis to restrict seeking of injunctions in « *exceptional circumstances* »

+ *ITT Promedia* and *Protégé* do not concern FRAND encumbered SEPs but unfair commercial practices and trademarks, §532 (neither did *IMS-Health*)

+ FRAND commitment to a SSO in the case, which further distinguishes *Samsung-Motorola* from *ITT Promedia* and *Protégé* (neither did *IMS-Health*)

PROPOSED AG WATHELET TEST IN *HUAWEI V ZTE*

§52, « Middle path »

Excludes *Magill/IMS-Health* test because those are refusal to supply cases

Excludes *Orange Book Standard* test, because case about *de facto* standard w/o FRAND

§72, paragraph 9 of CJEU judgment in *Volvo* (EU:C:1988:477)

§73, reads there a two pronged test

- “Relation of dependence” on the IPR holder => “infringer’s technological dependence following the incorporation into a standard” (§74)
- “Recourse to methods different from those governing normal competition” => recourse to injunction when FRAND commitment has been given, and when the infringer “has shown itself to be objectively ready, willing and able” (§74)

Assessment of conduct of both SEPs holder and potential licensee, §75

But *Volvo* is also a refusal to supply case...

Volvo is not about a standardized technology...

Volvo did not feature a FRAND commitment...

No discussion, let alone citation of *ITT Promedia* and *Protégé International*

A restriction on injunction can “therefore be permitted only in **exceptional** and clearly defined circumstances”, §62 >< commitment “on FRAND terms bears some similarity to a ‘licence of right’”, and “I would point out that, where a patent licensee has a licence of right, an injunction may not, **in principle**, be issued against him”, §65

GOOGLE



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THEORIES OF SELF-PREFERENCING: TEST DEBATE #1 AND 2

Google investigation into self-preferencing of own vertical search services: Google Shopping

Bo Vesterdorf, *Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin*, 1(1) Competition Law & Policy Debate, 4 (2015)

This is an “*essential facilities*” case

The “*essential facilities doctrine*” (EFD) only applies in “*very limited circumstances*”

Rejects “*new non-discrimination theories*”

TEST DEBATE #1

In positive competition law, several theories of liability exist under which self-preferencing can be abusive under Article 102 TFEU

The EFD is not a prerequisite to order a dominant firm to deal neutrally with rivals (rejected in *TeliaSonera* in relation to margin squeeze)

See

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253

Secondary-line injury discrimination, article 102 c) TFEU => *Deutsche Bahn*, *GT-Link*, *E.ON*

Tying, article 102 d) => *Microsoft I*

Unfair pricing, article 102 a) => *United Brands*

Other => *Van den Bergh Foods*

THE ESSENTIAL FACILITIES DOCTRINE — TEST DEBATE #2

Article 82 EC: Where do we stand after the *Microsoft* judgement?

Bo VESTERDORF*

Several months have now passed since the European Court of First Instance (CFI) handed down its much anticipated judgment in the Microsoft case. The judgment proved to be the final say in this highly important case as there was no appeal to the European Court of Justice (ECJ).

This article offers some reflections on the judgment and considers the key question of where we stand in relation to Article 82 EC after the judgment. The article begins with a brief introduction and preliminary observations on the relationship between competition law and the field of intellectual property (Parts 1 and 2). It then considers in Part 3 some of the key pre-Microsoft decisions. In Part 4 the article examines the judgment closely. This is followed with some reflections in Part 5. Finally, Part 6 concludes.

Strict or lax?

Microsoft I: on all counts, a “broadening”

Indispensability => The GC acceptance of the Commission’s interpretation “probably makes it easier to find a refusal on the part of dominant undertaking abusive”

Elimination of competition => “shift from elimination of all to elimination of effective competition [...]” has “rendered the conditions [...] less strict by loosening the conditions for finding an abuse in these situations”.

HOW TO APPROACH THE TEST DEBATE?

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ASSESSMENT

Type II test-debate is legitimate

Hypothesis: agreement on case-type but discussion over theory of liability

Policy issue

Type I test-debate is more problematic

Wils, The judgment of the EU General Court in *Intel* and the so-called 'more economic approach' to abuse of dominance, 2014: “*what matters is that the categories used are economically and legally sound, and that they are clear, foreseeable and administrable*”

Case in 101: difference between horizontal, vertical, and TTA is well traced (caveat: object restrictions until recently)

But in 102: fact that discussion on case-type exists suggests that theories of liability are inconsistent; confusion goes as far as exploitation/exclusion categorization

WHY DO WE HAVE TYPE-II TEST DEBATES?

EU courts hate to affirm that they are moving the law

- Often they will seek to avoid precedent, by abusively distinguishing facts which are similar (the *TeliaSonera* syndrom) => same types of abuse subject to distinct legal rules
- And to confuse things further, they will affirm old umbrella precedents as authority (the *Hoffmann-La Roche* addiction)

REMEDIES

Obvious remedy => overhaul reclassification of abuses

Reclassification of abuses is complex, bc several options

- Itemized: refusal to supply \neq margin squeeze
- Holistic: unilateral conduct with anticompetitive foreclosure
- Ontological: exploitation v exclusion, pricing v non-pricing
- Economic: leveraging, raising rivals' costs, consumer choice restriction, etc.

Submission is that case-reclassification is a second order problem, as long as consistent liability tests are defined accross case-types

Deutsche Bahn (COMP AT.39678 and AT.39731, 2013) very well shows this: « *pricing practice* » v « *discount* » v « *differentiation* » => eventually treated as a « *margin squeeze* », but Commission decided to apply the transversal AEC price-cost test in light of foreclosure effect => good practice

CASE-TYPE DISCUSSION MATTERS

Remains a necessary evil

Beware *Gazprom*

« *Overall strategy* » notion, bundle of non-abusive courses of action that together trigger liability

« *Mezzo* »-abuses or « *Karate* » competition law

CONCLUSION

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TEST DEBATE IS NOT OVER

Unique opportunity to clarify the law in *Post Danmark A/S v Konkurrencerådet* (Case C-23/14), *Post Danmark II*

Questions referred:

- What **guidelines** should be used to decide whether the application by a dominant undertaking of a rebate scheme with a standardised volume threshold having the characteristics referred to in points 10 and 11 of the order for reference constitutes an abuse of a dominant position contrary to Article 82 of the EC Treaty?
- In its answer the Court is requested to clarify what relevance it has to the assessment whether the rebate scheme's thresholds are set in such a way that the rebate scheme applies to the majority of customers on the market.
- In its answer the Court is further requested to clarify what relevance, if any, the dominant undertaking's prices and costs have to the evaluation pursuant to Article 82 of the EC Treaty of such a rebate scheme (relevance of a 'competitor as efficient' test).
- At the same time the Court is requested to clarify what relevance the characteristics of the market have in this connection, including whether the characteristics of the market can justify the foreclosure effect being demonstrated by examinations and analyses other than a 'competitor as efficient' test (see, in that regard, paragraph 24 of the Commission's communication on the application of Article 82).
- How probable and serious must the anti-competitive effect of a rebate scheme having the characteristics referred to in points 10 and 11 of the order for reference be for Article 82 of the EC Treaty to apply?
- Having regard to the answers given to Questions 1 and 2, what specific circumstances must the national court take into account in assessing whether a rebate scheme, in circumstances such as those described in the order for reference (characteristics of the market and the rebate scheme), has or is capable of having such a foreclosure effect in the specific case that it constitutes an abuse covered by Article 82 of the EC Treaty?
- In this connection, **is it a requirement that the foreclosure effect is appreciable?**

ANNEX

For more on *Intel*, see

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567628

For more on the test debate in *Google*, see

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253

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