Are we still on the road to an effects-based approach under Article 102?

Competition Law Association

Robert O'Donoghue

3 November 2010

Please note: these slides represent my personal views and not those of anyone I represent or might represent.

BRICK COURT CHAMBERS

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The (Historical) Context

- CFI/ECJ in *Michelin II* and *BA/Virgin* set low Article 102 anticompetitive effects standards, *e.g.*, enough that conduct "*tends*" to foreclose or is "*capable*" of doing so
- Worse, evidence capable of showing no anticompetitive effect can be assumed away (*ibid*.)
- Guidance Paper shows clear maturity and evolution in policy
- Much of the old (and some not so old) embarrassing case law effectively jettisoned in favour of ideas that *sound* modern (at least)
- The Commission deserves significant credit for using policy to (indirectly) do the Community Courts' job of restating the law

The Commission's reaction

- Commission decisional practice remains schizophrenic, wanting to look at effects but falling back on case law that effects are irrelevant:
  - *Tomra* (2006), paras. 285-286. Analysis of effects rather lightweight, focusing on relative changes in market share of Tomra and rivals and size of market affected by practices (see section IV.2)
  - *Intel* (2009), paras 922, 923 also repeats case law on "*tendency*" to restrict competition being sufficient for "effects" purposes. Decision undoubtedly looks at factual issues going to effects, and in considerable detail
  - *Telefónica* (2007): confirms that test is actual or likely anticompetitive effects (inc. effects on consumers) and that "*capable*" of restricting = likely effects (para 544)

The EU Courts' reaction (1)

- Most recent case, *Tomra* (09/09/10), not encouraging:
  - GC repeats older case law about "*tendency*" and "*capability*" to foreclose being sufficient (¶ 289)
  - GC confirms notion of abuse apparently disconnected from harm to consumer welfare "*Article* [102] *prohibits a dominant undertaking from eliminating a competitor and from strengthening its position by recourse to means other than those based on competition on the merits. The prohibition laid down in that provision is also justified by the concern not to cause harm to consumers*" (¶ 206)
  - GC rooted in formalistic approach to certain types of contractual obligation, *e.g.*, de jure or de facto requirement contracts: "*Obligations of this kind...are incompatible with the objective of undistorted competition within the common market*" (¶ 209)

The EU Courts' reaction (2)

- *Tomra* (cont):
  - Fact that dominant firm's share fell during abuse and rivals' increased not considered materially important, or, even, relevant (¶¶ 286 *et seq*)
  - GC considered appellants' argument that Tomra's rivals did not need to offer negative price at the margin "*based on an incorrect premiss*" (¶ 258)
  - Fact that Commission decision's quantitative analysis of "suction effect" was wrong deemed by GC to be irrelevant (¶ 266)
  - And yet GC felt confident to add an economic *non sequitur*: "*If retroactive rebates are given, the average price obtained by the dominant undertaking may well be far above cost and ensure a high average profit margin....the effective price for the last units is very low because of the 'suction effect'*". (¶ 266) – cf Guidance Paper/*Intel*

The EU Courts' reaction (3)

- Several GC statements fail to distinguish exclusion that results from competition and exclusion by abuse:
  - ¶ 270: "*competitor's average price will remain structurally unattractive*"
  - ¶ 241: "*foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market*"
  - ¶ 241: "*competitors should be able to compete on the merits for the entire market and not just for a part of it*"
  - ¶ 241: "*not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand*"

Closer to home

- Little or no OFT output bar *Reckitt*, *Cardiff Bus*
- But in many ways OFT *in*action may show more about its approach to effects
- Some interesting analysis in *Cardiff Bus* of whether victim of predatory pricing would have exited the market anyway notwithstanding Cardiff Bus conduct (see ¶ 7.235 *et seq*.)
- Interesting analysis also of effect of Cardiff Bus conduct on reputation for predation and acting as barrier to entry (see ¶ 7.242 *et seq*.)

My tuppence-worth (1)

- Much of “effects” debate involves fairly sterile battle of slogans
- Issue partly bound up in efficient rule design and burden of proof:
  - Some practices so insidious as to not merit them being complicated by effects analysis
  - Some practices (*e.g.*, above cost pricing) may be so generally pro-competitive as to merit presumption of legality
  - In cases like *AstraZeneca*/*Reckitt*, issue may be whether the new replacement product is advantageous relative to the replaced product. If not, reasonable to presume that the only reason to introduce new version and the discontinue the old version is to limit generic competition

My tuppence-worth (2)

- Issue may vary depending on practice:
  - Not unreasonable for example to have a presumption of recoupment where there is dominance and pricing below AVC/AAC
  - Exclusive dealing arrangements analysed similar to Article 101 in Article 102 context so effects clearly part of analysis (see *Van den Bergh*, *Intel*)
- Some practices involve crystal ball gazing (e.g., refusal to deal) so effects involve, at best, relative likelihoods of of competing views of future
- Temporal aspect important:
  - Absurd to demand actual effects if point of intervention is when practice has just started
  - But equally absurd to find abuse where there is no forensic story consistent with abuse for practice that has lasted for a considerable time

My tuppence-worth (3)

- Too much of a good thing?
  - Economics has made an enormous contribution to monpolisation, e.g., single monopoly profit
  - But the practical administrability of a rule of law is more important than the latest economics
  - Experience in *Intel* & *Tomra* suggests that Commission struggles to apply tests set out in Guidance Paper, even backed by extensive power to compel production of information. Applies *a fortiori* to litigation and courts
  - Legal certainty means that rule must reasonably be capable of *ex ante* application by those subject to it
- Unquestionably, Commission approach is changing and EU Courts likely to follow suit:
  - *Tomra* published pre-Guidance Paper
  - So *Intel* will be litmus test for EU Courts