

Law & Economics of Competition Law

Part 3 – EU Competition Law

Avinash S. Ganu

Advocate

B.Sc. LL.M. (Pune), LL.M. In International Economic Law
(Warwick, U.K.)

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EU Competition Law

- EU legal framework for internal market
- 1957 EC treaty – competition related main articles – Article 81 & 82
- 2009 Treaty on the functioning of the European Union (TFEU) – Article 101 & 102
 - Art. 101 – addresses ‘anticompetitive co-ordinated conduct’
 - Horizontal Agreements & Vertical Agreements
 - Art. 102 – regulates ‘abuse by the undertaking in the dominant position’

Article 101

- ▶ The agreements with object and effect of prevention, restriction or distortions of competition including
 - a) fix prices or trading conditions
 - b) limit production, market, technological development, investment
 - c) share markets or supply sources
 - d) discrimination
 - e) imposing unconnected supplementary conditions

Article 101

Efficiency Defences

- ▶ Article provide exception regarding agreements
 - ▶ Improving production / distribution,
 - ▶ technical or economic progress,
 - ▶ Consumer benefit

Article 102

- ▶ Abuse of dominant position
- ▶ By one or more undertakings
- ▶ Shall be prohibited
- ▶ Types of abuse
 - ▶ Imposing unfair prices or conditions
 - ▶ Limiting production, markets, technical development, prejudicial to consumer
 - ▶ Discriminatory conduct
 - ▶ Imposing unconnected supplementary conditions

Comparison of EU & US

USA	EU
Monopoly power	Dominant position
Monopolization	Abuse of Dominance
	No attempted monopolization
Standards – Common law	Detailed law – Civil law
Harvard & Chicago	Harvard, Chicago & Ordoliberal
More effect based	Cause important
Jury trial	Before Commission

Ordoliberal School

- Developed in Germany by 'Neoliberals'
- Idea of 'Order based policy'
- Policy concepts
 - Individual economic freedom
 - State role to protect basic parameters
 - With limits on direct intervention
 - Rule of law and not adhoc political decision making
 - Embedded in 'economic order of free and open society'

Courts

- General court – Court of First Instance
- European Court of Justice (ECJ) – is the supreme court of European Union
- Appeals from General Court – action for annulment
- National court – may make a reference to ECJ

Undertaking

- US law – person ; Indian law – Enterprise
- Undertaking – defined by European Court of Justice (ECJ)

In Hofner & Elser v/s Macratron

“Any person (natural or legal) engaged in economic activity”

- State run enterprise doing economic activity are included
- But public services run for ‘social purpose’ are not included
- Self employed included, But ‘employees’ not included
- Trade union not included

Abuse of Dominant Position

Steps

1. Relevant market

- Product market
- Geographic market

2. Dominance

3. Abuse of dominant position

Relevant Product Market

- ▶ EU commission relies on 'Hypothetical Monopolist', 'SSNIP test'
i.e. Small but Significant Non Transitory Increase in Price
Hypothetical permanent increase in price between 5 to 10% is considered
- ▶ If customers switch to other product – it is substitute
- ▶ Extends till no further substitute
- ▶ Needs economic studies, data
- ▶ Not applicable in small or new market, Competition Commission of India has not applied this test

Other Tests For Product Market

- ▶ Cross Elasticity of Demand
 - ▶ Physical characteristics
 - ▶ United Brand case – bananas – year round availability, softness, seedlessness, need
 - ▶ Price
 - ▶ Ferrari & Mazda – both 2 seater sports cars but different price band
 - ▶ Intended use
 - ▶ Michelin tyres for truck, bus, car
 - ▶ Supply side interchangeability
 - ▶ How manufacturers of other product can switch to relevant product in short time
- ‘Continental Cars’ Case

Relevant Geographic Market

- ▶ Legal, technical or practical reasons, transport difficulty
- ▶ General test
 - ▶ Area where objective test of competition must be same for all traders
- ▶ United Brand – banana
 - ▶ U.K., France, Italy excluded
 - ▶ Because of their relationship with former colonies which produce bananas

Dominance

- ▶ Ability to act independently – no longer a ‘price taker’.
- ▶ Key points
 - ▶ Market strength
 - 75% = ‘Super Dominance’ (Hoffman – Roche)
 - 50% to 75% = large share, presumption (AKZO)
 - 35% to 50% = to compare with nearest rival (United brand 41-45%, next 16%)
 - ▶ Barrier to entry
- ▶ Collective Dominance

Dominance Contd.

- ▶ Legal Provisions – IRR –Hilti, Tetra Pak
- ▶ Technical Advantage – Tetra Pak, Hoffman – Roche
- ▶ Financial Resource - Continental Cars, United Brand
- ▶ Economies of Scale – BPB & British Gypsum
- ▶ Vertical Integration – with upstream, downstream facility
 - United Brand – growing, picking, shipping, ripening, distribution
- ▶ Product Differentiation – United Brand – Chisquita Brand
- ▶ Conduct – to discourage new entrants - AKZO

Exploitative Abuse

- ▶ Excessive price – United brand
- ▶ Unfair conditions
- ▶ Quiet life – monopolist not subjected to competitive pressure to innovate

‘Porto di Genova’ – refusal to utilize modern technology

Exclusionary Abuse

- Export bans
- Discounts rebates - Hoffman – Roche, Michelin, British Airways
- Predatory pricing – AKZO, Tetra Pack II
- Tying & leverage – Hilti, Microsoft, British Sugar
- Refusal to supply – refusal to allow essential facility; refusal to grant IP license
- Refusal to deal – Commercial solvents
- IPR – Magill, IMS Health, Microsoft

Discount & Rebate

- ▶ Hoffman – Roche
 - ▶ Vitamins market – dominant
 - ▶ Fidelity rebates – buy all/ most requirement
 - ▶ Therefore dissimilar conditions to equivalent transactions, to consolidate its position
- ▶ Michelin
 - ▶ Discounts on achieving sales target
 - ▶ Dealer indirectly compelled to choose Michelin from other brands
 - ▶ Limit the dealer's choice and customer freedom

Discount & Rebate contd.

- ▶ British Airways v/s Virgin Atlantic
 - ▶ Capacity – air transport service
 - purchaser of travel agency services
 - ▶ Travel agencies – market for services
 - ▶ Apart from basic commission – Reward & loyalty schemes

Predatory Pricing

- AKZO v/s ECS
 - Organic peroxide market 50% share, next competitor very low share
 - Predatory pricing below AVC
 - Discriminatory pricing to ECS customers only
 - Could recoup in other sector (floor additive and plastic sector)
- Tetra Pak
 - Packaging liquid products in cartons – fruit juice, milk
 - Aseptic & non-aseptic cartons
 - Predatory pricing & tying

Predatory Pricing contd.

- France Telecom
 - High output internet access service
 - Predatory pricing
 - Deliberate strategy to restrict & harm competitors
 - Proof of recoupment is not pre-condition

Refusal to deal & Essential Facility

- ▶ Commercial solvent
 - ▶ Main supplier for amino butane
 - ▶ Stopped supplying to Zoja who used it to manufacture other chemical ethambutol

Essential facility

- ▶ Oscar Bronner v/s Media Print
 - ▶ Media Print is dominant,
 - ▶ Oscar Bronner is small newspaper – wanted delivery system of Media Print
 - ▶ Media Print denied
 - ▶ Held – not abusive, elements of essential facility doctrine provided

IPRs

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▶ IMS Health

- ▶ Refusal to grant license of IPR, for 'brick structure' for pharmaceutical product
- ▶ when protected structure is 'indispensable' for development of new product
- ▶ Refusal not justified by objective considerations

▶ Microsoft

- ▶ Refusal to supply 'inter-operability information to its competitors'
- ▶ Tying its 'Windows media player' to its operating systems
- ▶ Harmful to competitors & consumers
- ▶ IPR/ technology protection – not objective justification
- ▶ Microsoft accepted commitment in 2010 , failed in 2013 – fined 561 million pounds