

The creeping domination of extraneous concepts in Article 102 cases

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“Competition on the merits”

□ Old wine in new bottles?

– **Hoffmann-La Roche, Michelin I, AKZO**

- *“methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators/based on traders’ performance”*
- *“methods other than those which come within the scope of competition on the basis of quality”*

“Competition on the merits”

- *Leistungswettbewerb* (competition on the merits / performance competition) - superior business performance should be the decisive factor for success
- *Behinderungswettbewerb* (impediment/hindrance competition) – exclusionary practices
- ORDOLIBERALISM – freedom/equity – emphasis on methods/structure more than outcomes
 - BUT even ordoliberals saw the risk of these concepts being liable to be unduly influenced by considerations coming from the unfair trade practices law

“Competition on the merits”

- Normal competition → rational commercial conduct consistent with the profit-maximizing strategy of a non-dominant company, based on superior efficiency rather than on means that reflect the ability to harm competition
- Guiding principle – consistent with efficiency
- But no operational test – need to look at form, purpose, and effect of the conduct under review in each individual case

Guiding principle or operational test?

- New terminology
 - ***BPB Industries/British Gypsum, Irish Sugar, Michelin II, Irish Sugar, Microsoft, Tomra, Telefonica, Intel***: “by means other than those falling within competition based on merits”
 - ***AstraZeneca***: “the submission to the public authorities of misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which an undertaking is not entitled [...] constitutes a practice falling outside the scope of competition on the merits which may be particularly restrictive of competition. Such conduct is not in keeping with the special responsibility of an undertaking in a dominant position not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market.”

Operational test?

□ **Google - Shopping**

- *“The Conduct is abusive because it constitutes a practice falling outside the scope of competition on the merits as it: (i) diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service; and (ii) is capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services.”*

Equality of opportunity

□ Case T-271/03, **Deutsche Telekom**

- 198 [...] *However, a system of undistorted competition between the applicant and its competitors can be guaranteed only if equality of opportunity is secured as between the various economic operators (Case C-462/99 Connect Austria [2003] ECR I-5197, paragraph 83, and Joined Cases C-327/03 and C-328/03 ISIS Multimedia and Firma O2 [2005] ECR I-8877, paragraph 39).*

Equality of opportunity

- 199 *Equality of opportunity as between the incumbent operator and owner of the fixed network, such as the applicant, on the one hand, and its competitors, on the other, therefore means that prices for access services must be set at a level which places competitors on an equal footing with the incumbent operator as regards the provision of call services. Equality of opportunity is secured only if the incumbent operator sets its retail prices at a level which enables competitors – presumed to be just as efficient as the incumbent operator – to reflect all the wholesale costs in their retail prices.*

Equality of opportunity

□ Case C-280/08 P, **Deutsche Telekom**

- 230 *In the third place, in so far as the present complaint relates to the General Court's findings as to equality of opportunity, it should be noted that the Court of Justice has consistently held that a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators (see, in particular, Case C-18/88 GB-Inno-BM [1991] ECR I-5941, paragraph 25; Case C-462/99 Connect Austria [2003] ECR I-5197, paragraph 83; Joined Cases C-327/03 and C-328/03 ISIS Multimedia Net and Firma O2 [2005] ECR I-8877, paragraph 39; and Case C-49/07 MOTOE [2008] ECR I-4863, paragraph 51).*

Equality of opportunity

□ Case T-336/07, **Telefonica**

- *According to the case-law, a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. Equality of opportunity means that Telefónica and its at least equally efficient competitors are placed on an equal footing on the retail market. That is not the case, first, if the prices of national and regional wholesale products paid to Telefónica by the alternative operators could not be reflected in their retail prices and, second, if the alternative operators, given the prices of Telefónica's national and regional wholesale products, could offer those products only at a loss, which they would have to offset by revenues coming from other markets (see, to that effect, Deutsche Telekom v Commission, paragraph 170 above, paragraph 230, and Deutsche Telekom v Commission, paragraph 69 above, paragraphs 198 and 199 and the case-law cited).*

□ **Slovak Telekom, Google Shopping**

Competitive (dis)advantage

□ **Microsoft** Decision + Judgment

- *“unfair interoperability advantage”*
- *“That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed”*
- *“the ubiquity of Windows Media Player on Windows client PCs therefore gives Microsoft a competitive advantage unrelated to the intrinsic qualities of its product”*

Competitive (dis)advantage

□ **Microsoft** Decision + Judgment

- *“even if developers of media players competing with Microsoft succeeded in reaching an agreement with OEMs for the pre-installation of their product, they would still be in a disadvantageous competitive position by comparison with Microsoft”*
- *“The Commission is correct to make the following findings:*
 - *Microsoft uses Windows as a distribution channel to ensure for itself a significant competitive advantage on the media players market;*
 - *because of the bundling, Microsoft’s competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player”*

Competitive (dis)advantage

- **TeliaSonera**

- **Google-Shopping**

- *“The prospects of commercial success of Google’s comparison shopping service are enhanced not because of the merits of that service, but because Google applies different underlying mechanisms on the basis of the **advantages** provided to it by its dominant position in the national markets for general search services [reference to Microsoft]”*

- **Google-Android**