The assessment of the legal and economic context in practice: challenges and open issues

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The systemic view behind *Intel* and *Cartes Bancaires*

Behind the ECJ judgments in *Intel* and *Cartes Bancaires* (CB) there is a systemic view, supported by AG Wahl

- ✓ the temptation to use a strictly form-based approach in the assessment of infringements, which emerged from the unprecedented use of the notion of restrictions by object (RBO) in the first ten years since the entry into force of regulation no. 1/2003 and, for abuses, was transparent in the GC judgement in *Intel*, should be rejected

This vision is not entirely new: we find important examples of an impact-based assessment in the application of Arts. 101(1) and 102 also in the historical case-law (e.g. *STM; Vőlk; Hoffman La Roche; Akzo* etc.)

The vision is based on three pillars

a. the application of the prohibition rules contained in Arts. 101(1) and 102 always requires a theory of harm, looking at the actual or potential impact of the agreement/conduct on competitive variables

b. the possibility to apply Art. 101(3) or objective/efficiency justifications should be considered only after an analysis of the intrinsic capacity of the agreement/conduct to restrict competition (*Intel*, § 140): the assessment of whether the conduct is anticompetitive cannot be skipped. *Note: reliance on the possibility of justifications is not the same thing as proving that the conduct has not an adverse impact on competitive variables, it is much more difficult (almost impossible)*

c. on the other hand, the notion of RBO and the presumption of an anticompetitive impact for some unilateral conduct by dominant companies (e.g. exclusivity rebates) are legal tools which can be useful to reconcile an impact-based approach with an efficient allocation of the burden of proof => administrability

The current situation

Application of Art. 101(1)

Agreements restrictive by effect: assessment of actual or potential impact on competitive variables

Agreements restrictive by object: not necessary to assess the actual or potential impact on a case by case basis, but the impact on competition variables is still relevant, in two different respects:

a. the assessment of whether an agreement is RBO is based on experience of the deleterious impact of this type of coordination on the market (CB, § 58) (Wahl suggests to draw indications both from experience and economic analysis, § 56, 58, 61, 79)

b. in practice, ascertaining whether a specific agreement is RBO should always take into account the economic and legal context (including nature of the products and real conditions of the functioning and structure of the markets in question)

=> possible for the parties to prove that a specific agreement is not so intrinsically dangerous to be considered RBO taking into account several factors: nature of the restriction, market shares etc.

Application of Art. 102 to exclusionary abuses

- the purpose is not the protection of competitors but the protection of the competitive process (*Hoffman La Roche; Akzo; Post Danmark I*): competitors less efficient and thus less attractive to consumers from the point of view inter alia of price, choice, quality and innovation may well be foreclosed as the result of the competitive process (*Intel*, § 133-134).
- the criteria which, according to the case-law, can be used to assess infringements depend on the type of conduct (e.g. refusal to supply; margin squeeze; predation and selective price cuts; exclusive dealing; conditional rebates; tying and bundling, etc.). but should always be consistent with that purpose
- after *Intel*, for all types of price -based conduct, including exclusivity rebates, the ascertainment of an exclusionary abuse requires a theory of harm based on the actual/potential impact on competitive variables (=> anticompetitive foreclosure notion contained in § 19 of the Guidance Paper)

Assessment of price-based conduct

a. *price-based conduct different from rebates* (predation, margin squeeze, selective price cuts): capability to foreclose an AEC; assessment of the potential impact on the market (*Post Danmark I*)

b. *quantity rebates:* generally lawful

c. *rebates different from both quantity and exclusivity rebates*: assessment of the capability to foreclose an AEC is not necessary (although possible); however not sufficient to look at the bilateral relation, all economic circumstances which affect the potential impact on competitive variables must be taken into account (*Post Danmark II*)

d. *exclusivity rebates* still presumptively abusive, but the presumption can be rebutted by showing lack of capability to restrict competition (*Intel*, § 138). The assessment of the economic and legal context matters: the infringement may be excluded by taking into account the market position of the undertaking, the share of the market covered by the practice, the conditions of the rebates, their duration and amount (§ 139)

Thus …

- A step forward towards a consistent methodology in the application of Art. 101 and 102, removing unjustified differences in the treatment of various types of conduct under Art. 102:

✓ for both agreements and unilateral conduct, ascertaining infringements requires a theory of harm based on actual/potential impact on competitive variables, taking into account the economic and legal context – no pure form-based prohibitions

✓ the allocation of the burden of proof/use of presumptions varies depending on whether, for a type of agreement/conduct, the harmful nature for competition emerges from settled experience

EU competition law after *Intel* and *CB*: practical implications and open issues

Practical implications

What are the consequences for the different subjects involved in the application of EU antitrust rules?

a. undertakings and their advisors
b. competition authorities
c. national courts

a. Undertakings and their advisors

for hardcore restrictions different from cartels and for exclusivity clauses/rebates, in the light of the *CB* and *Intel* case-law, the possibility to exclude an infringement because of lack of capability to restrict competition is more than a mere hypothetical scenario: if the parties provide evidence of lack of capability to restrict competition, competition authorities and courts must take their arguments into account

However, the task should be taken seriously:

- not sufficient to bring abstract arguments – Laitenberger (2017) stresses that in order to rebut a presumption the dominant firm must present case-specific arguments based on concrete evidence
- there remain some regulatory risks because of the different approaches in the different Member States: e.g. UK cases on RPM compared to the Guidelines of the Bundeskartellamt on RPM; see also, in the light of *Coty*, different national approaches to restrictions in distribution agreements concerning the use of third party platforms

Therefore…

- in light of the remaining regulatory risk, wise to adopt presumptively anticompetitive agreements/practices only when two cumulative conditions are met:
- it is possible to exclude the capability to entail an adverse impact on competitive variables; and
- the restriction presents clear benefits (in terms of efficiency/effectiveness) for the company compared to alternatives, that justify taking the risk of trying to convince competition authorities that there is not a restriction of competition (with the help of good lawyers and economic consultants)
- in some cases, this internal reasoning may turn useful also to argue that the restriction is necessary to safeguard the image of the product pursuant to the *Metro/Coty* case-law or, more generally, is objectively justified pursuant to Arts. 101 or 102

b. Competition authorities (NCA and Commission)

- Competition authorities have to take into account that the parties may rebut the allegation of infringement of antitrust rules by showing that the agreement/unilateral conduct has not a potential adverse impact on competitive variables. Thus, the assessment of economic and legal context is crucial before starting a case and when assessing priorities, in order to ensure an effective use of the scarce resources of public enforcers
- Economists/chief economists may play an important role in this perspective
- Should a more impact based approach, consistent with *Intel* and *CB*, be further promoted within the ECN?

c. National courts

- It is for the parties to bring arguments and to recall the ECJ case-law supporting an impact-based approach
- On the other hand, the training of judges on the assessment of economic impact, with the aim to fully understand the arguments of the parties, remains (becomes increasingly) important

Open issues

Six open issues

a. Capability versus likelihood

b. Assessment of the impact on competitive variables (p, quality, variety/choice, innovation)

c. When can the as efficient competitor (AEC) test be neglected

d. Use of checklists to enhance predictability

e. Assessment of appreciability with presumptively anticompetitive practices (de minimis)

f. Selective distribution: *Metro* case-law versus theories of harm

Open issue no. 1 – Capability versus likelihood

What is the standard for the potential impact on competition: capability or likelihood?

- In *Intel* the ECJ uses both terms
- A.G. Wahl in *Intel* suggests that "(…) *capability cannot merely be hypothetical or theoretically possible* (§ 114); *the aim of the assessment of capability is to ascertain whether, in all likelihood, the impugned conduct has an anticompetitive foreclosure effect. For that reason, likelihood must be considerably more than a mere possibility that certain behavior may restrict competition* (§ 117)
- In order to rebut a presumption of anticompetitive impact, should the company prove that the conduct is not capable of having a appreciable anticompetitive impact?
- Reasonable to argue that the standard varies depending on the intrinsic harmful nature of the conduct

Open issue no. 2 – impact on competitive variables

- Competition is a multidimensional dynamic process: not sufficient to focus on prices. An agreement/conduct may have an adverse effect on price, quantity, quality, choice/variety, innovation
- Consideration of the impact in the short and longer term is important and should be clearly spelled out
- A problem may emerge if the impact on variety/choice is considered separately from the impact on other variables: the standard easily becomes the protection of competitors as such. For vertical agreements, a focus on variety may entail excessive emphasis on the protection of intra-store and intra-brand competition, without a broader look at alternatives for consumers
- A solution might be a commitment to consider the impact on choice/variety always together with the impact on other variables – need for a comprehensive story of consumer harm, taking all dimensions into account. Relevant in cases like *Google Shopping*

Open issue no. 3 AEC- when can the result of the test be neglected?

- *Post Danmark II*, Guidance Paper § 24: in particular cases Art. 102 should protect also "not yet as efficient competitors" and thus the AEC test would be irrelevant. The idea is that, in the presence of specific circumstances the "not yet AEC" needs some time to become efficient and exert a significant competitive pressure. These situations however should be strictly circumscribed in order to preserve the right of the dominant company to compete on prices
- the case-law suggests that for conditional rebates the AEC test is not necessary but is a possibility. On the other hand, in *Intel* the ECJ argues that if the test has been carried out by the undertaking it should be considered by the review court. Can an AEC test carried out by the company be simply set apart, proving the abuse by means of other evidence, or a specific rebuttal is required, showing that the conduct is capable of foreclosing an AEC? Should the capability to foreclose an AEC be neglected only in exceptional circumstances, as indicated by *Post Danmark II*?

Open issue no. 4 - checklists

How to enhance predictability in the assessment of the economic and legal context? A possibility is the use of checklists within a structured evaluation approach

- ✓ § 139 *Intel* and § 54 *Cartes Bancaires* on the variables which can be used to rebut the presumptions
- ✓ the checklists for a structured evaluation process in the various Commission Guidelines

Note:

- the lists are usually not exaustive, because in individual cases specific features of the market (e.g. sectoral regulation) may be used to exclude the risk of competitive harm
- is this true also in the opposite direction? i.e. is it possible for the Commission/NCA to show that, for a conduct that survived the screening based on the checklist, there may still be an infringement? In such cases, is the competition authority required to provide specific reasoning for departing from the standard approach?

Open issue no. 5- de minimis (a)

- According to some judgments (*Expedia*, *Hoffmann La Roche*, *Post Danmark II*, General Court in *Intel*) , the de minimis exception cannot be applied when an abuse pursuant to Art. 102 or a restriction by object pursuant to Art. 101 have already been ascertained
- However, the assessment of the economic and legal context before determining whether an agreement is restrictive by object or a conduct is abusive still allows to avoid the prohibition when there is no appreciable impact of the conduct/agreement on competition (consistently with the *Franz Völk* case-law (1969), which has not been overturned).
- Depending on the degree of intrinsic harmfulness associated to each type of restrictions , competition authorities may or may not be willing to admit a de minimis assessment

Open issue no. 5- de minimis (b)

e.g. for cartels, in order to preserve a strong deterrent effect it may be justified to ignore the market position of the parties

whereas for other less intrinsically harmful restrictions (such as, for instance, RPM) in the presence of very small market shares it may be reasonable to exclude an appreciable impact on competition

e.g. the UK competition authority for RPM agreements argued that the restriction is always appreciable "provided that it does not have only insignificant effects" (OFT, *Tobacco*, 2010; see also *Pride Mobility Products*, 2014). However, the Guidelines on RPM of the Bundeskartellamt apparently do not acknowledge this possibility. The German Federal Court annulled a judgment by a national court which had excluded infringement for RPM in the presence of small market shares, but does not take a position from the point of view of the law

Open issue no. 6 – Selective distribution

What are the perspectives of the impact-based approach in the application of competition law when distribution agreements and in particular selective distribution agreements are concerned?

- In *Coty* the assessment of the application of Art. 101(1) to selective distribution agreements is still centered on the *Metro* case-law (necessity and proportionality of the restriction), more than on a theory of harm based on the analysis of the economic context
- *Pierre Fabre* has not been overturned
- on the other hand, for geoblocking a specific legislative instrument, and not the application of competition rules, has been used to pursue the objectives of the Digital Single Market Strategy: signal of an evolving approach?