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Notion of dominance

The evolving notion of dominance in competition law: An overview of recent decisions at the national level

Unilateral practices, Abuse of dominance, Dominance, Refusal to supply, Remedies (antitrust), Margin squeeze, Foreword, Dominance (notion), Internet, Standard essential patent, All business sectors

Note from the Editors: Although the e-Competitions editors are doing their best efforts to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database can not be guaranteed. The present foreword provides readers with a fair view of the existing trends based on cases reported in e-Competitions and alternative sources gathered by the author. Readers are welcome to bring to the attention of the editors any other relevant cases.

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Introduction

A review of the Article 102 TFEU decisions at the member state level in the last years shows that the challenges of applying competition law rules in the digital economy or in relation to patent rights have not been reserved exclusively for the EU Commission. The EU Commission has launched various investigations into alleged exclusionary practices in the online search market and in the use of standard-essential patents, and imposed fines on pharmaceutical companies for the abuse of their intellectual property. National authorities have been challenged by, or have sought to deal with, these same issues. However, the national authorities' enforcement priorities also continue to include the more traditional cases relating to possible abuses by former state monopolies in liberalized industries. [1] This article, which is based on a review of national decisions as reported in e-Competitions in the last two years, focuses on how national authorities and courts have addressed the complex issues raised by the application of competition law rules to patent right uses or the digital economy in general, which are helpful in supplementing EU precedent on these issues. Particularly agencies and courts in France and in Italy have been active in applying their laws in these new markets.

It is noteworthy that national authorities do not always follow the EU Commission. As in the past, there are a number of decisions where the application of Article 102 TFEU by the national authorities diverges from the Commission's practice. We discuss a number of examples in the third part of this article, focusing on cases dealing with margin squeezes and refusals to supply.

Exclusionary practices and the online economy

It is useful to set out the first main steps of enforcement action affecting online services at the EU level. In November 2010, the EU Commission launched an investigation of Google's practices based on a number of complaints. The Commission identified four areas of concern. First, the Commission alleged that Google diverted internet traffic to its own specialized vertical search services through preferential treatment of its own services in its web-search results. Second, Google was alleged to have copied original material from the websites of its competitors, such as user reviews for travel sites and restaurant guides, for use on its own sites without prior authorization, thus hampering competitors' incentives to invest in the creation of original content for the benefit of internet users. Third, the Commission found that the agreements between Google and publishers are de facto exclusive as customers are required to obtain all or most of their requirements of search advertisements from Google, thus foreclosing competing providers of search advertising intermediation services. Fourth, Google was found to impose contractual restrictions on software developers that prevent them from offering tools that allow the seamless transfer of search advertising campaigns across AdWords and competing platforms. According to the Commission, these four business practices are liable to reduce consumer choice for innovative services and result in consumer harm. The Commission invited Google to submit commitments to address these concerns in May 2012. Google offered a first set of commitments in April 2013, and a second set in July 2013. [2] In a recent speech, Commissioner Almunia suggested that commitments pursuant to Article 9 of Regulation 1/2003 are the Commission's preferable route to solving competition concerns more quickly and concretely in fast-moving industries "with an immediate impact on the market and a forward-looking vision of how the market should function." [3]

Also at the national level, cases involving online search services, and other segments in the digital economy have been brought before the competition authorities and courts in the last few years. [4] The cases described below show that the limited EU precedent in this area is supplemented by the findings of national courts and agencies. In some cases, the conclusions simply involve traditional issues arising in a new environment. In other cases, the complexities of the online economy present new challenges to the application of competition laws.

For example, the first case concerning PagesJaunes, the leading editor for paper and online business directories in France, involved a very traditional set of issues. Customers can purchase advertising space either through the intermediary of independent advertising agencies or from PagesJaunes itself. Following a complaint by independent advertising agents in 2010, the French competition authority found that a number of practices of PagesJaunes raised competitive concerns in the market of both online and offline (print) advertising space: the company retained statistical data relating to the average number of views for the exclusive use of its own sales team; its sales team denigrated rival undertakings; and the company discriminated against advertisers using independent agencies. PagesJaunes offered commitments, which included granting access to its statistical database and providing its competitors with the software used to calculate the publication price of advertisements, as well as putting in place a number of measures to address the aggressive marketing practices of its sales team. The French competition authority accepted the commitments and closed the investigation in November 2012. [5]

The same was true for the PMU case, also of the French competition authority. In October 2013, the French competition authority also accepted commitments from PMU, which holds the legal monopoly in physical horse-betting in France, and a dominant position in online horse-betting in France. Following a complaint by online betting competitor Betclic, the French competition

authority found that PMU leveraged its monopoly in physical horse-betting to the online gambling sector by "mutualizing" its physical and online gambling activities, i.e. pooling together bets recorded physically and online. This practice allowed it to multiply potential gains for each bet and gain a number of advantages vis-à-vis its competitors, for example, by offering higher stakes and more stable odds to gamblers. These higher earning bets were only made possible because PMU used the resources of its monopolistic activities to support its online betting activities, and therefore could not be matched by its competitors. To address these concerns, PMU offered to split its online turnover from that of its physical betting turnover. The commitments are currently being market-tested. [6]

Other cases clearly raised very novel issues though, including in relation to business models for the provision of online services, and the ability for third parties to "scrape" the website of a dominant provider.

The first example is the Milan Court's ruling against Ryanair. The Court found that Ryanair had abused its dominant position in the downstream market for online travel agencies in breach of article 102 TFEU by refusing to allow the "scraping" of its website by online travel agents to retrieve information needed to provide travel services. Ryanair's business model is based on exclusive sale of tickets through its website and call centers, in order to avoid the costs incurred by intermediaries such as travel agencies. The Court found that Ryanair had a monopoly in the downstream market for the provision of information for its own flights, which it considered as an "essential facility" for online travel agents who seek to offer competing services. Moreover, according to the Court, Ryanair's refusal to allow the "scraping" of its website was capable of hampering the development of new services provided by online travel agencies, consisting in the offer of a complete booking process on a single website, and was not objectively justified. [7] The Court clearly took a very broad view of the forms of "access" that should be provided by a dominant firm.

In January 2012, the Paris Commercial Court found that Google had abused its dominant position in a market it defined as the market for online cartography which allows geolocalization of points of sale on commercial websites (essentially online mapping tools). Bottin Cartographes is a French company that offers services to businesses who want to integrate address/location maps into their websites. Google competes in this market with the Google Maps application, which it offers to users for free. The court concluded that Google was dominant in online mapping tools and that it engaged in predatory conduct, because it did not charge its customers for a service which is costly to produce, leading to the exclusion of all its competitors. It concluded that Google's conduct formed part of an exclusionary strategy that consisted of optimizing over time the commercializing of advertising, in particular in online mapping, and that Google would be the only supplier of advertising through online maps. [8] The court ordered Google to pay damages in the amount of € 500,000 to the plaintiff as well as a € 15,000 fine. Google has appealed the decision and the proceedings are still pending. On 20 November 2013, the Court of Appeals stayed proceedings and asked the French competition authority to opine on Google's alleged abuse. Interestingly, the Court rejected Google's request to stay the proceedings pending a decision to be taken by the EU Commission. [9]

Patent misuse in the pharmaceutical sector

Another area of recent interest for national competition authorities and courts has been the abuse of intellectual property in the pharmaceutical sector, following the EU Commission's decision against

AstraZeneca. In June 2005, the EU Commission imposed a € 60 million fine against AstraZeneca for abusing its dominant position in a number of national markets for so-called proton pump inhibitors sold on prescription and used for gastro-intestinal acid related diseases (such as ulcers), in which AstraZeneca competed with its blockbuster drug Losec. According to the Commission, AstraZeneca's infringement involved a pattern of misleading statements to patent authorities and other misuses of the patent protection system, as well as misuses of procedures relating to the marketing authorization for pharmaceutical products. The Commission found that the company's conduct had delayed the entry of generic competitors and restricted parallel imports of Losec, thus ultimately leading to additional costs for health systems and consumers. [10] Both the General Court and Court of Justice largely upheld the Commission's findings. [11]

Following the AstraZeneca case, allegations of similar conduct were brought before national courts and competition authorities. In September 2012, the Italian Court of First Instance annulled the decision of the Italian competition authority that had imposed a fine of € 10.6 million on Pfizer for having abused its dominant position in the visual glaucoma medicine market, by blocking or delaying the market entry of generic versions of its Xalatan drug (latanoprost) in Italy, through the misuse of regulatory patent procedures. The Court relied upon the AstraZeneca precedent, and emphasized that the authority had failed to clearly establish Pfizer's exclusionary intent, which – according to the Court – was needed to qualify as an abuse "a simple group of legitimate actions carried out and brought before the competent administrative and jurisdictional authorities." The Court also emphasized that the Italian authority had failed to take into account that Pfizer had not provided misleading information to the patent office and that the procedure to evaluate the relevant patent had been absolutely transparent. The Court concluded that Pfizer's use of patent procedure was legitimate and the expression of the protection of its rights and legitimate interests. The emphasis on exclusionary intent is consistent with the General Court's decision in the AstraZeneca case. [12]

Refusal to supply and margin squeeze – the application of EU precedent by national authorities

In a number of decisions relating to exclusionary refusals to supply and margin squeezes, national competition authorities appear to have diverged from the EU Commission's decisional practice.

For example, a decision of the highest administrative court in Italy (Council of State) in January 2013 involved an alleged abuse by BCS of its dominant position in the Italian market for fosetyl-based fungicides. The Italian competition authority had found that BCS had abused its position by refusing access of certain competitors to the results of two toxicological studies on the effects of the active ingredient fosetyl. Under sector regulation, these studies were necessary to obtain the renewal of marketing authorizations for generic fungicides based on focetyl. According to the Italian competition authority, BCS' conduct had resulted in the exclusion of its competitors from the relevant market, an increase in BCS' market share and a rise in average prices of fosetyl-based fungicides.

The Council of State relied on a broad interpretation of the essential facilities doctrine. First, in assessing whether the toxicological studies were *objectively necessary* for competitors to operate in the market, the Council of State found that the fosetyl studies were indispensable, even though alternative - albeit less advantageous - solutions would have allowed competitors to continue to operate in the relevant market. Second, the Council of State did not examine the anticompetitive

effect of BCS' behavior in detail, but placed an emphasis on BCS' anti-competitive intent, and ruled that BCS' behavior had to be considered illegal irrespective of a finding of the existence of harm to competition. Last, the Council of State interpreted very broadly the requirement that the refusal prevented the development of a *new product*, and considered that the renewal of existing marketing authorizations for the competitors' generic fungicides was equivalent to obtaining a marketing authorization for a "new product". [13]

The Belgian competition authority's decision concerning Belgacom's alleged margin squeeze offers another example of a broad interpretation of established EU precedent. In November 2012, the Belgian Competition Council rejected a complaint from Tele2 against Belgacom concerning its Happy Time offer on fixed telephony calls. According to Tele2, the rate charged to Tele2 for access to Belgacom's network at the wholesale level constituted a margin squeeze in relation to the charges to customers for Tele2's Happy Time offer at the retail (fixed telephony) level where the two operators competed. To assess the margin squeeze claims, the Belgian Competition Council departed from the EU Commission's "as efficient operator test" (which would have compared the price at the retail level with Belgacom's costs) and instead applied a "reasonably efficient competitor test" which is based on a comparison with Tele2's costs. However, even under the "reasonably efficient competitor test", the Competition Council could not find an abuse. [14]

Conclusions

A review of these cases shows that a body of precedent is likely to develop also in the Member State agencies and courts that will inform the application of competition law rules in the online economy, and in relation to the use of patent rights. While in some areas the national authorities' application of Article 102 TFEU (and national equivalents) is not always consistent with EU case-law or the Commission's effects-based approach in the application of Article 102 TFEU, it will be increasingly important to understand and take into account national developments.

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[1] For an overview of decisions in the telecoms and postal sectors see **Cani Fernández, Irene Moreno-Tapia**, Dominance in the telecommunications sector: An overview of EU and national case law, 4 September 2013, e-Competitions Bulletin Telecom & Dominance, Art. N° 42836, and **Damien Géradin, Christos Malamataris**, Postal services and competition law: An overview of EU and national case law, 6 March 2012, e-Competitions Bulletin Postal services, Art. N° 43769.

[2] Commission seeks feedback on commitments offered by Google to address competition concerns, European Commission - IP/13/371, 25/04/2013 (Case COMP/C-3/39.740 - Foundem and others). See also **Thomas Graf**, The European Commission carries out a market test of commitments in its investigation of online search service provider (Google), 26 April 2013, e-Competitions Bulletin April 2013, Art. N° 54833.

[3] See Joaquín Almunia, The Google antitrust case: what is at stake?, EU Commission, SPEECH/13/768, 01/10/2013.

[4] E.g. in October 2010 the French competition authority accepted commitments from Google to resolve concerns about the rules governing its online advertising service, AdWords, following a

complaint from Navx. See Autorité de la Concurrence, Décision du 28 octobre 2010 relative à des pratiques mises en œuvre dans le secteur de la publicité sur Internet, available at http://www.autoritedelaconcurrence.....

[5] See Autorite de la Concurrence, Advertising agencies can now compete more effectively with the PagesJaunes advertising network for advertising space, Press Release of 22 November 2012 and Autorité de la Concurrence, 12-D-22 Décision du 22 novembre 2012 relative à une saisine présentée par les sociétés NHK Conseil, Agence I&MA conseils, Sudmédia conseil, OSCP, Audit Conseil Publicité Annuaires, Charcot.net, Agence Heuveline, Avycom publicité annuaire, Toocom, Ecoannuaires, Netcreative-Pages annuaires à l'encontre de pratiques mises en œuvre par la société PagesJaunes SA.
See also **Jean-Julien Lemonnier**, The French Competition Authority accepts commitments proposed by editor of printed and online directories and puts an end to its investigations in the market of sale of advertising space in those directories (PagesJaunes), 22 November 2012, e-Competitions Bulletin November 2012, Art. N° 50126.

[6] See **Jocelyn Delatre**, The French Competition Authority launches a public consultation on commitments received in by a major operator in online gambling sector (PMU), 30 October 2013, e-Competitions Bulletin October 2013, Art. N° 59423.

[7] See **Gabriele Accardo**, The Italian Court of Milan finds an abuse of dominant position in the market for online travel agencies (Viaggiare/Ryanair), 4 June 2013, e-Competitions Bulletin June 2013, Art. N° 57725.

[8] See **Cédric Manara**, The Paris Commercial Court finds that leading internet search company abused its dominant position on the maps market (Bottin Cartographes v. Google), 31 January 2012, e-Competitions Bulletin April 2012, Art. N° 45008.

[9] Google had made this request on the basis of potentially similar complaints for abuse by competing companies. See Bottin Carto vs Google: Google en partie débouté par la Cour d'Appel de Paris (press release), available at http://www.bottincarto.com/actualit....

[10] See EU Commission, Commission fines AstraZeneca €60 million for misusing patent system to delay market entry of competing generic drugs, IP/05/737, 15/06/2005.
See also **Soren Bo Rasmussen, Niklas Fagerlund**, The European Commission imposes a € 60 M fine against two companies in the pharmaceutical sector for abuse of a dominant position (AstraZeneca), 15 June 2005, e-Competitions Bulletin June 2005, Art. N° 36764.

[11] See Case T-321/05, AstraZeneca AB and AstraZeneca plc v European Commission, ECR 2010 Page II-02805; and Case C-457/10 P, AstraZeneca AB, AstraZeneca plc v. European Commission, European Federation of Pharmaceutical Industries and Associations (EFPIA), ECR 2012.
See also **Jonas Koponen, Bernd Meyring, Gerwin Van Gerven**, The EU General Court upholds "novel" approach to abuse of dominance in pivotal pharma appeal (AstraZeneca), 1 July 2010, e-Competitions Bulletin July 2010, Art. N° 41073; **Kyriakos Fountoukakos, Kristien Geeurickx**, The ECJ dismisses pharmaceutical company's appeal against Commission and EU General Court's findings that it abused its dominant position by misusing patent systems and pharmaceutical marketing procedures in order to exclude generic competitors from the market and to restrict

parallel imports (AstraZeneca), 6 December 2012, e-Competitions Bulletin December 2012, Art. N° 50286.

[12] In the AstraZeneca judgment, the General Court ruled that intention "constitutes a relevant factor which may, should the case arise, be taken into consideration by the Commission. The fact, relied upon by the applicants, that the concept of abuse of a dominant position is an objective concept and implies no intention to cause harm (see, to that effect, Aéroports de Paris v Commission, paragraph 309 above, paragraph 173) does not lead to the conclusion that the intention to resort to practices falling outside the scope of competition on the merits is in all events irrelevant, since that intention can still be taken into account to support the conclusion that the undertaking concerned abused a dominant position, even if that conclusion should primarily be based on an objective finding that the abusive conduct actually took place." See Case T-321/05, *op. cit.*, para. 359.]

Similarly, in December 2012, the Spanish competition authority announced that it had opened formal proceedings against Pfizer over concerns that the company might have engaged in artificial prolongation of the Xalatan patent in Spain, thus delaying entry of generic versions of latanoprost.[[See **Peter L'Ecluse**, The Spanish Competition Authority opens formal proceedings in the pharmaceutical industry (Pfizer), 19 December 2012, e-Competitions Bulletin December 2012, Art. N° 58215.

[13] See **Amedeo Arena**, The Italian Council of State rules on the issue of dominant firms' duty to supply essential information beyond the requirements of sector regulation (BCS), 11 January 2013, e-Competitions Bulletin January 2013, Art. N° 51786.

[14] See **Alexandre Defossez**, **Daniel Muheme**, The Belgian Competition Council's College of Prosecutors dismisses complaints against telecom operator for abusing its dominant position in the market for fixed telephony, due to margin squeeze on its "Happy Time offer" (Tele2, Belgacom), 28 November 2012, e-Competitions Bulletin November 2012, Art. N° 51821.

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