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Global, local, public and private enforcement: an article 102 perspective

(abstract)

Introduction

There is a high degree of complementarity between global and local antitrust enforcement in Europe, and between public and private antitrust enforcement. Taken together, these different levels and perspectives create a powerful antitrust machine.

This is a very good thing, but – in the light of the obvious fact that any enforcement system may incur in over-enforcement or under-enforcement errors[2] - we should consider to what extent such a powerful machine may generate public policy issues.

From an article 101 perspective, European public enforcement has a clear bias[3] towards over-enforcement, with a thoroughly inferential approach (concerted practices, restrictions by object) and clever procedural rules encouraging leniency.

At the end of the day, the probability that a cartel will go undetected in Europe is quite low, and it is correspondingly quite high the probability that (say) an innocent exchange of information among competitors may be taken as evidence of a cartel. There is nothing wrong with this: given the evidence on the widespread existence of cartels, and on their enormous cost for consumers, it is probably socially better to err on the side of caution, and have an over-enforcement bias vis-à-vis cartels, rather than an under-enforcement bias.

Directive 2014/104 makes private actions for cartels much easier, generally lowering the burden of proof required in civil actions (article 16.1), introducing a specific presumption of harm in cartel cases (article 16.2), and, again generally, making it easier for the claimant to disclose evidence (article 5).

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[2] These are known in statistics as Type-I and Type-II errors. These errors are in a trade-off: a lower probability of under-enforcement necessarily entails a higher probability of over-enforcement, and vice versa.

[3] "Bias", to an economist, is a fact of life, and not necessarily a bad thing.

From a practical viewpoint, and taking together public and private enforcement we should therefore conclude that the over-enforcement bias of article 101 has become more pronounced, as the probability of a cartel finding is as high as it was before the Directive, but the expected cost of a cartel (taking together fines and the damages) has increased.

It is difficult to establish whether such a bias exists in European anti-trust enforcement also from an article 102 perspective, as the range of potentially relevant behaviours is large and highly differentiated.

However, if we consider the specific case of margin squeeze, I believe that such an over-enforcement bias exists, and I would like to argue that the incentives created to civil actions by the laudable, 10-year long, Commissions effort, may end up strengthening such a bias to an extent that may be socially inefficient.

Margin squeeze

Under European competition law, margin squeeze is a stand-alone infringement as it embodies an unfair practice by a firm which is dominant in an upstream market[4], as a consequence of which the margin between upstream and downstream prices is insufficient to allow a competitor as efficient as the dominant firm to profitably supply the downstream service[5].

There are, I believe, at least three major sources of over-enforcement bias in margin squeeze cases, built in European-level precedents[6]

- the cost notion considered in the test systematically over-estimates the relevant dominant firm's costs; thus, a squeeze may appear even when none really exists;
- the test is often conducted not considering the relevant market, but only a portion of it: this increases the probability of a squeeze finding;
- consequently, the burden of proving anticompetitive effects may be too quite low.

Before I review these, let me stress I believe it is probably socially efficient to have an over-enforcement vis-à-vis margin squeeze infringements, as these are quite common in network services[7], the opening and the

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[4] *Deutsche Telekom*, par. *167* and 183; *TeliaSonera*, par. 34.

[5] *Deutsche Telekom*, par. 183; *TeliaSonera*, par. 31.

[6] The first and foremost is of course the very notion of a margin squeeze a last stand-alone infringement: but the discussion of this falls outside the perimeter of this paper

[7] According to Wiethaus and Nitsche (2014), "*there have been 47 margin squeeze cases in 21 European countries. The majority of cases was brought before the courts in France, Great Britain, Germany and Italy. While a sizeable number of margin squeeze cases were in the water, energy,* pharmaceutical*, postal, transport and infrastructure … sectors, the*

integration of which has been since the 1980s a high priority in Europe. Once open network provisions were enforced, margin squeeze became the next battleground with the incumbents. Nothing wrong with over-enforcement here, although one would wish to see margin squeeze cases less concentrated in telecoms, as I suspect there are lots of squeeze cases in other network industries.

Let me now analyse each of the sources of the over-enforcement bias in margin squeeze I just mentioned, and see how the bias can be made more serious, and/or more costly, to dominant firms by private litigation.

In general it is rather well-established that margin squeeze in and of itself need not be an infringement. It becomes one only to the extent that it has an actual or potential anti-competitive effects on the relevant market, in so far it has exclusionary effects on as-efficient competitors.

On practical grounds, major issues here are;

- was the set of services affected by the squeeze sufficient to have an exclusionary effect only on a competitor offering such services, or shouldn't one measure exclusion considering a competitor offering a broader range of services?
- what is the time-frame over which such an assessment of the effects of the squeeze should be made?
- what exactly are the costs, and why, that should be considered when measuring the available margin to a competitor?

Products considered in the squeeze test and the relevant market

What should matter for the test is the effect of the squeeze on competition in the relevant market. Therefore, the effects of a squeeze concerning a particular set of products (let us call it a <u>technical squeeze</u>) should become relevant only if such products are sufficiently important as to make the squeeze effects felt on the relevant market as a whole. Typically, this depends on the weight of the products in terms of sales, on the rate of growth of their sales, and on the time interval over which the effects are assessed.

There is quite a lot of variance in public enforcement decisions on margin squeeze under this point of view. While some argue rather extensively why the squeeze on products entails foreclosure of the market, some others do

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majority occurred in the telecommunication industry". There were six cases at the European level, four of which in telecommunications.

not, and this is the case I believe for relevant cases such as *Telefonica* and the recent *Belgacom*[8].

This I believe has a clear implication in terms of private enforcement, where the claimant is not a generic claimant that has been or may have been foreclosed from the market, but a specific firm that must prove that it did suffer foreclosure.

The existence of a foreclosure vis-a-vis such a specific firm may not be inferred from a public enforcement decision concerning the existence of a squeeze, but must be proved in court with specific reference to the services that were offered by the claimant, the time-frame over which the squeeze did take place, and the practical consequences of such a squeeze.

In case such a rigourous analysis were not carried out in court, a decision in favour of the claimant would become much more likely, and over-enforcement of margin squeeze infringements could become even more likely and costly to the defendant.

Costs considered in the squeeze test

Costs which are typically used in margin squeeze testing are the Long-Run Incremental Costs (LRICs) of the dominant firm. These may be used directly by the NCA, or indirectly when the NCA adopts regulatory tariffs, as these are normally LRIC-based.

LRICs are a reasonable cost notion from a public enforcement point of view, because they include both avoidable costs (i.e. costs that are borne when engaging in an activity) and sunk costs, i.e. the activity-specific investments that would be irrecoverable if the activity was discontinued. As the public policy objective is to avoid foreclosure of existing and potential competitors, sunk costs should be included.

In most practical cases, in a private action, the Claimant is however not the new entrant but an existing competitor, for which only avoidable costs are relevant. This is indeed why avoidable costs, and not LRICs, are used in testing for predatory behaviour[9].

LRICs are therefore a further source of over-enforcement bias in margin squeeze cases, in so far as these are the cost of the, so to say, most disfavoured competitor, i.e. a potential entrant which will have to bear both sunk costs and avoidable costs.

[8] Where the Belgian NCA "*confirmed that in principle one should analyse the margin squeeze in relation with all the products offered by the dominant undertaking on the relevant downstream market. However, in specific circumstances (i.e. when the newly launched offer due to its high popularity could lead to a total negative margin in the future) margin squeeze should be determined on a product level, thus in relation with a specific offer*".

[9] See CRA Competition Memo *When is a margin squeeze not an abuse?*, July 2013.

Should LRICs be used in civil litigation? I do not think so, as claimants in these cases are typically companies that have already entered the market, already born the sunk costs, and for which the relevant costs are only those that are avoidable.

In other words, I believe that in a civil case the court should carefully assess if there has been a squeeze vis-a-vis the actual claimant, on the basis of an analysis of the margin available to it, were the margin is calculated not on the basis of LRICS, but on the basis of avoidable costs. The margin available to the competitor will be in these cases higher than it would have been had the calculation been based on LRICs, and a squeeze finding vis-a-vis a specific claimant will probably be less likely.

Unless such a line of analysis is undertaken, I believe that over-enforcement will be aggravated in margin squeeze cases by private actions.

Burden of proof may be too low

Proof of anticompetitive effects, as we saw, is one of the two cumulative conditions for the existence of a margin squeeze infringement (as opposed to a mere technical squeeze). Such a test is most often conducted in the abstract: "*the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking*"[10].

On practical grounds the fact that in the relevant precedents market effects are inferred is rather curious, as typically infringement cases decisions are reached long after the period in which the alleged squeeze behaviour took place.

A mostly theoretical approach to the existence of effects may be understood in public enforcement cases, where the enforcer cares about our not only the actual competitors but also the potential competitors. Such a theoretical approach is however certainly incorrect in civil litigation cases, where there is a specific competitor claiming damages, and the court can easily analyse - as normally a large number of years have passed since the alleged squeeze behaviour - what has happened in practice.

Sometimes an analysis of the claimant's fortunes over the intervening years may not yield a clear-cut conclusion, but in several cases they will. The point I'd like to stress, however, is that not looking at the data can only produce a further bias towards over-enforcement. It has been indeed refreshing to see in *Post Denmark* a clear indication by the European Court that, when available, actual data should be considered when assessing effect.

[10] *TeliaSonera*, par. 64.

Conclusions

While I believe that it is highly socially beneficial that now Europe has an integrated global-and-local, and public-and-private, antitrust enforcement system, I think more analysis should be devoted to the effect that such a system has on article 102 infringements. As the 10-year history of the intellectual, economic and legal development of Directive 2014/104 clearly shows, most of the thinking has been done considering cartels. Indeed, the earlier drafts of the relevant documents mostly dealt with cartels having only a couple of pages added at the end considering exclusionary conduct.

There is nothing wrong in this, as cartels are a clear social priority, but on the other hand we should reflect about increasing the over-enforcement bias especially first are some types of article 102 abuses.

The policy implications of this should be debated, but I think that a natural antidote to such an increase of over-enforcement will come from the work of the civil courts. Given their experience in a very broad array of illicit behaviours, I think they should be trusted for carefully analysing each case on its own merit, thereby helping in redressing the balance.