

Use of Theories of Harm in the Application of Art. 102 TFEU

Abstract

This master's thesis presents a study of the impact of European Union competition law on the area of abuse of dominance. It maps the usage of the effects-based approach and consumer welfare standard in abuse of dominance cases pursuant to Article 102 of the Treaty on the Functioning of the European Union. This is done by an analysis of the theories of harm advanced in the case law of the European Commission in prohibition decisions from the last twenty years.

The thesis begins by a theoretical discussion and outline of the boundaries to the Commission's discretion in this area, as set by Union courts. Then, a short description of the process of competition law modernisation in Europe continues. In the subsequent analytical part, the cases are tested against two criteria. The first criterion is whether the Commission has analysed the actual or likely effects of a dominant undertaking's conduct. The second criterion is whether the Commission tested the pertinent conduct against a consumer welfare standard. In the final chapter, the results of the analysis are discussed.

The conclusion of this thesis is that the Commission's case law did shift to a more effects-based approach over time and that the Commission does attempt to take the consumer welfare standard into account in some way in most of its decisions. Beyond this general result, there are some remaining issues, though.

First, the depth and quality of the Commission's analysis seems to differ case to case without any clear, legally or factually relevant reason. Second, there is room for improvement in the clarity and transparency in the theories of harm advanced by the Commission. Some cases do not identify clear legal standards that led the Commission to its decision. Such a standard could provide better guidance for future conduct and its penalisation to the benefit of overall legal certainty.