

Abuse of a dominant position - the concept of abuse and modes of abusive conduct

Abstract

This thesis deals with an abuse of dominant position, specifically with concept of abuse as such and subsequently with individual abusing practices. Article 102 TFEU as well as § 11 ZOHS do not define concept of abuse, it is therefore necessary to analyze case law for their understanding. The same apply in case of individual abusing practices. This analysis is fitted into the wider framework which consists in exploring the object of Article 102 and the method of its application, particularly in regards to Commission's effort to modernization. The main aim of the thesis is critical reflection of case law in the context of searching of purpose of Article 102, not comprehensive and detailed review.

The thesis is composed of three chapters. Chapter One characterizes basic objectives of Article 102 and method of its application. Due to brief text of Article 102, the objects of the Article are really crucial for its interpretation and application. In the same way assessment methods can fundamentally change and shift use of Article 102. Basically there are two different objectives and two different methods. Objectives are ordoliberal economic freedom protecting competition as a process and consumer welfare pursuing growth of consumer welfare. Methods are form-based approach and effect-based approach. The knowledge of objectives and methods constitutes basic framework for exploring Article 102, orientation in discussion over its main objective and its implication and it is necessary for understanding of prospective shifts in its application.

Chapter Two deals with concept of abuse as such and particularly with conclusions resulting for this concept from decisions *Continental Can* and *Hoffmann-La Roche*. Core of the chapter consists in analysis of main features of the definition laid down in *Hoffmann-La Roche*. Specifically it focuses on the abuse as objective concept, special responsibility of dominant undertaking, competition on the merits and anticompetitive effect. As further the concept of anticompetitive foreclosure and the concept of as efficient competitor which Commission introduces in Guidelines are described. These concepts are supposed to bring effect-based analysis into application of Article 102. At last the possibilities of defense of dominant undertaking in case of abuse are discussed.

Main part of the thesis represents Chapter Three. Chapter Three consists in analysis of the most common abusing practices. It deals with predatory price, exclusive dealing and rebates, tying, refusal to deal, excessive price, and discrimination. After introduction presenting each practice, its nature and controversial points analysis of European case law follows. The aim is to focus on and explore substantial features of each practice, the facts of decisions are outlined only to the extent necessary for understanding context. Then Guidelines' provisions relating to individual abusing practices are briefly introduced for the purpose of comparison and assessment of case law and Commission's modernization.

The thesis ends with reflection about prevailing objective and method of Article 102 considering case law on the one side and Guidelines on the other and concludes that interpretation of Article 102 is still firmly rooted in ordoliberal tradition.