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978-0-521-76714-9 - A Principled Approach to Abuse of Dominance in European Competition Law

Liza Lovdahl Gormsen

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## A PRINCIPLED APPROACH TO ABUSE OF DOMINANCE IN EUROPEAN COMPETITION LAW

Three questions surround the interpretation and application of Article 82 of the EC Treaty. What is its underlying purpose? Is it necessary to demonstrate actual or likely anticompetitive effects in the marketplace when applying Article 82? And how can dominant undertakings defend themselves against a finding of abuse?

Instead of the usual discussion of objectives, Liza Lovdahl Gormsen questions whether the Commission's chosen objective of consumer welfare is legitimate. While many Community lawyers would readily accept and indeed welcome the objective of consumer welfare, this is not always supported by Article 82 case law. The Community Courts do not always favour consumer welfare at the expense of economic freedom. This is important for dominant undertakings' ability to advance efficiencies and for understanding why the Chicago School arguments cannot be injected into Article 82.

LIZA LOVDAHL GORMSEN teaches competition law at London School of Economics and Political Science and at King's College London.

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## P R E F A C E

According to one study in 2006, the Commission has a 98 per cent success rate in Article 82 cases,<sup>1</sup> and according to another, the Commission has not lost a single Article 82 appeal on substance in twenty years.<sup>2</sup> Yet Article 82, prohibiting abuse of dominance, is in a stage of flux. Perhaps this is because, as eloquently put by Franz Böhm, '[i]t is easier to hold a greased pig by the tail than to control a firm for abuse of a dominant position'.<sup>3</sup>

The Commission's review of Article 82 has created much debate and many excellent participants have tried to find workable solutions to the conundrums raised by Article 82. This author fears the problem of Article 82 is easier to identify than to fix, but hopes it may be possible to design some sensible principles. Unlike most contemporary books on competition law which mainly accept the view that consumer welfare is the main objective of competition law, this book challenges that belief: not because it disregards the importance of consumer welfare, but because it believes the aim of Article 82 is broader than that. The book is not a detailed account of different types of abuse, but draws on case law where relevant for the conceptual discussion.

Some contemporary literature identifies the different goals of Article 82 and expands the analysis to consider the role of economics within the scope of Article 82.<sup>4</sup> This book is not a substitute for any of these other

<sup>1</sup> DG COMP Chief Economist D. J. Neven, 'Competition Economics and Antitrust in Europe' 21(48) *Economic Policy* (2006) 741, 761–2.

<sup>2</sup> C. Ahlborn and D. Evans, 'The *Microsoft* Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe' (2008) 1, 25. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1115867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115867).

<sup>3</sup> F. Böhm in F. M. Scherer, *Competition Policies for an Integrated Work Economy* (Washington, DC: Brookings Institution, 1944) 70.

<sup>4</sup> R. O'Donoghue and A. J. Padilla, *The Law and Economics of Article 82 EC* (Oxford: Hart Publishing, 2006); C. D. Ehlermann and I. Atanasu (eds.), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Oxford: Hart Publishing, 2006);



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works: it merely hopes to complement these by contributing to the scholarly discussion of Article 82. The book includes some discussions of economics, social science and politics. However, the author is a lawyer so the book is written from a legal perspective. Relevant developments are taken into consideration up to 1 March 2009. Since then, the ECJ has given a preliminary ruling in *T-Mobile*<sup>5</sup> and decided the appeal case in *GlaxoSmithKline*.<sup>6</sup> Despite both being cases under Article 81 EC, they are relevant for the point being made about the objectives of Article 82 EC. They both confirm that Article 81, like the other competition rules of the treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also the structure of the market and thus competition as such.<sup>7</sup> This has been the position under Article 82 since *Hoffmann-La Roche*,<sup>8</sup> and was recently reiterated in the *Microsoft* case.<sup>9</sup>

M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004); EAGCP Report, *An Economic Approach to Article 82 EC* (July 2005).

<sup>5</sup> Case C-8/08 *T-Mobile Netherlands and others*.

<sup>6</sup> Case C-501/06 etc. *GlaxoSmithKline v. Commission*.

<sup>7</sup> *T-Mobile*, supra note 5, para. 38; *GlaxoSmithKline*, supra note 6, para. 63.

<sup>8</sup> Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, para. 125.

<sup>9</sup> Case T-201/04 *Microsoft Corp. v. Commission* [2007] ECR II-3601, para. 664.

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Many of the ideas in this book developed during my time as a doctoral research student at King’s College London supervised by Professor Richard Whish and David Bailey. The thesis was examined by Professor Thomas Eilmansberger at the University of Salzburg and Dr Maher Dabbah at Queen Mary, University of London, from both of whom I have received excellent comments.

Other ideas were developed during interesting discussions with my LLB and LLM students while teaching competition law at London School of Economics. I am also grateful for the many and interesting discussions I have had with Margaret Bloom and Alison Jones over the years and all the bright people I have met on my way, in particular at the Office of Fair Trading and the Hellenic Competition Commission.

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