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BERGEN CENTER FOR COMPETITION LAW AND ECONOMICS



Articles 101 and 102 TFEU

‘Restriction of competition’, coherence and concurrent application

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UNIVERSITY OF BERGEN



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Today

- Subject, purpose research question
- Background and motivation
- Methodology
- Framing the project

The dominant firm predicament

A dominant firm offers a contract to a customer that provides for exclusivity in return for rebates.

The contract is litigated before a national court under both Articles 101 and 102 TFEU. The national court finds that the exclusivity in question only covers 1 % of the market, and states in its judgment that there is no infringement of Art. 101 TFEU because the agreement does not *appreciably restrict competition*.

However, the national court proceeds to affirm liability under Art. 102 TFEU on the ground that the contract amounts to an abuse and is presumptively unlawful pursuant to the *Hoffmann-La Roche* line of case law.

How can the same contract be found to (presumptively) restrict and not to restrict competition at the same time, depending on the provision under which it is examined?

“The Advocate General’s opinion in *Intel v Commission*: Eight points of common sense for consideration by the CJEU”

Nicolas Petit

Subject and purpose

- Subject - The simultaneous (concurrent) application of Articles 101 and 102 TFEU
- RQ: Whether there are or should be any principles or criteria guiding whether to apply Article 101 TFEU, Article 102 TFEU or both in concurrence.



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‘Concurrent’/simultaneous application

- Ideal heteroclite concurrence
 - refers to the situation in which a person by one single action commits several criminal offences, and is convicted pursuant to the respective provision in concurrence
- Real/actual heteroclite concurrence
 - refers to the situation in which several actions infringes several provisions, but is to be dealt with in the same case

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Background and motivation

- Supposed to achieve the same aim
- Applies to the same behavior – can be applied in parallel
- No clear criteria for application where the provisions can be applied in parallel
- Uncertainty as to the meaning of ‘Restriction of competition’ and whether the same concept has been applied under Arts. 101 and 102 TFEU
- Difference in legal characterization, assessment and consequence for similar behavior under the provisions
- Uncertainty due to the competition agencies’ own discretion

The dominant firm predicament

- RQ: Whether there are or should be any principles or criteria guiding whether to apply Article 101 TFEU, Article 102 TFEU or both in concurrence.
- Primary aim: to uncover similarities and discrepancies, coherencies and incoherencies in the jurisprudence of the ECJ that may provide some guidance and criteria.

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Methodology

- Legal dogmatism
- Economically informed legal analysis

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Framing the project (skeleton draft)

- Schools of Economics and Competition Policy – the fluxing goals of Competition Law
- Identifying the overlap
- The relationship between Arts. 101 and 102 – the case law so far
- Parallel application in practice and *Ne Bis In Idem*
- On exclusivity
- ‘Restriction of Competiton’