



The enforcement of Article 102 TFEU by the NCAs

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Summary

- NCAs' closed cases since 01/2009
 - proceedings pursuant to art 101 and 102 TFEU
 - proceedings on exclusionary and exploitative conducts
 - proceedings according to the type of decision
 - (i) Infringement
 - (ii) Commitments
 - (iii) No action
- Focus on no action decisions
- Some conclusions






The Data

- The data concern all NCAs' closed proceedings which, at the outset of the procedure, complied with the information duties provided for by art 11(3) of Reg n. 1/2003.
- The number of closed proceedings pursuant to art 101 and 102 TFEU, since the beginning of 2009 amounts to 253 cases.






NCAs' closed cases

(01/2009 – 31/3/2012)

Infringements	n. cases
101	147
102	95
101 + 102	9
total	253






NCAs' art 102 cases, by conducts (01/2009 – 31/3/2012)

Nature of the alleged abuse	n. cases
Exclusionary	89
Exploitative	8
Mixed (exclusionary and exploitative)	7
total	104





NCAs' art 102 cases, by type of decision (01/2009 – 31/3/2012)

Decisions	n. cases
Infringements	25
Commitments	28
No action	51
total	104





The outcomes

- Preminence of proceedings on agreements rather than on abuses;
- Marginal role of exploitative abuses
- Significant – though not overwhelming – role of commitment decisions
- Unexpected, significant weight of no action decisions





Further considerations on “no action” decisions

- Several practical circumstances may lead to no action decisions: complainants' loss of interest to pursue cases, changes in an NCA's enforcement priorities...
- However, the adoption of an “effect based approach” to ascertain abuses is not to be underestimated in the interpretation of “no action” decisions.





Further considerations on “no action” decisions

The possible role played by “no action” decisions:

- Clarification on the approach a CA commits itself to follow
- Clarification of substantive issues arising from the application in specific cases of the general enforcement standards set by the Commission
- Clarification of novel and controversial issues





An example: predatory pricing

The Commission's GP sets an “ **as efficient competitor + an anti-competitive foreclosure** ” test :

- Foreclosure of an equally efficient competitor is a necessary but not a sufficient condition for anticompetitive foreclosure
- Anticompetitive foreclosure requires likely consumer harm. In turn, the latter requires that after the predatory conduct, the dominant undertaking is in a position of benefiting from its profit sacrifice
- GP does not contemplate a recoupment analysis. However, it provides some margin for performing an analogous kind of evaluation
- “Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers. In this context, the Commission will also consider possibilities of re-entry.”





The Chep Case

(Decision by the French CA n. 09-D-33)

- Alleged predatory conduct by CHEP France, dominant undertaking in the French market for renting of plastic bins and pallets
- Alleged predatory practice concerned 10% of the relevant market
- At the time of the practice, CHEP's main competitor stopped supplying the customers addressed by the practice





The Chep Case

(Decision by the French CA n. 09-D-33)

- The French authority considered that a durable exclusion would not be economically plausible if this strategy was limited to a mere segment of the relevant market
- Consequently, the Authority operated a “cost test” on the whole relevant market
- The test revealed that $AVC < p < ATC$





The Chep Case

(Decision by the French CA n. 09-D-33)

- The Authority went on to assess the likelihood of recoupment of losses by CHEP, taking into account that :
 - the dominant undertaking's market share had declined
 - Chep's competitors could re-expand their presence in the market
- On this basis the Authority considered that recoupment was highly unlikely and adopted a no action decision
 - Foreclosure was not ruled out by the “as efficient” test and it did not pass “the anti-competitive” foreclosure test



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The Flybe Case

(Decision by the OFT, 05/11/2010)

- Alleged predatory conduct by the air carrier Flybe in the Gatwick – Newquay (LNG-NQY) route
- Flybe was a new entrant in the LNG-NQY route but it was dominant in the Exeter Airport markets
- Did the alleged predatory conduct aimed to strengthen the existing dominant position?





The Flybe Case

(Decision by the OFT, 05/11/2010)

- OFT adopted a no action decision:
 - No sufficiently strong links between the dominated market and the market in which the abuse was alleged
 - Flybe's loss on the route (price below AAC in the first 18 months) was not out of the ordinary for an airline
- The conduct did not pass “the anti-competitive” foreclosure test





Some considerations on the Chep and Flybe no action decisions

- Both Chep and Flybe no action decisions provide very interesting applications to specific circumstances of the general enforcement test set by the GP for predatory pricing
- Fully reasoned no action decisions like the above may have a clarification role which is comparable to that of infringement decisions
- Compliance with art 5(2) of Reg 1/2003 does not prevent no action decisions from playing a complementary role in providing guidance on concrete substantive issues.





Conclusions

- more procedures on agreements than on abuses,
- more cases on exclusionary than on exploitative conducts,
- more “no action” than infringement or commitment decisions,
- rather different practices across NCAs concerning the reasons and standards of no action decisions,
- important role for fully reasoned no action decisions in the clarification of substantive issues arising from the implementation of general enforcement tests.

