

Measuring competitive harm against the relevant counterfactual

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On the counterfactual

- My paper seeks to examine the role of the counterfactual in EU competition law analysis
 - Present systematically some issues that are implicit and explicit in the case law
 - Discuss the consequences that may follow from the issues for some questions that have not been addressed (or not addressed systematically)

On the counterfactual

- What I talk about when...
 - **The question:** Evaluation of the conditions of competition that would have existed in the absence of the practice/transaction
 - **The point:** Examine the link between actual or potential harm to competition and the practice/transaction

Counterfactual and competitive harm

- In EU competition law, the evaluation of competitive harm operates at two levels:
 - The evaluation of competitive harm may be implicit in the analysis
 - Evidence of competitive harm is not necessary to establish an infringement
 - The threshold is low: *plausibility*
 - Sometimes, the evaluation of harm is explicit in the analysis
 - Evidence of competitive harm is an element of the legal test
 - Plausibility is not sufficient to establish harm: threshold of *likelihood*

Counterfactual and competitive harm

‘Object level’

- Implicit analysis of harm
- Threshold: plausibility
- Examples
 - By object infringements under Article 101 TFEU (e.g. *T-Mobile*)
 - Some practices under Article 102 TFEU (e.g. *Hoffmann-La Roche*)

‘Effects level’

- Explicit analysis of harm
- Threshold: likelihood
- Examples
 - By effect infringements under Article 101 TFEU (e.g. *Delimitis*)
 - Some practices under Article 102 TFEU (e.g. *Deutsche Telekom*)
 - Concentrations caught falling under Regulation 139/2004

Counterfactual analysis and the ‘object level’

- The case law suggests that, at the ‘object level’, it is possible for the parties to show that harm is implausible
- There are three instances in which the evaluation of the counterfactual suggests that harm is implausible:
 - **Objective necessity** of the practice (e.g. *Pronuptia*)
 - The **regulatory framework**, irrespective of the practice, precludes competition (e.g. *E.On Ruhrgas*)
 - There may be other factors suggesting that there are no **‘real, concrete possibilities’** for competition (e.g. *European Night Services*)

Counterfactual analysis and the ‘object level’

‘143. Also, FAPL and others and MPS have not put forward any circumstance falling within the economic and legal context of such clauses that would justify the finding that, despite the considerations set out in the preceding paragraph, those clauses are not liable to impair competition and therefore do not have an anticompetitive object’.

Joined Cases C-403/08 and C-429/08, *Murphy*

Counterfactual analysis and the ‘effects level’

- The evaluation of the counterfactual is an indispensable ingredient of the analysis of the anticompetitive effects of a practice/transaction
 - Well-established in merger control (e.g. failing firm defence)
 - In the context of Article 102 TFEU, *Post Danmark II* made an explicit reference to the attributability of the anticompetitive effects to the dominant firm.
 - See also *Streetmap*
 - See also Guidance Paper, para. 21

Counterfactual analysis and the ‘effects level’

‘47. Lastly, should the referring court find that there are anticompetitive effects attributable to Post Danmark, it should be recalled that it is nevertheless open to a dominant undertaking to provide justification for behaviour liable to be caught by the prohibition set out in Article 82 EC’.

Case C-23/14, Post Danmark II

Legal implications

Does the evaluation of the counterfactual play a role in 'by object' restrictions under Article 101 TFEU?

Legal implications

- The case law suggests that there is no reason to distinguish between restrictions by object or effect in this regard
 - The evaluation of the counterfactual is an element of the analysis of the 'economic and legal context' of the agreement
 - It is well-established case law that the restrictive nature of an agreement cannot be established in the abstract
 - It is possible to identify concrete examples from the case law and the practice of the Commission

Legal implications

'61. [...] Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years that the distributor is selling the contract goods or services in that territory or to that customer group, even though such hardcore restrictions are in general presumed to fall within the scope of Article 101(1)'.

Guidelines on vertical restraints

Legal implications

Is it possible to challenge the plausibility of harm at the 'object level' in the context of Article 102 TFEU?



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Legal implications

- It is reasonable to argue that dominant firms should be able to show that a practice is not capable of having anticompetitive effects:
 - Consistency with Article 101 TFEU
 - The case law and administrative practice suggest the same conclusion
 - There are explicit references to a test of objective necessity (e.g. *Telemarketing*)
 - The analysis of restrictive effects must not be 'purely hypothetical'

Legal implications

Is the meaning that is given to the notion of effects not a crucial one in this context?