

Introduction

Abuse of dominance is back on the agenda in antitrust: the growing discontent with digital gatekeepers such as Google, Facebook or Amazon led to fresh abuse cases all over the world. The record fine handed out by the European Commission in the case *Google Shopping* is just the tip of the iceberg.

Abuse of dominance requires proof that the undertaking in question can act independently of the reactions of customers or competitors. That is a tough threshold. Some jurisdictions try to regulate behaviour that is considered abusive even if dominance could not be established. They use different thresholds such as relative market power or superior bargaining power. The doctrine of unconscionability, as established in some jurisdictions, also serves as a tool to make intervention into business relationships possible for courts and competition agencies. As this collection shows, turning to constellations of superior bargaining power is another global trend in competition law practice. Behind this is the idea that working markets need ‘fairness’ in the dealings of undertakings. This trend may also reflect a certain discontent with a complex, model-based economic approach.

Be it the abuse of dominance or of relative market power – both instruments require proof of ‘abuse’, a term that arguably is harder to define than any other term in competition law. Abuse requires an understanding of the ‘right’ use of market power, yet free-spirited competition lawyers who cherish Friedrich von Hayek’s ‘discovery procedure’ struggle with the definition of what is right and what is wrong in competition.

Where to draw the lines? What is dominance, what is relative market power? What can be required from undertakings – taking into account the institutional confinements of competition law enforcement – when they start to compete aggressively? How can it be ensured that the regulation of abusive practices does not lead to chilling effects for competition?

These are pressing questions that need to be answered in courtrooms and competition agencies. The questions deserve the attention of academics, and thus the Academic Society for Competition Law (Ascola), the ‘patron’ of this book, decided to guide the attention of outstanding competition law academics from all over the world to the topic of abuse

regulation. Their ideas on the topics are presented in this collection of original contributions.

The book is divided into three parts.

In the first part, the authors put the abuse of dominance into perspective with a set of four contributions that go to the fundamentals of abuse and three exemplary case studies. Peter Behrens takes us into the history of abuse regulation in the European Union, laying open the theoretical and historical basis of Article 102 of the Treaty on the Functioning of the European Union. Lorenz Marx turns to the practical application of this norm by the European Commission and presents statistical evidence on enforcement with some counter-intuitive findings. Pieter Van Cleynenbreugel analyses legal presumptions as a tool of overwhelming practical importance, in EU law as well as US law, that is hardly ever analysed with care. Rupperecht Podszun exposes the deficits of market definition as the starting point of all abuse cases and advocates a new and more open approach to defining markets. The next chapters go into the details of three fields of application: Antonio Robles Martín-Laborda deals with exploitative prices, an issue that gained new prominence after years of being ignored by leading competition jurisdictions. Luís Silva Morais and Lúcio Tomé Feteira go into another field that – after some ignorance in the past – is now under specific scrutiny in several jurisdictions: the financial sector. They particularly look at the interplay of competition law and regulation. Maria Ioannidou, finally, critically analyses commitment decisions in abuse cases in the energy sector.

The second part of the book is devoted to general questions of relative market power. It starts with a contribution by Mor Bakhoum who explores the interface of the concept of economic dependence on the one hand and the concept of dominance on the other. Thomas K. Cheng and Michal S. Gal analyse provisions on superior bargaining power as a means to control aggregate power. Thus, their focus is on behaviour of conglomerates. Florian Wagner-von Papp, after comparing the German, the Japanese and the US approaches to superior bargaining power, argues that the concept should be abolished. In the same vein, Toshiaki Takigawa compares the Japanese concept of superior bargaining power and the European avoidance of such a concept and argues for a very cautious approach in cases of superior bargaining power. Stefan Thomas turns to the analysis of market power of buyers. In order to set the standard right, he analyses abuse provisions with their *ex post* assessment as well as merger control rules with their *ex ante* assessment.

The third part of the book presents a collection of specific experiences with the regulation of abusive conduct. All contributions in this section endeavour to discuss national or regional peculiarities in order to carve

out the wider implications for the global competition community. Fang Xiaomin starts with a look at the Chinese law on abuse and its application to state-owned enterprises – a particularly delicate field of antitrust enforcement in all jurisdictions. Allan Fels and Matthew Lees present a study of the unconscionability doctrine that is particularly prominent in Australia. Unconscionability has become an alternative way for intervention, particularly in retailer/supplier constellations. Having laid ground with the Australian experience, other scholars analyse the concept of unconscionability or economic dependence in their jurisdictions. Valeria Falce and David Bosco present the Italian and the French approach, respectively, with reference to the latest developments and challenges. Kazuhiko Fuchikawa follows with a review of the Japanese approach to bargaining power situations in grocery markets. The section finally presents Abayomi Al-Ameen's review of the concept of unconscionability that the author sees as a potentially helpful tool for regulating imbalanced bargaining situations in emerging economies.

Fabiana Di Porto's review of the findings in the preceding chapters concludes this book. The many different perspectives on abuse regulation in their entirety, from critical attacks on the concepts to embraces of their value, from the analysis of fundamental tools to the review of national experiences, give the reader the capability to find a standpoint. The discourse on the special responsibilities that the law imposes or should impose on certain undertakings will never end – yet the contributions in this book have the power to take the reader's understanding of and engagement in the discourse to a new level.

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