

Book Review: Article 82 EC: Reflections on Its Recent Evolution Edited by Ariel Ezrachi, Hart Publishing, 2009

THALIA ZAGOU¹

The book authored by Ezrachi is a compilation of ten presentations of guest lecturers on competition related discussions, organized at the University of Oxford. The common starting point of all ten chapters is the Guidance² on the application of Article 102 TFEU (ex. Article 82 EC), published by the European Commission and the relevant recent judgments of the European Courts. This book analyzes different perspectives of the new effect-based approach of Article 102 introduced by the European Commission and draws a comparison with the formalistic approach, traditionally applied.

The first chapter provides an introduction to the new economic approach of Article 102 and expands on the reasons behind this development. Moreover, the author stresses on the crucial role that should be played by the European Courts` as a leading driver of this reform.

The second chapter critically assesses how the effects-based approach is being implemented. Furthermore, the relevance of the classification pertaining to abuses of dominance and examines whether they can be considered appropriate yet was presented. An interesting contribution is comparing the enforcement policy in Europe with the U.S. rule of reason approach.

In the light of these considerations, the third chapter describes the difficulties that arose from the effects-based approach of Article 102 in relation to the non binding nature of the recent Guidance of the Commission. Moreover, since the latter is subrogated to the European judicature, a balance between the need for a reform and the precedent system is discussed. The overview of the relevant case law is really helpful for the reader to understand how the European Courts have reacted to the new approach.

The following chapter traces how the European Courts have shown preference to protecting competitors` interests over that of final consumers. It further illustrates how effectively the new economic approach has been implemented as far as the consumer interest is concerned. Moreover, it urges the courts to check the effects of alleged infringements of Article 102 on consumer welfare before issuing a final decision.

The discussion carries on with different issues triggered by the Microsoft case . In chapter five, the test of "exceptional circumstances" and its development in the Microsoft case ³ are discussed. Although this topic is of special nature the author succeeds in presenting the concept of 'essential facilities' clearly.³ Chapter six examines the interaction between Intellectual Property and Antitrust Law to maximise consumer welfare. In addition, this chapter deals with the peculiar features of software and how interoperability between different software can be readdressed according to Article 102.

¹ Attorney at law, LL.B Law, National and Kapodistrian University of Athens, LL.M Commercial and Corporate Law, Queen Mary University of London,

² "Guidance on the Commission's enforcement priorities in applying Article 102 of the Treaty to abusive exclusionary conduct by dominant undertakings"

³ CFI, T-201/04, Case Microsoft Corp. v Commission

The debate from there on would be whether this could mark the beginning of a new antitrust era, where mandatory licensing will be a frequent and massive phenomenon.

In chapter seven, special responsibility of the dominant firms not to impair undistorted competition is examined, focusing mainly on its consistency with the effects-based approach of Article 102. Indeed, it proceeds with a transatlantic comparison; between the EU competition law and the US courts' diverging approaches. Hence, it allows the reader to understand in depth the ideological differences between those leading jurisdictions when dealing with dominant undertakings.

The next chapter takes the discussion a step further into the examination of the criteria and the economic analysis of tying and bundling. More specifically, it assesses whether the Guidance and Microsoft case reflect the effects-based approach as far as these two types of conduct are concerned. The rational structure of this chapter provides a clear comprehension and understanding of these concepts.

Although Article 102 focuses on exclusionary practices, chapter nine deals with the most common exploitative abuse, i.e. excessive pricing and the main reasons for non intervention in such cases. The author proposes a post-entry price-cut benchmark. However, it seems that this chapter is substantially theoretical unlike the other practical issues discussed in the book which does not make it fit neatly therein.

In chapter ten, the relationship between the sanction of voidance as a legal consequence of the breach of EU antitrust rules and the right to seek damages, are examined in the light of the absence of any relevant provision under Article 102. The study also discusses the necessity to reconsider these measures following the recently published White Paper on damages.

This book will find its primary audience among practitioners and students. It can also be useful for those interested to engage in an in-depth discussion on how Article 102 is implemented. It should be noted that this book is not advisable for those who are unfamiliar with Antitrust Law in general and Article 102 in particular. Moreover, it opens more doors for further discussions on the selected topics and highlights a number of challenges.

In summary, this book contains a sceptical approach towards many different issues that arise from the timely debate on the balance between the formalistic approach of the European Courts and the economic analysis proposed by the European Commission. The chapters are not restricted to presenting the different approaches and explaining how they are implemented in practice. The authors have rather offered insights through comparison of different practices, proposal of new schemes and description of new perspectives. The conclusions as drawn are supported with thorough and comprehensive arguments and innovative proposals. Therefore, the peculiar structure of the chapters of the book allows the reader to have an in depth overview of the issue s/he is interested in, since every chapter is meant to deal with one specific issue. At the same time this arrangement might not be helpful to a reader that looks for a coherent study of Article 102. In any case, the fact that there have been recently a lot of debates on the implementation of Article 102 makes the book a valuable contribution to reform and further develop Article 102 which also makes it worth reading.
