AGENDA

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Abuse, She Wrote

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Jessica Fletcher and her fellow protagonists in whodunnit stories, such as Jane Marple and Hercule Poirot, knew the formula: find the motive of the suspect, and you have solved half the crime. Dr Gunnar Niels, Partner at Oxera, discusses how competition authorities sometimes behave as if they were in a detective novel by Agatha Christie or Sir Arthur Conan Doyle, focusing on the intent of the dominant company

An earlier version of this article appeared this year in the Dutch journal Markt & Mededinging*, although with the same English title: Niels, G. (2020), 'Abuse, She Wrote',* Markt & Mededinging*, Aflevering* ***2****, https://bit.ly/31qmlO1.*

Following decades of abuse of dominance cases in which EU competition law focused on the *form* of a given company's conduct, the reforms of Article 102 TFEU that began in 2005 shifted the focus to the *effect* of the conduct on competition and consumers. More recently, competition authorities seem to have given increasing weight to the *intentions* of the dominant company. They forensically review internal documents, emails and other communications. Indications that the company's management intended to eliminate its rivals are treated as smoking guns.[1]

Two recent examples of such abuse cases are the decision of the Dutch competition authority (Autoriteit Consument en Markt, ACM) on predatory conduct by NS, the rail incumbent in the Netherlands; and the decision of the UK communications regulator (Ofcom) regarding exclusionary conduct by Royal Mail, the postal incumbent in the UK. The former decision was overruled by the Court of Rotterdam in June 2019; the latter was upheld by the Competition Appeal Tribunal (CAT) in November 2019.[2] I discuss these cases below. Another example of an emphasis on intent was the antitrust hearing in the US Congress of the CEOs of Amazon, Apple, Facebook and Google on 29 July 2020, where lawmakers had obtained 1.3m documents and cited various internal emails relating to intent.[3]

Murder on the Orient (Limburg/Whistl) Express

The ACM found NS guilty of abusing a dominant position by submitting a loss-making bid in the tender for the public transport concession in the province of Limburg in the South-East of the Netherlands. This concession is separate from the main national rail network in the Netherlands that is run by NS. In its decision, the ACM placed strong emphasis on internal emails, communications and board documents from NS in the run-up to the tender. The ACM concluded that NS wanted to win the tender at any cost, so as to avoid the 'rot' of the main national rail network. The competitive tender in Limburg was regarded as a test case for possible further decentralisation of the national network—i.e. separating more regions from the national network and tendering them competitively in the same way as for the Limburg concession.

With so many indications of NS's intention to win the tender, the ACM paid relatively little attention to the analysis of its economic theory of harm. What was the source of market power in Limburg, where NS did not have an established market position and was facing rival bids from Deutsche Bahn/Arriva and from Veolia (the incumbent)?[4] What were the anticompetitive effects of NS's behaviour in the Limburg tender on competition for the main national network?

On appeal, the Court of Rotterdam found that these possible effects were too uncertain to be considered anticompetitive. It put into perspective the importance of the Limburg concession as a test case for the main network, since the Dutch government's decision on further decentralisation of rail would depend on many other factors, and in any event such decentralisation would not occur until after 2025 when the current national concession held by NS was due to expire.

Ofcom—the UK regulator with powers to apply the competition rules in the postal sector—found Royal Mail guilty of abusing a dominant position by setting discriminatory prices with the aim of excluding new entrant Whistl. Royal Mail's differentiated tariffs for access to its network made it difficult for competitors in the retail market to gain customers for bulk mail. The decision contains an extensive discussion of internal Royal Mail documents and concludes that the exclusionary conduct was intentional. Ofcom even gave weight to the (confidential) external economic advice that Royal Mail had obtained—according to which the pricing structure could be defended from an economic perspective, but there was a risk that the regulator would see things differently.

On appeal, the CAT confirmed that Royal Mail had the intention to exclude its competitor and that its management had unduly dismissed the risk of breaching competition law. The CAT did note that intent cannot be the decisive factor in abuse of dominance cases,[5] but ultimately accepted that Ofcom had shown sufficient evidence that Royal Mail's differentiated tariffs would have had a negative effect on competition (the tariffs were never actually implemented).

Cards on the Table

Internal emails and documents often provide juicy evidence on the intentions of the dominant company. However, there is a fundamental difference between whodunnits and abuse cases: the intention to eliminate rivals is not the same as the intention to murder someone. Murder is a crime. Competing fiercely is desirable behaviour in a market economy (provided that one stays within the rules of the game). Internal emails that reveal how managers discussed throttling a rival may have some entertainment value in a court hearing, but are in themselves of little concern for competition policy—it is much more preferable to see this kind of behaviour than to see internal documents that reveal how rivals agreed among themselves to compete less fiercely. A market in which rivals collude with each other (tacitly or overtly) is worse for consumers than one in which rivals are at each other's throats.

This is an old debate. US courts tend to give little weight to evidence on intent in monopolisation cases, for the above reason. As one court put it in a judgment from 1989 concerning a predatory pricing dispute between egg producers:

> Firms 'intend' to do all the business they can, to crush their rivals if they can … Entrepreneurs who work hardest to cut their price will do the most damage to their rivals, and they will see good in it … If courts use the vigorous, nasty pursuit of sales as evidence of forbidden 'intent', they run the risk of penalizing the motive forces of competition.[6]

Instead, US courts view intent as one possible indicator of the likely effect of a practice. As noted in the widely publicised *Microsoft* judgement of 2001:

> Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of [section 2 of the Sherman Act], our focus is upon the effect of that conduct, not upon the intent behind

it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.[7]

A somewhat similar debate takes place in the context of Article 101 TFEU covering restrictive agreements, where a distinction is made between restrictions by object and restrictions by effect. In cases of restrictions by object—most commonly cartel agreements between competitors—the competition authority does not need to assess the possible effects. This can be an efficient way to enforce competition law since, also from an economic perspective, such restrictions by object invariably produce negative effects on competition (for example, price-fixing cartels). Internal documents and communications often constitute important evidence in these cases. Nevertheless, EU case law carefully circumscribes the types of practices that fall into the 'by object' category—see, for example, the recent Court of Justice of the EU ruling in *Budapest Bank* (2020) and earlier in *Cartes Bancaires* (2014).[8]

Furthermore, despite the terminology, restrictions by object are not so much about the intention (object) behind the agreements in question, as about the nature of these agreements. Specifically, the question is whether these agreements by their very nature have the potential to restrict competition. Internal documents and communications often form key evidence in cartel cases. However, this evidence is not so much focused on intent as such, but on demonstrating that the anticompetitive agreements took place—indeed, this is where competition authorities come closest to being detectives, searching for smoking gun evidence in dawn raids. Accordingly, the discussions on restrictions by object under Article 101 are not really comparable to the parallel debate on the focus on intent in abuse of dominance cases.

Ordeal by Innocence

Internal documents do have a role to play in abuse of dominance cases. They can help competition authorities to better understand the functioning and strategies of companies, and thus place the conduct in question in a broader context. After all, competition authorities are often accused of not knowing enough about the business models in an industry. At the very least, internal documents add colour to a case when a competition authority is able to describe how a company has behaved and why.

But evidence on intent alone is insufficient in abuse of dominance cases, and should not be the main focus. As part of the broader context, competition authorities must also identify a plausible theory of harm and support this with evidence on the likely effects on competition in the market. Mrs Fletcher, Miss Marple and Sherlock Holmes knew this all too well: discovering the motive still only *half* solves the crime.

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[1] *Murder, She Wrote* was a popular US TV series that screened from 1984 to 1996, starring Angela Lansbury in the role of amateur detective Jessica Fletcher.

[2] Court of Rotterdam, Case ROT 2018/527 between N.V. Nederlandse Spoorwegen and Autoriteit Consument en Markt, 27 June 2019; Competition Appeal Tribunal, [2019] CAT 27, *Royal Mail plc v Office of Communications*, 12 November 2019. Oxera advised NS and Royal Mail on these cases. The reader may decide whether that makes the author a Dr Watson or a Professor Moriarty.

[3] House of Representatives Judiciary Committee, Hearing in the Subcommittee on Antitrust, Commercial and Administrative Law, 'Online platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook and Google', 29 July 2020. A recording of the hearing can be found at https://bit.ly/34BRPDb, accessed 16 August 2020. There is currently no written transcript of the hearing.

[4] Whodunnit stories typically feature a police inspector who zooms in on the motive of the prime suspect and prematurely considers the case closed. Our clever detective knows better, and also explores the motives of other characters in the story. The ACM did not investigate the intentions of Deutsche Bahn/Arriva (a large player in a neighbouring market, possibly intending to conquer the Dutch market) or Veolia (the incumbent, possibly intending to strengthen its position in bus and rail).

[5] Competition Appeal Tribunal, section G.5. In the recent *Paroxetine* judgement, the Court of Justice of the EU stated that in abuse of dominance cases it is not necessary to demonstrate intent, but that where there are indications of an intentional exclusionary strategy this must be considered in the assessment. Case C307-18, *Generics UK and others*, Judgement of 31 January 2020.

[6] *AA Poultry Farms, Inc. v Rose Acre Farms, Inc.* 881 F 2d 1396 (7th Cir. 1989), cert. denied, 494 US 1019 (1990).

[7] *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

[8] Case C-228/18 *Budapest Bank and others*, Judgement of 2 April 2020; Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, Judgement of 11 September 2014.