

Antitrust remedies – an ex post assessment

Be Ware of Crooked Lines

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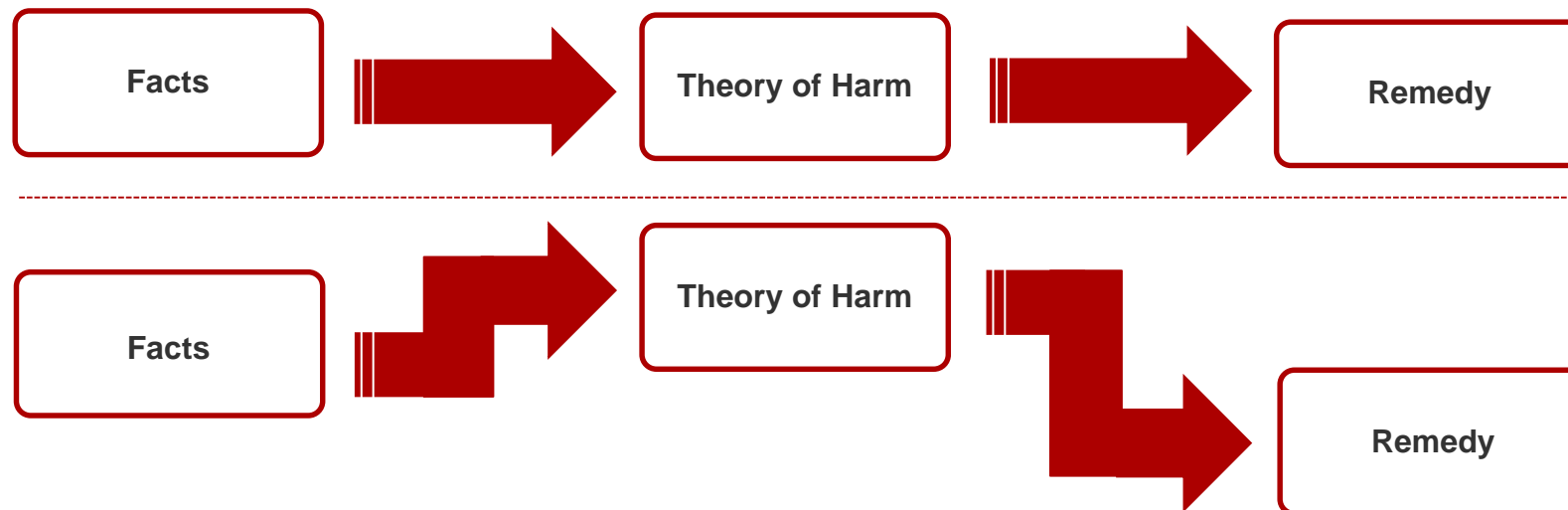
Lars Kjolbye

The legal benchmark for success

- The effectiveness of a remedy imposed should be tested against the Commission's powers to impose remedies and their aim
- Could a different and potentially more effective remedy have been imposed or would such a remedy have gone beyond existing enforcement powers?
 - Regulation 1/2003: The Commission may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end
 - *Ufex*: If anti-competitive effects continue after the practices which caused them have ceased, the Commission remains competent to act with a view to eliminating or neutralising them

Straight and crooked lines

- Antitrust remedies often apply in complex settings that make it difficult to disentangle their effects from other dynamics.
- Remedies imposed in complex settings should be based on a thorough understanding of the specific facts of the case, the theory of harm and market drivers. This maximizes the chances that the analytical dots align



Microsoft Windows N remedy

- Microsoft was found to have abused its dominance in Windows desktop OS by integrating Windows Media Player (WMP). Microsoft was required to make available a version of Windows (N) that did not include WMP but not to charge a lower price for Windows N. Microsoft sold very few copies of Windows N. The remedy is seen as a failure but why?
 - There was a straight line between the facts (product integration), the theory of harm (foreclosure through tying) and the remedy (untying). Complete unbundling would have deprived consumers of the benefits of an integrated product
 - But there was no attractive monetization model for media players to support revenue sharing with PC OEMs preinstalling competing media players. That remains the case
 - Once bandwidth improved consumers started downloading competing media players. Today, VLC Player (free open-source) has highest usage on Windows of standalone media players but the market has moved to integration of content and functionality (e.g. Netflix)

Microsoft Internet Explorer

- Microsoft was found to have abused its dominance in Windows desktop OS by integrating Internet Explorer (IE). Microsoft was required to create a browser choice screen prompting consumers to choose a web-browser when switching on a new Windows PC for the first time. Existing users were offered the same choice through Windows Update. The remedy is seen as a success but why:
 - There was a straight line between the facts (product integration) and the theory of harm (foreclosure through tying)
 - The remedy went beyond untying by seeking to undo the effects of the past infringement. The solution sought to create a level playing field while allowing integration. It was technically workable. But was the remedy necessary and effective?
 - Today, Chrome is the leading web-browser and Firefox is no. 2. Firefox was stronger before the remedy
 - Web-browsers monetize through revenue sharing (search default deals)
 - Downloading has become effective and very common
 - Most web-browsing occurs on smartphones where Microsoft does not play

- Intel was found to have abused its dominance in x86 CPUs by implementing loyalty rebates in contracts with PC OEMs. The Commission imposed a cease and desist order
- There is a straight line between the facts (loyalty rebates), the theory of harm (likely foreclosure) and the remedy (prohibition of the conduct). Was the remedy a success?
 - AMD remains an active competitor and has a share of around 12%. In 2006 its share was around 15%
 - Should the Commission have imposed additional remedies? What would it be?
 - High risk that affirmative obligations would interfere with commercial relationships. EU competition law aims to eliminate obstacles to competition created by dominant forms. The aim is not to engineer market outcomes

Google Shopping

- Key facts: Results from Google Shopping were displayed on the search results page as sponsored links with product images. Results from third-party comparison shopping sites were displayed as unpaid general search results. Merchants paid to be included and bid to be displayed as sponsored links in the Google Shopping Box
- Theory of harm: leveraging dominance in general search to divert traffic away from rivals which could not recoup the lost traffic by other viable means. Google positioned and displayed more favourably its own shopping comparison service compared to competing comparison shopping services
- Remedy: Google is required to treat competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages. Google is required to give competitors access to monetize a paid service
- Will it work? Are the lines straight or crooked?