

WHAT IF WE DID NOT USE COUNTERFACTUALS?

Swedish Competition Authority

Professor Richard Whish

6 December 2013

WHAT IF WE DID NOT USE COUNTERFACTUALS?

STRUCTURE OF PRESENTATION

- ◉ WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?
- ◉ WHEN IS IT NOT NECESSARY TO USE A COUNTERFACTUAL?
- ◉ WHEN IS IT USEFUL TO USE A COUNTERFACTUAL?
- ◉ CONCLUSION

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?

- ◉ IN SOME CIRCUMSTANCES IT IS CLEAR THAT THERE IS A LEGAL REQUIREMENT TO USE A COUNTERFACTUAL
- ◉ ARTICLE 101(1) TFEU: RESTRICTIONS BY EFFECT
 - *SOCIÉTÉ TECHNIQUE MINIÈRE V LTM* (1966): ‘THE COMPETITION IN QUESTION MUCH BE UNDERSTOOD WITHIN THE ACTUAL CONTEXT IN WHICH IT WOULD OCCUR IN THE ABSENCE OF THE AGREEMENT IN DISPUTE’

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?

◉ ARTICLE 101(1) TFEU: RESTRICTIONS BY EFFECT

- A FAIRLY RECENT EXAMPLE OF A COMMISSION DECISION BEING ANNULLED FOR FAILURE TO ESTABLISH THE COUNTERFACTUAL IS THE GENERAL COURT IN *O2 (GERMANY) V COMMISSION* (2006)

◉ ARTICLE 101(3) TFEU: ARE THE RESTRICTIONS INDISPENSABLE?

- ALL FOUR HEADS OF ARTICLE 101(3) REQUIRE COUNTERFACTUAL ANALYSIS

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?

- ◉ MERGER CONTROL SYSTEMS THAT ASK ‘WOULD THE MERGER SUBSTANTIALLY LESSEN COMPETITION?’ NECESSARILY REQUIRE COUNTERFACTUAL ANALYSIS
 - SEE PAGES 21-27 OF THE COMPETITION COMMISSION/OFT MERGER GUIDELINES 2010: EXTENSIVE DISCUSSION OF THE COUNTERFACTUAL

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?

- ◉ MERGER CONTROL SYSTEMS THAT ASK ‘WOULD THE MERGER SIGNIFICANTLY IMPEDE EFFECTIVE COMPETITION?’
 - PARAGRAPH 9 OF THE EUROPEAN COMMISSION’S *HORIZONTAL MERGER GUIDELINES* SAYS THAT THE COMMISSION WILL COMPARE THE POSITION AFTER THE MERGER ‘WITH THE CONDITIONS THAT WOULD HAVE PREVAILED WITHOUT THE MERGER’
 - SEE SIMILARLY PARAGRAPH 20 OF THE *NON-HORIZONTAL MERGER GUIDELINES*

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?

- ◉ THE FAILING FIRM DEFENCE IS A PARTICULARLY CLEAR CASE WHERE THE COUNTERFACTUAL MUST BE ANALYSED
 - SEE *FRANCE V COMMISSION* (1998): DID THE MERGER CAUSE A LOSS OF COMPETITION?
 - SEE THE PRESENTATION OF DAMIEN GERADIN ON THIS

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?

◎ THE ASSESSMENT OF DAMAGES

- WHAT WOULD HAVE HAPPENED 'BUT FOR' THE CARTEL
- WHAT WOULD HAVE HAPPENED 'BUT FOR' THE ABUSE OF DOMINANCE?
- SEE THE EUROPEAN COMMISSION'S PRACTICAL GUIDE ON THE ASSESSMENT OF DAMAGES OF JUNE 2013 - BASED ON THE COUNTERFACTUAL OR 'BUT FOR' TEST
- SEE THE PRESENTATION OF DAME VIVIEN ROSE

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NECESSARY TO USE A COUNTERFACTUAL?

- ◉ INABILITY TO PAY A FINE
 - ◉ AGAIN THIS NECESSARILY REQUIRES
COUNTERFACTUAL ANALYSIS

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NOT NECESSARY TO USE A COUNTERFACTUAL?

◉ ARTICLE 101 TFEU: RESTRICTIONS BY OBJECT

- *SOCIÉTÉ TECHNIQUE MINIÈRE V LTM* (1966):
WHERE AN AGREEMENT CONTAINS A RESTRICTION
BY OBJECT THERE IS NO NEED FOR EFFECTS
ANALYSIS
- THIS HAS BEEN REPEATED MANY TIMES IN
SUBSEQUENT YEARS
- SEE MOST RECENTLY CASES SUCH AS *EXPEDIA*,
ALLIANZ HUNGARIA, *DOLE V COMMISSION*

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NOT NECESSARY TO USE A COUNTERFACTUAL?

- ◉ ARTICLE 101 TFEU: RESTRICTIONS BY OBJECT
 - NOTE ALSO THAT THE SIZE OF THE ‘OBJECT BOX’ SEEMS TO GET BIGGER RATHER THAN SMALLER: SEE EG *DOLE V COMMISSION*, *ALLIANZ HUNGARIA*
 - NOTE ALSO RECENT COMMISSION DECISIONS, SUCH AS *TELEFÓNICA*, *LUNDBECK*
- ◉ ARTICLE 101 TFEU: THE APPRECIABILITY OF OBJECT RESTRICTIONS
 - SEE PARA 37 OF *EXPEDIA*: NO NEED FOR EFFECTS ANALYSIS IF AN EFFECT ON TRADE BETWEEN MS

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT NOT NECESSARY TO USE A COUNTERFACTUAL?

- ◉ **ARTICLE 102 TFEU: CERTAIN ABUSES DO NOT REQUIRE COUNTERFACTUAL ANALYSIS**
 - PREDATORY PRICING: SALES BELOW AAC (AVC) OR LRIC (ATC)
 - ABUSE OF REGULATORY PROCEDURES (*ASTRAZENECA V COMMISSION*)
- **FINING POLICY**
 - EFFECTS ARE RELEVANT TO THE SIZE OF A FINE, BUT THE 'BUT-FOR' TEST IS NOT APPLIED AS IT IS IN THE CASE OF CALCULATION OF DAMAGES

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT USEFUL TO USE A COUNTERFACTUAL?

- ARTICLE 102 TFEU AND EFFECTS ANALYSIS
 - A MOVE TOWARDS A MORE ‘EFFECTS-BASED APPROACH’ WOULD SEEM TO INVITE MORE USE OF THE COUNTERFACTUAL: SEE PARA 21 OF THE COMMISSION’S GUIDANCE ON ARTICLE 102 ENFORCEMENT PRIORITIES
 - HOWEVER OTHER TOOLS ARE ALREADY IN PLACE THAT HAVE GREATER PROMINENCE IN ARTICLE 102 CASES (FOR EXAMPLE PRICE-COST ANALYSIS): WILL A FULLY COUNTERFACTUAL APPROACH BE ADOPTED?

WHAT IF WE DID NOT USE COUNTERFACTUALS?

WHEN IS IT USEFUL TO USE A COUNTERFACTUAL?

- ◉ EFFECTS ANALYSIS UNDER ARTICLE 102 TFEU IS LIKELY TO BE WHERE THE DEBATE ABOUT COUNTERFACTUALISM WILL BE MOST VIGOROUS IN THE YEARS AHEAD
- ◉ RECENT JUDGMENTS OF THE COURT OF JUSTICE HAVE STRESSED THE NEED FOR DEMONSTRATION OF EFFECTS IN ARTICLE 102 CASES (*DEUSTCHE TELEKOM V COMMISSION*, *TELIASONERA*, *POST DANMARK*)

WHAT IF WE DID NOT USE COUNTERFACTUALS?

CONCLUSION

- ◉ FOR MANY ISSUES IN COMPETITION LAW IT IS CLEARLY NECESSARY TO USE THE COUNTERFACTUAL
- ◉ HOWEVER THERE ARE SOME MATTERS THAT CAN BE RESOLVED IN OTHER WAYS, PARTICULARLY WHERE THERE ARE 'BRIGHT-LINE' RULES
- ◉ EFFECTS ANALYSIS IMPLIES GREATER USE OF COUNTERFACTUALISM

WHAT IF WE DID NOT USE COUNTERFACTUALS?

CONCLUSION

- ◉ A SEPARATE QUESTION IS ‘WHAT IS THE APPROPRIATE COUNTERFACTUAL?’
- ◉ THERE CAN BE DIFFERING VIEWS AS TO THE CORRECT COUNTERFACTUAL
- ◉ THE COUNTERFACTUAL CAN VARY OVER TIME
 - THE COUNTERFACTUAL CANNOT BE ‘PINNED TO A BOARD LIKE A BUTTERFLY AT AN EARLY PART OF THE COMMISSION’S ASSESSMENT, IT ACTUALLY REMAINS ALIVE, VIBRANT AND IMPORTANT THROUGHOUT’ (BSKYB V COMPETITION COMMISSION, 2008)

WHAT IF WE DID NOT USE COUNTERFACTUALS?

CONCLUSION

- ◎ SO WHAT IF WE DID NOT USE COUNTERFACTUALS?
 - SOME QUESTIONS COULD NOT BE ANSWERED AT ALL
 - OTHERS WOULD BE ANSWERED IN THE SAME WAY
 - WE WOULD LIVE IN A MORE 'FORM-BASED' WORLD
 - HOW MUCH MORE EFFECTS-BASED WILL WE GET IN THE FUTURE?

- ◎ THANK YOU FOR YOUR ATTENTION