



Objectives and Legal Standards in the Commission's Guidance Paper

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Summary

- Objectives of the Commission's enforcement of art. 82
- Legal standards for predatory pricing
- Some preliminary conclusions



Objectives of the Enforcement of art. 82

“The Commission will focus on those types of conduct that are most harmful to consumers ”



Promoting consumer welfare

“The Commission will direct its enforcement to ensuring that markets function properly and that consumers benefit from effective competition between undertakings” (par. 5)



Ensuring an effective competition process



Objectives of the Enforcement of art. 82

“The aim of the Commission enforcement activity is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare” (par. 19)



Effective competition



is a necessary condition for



consumer welfare



Objectives of the Enforcement of art. 82

“What really matters is protecting an effective competitive process and not simply protecting competitors”.



Convergence between the European traditional approach and a consumer harm approach





Standards for price based exclusionary conduct

1. Harm to competition :

as efficient as test (average avoidable costs and long-run average incremental costs)

2. Harm to consumer :

price increase and output restriction



Conditions for consumer harm

Consumer harm requires (Spector 2006) :

- i. Decrease in rivals' sales
- ii. Reduction of the competitive pressure exerted by rivals
- iii. Significant decrease in the overall competitive pressure constraining the dominant firm's behaviour



Anticompetitive foreclosure in the GP

A situation where effective access of competitors to markets is hampered as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers (par 19)

Anticompetitive foreclosure requires consumer harm





Anticompetitive foreclosure in the GP

Foreclosure of an equally efficient competitor is a necessary but not a sufficient condition for anticompetitive foreclosure

Anticompetitive foreclosure requires consumer harm



Assessment of dominance

The focus is on degree of market power rather than on market share:

- i. Analysis of competitive constraints (existing supplies, possible future expansion of actual or potential competitors, countervailing buyer power) (par12)
- ii. Competitive constraints exerted on the undertaking in question must not be sufficiently effective (par. 10)
- iii. Market power must be enjoyed for a significant period of time (par. 11)



Standards for predatory pricing

A dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term so as to foreclose competitors with a view to strengthening its market power, thereby causing consumer harm



Sacrifice test ?



Standards for predatory pricing

“the concept of sacrifice does not only include pricing below AAC. In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say , whether the dominant undertaking incurred a loss that it could have avoided. Only economically rational and practicable alternatives will be considered which can realistically be expected to be more profitable.”(par. 65)



Conclusions

- substantive reconciliation of different approaches in a coherent framework by focusing on anticompetitive foreclosure
- assessment of dominance focused on competitive constraints
- flexibility can be exploited in a consistent manner
- importance of future proceedings

