

Some Critical Comments on the Commission's Guidance Paper on Art. 82 EC

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Outline

- Some concerns with the Guidance Paper
- Treatment of Efficiencies
- Enforcement / decision procedures
- Issues of deterrence and legal uncertainty
- Example: refusal to deal practices

The Commission's Recent Guidance Paper

Some concerns:

1. Unclear articulation of the Commission's **objectives** given its purported aim to adopt an effects-based approach in its decision procedures;
2. While adoption of an effects-based approach is generally welcome, in the Paper: (i) important considerations relevant to the optimal selection of **decision procedures** are not taken into account, and (ii) potential **efficiencies** are not assigned the importance they should have;
3. The Paper's formulation of legal standards for specific "abuses" may, in fact, lead in some cases to a substantial increase in **legal uncertainty**.

Objectives - Substantive standard

- Purported to be Consumer Welfare, but....
- The Paper contains quite a lot of discussion about the conditions that will generate exclusion, but much less discussion about the conditions that will make it likely that consumer harm will also result.
- In this respect, the Paper has not, unfortunately, improved on the Commission's 2005 DP which, while stressing the unifying principle of consumer welfare, did not pay enough attention:

“to the causal relationship between harm to **competitors** and harm to **competition**, and to which screens could be used in order to dismiss cases in which this causal relationship is likely to be absent”

Decision procedures

- Effects–based. Yes, but....then one needs to:
 - Recognize fully role of efficiencies – pro-competitive effects of practices.
 - Weight the implications of effects-based procedures for **decision errors** as well as their indirect (**deterrence**) and administrability implications.
 - Distinguish different forms of effects-based procedures: extreme effects-based procedures associated with the discretionary application of different models on a case-by-case basis (call this for short: *Rule-of-Reason*) can increase substantially legal uncertainty (also below).

Efficiencies: General Considerations

Giving due weight to efficiencies is very important:

1. In design of appropriate decision procedures – by helping to answer the question, is the practice presumptively (or *prima facie*) legal or illegal?
2. In assessing welfare implications of specific conduct:
 - Efficiencies recognized as of major importance for most unilateral practices.
 - Efficiencies not necessarily more difficult to assess than anti-competitive effects (even taking into account firms' incentives to exploit asymmetric information) - benchmarking.
3. Dynamic efficiencies particularly important in some cases but assessment / measurement may be more difficult: what procedure should one use? Must weight potential for improved effectiveness in decision error terms and issues of deterrence and legal uncertainty (also below – refusal to deal).

Efficiencies in EC Paper (1)

1. Paper treats potential efficiencies in a very asymmetric way relative to potentially harmful effects—though there is no justification of this approach in current economic thinking, nor indeed is any offered in the Paper.
2. Discussion omits or just touches on a large number of beneficial effects that the economic literature has identified, especially for tying, refusal to supply, and exclusive dealing practices.
3. It is revealing that in the Paper's 26 pages, efficiencies are discussed in paragraph 29 and then, in the discussion of specific “abuses,” in paragraphs 45, 61, 73, and 89, making a total of about one page of the document.

Efficiencies in EC Paper (2)

4. It is clear from par. 29—describing the conditions for efficiencies to be a potential justification—that the Commission is taking a stance on efficiencies that is reminiscent of the exception criteria under par. 3 of Art. 81 EC. This makes it extremely hard for a dominant company to succeed in having any conduct allowed on efficiency grounds.
5. Treatment completely different from that of recent DoJ Report on “Single Firm Conduct”(2008). In latter, treatment of pro-competitive implications of unilateral conduct is:
 - Much more extensive
 - Recognized as very important without placing undue burden of proof on defendants
 - Getting full recognition in designing appropriate rules – examples: exclusive dealing, refusal to deal.

Recognising Deterrence and Legal Uncertainty when Designing Enforcement Procedures(1)

- US DoJ Report gives much fuller recognition to deterrence effects and legal uncertainty issues – devoting much of Chapter 1 to considerations related to these issues and recognizing their significance when examining specific conducts.
- This is not the case in Guidance Paper...
- But, it is vitally important that the assessment tests proposed should allow firms to identify whether their conduct will be classified as harmful or as benign by the Commission.

Recognising Deterrence and Legal Uncertainty when Designing Enforcement Procedures(2)

- The Commission does not seem to have given weight in this respect to appeals by eminent commentators in Europe who have stressed the importance of “predictability”.
- E.g. John Vickers has argued recently against “discretionary decision-making based on whatever is thought to be desirable in economic terms case by case” (*Rule of Reason*).
- EC Paper proposes what amounts to exactly such decision making procedures for refusals to deal.
- Are there formal ways of capturing “legal uncertainty” and its welfare costs?

Recent Developments in Modeling the Costs of Legal Uncertainty

- The recent economic literature on optimal decision and enforcement procedures, when decision rules are imperfect and subject to Type I and Type II errors, has formalized the notion of legal uncertainty and has made clear how the cost of legal uncertainty can be formally measured (Katsoulacos and Ulph, K&U, 2009 – under Publications in www.cresse.info).

Effects-based procedures and Legal Uncertainty (1)

Effects-based procedures give rise to Legal Uncertainty in two senses:

1. First, even assuming that firms know whether their conduct is harmful or benign and the model/analysis that the Competition Authority (CA) will employ to assess their conduct, because of the inherent inability to avoid decision errors, firms will no longer be able to say with certainty whether their conduct will be allowed or disallowed – as they are able to do under *Per Se* rules.
2. Second, when CAs adopt extreme forms of effects-based procedures associated with the discretionary application of different models on a case-by-case basis (*Rule-of-Reason*), then it is likely that firms will not be able to infer exactly how the CA will assess their conduct – firms will then only be able to deduce from the CAs enforcement record the average likelihood of having their actions disallowed. Thus there will be “average” rather than “marginal” deterrence – and this reduces welfare.

Effects-based procedures and Legal Uncertainty (2)

- While an **effective** effects-based procedure (i.e. one that lowers decision errors – K&U, JIE, 2008) will not in general be welfare inferior to *Per Se* as a result of its impact on Legal Uncertainty, an (effective) discretionary (*Rule-of-Reason*) procedure is much more likely to be inferior due to the welfare costs of Legal Uncertainty associated with “average” deterrence (K&U, 2009).
- This would seem to be true, for example, for **refusal to deal conduct** for which the US DoJ report essentially proposes the adoption of *Per Se Legality* while the EC Paper proposes *Rule-of-Reason*. The DoJ proposal is supported by the analysis of Katsoulacos (JCL&E, 2008).

Conclusion

While the adoption of an effects-based approach in the assessment of unilateral conduct is long due, it is regrettable that after years of practice, internal reflection, and public consultation, the Commission's Paper has still not offered a more satisfactory framework and guidance to the business community, in terms of objectives, predictability and recognizing efficiencies, as to how the Commission will tackle potentially abusive conducts under Art. 82 EC.