A New Approach to Article 82

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The EAGCP, a group of 7 distinguished economists, has proposed a new, economic approach to Article 82.

Under this new approach, "the standard for assessing whether a given practice is detrimental to 'competition' or whether it is a legitimate tool of 'competition' should be derived from the effects of the practice on consumers."

This is in contrast to the current enforcement of Article 82, which the EAGCP characterizes as "form based" – focussing on the forms of anticompetitive behavior – predation, tying arrangements, etc.

The EAGCP summarizes the advantages of their economic approach to Article 82 as follows:

"An economic approach to Article 82 focuses on improved consumer welfare. In so doing, avoids confusing protection of competition with the protection of competitors and is stresses that the ultimate yardstick of competition policy is in the satisfaction of consumer needs. Competition is a process that forces firms to be responsive to consumers' needs with respect to price, quality, variety, etc.; over time it also acts as a selection mechanism, with more efficient firms replacing less efficient ones. Competition is therefore a key element in the promotion of a faster growing, consumer-oriented and more competitive European economy."

How could any economist be opposed to that?

I am not opposed.

Somewhat worried that the implementation of the economic approach will prove to be a Full Employment Act for lawyers and economists working in the competition policy area.

Two objectives of bringing a case under Article 82:

1. Stop particular actions which harm consumers by the firm or firms being tried.

2. Signal to other firms the kinds of actions that the Commission deems in violation of Article 82, and thereby deter future anticompetitive behavior by other firms.

A danger of the economic approach as proposed is that it concentrates too much on the first objective and will fail to achieve the second.

"An economic-based approach requires a careful examination of how competition works in each particular market in order to evaluate how specific company strategies affect consumer welfare."

No presumption that a particular practice – bundling by a dominant firm – is anticompetitive.

"The economic approach implies that there is no need to establish a preliminary and separate assessment of dominance."

Firms will have little guidance from past decisions as to what violates Article 82 and what does not, other than whether consumer welfare is harmed.

But the number of theories that claim consumer welfare is harmed (improved) by a particular practice is large.

How will firms be able to predict which theories or empirical evidence will find favor with the courts?

Two approaches to competition policy:

Per se versus rule of reason.

"An economics-based approach will naturally lend itself to a 'rule of reason' approach to competition policy, since careful consideration of the specifics of each case is needed, and this is likely to be especially difficult under 'per se' rules."

Advantages of per se rules – court costs and predictability.

Per se rules can be consumer-welfare oriented.

A form-based, economic approach to Article 82.

1. A firm with a market share of over 50 percent is presumed to have a dominant market position.

2. A firm with a market share between 40 and 50 percent may possibly have a dominant market position.

3. A firm with a market share of less than 40 percent is presumed not to have a dominant market position.

Certain practices by dominant firms are presumed to be per se illegal subject to an efficiency defense by the dominant firm. These include tying and bundling arrangements, refusals to deal and resale price maintenance.

Advantages: predictability and litigation costs.

EAGCP envisage that “the dominant firm should bear the burden of establishing credible efficiency arguments.”

EAGCP claims that “the greater flexibility of an effects-based approach need not reduce the predictabililty of competition policy.”

Proof?