



Competition Competence Report 2/ 2005

MODERNISATION OF ARTICLE 82 EC TREATY

Modernisation of Article 82 EC Treaty is one of the topics under review. After the successful modernisation of Article 81 EC Treaty and the EC Merger Regulation, it is now the intention of the EC Commission to bring Article 82 in line with the “more economics based approach” too. Therefore, the Commission is currently working on draft guidelines for the enforcement of Article 82. The intention is to move from a legalistic and formalistic approach towards enforcement based on more economic principles.

Article 82 EC Treaty

Antitrust cases challenging the unilateral conduct of dominant firms are among the most controversial cases. In contrast to the EC Merger Regulation, dominance under Article 82 is derived from healthy competition by efficient enterprises. In fact, Article 82 challenges the business practices of rather successful companies. That is why a careful thorough approach is mandatory. The idea is not to apply per se rules but to develop a broader concept that takes the competitive market situation into account. The focus of analysis is on consumer welfare and competition on their merits. Whereas it is up to the EC Commission or antitrust authorities to provide evidence of the exclusionary effects of conduct in such an analysis, it is up to the defendants/companies to provide evidence of countervailing factors such as business justifications and efficiencies. To conclude, the assessment of a dominant position, its abusive behaviour and the competitive effects on a market, demand the application of sophisticated economic tools.

A finding of dominance

A dominant position is a prerequisite in assessing abusive behaviour under Article 82. Having defined the relevant market(s), the undertaking's market position is evaluated according to several criteria. Market share is a universally applied criterion to start with. EC Courts assume that a dominant position may exist when an undertaking has a market share of 40-50%. However from the economic perspective, the importance of market shares should not be exaggerated. Market shares serve as an indication of dominance only. To establish dominance finally, a thorough analysis of the competitive conditions in the market is necessary. Such an assessment focuses on barriers to entry, sunk costs associated with economies of scale and scope as well as product differentiation, statutory or regulatory barriers, and strategies by incumbents to discourage entry. Depending on the market circumstances, factors like barriers to expansion by rival firms, other firms' market shares, and the existence of large buyers, the degree of vertical integration and past history of abuse have to be assessed as well.

Having detected dominance under Article 82, the respective undertaking's behaviour has to be evaluated. From the economic perspective not every action by a dominant undertaking automatically classifies as an abuse. Consequently, the economic impact of this behavior on the market requires a more detailed analysis. The following discussion, as an example, focuses on discounting practices/rebate schemes of a dominant firm.

Rebates of dominant companies

The main issue is to distinguish between normal competition and abusive practices. With regard to pricing strategies whereby dominant firms seek to exclude their competitors from the market or at least contain their growth, things are quite complicated. However, as rules about the nature of conduct - as outlined above - are not appropriate, an evaluation of the exclusionary effects of the conduct is mandatory. The competition concern with these exclusionary pricing practices is that they may artificially foreclose business opportunities for the dominant company's competitors and that they may harm the competitive process in general. It is still an open question whether that conduct is capable of having exclusionary effects to a sufficient standard for finding an abuse.

Economic assessment of rebate schemes

In cases of doubt, economic justifications of rebate schemes have to be performed. Specifically, the balancing of efficiencies and other pro-competitive effects of a conduct with potential exclusionary effects is a difficult task. In this context it is important to note that the emphasis is on the impact on consumer welfare and not on protecting competitors. The impact on consumers might be output restrictions, price increases, and reduction in quality or availability. The Court of First Instance affirmed in its Michelin II judgement that the burden of proof is on dominant companies to show that their rebates are economically justified. By means of such economic assessments, a control is performed on whether rebate schemes are detrimental to competition or not.

Against this background, the Court of First Instance established a two-step test to examine the compatibility of rebate schemes with Article 82 in Michelin II. Has a rebate scheme fidelity-building effects leading to, for example, foreclosure, and if so, whether the rebate scheme is based on economically justified reasons. Thus, rebate schemes are not categorised as abusive market behaviour if, for instance, production processes are demonstrably optimised and subsequently cost savings are passed on to consumers.

EE&MC approach

At first sight, certain rebates may appear to have anti-competitive elements whereas actually certain pro-competitive elements are involved as well. With the support of state-of-the-art analysis, superficial statements on the real economic effects of rebates can be avoided. Obviously, this makes economic analysis indispensable. EE&MC recommends an approach where the economic analysis is based on market data that has been identified as being relevant in the decision making process of all market participants. This encompasses the supply side (the respective undertaking and its rivals) and the demand side (end consumers / buyers). The advantage of this approach is that rebate schemes and their economic effects on the relevant market can be quantified in a realistic manner. In addition, this approach can be applied to a broad range of even highly complex rebate schemes too, taking varying market situations into consideration. The EE&MC approach is summarised below.

EE&MC Approach:

Preparation

Collection &
Analysis of relevant
data, case studies

Economic Analysis

Analysis of economic
impacts of
rebate schemes

Result

Assessment of a
dominant undertaking's
competitive behaviour

For firms, the benefit of such assessments is that their own market conduct is evaluated from a competition economics perspective and that they - where appropriate - may adopt their rebate schemes to be in line with legal requirements. The real advantage is that a thorough economic assessment of rebate schemes is necessary to avoid a wrong application Article 82.



Competition Competence Report

in

3D-Format