

Chapter II – where less is more?

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20 October, 2011

Chapter II cases – a taxonomy

Abuse type	Abuse	Economic analysis ¹	Immediate price effect of successful case
Exploitative abuses	Excessive pricing	Competitive benchmark	Price decrease
Exclusionary abuses	Refusal to supply	Competitive benchmark	
	Margin squeeze	“As efficient competitor”	
	Loyalty rebates	“As efficient competitor”	Price increase
	Predation	Profit sacrifice	Price increase
	Tying/ bundling	“As efficient competitor”	Price increase

¹ Assuming dominance established

- Chapter II involves substantial risk of type I error
- Need to be confident about the economic analysis underlying Chapter II

Dominance

- Recent recognition in a merger context that market definition is difficult
 - Availability of data: testing a hypothetical
 - Technical challenges in implementing the SSNIP
- Market definition much more critical and more difficult in Chapter II cases than in mergers
 - Cellophane fallacy
- Role of economic analysis on abuse much more important

Abuse: the gap between law and economics

- EC experience suggests Courts too ready to accept form-based arguments
- Inconsistency of approach across similar abuses
 - Tomra vs. Deutsche Telekom: “equally efficient competitor” test
- Insufficient emphasis on economic effects

Deterrence – too little or too much?

Problem of identification

- Few cases = deterrence works or no cases = no deterrence?

Deterrence is not always positive

- Targeting price-based exclusionary “abuses” can have a chilling effect on competition
- Cases in fast-moving technology sectors: effect on dynamic incentives?

And in any case may be limited

- Does UK action add much to EC actions?
- Local markets – are deterrent effects notable?

Chapter II on balance

- Chapter II - protecting competitors or competition?
- Type I error of taking on cases vs. dangers of leaving Chapter II to the Courts?
- Role for clear guidelines (for the Courts)?