



***Exclusionary Abuses: Between Per Se
Prohibition and Rule of Reason***

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Economic Approach of article 102 TFEU – harm to Consumers' Interests

Negative impact on consumers as a condition of application of article 102 TFEU

✓ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02) **point 5** : *“In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers”*.

but

Economic Approach of article 102 TFEU – harm to Consumers' Interests

From a strict legal point of view the (direct) prejudice to the consumers' interests **is not** a *conditio sine qua non* of an abuse of dominance especially as per exclusionary abuses :

✓ **CJ, Case 6/72, Continental Can, paragraph 26** : *As may further be seen from letters (c) and (d) of article 86 (2), that provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on the effective competition structure [...]*

✓ **CJ, Joined Cases C-468/06 to C-478/06, Sot. Lélos kai Sia EE and Others paragraph 57** : *“Accordingly, without it being necessary for the Court to rule on the question whether it is for an undertaking in a dominant position to assess whether its conduct vis-à-vis a trading party constitutes abuse in the light of the degree to which that party's activities offer advantages to the final consumers [...]*”

Economic Approach of article 102 TFEU – appreciable effect to Competition or de minimis rule

Appreciable effect condition or de minimis exclusion **does not** apply :

✓ **CJ, Case 85/76, Hofmann-La Roche (Vitamins), paragraph 123 :**
[...] Moreover since the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of application of article 86 any further weakening of the structure of competition may constitute an abuse of a dominant position [...]

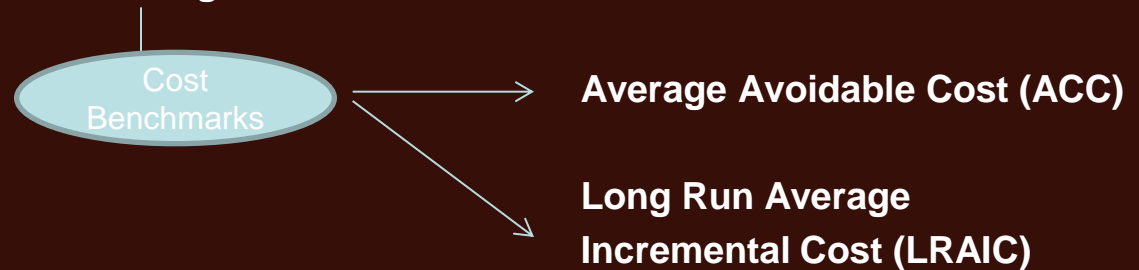
Economic Approach of article 102 TFEU – Efficiency Balancing Test

- ✓ An economics-based approach to the application of article 102 TFEU implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes (for example, exclusive dealing, tying, etc.) but rather will be based on the assessment of the anti-competitive effects generated by business behaviour.
- ✓ This implies a **Balancing Test** : Competition authorities will need to identify a competitive harm, and assess the extent to which such a negative effect on consumers is potentially outweighed by efficiency gains.
- ✓ An Economics-based Approach will naturally lend itself to ***a rule of reason*** approach or ***an effects-based*** 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.

Economics-based Approach : the position of the Commission – [1] Price-based Exclusionary Practices

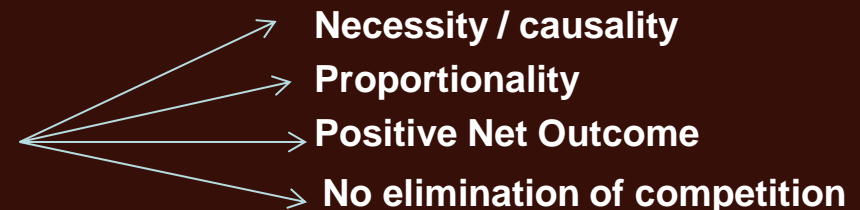
✓ “Per se” / Rebuttable Presumption

Below cost Pricing



✓ Balancing Test in general – paragraphs 30 :

Efficiency Test



Economics-based Approach : the position of the Commission – [2] Special Forms of Abuse

✓ Exclusive dealing (Exclusive Purchase & Conditional Rebates)

“Per Se” / Rebuttable Presumptions

- Unavoidable Trade Partner (including must stock item)
- Capacity Constraints
- Retroactive Rebates *versus* Incremental Rebates
- Standardized Volume Targets *versus* Individualized Volume Targets

Efficiency Test paragraph 46 : *“Provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by dominant undertakings that rebate systems achieve cost or other advantages which are passed on to customers. Transaction-related cost advantages are often more likely to be achieved with standardised volume targets than with individualised volume targets. Similarly, incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes. Under the same conditions, the Commission will consider evidence demonstrating that exclusive dealing arrangements result in advantages to particular customers if those arrangements are necessary for the dominant undertaking to make certain relationshipspecific investments in order to be able to supply those customers.”*

Economics-based Approach : the position of the Commission – [3] Special Forms of Abuse

✓ Tying & Bundling

“Per Se” / Rebuttable Presumptions

- **Distinct Products (duration / number of products in the Bundle)**
- **Multi-Product Rebates → LRAIC as Cost Benchmark**

- ✓ **Efficiency Test – paragraph 62** : *“Provided that the conditions set out in Section III D are fulfilled, the Commission will look into claims by dominant undertakings that their tying and bundling practices may lead to savings in production or distribution that would benefit customers. The Commission may also consider whether such practices reduce transaction costs for customers, who would otherwise be forced to buy the components separately, and enable substantial savings on packaging and distribution costs for suppliers. It may also examine whether combining two independent products into a new, single product might enhance the ability to bring such a product to the market to the benefit of consumers. The Commission may also consider whether tying and bundling practices allow the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product”*

Economics-based approach : the position of the Commission – [4] Special Forms of Abuse

- ✓ **Predation – paragraph 74** : *“In general it is considered unlikely that predatory conduct will create efficiencies. However, provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale or efficiencies related to expanding the market”.*
- ✓ **Refusal to Supply & Margin Squeezing – paragraph 89** : *“The Commission will consider claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realise an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account. The Commission will also consider claims by the dominant undertaking that its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about, including the development of follow-on innovation by competitors”.*

Economics-based Approach : the position of the Court [1] – only Actual Effects or (and) Potential Effects ?

- ✓ Opinion Advocate General Kokkot Case C-95/04 P British Airways paragraphs 69-71 :

“The conduct of a dominant undertaking is not, therefore, to be regarded as abusive within the meaning of Article 82 EC only once it has concrete effects on individual market participants, be they competitors or consumers [...] What is to be proved is, rather, the mere likelihood of the conduct in question hindering the maintenance or development of competition still existing in the market by means other than competition on the merits, thereby prejudicing the goal of effective and undistorted competition in the common market”.

Economics-based Approach [2] : the position of the Court – Objective Justification

- ✓ Joined Cases C-468/06 to C-478/06, Sot. Lélouk kai Sia EE and Others, paragraph 50 (the stricto sensu Commercial Defense Justification) :

“In paragraph 189 of the judgment in United Brands and United Brands Continental v Commission, the Court stated that, although the fact that an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect those interests [...]”

Economics-based Approach [3] : the position of the Court – Efficiency – Balancing Test

✓ **Case C-95/04 P, British Airways, paragraph 86 :**

“Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case (see, to that effect, Michelin, paragraph 73). It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse”.

Conclusion

The examination of the relevant Practice and Jurisprudence shows that European Law of application of article 102 TFEU stands somewhere in the middle between the concept of Per Se Prohibition and the concept of a purely Economics-based Approach

- ✓ *European Practice and Jurisprudence depart from a purely per se approach to the extent that they are based on a concept of Rebuttable Presumptions of infringement.*
- ✓ *European Practice and Jurisprudence depart from a purely Economics-based Approach to the extent that they refer to a (non-exhaustive) list of serious exclusionary behaviors.*

***Thank you for your
attention !***

KLC

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