

Policy review under Article 82

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Why this review?

- Continuation of work done in other areas (Art. 81 and mergers)
- More systematic and transparent approach would clarify policy and facilitate consistent approach throughout EU

The concept of abuse

- Hoffman-La Roche: two questions
- Competition on the merits (“normal” competition)?
- Effect of hindering maintenance or growth of competition?

This implies three-level analysis

- What is the form: capability to foreclose?
- What is the incidence: significance of the effect on the market?
- What is the degree of dominance?

What do we mean by “effects”?

- Likely, not only actual effects
- Both direct and indirect harm
- Not only short-term but also medium and long-term harm

Competition on the merit – price based abuses

- Inefficient competitors should not be protected by competition law
- Only exclusion of “as efficient” competitors abusive
- Normally costs of dominant company benchmark

Justifications

- Is an “efficiency defence” possible and desirable?
- No exemption possible
- Successful efficiency defence must lead to conclusion that conduct is not abusive
- Same conduct can be both efficiency-enhancing and restrictive
- Consistency with Art. 81 and Merg Reg?

Analytical framework should be similar to Art 81 and Merg Reg

- Result of conduct concerned
- “Conduct-specific” (indispensable)
- Outweigh negative effects of conduct for consumers
- Not eliminate competition

Article 82 and IPRs

- Not much new from review
- Commission will continue to take an extremely cautious approach to impose compulsory licensing of IPRs

Where are we?

- Internal DG COMP deliberations nearly over
- Next step discussions with other Commission services and Member States
- Public consultation hopefully end of 2005 or beginning of 2006