

WHAT IS COMPETITION ON THE MERITS?

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Theme: form v economic effect

“Legal presumptions that rest on formalistic distinctions, rather than actual market realities, are generally disfavored in antitrust law.”

- US Supreme Court in *Kodak v ITS* (1992)

Plan of remarks

- ▶ recap Berlin/EJ paper on “abuse of market power”, then say more on
- ▶ pros and cons of candidate tests
- ▶ how economic principles can inform law and practice
- ▶ relation of dominance to abuse

EC competition policy development

- ▶ anti-competitive agreements: ✓
- ▶ mergers: ✓
- ▶ abuse of market power: ?

Abuse of dominance: current issues

- ▶ form v effect?
- ▶ EC v US?
- ▶ underlying principles?
- ▶ role of economics in rules of law?

Context of debate

- ▶ recent cases – EC, US, ...
- ▶ EC review of Article 82 policy
- ▶ academic contributions

What is abuse?

- ▶ special responsibility of dominant firm not to distort competition
- ▶ recourse to methods other than normal competition / competition on the merits
- ▶ objective concept (so intent not necessary)

Fundamental questions about abuse

What is

- ▶ competition on the merits?
- ▶ undistorted competition?
- ▶ normal competition?
- ▶ (unlawful) exclusionary conduct?

Need for underlying principles

- ▶ avoid *ad hocery* and inconsistency
- ▶ help predictability
- ▶ align law with its economic purpose
- ▶ anchor case analysis in economic principle (cf theory)

Underlying principles: candidates

- ▶ sacrifice test
- ▶ as-efficient competitor test
- ▶ consumer harm test
- ▶ [...]

Predatory pricing

- ▶ caution v incredulity
- ▶ below-cost tests (*Akzo*, *Tetra Pak*)
- ▶ inferences and evidence of intent
- ▶ the recoupment question

Predatory pricing: links to principles

- ▶ intent/wilfulness: sacrifice test?
- ▶ cost benchmarks: as-efficient competitor test?
- ▶ recoupment: consumer harm test?
- ▶ → predatory pricing case law can be rooted in economic principle

Sacrifice test

- ▶ does the conduct entail profit sacrifice/
make no business sense but for its anti-
competitive effect?
- ▶ intuitive – seems to distinguish between
predation and meeting competition
- ▶ incorporates efficiency issues

Sacrifice test: evaluation

- ▶ can be useful part of assessment
- ▶ but major specification issues
- ▶ not generally necessary for abuse
- ▶ and cannot itself say what is exclusionary
- ▶ no escape from fundamental question: what is harm to competition?

As-efficient competitor test

- ▶ guards against exclusion of the (as-) efficient
- ▶ some case law pedigree
- ▶ avoids undue competitor protection
- ▶ economic logic of productive efficiency
- ▶ scale issue; no counterfactual issue?

Too permissive?

- ▶ inefficient rivals can sometimes raise consumer welfare
- ▶ what about (above-cost) price cuts that are
 - selective / "discriminatory"?
 - conditional (e.g. on "loyalty")?

Can (inefficient) foreclosure happen?

- ▶ yes, in theory
- ▶ in practice depends on facts – e.g. extent of foreclosure, scale economies, price/cost
- ▶ form of conduct doesn't yield answer
- ▶ conduct of the same form can bring benefits

Consumer harm test

- ▶ can there be abuse without consumer harm?
- ▶ when is consumer harm sufficient for abuse?
- ▶ is there a distinct concept of harm to the process of competition?

Consumer harm test: specification

- ▶ types of harm: price, output, quality, ... ?
- ▶ harm relative to what?
- ▶ standard of proof: actual / probable / possible harm?
- ▶ clear-and-present dangers only, or indirect and long-term harms too?
- ▶ case-by-case or wider tendency to harm?

Competitive "process" harms too?

- ▶ maybe if only short-term, demonstrable harms count as consumer harm ...
- ▶ but beware competitor protection
- ▶ less need if likely and longer-term harms count too
- ▶ competition to serve consumer needs is the point of competition policy

A tentative view about the tests of exclusionary abuse

- ▶ sacrifice test doesn't answer primary question but sometimes has value
- ▶ as-efficient competitor test a sufficient condition?
- ▶ [likely] consumer harm a good discipline, but too vague a general sufficient condition?

How can economic principles help decide cases?

- ▶ not in one bound
- ▶ issue is not rules -v- discretion but rules -v- rules: formal or economics-based?
- ▶ need structured rule-of-reason approaches
- ▶ rooted in economic principles

Develop a structured approach

- ▶ tests can all be seen in (limited?) EC case law but case law and practice generally need consistent development
- ▶ develop, in guidelines and casework, a structured approach for assessing case facts in relation to (alleged) abuses
- ▶ anchor in economic principles helps consistency, avoids “category-shopping”

What about legal certainty?

- ▶ plenty of scope for more of both economic principle and legal certainty
- ▶ complements not substitutes
- ▶ the law-and-economics bundle should (on the merits) eliminate *per se* approaches to abuse of dominance

Relation of dominance to abuse

- ▶ crossing the threshold shouldn't itself make conduct abusive
- ▶ dominance is more than a jurisdictional requirement
- ▶ is threshold too low, or too readily met in market share terms?
- ▶ should abuse judgment depend on degree of dominance?

Does degree of dominance matter?

- ▶ yes – insofar as facts, not law, vary by degree of dominance
- ▶ harm to competition can be more likely with super- than marginally dominant
- ▶ lioness or alsatian in Regent's Park?
- ▶ Bayesian logic might also help assess relevance of same conduct by non-dominant firms

Abuse in associated markets

- ▶ Clearly possible in law and in fact
- ▶ *Tetra Pak II* hard to interpret
- ▶ basis in economic principles could help clarify which associative links matter
- ▶ stronger case for recoupment test in non-dominated markets?

What next?

- ▶ EC law and practice on types of abuse needs stronger basis in economic principle
- ▶ which needs to be practical in application
- ▶ *initiative* cannot lie with courts
- ▶ so must be seized by DGComp (& NCAs)
 - guidelines
 - casework