

The More Economic Approach to Art. 102

Is it history and what is replacing it?

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The "more economic approach" in a nutshell

- Shift from form-based approach to effects-based approach
- Consumer welfare as guiding principle
- Use of economic analysis to determine likely effects on competition and consumers
- Guidelines serving to
 - provide bright lines to promote legal certainty
 - force competition authorities to focus on cases that benefit consumers

Where are we heading?

- Competition authorities want greater freedom act
 - Elimination of bright lines in guidance to gain freedom to act in any case
 - Relaxation of substantive tests to make it easier to intervene
 - The effects-based approach is seen as imposing too many constraints on the ability to intervene
 - DMA recital 10 illustrates mindset: Article 102 requires “*an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question*”

How did we end up where we are?

- Factors that have put into question the policy developed 20 years ago
 - The 2008 Financial Crisis eroded trust in markets
 - View that economics-based tests led to under enforcement
- The economy is changing
 - Industrial era homogeneity
 - Digital era heterogeneity and complexity
- Concerns regarding the power of large digital platforms

Are economics-based tests fit for purpose?

- To be useful, economics-based tests must reflect the real world and accurately predict effects on competition and consumers
- Industrial era tools focused on short-term price effects, closeness of competition, incremental and path-dependent innovation
- Need for new framework to capture digital era economy and dynamic competition, differentiation, multi-sidedness
- For now, focus on dismantling what exists

Self-assessment in a new environment

- Need to navigate lacuna created by competition authority policy void and quest for elimination of intervention constraints
- EU case law has evolved substantially since *Michelin (II)* and provides a compass for navigating policy void
- Facts-based approach guided by economic principles where they exist and make sense in the relevant context

EU case law guidance: *Google Shopping*

- *Google Shopping* (¶165)
 - To establish abuse of dominance *“it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market or markets concerned”*

Competition on the merits

- *Google Shopping* (¶164)
 - Competition on the merits is based on “price, choice, quality or innovation”
- AG in *Servizio Elettrico Nazionale*
 - “Winning customers is an essential element of normal competition”
 - “The Enel Group is surely fully allowed, even expected, to implement practices that seek to improve its goods and services in order to remain competitive and retain its customer base”

Contextual facts-based analysis

- Google Shopping (¶¶166 and 168)
 - The assessment of a conduct's capability to foreclose competition “*which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must however be made in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s). That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects”*
 - “*Thus, circumstances relating to the context in which the conduct of the undertaking in a dominant position is implemented, such as the characteristics of the sector concerned, must be regarded as relevant*”

Actual and potential effects

- A potential effect is not some hypothetical possibility. It is based on concrete contextual factors that lead to the conclusion that actual effects are likely
- *Google Shopping* (¶221)
 - *“The evidence concerning the variation in traffic from Google’s general results pages to competing comparison shopping services and to its own comparison shopping service did not therefore constitute actual anticompetitive effects relied on by the Commission, but tangible evidence on which the finding of the potential anticompetitive effects of the conduct at issue was based”*

Summing up

- The "more economic approach" was conceived as a tool to ensure sound outcomes in terms of protecting competition and consumers
- To be useful economic analysis and tests must be able to translate the real world into analysis that leads to sound outcomes
- The digital era is far more complex than the industrial era which makes it difficult to develop single economics-based tests that drive the analysis
- The Court of Justice's contextual and fact-based approach provides building blocks for navigating complex environments
- Article 102 analysis starts with a deep understanding of the specific context in which the dominant firm operates