PANEL 3

ESTABLISHING ABUSES OF DOMINANCE: IS THE EFFECTS-BASED APPROACH ADMINISTRABLE?

Damien Gerard (Prosecutor General, Belgian Competition Authority, Brussels) moderated this panel. The discussion focused on the significance of enforcing Article 102 in EU competition law, with many impactful decisions based on it in recent years. There has been a notable increase in EU Court cases related to Article 102, prompting a transformation in enforcement practices since the 2008 Guidance Paper. It aims at enabling the emergence of an effect based approach. The Intel case exemplifies this approach, raising concerns about its administrability and evidentiary standards. In response, the EU Commission adopted amendments and plans to replace the Guidance Paper with Guidelines on exclusionary abuses, sparking debates on the scope and requirements of Article 102. A reassessment of enforcement is now needed, considering the rationale for adjustments by the Commission and NCAs.

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The emergence of an effect based approach

- Article 102 decisions by EU Commission and NCAs are now grounded in economics due to a better understanding of potential anticompetitive effects.
- The first guidance by the EU Commission and economists' papers contributed to developing an economic-based approach.
- Decisions now rely on convincing theories of harm that rigorously align with economic reasoning.
- Case law has clarified key aspects of the effect-based approach, making it more predictable, such as the use of price-cost tests.
- It is not necessary to identify actual anticompetitive effects; long-term consumer welfare impact is crucial.
- Detecting anticompetitive effects may be complex, especially when rivals continue to operate but their surplus is captured by the dominant firm.
- Administering Article 102 is challenging, requiring precise conduct identification, demonstrating dominance, and assessing competition distortion and impact on consumer welfare.
- This analysis demands significant resources from Competition Authorities.

Type I and type II errors

- Type I error (over-enforcement) cost may be lower than Type II error (under-enforcement) cost.
- Decision-making cannot solely rely on the relative cost of Type I and Type II errors.
- The expected cost, which considers the probability of anticompetitive or pro-competitive effects, is essential in the decision-making process.
- Authorities should consider multiple parameters, not just the relative cost of errors, when making decisions.

Building presumptions

- Economic theory can help design different kinds of presumptions and legal standards.
- The interpretation of the DMA creates a shortcut to implement Article 102 with restrictions on gatekeeper firms.
- There are two extremes for easier administration: per se legality or per se illegality, and in the middle, the 2005 paper's pure rule of reason approach.
- Rebuttable presumptions of legality or illegality are other options that can be analysed economically based on various conducts.

- Analysing potential effects of practices is feasible with economic theories and theories of harm to understand causality between conduct and potential anticompetitive effects.
- Likelihood of anticompetitive effects varies based on the category of conduct. For example, bundling is more likely to have procompetitive effects compared to below-cost predation.
- Different conducts require specific legal standards and tests to determine if the presumption of legality or illegality can be rebutted.

As efficient competition principle/test

- The principle of pushing out less efficient rivals is easy for a dominant company.
- The price cost test allows us to see whether there is potentially an anticompetitive problem.
- A shift from the «as efficient competitor» principle to the «not yet as efficient competitor» principle is proposed to protect less efficient firms and foster competition.
- Implementation of the «not yet as efficient competitor» test may be complex and challenging.
- There is a need to design the test carefully to avoid giving advantages to lazy or inefficient competitors.
- This test is similar to identifying a natural monopoly where size leads to cost efficiency and new competitors struggle to compete.

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Effect based approach and legal certainty

- Advising clients on the effects of unilateral conduct is challenging due to the absence of clear rules, requiring a case-by-case analysis.
- Uncertainty is not necessarily negative, as easy labels can lead to the lack of effective enforcement, which means that there could be false positives.
- In the past, bright line rules offered more legal certainty, but they may not capture the complexities of unilateral conduct cases, especially exclusionary conduct cases.
- Presumptions in exclusionary conduct cases can lead to overuse and hasty judgments without considering actual market effects.
- The shift towards an effect-based approach places the burden of proof on the enforcer to show the conduct's detrimental effects on competition, making the task more difficult.
- Efficiency in enforcement should prioritise reducing false positives without increasing false negatives, particularly concerning in Article 102 cases with exclusionary conduct.
- Effective competition can resemble exclusionary conduct, leading to the demise of some competitors, making precision in analysis essential to avoid false positives.

Amendments to the Guidance Paper

- The Commission's amendments have achieved a balance between effective enforcement and legal certainty.
- Assessing potential effects along with actual effects is a positive approach, supported by the Court.
- Agencies should handle complaints carefully, especially when complainants claim exclusionary conduct by incumbents causing their market exit.
- Potential effect analysis allows for more objective examination based on data, reducing controversies.
- The amendment emphasises the importance of factual and economic data in the analysis, moving away from assumptions and narrow understandings of effects.
- Recognizing that genuine competition can come from less efficient entities is a positive change in perception.

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EU effect based approach

- As opposed to the US approach, the European effect-based approach focuses on potential effects rather than actual effects.
- Effects-based cases are quite demanding in resources and any reform at the EU level (e.g Guidelines) should take into account not only the institutional capabilities of the European Commission and some large NCAs but also those of smaller NCAs and national courts. This means that an expansion of the effects-based approach to Article 102 and its national equivalents will lead less enforcement and therefore to a higher risk of false negatives overall.

- NCAs have seen an increase in cases, often involving less comprehensive effect analysis, with a resurgence of cases on naked restrictions or more by object cases due to the complexities involved in effect-based analysis.
- Some national courts have not fully embraced the effect-based approach, taking a more aggressive perspective on Article 102 based on the precautionary principle and emphasising justice and fairness over economic effects.
- Policy standards in effect analysis are based on a broad conception of consumer welfare (including harm to the competitive process) but also behavioural norms based on principles of justice and fairness (impediment competition as opposed to merits-based performance competition), which explains why for naked restrictions positive effects may not rebut the presumption of anticompetitiveness.

Potential effects

- There is a trend towards analysing potential effects, requiring more reliance on economic evidence of a predictive nature (e.g. economic models, simulation) but also data analytics that emphasise tendencies rather than causal interactions narrowly constructed.
- The Commission is re-adopting the «not as yet as efficient competitor» test that was introduced in a discussion paper in 2005, considering the importance of protecting possible future competitors in complex economic settings, a principle abandoned in the Priority Guidance in favour of the As Efficient Competitor Test, which was promoted by economic consultancies and the defence bar
- Emphasising potential effects may lead to the need for more presumptions, similar to those in the economic approach in the context of Article 101 TFEU (by object restrictions of competition).
- Presumptions in the effects approach can be rebutted with economic evidence. However, this possibility does not exist for naked restrictions where the only possibility of rebuttal is evidence showing the anticompetitive conduct didn't occur.
- The design of these presumptions will be an evolutionary process, relying on case law and categorical thinking on the basis of economic but also other social science empirical research, which remains crucial in Article 102 enforcement.

Building presumptions

- Different theories of causality in which a simple contribution to an effect are considered is considered as demonstrating a causal relation. There is a quite open perspective on causation if the Commission may only need to prove potential effects. The but for approach is not the only way to prove causality in this context and we may use generalised probabilistic theories of causality.
- Various parameters of competition are taken into account (e.g. price, innovation, quality, variety, resilience), and presumptions are needed to reduce administrative costs.
- Presumptions should be designed with the help of economists/social scientists but also legal precedent and consider behaviours that are not considered as competition on the merits not only for economic but also for ethical reasons (establishing a moral market economy).
- Rebuttable analysis is ideal, but limited empirical research and costs lead to relative probability analysis by judges and enforcers due to the lack of full knowledge.

As efficient competitor test

- The European approach differs from the US.
- Principle in the EU: Consumer betterment standard.
- The test is a price cost test, limited to efficiency and price considerations, not useful for innovation, quality or variety parameters. Therefore, the ambit of the AEC test is very limited. Only for price predation theories of harm but does not concern leveraging/anti-competitive foreclosure theories of harm.
- A less efficient competitor in terms of price may still have positive aspects for consumers as it may constrain the ability of the dominant undertaking to increase prices further (due to the price constraint by the less efficient competitor).

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Dynamic and workable effect based approach

- The Commission stands behind the effect-based approach and continues to integrate economics into exclusionary abuse cases.
- Since the adoption of the Guidance Paper in 2008, the Commission has dealt with 26 unilateral conduct cases, leading to 32 judgments, and has followed the Court's interpretation of the effect-based approach, influencing changes to the Guidance Paper.

- The question is not whether to use an effect-based approach but how to do so. The Court's case law on evidentiary standards for the approach is still somewhat in flux.
- With Google Shopping and Google Android, the Court seems to recognise that a qualitative assessment is conducted in an effect based approach. The Court also looks at the full context and the full body of evidence that is available.
- The Intel renvoi case raised concerns about the evidentiary standards, and the Commission appealed the decision to seek clarification.
- The Commission wants Article 102 to be applied not only by the Commission but also by NCAs and national courts, requiring an enforceable standard and a realistic threshold of evidence.

Amendments to the Guidance Paper

- The standard for anticompetitive foreclosure lies between purely hypothetical effects and actual effects and requires clarification. The Commission prioritises looking at potential effects in setting its enforcement priorities.
- The concept of harm to the competitive process is broader than a full foreclosure test.
- The Commission relies on its own enforcement practices, especially in the digital sector, and draws lessons from those cases. Exclusionary conduct by dominant players can prevent competitors from growing and exercising competitive constraints, even if it doesn't entirely keep them out of the market.
- Protection of competition from less efficient competitors may be necessary in some circumstances.
- The standard for exclusionary conduct is not solely based on the dominant player being able to profitably increase prices afterwards, as competition dynamics involve factors beyond just prices.

The process of establishing guidelines

- Different categories of conduct fall under naked restrictions (e.g., Intel case).
- Need to preserve naked restrictions from a public enforcement perspective.
- Extent of quantified economic assessment varies for different exclusionary conduct categories.
- Pricing conduct, being part of fierce competition, requires deeper quantified economic assessment.
- Differentiation between categories required to meet evidentiary standards in public enforcement.

As efficient competitor principle

- The 2008 Guidance Paper on exclusionary conducts faced allegations from the US that the Commission was preventing inefficient competitors from being pushed out of the market through competition on the merits.
- The as efficient competitor test played a role in this context.
- Distortion of the competitive process is necessary to meet the legal standard.
- This highlights the need to focus on potential effects on the competitive process.
- Pricing conduct: The Court regarded it as an optional test, sparking the need for further debate.
- Utilising the contestable share calculation in the test can lead to a false sense of legal certainty.