

Exploitative Abuse in Article 82EC: Back to Basics?

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BACKGROUND

- Article 82EC prohibits the abuse of a dominant position on the Common Market. The EC Commission expresses the objective of Article 82EC as 'enhancing consumer welfare'.
- For the last few years, the EC Commission has been reviewing its application of Article 82EC. During this review, there appeared to be a move towards a more economic approach to Article 82EC that would scrutinise conduct on the basis of its *effects* on the market.
- 'Exclusionary' abuses refer to those practices of a dominant undertaking which seek to harm the competitive position of its competitors or to exclude them from the market. Such abuses only *indirectly* harm consumers as the result of the exclusion of competitors.
- 'Exploitative' abuses can be defined as attempts by a dominant undertaking to use the opportunities provided by its market strength in order to harm customers *directly*.
- The EC Commission's review was limited to exclusionary abuses whilst exploitative abuses were outside its scope. The enforcement priorities of the EC Commission set out in the Guidance (2008) are also limited to exclusionary abuses.

METHODOLOGY

- The paper identifies and explores a paradox: given that the ultimate objective of Article 82EC is enhancing consumer welfare, one would have expected the EC Commission review to include an assessment of exploitative abuses since these can immediately and directly harm consumers.
- The paper questions whether, and under what circumstances, exploitation can and/or should be found 'abusive'.
- The paper draws on a reading of Article 82EC and on examples from case-law.

KEY FINDINGS

- The paper finds that, although there is no doubt that exploitative abuse is covered in Article 82EC, there are very few cases which provide limited insights into the role of exploitative abuse.

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CCP Policy Briefing

- The paper argues that pure exploitation should *not* be found abusive under Article 82EC: exploitation on its own does not demonstrate harm to competition and mostly demonstrates more of a contract/consumer law problem than a competition law problem.
- Similarly, pure exclusion on its own without exploitation also should *not* be found abusive under Article 82EC to avoid protecting competitors rather than competition.
- Since neither exploitative abuse nor exclusionary abuse makes sense on its own, there is ultimately one type of abuse.
- Exploitative abuse can and should be used as the test of anticompetitive *effects* on the market under an effects-based approach and, therefore, conduct should only be found abusive if it is exploitative.

POLICY ISSUES

- If the objective of Article 82EC is enhancing consumer welfare, then harm to competition resulting in harm to consumers should be the test of abuse.
- Harm to consumers should be assessed on the basis of 'actual' (rather than 'likely') exploitation.
- With a possible rise of private enforcement of EC competition rules, customers of dominant undertakings will have to base their claims on exploitative abuse and thus the number of cases of exploitative abuse is likely to rise. Exploitative abuse is, therefore, likely to attract more attention in the future enforcement of Article 82EC even though it has been left out of the EC Commission's review of its application of Article 82EC.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

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