

'Consumer Welfare' and Article 82EC: Practice and Rhetoric

November 2008

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INTRODUCTION

- Article 82EC prohibits the abuse of a dominant position in the market.
- The EC Commission DG Competition states that the objective of Article 82EC is the *'protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'*.
- The author questions whether the objective of Article 82EC is indeed enhancing consumer welfare by considering the application of the provision by the EC Commission and Courts alongside policy declarations of the EC Commission.

KEY FINDINGS

- 'Consumer welfare' is repeatedly pronounced as a motto in reference to the ultimate objective of EC competition rules in the policy declarations of the EC Commission.
- However, as far as the author is able to detect, the term 'consumer welfare' has been used in just two competition cases by the Court of First Instance and has never been referred to by the European Court of Justice.
- There is a lack of consensus on what is meant by 'consumer welfare', and the EC Commission does not refer to 'consumer' in the sense of final-user which is the usual understanding of the term in consumer law.
- There does not appear to be a unified and coherent test applied by the EC Commission and Courts in finding the behaviour of a dominant undertaking abusive.
- It is not even clear whether the effects on consumers or the market are relevant or whether merely an anticompetitive object is sufficient.
- It is also not clear what the relation is between the likelihood of anticompetitive effects and the form of conduct.
- It is similarly ambiguous what the relevant probability is at which likely effects can be deemed sufficient to justify a finding of abuse.
- The author concludes that, when the practice is considered alongside the rhetoric, Article 82EC appears as a provision enforced without a clear standard of harm, which leads to doubts about the legitimacy of enforcement.

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POLICY ISSUES

- The EC Commission has to either say as it does or do as it says. This has not been the case with the application of and policy on Article 82EC so far.
- If the standard of harm is 'consumer welfare', then harm to competition resulting in harm to consumers should be the test of abuse.
- Without a properly defined standard applied in actual decisions by the EC Commission and upheld by the EC Courts, the modernisation of Article 82EC cannot succeed.
- To reconcile its practice with its rhetoric, the EC Commission either has to demonstrate in its decisions unambiguously that it follows a well-defined 'consumer welfare' approach, or it should unambiguously declare what approach it follows in practice.

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