

Exclusionary Pricing Abuses



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Handbook on EU Competition Law Chapter 10

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- Predatory pricing, selective low cost pricing, margin squeeze, rebates and price discrimination.
- Conundrum remains how to distinguish between anti-competitive conduct and competition on the merits.
- The EU courts have not generally utilized a single workable test but applied conduct-specific tests.
- Pricing practices which have an exclusionary effect on equally efficient competitors of a dominant firm will generally be condemned as abusive conduct contrary to Article 102 TFEU.

Equally efficient competitor

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- The 'equally efficient' or 'as efficient' competitor test was developed as part of the legal price-cost test in *AKZO*.
- It has since been adopted in other cases, for example, *Deutsche Telekom*, *TeliaSonera* and *Post Danmark*.
- This test requires an examination into whether a competitor who is as efficient as the dominant undertaking is *capable* of being excluded by the conduct in question by assessing the dominant undertaking's cost structure.
- This means that certain pricing practices will only be considered abusive if, given its effect of excluding competitors who are at least as efficient as the dominant firm, it is *capable* of making entry more difficult or impossible for those competitors.

Two approaches to effects

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- Effects can be assessed in two distinct ways.
- One is a *presumption* of harmful effects (orthodox approach). The other is a *finding* of actual effects at the point of application through a case-by-case analysis (analytical approach).
- The orthodox approach presumes a specific outcome will have a harmful effect in advance of the actual application because it is believed that the conduct always or nearly always tends to harm the structures of competition or run contrary to a fundamental aim of competition law.
- A finding of actual effects requires an empirical analysis of the conduct in its legal and economic context.

The standard of proof

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- The standard of proof differs according to which effects-based approach is applied.
- The standard of proof underpinning the orthodox approach is 'capable of creating harmful effects'.
- The standard of proof required in the analytical approach can be as high as 'actual harmful effects'.
- Case law does not require a finding of actual effects. Thus, the standard of proof remains 'capable or likely' to have a harmful effect.

Margin Squeeze

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- The Court of Justice held in *TeliaSonera* and *Deutsche Telekom* that margin squeeze must have an anti-competitive effect on the market. Although it confirmed that the effect does not necessarily have to be concrete and that a margin squeeze is in itself capable of constituting an abuse.
- Instead, it is sufficient to demonstrate that there is an anti-competitive effect which may *potentially* exclude competitors who are at least as efficient as the dominant undertaking.

Predatory Pricing

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- According to *AKZO*, prices below AVC are presumed to be predatory, as it is believed that there is no other conceivable economic purpose than the elimination of a competitor.
- This presumption cannot be applied where prices are above AVC but below ATC, as there could be a perfectly legitimate reason for adopting such a pricing policy. For example, selling off excess stock or trying to 'meet competition'.
- Nevertheless, 'such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking...' if the dominant undertaking engages in a plan to eliminate such a competitor.

Predatory Pricing

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- In *AKZO*, it was found that AKZO had acted with the intention of selectively targeting ECS's customers to force ECS either to abandon them or to match a loss-making price to retain them.
- No such evidence was found in *Post Danmark*. It had merely been established that Post Danmark's prices did not cover ATC – only AIC.
- In the preliminary ruling, the court found that a dominant undertaking charging certain major customers of a competitor a lower price may not be considered to amount to an exclusionary abuse merely because the price is lower than ATC, but higher than AIC.
- Instead it is necessary to consider whether that pricing policy, without objective justification, produces an *actual or likely* exclusionary effect, to the detriment of competition and, thereby, of consumers' interests.

Effects of price discrimination

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- In *AKZO*, the Court of Justice regarded potential anti-competitive effects as sufficient for a finding of abuse by stating that AKZO's intention was to adopt a strategy that 'could damage ECS'.
- Whereas in *Post Danmark*, the court formulated fairly clearly that the standard required for a finding of abuse is 'actual or likely exclusionary effect'.
- The Court of Justice does not reject the possibility of finding an abuse of dominance where prices are below average total cost, even where there is no intention to eliminate a competitor, if the national court can establish actual or likely exclusionary effect.

Intent

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- The court is not concerned with intent in *Post Danmark*, but this is unremarkable.
- Firstly, no intention was found and secondly, intention is not a legal requirement (but a relevant factor) for a finding of abuse of dominance.
- There may be a legitimate reason why a dominant undertaking prices below ATC, but above average or incremental variable costs. However, if there is no objective justification, but rather evidence of a plan to eliminate a competitor then that is enough to establish potential harmful effects as seen in the *AKZO* case.
- The court was not ignorant towards effect in *AKZO*, but did not require more than *potential* effects.
- In *Post Danmark*, there was no plan to eliminate its competitor, Forbrugerkontakt. Thus the Court of Justice considered it necessary to look at *actual or likely* exclusionary effects.

Potential, actual and likely effects

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- It is not entirely clear whether evidence of a plan to eliminate a competitor, and thereby potential effects, would have been enough to satisfy the standard of proof. There was no mentioning of intent.
- However, it is clear that where there is not intent to eliminate, it requires the relevant enforcement authority to increase the standard of proof to actual or likely effects. In this way, actual and likely effects act as an alternative test to potential effects.
- But what is the difference between potential and likely effects?
- None, see slide on standard of proof.

Conclusion

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- An effects-based approach in terms of a price cost analysis has not changed the standard of proof, which is still *capable of or liable to* create harmful effects.
- Adopting an analytical approach would add an extra layer of scrutiny compared to the orthodox approach by using more precise tools to assess whether the conduct is capable of creating harmful effects.
- However, the fact remains that the 'as efficient competitor' test is based on an *inference* of harmful effects, and thus the effects-based approach to Article 102 advanced in the *Guidance Paper* continues to be closer to the orthodox approach than the analytical approach.