

## Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?

European competition law is currently undergoing major changes as since the mid-1990s, the European Commission subscribes to a *more economic approach* to the interpretation and application of Articles 81 and 82 EC. Following the wholesale reform of the block exemptions under Article 81 EC, the Commission has now turned to reconsidering its practice on Article 82 EC. In December 2005, the Commission published a Discussion Paper on the application of Article 82 EC. In this, the Commission lays out a general framework for analysing abusive exclusionary conduct by a dominant undertaking. Almost simultaneously, the Commission launched a public consultation on enhancing private enforcement of EC competition law. In its Green Paper of 2005 and in its recently published White Paper, the Commission proposes policy choices and specific measures to ensure that victims of infringements of EC competition law are fully compensated for the harm they have suffered. Although the proposed reforms have attracted a good measure of attention from competition law scholars and practitioners, little thought has been given to the interaction between these two policy areas.

In October 2006, the Max-Planck Institute for Intellectual Property, Competition and Tax Law in Munich hosted a conference to highlight and discuss the major changes proposed by the Commission, and their combined effects. The conference brought together academics from all over Europe. *Ulf Böge*, then President of the German Cartel Office (Bundeskartellamt), opened the conference as keynote speaker. He stressed the importance of considering the possible repercussions on private enforcement of an effects-based approach in the application of Article 82 EC. Against the backdrop of the analysis presented by *Ulf Böge*, academics from several countries presented papers on the proposed reform of Article 82 EC in the light of a *more economic approach* as well as the distinct features of private enforcement of Article 82 EC. These papers are published here. The developments until May 2008, in particular the publication of the White Paper by the Commission, have been heeded in the articles.

In the first article, *Wolfgang Wurmnest* offers a critical appraisal of the Commission's Discussion Paper on exclusionary abuses. The author reproaches the Commission for obscuring departures from existing case-law with confusing language. He also criticises that the Commission gives little guidance on which economic tools and insights should be applied when assessing alleged abuses. On the more fundamental question of the goals of EC competition law in general and of Article 82 EC in particular, *Wurmnest* argues that in the light of recent decision practice of the European Court of Justice, the Commission is not entitled to declare "consumer welfare" ought not to be the only goal of competition law. Instead, he advocates an approach which places welfare considerations on an equal footing with other goals, such as the protection of economic freedom, market integration, and the promotion of innovation.

The articles by *Emanuela Arezzo* and *Pranvera Këllezi* examine different aspects of the concept of dominance. *Arezzo* asks whether there is a role for market definition and dominance in an effects-based approach. She compares a formalistic approach with the effects-based, more economic approach as envisaged in the Commission's Discussion Paper and in the report by the Economic Advisory Group for Competition Policy (EAGCP). Having examined the interrelationship between the concepts of market power, consumer welfare and anti-competitive harm, she warns against a departure from well established concepts, like, in particular, the notion of dominance and, in general from the adoption of a methodology which risks undermining the very political rationale of Article 82 EC.

*Këllezi* then turns to the issue of the abuse of economic dependence. The author reflects on the concept of economic dependence as developed in the case law of national competition laws. She considers whether this concept is consistent with the definition in European competition law of a dominant position, as well as with the concept of market power.

*Dimitris Riziotis* analyses the arguments in favour of and against an efficiency defence in the context of Article 82 EC. The introduction of an efficiency defence represents a trade-off between economic efficiency and freedom of market participants. It would thus mean a shift of EC competition policy objectives in favour of market performance. Whereas such a shift may benefit consumers, focussing solely on market performance may prove to be detrimental for consumer welfare in the long run. The Commission would thus be well-advised to make the maintenance of a competitive market structure (i.e. the openness of markets) the main condition for the consideration of any efficiency gains.

*Ariel Ezrachi* maps the developments which have shaped private enforcement of European competition law to date. He considers the value of private action in general and its significance to competition enforcement, and goes on to illustrate the main challenges for an effective private enforcement in Europe. In this context, he evaluates the consequences of an effects-based approach in the application of Article 82 EC for the volume and quality of Article 82 EC damage claims as well as for actions for injunctive relief and out-of-court settlements.

*Hedvig Schmidt* identifies a lack of guidance from the Commission on how to establish a causal link between the abuse and the harm caused to the claimant in a private action. Under the present case-law, it is sufficient for the Commission to prove a likelihood of harm to competition. This standard of proof gives private claimants not enough to found their own case in a follow-on action. The move to a more rigorous economic analysis, *Schmidt* argues, would benefit these claimants but would, at the same time, raise the benchmark for those bringing an independent action in national courts.

*Mark-Oliver Mackenrodt* argues that effective enforcement requires that exactly those cases should be selected for decision which cause the type of negative welfare effects that Article 82 EC seeks to prevent. He finds that public enforcers seek to repress business strategies causing harm to competition as protected by Article 82 EC. Private plaintiffs, by contrast, are motivated by the prospect of gaining damage awards. *Mackenrodt* distinguishes several groups of private plaintiffs. For each, he

asks whether there is a correlation between individual harm and harm to competition. As it turns out, there is a divergence in the incentives of public enforcers as compared to certain potential private enforcers. *Mackenrodt* concludes by discussing the consequences for reaching the optimum level of enforcement and the influence of a more economic understanding of Article 82 EC.

*Fernando García Cachafeiro* focuses on the role of consumer associations in the enforcement of Article 82 EC. As one of the measures to improve private enforcement of the EC competition rules, the Commission suggests that consumer associations be enabled to bring damages claims against dominant companies on behalf of their members. Taking the US experience on mechanisms of collective redress into account, the author analyses those factors that contribute to effective representative claims and contemplates what happens to individual claims if an association brings a claim, which association should have standing to sue and who should be the beneficiary of any compensation paid.

A number of people deserve special thanks for their contributions to the success of the conference and to the publication of this volume. In addition to the authors, who demonstrated great commitment throughout the course of the project, Professor *Josef Drexler* gave advice and encouragement, *Delia Zirilli* helped in the organisation of the conference, *Allison Felmy* and *Christine Herrick* revised the papers in English, and *Sebastian Kestler* and *Lorenz Marx* assisted in the editing of the papers. Finally, the editors' would like to thank *Dimitris Riziotis* for taking notes of the presentations and of the lively discussion throughout the conference.

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Mark-Oliver Mackenrodt  
Beatriz Conde Gallego  
Stefan Enchelmaier

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Mackenrodt, M.-O.; Conde Gallego, B.; Enchelmaier, S.  
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