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Ten Years of the Effects-Based Approach in EU Competition Law
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**Impact on competition authorities –
the challenge of managing and
deciding cases**

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Introduction

- Effects-based approach substitutes a new reasoning for the previous form-based approach,
 - in particular in the field of unilateral conducts
 - But more generally has reinforced the role of economics in competition policy (assessment of damages in cartel cases for instance)
- Form-based approach in unilateral conducts:
 - Is the firm dominant?
 - Is the practice at work (rebates, bundling ...)?
- In an effects-based approach :
 - What is the competitive harm, what mechanism is at work?
 - On which market does it appear?
 - Are there efficiencies and pass-on to consumers?

Advantages

- Allows to treat similarly different forms of practices that have the same effects (predatory prices, discrimination, bundling...)
- Reduces the risks of type-1 and type-2 errors
 - Fine firms for pro-competitive behavior
 - Discharge firms despite anticompetitive behaviors

Implementation

- Effects-based approach : more demanding both for competition authorities and for the parties.
- Some examples taken from the practice of the French competition authority
 - Bundling : Canal+ vs. TPS (05-D-13)
 - Predatory pricing : British Airways vs. Eurostar (07-D-39)
 - Discrimination : NMPP vs. MLP (09-D-04)
- Assessment of damages : use of economic analysis and data to evaluate the effects of a practice.

Canal+ vs. TPS

- Canal +
 - dominant on the pay-TV (relevant) market : 90% market share
 - Offers
 - Charges 175 for the premium channel Canal +
 - Charges 98 for the satellite package CanalSat
 - Charges $225 < 175+98 (= 273)$ for the package {Canal+ and CanalSat}
- TPS complains that:
 - It is a predatory offer (Canal + is sold at a price 50 that cannot cover the costs)
 - **Anticompetitive bundling**
- Statement of objections sent to Canal + for bundling and [predatory pricing]

Analysis of the conseil

- Offers made by Canal +, CanalSat and TPS all available on the same pay-TV market :
 - Therefore « bundled offer » {Canal+, CanalSat} similar to a quantitative rebate
- For Canal+, bundled offer {Canal+, CanalSat} generates economies of costs (commercial costs, billing...)
- That should be passed on to consumers
- Profit maximizing associated with recruitment of new clients would also occur with a monopolist
- Consumers also benefit from economies (one bill, one decoder)
- And can still choose to subscribe to each offer separately:
 - Bundling is one more option;
 - Allows to discriminate between light and heavy users by offering low prices to heavy users.
- « Mixed bundling » (not « pure bundling »), that increases demand, without any exclusion of TPS (who during the same period increases its price)
- Conclusion : no anticompetitive practice.

British Airways - Eurostar

- Route between Paris and London
- British Airways complains about predatory pricing by Eurostar
- Two interesting questions:
 - What is the appropriate price/cost test?
 - What is the predatory strategy?
 - Predation = strategy by which the predator excludes rivals; should be followed by a recoupment phase.
- Relevant market and position of Eurostar :
 - Route Paris-London
 - On which Eurostar is dominant
 - Distinction between business and leisure travellers is irrelevant
- Profitability :
 - Of the route as a whole?
 - On each train? Each passenger? Each train at a given time?

Price cost-test

- Route Paris-London for the year 2004 involved in the alleged practice : revenue lies between variable costs and total costs :
 - « grey » area, where the strategy/microeconomic story matters
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- At the level of each train :
 - Average revenue of a train always covers the average variable costs associated with this train, even for the less profitable schedule (the 6.42 am train).
 - Costs of the train + passengers
 - Average revenue per passenger x average number of passengers in the train.
- But no coverage of fixed costs (mainly the costs of the Channel Tunnel)

The strategy of the firm

- Yield management : implementation of a scale of prices in order to maximize revenue.
- The gap {revenue – variable costs} (>0): allocated to the coverage of fixed costs (Ramsey pricing).
- The removal of a given train or schedule would decrease profits, not increase them.
- Offering more trains/day increases demand : on the opposite, cancellation of some trains could decrease the demand for the remaining ones.
- If cancellation of schedules would allow to release some trains, reallocation to other activities would not increase profits either :
 - Trains are Channel Tunnel specific, not efficient for other uses
- But in any case, the question of defining the « optimum optimorum » cannot be the right one (i.e. the question of the best use a firm could make of its assets is not relevant).

MLP-NMPP

- Sector : distribution of newspapers.
- MLP (15% market shares) complains about practice of discrimination by NMPP (85%):
 - Some editors enjoy advantageous tariffs;
 - Loyalty rebates conditional upon : (i) the length of the commercial relationship between NMPP and the editor; (ii) the number of titles brought by the editor to NMPP.
- NMPP has a dominant position.
- Statement of objections : 1) discrimination; 2) anticompetitive loyalty discounts.

Analysis of the Autorité (1/2)

- Price discrimination by NMPP can :
 - Distort competition between editors;
 - Exclude competing press distribution services.
- Crucial fact :
 - *Relevant level of competition between distribution services : level of each title, and not of each editor*
- Distribution costs vary from a title to another.
- Competition involved by the procurement process by editors leads to price differentiation between titles.
- Prices should get closer to the costs incurred by distributors to deal with a given title.
- Therefore, the price benefit offered to a given title results from the competitive process.

Analysis of the Autorité (2/2)

- Some titles benefiting from a rebate from NMPP have switched to MLP :
 - can simply reflect the greater efficiency of MLP on that title.
- The competitive process may explain that those titles that should more likely switch to the competitor will more likely benefit from a rebate : this is pro-competitive!
- The very nature of the competition process in this sector (at the level of titles, not that of editors) is crucial to understand the features of the case, namely :
 - Pro-competitive effects of price discrimination between titles.
 - Anticompetitive effects of loyalty rebates granted to **editors**.

Another consequence of the effect-based approach importance of the « counterfactual » situation

- What would have happened, had the practice not been committed?
 - Important question regarding the assessment of the damage;
 - Economic analysis involved also in the field of cartels and fines.
- An example taken from the French practice : the case of temporary employment sector, that combines macroeconomic data and case specific data.

Temporary employment sector

- 3 major actors of the sector in France
- Agreement on the absence of pass-on to clients of the fall of employers' contributions on unskilled decided by the government to favor employment.
- 3 components of the damage:
 - Profit transfers from the clients (firms) to the temporary work agencies;
 - Fall in demand for temporary work (and production);
 - Losses incurred by the unemployed workers.

Temporary employment sector

- Estimates of the volume component :
 - requires assessment of the number of lost jobs due to the non fall in employers' contribution
 - Which in turn requires to know the elasticity of labor demand with respect to the cost of labor.
- Economic literature :
 - ε (labor demand elasticity/cost of labor) in France from -0.3 to -0.8 for permanent jobs
 - Unskilled : (over concerned by temporary employment) around -1.
 - Assumption used in the case (conservative) : - 0.5

Temporary employment sector

- Overcharge : known precisely (depends on the public policy that has not been applied) : +0.5%
- Combined with the data on labor demand elasticity, leads to a decrease in the volume of employment of 0.25%.
- Applied to the volume of temporary employment in France : 800 lost jobs.
- Valued at the minimum wage level (gross level: 1250€), loss of 20 million € for the workers.
- Temporary employment could be substitutable for other types of employment : the practice could have raised the demand for other types of employment.
- But many constraints on the French labor market : temporary work may be the only source of flexibility.
 - Unsufficient flexibility to compensate lost jobs
- Estimate of the losses : between 10 and 20 million € of wages.

Conclusion

- In the unilateral conduct cases presented above, effects based approach changes dramatically the conclusions with regard to a form based approach.
 - Form based approach would have led to fine the practices (dominance? Yes! Existence of the practice? Yes!)
 - Here, no convincing theory of harm.
- Does not mean that effects based approach is more lax than a form based approach :
 - More demanding in terms of economic foundations.
 - Could lead to fine a practice that would not be sanctioned under a form based approach.
- More weight given to economic analysis
 - Also true in the assessment of damages.