

The Application of Article 82 in High-Tech Markets

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Overview

- Key aspects of high-tech industries and implications for competition policy
- Competition policy objectives
- Does the Status Quo Ante of Article 82 enforcement in high-tech industries meet the competition policy objectives?
- Does the Enforcement Priority Guidance on Enforcement Priorities improve the Status Quo Ante?

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Key Aspects of High Tech Industries

- Dynamic competition is poorly understood
- Competition in the market vs competition for the market
- The role of IP rights and tension between dynamic and static competition
- Closed versus open systems (platform competition vs component competition)
- Interoperability and technical integration are important aspects



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Basic Competition Policy Objectives

- Two basic objectives
 - 1.prohibition of harmful and permission of beneficial behavior (ex post intervention)
 - 2.predictability / legal certainty (ex ante deterrence)
- Tension between the two objectives
- Over-emphasis of ex post objective
- Need for the design of workable rules (both ex post and ex ante)

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The Status Quo Ante: General View

- Significant over-enforcement
 - form based approach
 - quasi per-se illegality inconsistent with economic prior beliefs
- Fictitious legal certainty
 - high compliance costs
 - low enforcement risk
 - the “lightening” approach
- The liberating effect on BA/Virgin and Michelin II



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Guidance on Enforcement Priorities: General View

- Mixed picture
 - narrower focus in certain areas
 - widening of scope of abuse in others
- Shift from form-based to effects-based analysis
- Introduction of Article 82(3)
- Shift of burden of proof
- Overall impact
 - potential for improvement of ex post analysis
 - significant problems ex ante in certain areas

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The Status Quo Ante: Interoperability

- The “new product” test under *Bronner/IMS Health*
 - modified per se legality
 - reflects the belief that dynamic efficiencies greatly outweigh static efficiencies
 - reasonable legal certainty
- The test under *Microsoft*
 - weakened per se legality
 - exceptional circumstances based on limitation of technical development
 - reduced legal certainty

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Guidance on Enforcement Priorities: Interoperability

- unstructured rule of reason
- balancing of static and dynamic efficiencies
- burden of proof on defendant (Article “82(3)”)
- no “exceptional” circumstances
- implications
 - lack of proper balancing mechanism
 - risk of over-enforcement
 - no legal certainty



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The Status Quo Ante: Tying

- Erroneous “separate product” test
- Presumption of foreclosure and consumer harm once “unfair advantage” has been shown
- Modified per se illegality rule is not compatible with economic theory and evidence
- Implications
 - ex post objective: rule is vastly over-inclusive
 - ex ante objective: encourages the “lightening approach”

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Guidance on Enforcement Priorities: Tying

- Improvement of the ‘separate product’ test
 - shift from independent demand for tied product to independent demand for the tying product
 - unclear reference to “bundling” in the counterfactual
 - focus on “stand-alone production” to narrow
- Shift from per se illegality to rule of reason approach
- Problem with the burden of proof
- Implications
 - improvement regarding ex ante objective
 - limited legal certainty

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Any questions?



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