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# Modernization of Article 82

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\*The views expressed are those of the author and do not necessarily reflect those of DG COMP or the European Commission

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## outline

- n Why the review?
- n The EAGCP report
  - n effect-based approach
  - n rule-of reason vs. per se approach
  - n role of dominance
- n Current review – overview
- n Other issues

# Why the review of Article 82



- n current approach too restrictive
  - n In the past: form-based approach and per se rules (loyalty rebates in Michelin II)
  - n need to limit false positives that chills pro-competitive conduct
  - n need to limit false negatives that allows conduct that lead to consumer harm
- n effect-based analysis
  - n in order to better discriminate between harmful and pro-competitive conduct (limit false positives/false negatives)
  - n to identify relevant theory of harm & the relevant empirical evidence
  - n should provide legal certainty and consistency
  - n may require significant investigation (time and resources)
- n clarifies and creates consistency
- n approach consistent with Art. 81, merger control, and state aid action plan

# The EAGCP report



- n not form-based, but effect-based
  - n categories of conduct (predation, discrimination, rebates, tying, refusal to deal) can have the same effect
  - n effect of foreclosure (same, horizontal, vertical markets) on consumers (as a proxy for competition -multiple, present and future)
  - n “the story” = role of robust theory and facts
- n more rule-of-reason, less per-se rules
  - n rule-of-reason better done under an effect-based approach
- n no need for separate dominance under an effect-based approach
  - n dominance and its abuse => interrelated
  - n case law vs. legal norm of Art. 82 => *abuses* of dominance



# Current review of Article 82

(some key elements)

- n abuse-specific approach, but effect based
- n competition not competitors, consumer welfare
- n all effects (likely & actual, short & long-term)
- n as efficient competitor test
- n on dominance
  - n necessary condition
  - n more economics in dominance assessment

=> role of the case law and the ECN

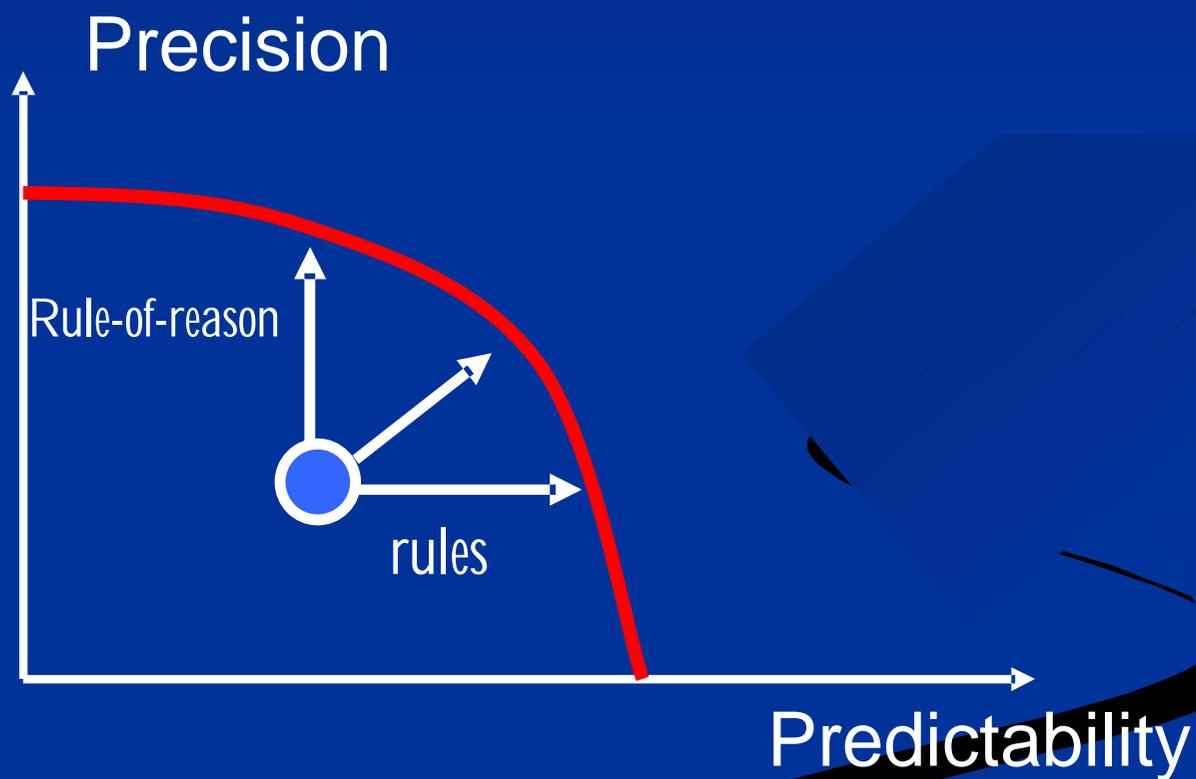


## rule-of-reason vs. per-se rules

- n need presumptions & safe harbors as a screen
  - n green light zones & red light zones
  - n “rule of reason” analysis for some cases (follow EAGCP approach)
- n predictability vs. precision: is there a trade-off ?
  - n Vickers argument
  - n ultimate trade-off between precision and predictability (and enforcement costs)
  - n predictability of rules



## Is there a trade-off in Article 82?





# Overall

- n effect-based approach
- n consumer orientation
- n pre se rules and rule of reason
- n dominance necessary condition

some other issues.....

# the role of dominance



- n only dominant firms are subject to Article 82
  - n advantage: bright lines + legal certainty + enforcement costs
  - n disadvantages: under-enforcement
    - n abuse of pre-existing dominance
    - n But market power may create significant anticompetitive conduct => acquiring dominance through such conduct might be abused
- n how much economic analysis under dominance, given that effect-based analysis is to follow?
  - n how do we determine that a firm has substantial market power?
    - n use of market share?
    - n analysis of barriers to entry?
    - n price-cost margin?
  - n integrated approach?
  - n what is the correct screen?
- n can a non-leader be a dominant firm?
- n should the path to dominance matter in the competitive assessment?

## an over-arching test



- § no reason to believe that one single test gives best answer in all cases
- § as-efficient competitor test
  - § cost data
  - § potentially efficient
  - § competitive constraint, even if inefficient
  - § non-price competition
  - § product differentiation
- n probably better to apply different (structured) rules, including shortcuts, for different practices
  - § but strive for consistent framework
  - § to show: capability to foreclose and market distorting effect

# predation



- n How much form-based is there in the case law?
  - n AKZO rule still basic framework
    - n Below AVC/AAC rebuttable presumption of abuse
    - n Between AVC and ATC need to prove strategy of foreclosure (“intent”)
    - n No separate requirement to prove recoupment beyond dominance
      - n Except perhaps in specific cases (e.g. collective dominance)
- n Predation: likely foreclosure, sacrifice, recoupment



## n efficiency defense

- n abuses have two effects
- n burden of proof (burden of production)
- n integrated into conduct (pricing efficiencies)

## n market definition

- n defining the relevant product or geographic market is a legal requirement
- n by definition the dominant firm does not face any competitive constraint. So does the dominant firm constitute a market on its own?
- n applying the SSNIP test would often result in a broader market definition
- n evaluate directly the impact of the exclusionary abuse should help delineate the boundaries of the relevant market

## n exploitative vs. exclusionary abuse

- n is monopoly pricing an abuse of dominant position?
- n in market economy, risk of reducing firms' incentives to be more efficient or innovative. Merger control, IP rights and regulation of natural monopolies can better limit false positives and negatives

## n should there be guidelines? (how much do we know?)

# Convergence with the US?



- n institutional differences with EU
- n US approach may put more emphasis on green zones
- n economics is a common language (same questions, same methodology)
  - n answers to the same case may still be different



## The role of economics

- n DG-Comp – more emphasis on economic effects
- n Judicial Review – recent judgments
- n ECN - consistency



## conclusion

n pragmatic approach

n important improvements

n legal certainty

n consistency

n competitiveness