

Economic Analysis of Antitrust Law: Question of Fact or Question of Law

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- I. Framework of topic: Forensic economics in competition law enforcement
 - a. *Not the subject matter of this presentation/discussion:*
“Economic evidence” as a tool to start/have a “case”,
 - to detect violations, to start proceedings or
 - to arrive at a grounded suspicion for cartel-related “dawn raids”
 - b. *Goals of this presentation:*
Aims at opening discussion as to the scope of forensic economics in the realm of anti-trust procedure (focus on Art 82).

II. Relationship of economic and legal analysis in Art 82 cases

- What are the questions that forensic economics shall answer in a “foreclosure” case?
- What is the role of the deciding body, once furnished with economic analysis?
- What, if deciding body (court) does not gather economic analysis? (Can the court provide the analysis by itself?)
- What, if deciding body (court) disregards economic analysis furnished by one party?

III. Procedure

Procedure as “positive law”:

- In a law and economics perspective: minimize the sum of direct costs and error costs
- In a law and economics perspective: incentives matter, but no clear distinction between substantial and procedural law
- Material truth in procedure: Role of expert witness as an institutional device to get the facts right.

IV. Distinction between questions of law and questions of fact

The pertinent law determines which facts are relevant for a legal conclusion.

- Questions of fact: concern “naked” facts of the case and “factual” conclusions drawn from the facts
- Questions of law: Application of legal norm to the facts of the case
- Austria law: category of “mixed questions”

Distinction can be found in most jurisdictions, relevance typically:

- Limited appealability of questions of facts
- Procedural guarantees apply to questions to questions of fact (example: not hearing a witness)
- The court knows the law.

V. Art 82: Prohibition of abuse of dominant position

- *"Modernization"*: Effects-based.
(Report EAGCP: *"Such an approach focuses on the presence of anti-competitive effects that harm consumers, and is based on the examination of each specific case, based on sound economics and grounded on facts"*).
- *Abuse* = behavior with a certain effect (Behavior is abusive, if it generates competitive harm not outweighed by efficiency gains for consumers).
- *Relevant question therefore*: Does this effect exist? Answers both question of fact and of law.
- *Consequences*: opens up "a window of opportunities" for courts to behave opportunistically

VI. Illustration: The Austrian case "Tiktak", Austrian High Court 16 Ok 12/04, 20.12.2004

a. Austrian incumbent telecom operator

- modifies tariff system (constituting of fixed line rental and possibility to make calls on the incumbent's network; option of carrier preselection or "call by call selection")
- eliminates previous lowest tariff for fixed line rental because of cost inefficiencies
- maintains TikTak-tariffs (second lowest), where the first 60 min of calls (off peak) are free of charge.
- Customers are free at any moment to make calls on any network.

- b. Austrian incumbent telecom operator
 - provides privately furnished expert opinion by Austrian economist (university professor) that argues: no danger of market foreclosure:
 - no market foreclosure to be expected
 - no materialization of actual foreclosure effects
 - requests court (in addition) to appoint expert witness

c. Cartel Court of 1.Instance

- Argues that the tariff scheme has the ability to harm competitors
- Rejects the expert opinion because it “answers questions of law”
- Rejects the motion for court expert witness, because the court knows the law
- And because “ability to harm” is sufficient, no need to examine actual effects

d. High Court confirms judgement of first instance.

VII. Relationship of legal and economic analysis

- a. Law as the embodiment of economic efficiency? Positive (descriptive) analysis and normative evaluation would converge “bottom up”.
- b. From a normative standard, the law may define abusive behavior “top down” as “behaviour creating competitive harm with no outweighing positive efficiency effects”.
- c. Assignment of roles for economics and for the law:
 - Economic analysis: Specifies effects of behavior
 - Legal question: Is this behavior abusive? (sometimes parallel to factual question, sometimes more encompassing, e.g., in essential facility cases)

- d. Scope of forensic evidence: What needs to be proven?
- *verification* of competitive harm (foreclosure effect)?
 - *verification* of negative effects in the overall (including possible efficiencies)?
 - *likelihood* of market distorting foreclosure effect?
 - *empirical effects*, if available
- e. "Fair trial"
- Defendant must have opportunity to prove analytically that effects of his behavior are not anti-competitive.
 - Defendant must have an opportunity to refute empirically the finding of "capability to foreclose".

VIII. Topics for discussion

The concept of abuse in the light of the “modernization” of article 82.

- Requires a “certain degree of flexibility in the handling of proof requirements” (Report EAGCP, 16).
- Capability to harm - examination of real effects.
- Role of presumptions - rebuttal of presumptions.