Discussion of presentation *"The enforcement of article 102 Part 2. The As Efficient Competitor Test"*

by Fumagalli and Motta
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My three takeaways an AECT in Fumagalli and Motta (FM)

1. Truly embracing and effect-based approach means that the Commission *always* needs to identify a solid theory of harm
2. Do not use price tests for price-discounts that reference rivals
3. When useful (no discounts, or standard discounts), perform the test as an assessment of profit-sacrifice, not as a replication analysis of an As-Efficient-Competitor

Price related exclusionary abuses I

1. **No-discounts**: use price cost test assessing anticompetitive low prices, as with predation/margin squeeze
   - FM propose a standard and solid approach to assess profit sacrifice based on own costs, with safe harbor (AAC-LRAIC), I agree with it and the arguments

   - But, how does it square with Courts' (and Guidance) explicit notion of assessing foreclosure of *As-Efficient-Competitor* (the principle, not the test)?
   - Think carefully for possible unexpected implications and incongruencies: reasoning on its own characteristics per se vs. as if it was a competitor
     - Example: a face-value implication of the AEC Principle could be that only as-efficient competitors are worth protecting, which is not an implication of a price-cost test
     - Dominant is different from competitors on several dimensions, on costs and other dimensions, especially in digital markets
   - Also, with this approach are we coming closer or not to assess possible consumer harm?

Price related exclusionary abuses II

2. Standard discounts (e.g. quantity discounts): a price-cost test can be used but watchout as it is complex because: not a single price, price-discrimination, contestable market

- When using it, instead of trying to assess the test punctually, calculate safe boundaries "*In the present case, the test certainly fails if contestable share below …, discount less than …, hence …*". Aim of reducing the risk of false positive

3. Discounts referencing rivals (e.g. exclusive discounts): I'd avoid an AECT

- One may want still want to test price with costs
- But apart from this, the AECT as a replication test is logically flawed as here dominant may seek to exclude and *increase* its price and the test designed to identify low prices
- McNamara Fallacy (US Secretary of Defence, Vietnam '68-69): relying solely on what is quantifiable, simply because it is so, even if it gives a distorted view of the reality, and disregarding the rest simply because it is not quantifiable

More exotic AECT ?

- AECT for non-pricing strategies, e.g. self-preferencing, you would have to calculate the hypothetical platform's demand if demoted!
- Not-yet AECT: a Less Efficient Competitor Test ?

- I'd stay away: economic theory con offer solid argument and it is now necessary, but do not stretch
- Instead, devote effort to build one or *more* solid theories of harm

Defendants will use the AECT

- In view of recent history (e.g. Intel and Qualcomm), one can foresee that defendants will be more and more interested in using AECT for self-assessing legality and for rebuttal
- Prepare for that
- What if they do so for discounts referencing rivals?
  - After Intel, claiming the test is irrelevant and disregard it is risky and impossible: be ready to use economic theory

Check if and where the following are clarified

If and when AECT is:

- Supportive / decisive factor
- Indispensable / optional
- Red-lines / safe-harbour
- Necessary and/or sufficient
- Usable for rebuttable presumption of anti-competitiveness