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