



Competition Law Forum

The Reform of Article 82: Recommendations on Key Policy Objectives

- prepared by the Competition Law Forum's *Article 82 Review Group* -

Introduction

This paper is submitted to the European Commission, national competition authorities and interested organisations by members of the Competition Law Forum (CLF).¹ Members of the CLF discuss pressing matters of competition law and policy, and make recommendations to improve its effectiveness, efficiency, and coherence throughout Europe. Our discussions occur in quarterly plenary meetings in London and Brussels, but when particularly important matters arise the CLF Director convenes an expert group of members to discuss and prepare a policy paper for submission to the relevant authorities.² In the summer of 2004, we formed an *Article 82 Review Group* to meet regularly with industry experts, practitioners, economists and competition officials to review the operation of Article 82 EC and the potential for its reform.³

This initial paper is concerned with the key policy issues that the *Article 82 Review Group* considers need to be settled before reform of Article 82 can take place. In writing our paper we focus on what in our view is in the interests of the Community, including that of a more competitive and innovative business environment and in particular in the interests of European consumers. In our view, an

¹ The British Institute of International and Comparative Law launched the Competition Law Forum (CLF) in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum is comprised of leading practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to the area of competition law and policy. For further information, please see www.competitionlawforum.org or contact its Director, Dr Philip Marsden, at p.marsden@biicl.org or (ph.) 44 207 862 5151.

² Our *Modernisation Expert Group*, for example, issued papers in 2003 on Cooperation within the European Competition Network. Copies are available from the above address.

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effective, efficient and coherent approach to competition policy – particularly with respect to the application of Article 82 – can help to create strong, dynamic and innovative industries that benefit consumers through an improved choice of better quality and lower priced products.

To that end, our overarching recommendation is that **the effectiveness, efficiency and coherence of European competition policy requires a modernised approach to the application of Article 82, involving an analysis of the economic effects of conduct on competition on the market, and in particular on consumer welfare.**

We appreciate that it is early in the debate on Article 82, and we look forward to contributing to the discussions and deliberations within Member States and with the European Commission. The *Article 82 Review Group* will be producing further papers as the debate develops.

We begin by reviewing the historical rationale for the application of the ordoliberal approach to competition policy in relation to abuse of dominance under Article 82. We then submit that **there is a real need to construct and adopt a modernised approach to the application of Article 82, based on economic effects, in order to:**

- fulfil the aim of the Community competition rules, namely ensuring that competition on the market takes place on the merits as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources;
- align the application of Article 82 with current economic thinking, and with the modernised application of other provisions of European competition law – most notably Article 81 and the *Merger Control Regulation*; and
- better attain the aims of the Lisbon Agenda and the new Commission, in particular by enhancing the competitiveness of European industry, economic efficiency and growth, innovation and the welfare of European consumers.

1. Why a modernised approach to Article 82 is required

a. An ordoliberal approach is no longer appropriate

To date, Article 82 has been applied using an ‘ordoliberal’ approach to competition policy. The ordoliberal approach seems to assume that the presence of dominance has itself already weakened the competitive process thereby reducing the economic freedom of other undertakings, and operating to the detriment of consumers. As a result, from an enforcement perspective, greater reliance is placed on the application of competition policy to ensure that the dominant firm does not weaken competition further. While economic effects are not examined directly, form-based rules are based on assumptions about harm, particularly with respect to exclusion.⁴ This approach leads to allegedly anti-competitive abuses being categorised under various headings, based on descriptions of behaviour that are likely to be prohibited regardless of their factual context or actual economic impact in any particular case. The form of conduct is examined, rather than its effect on competition in the market, or on consumer welfare.

This approach was adopted when the Community’s competition policy was in its infancy, and it was considered that reasonably clear rules were needed to address conduct which impeded trade between Member States. At that time economic analysis in relation to competition policy and law was also less developed and could not provide a clear view of the effects that practices were having on competition in the evolving Common Market. However, in the view of the *Article 82 Review Group*, this approach is no longer the optimal one, especially in the light of the development both of the European Union and of economic analysis over the last forty years. The public and private barriers to trade that still exist may continue in some cases to segment the market along broadly national lines, and so competition authorities need to remain vigilant. Nevertheless, in doing so, their economic analysis of the exclusionary effect of a practice should focus on foreclosure and barriers to entry generally, rather than with respect to any particular national boundary. This will not only enhance consumer welfare but will also support the continued evolution and integration of the Community.

⁴ The ordoliberal approach has four contributing assumptions: First, that competition policy is primarily orientated towards the goal of individual freedom with efficiency as its by-product. It is assumed that the market will not out of itself generate and maintain a framework of rules that assures its beneficial working. Thus, the way of preserving economic freedom is to adopt clear ground rules whose *Ordnungspolitik* is specifically aimed at providing and maintaining a suitable legal framework for the market order. Second, the state retains a strong role in protecting the basic parameters of the system of competition but with strict limits on more direct intervention as it is accepted that a policy that seeks to bring about particular outcomes by intervening in the market process by specific measures must be avoided. Third, competition policy is shaped by the rule of law rather than by ad hoc political decision-making and fourth, that competition policy should be embedded in the economic order of a free and open society. See, Van Miert, “The Future of European Competition Policy”, 17 September 1998. Available at: http://europa.eu.int/comm/competition/speeches/text/sp1998_042_en.html; Gerber, *Law and Competition in the Twentieth Century Europe* (Clarendon University Press, 1998); Möschel, “Competition Policy from an Ordo Point of view” in Peacock & Willgerodt, *German Neo-liberals and the Social Market Economy*, (Macmillan, 1989).

b. Analysis under Article 82 must keep pace with economic advances and legal modernisation

We are concerned that in the past a finding of dominance has appeared to be not only a necessary step in the analysis, but sufficient grounds on which to prohibit conduct by dominant firms. There should be no short-cuts to the finding of an abuse, nor formalistic categories of prohibited conduct. Dominance must be assessed as an intermediate step, and the economic effects of an allegedly abusive practice must be examined to demonstrate actual or likely consumer harm

A more economics-based approach is now necessary and possible, particularly in order to distinguish exclusionary conduct from pro-competitive conduct. Economic analysis has developed and offers better insight and tools with which to evaluate the effects that conduct is having or is likely to have on the market. Crucially, it has now been broadly recognised that a formalistic approach to the review of business activity - with no appreciation of its effects – can discourage pro-competitive conduct which benefits consumers and economic activity generally.

Adopting an economics-based approach to Article 82 will also unify and provide a clearer and more consistent enforcement approach of the Treaty provisions on competition law. This will provide an important signal to national competition authorities and courts, which will in turn help provide a more efficient, effective and consistent enforcement of competition law within Europe. Indeed, modernisation of Article 81, and of the *Merger Control Regulation*, has already displayed a movement away from a form-based approach to dominance, and towards an approach that evaluates economic effects and which is more concerned with the significance of the impact that practices have on competition in the market.⁵ In the same manner, in its *Notice on the Application of Article 81(3)* the Commission has signalled a welcome shift in emphasis towards a modernised ‘economic approach’.⁶ We support this evolution, and recommend that a similar approach to Article 82 should be adopted.⁷

The *Article 82 Review Group* therefore recommends that Member States and the Commission adopt a more economics-based approach to cases involving allegations of abuse of dominance under Article 82.

⁵ In its *Notice on the Application of 81(3)*, the Commission set out its view of the purpose of Article 81: “The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.” Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, Official Journal C 101, 27.04.2004, page 98

⁶ See paras 5, 13 and 24-27 of the above Notice.

⁷ Indeed, to maintain a formalistic approach to the application of Article 82 which is inconsistent with current economic thinking and with the modernised regime would be likely to give rise to some troubling inconsistencies.

c. Looking to the future: the Lisbon Agenda and the new Commission's aims: promoting competitiveness, growth and consumer welfare

We submit that the ultimate goal of competition policy is to protect competition on the merits as a means of enhancing consumer welfare and of ensuring the efficient allocation of resources. To pursue this goal, the approach to the application of Article 82 must change. Although a formalistic approach may suggest greater legal predictability, it has provided a significant degree of business uncertainty about which practices are permissible, and may also have had a chilling effect on pro-competitive conduct. In short, it is our group's view that by pursuing a 'per se' approach to the review of allegations of exclusionary conduct by dominant firms, such firms are likely to find almost any type of conduct which requires a competitive response from rivals subject to legal challenge. Such an approach is not appropriate when the economic analysis and evidence shows that the business practices in question do not reduce consumer welfare – indeed, they may well enhance it. The current approach risks creating markets with more numerous, but less efficient and smaller 'competitors', who charge higher prices, but offer less innovative products and ultimately less choice, while at the same time deterring dominant firms from investing and improving their offering as part of normal competition on the merits.

2. Specific recommendations:

1. There should be a single policy objective for European competition policy: to protect competition on the market as a means of enhancing consumer welfare and of ensuring the efficient allocation of resources.
2. The above objective has guided the evolution of the analysis of conduct under Article 81 and that of concentrations under the *Merger Control Regulation*: we support this evolution and urge the Commission, national competition authorities and courts to apply Article 82 in the same manner.
3. To evaluate whether competition on the merits has been harmed, and consumer welfare reduced, conduct must be assessed by examining its actual and potential economic effects on the market(s) concerned.
4. Only conduct which involves actual or likely harm to competition in the market(s) concerned – and hence to consumers – should be prohibited.