Chapter II – where less is more?

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Chapter II cases – a taxonomy

<table>
<thead>
<tr>
<th>Abuse type</th>
<th>Abuse</th>
<th>Economic analysis¹</th>
<th>Immediate price effect of successful case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exploitative abuses</td>
<td>Excessive pricing</td>
<td>Competitive benchmark</td>
<td>Price decrease</td>
</tr>
<tr>
<td>Exclusionary abuses</td>
<td>Refusal to supply</td>
<td>Competitive benchmark</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Margin squeeze</td>
<td>“As efficient competitor”</td>
<td></td>
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<td></td>
<td>Loyalty rebates</td>
<td>“As efficient competitor”</td>
<td>Price increase</td>
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<tr>
<td></td>
<td>Predation</td>
<td>Profit sacrifice</td>
<td>Price increase</td>
</tr>
<tr>
<td></td>
<td>Tying/ bundling</td>
<td>“As efficient competitor”</td>
<td>Price increase</td>
</tr>
</tbody>
</table>

¹ Assuming dominance established

- Chapter II involves substantial risk of type I error
- Need to be confident about the economic analysis underlying Chapter II
Dominance

- Recent recognition in a merger context that market definition is difficult
  - Availability of data: testing a hypothetical
  - Technical challenges in implementing the SSNIP
- Market definition much more critical and more difficult in Chapter II cases than in mergers
  - Cellophane fallacy
- Role of economic analysis on abuse much more important

Abuse: the gap between law and economics

- EC experience suggests Courts too ready to accept form-based arguments
- Inconsistency of approach across similar abuses
  - Tomra vs. Deutsche Telekom: "equally efficient competitor" test
- Insufficient emphasis on economic effects
Deterrence – too little or too much?

Problem of identification
- Few cases = deterrence works or no cases = no deterrence?

Deterrence is not always positive
- Targeting price-based exclusionary “abuses” can have a chilling effect on competition
- Cases in fast-moving technology sectors: effect on dynamic incentives?

And in any case may be limited
- Does UK action add much to EC actions?
- Local markets – are deterrent effects notable?

Chapter II on balance

- Chapter II - protecting competitors or competition?
- Type I error of taking on cases vs. dangers of leaving Chapter II to the Courts?
- Role for clear guidelines (for the Courts)?