

E.CA Economics

Dominant and Efficient

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On the relevance of efficiencies in Article 102 TFEU cases

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This presentation is based on joint work with Dr. Linda Gratz, E.CA.

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Relevance of efficiencies in Article 102 Treaty of the Functioning of the European Union (TFEU) cases

Recent enforcement priorities and relevance of efficiencies

Some conceptual issues

Price abuses – a business perspective

Summary and policy proposals

Recent enforcement priorities

Opened investigations (#14) and final EU commission decisions (#12); 2009 – 2012

	Regulated network industries			Manufacturing		Services	
	Energy	Transport	Telecoms	General	IT Hardware	IT Software	Financial Services
Exclusive dealing	1				1		
Tying/ bundling				1		5	1
Refusal to supply/ margin squeeze	4	2	2		1	1	
Predatory pricing							
Exploitative abuses					4		1

Recent enforcement priorities

Opened investigation and final EU commission decisions 2009 – 2012; percentage of total

	Regulated network industries			Manufacturing		Services	
	Energy	Transport	Telecoms	General	IT Hardware	IT Software	Financial Services
Exclusive dealing							
Tying/ bundling							
Refusal to supply/ margin squeeze	32%						
Predatory pricing							
Exploitative abuses							

Recent enforcement priorities

Opened investigation and final EU commission decisions; 2009 – 2012; percentage of total

	Regulated network industries			Manufacturing		Services	
	Energy	Transport	Telecoms	General	IT Hardware	IT Software	Financial Services
Exclusive dealing							
Tying/ bundling						28%	
Refusal to supply/ margin squeeze	32%						
Predatory pricing							
Exploitative abuses							

Recent enforcement priorities

Opened investigation and final EU commission decisions; 2009 – 2012; percentage of total

	Regulated network industries			Manufacturing		Services	
	Energy	Transport	Telecoms	General	IT Hardware	IT Software	Financial Services
Exclusive dealing							
Tying/ bundling						28%	
Refusal to supply/ margin squeeze	32%				8%		
Predatory pricing							
Exploitative abuses							

Recent enforcement priorities

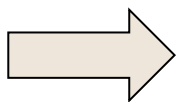
Opened investigation and final EU commission decisions; 2009 – 2012; percentage of total

	Regulated network industries			Manufacturing		Services	
	Energy	Transport	Telecoms	General	IT Hard-ware	IT Software	Financial Services
Exclusive dealing							
Tying/ bundling					8%	28%	
Refusal to supply/ margin squeeze	32%						
Predatory pricing							
Exploitative abuses					16%		

Relevance of efficiencies and other objective justifications

Opened investigation and final EU commission decisions; 2009 – 2012; percentage of total

	Regulated network industries			Manufacturing		Services	
	Energy	Transport	Telecoms	General	IT Hardware	IT Software	Financial Services
Exclusive dealing					Intel		
Tying/ bundling						Microsoft	
Refusal to supply/ margin squeeze			Telekomunikacja Polska		IBM		
Predatory pricing							
Exploitative abuses							S&P



In five out of 12 cases efficiency defences or other objective justifications were discussed; companies mostly active in the ICT sector

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- In **comparison to merger cases** differences exists
 - Higher diversity of conduct/ efficiencies in abuse of dominance cases
 - Justifications include meeting competition and objective necessity defence
 - Fix cost savings/ dynamic efficiencies are more important
 - Different types of analysis (backward vs. forward looking)
 - Different presumptions (negative vs. neutral)
 - And: **pro- and anticompetitive elements are often non-separable and non-monotone!**
- **Example**
 - A low price strategy may be carried out because of “economies of scale” or “foreclosure”
 - One single behavior; there is no balancing → **integrated approach required**
 - A low price strategy has strong positive effects in the short term; only after successful foreclosure negative effects arise → **non-monotonic effects**

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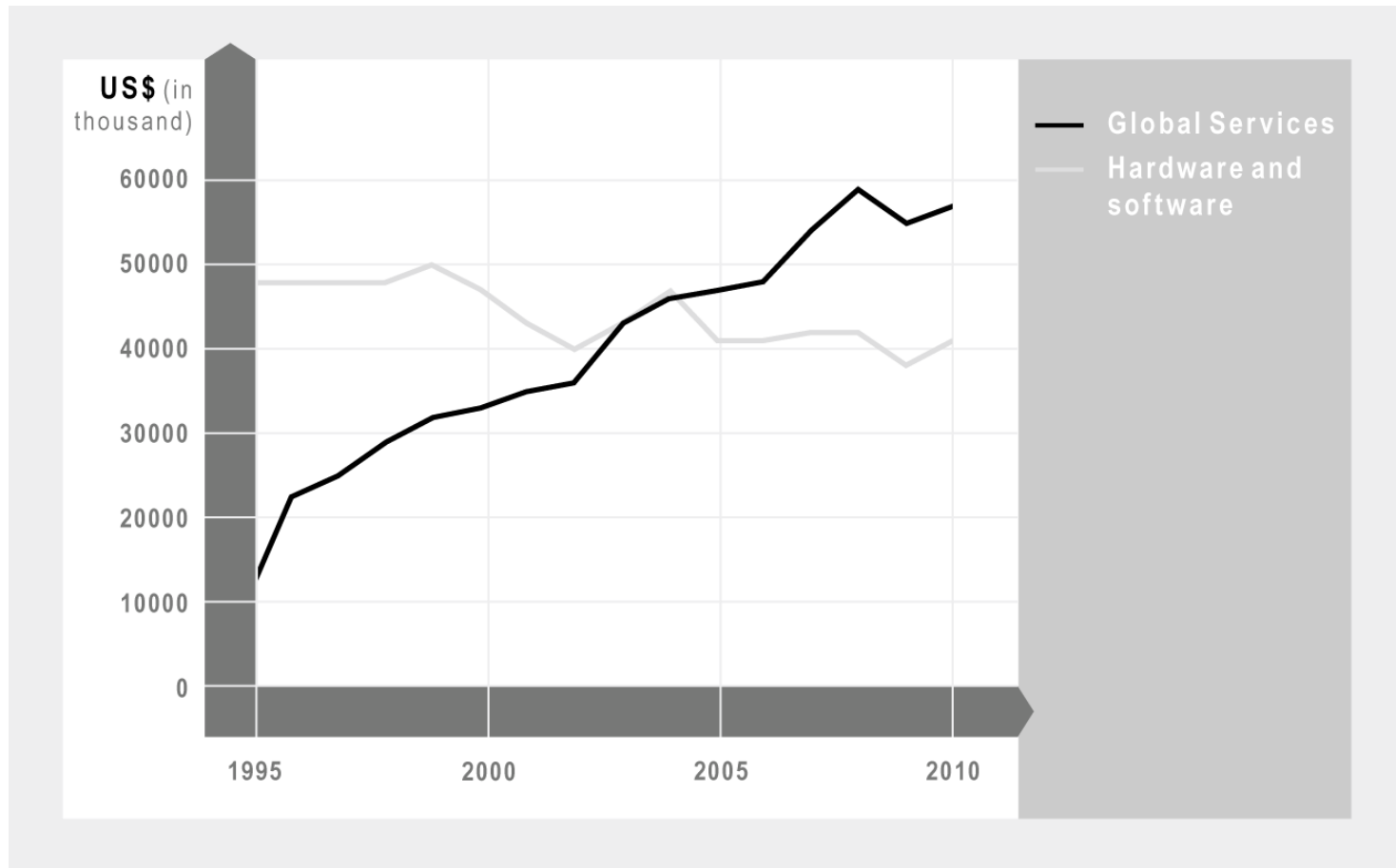
Price abuses – a business perspective

Summary and policy proposals

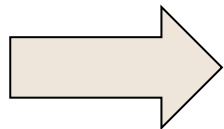
Price abuses – a business perspective

- As pointed out forcefully by Röller (2007) *“if there was no possibility to ever exploit ones market power, there would be no incentive to compete. Thus, pro-competitive behavior must also involve exploitation”*
- If one talks to CEO's their **focus is often broader**
- For instance consider technology centered manufacturing firms, e.g. **IBM mainframe computers**
 - In good old times: **entry barriers related to technology**; B2B customers paid a relative low price for primary product and where exploited thereafter in the **aftermarkets**
 - ↔ see current IBM Maintenance abuse of dominance case
 - New **B2B customers do not accept this pricing structure anymore** – China enforces aftermarkets to be open to third-parties
 - risk of imitation and entry in primary market!
 - Firms have to reinvent themselves and search for new competitive advantages in market segments protected against imitation
 - IBM moved into **“complex service solution”**, blending IT with consulting skills
 - IBM Global Business solutions has become the **world largest consultancy!**

Price abuses – a business perspective (continued)



Source: Olaf Plötner (2012): Counterstrategies in Global Markets. Palgrave Macmillan, NY

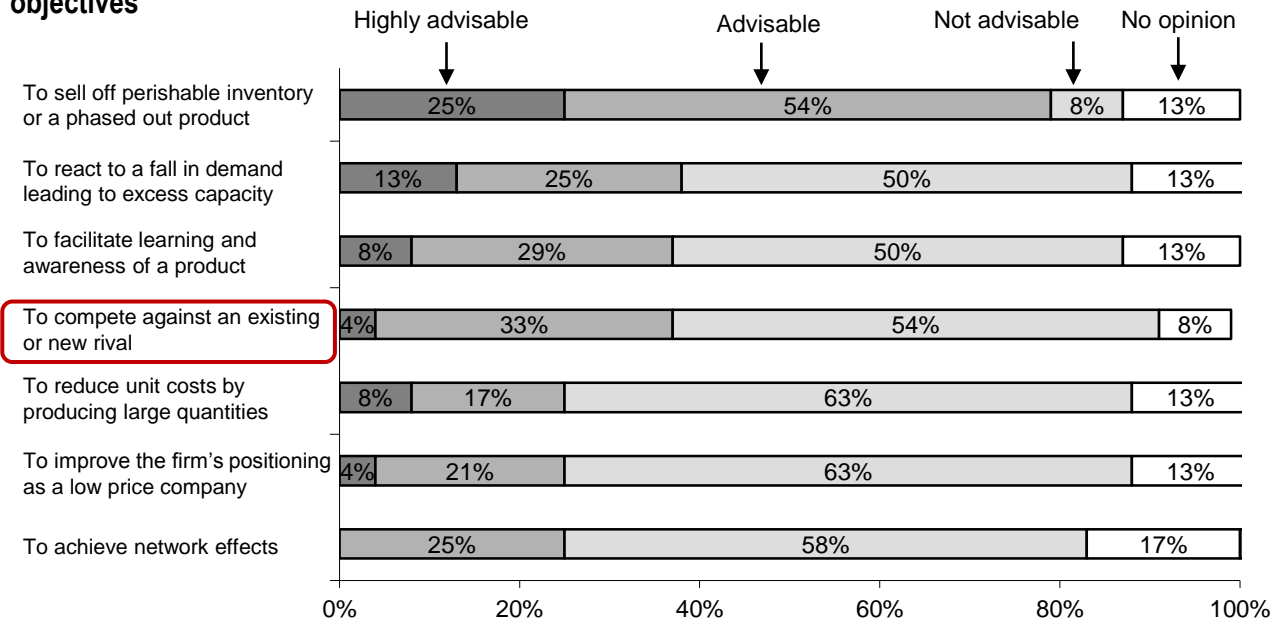


IBM Maintenance abuse of dominance case is a “battle of the past”

Price abuses – a business perspective: results of a survey

- Very aggressive pricing has been observed by 64% of respondents
- Even though all respondents worked for large companies, 29% stated they had observed a small or medium company pricing very aggressively
- Very aggressive pricing has many motives; rivalry is one of them but not the most relevant one

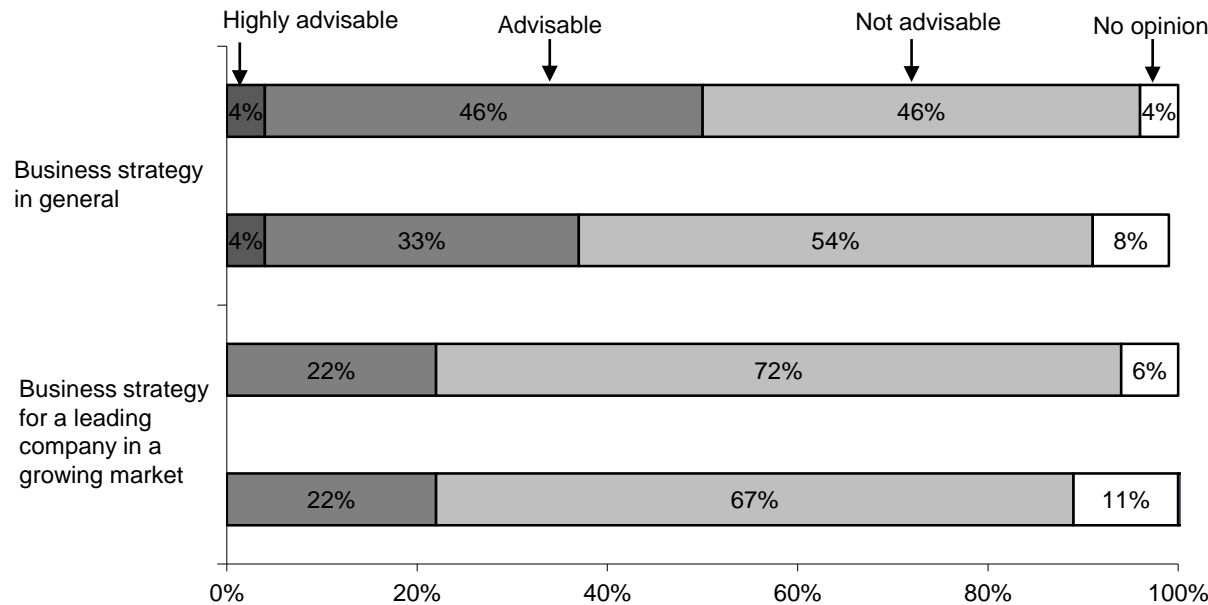
Figure: Respondents' rating of how advisable they regard very aggressive pricing as a business strategy in general to achieve specific objectives



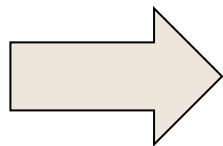
Source: E.CA Economics.

Business perspective – results of a survey

Figure: Advisability of aggressive pricing (first and third row) and very aggressive pricing (second and fourth row) as a business strategy in general and as a business strategy for a leading company in a growing market in order to compete against an existing or new rival



Source: E.CA Economics.



Aggressive as well as very aggressive pricing strategies are rated less advisable as a business strategy within a **leading company** context than as a business strategy in a general

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Summary and policy proposals

- Based on a **survey among EMBA students** we find:
 - Aggressive and very aggressive price strategies are **frequently used** in business practice
 - The **motives are diverse, often procompetitive and in line with antitrust compliance** (the strategies are rarely considered advisable for leading firms)
- Given that the EU Commission currently focuses on cases in which efficiency defences are more common, several issues require further considerations:
 - **Shall we pursue a more integrated approach towards abuse of dominance cases? How could that be implemented?**
 - **How can we “incentivize” a transparent discussion of business justifications in decisions?**
 - **Do we need a broader discussion to reconcile business and antitrust perspectives?**

Thank you!

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Cases in which the companies brought forward objective justifications

Case/ Conduct/ Sector	Objective justifications raised by the dominant undertakings
Microsoft (Commitment Decision); Tying of Internet Explorer to Windows; ICT	In the earlier case of the tying of Windows Media Player to Windows, Microsoft argued the tying <ol style="list-style-type: none"> 1. lowers transaction costs for consumers. 2. saves resources 3. makes it easier for third-party software producers to implement a functionality → increase in the value of the operating system package for end-users.
Intel (fine; under appeal); Exclusive dealing; ICT	<ol style="list-style-type: none"> 1. By using a rebate, Intel responded to price competition from its rivals. 2. The rebate system was necessary to achieve efficiencies (lower prices, scale economies, other cost savings and production efficiencies and risk sharing and marketing efficiencies).
Telekomunikacja Polska (TP) (fine; under appeal); Refusal to supply; Telecommunications	TP claimed that it had difficulties <ul style="list-style-type: none"> • to simultaneously manage several projects on many various wholesale services, • to develop proper IT systems • to find human resources to perform certain projects.
Standard & Poor's (Commitment Decision); Excessive pricing; Financial Services	Intellectual property rights over US ISIN databases and on US ISIN numbers for the use of which it is entitled to claim licensing fees.
IBM (Commitment Decision); Refusal to supply (after-markets); ICT	Intellectual property rights with regard to some inputs required to provide maintenance service to IBM mainframes.

Enforcement activity of DG Comp – List of decisions between 2009 and now

- 37.990 Intel
- 38.636 Rambus
- 39.315 ENI
- 39.316 GDF foreclosure
- 39.317 E.ON gas foreclosure
- (39.351 Swedish Interconnector)
- 39.386 Longterm electricity contracts in France
- 39.402 RWE Gas foreclosure
- 39.525 Telekomunikacja Polska
- 39.530 Microsoft (tying)
- 39.592 Standard and Poor's
- 39.692 IBM – Maintenance service

Enforcement activity of DG Comp – List of Openings of proceedings between 2009 and now

- 39.230 Reel / Alcan
- 39.523 Slovak Telekom
- (39.612 Perindopril (Servier))
- 39.654 Reuters Instrument Codes
- 39.678 / 39.731 / 39.915 Deutsche Bahn I – III
- 39.727 CEZ
- 39.740 Foundem / 39.768 Ciao / 39.775 1plusV / Google
- 39.759 ARA foreclosure
- 39.839 Telefonica and Portugal Telecom
- 39.840 The MathWorks
- 39.939 Samsung – Enforcement of ETSI standards essential patents
- 39.985 Motorola – Enforcement of ETSI standard essential patents
- 39.586 Motorola – Enforcement of ITU/ISO/IEC and IEEE standard essential patents