

SOME EXPERIENCE FROM OVERSEAS

**Joint DOJ/FTC hearings on single-firm conduct
12 September 2006**

Margaret Bloom

Visiting Professor, King's College London

Senior Consultant, Freshfields Bruckhaus Deringer

Overview

- Should all jurisdictions have the same approach?
- Action to increase convergence worldwide
- Some lessons from EC Article 82 review

Should all jurisdictions have the same approach?

- Would this maximize consumer welfare?
- Are different approaches justified by different market structures eg former state owned monopolies? Smaller national markets?
- Are they justified by whether enforcement is by administrative agencies or by courts?
 - Impact of treble damages suits
- Or do they just reflect different judgments on the right balance between false negatives and false positives?

Action to increase convergence worldwide

- By ICN, OECD, U.S. agencies and others
- Training and sharing experience
 - Success of International Cartel Enforcers Workshops
 - ICN Investigative Techniques for Mergers Workshop
- Guidelines
 - ICN Merger Guidelines Workbook
 - How do others learn easily about US approach?
 - ABA “strongly encourage” EC to issue A82 guidelines
- Staff exchanges?

Some lessons from Article 82 review (1)

1. Need clarity on objectives ie enhancing consumer welfare and efficiency
 - Much EC case law influenced by “protecting the structure of competition” and “the rights and opportunities of market operators”
2. Plausible theory of consumer harm should be required for intervention: actual or likely harm
3. Avoid overly complicated rules
4. Efficiency benefits should be assessed as part of the analysis of conduct rather than a limited defence

Some lessons from Article 82 review (2)

5. Use safe harbors rather than presumptions of dominance/monopoly power or abuse eg
 - Low market share cannot have substantial market power. But high market share cannot safely presume firm has substantial market power
 - Assuming can define market!
 - Price > AAC for loyalty discounts and predation
6. Should not be too easy to find a firm is dominant or has monopoly power
 - Should follow US rather than EC approach

Some lessons from Article 82 review (3)

7. Avoid “abuse shopping”

- Need same tests and cost benchmarks for similar economic effects eg
 - Predation and loyalty discounts
 - Margin or price squeeze, predation or refusal to deal

8. May need more than one test of harm to cover different types of exclusionary conduct

- If so, need clarity on which one to use when
- If only one, prefer no-economic-sense to equally-efficient-competitor