

# **LAW AND ECONOMICS: THE CASE FOR BUNDLING**

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## On form and effect

“Legal presumptions that rest on formalistic distinctions, rather than actual market realities, are generally disfavored in antitrust law.”

- US Supreme Court in *Kodak v ITS* (1992)

# EC competition policy development

- ▶ anti-competitive agreements: ✓
- ▶ mergers: ✓
- ▶ abuse of market power: ?

# Abuse of dominance: current issues

- ▶ form v effect?
- ▶ EC v US?
- ▶ underlying principles?
- ▶ role of economics in rules of law?

# What is abuse?

- ▶ special responsibility of dominant firm not to distort competition
- ▶ recourse to methods other than normal competition / competition on the merits
- ▶ objective concept (so intent not necessary)

# Fundamental questions about abuse

What is

- ▶ undistorted competition?
- ▶ normal competition?
- ▶ competition on the merits?
- ▶ (unlawful) exclusionary conduct?

## Need for underlying principles

- ▶ avoid *ad hocery* and inconsistency
- ▶ help predictability
- ▶ align law with its economic purpose
- ▶ anchor case analysis in economic principle (cf theory)

## Underlying principles: candidates

- ▶ sacrifice test
- ▶ as-efficient competitor test
- ▶ consumer harm test
- ▶ can all be seen in EC case law (e.g. on predatory pricing and margin squeeze) ...

## Develop a structured approach

- ▶ ... but (limited?) case law generally needs consistent development
- ▶ develop, in guidelines and casework, a structured approach for assessing case facts in relation to (alleged) abuses
- ▶ anchor in economic principles helps achieve consistency and avoid “category-shopping”

## What about legal certainty?

- ▶ plenty of scope for more of both economic principle and legal certainty
- ▶ complements not substitutes
- ▶ the law-and-economics bundle should (on the merits) eliminate *per se* approaches to abuse of dominance

## Greek ECJ reference: Syfait v GSK

- ▶ specific context: price-regulated pharmaceuticals
- ▶ is output restriction by dominant firm to stop parallel trade *per se* abusive?
- ▶ if not, is (limited) consumer harm relevant when balancing interests?

## What next?

- ▶ EC law and practice on types of abuse needs stronger basis in economic principle
- ▶ which needs to be practical in application
- ▶ *initiative* cannot lie with courts
- ▶ so must be seized by DG Comp (& NCAs)
  - guidelines
  - casework