

# How Much more Economic is the New Approach?

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- I. What makes an approach economic and can it be found in the communication?
  - II. More economic than what?
  - III. Tentative balance sheet

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## I. What makes an approach economic and can it be found in the communication ?

- A. Consensus about economic orientation
- B. Other possible characteristics

## A. Consensus about economic orientation

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- Effects-based
- Consumer-welfare oriented
- Efficiency is good

## B. Other possible characteristics

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- Market power matters
- Strategy matters
- Incentives matter

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- Basic values endorsed by economic discourse and basic features of economic reasoning are to be found in the communication

## II. More Economic than What?

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- Previous approach by the Commission
- Consultation paper
- EAGCP report
- Case law

### III. Tentative balance sheet

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- A. More economic (than case law, than previous practice)
- B. Less economic (than expected)



## A. More economic

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- Scenario approach
- Theory of harm
- Higher standard of proof
- As efficient competitor test

## Standard of proof

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“For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is *capable of* having that effect”.

Michelin II, para. 239

« The Commission will normally intervene under Article 82 where, on the basis of *cogent and convincing evidence*, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure »

Communication, para. 20

## Let's have a dream

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Community judicature [...] can in particular ascertain whether the factual information on which such assessments are based is accurate and whether the conclusions drawn as to fact are correct;  
whether the Commission undertook a thorough and painstaking investigation, and in particular whether it carefully inquired into and took sufficiently into consideration all the relevant factors;  
and whether the various passages in the reasoning developed by the Commission in order to arrive at its conclusions in respect of **the legality of conduct by a dominant firm with regard to article 82 EC** satisfy requirements of logic, coherence and appropriateness

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“Such a review is all the more necessary in  
the case of a prospective analysis”

AG Tizzano, Opinion in Case C-12/03 P,  
Commission/Tetra, points 88\* and 111.

\* With minor alteration

## A. More economic

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- Scenario approach
- Theory of harm
- Higher standard of proof
- **As efficient competitor test**

## As efficient competitor test

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- Highlight (+1)
- Accepted by CFI in Deutsche Telekom (Case T-271/03) (+0)
  - legal certainty (Deutsche Telekom, para. 192) (+1)
  - Kant-compatibility
- Restricted scope: why? (-0,5?)
- Qualifications (-1?)

## B. Less economic

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1. Extensive notion of consumer welfare
2. Intention plays a role



## 1. Extensive notion of consumer welfare

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### **Price increase**

« "increase prices" includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers »

Communication, para. 11

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- Not anti-economic
  - Need for more empirical studies on consumer preferences

## B. Less economic

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1. Extensive notion of consumer welfare
2. **Intention plays a role**

## Intention

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- Critics say intention should not play a role
  - Posner's argument: evidence of intention can easily be manipulated
  - True but not decisive
    - Other types of evidence can be manipulated too
    - Decisive only as long as intention is the key test of abuse
    - Certainly problematic now

« for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing »

Michelin II, para. 241

- Argument about evidence is less decisive if intention is only one element
- as is the case in the scenario approach (intention, effects, incentives)
- Intention is the legal concept through which strategic analysis can be brought in
- Can be a vehicle for economic approach

## Conclusion

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- Overall score?
- Game is not over yet
- Courts are up
  - Tetra-type of control can make the new approach substantially more economic
  - Communication is inviting it