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
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

- Effects-based
- Consumer-welfare oriented
- Efficiency is good
B. Other possible characteristics

- Market power matters
- Strategy matters
- Incentives matter
Basic values endorsed by economic discourse and basic features of economic reasoning are to be found in the communication.
II. More Economic than What?

- Previous approach by the Commission
- Consultation paper
- EAGCP report
- Case law
III. Tentative balance sheet

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

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

“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

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.
“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

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

- 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

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

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

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

- 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

- 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