

Insight

Newsflash

Publication of the Commission's Guidance Paper on Exclusionary Abuses under Article 82 EC

■ BACKGROUND

Today, the European Commission published a Communication containing its long-awaited Guidance Paper on exclusionary abuses under Article 82 EC.¹

The Guidance Paper follows the publication in December 2005 by DG-COMP of a Staff Discussion Paper,² which suggested possible methodologies for the assessment of some of the most common exclusionary abusive practices, such as refusal to supply, tying, and rebates.

A more economic approach to Article 82 EC has been needed for two main reasons:

- the combination of the relative ease of a finding of dominance together with the “special responsibilities” imposed upon dominant companies under Article 82 EC, essentially amount to a condemnation of dominance itself; this is a serious problem and can result in over-cautious behaviour that may not promote consumer interests;
- some of the cases of exclusionary abusive behaviour under EC competition law are out of line with modern economic thinking.

While the Guidance Paper goes some way towards remedying these problems and the Commission does say that it will focus on conduct that is “most harmful to consumers”, at the same time it puts emphasis on “safeguarding the competitive process” and on ensuring that competitors are not excluded. Time will tell whether the Commission will continue to enforce a more process-oriented or a more consumer welfare-oriented competition policy. In any event, the intention is that the approach to Article 82 cases should be less formalistic and more economic or “effects-based”.



White & Case LLP, Brussels has been involved in many of the landmark Article 82 cases, notably in the field of intellectual property and refusals to supply. As antitrust enforcement becomes global and Article 82 is mirrored in other jurisdictions such as China, we work with colleagues in the US, Asia and elsewhere to ensure the comprehensive representation of our clients.

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¹ Commission Communication – Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, available at <http://ec.europa.eu/comm/competition/antitrust/art82/guidance.pdf>.

² DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

■ SUMMARY OF THE GUIDANCE PAPER

In contrast with the 2005 Discussion Paper, the new Guidance Paper is not a summary of how the law currently stands; rather, it is a statement of what the Commission considers its enforcement priorities to be over the following years. Thus, the existing case law on Article 82 EC stands, as the Community Courts will continue to consider such case law as binding, irrespective of what the Commission defines as its priorities. Even if the latest Guidance Paper proves to be influential with national competition authorities, it is possible that these authorities may feel bound to follow the more formalistic approach based on existing case law. This risk may be even more present with regard to national courts, which must otherwise find a way to differentiate a case before them from an apparently binding position taken by the European Court. So it remains to be seen what impact this document will have outside Brussels.

The Guidance Paper's ambitions are scaled back compared to the approach when reform of Article 82 EC was first raised in the 2005 Discussion Paper. In addition, it relies less on economic and legal jargon, and is, accordingly, a more accessible document.

The main points can be summarised as follows:

- Dominance cases will be investigated where market shares are above 40 percent, but action even in cases of lower market shares should not be a surprise;
- Where abusive conduct has led or "is likely to lead" to anticompetitive foreclosure, the Commission will act "on the basis of cogent and convincing evidence";
- In reaching its decision, the Commission will examine direct evidence of any exclusionary strategy, including internal documents which may be helpful to interpret the dominant company's conduct; in other words, the intention of a company will matter;
- The stronger the dominant company in terms of market share, the higher "the likelihood" that conduct may lead to anticompetitive foreclosure; although the Commission does not come out and

say it, it will be more proactive in situations of "super-dominance";

- There may be circumstances where it may not be necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is anticompetitive; examples of such conduct include: preventing customers from testing a competitor's products; paying distributors to delay the introduction of a rival's product; or undermining single market integration; again, the Commission may not spell it out, but this is reminiscent of a *per se* approach;
- As for the potential justifications on which a dominant company may rely, the Guidance Paper indicates that the company must show to a "sufficient degree of probability" that (i) efficiencies have been/are likely to be realised as a result of its conduct; (ii) its conduct is indispensable; (iii) the likely efficiencies will outweigh any likely negative effects on competition and consumer welfare; and (iv) its conduct does not eliminate effective competition, i.e. does not eliminate most sources of potential competition. In other words, as in the 2005 Discussion Paper, the Commission imports into Article 82 EC the four conditions of Article 81(3) EC. That may make the objective justification defence more systematic, but it makes it more difficult to succeed.

■ TREATMENT OF SPECIFIC ABUSES

Exclusive dealing and rebates

The 2005 Discussion Paper considered that potentially loyalty-enhancing rebate schemes were not *per se* abusive. In addition, it appeared to champion a more economic approach to the analysis of potentially loyalty-inducing rebates. However, the Commission also continued to advocate certain formalistic principles of analysis. The new Paper appears to follow the Discussion Paper in this.

The Commission first espouses several "bright line" rules and methods of empirical analysis based on specific cost benchmarks with which to analyse whether parties' rebate systems are abusive. The Commission maintains the view expressed in the Discussion Paper that individualised rebate systems are presumed to be

foreclosing and that standardised systems are less problematic. The statement is set out immediately after the Commission lists certain economic criteria on which it will assess a rebate system's foreclosing effects.

In terms of making this complicated area more predictable, the Guidance Paper is only a modest improvement. It is difficult to see how a company might work out whether it is above or below the Commission's cost-based thresholds by replicating the Commission's assessment criteria, at least not without incurring significant cost. Elements such as the "relevant range", the "contestable" and "non-contestable" share and the "effective price" appear difficult to assess quickly and efficiently as part of a company's efforts to design compliant rebate strategies. Two questions remain: (i) how can a company predict the Commission's assumptions in these areas, and (ii) if it cannot do so accurately, should the company fall back on the previous system of arbitrary guidelines and rigid *per se* rules? That would be unfortunate, as the Commission has already implicitly acknowledged that such formalistic approaches potentially chill advantageous price-competition, and the aim is to move away from that.

Tying and bundling

As to companies' tying and bundling practices, the Commission limits its analysis to the risk of foreclosure. Tying refers to a situation where customers of one product (tying product) are required to purchase another product (tied product) whereas bundling refers to the way products are offered and priced by the dominant company. The Commission states that companies dominant on the market for the tying products would commit an abuse by engaging in these common practices where the tying and tied products belong to different markets and the practice leads to foreclosure.

The Commission suggests that a lasting tie produces a greater foreclosure effect than a temporary tie. As such, technical tying is particularly foreclosing of competition because of its irreversible nature. The Commission also proposes that where a party holds a dominant position in a greater number of products within a bundle, the larger would be the foreclosure effect, especially if competitors would have difficulties in replicating such a bundle. In relation to multi-product rebates, the Commission considers such rebates in parallel with its rebating analysis (discussed below). Where a company offers a bundled price that results in the individual products

being offered at below the long run average incremental cost of the bundle's individual components, then it is likely such a pricing strategy will result in foreclosure. The Commission also mentions that it may consider the existence of efficiencies such as savings in production or distribution costs, provided that they benefit consumers.

Predatory pricing

There is no doubt that the Guidance Paper has helpfully moved away from a formalistic price-cost analysis to a more effects-based approach. The definition of predatory pricing is now wholly effects-based, with a new term of "sacrifice", deliberately incurring losses or foregoing profits in the short term, so as to actually or be likely to lead to the foreclosure of one or more actual or potential competitors.

Pricing below Average Avoidable Cost is a presumed sacrifice. Other indications may also be considered, such as the existence of a predatory strategy as compared with other economically rational and practicable alternatives. On a more critical note, it is not clear whether the Commission will always investigate the possibility of anticompetitive foreclosure – instead, only if sufficient data is reliable will the Commission apply the "as efficient competitor" analysis. The Guidance Paper gives some examples of alternative behaviour that may signal predatory pricing. Similarly, the Commission's explanation of when consumer harm will demonstrate likely foreclosure effects and when the dominant firm could in fact return to competitive pricing is also confusing. The new Paper has lost an opportunity to clearly state the Commission's approach to predatory pricing sacrifice and recoupment.

Refusal to supply

The Guidance Paper deals with refusal to supply and margin squeeze abuses together. In reality, it mainly refers to refusal to supply. Interestingly, the Commission here departs from the scheme followed in the 2005 Discussion Paper. In the latter, the Commission had distinguished between (a) discontinuation of supplies, (b) refusal to supply a new customer with an indispensable input, and (c) refusal to license an intellectual property right. There was a graduation in this distinction in that the conditions for antitrust intervention were more permissive in the first case (it need only be shown that the customer risked elimination), narrow in the second case (the denied input must also be indispensable) and very stringent in the

latter case (in addition to the above, the refusal to license must block the emergence of a new product for which there is consumer demand).

This is now all in the past. The Commission, heartened by its *Microsoft* victory, now follows a different approach: For all cases of refusal to supply, the conditions are the following: (a) the refusal must relate to a product or service that is objectively necessary or indispensable (the two terms are used interchangeably) for a competitor to be able to compete effectively on a downstream market; (b) the refusal is likely to lead to the elimination of effective competition on the downstream market; (c) for consumers, the likely negative consequences of the refusal outweigh over time the negative consequences of imposing an obligation to supply in the relevant market. The last condition echoes essentially the Commission's balancing test in its *Microsoft* Decision. It is noteworthy that the third condition seems to depart substantially from the ECJ's ruling in *IMS Health* and even from the CFI's ruling in *Microsoft*. Prevention of the emergence of a new product (per *IMS Health*) and even prevention of follow-on innovation (per *Microsoft*) are only considered by the Commission as mere indicative examples of the third condition, which the Commission calls "consumer harm".

Of course, the Commission does not purport to state the existing case law – this is after all guidance on the *Commission's enforcement priorities*, but the watering down of the test will be of concern to potentially dominant undertakings. Further, the Commission appears to apply a negative presumption for

discontinuation of supply cases. In such cases, the Commission states that it is more likely to find that the indispensability condition is satisfied in favour of a finding of abuse and that there is no credible efficiency defence.

■ CONCLUSIONS

The new Article 82 Paper can be seen as an attempt by the Commission to "occupy the ground on the international scene" by providing an alternative to recent proposals by the US Department of Justice, which some European officials have warned may weaken antitrust enforcement. Such warnings were partially echoed by the US Federal Trade Commission and highlighted a deep split in the attitude of US regulators towards conduct by companies with significant market power. The election of Barack Obama may result in a change of direction at the Department of Justice and this may stiffen the resolve of the authorities to pursue dominant companies for abusive exclusionary conduct on both sides of the Atlantic. Time will tell whether European and US enforcers are converging towards a middle ground, with Europe abandoning formalism and the US becoming slightly more interventionist. What remains true, however, after the publication of this Guidance Paper, is that when it comes to refusals to supply and compulsory licensing, the gap between the US and the EU may even be widening.