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Article 82 Guidance Paper – *Something Old, Something New...*

On 3 December 2008, the European Commission (**"Commission"**) published its Guidance Paper on the application of Article 82 EC Treaty (**"Article 82 EC"**) to exclusionary abuses of a dominant position (the **"Guidance Paper"**).[1]

The Commission says that the Guidance Paper will introduce a more "effects-based approach" to Article 82 EC, which means "protecting competition and consumer welfare, not individual competitors who do not deliver to consumers".

On the one hand, "dominant companies should be free to compete aggressively as long as this competition is ultimately to the benefit of consumers" the Commission says.[2] On the other, the Guidance Paper "should leave dominant undertakings in no doubt that they will find the Commission in their way wherever their conduct risks increasing prices, limiting consumer choice or dissuading innovation".[3]

1 Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings. This is a draft text; the final text will only be adopted after legal linguistic revision. The final text will be published in the Official Journal in all EU languages.

2 Commission MEMO/08/761.

3 Commission press release IP/08/1877.

The Guidance Paper outlines the analytical framework to assess certain forms of exclusionary conduct (such as exclusive dealing, rebates, tying and bundling, predatory pricing, refusal to supply and margin squeeze). It is not binding on the Commission. Only time will tell the extent to which the national competition authorities, in particular the national courts, are influenced by the Commission's apparently more effects based approach.[4]

The Guidance Paper largely draws from recent high-profile cases, such as *British Airways* (exclusive dealing and rebates),[5] *Microsoft* (refusal to deal and tying),[6] *Wanadoo* (predatory pricing),[7] and *Deutsche Telekom* (margin squeeze).[8] It contains a few novel issues, which will have to be tested against the facts of each case. However, overall the Guidance Paper is a missed opportunity, because it contains little practical guidance for dominant companies as to what they can do without infringing Article 82 EC.

Background

It is the first time that the Commission has issued Guidance on the application of Article 82 EC to bring it into line with economic thinking in the same way as it has done with Article 81 EC (prohibiting anti-competitive agreements)[9] and merger control rules.

The Guidance Paper follows a period of public consultation of over three years,[10] which began in 2005 with a reflection on the policy underlying Article 82 EC and the way in which the Commission should enforce it.[11] In the same year, the Commission published a Staff Discussion Paper.[12] More than one hundred written comments were submitted from various stakeholders,[13] some of which were discussed at a public hearing in June 2006.[14]

The Guidance Paper is only concerned with exclusionary (Article 82(b) EC) and tying (Article 82(d) EC) abuses; it does not address exploitative abuses (Article 82(a) EC) and abusive discrimination (Article 82(c) EC). In addition, it does not touch upon some of the most controversial topics discussed in the previous Discussion Paper (see **Correlation Table** opposite).

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4 National competition authorities are empowered under Regulation 1/2003 to apply Article 82 EC. They have provided their comments on previous drafts of the Guidance Paper through the ECN (European Competition Network).

5 Case T-219/99 *British Airways v Commission*. Case C-95/04 P on appeal.

6 Case T 201/04 - *Microsoft Corp. v Commission*, not yet reported.

7 Case T-340/03, *France Tèlècom v Commission*. Case C-202/07 P on appeal.

8 Case T-271/03 *Deutsche Telekom v Commission*. Case C-280/08 P on appeal.

9 All the current Article 81 EC Guidelines can be viewed at: http://ec.europa.eu/comm/competition/antitrust/legislation/legislation.html. On 4 December 2008, the Commission launched a public consultation on the functioning of the current regime for the assessment of horizontal cooperation agreements under Article 81 EC, in particular the Specialisation and Research & Development Block Exemption Regulations and the Horizontal Guidelines.

10 See for background information: http://ec.europa.eu/comm/competition/antitrust/art82/index.html.

11 The broad lines of that reflection were set out by Competition Commissioner Neelie Kroes in her speech of 23 September 2005 to the Fordham Corporate Law Institute (SPEECH/05/537).

12 See: http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

13 See: http://ec.europa.eu/comm/competition/antitrust/art82/contributions.html.

14 See: http://ec.europa.eu/comm/competition/antitrust/art82/hearing.html.

Topic	Discussion Paper	Guidance Paper
Relationship between Article 82 EC and other provisions (e.g., IPRs)	☒	☐
Market definition	☒	☐
Single firm dominance	☒	☒
Collective dominance	☒	☐
"Antitrust foreclosure"	☒	☒
Presumption of foreclosure	☒	☐
Special considerations for pricing-related abuses	☒	☒
Abuse of collective dominance	☒	☐
Objective necessity defence	☒	☒
Meeting competition defence	☒	☐
Efficiencies defence	☒	☒
Exclusive dealing and rebates	☒	☒
Tying and bundling	☒	☒
Predatory pricing	☒	☒
Refusal to supply and margin squeeze	☒	☒
Refusal to license IPRs	☒	☐
Aftermarket	☒	☐

It is open to debate whether such omissions reflect the Commission's view that such topics are not priority concerns, or were just too difficult to reach an agreement on.

Outline of the Guidance Paper

The Guidance Paper follows a step-by-step framework that the Commission intends to apply when assessing whether to pursue a particular type of conduct:

- **Step 1 – Dominance**: is the undertaking in a dominant position?
- **Step 2 – Anticompetitive foreclosure:** is the dominant company's conduct likely to restrict competition and harm consumers? (Special considerations apply to pricing-related abuses).
- **Step 3 – Objective justification and efficiencies**: is the conduct likely to create efficiencies which outweigh its alleged anti-competitive effects?

The Guidance Paper explains how this general framework will be applied to specific forms of abuse.

Step 1 – Dominance

The Guidance Paper defines dominance, in the wording of the established case law, as "*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*" over a period of time.[15] In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative.[16] Accordingly, as a general rule, the Commission will take into account all the relevant factors before reaching a conclusion in Step 1.

The Guidance Paper identifies the following factors as particularly relevant:

- **market shares** of the allegedly dominant company and its competitors. Here, the Commission concedes that a company with less than a 40% share of the relevant market is unlikely to be dominant. This is a major difference from the Discussion Paper, where the market share threshold below which a dominant position was considered unlikely was much lower (i.e., 25%). In addition, the Guidance Paper no longer contains any positive presumption of dominance above a certain market share threshold, whereas the Discussion Paper had suggested that an undertaking holding 50% or more of the relevant market may be presumed to be dominant. However, the Guidance Paper stops short of setting a "safe harbour" for companies with a market share below 40%.
- credible threat of future **expansion** by actual competitors or **entry** by potential competitors. Barriers to expansion or entry can take various forms such as legal barriers e.g. tariffs or quotas, or advantages e.g. economies of scale and scope, access to essential input, important technologies or an established distribution and sales network. However, contrary to what was suggested in the Discussion Paper, the Guidance Paper no longer mentions intellectual property rights (**"IPRs"**) as a barrier to entry.
- countervailing **buyer power**, which must relate to the market as a whole for it to be effective, and not just benefit one group of customers. However, the Guidance Paper fails to state that buyer power needs to be examined in its specific market context. Examples of the problems concerning the assessment of buyer power relative to particular sectors include: the grocery retailing[17] and the pharmaceutical sectors respectively.[18]

15 See Case 27/76 *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207, para. 65; and Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 38.

16 Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207, para. 65 and 66; Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, para. 47; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, para. 90.

17 Commission's Green Paper on Vertical Restraints, para. 233.

18 Cases C-468/06 and C-478/06, *Sot. Lelos Sia EE and others v GlaxoSmithKline AEVE.*

Step 2 – Anticompetitive foreclosure

Following a finding of dominance, the Commission will assess whether the alleged abuse hampers or limits "effective access of actual or potential competitors to supplies or markets", to the detriment of consumers. This concept of abuse is defined as "anticompetitive foreclosure" throughout the Guidance Paper and it is reminiscent of the *Microsoft* judgment,[19] in which the European Court of First Instance (**"CFI"**) found that: "Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure".

The Guidance Paper clearly states that the Commission will only intervene on the basis of cogent and convincing evidence that the allegedly abusive conduct *is likely to* lead to anti-competitive foreclosure effects. The Commission does not need to establish that the dominant company's conduct actually harmed competition. The factors listed as relevant to the assessment of the likelihood of anticompetitive foreclosure are as follows:

- the strength of the dominant company;
- barriers to entry and expansion in the relevant market;
- the position of competing companies, customers and suppliers;
- the extent of the conduct in terms of duration and sales affected;
- any evidence of actual foreclosure; and
- any evidence of intent.

The last two factors are problematic.

As possible evidence of actual foreclosure, the Guidance Paper mentions the rise of the dominant company's market shares or its competitors exit from the market. However, there may be alternative reasons, other than the dominant company's conduct, for these two events.

As possible evidence of intent, the Guidance Paper mentions internal documents indicating a strategy to exclude competitors. However, it is established case law that abuse is an objective concept, mere intention, without more, does not amount to an abuse. For there to have been an abuse there must have been conduct that was actually implemented and capable of having the effect of restricting competition.[20] In general, intention has only been relevant in a narrow category of predatory pricing cases (e.g., *Akzo*,[21] and *Wanadoo*[22]). Going forward, companies should therefore be particularly careful in their drafting so as to ensure that their documents do not contain language that is open to misinterpretation.

19 Case T 201/04 - *Microsoft Corp. v Commission*, not yet reported.
20 Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, para. 239-245.
21 Case 62/86 *Akzo Chemie v Commission* [1991] ECR I-3359.
22 Case T-340/03, *France Tèlècom v Commission*. Case C-202/07 P on appeal.

Special test for pricing-related abuses

For pricing-related abuses, the relevant test for a finding of anticompetitive foreclosure will be the "as efficient competitor" test, in line with the recent *Deutsche Telekom* case.[23] Accordingly, the Commission will use the dominant company's own charges and costs, rather than those of actual or potential competitors, to check whether the dominant company is pricing above or below cost.

Step 3 – Objective justification and efficiencies

Assuming that the Commission has found that a company has likely abused its dominant position, it will be for the dominant company to put forward claims that its conduct is justified, either because it is "objectively necessary" (for example, for health and safety reasons) or on the ground of efficiencies. In this respect, the analysis is very similar to that under Article 81(3) EC. Accordingly, the dominant company will have to demonstrate the following cumulative conditions are met:

- the efficiencies result from the conduct;
- the conduct is indispensable for the efficiencies;
- the efficiencies outweigh any long term anti-competitive effects; and
- the conduct does not eliminate all competition in the market.

The burden of proving the efficiencies lies with the dominant company. It then falls on the Commission to make the ultimate assessment, weighing the negative effects against the claimed efficiencies. A notable omission in the Guidance Paper is any reference to the extent to which potentially abusive conduct may be justified on the grounds that it is necessary to protect a dominant company's commercial interest,[24] such as the limitation of parallel trade in the pharmaceutical sector.[25] However, the Guidance Paper is helpful to the extent that it sets out the specific efficiencies that may result from the specific forms of abuse.

Specific forms of abuse

The Guidance Paper explains how the above general framework is applied to specific forms of abuse, and lists some additional factors in respect of each of them.

23 Case T-271/03 *Deutsche Telekom v Commission*. Case C-280/08 P on appeal.

24 Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207.

25 Opinion of Advocate General Jacobs in Case C-53/03, *Syfait v GSK*, and Opinion of Advocate General Ruiz-Jarabo in Cases C-468/06 and C-478/06, *Sot. Lelos Sia EE and others v GlaxoSmithKline AEVE*.

Exclusive dealing and rebates

The Commission's concerns focus on long-term exclusive dealing arrangements. In general, the longer the duration of the exclusivity obligation, the greater is the likely foreclosure effect. However, exclusive purchasing arrangements in which the dominant company is an unavoidable trading partner may be problematic regardless of their duration. Similarly, conditional rebates may have foreclosure effects. In particular, the Commission is concerned with retroactive and individualised rebates. However, rather than a *per se* rule, the Commission will look at whether the price is below the average avoidable cost, and where it is higher, other factors will be taken into account. Standardised rebates are less likely to be found anti-competitive, except in certain circumstances.

Tying and bundling

The Commission will normally take action when an undertaking is dominant in the tying market (but not necessarily in the tied market) and where, in addition, the following conditions are fulfilled:

- the tying products are distinct products; and
- the tying practice is likely to lead to anticompetitive foreclosure.

In the case of tying, anticompetitive foreclosure is more likely to occur where the dominant company makes its tying strategy a lasting one, for example through technical tying which is costly to reverse. In the case of bundling, the greater the number of products in the bundle the stronger the likely anticompetitive foreclosure. This test is controversial, particularly for innovative products or those involving technological integration, where customer demand is dynamic.

In the case of a multi-product rebate, anticompetitive foreclosure is likely to occur only if the rebate is so large that "as efficient competitors" offering only some of the components cannot compete against the discounted bundle. This test is similar to a predatory pricing test.

Predatory pricing

The Commission will generally intervene where there is evidence showing that a dominant company deliberately incurred losses or forewent profits in the short term (referred to as "sacrifice" throughout the Guidance Paper), so as to foreclose one or more of its competitors in the long term.

The concept of sacrifice encompasses not only pricing below average avoidable cost, but also certain instances of pricing above average avoidable cost, e.g. where there is evidence of predatory intent. This is in line with the *Akzo* case law.[26] However, the Commission does not clarify what other instances of pricing above average avoidable cost might be abusive.

26 Case 62/86 *Akzo Chemie v Commission* [1991] ECR I-3359.

Finally, the Guidance Paper seems to suggest that it is not necessary to show a dominant company's ability to recoup its losses after the exit of its competitors from the market. The Commission cites the *Tetra Pak* judgment as authority that such proof is not required.[27] However, it also indicates that it will consider factors related to competition on the market during the period following the predation.

Refusal to supply and margin squeeze

This is perhaps the most controversial section of the Guidance Paper, to the extent that it might lead to a lowering of the bar for a finding of abuse.

The Commission starts from the position that any company "should have the right to choose its trading partners and to dispose freely of its property". Accordingly, "intervention on competition law grounds requires careful consideration", because of the need to preserve incentives to innovate. However, the Guidance Paper also states that "typical competition problems arise when the dominant undertaking competes on the downstream market with the buyer whom it refuses to supply", without distinction as regards the subject of the refusal (goods, services, IPRs, interface information, or essential facilities).

According to the Commission, margin squeeze tactics (whereby a dominant company charges its competitors a price for an upstream input, which compared to the price it charges on the downstream market, does not allow even an as efficient competitor to trade profitably) are just another form of refusal to supply.

Against this background, the Guidance Paper sets out three cumulative factors which are likely to result in intervention against a dominant company:

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
- the refusal is likely to lead to the elimination of effective (not necessarily all) competition on the downstream market; and
- the refusal is likely to lead to consumer harm, where the negative consequences of the refusal to supply outweigh over time the negative consequences of imposing an obligation to supply.

The last balancing test is particularly difficult to reconcile with the case law on refusal to license IPRs. Under such case law, a refusal to grant access to an IPR is *per se* legal. A refusal will arguably be abusive only in exceptional circumstances. In the *IMS* judgment, the CFI found that these exceptional circumstances are:[28]

- the indispensable nature of the licensed product to exercise an activity on a neighbouring market;
- the elimination of effective competition on that neighbouring market; and
- the prevention of a new product emerging for which there is consumer demand.

27 Case T-83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II-755, upheld on appeal in Case C-333/94 P.

28 Case C-418/01 *IMS Health v NDC*.

In its *Microsoft* decision,[29] the Commission argued that the list of exceptional circumstances contained in the *IMS* judgment is not exhaustive. On appeal, the CFI found that these exceptional circumstances were satisfied in the *Microsoft* case and accordingly that it did not need to decide whether or not other factors could constitute exceptional circumstances. The new balancing test introduced by the Guidance Paper potentially opens the door for a finding that other factors could constitute exceptional circumstances, and this is likely to operate as a catch all.

Conclusion

Overall the Guidance Paper is a missed opportunity, because – if compared with the Commission's guidelines on the application of Article 81 EC – it contains little practical guidance for dominant companies as to what they can do without infringing Article 82 EC. This is disappointing given the length of time it has taken the Commission to issue the Guidance Paper (over three years).

The intention is that the approach to Article 82 EC cases should be more "effects-based" and less formalistic. Whether or not the Commission will adopt a more consumer welfare-oriented competition policy and will continue with its process-oriented approach is something that only time will tell.

Other jurisdictions across the world have recently launched a review of their antitrust rules on unilateral conduct (e.g., the US). The Guidance Paper is therefore just another piece of the jigsaw which dominant companies with global activities will have to look at when devising their commercial strategies. However, with a number of important court cases in the pipeline, the picture emerging from the jigsaw is incomplete.

The Antitrust & Competition Group has a wealth of experience representing clients in all types of competition law proceedings. If you have any questions about the above news item, or would like to discuss any aspect of your own business conduct in confidence, please contact Frances Murphy or Gillian Sproul:

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29 Case COMP/C-3/37.792.

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