

THE EC COMMISSION ARTICLE 82 GUIDANCE

Femi Alese*

Like the seasoned ball juggler, ambidexterity remains one of the greatest skills of the EC Commission's approach to handling issues pertaining to unilateral conduct of dominant firms under the controlling provisions of Article 82. Thus, in its attempt to make a clean break from the manacles imposed by the need to liberalize markets within the EU and set in place the foundation for an integrated market, the Commission provides an Enforcement Priorities Guidance (the "Guidelines") on Article 82 in which a general "effects-based" approach largely co-exists with the Community courts' renowned formalistic approach to sorting out exclusionary issues under that provision.

The Guidelines bear many uncanny resemblances to the Discussion Paper¹: however, they are much shorter, general and less ambitious. These attributes might have been designed to encourage "take-up" by various competition authorities and national competition courts within the Union – given that the Guidelines are not a statement of law and do not prejudice precedents of the Community courts. Furthermore, unlike the much criticized Department of Justice (Antitrust Division) recent report on the application of S: 2 of the Sherman Act (the "Report"), the Commission was forthright in the belief that the Guidelines will be crucial in determining its enforcement priorities. Consequently, the practical usefulness of the document is that it provides for businessmen and their lawyers a framework of analysis of the Commission's approach to Article 82 and territories upon which the Commission can tread to reject complaints and on which complainants' counsels can fight their case during the quasi-administrative stage of proceedings, while reserving different tactics for appeals to the Community courts.

The Guidelines like the Report, sets out general standards for exclusionary conduct but also provides an "overarching approach" to which the Commission will resort to in enforcing the relevant provision. Hence, although the Guidelines are divided into four sections: the last two focusing respectively on the general approach to determining exclusionary conduct and specific types of exclusionary abuse (exclusive dealing, tying and bundling, predation and refusal to supply and margin squeeze) appear to be the most important. Essentially, the third section of the Guidelines forms the "overarching approach" to the enforcement of Article 82, while the fourth, elaborates on how specific events would be tied into the "overarching approach" to provide a complete case.

* Femi Alese, Senior Research Fellow, Institute for Consumer Antitrust Studies, Loyola University Chicago Law School. He's the author of Federal Antitrust and EC Competition Law Analysis (Ashgate, 2008).

¹ See Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings – Brussels December 3 COM (2008) contrast with Discussion Paper (Brussels, December 2005) available at: <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>

Exclusionary conduct

Enforcement initiatives under the Guidelines will be approached primarily from considerations of common factors such as market power, a showing of anticompetitive conduct in non-price (“anticompetitive foreclosure”) and price-based exclusionary cases and objective justification – with the implication that the complainee-firm only fully carries the burden of justifying its conduct as legitimate after the Commission has satisfactorily proven its case. This is a distinction from the D.C Circuit’s approach in *Microsoft* favored in the Report by the DOJ (which essentially requires the plaintiff to carry the burden of showing anticompetitive effect, the monopolist to proffer ‘non-pretextual’ procompetitive justification that must not stand un rebutted or be shown by the plaintiff to carry more procompetitive benefits than anticompetitive harm) and reflects jurisdictional differences – the Commission is the judge and jury during the quasi-judicial stage of EC competition law proceedings.

The Guidelines’ approach to market power and the required general threshold of 40% market shares goes to the root of establishing dominance largely in accordance with precedents of the Community courts.² The Commission makes allusions to the position that it will consider a case for market power even where market shares dip below this level and competitors are not in a position to constrain effectively the conduct of dominant undertakings.³ While this is easy to justify on paper or even theoretically (the theory of localized competition), it remains to be seen how the Commission before the Community courts can get away with defining the relevant market, a central tenet in dominance cases, without bringing into play how other competitors are able to hold the 60%-plus market shares in the relevant market.⁴ The Commission confidently rounded up on the issue of dominance by touching on necessary factors for showing feasibility of capacity expansion, entry and countervailing buyer power required to nullify or supplement assessments of the existing market situations (relating to allocation of market shares).

Reasonably, these factors are also present in the consideration of conduct leading to anticompetitive foreclosure, the second sub-heading of the “overarching approach”. The theme here is that of examining constraints on the market power of the dominant firm through quantitative and qualitative evidence (with such examination extending, as shown in case-law, to both intermediate and final consumers’ levels), and, as a result, was not able to convince that the notion of “anticompetitive harm” goes beyond restricting the ability of rivals to compete. Demonstration of the Commission’s much vaunted new-found path to a general “effects-based” analysis is illuminated in its approach to dealing with price-based offenses, the third sub-section of the “overarching approach”.

This, to the seasoned practitioner versed in EC competition matters is the *real* duel between the Community courts and their tight fists around the floating wreckage of the past and the Commission’s need to swim together with these courts into new waters

² Case 27/76 *United Brands v. Commission* [1978] ECR 207, [1978] 1 CMLR 429 at paragraph 65

³ Guidelines 10

⁴ See similarly Guidelines 14

without the flotsam. Hence, the Guidelines trumpet the benefits of vigorous price competition to consumers and sternly warn that the Commission would only generally intervene where the relevant conduct threatens the existence of an equally efficient rival. This hypothetical “as efficient” competitor test is one largely reliant on Joskow-Klevorick and Baumol’s influential cost-based standard for assessing predatory pricing.⁵ As a result, where data is available the applicable benchmarks will be average avoidable costs (the “AAC” – the costs that a firm can avoid by choosing not to produce or avoidable costs divided by predatory increment of output) and the long-run average incremental cost (the “LRAIC”) – that is, the long-run version of the AAC (including previously incurred specific costs). Consequently, failure to cover the AAC is regarded as a “profit sacrifice in the short-run”; while failure to cover the LRAIC (which is usually above the AAC as the latter only considers specific costs within a limited period) is regarded as posing a threat of market foreclosure to “as efficient rivals” because average total costs are not being covered.

Although, the general consensus on the effects of not covering the AAC is shared in the Report, the Commission differentiates itself by willing to go after conduct that is not profit-maximizing regardless of the fact that the pricing under conduct might be above costs. As the Commission carries the burden of proof for this analysis, it must be aware not only of the difficulties of obtaining accurate relevant data on costs and sales prices but also of devising a cost measure not inclusive of fixed and variable costs not attributable to the specific conduct under review. Moreover, finding infringements on the basis that a dominant firm is not maximizing profit would appear to put doubts over the credibility of the general “effects based” approach.

The Guidelines completes the “overarching approach” with requests for dominant firms to justify the abusive exclusionary conduct under review – through the notion of objective necessity or substantiated efficiencies which outweigh any anticompetitive effects on consumers. The overriding theme of the latter is that the Commission must be appeased over the indispensability of the conduct (shown by external factors to the dominant firm), particularly in proportion to the identified goal of the dominant firm. This last phrase implicitly reveals the wide discretion of the Commission not only in setting the determinative proportion but also of including measures regarded as less restrictive to achieving the same ends but least favourable to the identified goals of the dominant party.

Therefore, providing efficiency defense may appear the best way forward. The requirements are cumulative and rely on showing that on the basis of a “sufficient degree of probability” efficiencies have been or are likely to be realized; the conduct is indispensable to the realization of these efficiencies in that lesser restrictive means are not capable of generating the same effects; the efficiencies outweigh any likely negative effects on competition and consumer welfare and; the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential

⁵ See Joskow and Klevorick, ‘A Framework for Analyzing Predatory Pricing Policy’, 89 Yale L.J. 213, 252 FN 79, (1979). See also, W. Baumol, ‘Predation and the Logic of the Average Variable Cost Test’, 49 J.L. & Econ. (1986).

competition. The first three criteria appear justified in that they can screen spurious claims of efficiencies; the wide spectrum of the last criterion, however, appears out-of-synch with an approach reliant on general effects of a conduct – particularly in technological markets where competition for the field rather than a specific market is a prevalent practice.

Common abuse

The other major part of the Guidelines, the fourth section, focuses on common types of exclusionary abuses that are to be inserted within the “overarching approach” – particularly in price-based exclusionary cases –for the determination of cases. On refusal to supply, while the Commission accepts the right of a seller to choose whom to trade with and the threat that unnecessary intervention poses to the competitive process, it nevertheless will intervene where the refusal concerns supplies of “essential input” to producers in related or downstream markets, particularly where there are no actual or potential competitor to counter the negative effects of the refusal. Furthermore, intervention might be extended to cases of products not previously supplied (*de novo* refusals).

While these positions further separates the Commission from the approach taken by the DOJ on the same issue in the Report (and to a large extent by the Supreme Court in *Verizon*), the Commission did not bother mentioning the additional critical Magill requirement that refusals must prevent the creation of a “new product” (or obstruct technical development). Furthermore, the issue of *de novo* refusals drifts away from the position of the Community courts in *Bronner* where the refusal by a dominant firm to satisfy a derivative demand from a competitor was regarded as legal. Consequently, the threshold for enforcement appears to be low and against warnings about threats posed by “soon enough” regulatory interventions. It is worth noting that in line with aspects of the decision in *Verizon*, the Commission’s criteria would not apply in cases of sectors with State-assisted facilities and where domestic laws already impose obligations on dominant firms to supply.

For margin squeeze, predation and *de jure* exclusivity (including aspects of multi-product rebates or bundling), where direct evidence is inadequate for the Commission’s case, cost-based assessments will be applied. In margin squeeze cases, the LRAIC will be the benchmark for determining costs; while the AAC will be primarily applied in cases of predation and the LRAIC will be drafted in to show anticompetitive harm and, of course, determine if an equally efficient rival can be foreclosed from the markets. There are no US Brooke-Group-type recoupment requirement, pricing above-cost but below total costs can be illegal where there is evidence of eliminatory intent and diverting resources from a dominated market to a market where a firm holds no “dominance” can be found predatory. Hence, the Guidelines largely follow the approach of the Community courts in *AKZO*.

The Guidelines considers both exclusive purchasing and conditional rebates (essentially, retroactive rebates - where once the buyer reaches the set-target, the available discount applies to all units purchased - and incremental rebates - where once the buyer hits the set-target, the available discount relates to all units purchased at or above the target level). The analyses of effects for conditional rebates are required to incorporate cost measures under the overarching approach. Additional considerations are on significant “brand” effects and capacity constraints, which enables the dominant firm to be an unavoidable trading partner (non-contestable portion of demand) and, in turn, allows it to have the ability to reduce price for the portion of demand the buyer might have obtained elsewhere (the contestable portion of demand) – the “suction effect”. Enforcement will be initiated where the “suction effect” becomes larger in relation to higher thresholds and higher rebates. Where data is available, cost analysis will be utilized to assess foreclosure capability.

Finally, tying is considered and the Guidelines largely follow Microsoft. It expresses the anticompetitive harm that technological tying may cause without touching on the benefits it may also bring. This is a drawback given that factors such as the extent of information asymmetry (who’s best to protect the interests of consumers), own-firm innovation and industry trend are critical in examining the incentives for tying. Unlike the D.C Circuit in Microsoft, the Commission fully embraces the ‘market substantiality test’ and industry wide practices in determining the notion of “single product” – regardless that such factors are largely backward looking and poor gauge for improved specialization. An “effects-based” approach should award a legal presumption to technological tying and, essentially, raise the bar for both the plaintiff (to show that the integration was a sham or less restrictive means are available) and the defendant (to show efficiency and necessity of integration).

Conclusion

The Commission deserves commendation for its attempt to move away from its formalistic past and in providing the Guidelines it might have set in place a gradual process of change to be used by various national competition authorities and courts within the EU.