

Abuses of dominant position in the Commission's Guidance and the case-law of the Court of Justice and the General Court

Introduction. Competition overview

Competition is a basic mechanism of the market economy. Where the market information flows freely, competition plays a regulatory function in balancing demand and supply. It is a rivalry in which every seller, for example an undertaking, tries to get what other sellers are seeking at the same time: sales, profit, and market share by offering the best practicable combination of price, quality, and service. Merriam-Webster¹ defines competition in business as 'the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms'. Very often it happens that an undertaking is in a privileged, dominant position, which, in fact, is legal and not prohibited by competition law.

¹ An American company that publishes reference books, especially dictionaries.

The relevant market

The first step in determining whether an undertaking is in a dominant position or has abused it, is defining the relevant market, both in the product and geographical aspects. In *Volkswagen AG v Commission of the European Communities* [2000] ECR II–2707, it was observed that, ‘For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined’².

The European Commission’s 1997 notice on the definition of relevant market for the purpose of community laws lays out systematically the considerations to identify product and geographical markets. A relevant product market comprises all the products or services which are interchangeable or substitutable by the consumer, by reason of the product’s characteristics, their prices and their intended use. A *relevant geographical market* comprises all the areas in which the undertakings concerned are involved in supply and demand of products or services, in which conditions of competition are sufficiently homogeneous and which can be distinguished from neighbourhood areas because the conditions of competition are appreciably different in these areas³.

The Courts of most jurisdictions have taken note of the importance of defining the relevant market.

Dominant position. Definition. Factors to be taken into account to determine a dominant position. Presumption of existence of dominant position

Dominance has been defined as a position of economic strength which manifests in ability to behave independently of competitors, customers and

2 Judgment of the Court of First Instance (Fourth Chamber) of 6 July 2000, <http://www.worldlii.org/eu/cases/EUECJ/2000/T6298.html> [access: 02.04.2014], para 230.

3 OECD (2005), *Competition law and Policy in the European Union*, <http://www.oecd.org/dataoecd/7/41/35908641.pdf> [access: 02.04.2014].

consumers to an appreciable extent⁴. Several factors set up a dominant position, however, taken separately, they may not be determinative itself⁵.

What constitutes an abuse of a dominant position. Prohibition of abuse of such dominance under Article 102 of the TFEU

The European Law, similarly to most competition laws, does not itself contain a definition of abuse of a dominant position. However, in *Hoffmann-La Roche & Co. AG v Commission of the European Communities*⁶, it was observed that: 'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. Abuse of the economic strength – dominant position, is prohibited in the European Law, under the Article 102 of the TFEU⁷.

Article 102 of the Treaty on the functioning of the European Union provides as follows:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

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

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

6 [1979] 3 C.M.L.R. 211.

7 Treaty on the Functioning of the European Union (Earlier The Treaty of Rome, officially the *Treaty establishing the European Economic Community*-TEEC, amended by the Treaty of Lisbon 2009); since there have been changes, previous article 82 of the EC Treaty is currently article 102 of the TFEU.

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Guidance on the Commission's enforcement priorities in applying Article [102] of the [TFEU] to abusive exclusionary conduct by dominant undertakings. Overview

On December 3, 2008, the EU Commission's Directorate General for Competition published its Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (hereinafter referred as 'Guidance'). It is a document, which provides numerous substantive rules for the assessment of abuses. Though, the European Courts are not bound by the Guidance, they may be expected to look to it to provide a framework for analysing violations of Article 102. The Guidance covers only exclusionary abuses of an undertaking in a single dominance position.

The Commission will check whether an effective access of actual or potential competitors to supplies or markets is hampered or eliminated due to the dominant undertaking's action. Such situation is called 'anti-competitive foreclosure'. To such assessment following factors are relevant: the position of the dominant undertaking, the conditions on the relevant market, the positions of the dominant undertaking's competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure, direct evidence of any exclusionary strategy.

As far as prices are concerned, in general, a price competition is beneficial for consumers. However, the Commission will examine, whether the dominant undertaking is engaging in below-cost pricing.

Most importantly, the Guidance describes 'the economic and effects-based' approach that will guide the Commission in the assessment of exclusionary practices. The new 'effects-based approach' put an emphasis on the measurable effects on the market of such conduct. The Commission intends to carefully discern competition on the merits, which has beneficial effects for consumers and should therefore be promoted. This new approach requires sound economic analysis and convincing evidence.

In Commission's opinion, a dominant undertaking may justify conduct leading to foreclosure of competitors due to expected efficiencies, without a net harm to consumers. Generally, in the enforcement of Article 102, a dominant undertaking's claims that its conduct is justified, will be examined. Such conduct has to be indispensable and proportionate to the goal pursued by the dominant undertaking.

The Commission's Guidance provides instructions how to assess an abuse of dominant positions by national competition authorities. In this context it has been signaled that:

The Commission cannot require national competition agencies and national courts to follow Commission guidelines. However, the Guidance Paper has been discussed extensively with the national competition authorities and there is a good deal of agreement on the content of the Paper⁸.

Furthermore, it gives guidance competitors on how to plead their case in front of the competition authorities. What is more, the Guidance explains the dominant companies how to defend themselves against allegations of abuse.

In the Guidance, the Commission pays much attention to specific forms of abuse, such as: exclusive dealing; exclusive purchasing⁹, conditional rebates¹⁰;

⁸ DG Competition MEMO/08/761, para. 9.

⁹ 'An exclusive purchasing obligation requires a customer on a particular market to purchase exclusively or to a large extent only from the dominant undertakings'. Guidance, p. 33.

¹⁰ 'Conditional rebates are rebates granted to customers to reward them for a particular form or purchasing behavior. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates)'. Guidance, p. 37.

tying and bundling¹¹, predatory pricing¹², refusal to supply¹³ and margin squeeze¹⁴.

Generally, in all above – mentioned cases, a dominant undertaking is obliged to provide all the evidence essential to prove and justify that the conduct concerned is objectively justified and necessary.

Any support in the case-law? Court of Justice and the General Court on exclusionary abuses of dominant position. *Deutsche Telekom, France Telekom Post Danmark, Tomra*

a) Deutsche Telekom¹⁵

The European Court of Justice upheld the Commission's prohibition decision on *Deutsche Telekom* for abusing its dominant position through

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- 11 'Tying usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis. Bundling usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price'. Guidance, p. 48.
- 12 'In line with its enforcement priorities, the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm. Conduct will be viewed by the Commission as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided'. Guidance, p. 63, 64.
- 13 'The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers, refusal to license intellectual property rights, including when the licence is necessary to provide interface information, or refusal to grant access to an essential facility or a network'. Guidance, p. 78.
- 14 '(...) a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis'. Guidance, p. 80.
- 15 Case C-280/08 P.

margin squeeze. This case is significant as the Court approved the 'as-efficient competitor test' used by the Commission. The Court put an emphasis on the need to examine whether the practice leads to anti-competitive effects, concluding that the undertaking's abuse had an exclusionary effect on competitors and led to the detriment of consumers' interests. This is fully in line with the Commission's Guidance on exclusionary abuses.

b) France Telecom¹⁶

The European Court of Justice upheld the General Court's judgment and the Commission's predation prohibition decision in *France Telecom* and confirmed that recoupment was not a necessary part of a showing of predation. The Court explicitly referred to the 'effects-based' analysis, opening the door to continued use of that analysis in the future.

c) Post-Danmark¹⁷

The *Post-Danmark* is probably the most famous case when applying Article 102. In its judgment the Court closely followed the approach recommended by the Commission in the Guidance. It indicates a welcome willingness to consider the economic effects of pricing decisions rather the form-based approach, which is way more rigid. The Court in its ruling confirmed that a dominant undertaking does not automatically abuse its dominant position contrary to Article 102 by selectively offering prices that are below its average total costs and above the incremental cost of serving the customer concerned. It has been ruled that also other factors must be taken into account to establish an abuse. The Court focused on the potential exclusionary effect of pricing on an equally efficient competitor.

d) Tomra¹⁸

In this case, the Court appeal followed a more formalistic approach to assessing the compatibility of retroactive rebates with Article 102 that took no account of costs. In *Tomra* judgment there are elements that clearly support the earlier case law, that, in general, certain types of conduct are illegal. At the same time, this case shows that the Court is still sensitive to an 'effects-based' approach.

¹⁶ Case C-202/07 P.

¹⁷ Case C-209/10.

¹⁸ Case C-549/10 P.

Conclusion

Practical impact of *Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* is very questionable for several reasons.

The Guidance cannot in any way affect the existing case law of the European Courts. It is not a legally binding document and is not able to change the law. The Guidance, however, can influence the way that the European Union judicature approaches the interpretation of Article 102 in the future. In some way the Guidance may be inspiring for the Courts. On the other hand, undertakings will obviously look at the Guidance to find out which conduct the Commission considers as infringement of Article 102, even though it is not a statement of law. However, it should be emphasized, that the Guidance does not assure companies that their infringing conduct will go unpunished if it does not fall under the new enforcement priorities set up in the document.

The use of economics in cases involving Article 102 seems to be a very delicate topic. Assessment of abuse of dominant positions and allegations of it can change over time; and this assessment can be informed and changed by economic thinking. New understandings and new arguments constantly develop. What the European judiciary is ought to do, is to reconcile the new economic thinking with the principles underlying the earlier rulings. Sometimes it can be seen that there is still a lack of understanding of how law and economics inter-relate. In such cases, it is quite often considered that the Commission is pushing for a more economic approach, while the Courts act as more of a barrier. While deciding on the interpretation of a legal rule, they are largely constrained by the arguments of the parties before, and by the general knowledge existing at that point in time.

At the moment, there is a general consensus between economists and lawyers, that Article 102 should be applied only to enhance efficiency and consumers' welfare. Theoretically, there is an agreement that this should not be done by prohibiting behavior on the basis of the form it takes, rather by the 'effect-based' approach. This is what has been adopted in the Commission's Guidance on enforcement priorities in respect of exclusionary abuses.

The *Tomra* case has clearly shown that the new approach to Article 102 presented by the Commission in its Guidance does not sit altogether comfortably with the case law. The Courts seem to be reluctant to depart

from the existing jurisprudence. This means that the effect of the Guidance is uncertain. It is still unclear whether the Commission will get the necessary support from the European Courts. This is a question that, hopefully, will be answered in practise in the years to come.

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