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EC Competition Commissioner Kroes announced the publication of a “DG Competition discussion paper on the application of Article 82 of the [EC] Treaty to exclusionary abuses” (the “Discussion Paper”) on December 19, 2005,¹ opening a public consultation that lasted until March 31, 2006. The publication of the Discussion Paper sparked tremendous interest in the EC antitrust community and, indeed, much beyond. The Commission received no less than 107 contributions from all over the world in the framework of the public consultation and one cannot begin to estimate the number of seminars, colloquia, or symposia devoted to the enforcement of Article 82 EC in the months preceding and following the publication of the Discussion Paper.² In that sense, the Discussion Paper certainly achieved one of its main stated objectives, namely to “promote a debate” on exclusionary conducts by dominant companies.³

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¹ See EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005) [hereinafter Discussion Paper], available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

² See, e.g., Second Annual Conference of the Global Competition Law Centre: The Modernisation of Article 82, Global Competition Law Centre (GCLC), College of Europe, Brussels (Jun. 16-17, 2005); and the collection published thereafter, GCLC RESEARCH PAPERS ON ARTICLE 82 EC (D. Geradin ed.) (Jul. 2005), available at <http://www.gclc.coleurop.be>.

³ See Press Release IP/05/1626, European Commission, Competition: Commission publishes discussion paper on abuse of dominance (Dec. 19, 2005).

However, since a public hearing was held on June 14, 2006, silence has prevailed on the side of the Commission. Officially, it is “currently reflecting carefully on the comments received from the public and on the issues at stake, to determine the best way to move forward with the review.”⁴ That careful reflection has been ongoing for almost two years and no announcement has been made as to the outcome of the review process. Is the Commission likely to issue some sort of “Article 82 enforcement guidelines” any time soon? The fact is that, in spite of the silence of the Commission, a lot has happened on the Article 82 front since June 2006. In particular, the European Court of Justice (ECJ) and the European Court of First Instance (CFI) (and together the “EC Courts”) have released five important judgments since then, dealing with most of the issues addressed in the Discussion Paper (and more).⁵ In all those cases, the EC Courts have sided with the Commission. More importantly, the EC Courts have at times ratified the approach advocated in the Discussion Paper—which contained some sections clearly drafted with pending cases in mind—and have in other places resorted to loose language that goes beyond the positions advocated in the Discussion Paper. A number of examples are listed in the following paragraphs, which are presented in the same order as in the Discussion Paper.

⁴ See European Commission - Competition, Antitrust: Art 82 review, at <http://ec.europa.eu/comm/competition/antitrust/art82/index.html> (last visited Apr. 22, 2008).

⁵ Case T-340/03, *France Telecom SA v. Commission*, 2007 E.C.R. II-107 [hereinafter *Wanadoo*]; Case C-95/04 P, *British Airways plc v. Commission*, 2007 E.C.R. I-2331 [hereinafter *British Airways*]; Case T-151/01, *Der Grüne Punkt v. Commission*, 2007 E.C.R. II-3895 [hereinafter *Grüne Punkt*]; Case T-201/04, *Microsoft Corp. v. Commission* (not yet reported) (judgment of Sep. 17, 2007) [hereinafter *Microsoft*]; Case T-271/03, *Deutsche Telekom AG v. Commission* (not yet reported) (judgment of Apr. 10, 2008) [hereinafter *Deutsche Telekom*].

Dominance (Section 4)

With respect to the definition of single dominance, many commentators expressed concerns at the Discussion Paper’s overemphasis on the importance of market shares as “the starting point” in its analysis, but also seemingly the final point in case of “very high market shares” (i.e., “where an undertaking holds 50% or more of the market”).

However, the stance adopted by the EC Courts in recent cases confirms the position advocated by the Commission. By sticking to a case law that is more than 20 years old, the CFI repeated in *Wanadoo*, for instance, that “very large market shares [i.e., 50%] are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position” and added that the existence of competition on the relevant market was not a decisive factor in the assessment of dominance.⁶

Framework for Analysis of Exclusionary Abuses (Section 5)

One of the most controversial propositions of the Discussion Paper was the Commission’s attempt to mold Article 82 enforcement after Article 81, which prohibits “all agreements between undertakings” unless they are indispensable to deliver efficiencies. As understood by many, the Discussion Paper proposed that a conduct which is capable of foreclosing competition “by its nature” and likely to disadvantage rivals would be deemed abusive unless objectively necessary (i.e., indispensable, to achieve efficiencies). Such an approach, which was partly inspired by the case law of the EC Courts, appears to have been confirmed in recent cases. First, the CFI and the ECJ have regularly referred to their historic proposition that a practice is abusive if it “hinder[s] the

⁶ *Wanadoo, id.* at paras. 100-01. The CFI added that: “a decline in market shares which are still very large cannot in itself constitute proof of the absence of a dominant position” (at para. 104).

maintenance of the degree of competition still existing in the market or the growth of that competition.”⁷ Second, the EC Courts have shown little consideration for the need to demonstrate (at least “likely”) anticompetitive effects to reach a finding of abuse. Instead, they have displayed a tendency to equate “foreclosure effects” with “abusive” or “anticompetitive” practice. Thus, in *Deutsche Telekom* and in *Microsoft*, respectively, the CFI seemed comfortable with the idea that a margin squeeze was “in principle” abusive or that tying two distinct product entailed foreclosure effects “by nature”.⁸ On a more anecdotal note, one could even notice sometimes the dichotomy between “object” and “effect”, typical of Article 81 EC, transpiring from some of the findings of the CFI, for instance in *Wanadoo*.⁹ Third, the EC Courts have at times adopted a two-stage approach according to which the possibility for a practice to create foreclosure effects creates a presumption of abuse that can only be rebutted if the dominant company demonstrates its pro-competitive benefits and satisfies a strict proportionality test.¹⁰

On a related topic, commentators were generally concerned by the strict proportionality test advocated by the Discussion Paper in relation to the “meeting competition defense.” According to the Discussion Paper, to succeed that test, not only must the conduct of the dominant company be “suitable” and “indispensable” to protect

⁷ See, e.g., *Deutsche Telekom*, *supra* note 5, at para. 233 and *Grüne Punkt*, *supra* note 5, at para. 120.

⁸ See, e.g., *Deutsche Telekom*, *supra* note 5, at para. 237 and *Microsoft*, *supra* note 5, at paras. 868 & 1035. In *Microsoft*, the CFI also appears to infer harm to competition merely from the large market share gained by Microsoft on the market for operating systems for workgroup servers (at para. 664).

⁹ See, e.g., *Wanadoo*, *supra* note 5, at paras. 195-96 (“If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect”).

¹⁰ See, e.g., *British Airways*, *supra* note 5, at para. 86. For a somewhat different formulation, however, see *Microsoft*, *supra* note 5, at paras. 688 and 1144.

legitimate commercial and economic interests, but the “aim of Article 82”, as defined by the Commission in view of the relevant circumstances of the case, must be complied with. In effect, the CFI confirmed in *Wanadoo* that “the right [of a dominant company] to align its conduct [is] limited,” that the mere alignment on competitors did not exclude an infringement of Article 82, and that the Commission retained a broad discretion in assessing such defense.¹¹

Predatory Pricing (Section 6)

On predatory pricing, besides the more “holistic” approach proposed by the Discussion Paper compared to an exclusive reliance on cost benchmarks, one of the most noticeable points was the Commission’s restatement of the absence of a separate “recoupment” requirement to establish a predation abuse. In *Wanadoo*, the CFI assessed the applicant’s pricing practices under the “classic” prism of the case law established in *Akzo*, which relies predominantly on cost benchmarks, and confirmed that, once the *Akzo* test is met (i.e., either prices below average variable cost (AVC) or prices between AVC and average total cost (ATC) with evidence of predatory strategy), “proof of recoupment of losses [is] not a precondition to making a finding of predatory pricing.”¹²

Single Branding and Rebates (Section 7)

On rebates, in particular, the Discussion Paper put forward novel ideas and solutions, which appeared, however, complex and somewhat unworkable in practice. It also recognized the pro-competitive potential of rebates but, in line with the general framework of the Discussion Paper, mainly as a possible “defense”. There were

¹¹ *Wanadoo*, *supra* note 5, at paras. 178-82 & 187.

¹² *Id.* at para. 228.

expectations that the ECJ would clarify the case law on rebates and show more consideration for their pro-competitive benefits in deciding the *British Airways* appeal. However, the ECJ upheld the case law developed by the CFI according to which rebates linked with individually set sales objectives over a long reference period (e.g., one year) granted by dominant operators are likely to create exclusionary effects and, as a result, to be abusive. This is notably because the ECJ subjected pro-competitive justifications to a strict proportionality test and curiously equated the effects of the rebate scheme on the downstream market with harm to competition at the upstream level.

Tying and Bundling (Section 8)

On tying and bundling, the approach advocated by the Discussion Paper was largely upheld by the CFI in *Microsoft*. This was so in relation to the definition of the five “constituent elements of bundling” and their individual assessment. For example, the criteria mentioned in the Discussion Paper to establish the distinctiveness between products were almost systematically echoed in the judgment of the CFI, which, in some respects, went even beyond the Discussion Paper.¹³ Likewise, the CFI adopted an approach similar to that of the Discussion Paper in establishing the likely foreclosure effects of the tie between Windows and Windows Media Player, notably by referring to the “application [of the tie] in the market” at the original equipment manufacturer’s level and the “strength of the dominance” of Microsoft on the market for operating systems.¹⁴

¹³ See, e.g., the discussion on commercial usage or on the need to be forced to “use” the tied product (*Microsoft*, *supra* note 5, at paras. 942 & 970).

¹⁴ See, e.g., *id.* at paras. 1031 & 1034.

Refusal to Supply (Section 9)

For many commentators, the Discussion Paper failed to clarify a number of critical issues in relation to refusal to supply and a lot of concerns were directed at the proposed definition of the term “new product” in relation to the refusal to license intellectual property rights. Instead of referring to a genuinely new product (i.e., one that did not previously exist), the Discussion Paper advocated a lower standard encompassing “improvements” on existing products. In *Microsoft*, the CFI appears to have endorsed that proposition by emphasizing that the licensing of Microsoft’s interoperability information would not result in allowing competitors to “clone” Microsoft’s products, but would enable them to offer distinct products embedding additional “parameters which consumers consider important.”¹⁵

The Commission on Velvet

In view of the limited discussion of the Discussion Paper and recent case law in the preceding paragraphs, the Commission appears to be “on velvet”. On the one hand, despite the criticisms, some of the most controversial positions of the Discussion Paper have been endorsed or confirmed by the EC Courts and, generally, the Commission’s discretion in the enforcement of Article 82 EC appears reinforced. On the other hand, the debate that has resulted from the publication of the Discussion Paper and the dozens of contributions received by the Commission appears to have already assisted the Commission significantly, in the words of Commissioner Kroes, “to focus more closely

¹⁵ *Id.*, at para. 656.

on the right issues and to take better decisions.”¹⁶ In those circumstances, why would the Commission endeavor to issue Article 82 enforcement guidelines?

In weighing the pros and cons of releasing guidelines, two considerations are worth highlighting in particular. First, by their very nature, guidelines carry the potential of creating expectations on the side of dominant companies and, conversely, of limiting the discretion of the Commission. If guidelines were to be issued at this stage, they would probably be worded in a convoluted language, typical of the Discussion Paper and the case law of the EC Courts, to avoid setting too many expectations and limiting too much of the Commission’s discretion. This would be rather unhelpful and would hardly achieve the objective of “modernizing” Article 82 enforcement. Second, guidelines would influence, and indeed “guide”, the application of Article 82 EC throughout the European Union, thus also its application by the national competition authorities and national courts. Experience shows that national authorities and courts sometimes do not have the same resources and expertise as the Commission and tend to adopt more formal approaches in the enforcement of Article 82 EC, which may increase the risks of false positives. In that sense, guidelines that would summarize in broad strokes the case law of the EC Courts, for instance, carry the risks of doing more harm than good.

The Commission is of course aware of these considerations. As a result, it is suggested that it probably won’t issue Article 82 guidelines any time soon. However, “modernizing” the application of Article 82 EC remains a needed exercise and should be a first-hand priority for the Commission. It is also apparent that such modernization will

¹⁶ EC Competition Commissioner Neelie Kroes, Closing Remarks, Public Discussion on Article 82 Public Discussion on Article 82 Discussion Paper, Brussels (Jun. 14, 2006).

not happen by means of arguments developed by private litigants in front of the EC Courts.¹⁷ It therefore belongs to the Commission to build internally on the consultation process that followed the publication of the Discussion Paper and develop a consistent and economically sound enforcement policy. That policy should translate visibly in future Article 82 EC decisions based either on Article 7 or Article 9, but also, if appropriate, Article 10 of Regulation 1/2003 (“finding of inapplicability”), and should be openly promoted by means of a close cooperation with national competition authorities and national courts. Likewise, targeted public statements and openness with respect to concerns expressed “privately” by companies would be useful in increasing legal certainty and fostering understanding. This is not to say that official guidelines should never be issued; clearly, guidance on specific issues could be helpful to ensure consistency in the application of Article 82 EC and increase legal certainty. However, the stakes are high and Article 82 EC is a complex area; modernization is required on substance and it is not clear that the publication of too broad or general guidelines in the short term is the most appropriate way to achieve that objective.

¹⁷ Note that the *British Airways* and *Grüne Punkt* judgments also contain unhelpful language on discriminatory and “unfair” prices (see *British Airways*, *supra* note 5, at paras. 143-48 and *Grüne Punkt*, *supra* note 5, at para. 121).