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I. INTRODUCTION

The publication by the European Commission of its long-awaited Guidance Paper on exclusionary abuses under Article 82 EC¹ was the most important policy development of the second half of 2008. It is certainly positive that the Commission eventually did proceed to publish something. Following the DG-COMP Discussion Paper in December 2005,² there were fears that the Commission might not continue with the whole exercise. 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. It relies less on economic and legal jargon, and is, accordingly, a more accessible document. However, as explored in more detail below, there is an intellectual incoherence at the heart of the Guidance Paper: the formalism of the past coexists with a more economics-based analysis. This

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¹COMMISSION 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>.

²DG 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>.

contradiction prevents the Paper from successfully modernizing the enforcement of Article 82 EC and taking the debate forwards.

The main points can be summarized 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;
- 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 and paying distributors to delay the introduction of a rival's product. 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 realized 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.

II. CRITIQUE

The antitrust community always expected that the Commission’s Paper would move a step closer to a more “effects-based” approach, so the fact that there is now language that meets that expectation is not, as such, groundbreaking. But this step forward is contradicted by the survival and prominence of all the old formalistic mantras. We would have expected that one of the world’s two most important antitrust authorities would powerfully and convincingly describe to the global antitrust community where it stands on unilateral conduct—and in a positive rather than in a negative way. But what we see is a mixed text which has a sound and respectable intellectual basis, but which, at the same time, is too timid to break with the formalism of the past. It is as if the economist’s first draft was hijacked by the old-school lawyer, who hates losing pending cases and wants to ensure language in the text that can be of no prejudice to him. Yet the result of this impossible exercise can only disappoint.

True, it was always going to be difficult for the Commission to “restate” the law on unilateral conduct. Stating or “restating” the law is the job of the courts alone. However, a competition authority has an important role to play in this process—by

choosing the right cases and therefore deciding its priorities. Indeed, the European Commission is much more powerful in this regard than its U.S. counterparts. Unlike in the United States, most antitrust enforcement in Europe is public, so it is always the Commission that decides which case to bring and, thus indirectly, on how to develop Article 82 EC.³

Besides, the Guidance Paper does not profess to be 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. In addition, the Commission has a very high success rate in defending its cases before the European Courts (it has not lost a case in 20 years and has a 98 percent success rate according to one recent article),⁴ so the Commission could have been relatively comfortable that any enforcement action would be subsequently endorsed by the European Courts, even if that action conflicts with present precedent.

Unfortunately, however, the Guidance Paper, rather than speaking about the future, i.e. what the Commission's priorities should be under the effects-based approach, attempts to reconcile the formalism of some old case law with economics. This is evident already in paragraph 1 of the Guidance Paper where the Commission repeats the old mantra of the "special responsibility" and that "it is not in itself illegal for an undertaking

³The Commission's decision not to initiate proceedings and thus choose a case is subject only to very limited review, and the Commission is not bound to open proceedings pursuant to a complaint.

⁴See Ahlborn & Evans, *The Microsoft Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe*, 25-26 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115867, where the authors note that the Commission has not lost a single Article 82 EC appeal on substance in 20 years and cite the DG-COMP Chief Economist Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 (48) ECONOMIC POLICY 741-791, (October 2006), at pp. 761-762, for the proposition that the Commission has a 98 percent success rate in Article 82 EC cases.

to be in a dominant position,” as if there should be a doubt that the fact of being dominant is not *per se* illegal.⁵

In paragraph 5 the Commission states it will focus on conduct that is “most harmful to consumers,” but even this overture is quickly qualified through references to “safeguarding the competitive process” and to ensuring that competitors are not excluded. Indeed, in paragraph 23 it suggests that the position of a less-efficient competitor must be protected: the constraint of a less-efficient competitor may in certain circumstances be taken into account when judging if price-based conduct leads to anticompetitive foreclosure. There is a hint of “efficiency offense” about this stance. Such a defensive attitude (in terms of breaking with the formalism of the past) is certainly disappointing.

Then, there are in our view, far too many presumptions working against the dominant company. This was the case with the 2005 Discussion Paper and continues to be the case now.

Most importantly, as in the 2005 Discussion Paper, importing the four conditions of Article 81(3) EC into Article 82 EC, while making the objective justification and efficiency defenses more systematic, also makes them more difficult to succeed. An efficiency defense based on the four cumulative conditions is not a flexible one: the last (negative) requirement (for conduct not to eliminate competition) means that a dominant firm’s conduct, although socially desirable because of accruing efficiencies, will still be prohibited. There is also a certain inconsistency in the fact that the efficiency defense is

⁵That being said, the language in paragraph 15 suggests that the fact of having a high market share for a long period of time in and of itself can “in certain circumstances” indicate “possible serious effects of abusive conduct, justifying an intervention by the Commission under Article 82.”

based on the principle of “no net harm to consumers” (paragraph 29), yet as seen above the notion of abuse is not itself solely based on consumer harm.

Another disappointing element, which can only be seen as retrogression, is the resurgence of intention as a critical component of Article 82 EC. We saw this in the *Microsoft* and *AstraZeneca* cases⁶ and in the context of the on-going pharmaceutical sector inquiry (where extensive use has been made of selected extracts from emails and internal documents), and now we see it in the Guidance Paper. This is a serious mistake: the resolve to win over or even to eliminate competitors is the driving force of competition. What should matter is whether there is a plausible consumer harm theory. It is a pity that the Guidance Paper appears to contradict standard principles accepted even under the more formalistic approach—that an intention even by a dominant firm to prevail over its rivals should not be viewed as unlawful.⁷

III. REFUSAL TO DEAL IN PARTICULAR

We proceed now to see how the Guidance Paper deals with refusals to deal. Such cases offer a good example of how an antitrust authority perceives itself as enforcer and what kind of antitrust law it subscribes to. 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

⁶See Case T-201/04, *Microsoft Corp. v. Commission*, [2007] ECR II-3601, and Commission Decision of 15 June 2005 (*AstraZeneca*), respectively.

⁷See Commission Decision 85/609/EEC of 14 December 1985 (*ECS/AKZO*), OJ [1985] L 374/1, paragraph 81.

input, and (c) refusal to license an intellectual property ("IP") 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, including refusals to IP rights, 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 in a downstream market; (b) the refusal is likely to lead to the elimination of effective competition in the downstream market;⁸ and (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 European Court of Justice's ("ECJ's") ruling in *IMS Health* and even from the Court of First Instance's ("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."

⁸The Commission will generally consider that this condition is satisfied if the first condition is fulfilled, i.e. the input is objectively necessary—see paragraph 83.

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.

What's more, 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 favor of a finding of abuse; for example, if the recipient had made "relationship-specific investments." If there has been a previous supply by the dominant firm, the latter will have to "demonstrate why circumstances have actually changed in such a way that the continuation of its existing supply relationship would put in danger its adequate compensation" (paragraph 83). In other words, not only is the burden of proof reversed, but the dominant company's right to dispose freely of its property is reduced to an economic right to receive adequate compensation. This creates serious disincentives for dominant companies to enter into commercial agreements in the first place, for fear that once they supply someone they will be stuck in that relationship forever. This may create significant problems for companies doing business in Europe, as well as for their potential customers.

It is clear that the present Paper opens up an intellectual divide between U.S. and EU approaches to compulsory licensing. Much has been written about the differences between the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") when it comes to single-firm conduct. But on the topic of compulsory licensing of IP rights, the FTC and DOJ have spoken with one voice. In their joint paper, *Antitrust*

Enforcement and Intellectual Property Rights: Promoting Innovation and Competition,

the two agencies stated:

Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections. Antitrust liability for refusals to license competitors would compel firms to reach out and affirmatively assist their rivals, a result that is 'in some tension with the underlying purpose of antitrust law.' [Citing *Trinko*, 540 U.S. at 407-408] Moreover, liability would restrict the patent holder's ability to exercise a core part of the patent—the right to exclude.⁹

The Commission's Guidance Paper thus takes a significantly different position from the joint DOJ and the FTC approach to refusals to license.

IV. 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 DOJ, which some European officials have warned may weaken antitrust enforcement. However, the new Paper is likely to fail to achieve this goal as it does not succeed in modernizing European law on single-firm conduct by replacing the formalism of the past with a convincing approach driven by consumer harm. Of course, in the future, European and U.S. enforcers may converge towards a middle ground, with Europe abandoning some of its formalism and the United States becoming slightly more interventionist. But old habits in Europe die hard. Indeed, the publication of this Guidance Paper may even have succeeded in widening the gap between the United States and the EU when it comes to refusals to supply and compulsory licensing.

⁹Available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>, p. 6.