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Philip Lowe
Directorate General for Competition

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I. INTRODUCTION

During the past 50 years, the enforcement of Article 82 of the EC Treaty—which prohibits abuse of dominance—has been a cornerstone of the European Commission's competition policy. Investigations based exclusively on Article 82 currently make up one quarter of the Commission's ongoing antitrust cases. Taking into account cases involving both Article 81—which prohibits anticompetitive agreements—and Article 82, between one third and one half of our recent cases involve Article 82.

The text of Article 82 has remained untouched since 1957 despite several amendments to the Treaty. However, the context in which Article 82 has been applied has changed enormously. As a result, the Commission's interpretation of Article 82 has evolved over the years, under the supervision of the EU Courts. This context includes, of course, the furthering of EU integration and the Single Market, but also profound changes in the environment in which companies operate and developments in our understanding of how markets work, informed by evolving economic evidence and theory.

*Philip Lowe is the Director-General of the Directorate General for Competition.

In 2005 DG Competition launched a review of its policy on Article 82 by publishing a Staff Discussion Paper.[1] The purpose was to promote clarity and predictability, and to bring Article 82 policy in line with the effects-based approach, developed under Article 81 and mergers since the late 1990s, and already present in individual Article 82 cases.

The Discussion Paper sparked a wide ranging debate, both within and outside the Commission, on the objectives and enforcement principles that should guide the application of Article 82. The review resulted in the Commission adopting, on December 3, 2008, guidance on its enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings.

II. PURPOSE OF THE 2008 GUIDANCE: AN EFFECTS-BASED APPROACH TO ARTICLE 82

The Guidance sets out the factors the Commission takes into account when deciding whether to open an investigation into potentially exclusionary conduct under Article 82. What is key to this analysis is whether the dominant company's behavior is likely to restrict competition in such a way as to have harmful effects on consumers, whether in the short- or long-term.

How is this effects-based approach articulated? First, the focus put on the effects of a dominant company's conduct reflects a move away from a form-based approach to Article 82. The Commission recognizes that rebates and tying and bundling, for example, can be instruments of healthy competition. Rebates may allow a manufacturer to achieve

[1] http://ec.europa.eu/competition/antitrust/art82/index.html

a higher output and thereby realize economies of scale. Tying and bundling may be a way of bringing products to the market in more innovative ways. As long as this competition is ultimately for the benefit of consumers, dominant companies should be free to compete fiercely, even if this means that competitors who deliver less to consumers may have to leave the market.

Secondly, if the decision to take enforcement action against a dominant company is assessed in the light of the effects of the company's conduct, the Commission must establish that that conduct is likely to harm consumers. Predicting effects is not an easy task; it requires sound economic analysis and cogent and convincing evidence. The Guidance helps in this regard by setting out the general analytical framework the Commission will apply when assessing common types of exclusionary conduct: it clarifies the circumstances in which the Commission considers that conduct by a dominant company is likely to restrict competition and thereby harm consumers. The Guidance does not make the Commission's decision to bring enforcement action conditional on establishing actual effects: for enforcement to be effective the Commission must be able to intervene before likely harm has turned into actual harm.

Thirdly, given that the trigger for enforcement action is likely harm to consumers, dominant companies should be allowed to put forward arguments that their conduct is likely to create efficiencies which leave the consumers overall better off. Although Article 82 does not expressly foresee the possibility of allowing exclusionary conduct on the grounds that it gives rise to efficiencies, it would be difficult to apply an effects-based approach and effectively protect consumers, without taking efficiencies into account. The Guidance recognizes that such efficiencies may exist, explains how they should be assessed, and gives some examples of the type of efficiencies that may result from dominant company conduct.

III. THE COMMISSION'S ANALYTICAL FRAMEWORK FOR APPLYING ARTICLE 82

The Guidance is divided into three main parts: dealing with dominance, setting out the general analytical framework used by the Commission in assessing whether to take enforcement action against allegedly abusive exclusionary conduct by dominant undertakings, and explaining how this general framework applies to some of the most common types of exclusionary conduct.

A. Assessment of Dominance

The first step in any analysis of an alleged abuse of dominance is to establish whether or not a company in question occupies a dominant position. The Guidance confirms the Commission's recent practice of not relying only or primarily on market shares when assessing dominance. In making its assessment the Commission carefully considers whether or not the allegedly dominant firm is constrained by existing competitors and their output, by expansion or entry by competitors and/or by countervailing buying power. If there are no such constraints, then the Commission considers that the firm has the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of consumers, the classic definition of dominance set out in case-law. As regards market shares, the Guidance indicates that, based on the Commission's experience in handling cases, dominance is not likely if the firm's market share is below 40 percent.

B. Assessment of Conduct

The second part of the Guidance sets out the factors the Commission will take into account when examining allegedly abusive conduct, and the factors the Commission will take into account in assessing any arguments put forward by dominant undertakings to rebut a finding of abuse.

1. First Step

The Guidance draws a distinction between foreclosure and anticompetitive foreclosure. As mentioned above, a dominant company may foreclose competitors by competing on the merits, which will ultimately benefit consumers. So not all foreclosure is a concern under Article 82: what the Commission's enforcement should target is conduct that results in anticompetitive foreclosure.

The Guidance defines anticompetitive foreclosure as a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers. The reference to the possibility of increasing prices should be read as covering the various ways in which the dominant undertaking can influence the parameters of competition—such as prices, output, innovation, the variety and quality of goods and services—to its advantage and to the detriment of consumers. In a nutshell, anticompetitive foreclosure is foreclosure that has harmful effects on consumers.

On pricing conduct, the Guidance provides that when assessing pricing conduct the Commission will look at whether the company in question is capable of foreclosing competitors that are considered to be as efficient as the dominant firm ("equally efficient competitor test"). This is because foreclosure of less efficient competitors is generally unlikely to have harmful effects on consumers.

The Guidance also discusses a series of other factors which are relevant for the Commission's assessment of whether and how different types of exclusionary conduct (whether pricing or non-pricing conduct) by dominant companies may be likely to lead to anticompetitive foreclosure in a given case. These factors include, for example, the conditions on the market, including the relevance of entry barriers, the position of and counterstrategies available to competitors, and possible evidence of actual foreclosure and implementation of an exclusionary strategy.

2. Second Step

After having assessed whether a dominant company's conduct is likely to harm or have harmed consumers, the second step of the Commission's assessment entails analyzing any defenses put forward by the dominant company to justify its conduct. For instance, arguing that its conduct is objectively necessary and/or justified by efficiencies. All the necessary evidence for such a defense would have to be provided by the dominant company.

The criteria that the Commission uses in assessing efficiencies mirror those that it applies under Article 81. The efficiencies must have been or be likely to be realized, and must be the result of the conduct in question; the conduct must be indispensable to realize the efficiencies, i.e. there must not be a less anticompetitive ways of achieving the efficiencies; the conduct must not eliminate effective competition by removing all or most sources of actual or potential competition; last, but not least, the likely efficiencies must outweigh any likely negative effects identified by the Commission for competition and for consumers.

C. The Application of the General Framework to Specific Types of Conduct

The third part of the Guidance focuses on certain types of potential abuses of dominance—those that are the most common, in the Commission's experience. The general principles for assessing conduct are applied to these particular types of conduct—such as exclusive dealing (exclusive purchasing and conditional rebates), tying and multi-product rebates, predatory pricing and refusal to supply—and issues specific to these types of conduct are examined. For example, the section on predatory pricing discusses issues such as sacrifice and recoupment.

IV. THE COMMISSION'S REVIEW OF ARTICLE 82 OF THE EC TREATY

A. Policy Choices

While generally supportive, there have been a range of reactions to the Guidance. We have been congratulated on our efforts to set out our enforcement priorities for exclusionary behavior under Article 82 on the basis of a coherent effects-based framework providing a degree of legal certainty to business and consumers. Equally, we have been criticized for not having moved away from what some commentators qualify as overly restrictive and form-based case law on Article 82.

Some commentators have expressed concern at our intention to look at conduct that excludes less efficient competitors, arguing that we have failed to banish entirely a "form-based" approach to enforcing Article 82.

It is worth emphasizing that the more general test set out in the Guidance for pricing conduct is that of the “equally efficient competitor,” i.e. , the Commission will generally look at conduct that is capable of excluding equally efficient competitors. However, given the nature of the Guidance, this test is, of course, indicative only. The Commission has to retain its discretion to pursue other cases that may result in consumer harm—and, in certain circumstances, the longer term consumer harm that may result from the exclusion of less efficient competitors. This may be the case, for instance, where a dominant company is super-dominant, so that there is reason to preserve the competition that still remains on the market in order to prevent complete monopolization. Equally, in recently liberalized industries such as network industries, a dominant company's competitors might be just as efficient as the dominant company, if not for their lack of economies of scale and of scope. In that case, foreclosure of these competitors might run counter to liberalization objectives and decrease consumer welfare in the longer run.

Other commentators suggest that the effects-based approach introduced by the

Guidance, with its focus on evidence and economic analysis, will make the enforcement of Article 82 more complex and less predictable, with the result that overall legal certainty will suffer, and ultimately that enforcement will be curtailed.

To the contrary, I think that the Guidance provides businesses with a clear indication of the factors that the Commission will normally take into account when deciding on its enforcement priorities in relation to conduct that may be caught under Article 82. The use of an effects-based approach does not imply that complex economic or econometric analyses will be necessary in every case, although they can, of course, be useful tools. It is worth noting that an effects-based approach under the merger rules and under Article 81 has not resulted in less legal certainty or under-enforcement.

Overall, I think that the Guidance strikes a reasonable balance in terms of implementing an effects-based approach. I believe we have met the objectives we set ourselves in December 2005 when embarking on this review of our policy under Article 82.

Our objectives then, as now, were to establish our enforcement priorities in order to make our intervention as effective as possible, and to modernize our policy on Article 82 so that it would be convergent with our policy on merger control and Article 81.

B. About the International Context

Although convergence with other jurisdictions was not in itself the purpose of our Article 82 review, it is clear that the approach embedded in the Guidance is a step towards more convergence with other jurisdictions'—such as the United States'—

approach to unilateral conduct.

In September 2008, the U.S. Department of Justice published a Report on the assessment of single-firm conduct under Section 2 of the Sherman Act. The European Commission and the U.S. jurisdictions agree on the fundamental principle that protecting consumer welfare is the overall aim of competition policy, and that this is what Article 82 and Section 2 of the Sherman Act are all about. However, Commissioner Kroes and I have expressed some reservations about the implications of the recent report by the Department of Justice.[2]

The Department of Justice Report seems particularly concerned that public enforcers should abstain from intervening in the competitive process. In particular, it suggests that public enforcement is in general only warranted where the anticompetitive effects of conduct by a dominant firm are substantially disproportionate to any associated pro-competitive effects. Without knowing exactly how this "disproportionality test" will work out in practice, we are concerned that it may potentially leave little room for public (or private) enforcement, and will leave serious consumer harm unpunished.

In contrast, the general test that the Commission applies when deciding whether to take enforcement action against exclusionary conduct by dominant firms can be called a "consumer welfare balancing test." It strikes a balance between over- and under-enforcement by protecting consumers from conduct that, on balance, will harm them. It entails an assessment of the facts and merits of each case, and does not apply presumptions of legality of the kind formulated in the Department of Justice's Report.

[2] See in particular Commissioner Kroes' speech at the Fordham conference in September 2008 - SPEECH/08/457 on http://europa.eu/rapid

The Department of Justice's Report sets a much higher standard for intervention. For example, concerning dominance, the Article 82 Guidance paper provides a "soft" safe harbor where a company's market share is below 40 percent. The Department of Justice's Report presumes monopoly power where a firm has maintained a market share of 66 percent for a significant period of time and practically excludes a finding of monopoly power below 50 percent. Again, this may give rise to a risk of under-enforcement, which is just as dangerous to consumers as over-enforcement.

V. CONCLUSION

The Guidance sets out the factors the Commission takes into account when deciding whether to bring enforcement action against potential abuses of dominance under Article 82—it provides a general analytical framework for Article 82 that should facilitate compliance by dominant companies. But, we have also made it clear that there will be a balanced examination of the facts and merits of each individual case. In other words, the Guidance does not carve out any category of conduct from a case-by-case scrutiny under Article 82 on the basis that they are “per se” anticompetitive. Ultimately our aim is to target our enforcement resources to where they are most needed, namely against conduct that is likely to harm consumers.