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Abuse of a dominant market position: the european commission issues a new guidance paper

The European Commission's new approach to deal with abuse of a dominant market position

While it is not illegal for one or several companies to hold a dominant market position within the European common market, the abuse of such dominant position is strictly prohibited by Article 82 of the EC Treaty.

Until now, to assess the risks of abuse related to certain practices, the economic operators would refer to the rules set forth in Article 82 of the EC Treaty (imposing unfair purchase or sale prices, limiting production or markets, etc.) or to Community case law that adopts a more global approach by analyzing the structural effects of certain practices^[1].

With the intention of facilitating the interpretation of Article 82 CE and improving predictability, the European commission recently published a guidance paper "*on its enforcement priorities in applying EC Treaty rules on abuse of a dominant market position*".

This twenty-seven page guidance paper – even though not binding – is to be considered as a reference tool that sets out the approach the European Commission intends to adopt to control the practices of dominant companies likely to constitute anti-competitive and exclusionary conduct^[2]. In this document, the European Commission confirms most of the decisions rendered by Community jurisdictions in cases dealing with abuses of a dominant market position.

The guidance paper is available on the European Commission's website^[3].

2. The method to be applied by the European Commission

The European Commission first sets out the principles it will henceforth apply to assess whether a company is in a dominant market position (a) and whether there is an abuse of such dominant market position (b). It also provides the possibility for dominant companies to justify their conduct and practices (c).

a) Regarding the notion of dominant market position

Confirming established Community case law, the Commission defines the notion of “**dominant position**” by reference to the notion of “**market power**” (i.e. the economic strength of a company that enables it to prevent effective competition from being maintained in a relevant market by behaving independently of its competitors, of its customers and ultimately of consumers as a whole), and not only by reference to market shares.

b) Regarding the notion of abuse

The definition of abuse is one of the main innovations contained in the European Commission’s guidance paper. The European Commission will henceforth assess the **anti-competitive effects** (foreclosing competitors from the market, slowing down the development of the market, etc.) that result from the dominant company’s conduct and practices (so-called “effects-based approach”).

The European Commission thus strays away from the forms-based approach (also known as the “per se approach”) according to which certain specific practices must be sanctioned, even if they do not have any adversarial impact on competition between Member States.

The European Commission considers the following factors to be generally relevant to assess whether there exists an abuse of dominant position:

- The position of the dominant company;
- The conditions on the relevant market, including the conditions of entry and expansion;
- The position of the dominant company’s competitors;
- The position of the customers or input suppliers;
- The scope of the allegedly abusive conduct;
- Any possible evidence of actual foreclosure;
- The pricing policy of the dominant company and of its competitors in the relevant market.

c) **The examination by the European Commission of claims put forward by dominant companies to justify their conduct**

Lastly - and this is another important innovation - the European Commission will grant dominant companies the possibility to justify their conduct, by demonstrating either that their conduct is **objectively necessary** (e.g. for health and safety reasons related to the nature of the product in question, etc.) or that their conduct

produces **substantial efficiencies** (e.g. technical improvements to the quality of the product in question, reduction in the production or distribution costs, etc.). The arguments put forth by the dominant companies must show why their conduct overrides anti-competitive effects on consumers.

3. Specific conduct and practices likely to constitute an abuse of a dominant position

After having exposed the method it will apply to assess the conduct and practices of dominant companies likely to be abusive, the European Commission lists four categories of practices that will be investigated when applied by dominant companies:

- Exclusive dealing (*a*);
- Tying and bundling (*b*);
- Predation (*c*);
- Refusal to supply (*d*).

a) Exclusive dealing

Situations where a dominant company imposes on its clients **exclusive purchasing obligations** or grants them a **conditional rebate** (notably when the purchases exceed a certain threshold) may be considered as abusive and are likely to prompt an investigation by the European Commission.

b) Tying and bundling

These are practices by which a company which is dominant in one product market seeks to strengthen its position in another product market by **tying or bundling the purchase** of the first product to that of the second.

c) Predation

The European Commission will generally investigate when there is evidence showing that a dominant company engages in a so-called **predatory conduct**, by charging a lower price for all or part of its output over a specific period of time – thereby incurring losses that could have been avoided – and subsequently making up for such losses by raising prices.

d) Refusal to supply

Lastly, the European Commission will also investigate any **refusal by a dominant company to supply** a product or service that is objectively necessary to manufacture a product or supply a service on a downstream market whenever such refusal is likely to lead to the elimination of effective competition on the downstream market.

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[1] ECJ, *Continental Can*, February 2, 1973, aff. 6/72, R. p. 215

[2] Released on December 3, 2008, Publication in the JOUE n° C 45, February 24, 2009, p.7.

[3] <http://ec.europa.eu/competition/antitrust/art82/index.html>

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