

The VATM welcomes the opportunity to be able to join in the consultation process on the discussion paper presented by the Directorate General of Competition on applying Article 82 EC, and refers to the following points, to which in its opinion particular attention should be directed:

A. Relationship to sector-specific regulation and to supervision of competition in certain sectors

A central weakness of the discussion paper, from the perspective of the VATM, is that it largely ignores sector-specific regulation and the communications about applying Community law on competition in certain sectors. That applies in particular also to the telecommunications sector.

First of all, in the view of the VATM it would be welcome here if the discussion paper pointed explicitly to the applicability of Article 82 EC also in segments of the economy with sector-specific regulation. Even if the EC legal framework for electronic communication is basically intended to counteract practices of exclusion and displacement, because of its strict ex ante approach it is unable to fully prevent improper behavior by companies with substantial market power. For this reason it is important to point out explicitly to the competition authorities that EC competition law is also applicable in markets with sector-specific regulation.

But it is the view of the VATM that there is also still potential for optimization in regard to the treatment of communications the application of Community competition law in certain areas of the economy. At the present time the remarks in the discussion paper are supposed to ignore such sector-specific approaches, regardless of whether they are the results of already published notices from the Commission or will be the subject of future positionings (text index 6). This does not appear to be without problems, particularly in view of the fact that general competition law will gain in importance as deregulation increases in the particular sectors of the economy. But then it is necessary for it to be applied stringently. EC competition law must therefore be applied for example in telecommunications law according to the same principles as in other segments, if the competition authorities do not want to expose themselves to the accusation of applying the laws arbitrarily.

The VATM concurs however in the underlying premise in the discussion paper, that the special characteristics of individual sectors permit and even necessitate further differentiation and concrete definition of the principles of competition law. To reconcile the demand for stringent handling of competition law with the need for sector-specific concrete definition, the obvious solution in the view of the VATM would be to identify the principles contained in the discussion paper explicitly as minimal positions, which can only be supplemented by sector-specific communications, not replaced. This would allow categorization of special forms of abuse in such communications, which are made possible for a market-dominant company by the special characteristics of the particular sector. If this sort of sector-specific abuse cannot be identified in a concrete individual case, it may still be necessary for the competition authorities to intervene as a result of the constellations of abuse that are covered in the discussion paper – or in guidelines developed from it. The discussion paper or any guidelines that may have been developed from it would therefore ensure a minimum amount of market power control, which would then be amplified and expanded by the sector-specific communications.

B. Exemption from prohibition of abuse by analogy to Art. 81 Par. 3 EC

The entire discussion paper is pervaded by the consideration that an inherently abusive exercise of a market-dominant position does not violate Art. 82 EC if it leads to a gain in efficiency. The crux of this consideration is justified by an analogous use of the possibility of exemption relating to the ban on cartels according to Art. 81 Par. 3 EC (text index 8). In the estimation of the VATM, this viewpoint must be staunchly refuted – on the basis of both regulatory and legal considerations.

A possible result of the viewpoint expressed in the discussion paper could be that specifically in the sectors characterized by economies of scale and network externalities – such as the field of telecommunications – improper behaviors could regularly be “justified” by pointing to the gains in efficiency that would be achieved by driving out competitors. Such effects can be observable, particularly in the area of productive efficiency, due to the increase in economies of scale, but also from positive network externalities as a result of such a displacement of competitors. But including such considerations of efficiency results in very broad discretionary latitude on the part of the competition authorities, and is devoid of any convincing quanti-

tative logical derivation in the individual case (on this whole issue, with a focus on the “efficiencies defense” [the so-called “Williamson tradeoff”] discussed in American competition policy, see Koenig/Vogelsang/Kühling/Loetz/Neumann, *Funktionsfähiger Wettbewerb auf den Telekommunikationsmärkten* (‘Functional competition in the telecommunications markets;), 2002, pp. 55 f. and 105). For this reason, the possibility of such a justification of market-abusive behavior must be rejected in terms of regulatory policy. Even in US cartel law the use of the “efficiencies defense” is confined to borderline cases, in which the competition-suppressing aspects are only slight or doubtful, whereas the gains in efficiency are clear and provable (see Koenig/Vogelsang/Kühling/Loetz/Neumann, op. cit., p. 56). In sharp contrast to this, the discussion paper regularly concedes a prominent role to the possibility of an efficiency justification. In the view of the VATM, for reasons of regulatory policy this must not be reflected in final guidelines which will serve as the basis on which the competition authorities take action against the abuse of a market-dominant position.

But there can also be no legal justification for market abuse based on perspectives of efficiency by analogy to Art. 81 Par. 3 EC. The clear wording itself leaves no room for an exemption from the prohibition in Art. 82 EC. Even the systematic position of this exception rule, which is merely a component of the rules governing the ban on cartels, not also of the prohibition of abuse, speaks against the possibility of an analogous application. Furthermore, the sense and purpose of Art. 81 Par. 3 EC also argue against drawing on such an analogy in conjunction with Art. 82 EC: The exemption clause serves as a corrective for the very broadly formulated wording of the cartel ban according to Art. 81 Par. 3 EC, whereas from its very wording the prohibition of market power abuse according to Art. 82 EC is directly tailored only for behaviors that are specifically detrimental to competition (on this whole matter also see Weiss in: Calliess/Ruffert, *Kommentar zu EU-Vertrag und EC-Vertrag* (‘Commentary on EU Treaty and EC Treaty’), 2nd ed., 2002, Art. 82 EC Treaty, marginal index 3). The decisions of the Community courts therefore also recognize that an agreement exempted under Art. 81 Par. 3 EC can nevertheless certainly be prohibited as abuse of a market-dominant position according to Art. 82 EC (see the supporting documents in Weiss, op. cit., footnote 3).

In contrast, the discussion paper refers – incorrectly in this respect – to the decision of the court of first instance of 26 January 2005. It was not the exemption according to Art. 81

Par. 3 EC as such that led the court to deny abuse of market power, but the “foregoing remarks on the changed rules and on the exemption that the court found significant according to Article 81 Paragraph 3 EC” (European Court of Justice, decision of 26 January 2005 – Circular T-193/02, marginal index 117 - *Laurent Piau*; emphasis added). But these findings were not based on any considerations of efficiency, but on the simple fact that the behavior which was the subject of the dispute specifically did not result in walling off the dominated market. Instead, despite the behavior under discussion there were numerous new entries to the market. Furthermore, it was also possible to point to an objective reason for the behavior in question (on this whole matter see European Court of Justice, op. cit., marginal index 103). So the deciding factor was the special characteristics of the individual case, which in the opinion of the court not only satisfied the conditions of Art. 81 Par. 3 EC and hence were able to justify a competition-limiting agreement, but in addition were also an obstacle to the assumption of any abuse of market power. Hence there is no connection with the justification that an abuse of market power has been identified – as suggested by the discussion paper. Such a possibility is foreign to EC competition law. It is therefore crucial that the references to a possible efficiency justification that pervade the entire discussion paper be deleted.

C. Relativity of entrepreneurial efficiency

The premise underlying the discussion paper is that the determination of whether the behavior of a market-dominant company is abusive in the meaning of Art. 82 EC must be made on the basis of whether it is capable of driving out an “equally efficient” competitor (text index 63). This “equally efficient” competitor is understood here as a hypothetical company that has the same costs as the market-dominant company (op. cit.). In the opinion of the VATM, this absolute concept of efficiency is not in accord with the economic realities and the goal of Art. 82 EC to protect competition. In most sectors of the economy, advantages of scale and size result in large companies facing lower average costs than smaller companies. This is especially true of the network industries, in which pronounced advantages of scale and size are often also joined by network externalities that make size advantageous, and regularly also density advantages that operate in the same way. A hypothetical competitor that has the same costs as a market-dominant company is then not (only) “equally efficient,” but more efficient. A competing company that actually operates as efficiently as the market-dominant

company, but in contrast to the latter does not enjoy corresponding advantages of scale, size and density and corresponding network effects, has higher production costs by comparison than the market leader. A price which a market leader can offer while still covering its costs can therefore turnout to be too low to cover the costs of a competitor that is actually equally efficient, so that the latter is ultimately unable to sell at that price and has to drop out of the market. On the basis of the inaccurate premise on which the discussion paper is based here, the market-dominant company is consequently accorded too much behavioral latitude.

At the same time, the discussion paper itself explicitly acknowledges the described connections, but reduces their relevance to cases of exception (text index 67). In the view of the VATM this procedure is not justified. Instead, the starting point should be a relative concept of efficiency, which not only takes into consideration the costs and prices of the market leader, but also pays attention to advantages of scale, size and density. In contrast, an objective concept of efficiency can only be assumed as the exception, when a particular market exhibits such economic characteristics. The present relationship of normalcy and exception should therefore be reversed.

D. Market abuse through capacity limitation and consideration of possibilities for expansion

The discussion paper makes the sweeping assumption at present that from the perspective of competition law a market-dominating company may refuse the desired access to a significant facility with a reference to exhaustion of the capacity limits (text index 234). The VATM views this passage of the discussion paper as too undifferentiated. Instead this gives a market-dominating company the possibility of driving out competitors by limiting capacities or through inefficient utilization of existing capacities. It should therefore be pointed out in any case that bringing about an exhaustion of capacity on its part can be judged as an abuse of a market-dominant position according to Article 82 EC.

Furthermore, in the opinion of the VATM it would be sensible and appropriate to point out in addition that the exhaustion of capacities, even if this were not itself brought about improperly, can no longer be held up to oppose a desire for access if the person who desires access is willing to share in the costs of a capacity expansion in proportion to the scope of his

demand. If a market-dominant company rejects a request for access in spite of such an offer, it is acting improperly. There is no difference here from the constellation in which a request for access is denied when capacity is available.

E. Exclusion of competition to refinance investments

The discussion paper takes the view that it is unobjectionable under competition law if a market-dominant company temporarily refuses competitors access to a significant facility, as long as the purpose of this refusal of access is to refinance investments that it expended to set up that facility (text index 235). The VATM views this passage also as too undifferentiated. Particularly in sectors of the economy in which the individual markets are closely linked to each other, and an exclusion of competition in one market can have significant effects on the competition in other markets, it would not be acceptable in terms of regulatory policy to grant a company that has access to a significant facility a temporary monopoly position.

On the contrary, the interest of a company in refinancing its investments, which must also be acknowledged from the point of view of the economy as a whole, can also be taken into account in other ways. Thought could be given here in particular to allowing higher access fees for a limited time. Such an expansion of the behavioral leeway of a market-dominant company is by far the milder remedy, compared to total exclusion of competition. The relevant remarks in the discussion paper should therefore be qualified accordingly. Instead, the possibility should be pointed out explicitly that a complete refusal of access in any case can be unallowable under competition law in certain circumstances even if it supports the refinancing of investments that have already been made, since such refinancing is also possible through appropriately structured access fees. Whether and when such a constellation exists must then be decided according to the circumstances of the individual case. Attention will have to be paid here in particular to the interest in keeping competition open, and to the effects of such a complete refusal of access on competition in other markets that are connected to the totally controlled market.

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