

European Commission's Public Consultation on Article 82

France Télécom Group's Comments

France Télécom welcomes the initiative of the European Commission ("EC") of guidelines on its analysis of exclusionary abuses. In its draft document, the EC proposes an effect-based approach and more detailed developments, with a view to introduce more elasticity and economics in its interpretation and analysis of exclusionary abuses.

However, it is unfortunate that the document does not give a global view of the anti-competitive practices under art.82 EC. Indeed, it is France Télécom's belief that in certain circumstances, the practices concerned by art.82 can have combined effects, and therefore trying to categorize them by type of effect seems artificial. A **global assessment** of article 82 behaviours would have been preferable in our opinion rather proposing several distinct documents on the subject. The collective dominance analysis proposed by the EC also lacks in rigour and does not provide any certainty for companies on this specific and complex situation, where clarifications are much needed.

Moreover, the approach based on effects widens the scope for EC intervention, since in most cases any move from a dominant firm is likely to have a certain economical impact on the market. In particular, given that the aim of each company is profit maximisation, it is difficult to see how any move from a dominant company in that direction would not have an effect on the market. The risk is therefore higher for companies, and requires that the EC sets clearer rules and more safe harbours in terms of potentially harmful behaviours, as well as maintaining sufficient incentives for progress and innovation for European companies, especially those who are facing international competition on global markets.

Indeed, this is an essential element for the future competitiveness of the EU at the world-wide level. European companies playing a significant role in the world markets are likely to be considered as enjoying a strong market position at the European level (and be subject to art.82 prohibitions). However, as regards global markets the analysis should focus (as in the US) on dynamic competition, such as the capacity of new entrants to introduce disruptive solutions, the capacity of incumbent to innovate in order to keep pace, rather than ensuring, as the EC does in its proposed guidelines, the possibility for new entrants to share dominant firm's solutions and platforms, or limit European companies' framework for innovation. In such context, European companies should be put on **a level playing field with non European competitors** in the world-wide markets in order to remain competitive.

Furthermore, although competition law applies to all industries, it is important to stress the importance of **regulated sectors** in EU's economy and the "privileged area" they represent for the application of art.82 (given former historical monopolies). Therefore, an art.82 analysis of the behaviour(s) of a regulated firm is a specific but common situation which should be specifically dealt with by the EC as part of its global initiative. Instead of the general statement on the necessary interactions between the two areas, as proposed in this



document, France Telecom would welcome a separate proposition clarifying the EC's view on the respective aims, tools and procedures of regulation and competition law, through an in-depth description of how their rationale and their procedures operate in consistent and complementary ways¹.

Thus, France Télécom considers that the guidance of the EC generally lacks in clarity and safe harbours for dominant companies as regards the exclusionary practices described in the document. The EC's approach appears too broad, and its analysis lacks definite limits as to what effect could be considered as "anti-competitive", thereby reducing legal certainty for companies. This can be illustrated by the several references made by the EC to the protection of competitors, rivalry and even "not yet as efficient competitors", which raises the question of the aim that the EC should keep in mind in applying article 82 and the boundaries of its control, which according to the Treaty, should remain Consumer Welfare.

I. General discussion on exclusionary practices.

A. MARKET DEFINITION

As regards the **market definition and use of the SSNIP test** (§15), the EC does not provide for any alternative to the SSNIP in cases of cellophane fallacy situations. France Télécom should recommend the EC to indicate that the SSNIP should be the "reference" tool for companies, and used as much as possible in all circumstances, in the absence of any other viable instrument. However, in "cellophane fallacy" cases, France Télécom would recommend that the EC should try and determine the reasons for a decrease or stop in demand for the products of the dominant firm after a certain level of price is reached. Indeed, if the decrease is explained by clients deciding not to use the product any more nor any kind of substitute, the market should then be defined accordingly.

With regard to market definition, France Télécom also considers that the EC cannot define as a relevant market a group of customers whose demand is inelastic compared to other groups of clients of the same product (§18). If the use and need for the product is the same, then this group of customers should be included in the market definition, even though their demand may be less elastic than that of other customers.

B. DEFINITION OF DOMINANCE

Firstly, France Télécom considers that particular attention and separate analysis should have been made for the determination of dominance on nascent and innovation markets, giving sufficient room for the development of such market without creating disincentives on investments for the actors of these new markets. The analysis proposed by the EC in its draft guidelines on the determination of dominance does not take into account the specificities of such markets.

¹ Such clarifications could be made through a new document, as proposed, or through a revision of the content and scope of the EC Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265 of 22.08.1998 in the light of the New Regulatory Framework.



On the general analysis made by the EC on **single dominance**, France Télécom would like to draw the EC's attention to the following elements :

- The EC indicates that some elements internal to a company could help qualify a single dominance (§26). In this regard, France Télécom considers that the EC should adopt a very **careful and dynamic approach** in its analysis of such elements, in particular by always analysing them in the light of the market context of the company in question. In particular, "higher than normal profits" should not be a separate element in the determination of the existence of a dominant position, all the more since the EC does not define this notion. How should higher than normal profits be determined in practice? In the absence of such clarifications, this element should not be referred to by the EC. Moreover, the introduction of such new elements are indicative of the EC's willingness to widen the definition of dominance, which was not the aim of the document.
The dominance being defined only with reference to the market conditions by the case law, France Télécom considers that the EC should not use any other elements, which, if examined in a static way, could create confusion.
- Concerning evidence of single dominance based on the market conditions, France Télécom would favour the setting of clearer safe harbours in terms of market shares thresholds (§31). Indeed, the proposed safe harbour (25%) appears to France Télécom as too low to be of any significant help for potentially dominant companies, who are more often in the "grey area" (25% to 45%). France Télécom would have liked the EC to set a **more effective threshold** in order to be consistent with the objective of the guidelines.
- As regards barriers to entry (§ 34 to 40), the EC should also take a **dynamic economical approach** and look at practicable alternative solutions to possible barriers, such as for example new ways of distribution, as provided by the Internet, in the case of distribution networks. The new economy provides today sufficient means to access customers directly, so that the existence of widespread distribution networks should rarely be considered as a barrier to entry in any given market. The current wording of the document does not refer to such dynamic approach of barriers to entry.
- the EC also undermines significantly in its paper the importance of **countervailing buyer power** (§41). Indeed, it is not the customers' role or mission to protect competition or help maintain a sufficient degree of competition on the market. Moreover, it is in practice often the case that customers, when faced with a dominant supplier, will firstly try to obtain better conditions for themselves than turn to alternative suppliers of goods of lesser "reputation" than those of the dominant supplier. Thus, the conditions set by the EC in its document seem to France Télécom to diminish significantly the possibility for a company to invoke the countervailing buying power of customers successfully. The conditions appear to be set at too high/unreasonable a standard compared to the realities of the market, to make it a useful tool for companies in practice.

Finally, the existence of a **collective dominance** is defined by the EC in broad terms and concepts, creating a doubt as to the possibility to avoid collective dominance in cases of



simple parallelism of behaviour in oligopolistic markets (§47)². The EC should have provided a more accurate definition of collective dominance, as was expected in consideration to the recent cases laws. The factors, which establish such a collective dominance should also have been clarified. If the EC would wish to keep a broad definition of collective dominance and abuse of it, such a position would be highly detrimental to companies' legal certainty, and a higher standard of proof should necessarily be required for the EC to prove that such collective dominance exists and is being abused.

C. ANALYSIS OF FORECLOSURE EFFECT

It is in general unfortunate that the document does not give a global view of the anti-competitive practices under article 82 EC. Indeed, it is France Télécom's believe that in certain circumstances, the practices concerned by article 82 can have combined effects, and therefore trying to categorize them by type of effect seems artificial. Also, in its examination of exclusionary practices themselves, the document is not wholesome, as it does not deal specifically with certain exclusionary practices, such as the margin squeeze, although it is expressly mentioned as an exclusionary abuse in §73.

Moreover, in the general assessment of foreclosure effects, the EC doe not refer explicitly to **actual effects** of a behaviour, as compared to its likely/potential effects. Given that an article 82 analysis is mostly an ex-post control, the behaviour having already taken place, the EC should be in a position to identify the actual effects on the market(s) of an alleged anti-competitive conduct, and determine its impact on competition accordingly. When the conduct in question did not lead in practice to any actual negative effects on the market for a relevant period of time, should the EC still focus on likely/potential effects, and even sanction a company for such potential effects? The EC should indeed clarify whether a particular behaviour should be sanctioned under article 82 even in the absence of actual effects on the market for a significant period of time, and under what conditions.

As regards more closely the various elements the EC takes into account in its analysis of foreclosure effects, France Télécom has the following comments :

- 1) When determining the costs of a dominant firm to be taken into account in order to determine foreclosure, the EC refers in §67 of its draft guidelines to the costs of an « apparently efficient competitor », and if such are not available, the EC considers that it may have to protect competitors that are “not yet as efficient” compared to the dominant firm. Although the “as efficient competitor” test is considered by France Télécom as a justified tool, the reference to a “not yet as efficient” competitor seems to leave room for an arbitrary and artificial protection of competitors (as opposed to protection of competition) on the market, without any justification being given. If a competitor can not be efficient, should it be protected or should the market be left to decide? If the EC would keep this element of analysis, then the reference to “not yet as efficient” competitors should be used in strictly defined market conditions. The current proposal extends in our opinion beyond the scope and aim of article 82.
- 2) The EC also introduces in §69 the notion of horizontal foreclosure in one and the same market, i.e. foreclosure of access to clients. This, in our opinion, is also likely to

² Indeed, the EC states : “*undertakings in oligopolistic markets (...) may be able to coordinate their behaviour on the market by observing and reacting to each other's behaviour*”.

introduce confusion in the use of the commonly known notions of foreclosure, which related so far to the “locking” of two markets together (foreclosure between markets in a vertical or horizontal relationship). The use of the notion of “foreclosure” as regards consumers does not seem appropriate according to France Télécom.

3) The EC states several presumptions that are dangerous in our opinion, and show a lack of dynamism in its approach. These presumptions may lead to confusion and incoherence, and France Télécom would therefore suggest that they be removed from the document :

- §55 « Harm to intermediate buyers is presumed to create harm to customers » : such consequence should not be automatically presumed, but considered in the light of the market situation.
- §102 “under most market conditions a dominant position company is unlikely to price below ATC and make a loss”. This statement is quite generally untrue, especially in industries with fixed costs, a broad range of customers, and a wide spectrum of price sensitivity. In such industries, where art.82 is more likely to apply, it is generally admitted as a “consumer welfare friendly” standard for companies to price their products/services depending on the “consumers’ willingness to pay”. In classical markets, prices based on demand level, in the line of Ramsey pricing, are a normal, stable and efficient practice, which could result in some customers paying below ATC while others will pay above that level. In specific cases, this method of pricing can be refined in order to improve the economical efficiency, which can lead to elaborated methods such as “yield management”. Moreover, in cases of two sided markets, demand characteristics can lead to stable and efficient pricing below incremental costs.

As a more general appreciation, using ATC as a cost benchmark for predatory pricing amounts to ignoring the importance of demand characteristics in price determination, with two main drawbacks : firstly, ignoring customer demand is not a good way to maximise customer welfare, and secondly, it would bring economic analysis of pricing two centuries backward.

- §65: “the EC will allocate common costs in proportion to the turnover achieved by the different products unless other cost allocation methods are for good reasons standard in the sector in question...”. Allocating common cost in proportion to the turnover is indeed a good rule in the exceptional cases where ATC estimation is useful to appreciate predatory pricing. However, in a regulated sector such as the electronic communication industry, cost orientation obligations for wholesale products have induced the use of allocating common cost in proportion of non common cost, which does not make much sense in predation analysis. Therefore as long as cost orientation obligations are not replaced by modern regulation tools such as price caps, there is a risk of inconsistency between article 82 and sector specific regulation rules. This structural inconsistency between the relevant common cost allocation variable for predatory pricing (turnover) and cost orientation wholesale obligations in regulated sector should be addressed and resolved.



D. POSSIBLE DEFENCES

France Télécom only considers defences possible as part of the overall article 82 analysis. The analysis of defences must be part of the global assessment of the behaviour, and in this sense an abuse can only be found when there is no valid defence. Apart from the objective justifications, the parallel with article 81§3 as regards efficiency gains raises the question of whether such a defence can be put at the disposition of companies without it being expressly provided for in article 82 itself. Companies, which welcome the initiative of the EC on this regard, must however be ensured that they can invoke with **sufficient legal certainty** an efficiency defence, and that it will not be put aside for absence of legal basis at some point of the procedure.

Generally, the economic analysis developed by the EC in terms of defences can be considered as static and rigid. They do not take sufficiently into account the dynamics of markets and competitors, the potential of competition for the future. Moreover, although the document expresses to the contrary, it seems to France Télécom that the approach to defences significantly diminishes innovation and investments incentives, which should be considered as detrimental to competition altogether.

Indeed, the EC introduces such numerous and complicated conditions for innovation and progress that the document appears quite deterrent for any important firm who would wish to make an innovative move on the market. The only real safe conduct seems to be to refrain from any price or product improvement. In comparison, in countries outside the EU (such as in the US), which have more favourable economic records than the EC in terms of **growth and innovation**, improvements of offers by important companies, providing customers with large, real and immediate benefits, are not disregarded in favour of the protection of actual or potential new entrants and the hypothetical effects of their possible reinforcement on the market. Moreover, supporting incentives for new entrants to find new ways to catch up with or even overtake existing companies is considered as more efficient in the long run compared to slowing down important companies in order to allow smaller ones catch up and copy them. This alternative competition policy is based on the argument of more consumer benefit in the short term, and more efficient, innovative and competitive companies in the long run.

More generally, France Télécom wonders how any such defences could be successfully invoked by companies given the **very restrictive interpretation** that the EC seems to adopt for each condition, and the high burden of proof that rests with the companies.

As regards **Objective Justification**, France Télécom considers that denying the right for companies to react to the introduction or development on the market of products its considers as dangerous for it or for customers (§ 77), could raise an issue as regards the legal responsibility of companies in terms of protection of consumers. Although France Télécom agrees that such reaction could not take the form of an article 82 violation, the EC should not deny in such broad terms the possibility for a company to try and remedy a defect in the market. Such is particularly the case in certain sectors, such as telecoms, where dangerous or “infected” products can have a very quick and widespread “contamination effect”. These kind of situations should be expressly provided for by the EC, with explicit examples, taking into account the civil and criminal responsibility that a company may face if, through its inaction, it endangers consumer’s health and security, whether directly or indirectly.

In its analysis of the **Meeting Competition Defence**, the EC clearly refers to the possibility to put in the balance, in terms of proportionality, the interest of maintaining competitors or allowing them to expand (§82). Reference to protection of competitors is again invoked, whereas it should not be the object of article 82. The justification to such protection is not clearly defined but merely alluded to. In such circumstances, this possibility opens a room to arbitrary and artificial protection of competition which could be detrimental for companies, and highly diminishes the practical value of such defence. The “proportionality” test seems to become “protection of competitors” test .

The main innovation of the document is the introduction of the « **Efficiency defence** » as a counterbalance of potential negative effects on competition. Apart from the issue of the legal basis for such introduction, which is discussed above, France Télécom considers that the economic analysis made by the EC shows a static view on competition and absence of any market dynamism. The conditions set out seem to be interpreted rigidly by the EC, and will more act as disincentives for companies, especially on investments and innovation (e.g. §86) rather than as a framework for efficiencies.

Also, France Télécom wonders how such defence could be successfully invoked given the very strict definitions and the high burden of proof resting on the companies. France Télécom considers that a balance should be set between what the companies should prove, and what evidence the EC should bring. In particular, once a company has invoked an efficiency defence, and given evidence of the creation of efficiencies counterbalancing any harm on the consumer, it should be the EC’s responsibility to prove that there could have been less damaging behaviours.

II. Predatory Pricing

The system of benchmarking proposed by the EC seems to us to be a good starting point for a predatory pricing analysis. The P<AAC has the only presumed abuse seems also justified, and creates legal certainty for companies.

On the other hand, the test of predation for the P<ATC benchmark should be reviewed as regards the following points:

- Indirect evidence of the predatory intent : the EC should clarify what relevance should be given to predatory intent in the absence of actual effects, and who bears the burden of proof as regards such indirect evidence, in particular for “other reasonable explanations” or absence of them (§115) ?
- The possibility to recoup losses should not be presumed (§122) but must be proved distinctly by the EC as part of the predatory test. The presumption of the possibility to recoup losses for a dominant firm is not acceptable given the importance of this element as an evidence of the predatory intent in the EC’s analysis. In this regard, It is necessary to emphasize that this point is currently subject to review by the CFI and that a jurisprudence should be shortly set on that matter. France Télécom regrets that the EC did not mention this element in its draft guidelines. Moreover, this situation raises the question of the validity of the EC’s proposed guidelines on matters pending before the CFI or the ECJ, which may be overruled in a near future.



Also, the EC leaves a wide “grey area” whereas companies were looking for more certainty in their evaluation of pricing mechanisms. For example, how should be treated a $LAIC < P < ATC$, as may be the case in the telecoms industry?

In the same concern to provide more safe harbours to the companies, the EC should state clearly that $Price > ATC$ should never amount to predatory pricing. The only case where $Price > ATC$ could correspond to an abuse is the case of price squeeze : this should be expressly stated and the concept and practice of price squeeze should be distinctly defined, as already mentioned. *A contrario*, the exceptional case given in §129 where pricing above your own ATC but below that of a competitor could be abusive contradicts completely the “as efficient competitor” test, and should therefore not be relevant. The example is also not clear in practice and seem, again, to amount to the protection of competitors instead of consumers.

Finally, the EC does not provide for any clue on her analysis of pricing strategies used to conquer new markets. What should the relevant benchmarks be in that case? Could some pricing policies be presumed to fall within the scope of article 82?

III. Single Branding and Rebates

France Télécom considers that the test proposed by the EC can not be replicated by companies in practice, given their insufficient knowledge of the market in order to complete such a test. In practice, the companies will not be able to rely on this test to ensure that their rebates policy is compatible with art.82 EC.

As regards the economic tools proposed by the EC, France Télécom considers that the ATC should not be used as standard for determining whether the rebate system may have negative effects (§152), as explained in our previous comments on §102³. Such a choice seems arbitrary, since companies can often price below ATC without there being any intent to impede competition. Pricing below ATC in itself is rarely considered an abuse by the EC. Moreover, the ATC are taken into account without any reference to a time period, which appears rigid for an economic analysis, and clearly puts aside any consideration regarding the new standard of sale (multi-time, multi-product).

France Télécom regrets that the EC does not provide for clearer guidance given the difficulty to use the test proposed. France Télécom would be in favour of a more simpler test, such as the predation test to be applied to the “effective price”. The standard tool would then be the AAC, which seems more logical from an economic point of view. And any pricing below ATC for certain customers but not others should be analysed by the EC as a price discrimination rather than an exclusionary rebate. Thus, the principle would be that if the effective price is predatory, then the rebate system could be qualified as an abuse.

In order to help the companies to make their self-assessment, it could also be helpful to have a guidance on a percentage of customers requirements in establishing the level of « tied purchases » at which foreclosure is likely to occur .

Finally, the EC should also take into consideration in its analysis the strong evolution of market practices in particular in B to B markets: indeed, most Companies now have very powerful sourcing departments, whose buying power allows them to obtain exactly the best

³ see above p.4



specific deal for the Group to which they belong, in particular in terms of rebates. This evolution on the demand side needs to be taken account by competition authorities.

IV. Tying and Bundling

On this particular behaviour and the proposed analysis proposed by the EC, France Telecom only wonders at the incremental costs used by the EC, without any specification on the time period. Should companies rely on the long run or short run incremental cost as a basis for their self-assessment?

France Télécom would also appreciate it if the EC could clarify the notion of “distinct products”, as it only refers to the fact that distinct products can be part of the same market, which adds complexity to the assessment.

V. Refusal to Supply

In article §227, the EC considers it sufficient that a captive market “that is, a potential market, or even a hypothetical market” can be identified. The EC then however refers to an actual demand, which implies that the market is more than hypothetical, but potential. The EC should either clarify its meaning or remove altogether all references to a hypothetical market, which seems too broad a notion and too difficult for a company to define, in view of the sanctions at stake.

As regards IP rights, the EC should also clarify the definition of “new goods or new services” for which a licensor can not refuse to licence its rights (which would be considered indispensable for the creation of such new goods or services), in order to increase legal certainty for both licensees and licensors.

Finally the document must create more balance between the need to preserve effective competition and incentives for companies to invest in R&D.