

The BDI's position

- The BDI welcomes the “more economic approach” of the Commission in relation to the application of Article 82 of the Treaty.
- To ensure legal certainty for companies clear, simple and practicable guidelines are necessary; undefined legal terms that are designed for economic circumstances are difficult to ascertain. They should be structured in such a way that they are operable for companies.
- With the planned guidelines, the Commission is intervening in the freedom of contract of companies so it has to prove the conditions for abuse of a market dominant position.
- The commission should state how it will use its discretion to take up a case.
- Circumstances in relation to co-competitors should not be used as proof for the abuse of a market-dominant position.
- The Commission should not overemphasize the importance market shares for the assessment of market dominance; the sustainability of a market share should be given special significance in the assessment of market dominance.
- The BDI welcomes the requirement of an exclusionary effect as a precondition for the abuse of a market-dominant position; the Commission should explain the testing scheme clearly and emphasize that the dominance must be perceptible in the market.
- The “as efficient competitor” test requires revision if it is to be used as a yardstick for price-based abuse; conduct above the respective cost threshold should be emphasised as unobjectionable; no other circumstances or less effective competitors should serve as a basis.
- The commission should take efficiencies in account in the assessment of the abuse of a market dominant position. The requirements to prove efficiencies are very hard for companies to fulfil.
- In relation to the individual types of conduct, the Commission should ensure that presumptions do not result in reversing the burden of proof to the companies and that it consistently promotes the exclusionary effect described in the General Section and the protection of competition and not of competitors.
- The BDI places special value on the issue of intellectual property. The industrial property rights system must not be undermined by competition law.

Synopsis Paper



Law, Competition Policy and
Insurance

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Synopsis Paper

for the hearing at the Federal Ministry of Economics and Technology
on 24 March 2006

Concerning: Discussion paper by the Directorate-General for Competition
on the application of Article 82 of the Treaty to exclusionary
abuses

1. The BDI welcomes the intention of the Commission to create greater legal certainty with regard to the application of Article 82. The BDI supports the stronger orientation towards a "more economic approach". On the one hand the Commission is given the opportunity to take greater account of the particularities of the individual case. On the other hand, it is more difficult for companies to assess the legality of their own conduct. Commission guidelines could be a valuable aid here.
2. The BDI makes the point that companies in a market-dominant position must also have the opportunity to compete actively. Any encroachment of freedom of contract should be constituted with care and based on a clear foundation which is predictable for companies. The approach used by the Commission and European courts to date has been too formal. Shifting the burden of proof is particularly problematic as these have obliged companies to prove that their conduct is not abusive. These rigid rules prevent a reasonable assessment of innovative conduct. Companies must be able to ascertain how the Commission will exercise its powers of discretion. Unfortunately, the Commission's Draft only

Der BDI ist Träger der Initiative

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Land der Ideen**



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partially satisfies these requirements. In some parts it is extraordinarily detailed, however, too many questions either remain unanswered or the answer is not specific enough to be of much practical value for the companies concerned.

3. The BDI points out that the dominant position of a company is not per se a ground to assume its abuse. The BDI welcomes the fact that the Commission puts the significance of market shares in perspective. It is however problematic that the Commission also keeps a back door open for low market share thresholds. It should state clearly that in the case of companies with a market share of less than 40 % dominance does not as a rule come into question. Furthermore, an approach which considers each case individually should be selected. The BDI rejects a reversal of the burden of proof above a specific market share threshold. On the other hand we welcome the fact that the Commission intends to place greater emphasis on the evaluation of market access barriers and the market position of buyers.
4. The aim of Article 82 is to protect effective competition. Any conduct that strengthens effective competition, thereby benefiting in particular consumers, should be allowed. The BDI welcomes the fact that the Commission wants to base the analysis of exclusionary abuse largely on its effects in the market. The Commission should make clear that in every case it has to prove the exclusionary effect of particular conduct.
5. In the opinion of the BDI the application of the "as efficient competitor" test for price-based exclusionary abuse is problematic. The cost data desired by the Commission will often not be available or might only be obtainable at great expense. Application of the law will be completely unpredictable if the Commission wants to use the "apparently as efficient competitor" as a yardstick. The BDI proposes that the basis for application of the "as efficient competitor" test is made simple and predictable.
6. In the opinion of the BDI, the Commission's plans to take account of efficiencies are too restrictive. The positive effects of a specific conduct should be assessed in a single-step analysis. The BDI regrets that the Commission links acknowl-

edgement of efficiencies to such inprecise legal terms as "indispensability". It is not clear how companies are to satisfy the strict obligations imposed upon them. With similarly high obligations, the Commission also devalues its basic willingness to acknowledge the "meeting competition defence". This prevents the market-dominant company from keeping pace with its competitors using methods common in competition.

7. Individual issues

The comments of the Commission on individual issues - at least reading between the lines - reveal a persistent sympathy for a per se approach. In the opinion of the BDI the following points are particularly problematic.

a) Predatory pricing

The Commission's statements are not specific enough. For example it is neither clear how a company is to show that predatory prices were calculated on the basis of a "reasonable commercial plan", nor which costs the Commission intends to base its analysis on.

b) Single branding and rebates

The BDI welcomes the fact that the Commission, as a rule, does not want to intervene if a company offers a product or service for a price above total cost. However, in cases of abuse, the Commission is also to be able to intervene, if the exclusionary effect remains. This contradicts the statements of the Commission in the General Section. Furthermore there are numerous other terms which are unclear, such as "a good part of demand" (fraglich, ob diese Terminus aus dem Diskussionspapier der Kommission ist) or a "viable scale of business". The Commission still appears to have the protection of less effective competitors at the back of its mind if it wants to include market potential of competitors of the market-dominant company in these terms.

c) Tying and bundling

The BDI welcomes the fact that the Commission basically assesses these forms of distribution positively. But it still remains unclear, for example, what

the term "a sufficient part of the market being tied" is supposed to mean.
The Commission should clarify this point as well.

d) Refusal to licence

The assessment of refusals to supply by market-dominant companies, based on intellectual property rights such as a patent, is of particular importance to the BDI. The Commission primarily restricts itself to repeating the criteria established in the case law of the European Court of Justice. According to this, compulsory licensing by holders of intellectual property rights to competitors is only possible in "specific circumstances", in particular if the competitor wants to produce an innovative product based on this IPR. The Commission wants to permit compulsory licensing beyond this, even if a new product is not yet "clearly identifiable". These preconditions are too unclear to be put into practice and are also wrongly directed. The rights of the holder of an industrial property right must be comprehensively protected. Compulsory licensing must not lead to a devaluation of these proprietary rights. Eroding intellectual property rights would contradict the regulatory objective of strengthening innovative capability. The BDI advises great restraint on this point.