DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES

PUBLIC CONSULTATION

FOREWORD

This Memorandum has been prepared by a Working Group set up within the framework of the Antitrust Alliance. The Antitrust Alliance is a forum of independent antitrust practices that has been created as an immediate reaction by private antitrust practitioners to the modernisation and decentralisation of the EC competition rules started on 1 May 2004. At present, the Antitrust Alliance covers a majority of the EC Member States. The objectives of the Antitrust Alliance include the exchange of information on antitrust developments, joint training and the creation of direct contacts between antitrust practices so as to facilitate the provision of specialised antitrust counselling in the decentralised post-1 May 2004 environment.

The antitrust practices that have participated in the Working Group are listed at the end of this Memorandum.

INTRODUCTION

The "DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses" ("the Discussion Paper") is welcomed by the Working Group as a useful tool to stimulate the debate on the principles that will govern the future application of Article 82 EC. The Working Group encourages the Commission to proceed with the preparation and the adoption of guidelines covering the same theme so as to enhance legal certainty regarding the Commission's future enforcement policy and to provide concrete guidance to the national courts and competition authorities that will be called upon to apply Article 82 EC.

The Working Group hopes and assumes that an important objective underlying the efforts of DG Competition is to increase the possibilities of self-assessment, thereby reducing the risk of infringements of Article 82 EC. In light of this, the Working Group attaches considerable importance to the ease with which the principles set forth in the Discussion Paper can be applied by industry and practitioners.

The Discussion Paper is founded on the Report by the Economic Advisory Group on Competition Policy of July 2005 ("EAGCP Report") and the speech given by Mrs. Neelie Kroes to the Fordham Corporate Law Institute in New York on September 23, 2005. The

Discussion Paper suggests strengthening economic analysis in Article 82 EC cases, and sets out methodologies for the assessment of some of the most common abusive practices.

The Discussion Paper shows the Commission's approach moving from the purely "form-based" to rather "effect-based" application of Article 82 EC. The Working Group welcomes this new approach. However, the approach entails a substantial risk of reduced legal certainty. The Working Group encourages DG Competition to ensure that the more economic approach is implemented in a manner that secures sufficient legal certainty.

The specific observations of the Working Group are set out below and follow the order of the Discussion Paper.

1. INTRODUCTION

Paragraph 2

In order to render the Discussion Paper/Guidelines as practical as possible, it would be useful that fairly detailed practical examples are added. Reference can be made in this respect to the approach adopted in other Guidelines.

Paragraph 3

The Working Group strongly supports any Commission initiative to expand the scope of the future Guidelines so as to encompass all possible types of abuses. As the same conduct can potentially be covered by more than one type of abuse (see, for example, pricing strategies that may qualify as predatory pricing, discriminatory pricing or both), it seems to the Working Group somewhat artificial to limit the Guidelines to one type of abuse and to address the other types of abuse in separate Guidelines to be made available later.

Appendix 1 to this Memorandum illustrates that, given the existence of certain national laws dealing with broad ranges of abuse issues, the limitation of the future Guidelines to exclusionary abuses may also from that perspective be less desirable.

2. RELATIONSHIP OF ARTICLE 82 WITH OTHER PROVISIONS

Paragraph 8

Given the lack of clarity that has existed for some time with regard to the interplay between Articles 81 and 82 EC (see Vertical Guidelines no. 135), the new Guidelines may present an appropriate occasion to cover all possible hypotheses in respect of this matter. The relevant hypotheses essentially consist of the following:

- if a practice engaged in by a dominant company benefits from an exemption pursuant to Article 81 (3) EC, it can by definition no longer be challenged on the basis of Article 82 EC.

- if a practice engaged in by a dominant company is caught by the prohibition of Article 82 EC, it is by definition not eligible for an exemption pursuant to Article 81 (3) EC.

- if a practice engaged in by a dominant company is not covered by the prohibition of Article 81 (1) EC, it can by definition no longer be challenged on the basis of Article 82 EC. For a recent national judgment that fails to respect this principle, see judgment of 10 November 2005 of the Court of Appeal of Brussels (Belgium) (case 2004/MR/8, Febiac).

- quid if a practice engaged in by a dominant company is caught by the prohibition of Article 81 (1) EC and does not benefit from an exemption pursuant to Article 81 (3) EC, is the practice then automatically caught by Article 82 EC or will this depend on the reasons that causes the inapplicability of the exemption?

3. MARKET DEFINITION IN ARTICLE 82 CASES

Paragraph 13

- The Discussion Paper mentions the cellophane fallacy in relation to market definition issues in Article 82 cases. Given the importance attached to market shares in all of the new-style block exemptions, it is important to know whether the cellophane fallacy should in practice also be taken into account in an Article 81 context, notably for markets on which a dominant player is present. Needless to say, this would render the application of the block exemptions substantially more complex.

- The SSNIP-test is difficult to apply in practice without involving expert economists. Even then, members of the Working Group have quite different experiences as to the robustness of the analysis performed by such economic experts. In light of this, it would be welcomed greatly if future Guidelines provide more guidance on the "variety of methods" referred to in this paragraph 13.

Paragraph 14

While theoretically sound, the central role given to the SSNIP-test in the Discussion Paper (and also in other documents issued by DG Competition) presents considerable practical difficulties for industry and practitioners. These difficulties are enhanced if there is a risk that the cellophane fallacy applies. While the Working Group acknowledges that the SSNIP-test and the cellophane fallacy are applied in fully-fledged Article 82 EC investigations, it strongly recommends that guidance is provided as to other more easily applicable methods for defining markets.

Paragraph 18

The test put forward in this paragraph ("what matters is that....") requires more explanation. More specifically, in order to distil meaningful guidance from this paragraph, it is essential that the concept of "a sufficiently large number of consumers" is clarified and rendered more specific.

Paragraph 19

Certain aspects of this paragraph could be clarified further:

- Which prices must be compared (e.g. net of taxes or including taxes; average prices for the region or individual prices, etc.)
- The sentence ("If an undertaking...") would be clearer if it was followed by an illustration.
- It would be helpful if examples of "other factors" (see last sentence) were provided.

4. DOMINANCE

4.1. INTRODUCTION

Paragraph 22

Does "a leading position" mean the number 1 position in terms of market share ?

Paragraph 23

We welcome the unequivocal equation of "dominance" with "market power". This begs the question, however, as to what degree of market power is needed before a firm can be said to be dominant. Although it is appropriate to move away from over-reliance on market shares as an indicator of dominance, presumptions of dominance based on market share thresholds at least had the advantage of providing some degree of quantification of the degree of market power (however inaccurately measured by way of market share) which amounted to dominance. Paragraph 23 refers to "substantial market power" being the level at which a firm will be found to be dominant. It would be useful to discuss how it might be possible to identify features which distinguish firms enjoying substantial market power from those which enjoy only significant market power (a somewhat arbitrary measure of market power utilised in the Open Network Provision directives to identify communications providers on whom additional regulatory obligations can be imposed), assuming that it is intended that these two market power thresholds should remain distinct.

Paragraph 24

It would be helpful if future Guidelines could be more specific as to what is meant by "a significant period of time"?

Paragraph 26

The Working Group has the following questions:

- How is it established that profits are higher than normal?
- The second sentence is somewhat puzzling. For the existence of dominance, certain conduct is deemed indicative. The example that is given concerns the increase of prices while costs are falling. However, such a scenario is perfectly conceivable outside any context of market power (e.g., a new entrant pricing its products quite low in order to attract consumer interest and to gain consumer acceptance and, once the products have built up a reputation on the market, such entrant being able to levy a higher price while (on account of the volume of demand) his costs are going down). It would seem that both the principle and the example may need to be phrased more cautiously.

With regard to the second sentence, it is true that a firm whose behaviour on the market could only be carried on if it were not constrained by effective competition must, by definition, not be so constrained. The logical consequence of this observation is that it may be possible to infer dominance from the fact that a firm is exhibiting certain behaviours in a certain market context, perhaps even if that firm's market share is below the level that would traditionally have been regarded as indicative of dominance. However, it may be dangerous to rely too much on the behaviour of a firm as proof that it holds a dominant position (thereby blurring the line between dominance and conduct amounting to abuse) since firms with very small market shares and little or no real market power may still engage in conduct which is generally regarded by Community law as abusive when carried on by a dominant firm (e.g. selective price cuts, threshold rebates, tying, bundling, and even charging certain customers exploitative prices and refusals to supply). These are difficult matters that deserve to be considered in greater detail.

4.2. SINGLE DOMINANCE

4.2.1. MARKET POSITION OF ALLEGEDLY DOMINANT UNDERTAKING AND ITS RIVALS

Paragraph 29

It would be helpful if future Guidelines could be more specific as to what is meant by "provided that this market share has been held for some time".

Paragraph 31

The Working Group would welcome clarification in future Guidelines as to:

- what is meant by rivals holding "a much smaller share";
- the circumstances where a market share below 40% may still mean dominance.

It is suggested that the characterisation of market dominance (paragraphs 20-50) should be made more precise. It might be useful to develop a test to support the classification of dominance. Such a test could take account of factors such as the intensity of existing competition, decreasing entry barriers into a market, the level of concentration in combination with the distribution of market shares. A more precise characterisation of market dominance would make the current version of Article 82 EC more predictable for undertakings and, thus, would guarantee a higher level of legal certainty.

Paragraph 33

It would be helpful to know whether the issue of product differentiation works only negatively for the allegedly dominant player or whether there are instances where this issue may result in a finding that the market share overstates the market strength of the allegedly dominant company. More generally, what impact will the product differentiation factor be given in practice?

4.2.2. BARRIERS TO EXPANSION AND ENTRY

Paragraph 40

With regard to the economies of scale and scope, it seems that the decisive factor is not so much whether entry or expansion occurs at less than the minimum efficient scale, but rather whether such scale can be achieved within a reasonable period of time. Furthermore, when measuring the constraining impact of such expansion or entry, the perception of the dominant player as to whether such minimum efficient scale will be achievable within a reasonable period of time will be important.

As to the distribution or sales network, it must first be established whether there is a need to replicate. This will not be the case if there are enough independent dealers or agents on the market or if there are other means of distribution (e.g. via the Internet) that may present viable alternatives.

More generally, the Working Group believes that costs of switching to a new supplier are too limited a factor for assessing whether there is a strategic barrier to expansion or entry. A more complex assessment seems to be called for to arrive at that conclusion[1].

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[1] According to the French Supreme Court (Cour de cassation) and the French Competition Council, the sole fact that it might be "costly for customers to switch to a new supplier" has, in itself, never been considered sufficient to characterize an abuse of a dominant position.

For example, in vertical supplier-to-reseller relations, four cumulative criteria are taken into account by the Cour de cassation and the Competition Council before admitting the likelihood of an "abuse by an undertaking or group of undertakings of the state of economic dependence" as referred to in article L.420-2 of the Code de commerce :

- reputation of the supplier;
- market share which is held by the supplier;
- percentage of the supplier's products in the annual turnover of the reseller;

4.2.3. MARKET POSITION OF BUYERS

Paragraph 42

Given the overall importance attached by the Commission to market shares (not only in the context of Article 82 EC, but also in the new-style block exemptions), it is imperative that this paragraph is expanded. The observation contained in this paragraph may have a considerable impact on the analysis. Hence, it seems essential that future Guidelines explain as specifically as possible the conditions under which such separate markets will be defined. The failure to do so creates legal uncertainty and lack of predictability. The principle contained in this paragraph should not serve as a surprise argument for enforcement agencies where they encounter difficulties in establishing dominance in the broader market encompassing all customers.

4.3. COLLECTIVE DOMINANCE

Paragraph 43

Certain members of the Working Group have emphasized that in their jurisdiction collective dominance has to date essentially been based on a structural analysis (existence of financial links) so that the adoption of the principles reflected in the Discussion Paper is likely to trigger a change in policy (see, e.g., French Competition Council decision No. 03-MC-04, 22 December 2003, Messageries lyonnaises de presse, §63).

Paragraph 44

Is it sufficient that the undertakings are able to adopt a common policy or is it necessary for establishing collective dominance that the relevant undertakings have effectively adopted a common policy?

Paragraph 47

There seems to be a contradiction between the first sentence of this paragraph and the other sentences dealing with coordination. As described, the coordination referred to in these other sentences qualifies as an agreement or a concerted practice within the meaning of Article 81 EC. If this is not a correct understanding, it should be explained in what respect the coordination described here differs from coordination caught by Article 81 EC.

- difficulty for the reseller to switch to a new supplier.

In addition, both the Competition Council and the Cour de cassation have taken the position that, even if it would be "costly for customers to switch to a new supplier", this situation would not necessarily be damaging to competition when the reseller would have an alternative solution. For examples, see : for the Competition Council, decision No. 01-D-49, 31 August 2001, relating to practices carried out by Sony and decision No. 05-D-50, 21 September 2005, relating to anticompetitive practices in the beer sector; and for the Cour de cassation, decision No. 00-13.921, 9 April 2002.

Paragraph 59

Throughout the Discussion Paper, dominance tends to exist "either-or", i.e. either an undertaking is dominant or it is not. However, in paragraph 59 it is stated that the "degree of dominance" will be a relevant factor in assessing foreclosure effects. The question is raised how that is consistent with the way the underlying dominance concept is introduced and characterised in paragraphs 20 – 50.

5. FRAMEWORK FOR ANALYSIS OF EXCLUSIONARY ABUSES

Paragraph 52

If there are other exclusionary abuses which are not addressed, it would be useful that they are listed in this paragraph of the future Guidelines. From a practical viewpoint, it would be useful to be given a catalogue of the exclusionary abuses identified by the Commission to date.

5.1. THE CENTRAL CONCERN AND PROOF OF FORECLOSURE

Paragraph 60

The presumption put forward here must be applied cautiously. Where ordinarily efficiencies must be proven by the company that may be caught by Article 82 EC, the burden of proof must in this particular case remain with the authority or party relying on the presumption and hence alleging the existence of an abuse. It is fair that such authority or party must first prove (and not merely allege) that no efficiencies are created and only obstacles are raised before it can avail itself of the benefit of the presumption.

5.2. PRICE VERSUS NON-PRICE BASED EXCLUSIONARY CONDUCT

Paragraph 63

The definition of the "as efficient" competitor requires further elaboration. Notably the concept of "the same costs" may lack precision. For instance, if the dominant player and its direct competitor have the same fixed costs (total amount), the fixed cost per unit will be different on account of the volume sold by the dominant company. Likewise, if the price of raw materials is volume-driven (e.g., as of certain quantities, certain standard rebates kick in), the non-dominant company may pay a higher price for the raw materials, but if it were to purchase the same volumes as the dominant company, it would be entitled to the same price. Hence, by way of example, it is essential to clarify whether the same costs means the same costs per unit or in total and whether costs means costs actually incurred or costs corresponding to a given hypothetical volume of units.

The adoption of an "as efficient competitor" concept or test raises a number of questions as to whether it is an appropriate formula in an Article 82 EC context. These questions include the following:

First of all, the existence of competition itself may discipline dominant firms and thereby may benefit consumers no matter whether the competitor is as efficient or less efficient than the dominant firm. The presence of competitors alone may constrain the behaviour of a dominant firm and thereby reduce the possibilities to successfully engage in abuse of the dominant market position. Hence, even the exclusion of an inefficient rival can harm consumers because even an inefficient firm can lead to lower prices.

Secondly, e.g. due to economies of scale or learning effects, a dominant incumbent may very well price above its own average costs but below the present average cost of the entrant. This does not mean that the incumbent is more efficient than the entrant from a purely technical point of view. Under certain circumstances, it may be that foreclosure does not require the dominant undertaking to price below its own costs.

Thirdly, it seems rather difficult to actually define an "as efficient rival" or to determine which undertaking is more efficient. Hence, it may be problematic to adopt a policy which is critically contingent on non-observable features.

Paragraph 66

- Is the assessment as to whether an as efficient competitor can compete with the dominant company made on a transaction-by-transaction, customer-by-customer or an overall basis ?

- The Working Group wonders whether the "as efficient competitor" test will lend itself well for non-price based exclusionary abuses. More generally, the question has been raised whether it would be more practical to distinguish between "per se" abuses and to reserve the more complex and other effects based tests (such as "the as efficient competitor test") only to non per se cases.

Paragraph 67

The fourth point made here requires further explanation. As it presents an exception to the general principles, it should not function as an easy solution in cases where the dominant company meets the as efficient competitor test. The future Guidelines should foster greater predictability and hence this exception must be described as specifically as possible.

5.3. HORIZONTAL VERSUS VERTICAL FORECLOSURE

5.4. ABUSE OF COLLECTIVE DOMINANCE

Paragraph 74

It is assumed that by the words "one of the manifestations of the collective dominant position" what is meant is "one of the manifestations of the common policy".

The section dealing with abuse of collective dominance (paragraphs 74 – 76) does not give an adequate level or amount of information concerning the required standard of proof for the establishment of collective dominance. Are there circumstances where Article 82 EC could be applied to collective dominance, but where Article 81 EC could not be applied ? In other words, what is the value added by Article 82 EC relative to Article 81 EC when it comes to collective dominance ?

5.5. POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

5.5.1. OBJECTIVE NECESSITY DEFENCE

Paragraph 80

This paragraph is phrased in such terms that it seems almost impossible for a dominant player to advance an objective necessity defence. It would be helpful if hypothetical examples could be added illustrating cases where DG Competition would be inclined to accept the defence.

5.5.2. MEETING COMPETITION DEFENCE

Paragraphs 82-83

A member of the Working Group emphasized the difficulty of applying both the principles set out here and the defences in a common scenario such as a price war launched by a leading supermarket chain. It would be instructive to address, as a hypothetical example, such a scenario.

Furthermore, the third element of the "proportionality test" – whether the dominant firm's conduct was a "proportionate response" to the competition it was facing – might reasonably be thought somewhat vague and difficult to apply in practice, particularly after the first two elements of the test ("legitimate aim" and "indispensability") have already been established. It may be that the writer of the paper had in mind the *Compagnie Maritime Belge* case discussed in Part 6.2.4 of the Discussion Paper, which is generally cited as authority for the principle that even pricing above average total cost can be predatory (at least if carried out by a 'super-dominant' firm). It may be useful for the final paper to include a discussion of

whether, why and to what extent a dominant firm can realistically be expected to deprive itself of methods of responding to competition which are indispensable in pursuance of a legitimate aim (i.e. are not intended to exclude through methods other than 'normal competition on the merits') upon self-recognition by that firm that its employment of such measures would be "disproportionate" in its effects on its competitors' interests. The *Compagnie Maritime Belge* case can perhaps be better understood as an instance where the dominant undertaking's response to competition was unlawful, not merely because it was directed at excluding a less efficient competitor with a view to the dominant firm being able to maintain its super-dominant market share, but because the response to competition was intrinsically related to other conduct on the part of the dominant firm, such as charging excessive prices, which might also be regarded as abusive and which the dominant firm wished to continue to practice once the new competitor had been driven out of the market.

Paragraph 83

This paragraph implies that, if a competitor offers to a long-standing customer of a dominant player an extremely low price in order to lure that customer, the dominant player cannot rely on the meeting competition defence in order to offer the same prices (below AAC) as that offered by the competitor. So-called "defensive" meeting competition seems to be treated in the same way as "offensive" meeting competition. If this is intended, it would be helpful if it was spelled out.

Is there a difference between the conditions related to the efficiency defence and the exemption conditions of Article 81 (3) EC. If so, it would be helpful to address such differences in this paragraph.

5.5.3. EFFICIENCY DEFENCE

The new approach guarantees a more economic handling of Article 82 EC cases and allows for a more comprehensive and in-depth assessment of the economic circumstances of each individual case. For instance, if all four conditions of the efficiency test as proposed by the Commission (paragraphs 84 – 92) are met, this defence may open up opportunities to justify conduct that would have been prohibited under the form-based approach to date. However, the inherent risk may be an increased level of legal uncertainty for undertakings concerned as the efficiency test is highly complex and requires the analysis of a variety of different aspects. Not all of these aspects can be easily assessed by the undertakings concerned and the final decision on whether a given restriction in competition is outweighed by potential efficiency aspects is largely discretionary. A possible solution may be that the Commission issues economics-based guidelines, which would guarantee an adequate level of legal certainty. In these guidelines, principles and practical examples should be set out, so that they can be taken into account ex-ante by undertakings and their legal advisors when they decide on a given course of conduct.

Paragraphs 90-91

Is the implication of this paragraph that while dominance does not exclude the possibility of an exemption pursuant to Article 81 (3) EC the same is not true in cases where the dominant player holds monopolistic market power?

6. PREDATORY PRICING

6.1. INTRODUCTION

6.2. ASSESSMENT

Paragraph 105

Is the period of the alleged predatory pricing only relevant for measuring (i.e. calculating) costs or is it also relevant to determine the fixed as opposed to variable nature of costs ? If this is not the case, what will then be the relevant period for that purpose ?

The Working Group has emphasized that the appropriate time frame over which costs should be analyzed may vary significantly between industries. This is an illustration of the more general observation that in each instance proper account must be taken of the specific economic conditions of the case and the industry. Competition authorities should take full account of the economic realities in the various sectors of the economy and be ready to examine each situation on its merits. Support for this type of more nuanced approach can be found in the Deutsche Post decision, as well as the Notice on the application of the competition rules to access agreements in the telecommunications sector.

6.2.1. PRICING BELOW AVERAGE AVOIDABLE COST

Paragraph 106 et seq

The analysis seems to be based on an overall reduction of prices by the dominant player. Does the analysis also apply to cases where a dominant player selectively goes below AAC in order to meet a very sharp offer to one of its longstanding customers ? The pricing may well be below AAC, but the risk of the rival being excluded from the market is nil as only one major customer is involved in the price war. The example provided at the end of paragraph 110 does not truly address this issue. Hence, and more generally, how must the presumption reflected in these paragraphs be applied in cases where the low prices are not applied to the entire market, but for instance only in respect of certain customers or a limited part of the relevant geographic market ?

It has been observed by the Working Group that the formalistic price-cost tests applied by the Commission (paragraphs 106 – 129) may not be consistent with an effects-based

approach. The proposed focus on "correct price-cost criteria" tends to distract the attention from the crucial underlying abusive practice and the evaluation thereof to technical discussions on whether the selected price-cost criteria are met.

6.2.2. PRICING ABOVE AVERAGE AVOIDABLE COST BUT BELOW AVERAGE TOTAL COST

6.2.2.1. DIRECT EVIDENCE OF A PREDATORY STRATEGY

6.2.2.2. INDIRECT EVIDENCE OF A PREDATORY STRATEGY

Paragraph 117 et seq

It might be useful that future Guidelines address quite specifically the type of market where these elements can be expected to be proven. It seems prima facie that in markets where the dominant undertaking does not have the profile of a monopolist (as described in paragraph 92) it will be unlikely that a case of predation can be proven (see, for example, the issue of recoupment). More generally, in an effort to increase legal certainty, it should be possible to include a description of the markets that are more or less susceptible to predation. For instance, it is difficult to imagine that a predatory strategy can work if the dominant player has a market share of 55% and there are 4 other players on the same market (holding respectively 20%, 10%, 8% and 7%). If the dominant player were to target the customers of the 7% rival with prices below AAC, the chances of recoupment of the losses are close to nil due to the likely reaction of the other competitors. Likewise, in markets where customers have a habit of dual or multiple branding (in order to reduce their dependence on any single supplier), the chances that predatory pricing will be a successful strategy seem very limited.

In view of the foregoing examples, the Working Group wonders whether the position reflected in paragraph 122 is correct, namely that, once dominance has been established, the Commission needs not to prove the issue of recoupment. It would not seem appropriate to reverse the burden of proof and to leave it to the (allegedly) dominant company to prove that recoupment is not possible (see, paragraph 123). More generally, in the interest of legal certainty, the Working Group would favour in all predatory pricing cases a consistent discussion involving a variety of aspects, such as the predator's intention, possibilities of recoupment, foreclosure effects and other indirect evidence of a predatory strategy.

6.2.3. PRICING BELOW LONG-RUN AVERAGE INCREMENTAL COSTS

6.2.4. PRICING ABOVE AVERAGE TOTAL COST

6.2.5. POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

7. SINGLE BRANDING AND REBATES

7.1. INTRODUCTION

7.2. ASSESSMENT

7.2.1. SINGLE BRANDING OBLIGATIONS AND ENGLISH CLAUSES

Paragraph 149, footnote 94

The argument advanced in footnote 94 for justifying that the short term or short termination notice is not likely to be relevant does not seem very compelling. The impact of the single branding obligation applies only to such part of the purchases that the customer would otherwise not have purchased. The existence of "must stock items" does not mean that a short term or a short termination notice would not allow the customer to switch to a competitor for such part of its requirements that it would not necessarily purchase from the dominant supplier. The argument as phrased in paragraph 149 and footnote 94 seems to lack conceptual coherence.

7.2.2. CONDITIONAL REBATE SYSTEMS

According to paragraphs 151 – 176, incentives that take the form of pure quantity rebates are more likely to be motivated by efficiency considerations than fidelity rebates. However, the mere form of the rebate may not constitute a clear indicator. Instead, a more effects-based orientation might be useful in that respect. Furthermore, the effects of rebates towards retailers should be distinguished from schemes that are applied towards final customers.

7.2.2.1. CONDITIONAL REBATES ON ALL PURCHASES

Paragraph 153, footnote 98

The final sentence of footnote 98 is not clear to the Working Group.

Paragraph 161

The Working Group wonders whether it is accurate to state that the length of the reference period has no bearing on the loyalty enhancing effect. The shorter the reference period, the less will be the leveraging between the non-contestable and the contestable portion of demand. Also, shorter reference periods will make it easier for competitors to convince customers to make a switch. If the customer for whatever reason believes that the switch did not serve its interests, it has the comfort of being able to switch back at the end of the (short) reference period to the dominant supplier.

Also the nature of the product (e.g. seasonal products) may have to be factored in when assessing the relevance of the length of the reference periods.

Given these points, the Working Group believes that a more nuanced approach towards the length of the reference periods as part of the analysis may be called for.

7.2.2.2. CONDITIONAL REBATES ON INCREMENTAL PURCHASES ABOVE THE THRESHOLD

7.2.3. REBATES IN RETURN FOR THE SUPPLY OF A SERVICE BY THE BUYER

7.2.4. UNCONDITIONAL REBATES

7.2.5. POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

8. TYING AND BUNDLING

8.1. INTRODUCTION

8.2. ASSESSMENT

8.2.1. DOMINANCE IN THE TYING MARKET

8.2.2. DISTINCT PRODUCTS

8.2.3. MARKET DISTORTING FORECLOSURE EFFECT

Paragraph 189

There is one aspect of mixed bundling that may require more explanation in future Guidelines. Mixed bundling proceeds on the assumption that the dominant player is prepared to forego part of the (supra-competitive) profit which it makes in the tying market in order to boost sales of the tied product. Such a scenario seems to make sense only if the dominant player has reason to believe that, as a result of the mixed bundling, the foregone profits in the tying market will be compensated by (i) either increased profits on the tied market (due to the greater volume sold) or (ii) increased profits on the tying market over time as the mixed bundling serves to keep competitors active on the tied market away from the tying market. Both hypotheses seem rather exceptional. Hence, mixed bundling seems a fairly risky strategy and one which the dominant player must be truly convinced of before it decides to pursue it.

8.2.4. POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

9. REFUSAL TO SUPPLY

9.1. INTRODUCTION

9.2. ASSESSMENT

9.2.1. TERMINATION OF AN EXISTING SUPPLY RELATIONSHIP

9.2.1.1. BEHAVIOUR PROPERLY CHARACTERIZED AS TERMINATION

9.2.1.2. DOMINANCE

Paragraph 221

The statement included in the first sentence seems to be phrased in very absolute terms. Given the Commission's decision-making practice, it is clearly possible that the termination of an existing supply relationship infringes upon Article 81 EC (e.g. because the termination operates as a sanction regarding legitimate parallel trade on the part of the customer).

9.2.1.3. LIKELY MARKET DISTORTING FORECLOSURE EFFECT

9.2.1.4. POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

9.2.2. REFUSAL TO START SUPPLYING AN INPUT

9.2.3. REFUSAL TO SUPPLY INFORMATION NEEDED FOR INTEROPERABILITY

10. AFTERMARKETS

10.1. INTRODUCTION

Paragraph 243 et seq.

The Working Group wonders whether the Discussion Paper attaches sufficient importance to issues such as information asymmetries and the actual degree of rationality of the choices made by consumers.

10.2. ASSESSMENT

10.2.1. MARKET DEFINITION

10.2.2. DOMINANCE

Paragraph 261

The Working Group wonders whether the conclusion drawn in the second sentence from the change in policy reflected in the first sentence is not too mechanical. Conduct associated with installed-base opportunism should not, without a further more detailed investigation, be characterized as evidence of dominance.

10.2.3. ABUSE OF DOMINANT POSITION

10.2.4. POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

About the authors of this Memorandum

The authors are members of the Working Group of the Antitrust Alliance. Please note that the views expressed in this Memorandum reflect the position of the majority of the Working Group. This implies that on specific points individual members may have a different position. The antitrust practices that have participated in the Working Group are:

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- Italy: Tosetto, Weigmann & Associati, Torino (Guido Cravetto, Carlo Mezzetti)
- Lithuania: Sutkienė, Pilkauskas & Partners, Vilnius (Eugenija Sutkienė, Lina Daruliene)
- The Netherlands: Kneppelhout & Korthals, Rotterdam (Jan Kneppelhout, Kees Capel, Joost Vrancken Peeters, Monique Van der Kaden)
- Sweden: Danowsky & Partners, Stockholm (Ulf Isaksson)
- Sweden: Lindberg & Saxon, Stockholm (Maria Eiderholm)
- UK: Bates Wells & Braithwaite, London (Julian Blake, Selman Ansari, Julie Tenenbaum)
- UK: Monckton Chambers, London (Alan Bates)

APPENDIX 1

THE FRENCH EXAMPLE

The fact that the Discussion Paper encompasses only exclusionary abuses makes it too limited from a French point of view. Article L.420-2 of the French commercial Code (Code de commerce), which was amended by statute on 2 August 2005, lists a much wider range of practices which may be considered as abusive when carried out by an undertaking in a dominant position, even if such practices may not be regarded as exclusionary.

Article L.420-2 of the Code de commerce states the following:

> The abuse by an undertaking or group of undertakings of a dominant position in the internal market or a substantial part of this shall be prohibited in accordance with the conditions specified by Article L.420-1. These abuses may in particular consist of refusals to sell, linked sales (tying) or discriminatory conditions of sale and the severance of established commercial relations solely because the partner refuses to submit to unjustified commercial conditions.
>
> The abuse by an undertaking or group of undertakings of the state of economic dependence in which a client or supplier undertaking finds itself in respect of the above shall also be prohibited when it is likely to affect the operation or structure of competition. These abuses may in particular consist of refusals to sell, linked sales (tying) or the discriminatory practices referred to in paragraph I of Article L.442-6 or in agreements concerning the sale of a product range.

As far as the "practices referred to in paragraph I of Article L.442-6" are concerned, the following discriminatory practices might potentially be considered abusive:

- Applying to an economic partner, or obtaining from an economic partner, discriminatory prices, terms of payment or terms and conditions of sale or purchase which are not justified by any real quid pro quo, thus creating, for that trading partner, a competitive disadvantage or advantage;

- Obtaining, or seeking to obtain, from a trading partner any advantage unrelated to a commercial service effectively rendered or which is manifestly disproportionate to the value of the service rendered;

- Taking unfair advantage of a trading partner's dependence on him or of his own purchasing power or selling capacity by subjecting him to unjustified trading conditions or obligations;

- Obtaining, or seeking to obtain prices, terms of payment, selling arrangements or commercial cooperation conditions which are manifestly different from the general conditions of sale under the threat of a sudden total or partial severing of business relations;

- Suddenly breaking off an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices;

- Direct or indirect involvement in violation of the prohibition on reselling outside the network imposed on a distributor by a selective or exclusive distribution agreement exempted by virtue of the relevant rules of the law on competition;

- Subjecting a trading partner to terms of payment which are manifestly unfair in the light of good commercial practice.

On various occasions in recent years, the French Competition Council has referred to one or several of the above mentioned practices in order to characterize abuses of dominance (see: decision No. 05-D-50, 21 September 2005, relating to anticompetitive practices in the beer sector, § 47-48; decision No. 04-D-45, 16 September 2004, Société Export Press vs. NMPP, § 74-75).

In addition, it is clear that such discriminatory practices may have a possible exclusionary impact and therefore a mixed character.

In light of this, there seem to be sound reasons for not confining the Discussion Paper and future Guidelines to exclusionary practices ("the most important categories of practices not covered at this stage are exploitative and discriminatory practices").