EUROPEAN COMMISSION CONSULTATION ON THE APPLICATION OF ARTICLE 82 OF THE EC TREATY ON THE ABUSE OF A DOMINANT POSITION

AFEP comments

On 19 December 2005, the European Commission published a discussion document on the application of EU competition rules on the abuse of a dominant position (Article 82). The Association Française des Entreprises Privées (AFEP) sets out below its comments on the principles that the Commission is submitting for discussion.

AFEP represents at present more than 85 of the top private sector companies operating in France. The stock market value of the French listed companies which belong to AFEP amounted in 2005 to 1000 billion euros, with more than 4,8 million employees, and a combined turnover of over 1100 billion euros.

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AFEP member companies take note of the new approach adopted by the European Commission, which builds on the economic analysis and focuses on exclusionary abuses. As issues relating to exploitative abuses and discriminatory conduct are not dealt with, companies observe that it is therefore difficult at this point to have a global and coherent vision of the subject. In fact, there are considerable discrepancies between the different types of abuse that can be forbidden by the Commission. Hence, despite the Commission’s attempt at greater pragmatism, several “grey areas” remain.

Companies believe that the Commission should take into consideration the economic environment as a whole and also specify the underlying case law on which it intends to base its guidelines. In order to ensure greater legal protection, certain essential definitions should be reconsidered (relevant market, abuse of a dominant position, predatory pricing). Furthermore, the new approach of the Commission relating to the burden of proof should not be enforced to the detriment of companies which may abuse their dominant position. Finally, it is essential that intellectual property rights be effectively protected.
With the notion of abuse of a dominant position, that which was considered to be normal conduct for an undertaking legitimately seeking to maximise its profit, becomes an abnormal practice as soon as the company finds itself in a dominant position.

As the role of a company is not to permanently monitor its relative situation on the market, especially as, even within the framework guidelines, the factors of analysis and the cases always prove to be more complex.

As far as abuse of a dominant position is concerned, companies would therefore like to see the Commission exercise its control without prejudices and by evaluating their position in the long term and not at a given time. An excessively static analysis, such can be understood from the proposed guidelines, in fact places the most innovative companies in a particularly precarious situation, whereas their dominant position is only transitory and is essential for the dynamism of the European economy.

**Companies invite the Commission to take into consideration the economic environment as a whole**

The relevant market in which companies operate goes far beyond the borders of the internal market. Just like competition law and state aids in general, the Commission cannot ignore this when it comes to reforming the abuse of a dominant position. In order to safeguard the international competitiveness of the European companies, an in-depth comparative analysis of the rules applied by third countries should be taken into consideration to lay down coherent and non-discriminatory provisions for European companies.

The economic approach proposed by the Commission is welcome, but cannot alone determine its policy, which must be completed by other criteria in order to better take on board the complexity of each case.

- An analysis of the market shares alone is not enough, as suggested by paragraphs 20 et seq.

   Indeed, companies would like the demonstration of the dominant position to be effectively proven by several criteria, especially if the market in question is narrow, and therefore, likely to quickly place the company in a dominant position. The specific situation of the most innovative companies, which often create their market themselves, must therefore be given due consideration by the Commission. Article 82 must not impede the most cutting edge companies in their sector, which open up new markets, from innovating. The Commission should be able to accept that an innovative company can momentarily find itself at the edge of competition law, if interpreted in an excessively static manner. It is important to allow the market to express itself firstly through innovations, and secondly through the development of a market around this market, with the arrival of competitors stimulating the system. In the absence of which, companies could be wary of carrying out research and innovation on a market where, potentially, they could be quickly accused of abusive practices.
In order to reduce this risk and ensure companies greater legal protection, the effects on the market must therefore be combined with a multicriteria approach that takes into consideration factors such as industrial logics, the competitive context, the product policies and their possibilities of substitution or the purchasing power of certain buyers (punishing companies for abuse of a dominant position must trigger the problem of tougher competition among distributors). In this sense, the Commission could usefully illustrate its comments by adding examples or practical cases that would serve to clarify matters for companies¹.

- Furthermore, to be relevant, this economic analysis must be carried out along the same principles as those used by the industrialists, who reason in terms of long term investments not only within a macro-economic and short term framework.

The Commission should specify the case law on which it intends to base its guidelines

The new approach of the Commission is creating a demand for greater legal protection among companies. Yet, on several essential points, the guidelines propose either to refer to a settled case law of the Court, or to anticipate the validation by the Court of interpretations of the Treaty, which are highly contested by the various parties. In doing so, the legal protection offered to companies that follow the guidelines would be relative.

It would therefore be useful for the Commission to deal with the links between articles 82 and 86 of the EC Treaty. The case law of the European Court of Justice has in fact established that article 86 of the EC Treaty relating to companies granted special or exclusive rights as well as services of general economic interest is not a barrier, in principle, to the application of competition law, in particular of article 82. This case law has laid down the specific conditions of the application of article 82 to the conduct of companies in a dominant position when they are in a position to avail themselves of the provisions of article 86.

As for the guidelines, whose interpretative value does not always favour legal certainty, they sometimes appear as the instrument of a procedural commodity rather than as a means of enlightening companies. The guidelines of the Commission must shed some light on the decision-making practices of the Commission, confirmed after factual analyses specific to each case.

In their current version, companies observe that the objective of the Commission’s guidelines is broader, in that they tackle the practices of the Commission with regard to legal proceedings. Should these principles be maintained, it would be desirable to explain in greater detail the recourse likely to be used by companies.

¹ As it did on the subject of the guidelines on the vertical restrictions - C291/1 of 13 October 2000
Certain essential definitions should be reconsidered

Beyond the multicriteria approach that must prevail in the definition of the notion of dominance, particularly to take into consideration the economic environment in which companies operate in a broad and realistic manner (see above), other definitions concerning the notions of relevant market, of a collective dominant position, or of abuse of predatory pricing should be reconsidered.

Definition of the relevant market

The Commission mainly refers to its communication on relevant markets of December 1997 while considering that these definitions can cause difficulties in the event of the application of article 82. This observation leads the Commission to propose various solutions to get round these difficulties (reconstitution of the “competitive” prices, approach based on the intrinsic characteristics of the products and of their value of use, etc.).

Companies consider that the criteria laid down in the text of 1997 (nature of the product, degree of substitutability and geographical coverage) to define a relevant market are globally satisfactory and it is not necessary to introduce new criteria or tests. Furthermore, this kind of definition must be identical for all of the anti-competition practices in order to facilitate the legal implementation.

The 1997 criteria could however be usefully amended. For its part, the “SSNIP test”, cannot be sufficient in itself.

The notion of substitutability should be specified in order to take into consideration the importance of the certification or homologation procedures. Imposed by the clients and sometimes implying very long delays (which can go on for several years), they in fact represent a considerable barrier to market entry for those companies that must comply with them.

Furthermore, an updating of the 1997 Communication would be useful in order to harmonise it with the most recent case law.

For its part, the “SSNIP test” (§ 14 to 17) chosen to define a relevant market is not satisfactory in that the Commission considers that the costs, a factor in the breakdown of the price, are not always available and that it is therefore necessary to consider other benchmarks.

However, companies believe that this kind of approach leads to an enlargement of the notion of relevant market and to a denial of an essential price factor, which is cost. That is in particular linked to the efforts of innovation and research made by a company. To remain competitive on a market, companies must be able to come up with new products and organise the upscaling of innovative products. If, to satisfy a concern of competition for consumers, companies cannot pass on the cost factor incurred by this kind of strategy in their prices, their economic dynamism will be altered.
Definition of the notion of a collective dominant position

Companies believe that the document of the European Commission is excessive in § 46 relative to a collective dominant position and that it goes further than case law in this matter.

Companies are in fact likely to be in a situation of a collective dominant position in the absence of any agreement. The oligopolistic character of the market would be enough to create this situation, which is more often than not produced without concertation or without any intention of agreement, within the framework, for example, of the upscaling of a new product, initially sold by a small number of companies.

Furthermore, the very philosophy behind this kind of assertion is disputable in that companies could be punished without having any link with their competitors ("the existence of an agreement or of other links is not indispensable to a finding of a collective dominant position.").

Should the proposed principles of the Commission on a collective dominant position be maintained, it would be up to it then to demonstrate, at the very least, the existence of links between the different incriminated parties (contractual, financial, structural, etc.) implying a common strategy.

Definition of the notion of abuse

Companies agree that the costs of the “as efficient” competitor be taken into account.

However, the analysis of the Commission shall not lead to the requalification of the costs of the company accused in a dominant position. This reconstruction of the costs could only be based on a theoretical construction that is too hypothetical to justify a sanction.

Furthermore, companies consider that only a very limited number of cases of abuse practices should be presumed.

Definition of predatory pricing

The Commission asserts the relevance of its test on predatory pricing. Companies consider this position as premature in that this debate is pending before the Court of First Instance, particularly as regards the aspects relating to the presumption of recovery of losses.

At this stage of the procedure, they therefore intend for this point to be abandoned and for the guidelines, if necessary, to be the subject of an update once the Court of First Instance rules on the matter.

The new approach of the Commission concerning the allocation of the burden of proof should not be adopted to the detriment of companies.

The change in the approach of the Commission must not have negative consequences for companies in terms of burden of proof.
It is not up to the company to prove that a practice is abusive or not. It is up to the Commission to come up with the proof of a dominant position and of the anti-competitive effect of the conduct of the company in question, considering the context as a whole, both the negative and positive aspects concerning the company.

In fact there is no legal basis that makes it possible, following the example of Article 81, to establish the link between the proof of the constitutive conditions of the agreement, which is up to the Commission (Article 81.1), and the proof of the causes of exemption (Article 81.3), which is up to the company or companies in question. Thus, the Commission cannot justify its position expressed in § 77, according to which it is allegedly up to the company to provide the proof of the objective justification or the efficiencies justifying its practice.

Furthermore, the Commission accumulates a large number of functions such as economic analysis, consideration of the technical aspects, legal appreciation and the final decision.

This confusion of roles can be a source of legal insecurity for companies. The latter would like to see the Commission delegate a part of these functions to independent experts. In fact, it appears, in view of the complexity of the cases, and the extremely detailed analysis that a correct application of the proposed guidelines call for, that only the intervention of high level independent experts would be capable of guaranteeing an objective investigation throughout the procedure. Companies are moreover surprised that, at no time, the Commission shows an interest in the short, middle and long term interest for the consumer.

**It is essential for intellectual property rights to be protected**

The document submitted for the consultation marks a new stage in the confrontation between competition law and intellectual property rights (paragraphs 237 to 242) in a sense that is not acceptable for companies.

In fact, the latter would like to point out that intellectual property rights, as well as the know-how of companies are indissociable from the process of innovation, in itself an essential factor of competition. In this respect, intellectual property rights play a fundamental economic role.

The European Council that met in Lisbon on 23 and 24 June 2000 thus very justifiably pointed out that

(…) innovation and ideas must be adequately rewarded within the new knowledge-based economy, particularly through patent protection »

The autonomy of the policy governing the protection of intellectual property rights must therefore be safeguarded, as it is in the common interest and pursues an aim as legitimate as competition policy. By definition, the patent creates a temporary monopoly. This monopoly allows remuneration and authorises the dissemination of innovation.

However, companies are concerned about the growing gap between what the Community authorities say about increased protection of intellectual property rights and the growing number of obstacles facing them when they seek to actually protect these rights. Companies would like competition law and the intellectual property rights to be linked without prejudices or unfavourable presumption for the latter, yet this is not the direction taken by the guidelines presented by the Commission.

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2 Lisbon European Council, point 12.
These guidelines indeed go beyond the case law settled by the Court. Generally speaking, companies that find themselves in a dominant position have more and more difficulties in protecting their rights, legitimately acquired at the cost of heavy investments, in the face of the growing demands of the competition authorities, which are increasingly assimilating the exploitation of the intellectual property rights to an abuse of a dominant position. Similarly, within the framework of the technology transfer agreements\(^3\), the Commission takes an approach to the royalties and exclusivity in a way that is too unfavourable to the intellectual property rights.

In practice, competition law should only be applied to the field of intellectual property right in the most serious cases of abuse of competition. The full and entire application of competition law can in fact only lead to a fundamental questioning of what constitutes a patent, i.e. a temporary monopoly over exploitation.

The risk is that very result and motivation of innovation will be increasingly hindered, at the risk of pulling the plug on the driving force behind the growth of European companies, and therefore their competitiveness.

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Companies would like to reiterate the considerable importance they attach to the consideration for the international context by the European Commission. In order to achieve the proclaimed aim of a greater pragmaticism, it should in fact carry out a comparative consultation before taking any decision affecting companies in Europe. This kind of approach should thus make it possible to measure the economic environment as a whole and to analyse EU Competition law in the light of competing laws, such as those of the United States and Japan.

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\(^3\) Regulation 772/2004 of 27 April 2004 on the application of article 81, paragraph 3, of the Treaty to categories of technology transfer agreements and Guidelines relating to the application of article 81 of the EC Treaty to the technology transfer agreements