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The EU Commission's New Communication on the Application of Article 82 to Exclusionary Conduct – Compromise, Pastiche, Holding Action, Tight-Rope Walk, Exercise in International Antitrust Diplomacy

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Over the past eight years, the European Commission ("Commission") has been engaged in a programme to modernize substantive EU competition law and the structures for its enforcement. The goal has been to ground the substantive law firmly in an approach based on analysis of economic effects in the market. In a series of new guidelines and group exemptions, the Commission has revised the law under Article 81 of the EC Treaty on horizontal and vertical restrictions and on technology transfer agreements, and refined and redefined the substantive content of the "significantly impede effective competition" test under the EU Merger Regulation. The structure of enforcement has been thoroughly revised in Regulation 1/2003 and its flanking notices and guidelines. The last missing piece of this programme was the modernization of the law under Article 82.

The new communication providing "guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty to abusive exclusionary conduct by dominant undertakings" issued on December 3 is intended to fill this gap, or at least part of it. The wording of the title gives away the difficulties encountered by the Commission. A fairly dense case law of both the Commission and the European courts, much of it even quite recent, adopts positions that sometimes seem to apply what are virtually per se rules condemning certain types of conduct by dominant companies (a conspicuous example is the case law condemning fidelity rebates by dominant companies; others, arguably, are predatory pricing and tying). Much of this case law is doubtful in light of contemporary economic antitrust theory. Some of it has been the subject of sharp differences with the U.S. administration (e.g., *GE/Honeywell, Microsoft*), where the Commission has been accused of lack of economic rigour, protecting competitors rather than competition, and undermining incentives to invest by imposing supply or licensing obligations. On the other hand, enforcement agencies are naturally reluctant to give up established positions that could come in handy in future cases. Moreover, in the case of Article 82, the Commission has no discretionary power to issue group exemptions, which, together with the issuance of guidelines, were the vehicle for modernizing the law under Article 81. So, to the extent that the Commission wishes to distance itself from the old case law, it is confronted with the problem that much of that case law is enshrined in judgments of the European courts, which are the Commission's master.

The result is a somewhat equivocal and defensive document[1] that enunciates not what the law is or should be, but what the Commission's enforcement priorities will be.[2] It makes selective references to existing case law and its language and concepts, but also lays out positions which, in some instances, appear to depart from them. Broadly speaking, the Commission is apparently engaged in a rear-guard action that seeks to preserve as much as it can of existing positions, legitimating them economically by the expedient of accepting an overall requirement of consumer harm. The most important points:

1. The Communication stresses that its concern is "to protect an effective competitive process and not simply protecting competitors" – this clearly is intended to parry a criticism often heard from the U.S.

2. The section on market power melds the old formula of the case law - "a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers" - with the economic concept of the ability to raise prices, taking into account actual and potential competitors (including barriers to entry) and countervailing power of customers. This introduces more economic rigour into the market power determination. The Communication also endorses the existing "soft" safe harbour of 40% market share.
3. It introduces the umbrella concept of foreclosure leading to consumer harm, dubbed "anticompetitive foreclosure" - "a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in position to profitably increase prices [or limit output, quality or innovation] to the detriment of consumers". This concept, which is a function of detailed economic analysis of various parameters, provides a basis for taking distance from some of the old more rigid quasi per se rules in areas such as fidelity rebates and tying.
4. The assessment of anticompetitive foreclosure looks to the "actual or likely future situation in the relevant market" compared to the situation that would prevail in the absence of the alleged abusive conduct.
5. The Commission argues that some conduct is effectively per se infringing - i.e, no analysis of effects is necessary – where it appears that "the conduct can only raise obstacles to competition and . . . it creates no efficiencies". Thus, flexibility is preserved should it prove necessary in future cases.
6. There is a general discussion of price-based exclusionary conduct: the Commission "will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking". But this is qualified by the observation that less efficient competitors may be taken into consideration in certain circumstances. There is a discussion of the cost methodologies for determining foreclosure.
7. The Commission accepts that otherwise abusive conduct can be defended on the basis that it is objectively necessary and proportionate, or that there are efficiencies such that there is no net harm to consumers.
8. Having set forth these general considerations, the Commission then considers specific forms of abuse:
    - **Exclusive dealing,** which includes both imposition by dominant companies of exclusive purchasing obligations on customers and rebates. The fairly detailed discussion is apparently intended to signal a retreat from the previous rather rigid position condemning rebates by dominant companies to a more nuanced and effects-based analysis
    - **Tying and bundling:** the conditions for Commission action will be (i) dominance on the tying product market, (ii) the tying and tied products are distinct products, and (iii) the tying is likely to lead to anticompetitive foreclosure. This approach, which is supported by reference to the CFI judgment in the *Microsoft* case, specifically requires effects analysis to support a tying case. There is a brief discussion of the circumstances in which multi-product rebates covering both tying and tied products may be anticompetitive, and of the efficiency defense in tying cases.
    - **Predatory pricing:** the Commission offers an equivocal pastiche of old and new theories. There must be sacrifice in the form of incurring losses or foregoing profits in the short term. Different measures of sacrifice are proposed. There must be anticompetitive foreclosure. The likelihood of recoupement of the losses tends to show abuse, but is not a necessary element.
    - **Refusal to supply and margin squeezes:** the refusal to supply argumentation pays lip service to economic arguments about the need for firms' freedom to choose their trading partners, and the need to avoid undermining incentives to invest. It then endorses the relative aggressive approach to finding an infringement in the *Microsoft* and *IMS* cases, including the relatively relaxed standard of indispensability: "an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter – at least in the long term – the negative consequences of the refusal". The whole is subject to an overall requirement of consumer harm.

Footnotes:

[1] The document by its terms deals only with exclusionary abuses, not those deemed exploitative

(e.g., excessive pricing) or infringements relating to EU rules such as free movement of goods. It applies only to single company dominance (not collective dominance by two or more companies).

[2] "The present document sets out the enforcement priorities that will guide the Commission's action in applying Article 82 to exclusionary conduct by dominant undertakings. Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability on the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article 82. This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the European Court of Justice or the Court of First Instance." Paragraphs 2-3.