

# The European Commission's New Guidance On Exclusionary Abuses

Webcast Seminar, Brussels, 28 January 2009

OPPENHOFF & PARTNER

Rechtsanwälte

STEPTOE & JOHNSON LLP



# Welcome

- Where do we come from?
- Objectives of this seminar

# From DGCOMP



- Luc Peeperkorn, DGCOMP



- Katja Viertiö, DGCOMP



# Our Panelists

Rainer Nitsche  
ESMT Competition Analysis



Eckart Wagner  
Oppenhoff & Partner



Kenneth Ewing  
Steptoe & Johnson



# Moderators

Yves Botteman



Kees J. Kuilwijk



# Today's Agenda

1. Purpose and scope of the Guidance
2. Anticompetitive foreclosure
3. Efficiencies
4. Two specific conducts
  - Rebates
  - Refusal to deal

# Purpose and Scope of the Guidance



- Commission's Communication is continuation of work done earlier in other areas: Guidelines on vertical restraints, on technology transfer, on Article 81(3), on horizontal and on non-horizontal mergers
- The fragmented and sometimes rather form-based case law meant there was a good reason also in the area of Article 82 to publish a more systematic and transparent approach, to clarify policy and facilitate a consistent approach throughout EU
- The Communication published on 3 December will still undergo legal linguistic revision; this will not lead to substantive changes but the final text will only be published later in all Union languages

# Purpose and Scope of the Guidance



- Guidance on enforcement priorities
- Not meant to be a statement of the law
- Focus on single dominance and exclusionary conduct
- General approach:
  - Safeguarding the competitive process and not the protection of competitors
  - Effects on consumers
  - Objective necessity and efficiency defence
- To ensure that dominant firms do not impair effective competition by foreclosing rivals in an anti-competitive way, thereby having an adverse impact on consumer welfare

# Impact of Guidance in the Member States



- National courts and competition authorities apply Article 82, but they are not legally bound by the Guidance
- Member States may apply *stricter laws* on unilateral conduct in parallel to Article 82
- Thus, Guidance has (only) *factual impact* in Member States
- Differences in the legal systems will remain – e.g., German law on unilateral conduct even applies to companies that are not “dominant” under EU law

# Anticompetitive Foreclosure



- No particular test applied across all practices
- Anticompetitive foreclosure
  - Foreclosure: access to market is hampered or eliminated
  - Anticompetitive: in such a way that consumers are harmed
- Assess the current or likely future situation in the relevant market relative to an appropriate counterfactual
- The conditions of entry, the existence of scale/scope economies, network effects, the counterstrategies of competitors and customers, market coverage ...
- “As efficient competitor test” as a useful benchmark when assessing price conduct – taking a dynamic view of the constraint exercised by seemingly less-efficient competitor

# “As Efficient Competitor’s Test”



- The heart of DGCOMP’s analysis of price-based exclusionary conduct
  - Prices below cost could drive out an “as efficient competitor”
  - “AAC” – average avoidable cost – average cost per unit that could have been avoided if the “abusive” units had not been produced
  - “LRAIC” – long-run average incremental cost – average all costs (fixed and variable) incurred to produce the “abusive” units
- U.S. approach differs in key respects
  - More careful not to suppress vigorous competition
  - Also price/cost test – S.Ct. hasn’t decided, but usually average variable cost – close to AAC
    - Economic cost  $\neq$  accounting costs
  - But need likelihood or dangerous probability of recoupment

# Practical Implications: An Economic Perspective



- Use of “As efficient competitor test” for self-assessment?
  - Relevance depends on the alleged abuse
  - Be aware: keeping rivals with higher costs may sometimes be beneficial for competition
  - Do not lose sight of effect on consumers
- Other relevant practical benchmarks for self-assessment: consider the basics!
  - Relevant counterfactual?
  - Effect on rivals: Are there competing potent rivals despite the practice? Counterstrategies?
  - Effect on consumers?

# Focus on Efficiencies



- A dominant firm may justify conduct leading to anticompetitive foreclosure on the ground that efficiencies are sufficient to guarantee that consumers are not harmed
- The burden of proof is on the dominant firm to show that:
  - the efficiencies are the result of the conduct
  - the conduct is indispensable: there is no less-anticompetitive way
  - the efficiencies outweigh the negative effects for consumers
  - the conduct does not eliminate effective competition: exclusionary conduct that maintains or creates a position approaching that of a monopoly can normally not be justified on the basis of efficiencies
- The Commission makes the ultimate assessment of whether, considering the efficiencies, the behaviour is likely to lead to consumer harm

# A Critical Look



- Issues similar to the debate on the role of efficiencies under Art. 81(1)
- Integrated analysis preferred from an economic perspective (effect on consumers)
- Role of efficiency arguments will depend on the alleged abuse

# Efficiency Defence in the Member States



- Broad acceptance of efficiencies as defence in abuse of dominance cases in Member States
- But exceptions: Germany follows a rather “structural approach” – therefore, as such, limited scope for efficiency defence
- However, Guidance puts pressure on Member States to follow the Commission’s “more-economic approach”

# Rebates



- Guidance vs. case-law on rebates
  - Case law of limited help as cases differ: size of rebate, thresholds, products covered...
  - Guidance is more specific on requirements to show an effect
- Ideally Guidance induces the EC to consider
  - Does rebate induce complete foreclosure (number of competitors)?
  - How targeted is the measure (ranges, individualised)? Ability of rivals to respond?
  - Are consumers harmed?
- What are the divergences with the U.S.?

# Rebates

## Reply by DGCOMP



- Conditional rebates: foreclosure possible without sacrifice; low marginal price while high average price
- Can the rebate hinder entry or expansion of as efficient competitors?
  - Can rivals compete for the whole customer, or is the dominant firm an unavoidable trading partner: in the latter case, rebates can make it very unattractive to switch small amounts of demand
  - Calculate the effective price over that part of demand for which rivals can compete and customers are willing to switch (the relevant range) and compare it to the relevant cost benchmark
  - If customers have to forego a high rebate while switching a small amount, the effective price will be low
  - If the effective price is below AAC, the rebate is capable of foreclosing as efficient rivals, while such is unlikely above LRAIC
  - If the effective price is in between AAC and LRAIC, the Commission will investigate whether and to what extent rivals have effective counterstrategies at their disposal

# Refusal to Deal: Low Threshold?



- Guidance adopts the *IMS* and *Microsoft* judgments and sets a low threshold for a finding of abuse:
  - Dominance on *hypothetical* input market
  - Input is indispensable if there is no alternative source of *efficient supply* in the foreseeable future allowing competitors to compete on *downstream* market

# Refusal to Deal: Low Threshold?



- National Courts have already adopted this approach
- Düsseldorf Court of Appeal ruled that:
  - Lufthansa is required to allow RBS to deduct VAT in advance on its German flights (dominance on “input market”)
  - to enable RBS to offer a virtual credit card for business trips that competes effectively with Lufthansa's own card (indispensability of “input”)

# Refusal to Deal: A U.S. Perspective



- U.S. much less suspicious
  - Very few cases require dealing with a competitor
  - “Essential facilities” test – hard to apply in practice – courts not good as utility regulators
  - *Aspen Skiing* inscrutable
- U.S. DOJ rejects both tests – “beguiling label” “epithet” – “should not play a meaningful part in...enforcement”
- U.S. FTC disagrees, but no more guidance

# Refusal to Deal: Reply by DGCOMP



- General concern about incentives to invest in tangible and intangible assets – a specific framework
- Focus on input foreclosure
- Charging a price that prevents an efficient competitor from competing downstream is like a refusal to supply
- Cumulative conditions for intervention
- Input needs to be objectively necessary to compete effectively in the downstream market: there is no actual or potential substitute to the input, and replication would not be undertaken to a sufficient degree
- Elimination of effective competition: immediately or over time

# Refusal to Deal: Reply by DGCOMP



- Consumer harm:
  - may arise if refusal to supply prevents competitors from bringing new products or stifles innovation
  - a dynamic perspective: do the negative consequences of the refusal to supply outweigh the negative consequences of imposing an obligation to supply?
- Overall, balance of incentives to invest
- However, when it is manifestly clear that there can be no negative effects on the incentives to invest, for instance where regulation imposes an obligation to supply or where the upstream position of the dominant firm was financed by state aid, the usual test of likely anti-competitive foreclosure applies

# Wrap-Up



- This presentation reflects only the views of its authors. It may, in particular, not be taken to represent any view, express or implied, on the part of the European Commission.
- Sponsors & organizers:
  - ESMT Competition Analysis  
Schlossplatz 1  
10178 Berlin  
[www.esmt.org](http://www.esmt.org)
  - Oppenhoff & Partner  
Konrad-Adenauer-Ufer 23  
50668 Cologne  
[www.oppenhoff.eu](http://www.oppenhoff.eu)
  - Steptoe & Johnson LLP  
240 Avenue Louise, box 5  
1050 Brussels  
[www.step toe.com](http://www.step toe.com)