

# On the priorities for enforcement of Article 82

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\*The views expressed are those of the author and do not necessarily reflect those of DG COMP or the European Commission

# Introduction



- 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 final text of the Communication can be found in all Union languages at:  
<http://ec.europa.eu/competition/antitrust/art82/index.html>

# Introduction



- 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

# Dominance and market power



- The extent to which a firm can behave independently of its competitor relates to degree of competitive constraints exerted on this firm
- A dominant firm enjoys substantial market power over a period of time (two years)
- Competitive constraints :
  - Imposed by actual competitors
  - By the threat of expansion of actual competitors and entry of potential competitors
  - By the bargaining strength of customers
- High market shares are only a first indication
- Low market shares (below 40 %) are a good proxy for the absence of substantial market power

# Anticompetitive foreclosure



- No particular test applied across all practices
- Anticompetitive foreclosure
  - Foreclosure : access to market is hampered or eliminated
  - Anticompetitive : in such way that consumers are harmed
- Assess the current or likely future situation in the relevant market relative to an appropriate counterfactual
- Produce a convincing story of harm with the general factors in §20 - such as the conditions of entry, the existence of scale/scope economies, network effects, the counterstrategies of competitors and customers, market coverage, actual effects and intent ...- and the more specific factors mentioned in the conduct specific sections
- Small place for “hardcore” conduct (§22)

## As efficient competitor test



- As efficient competitor test useful indicator whether price conduct is capable to harm consumers
- Depending on the available data, to be applied for all pricing conduct: rebates, mixed bundling, predation, margin squeeze (see the different sections for details)
- In general consumers unlikely to be harmed if the conduct is only capable to exclude less efficient firms: soft safe harbour for pricing above LRAIC
- However, taking a dynamic view of the constraint exercised by seemingly less efficient competitor
- Tests only for capability to harm consumers: result to be integrated in general assessment of anticompetitive foreclosure

# Objective necessity and 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 a 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 which 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

# Conclusion



- Balanced effects-based approach to avoid over- and under-enforcement
- Comparison with US difficult to make because of ongoing debate in US
- Recent DoJ Report:
  - Concern of over-enforcement (private litigation culture?)
  - Safe harbour below 50% market share
  - Disproportionality test instead of balancing test
  - Most pricing conduct assessed as predatory pricing