

Does the Guidance Paper on Article 82 EC Matter?

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The Article 82 EC case-law of the Community Courts

- From a substantive standpoint, the Article 82 EC case-law is rather formalistic and akin to *per se* rule in some areas, such as rebates and tying.
- From a judicial review standpoint, the CFI and the ECJ have so far been reluctant to scrutinize Article 82 EC decisions in the same way they reviewed merger control decisions (*Airtours*, etc.)
- Unless this changes, the prospects of successfully challenging a Commission decision at the CFI / ECJ are bleak. This, in turn, may discourage applicants.
- Hence, the Commission feels relatively unconstrained in its ability to challenge dominant firms' conduct.

Outcome of Article 82 EC proceedings before CFI and ECJ

Date	Case Number	Applicant	Decision	Appeal before the ECJ
10 July 1999	T-228/97	Inish Sugar	Request rejected on most grounds Partial annulment: Commission did not prove one of the infringements	Confirmed (C-497/99)
12 December 2000	T-128/98	Aéroports de Paris	Rejection	Confirmed (C-82/01)
22 November 2001	T-139/98	AAMS	Rejection	None
30 September 2003	T-203/01	Michelin	Rejection	None
30 September 2003	T-191/98	Atlantic Container Line	Request rejected on first abuse Partial annulment re. second abuse: Commission erred in several respects, including rights of defense	None
23 October 2003	T-35/98	Van der Bergh Foods	Rejection	Confirmed (C-552/03)
17 December 2003	T-219/99	British Airways	Rejection	Confirmed (C-95/04)
30 January 2007	T-340/03	France Télécom (Wanadoo)	Rejection	Pending
24 May 2007	T-151/01	Duales System Deutschland	Rejection	Pending
17 September 2007	T-201/04	Microsoft	Rejection	None
10 April 2008	T-271/03	Deutsche Telekom	Rejection	Pending
1 July 2008	T-276/04	Compagnie Maritime Belge	Rejection	N.A.

Criticisms of this case-law

- This case-law has been widely criticized by lawyers, economists, academics, policy-makers, etc.
- But these criticisms have not yet been heard by the Community courts.
- The CFI judgment in *Microsoft* is particularly unhelpful as it seems to grant a blank check to the Commission (or, at least, this is the way the Commission seems to perceive it).

The Guidance Paper on Article 82

- This is the culmination of five years of efforts on the part of the Commission to provide some guidance as to the way it intends to enforce Article 82 EC.
- It follows the line taken in the 2005 Discussion Paper, but is shorter in that it does not provide extensive discussion of the various categories of abuse.

Does the Guidance Paper provide guidance? (1)

- The Guidance Paper is useful in that it confirms that the Commission intends to follow an effects-based analysis when assessing dominant firm conduct.
- This raises the question of whether the Commission binds itself to carry out an effects-based analysis even when the case-law of the Community courts does not arguably require such an analysis to be performed for a finding of infringement.
 - The answer must be yes as otherwise the Guidance Paper is meaningless.

Does the Guidance paper provide guidance ? (2)

- A whole host of potentially abusive practices, which are subject to controversial case-law standards, are not covered:
 - Exploitative pricing, price discrimination, etc.
 - Other abuses (sham litigation, patent strategies, etc.)
- The Guidance paper thus does not fully reflect the current enforcement priorities/practice of the Commission, which closely monitors such practices (e.g., pharmaceutical inquiry, cases involving behaviour in standard-setting organizations, etc.)

Does the Guidance Paper provide guidance? (3)

- The level of guidance offered by the guidance Paper is also limited by several factors:
 - Its reliance on tests which are hard to implement in practice
 - Its unwillingness to provide for safe harbours

Reliance on problematic tests

- The best example relates to rebates where the Commission continues to promote a complex “suction effect” test for assessing retroactive rebates.
- This test relies on the complex distinction between the “contestable” and “non-contestable” shares of a given customer’s demand.
- Complex tests are not only problematic in an *ex post* scenario (where an alleged abuse has been committed and the matter is investigated by the Commission), but also *ex ante* when firms need to design their rebates policy. Complex tests induce firms to be unnecessary cautious, thereby leading to type I errors (with the same effects/costs as *per se* prohibition rules).

The need for safe harbours

- Competition experts believe that competition authorities (and courts) should provide “safe harbours” designed to give firms immediate assurances, without the need to invest significant resources in a full-scale competitive analysis in order to ascertain that a given rebate regime will not be challenged by a competition authority or, more generally, create antitrust liability. As pointed out by Baumol:

“In a world in which vigorous competition is all too easily mistaken for predation, and in which firms can unintentionally overstep the line, it is important to provide managers with guidelines as unambiguous as the issue permits, to enable them to tailor their decisions in a way that ensures compliance with the law and minimizes vulnerability to anticompetitive lawsuits intended to handicap vigorous competition.”

The lack of safe harbours in the Guidance Paper

- With respect to pricing abuses, the Guidance Paper endorses the “equally efficient competitor” test.
- However:

“the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether a particular price-based conduct leads to anticompetitive foreclosure. The Commission will take a dynamic view of this constraint, given that in the absence of an abusive practice such a competitor may benefit from demand- related advantages, such as network and learning effects, which will tend to enhance its efficiency.”

The Commission's awkward position

- On the one hand, there is a genuine desire on the part of the Commission to go for an effects-based approach.
- But, on the other hand, the Commission does not want to be constrained in its ability to challenge dominant firm conduct.
- As long as this tension persists, the Guidance Paper will be of limited relevance.

The way forward

- In some areas (rebates, tying, etc.), the case-law is inadequate and therefore must change. But this may take years.
- In the meantime, the Commission should take its responsibilities and stop initiating procedures relying on case-law that is not in line with effects-based analysis. If the Commission thinks that the effects-based approach is the way to go, they should always apply it.
- Because Article 82 EC cases are complex, the Commission should also strengthen its intellectual infrastructure and (re-)introduce quality control in the decision-making process.

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