

# The assessment of efficiencies under Article 82 EC

## and the Commission's Guidance Paper

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# Overview

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## Why a Guidance Paper?

- (1) As regards Article 82 EC, the case law of the ECJ (and a part of the decision making practice of the Commission) is often **obscure and incoherent**
- (2) Concept of abuse **defined so broadly** that most behaviour is effectively prohibited (e.g. Michelin II: object = effect; intent to compete = anticompetitive; decline in market share irrelevant as it could have been even greater in the absence of the practice, etc.)
- (3) Case-law introduced wide ***per se* prohibitions** (either explicitly or implicitly: see e.g. Microsoft: dominance = advantage = effect)
- (4) Absence of economic analysis **inconsistent with case-law on Art. 81, mergers, etc.** (which requires effects-based approach, consideration of efficiencies, etc.)

## The 2008 Guidance Paper

- In principle to be *welcomed* (not only *effects based* approach; but also consideration of *efficiencies*: "*As efficient competitor*" test...)
- BUT too timid:
  - The Guidance Paper allows for **too many exceptions** based on old decisions rather than sound theory
  - Danger of **arbitrariness**
  - Risk of **chilling effect**

## Efficiencies in the Guidance Paper = A BASIC INCONSISTENCY

- *On the one hand*, the Guidance Paper allows dominant companies "to compete on the merits"; is designed to "protect consumers and not competitors"; applies the "as efficient competitor test"; indicates that "consumer harm" is required, etc.
- But then *on the other hand*:
  - Full of exceptions, presumptions, etc.
  - Efficiencies are mostly dealt with only as a "*defence*"
  - And can be invoked only under unduly strict conditions

## A. Back to basics: the concept of abuse

### 1. The concept of “abuse” is traditionally defined by reference to competition “on the merits”

- *Hoffmann LaRoche*, para 91:

*“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market ... and which, through recourse to **methods different from those which condition normal competition ... on the basis of the transactions of commercial operators**, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.” [in *Michelin I*, para 70 even clearer, i.e.: “methods different from those governing normal competition ... **based on a trader’s performance**”]*

#### **ERGO:**

Dominant companies **may** compete, even aggressively, on the market, provided this is competition “on the merits”

## 2. What does competition “on the merits” mean?

### Examples:

- *Lower prices or better products* are not an abuse, even if they affect competitors negatively. It is only exceptionnally if these low prices are part of a predatory strategy to foreclose the market (and then allow to recoup the losses to the detriment of consumers), that this is not competition “on the merits”;
- *Exclusivities* are very widespread<sup>0</sup> They are normally not an abuse if they allow for instance lower prices, or more interbrand competition etc. It is only if they are a device to foreclose the market to the detriment of consumers, that this is not competition “on the merits”;
- *Tying* is also mostly a way to offer better products. It is only if it is a device to foreclose competition on a neighbouring market to the detriment of consumers, that this is not competition “on the merits”;
- *Keeping an IPR for oneself* is also normal and not an abuse. It is only if access is denied to third parties who intend to put on the market a new product, that this is not competition “on the merits”, etc.

3. Article 82 must be read **consistently with Article 81**:  
If dominant companies are prevented to compete "*on the merits*", Article 82 becomes effectively an **instrument of cartels**:

- Prices not "*too low*"
- Not "*too many rebates*"
- Products not "*too good*"
- Compete "*a bit but not too much*"

Result:

➔ "*protecting competitors*" and not the consumers (= cartel?)

### IN PRINCIPLE:

Dominant companies no only **may** but **must** compete, even aggressively, on the market, provided this is competition "*on the merits*". (In a horse race, horses do not run faster if you handicap the fastest horse!)



4. This does not mean that all rules of Article 81 can be transposed to Article 82: In one aspect at least, **Article 82 is different from Article 81**: contrary to some anticompetitive agreements, abuses are almost always "*good*" or "*bad*" depending on the circumstances:

- Under Article 81, certain agreements are "*presumptively illegal*" (hardcore...) and need then to be justified under Article 81(3).
- Under Article 82, it is very difficult to find "*presumptions of illegality*" (hardcore restrictions, *per se* abuses etc.). Most abuses are perfectly normal behaviour used by any company, whether dominant or not. This is why the abuse itself has to be defined by reference to its effects and competition on the merits.

[NB: As with the Guidance Paper, a similar problem is found in Article 81 enforcement where the Commission also tries in the Article 81(3) Guidelines to broaden the scope of Article 81(1) unduly, and as much as possible puts all the burden on the undertakings to prove their innocence under overstrict conditions of Article 81(3)]

## B. The Guidance Paper departs from these sound principles:

- *Generally, the Paper accepts efficiencies* and recognises that intervention is only warranted where an *"as efficient competitor"* could not compete.
- Laudable but **too many exceptions**:
  - the *"as efficient competitor"* test applies only to *"pricing abuses"*;
  - even for *"pricing abuses"*, it is not applied systematically (e.g. above cost predation is said to be sometimes problematic!);
  - there are too many rules that only apply *"normally"*;
  - there are too many *"presumptions"* (e.g. if you foreclose a sufficient part of the market: presumption of illegality, etc.);
  - there is too much discretion to the authority (e.g. para 24: *"in certain circumstances a less efficient competitor may also exert a constraint..."* or para 15: having a high market share for a long period of time in and of itself can *"in certain circumstances"* indicate *"possible serious effects of abusive conduct justifying an intervention by the Commission under Article 82"*), etc.
- Therefore the Guidance Paper is *"full of holes"* and *"exceptions"* and has to introduce instead an **"Article 82(3)" defence**:

## The “*efficiency defence*” – Article 82(3)?

- Under para 30 of the Guidance Paper: an Article 81(3)-style “*efficiency defence*” applies if a dominant company can show that:
  - Efficiencies “**result from**” the conduct in question;
  - The conduct is “**indispensable**” to the achievement of the efficiencies;
  - The efficiencies benefit consumers – i.e. that they “**outweigh**” any negative effects on competition; and
  - Competition is “**not eliminated**” as a result of the conduct.

## C. Problems with introducing an Article 82(3) defence:

Such a defence:

- is contrary to the **text** of the Treaty (Article 82 has no paragraph 3). The Commission rewrites the Treaty!
- is contrary to the **purpose** of the Treaty. The abuse itself is defined by reference to competition "*on the merits*". So no need to refer also to competition "*on the merits*" as a defence! Creates a "*presumption of culpability*".
- does **not fit in the context of Art 82**.

The conditions of Article 81(3) are **ill-suited** to single-firm conduct:

(a) Efficiencies must “**result from**” the conduct in question:

➔ No difficulty with this first condition. Indeed, this forms part of the analysis of whether conduct in competition on the merits or abusive

(b) The conduct in question must be “**indispensable**” for the achievement of the efficiencies:

- Normal requirement under Article 81: parties ought normally to be able to judge in full transparency which restrictions are needed or not to achieve their legitimate objectives (e.g. do you need in a distribution agreement territorial protection or not, a non-compete clause or not, etc.)
  - However, indispensability is much easier to assess when drafting an agreement than in unilateral day to day pricing etc. decisions – Dominant companies are not supposed to know what their competitors’ costs are, nor their strategy.
  - Is it desirable to require dominant companies to limit their competitive behaviour to what is “*indispensable*”? Does it mean “*compete on the merits, but not too much*”? Open door to arbitrariness.
- ➔ It is not the “intensity” of the competition that matters but the “nature” of it (i.e. “*is it competition on the merits*?”).

## (c) The conduct must “**not eliminate**” effective competition:

- “*Superdominant*” firms should not compete “*too effectively*” as this prevents less efficient competitors to remain in the market. Is that much **better for the consumer**?
- Slippery slope: “**efficiency offence**”?
- Risk of **chilling effect** (and “*umbrella effect*”?); protects competitors and not competition.
- This prohibits (super-)dominance and not abuse ; **rewrites Article 82**.
- **Art. 82 not the same as Art. 81 or merger** control where an agreement or merger is not intrinsically “*meritorious*” so condition can (possibly) make more sense there).
- In any event, this “*no elimination*” criterion is **unclear** (in Discussion Paper, para 92: 75% market share; in Guidance Paper, para 30: aimed at the exclusion of “*all or most existing sources of actual or potential competition*” – *Quid?*).

## (d) Benefits must “**outweigh**” negative effects on competition and consumer welfare:

- This condition is very **difficult** for a dominant company to assess - The company will possess the data about its own behaviour but the authority is likely to have a better insight into the market.
- This condition is an open door to **arbitrariness**.
- This condition is arguably **wrong**: If competition is “**on the merits**”, there is no reason to prohibit it [e.g. if you have a patent, and do not prevent the emergence of a new product, on what ground should you be obliged to share it with competitors? Why should the Commission still say that consumer welfare would be better off if you share it with competitors than if you don't? However, if there is no competition “*on the merits*”, e.g. if you have legal monopoly upstream and use it to monopolise a market downstream, there is no need for a “*balancing exercise*”].



## D. Burden of Proof issues

- Para. 30 Guidance Paper: to benefit from the "*efficiency defence*", the **dominant company** "*will generally be **expected to demonstrate**, with a sufficient degree of probability, and on the basis of verifiable evidence, that the [...] conditions [set out above] are fulfilled*".
- This is in conflict with:
  - the text of Art 82;
  - The logic of Art. 82 (no presumptions of illegality);
  - Article 2 of Regulation 1/2003;
  - The principle of "*effectiveness*" (see e.g. *San Giorgio* case-law: no "*probatio diabolica*").

## True: case-law often has tended to reverse burden of proof

See for instance:

- *Michelin II*:

compare para 58 (Quantity rebates are "*deemed to reflect gains in efficiency and economies of scale*,") versus para 107 (The applicant has not shown that its quantity rebates "*reflect gains in efficiency and economies of scale*").

- *TetraPak II*:

in the absence of any **argument** by the applicant which might provide objective justification for its pricing policy, such disparities were unquestionably discriminatory (para 207). Or: **it must be ascertained** whether, as **claimed** by the applicant, the resulting system of tied sales was objectively justified in the light of commercial usage and the very "*nature*" of the products in question within the meaning of Article [82](d) of the Treaty (para 136).

**BUT: is this justified?**

## Critique

- A rule of “*presumptive illegality*” is highly inappropriate  
➔ conduct should be allowed until it can be shown by plaintiff that it is anticompetitive.
- This is so *a fortiori* since antitrust proceedings are increasingly *quasi-criminal* in character.
- Creating a presumption of culpability and requiring dominant companies to show that their behaviour is justified is likely to have a “*chilling effect*” on legitimate competition.

BUT:

- **Certain presumptions** of illegality with reversal of burden of proof might be justified **on a narrow basis** (e.g. pricing below AAC?)
- Moreover, as always with burden of proof, a certain **sharing of tasks** between plaintiff and dominant company will necessarily have to take place (e.g. demonstrate that pricing is not below AAC)

## Conclusion

- **True:** Better recognition of efficiencies in the Guidance Paper than before;
  - **But:** probably still excessive survival of old **formalistic** mantras: the way in which the Commission proposes to take efficiencies into account is still biased in favour of the plaintiff/enforcer and fails to take account of the logic of Article 82 – (Allows arbitrary approach, deprives of legal certainty, chilling effect, etc.)
  - **Cost of over-enforcement.** No rule can ever be perfect. Need for clarity even if that means that sometimes, a problematic behaviour will not be caught and a non-problematic behaviour will be prohibited (too much discretion to authority has also a cost).
- ➔ As one of the two most important antitrust enforcement authorities in the world, the Commission should lead the way and **be less timid**.