

INTERNATIONAL CONFERENCE ON THE ENFORCEMENT OF ART. 82
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Objectives of the Enforcement of art 82 and Legal Standards in the
Commission's Guidance Paper

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1. INTRODUCTION

1. The first thing I would like to do today is focus on the objectives of the EU enforcement of art. 82, according to the Guidance Paper (GP); then I will examine the standard of proof featured by the GP, with regard to predatory pricing; finally I will draw some conclusions on whether or not the paper provides effective guidance and in which direction.

2. UNDERLYING PRINCIPLES/OBJECTIVES OF ENFORCEMENT

2. At the outset, the GP clarifies that “the Commission will focus on those types of conduct that are most harmful to consumers” (p.5), the implication being that consumer welfare is a primary objective of the Commission's enforcement of art 82.

3. Later in the same paragraph, the concept is further qualified, as the GP states that “the Commission will direct its enforcement to ensuring that markets function properly and that consumers benefit from effective competition between undertakings”.

4. Thus, a twofold goal is assigned to the enforcement of art 82: **promoting consumer welfare** and **ensuring an effective competition process**. Moreover, the latter objective is the means to achieve the former. Therefore, it seems as if the assurance of an effective competition is a necessary condition for the first objective to be achieved: in order to maximize consumer welfare, markets must function properly, in an undistorted competitive manner. By

removing (or preventing) distortions, enforcement creates the conditions without which maximum consumer welfare is not possible.

5. Further on in the GP, another nuance is added to the interplay between the objectives of promoting consumer welfare and ensuring an effective competition process.

At par. 19, the aim of the Commission's enforcement activity in relation to exclusionary conduct is said to be: "to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare".

6. This explicitly means that harm to the competitive process translates into harm to the consumer, which amounts to reaffirming that effective competition is a necessary condition for maximum consumer welfare.

7. Indeed, the ubiquity and interplay between assurance of effective competition and promotion of consumer welfare are quite commonly found in unilateral conduct laws across countries. It is interesting, however, that, owing to this interplay, the GP actually achieves the purpose of reconciling the traditional European approach, concerned with the possibility that dominant firms use their power to appropriate advantages for themselves at the expense of competitors, with a narrower approach, based on consumer welfare, which however is regarded as more economically sound.

8. Moreover, the GP shows its willingness to clearly depart from the idea that harm to competitors necessarily translates into harm to competition, explicitly stating that "what really matters is protecting an effective competitive process and not simply protecting competitors". (par 6.)

9. All this is welcome. However, still some other improvements might have been possible. The relationship between the two objectives of enforcement - ensuring an effective competitive process and promoting consumer welfare - is not entirely clarified in the GP.

In particular, a question could be asked: what are the implications in terms of legal standards of the twofold objective assigned to the enforcement activity towards exclusionary conduct?

10. In order to detect harm to competition, it seems quite straightforward to focus on the features of the undertakings the exclusion of which should be prevented. Should the competitors which are as efficient as the dominant undertaking be hampered in their ability to compete, then there are the necessary conditions to intervene. Indeed, such are the GP guidelines with regard to price-based exclusionary conduct, explicitly restricting the Commission intervention to the safeguard of as efficient as competitors.

11. The GP clarifies that the cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC) (par. 26).

12. On the other hand, in order to detect harm to consumers, it seems equally straightforward to focus on the consumer harm test, whereby a conduct is not found to be exclusionary, unless it is shown to have effect in terms of price increase and output restriction.

13. However, as known, the two tests do not necessarily lead to the same outcome: when an undertaking, after excluding the as efficient as competitor, does not have the capacity to rise prices and reduce output, there isn't any impact on consumer welfare of the alleged exclusion of an as efficient competitor.

14. The impact on consumers of a practice with the potential to decrease the demand facing rivals, like predatory pricing, relies not only on its actual capacity to decrease rivals' sales, but also on whether or not the practice translates into a reduction of the competitive pressure which rivals exert on the presumed dominant firm (Spector, 2006).

15. Last September, the Advocate General delivered his opinions to the European Court of Justice regarding the case Wanadoo, which concerns an alleged abuse of a dominant position in the form of predatory pricing. The Advocate general argues that "where there is no possibility for the dominant undertaking of recouping losses,

consumers and their interests should, in principle, not be harmed (par. 74)” and also “unless there is a possibility of recoupment, the dominant undertaking is probably engaged in normal competition.”

16. The Advocate general argues that a correct interpretation of the Court’s previous case law in the area of predatory pricing does not rule out the requirement of the proof of the possibility of recoupment (par. 73). Indeed, in his judgement of Tetra Pak II, the European Court of Justice maintained that proving recoupment was not necessary “in the specific circumstances of the present case”.

17. The GP does not explicitly allow for a recoupment analysis. However, in my opinion, it provides some margin for performing an analogous kind of assessment. To this end, the definition of anticompetitive foreclosure as a situation that causes likely consumer harm is important.

Anticompetitive foreclosure is defined as a situation where owing to its conduct, “the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers” (par. 19). In other words, for foreclosure to be anticompetitive, it is necessary for there to be a likely effect on prices. A list of factors that are considered relevant to such an assessment is then provided by the GP.

18. Going back to the “as efficient test”, the GP states that when quantitative analyses show that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anticompetitive foreclosure according to the above lines (par 27).

19. In other words, the GP seems to feature a two step test for exclusionary pricing conduct, whereby the foreclosure of an “as efficient” competitor is a necessary condition although not sufficient for an anticompetitive foreclosure. The latter requires “consumer harm”, in other words a likely effect on prices. In my opinion this provides some margin for accommodating the Advocate general instances, when taking into account the GP’s suggested framework for the assessment of dominance.

20. First of all, the focus of the dominance analysis is on the degree of market power, rather than on market share. The traditional “notion of independence of a dominant undertaking is related to the degree of competitive constraints exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective (par. 10).”

21. Second, the GP states that for an undertaking to be regarded as dominant, it must enjoy market power over a significant period of time, (at least a period of two years)

22. Thus, the assessment of dominance takes into account the competitive constraints imposed on the undertaking in question by existing supplies, by the possibility of future expansion of actual or potential competitors and by the countervailing buyer power.

23. Moreover, the possibility that the dominant undertaking’s competitors and the customers or the input suppliers counter the conduct of the dominant undertaking is included among the factors indicated by the GP as relevant for the assessment of anticompetitive foreclosure.

24. The assessment of all these factors provide the necessary elements for a perspective evaluation of whether or not an alleged exclusionary conduct is likely to result in a price increase, as is required for the conduct to fall under the category of “anticompetitive foreclosure”.

This I believe contains all the ingredients which would be required to evaluate the undertaking’s possibility of recouping losses.

4. PREDATORY PRICING

25. Now, I would like to move on and to explore in further detail the standards of assessment featured by the GP for the evaluation of alleged predatory pricing conduct.

26. The GP’s section regarding predation requires the interpreter to make a further effort to reconcile different concepts.

Predatory conduct is described as a situation where, in the short term, the dominant firm is incurring losses or foregoing profits to foreclose competitors (...) causing consumer harm (par.63).

27. Thus, here the GP seems to suggest a new standard, the sacrifice test, to be associated to the consumer harm test. Further on in the paper, the notion of “sacrifice” is qualified by saying that “If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided”. Thus the sacrifice test is expressed in terms of below-cost standard with the benchmarking being the sacrifice relative to not producing.

28. Under these circumstances, there are no reasons to question the proposed test. However, further on, the GP maintains that the concept of sacrifice does not only include pricing below AAC because the Commission will also consider profit losses produced by not following a reasonable alternative conduct (par. 65).

29. At first sight, this seems a quite relevant derogation from the as efficient as standard, which leaves the enforcers with a certain degree of discretion as to the alternative courses of action that might have been more profitable.

It can be considered a departure both from an economically sound approach to the assessment of predatory pricing and from the consolidated jurisprudence.

30. Therefore, there is ground to sustain that in this case the GP could have done better. However, I believe that, although the matter may at first rise some perplexities, it does not deserve so much concern mainly because the GP itself, further on, (par. 67) reaffirms that, normally only pricing below LRAIC can give rise to anticompetitive foreclosure (see also par. 26). Therefore it seems to rule out the possibility that the sacrifice argument is taken into consideration when prices are above LRAIC. Moreover, on a practical ground, as it is difficult to imagine that economically rational and practical alternatives can easily be identified independently of their characterization in standard cost terms.

31. It is true that the GP refers to the possibility of relying upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy, such as a detailed plan to sacrifice in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or even evidence of concrete threats of predatory action.

However, earlier in the paper, (par. 20) this kind of direct evidence is said to have only the function of helping in interpreting the dominant undertaking's conduct, rather than representing a proof of infringement.

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4. CONCLUSION

32. Today I have argued that a rather coherent framework of analysis emerges from the paper. The GP reaches a substantive reconciliation between the objective of ensuring effective competition and that of promoting consumer welfare. Such integration of the two goals of the enforcement of art 82 is achieved by focusing on foreclosure that causes consumer harm. Moreover, in my opinion, the GP rightly indicates that the assessment of dominance must concern the competitive constraints which the hypothetically dominant undertaking is subject to. On this basis, an evaluation of the likelihood of price increase after the alleged abusive conduct can be performed as indeed required. This allows to close the perceived gap between different positions regarding the proof of recoupment.

33. Indeed, sometimes the GP seems to leave room for manoeuvre for flexible applications of some concepts. In my opinion there is no impediment for the Commission to exploit such flexibility in a manner consistent with the underlying economic principles contained in the paper.

34. The future proceedings by the Commission will be crucial in order to better evaluate the GP's guidelines.