

ART. 82 EC - INTERNATIONAL CONFERENCE
ON THE RECENT DEVELOPMENTS
IN ANTITRUST POLICY
AND THE ENFORCEMENT OF ART. 82

discussion: Application of art. 82 in regulated industries

Looking for a new approach – '*Winners do not punish*'

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Structure of the presentation:

1. key remarks on the new Art. 82 Guidance (also with respect to regulated industries)
2. 'Section D': Refusal to supply and margin squeeze
3. What we could learn from Deutsche Telekom and Telefonica cases
4. Three conditions to prioritise the Commission's enforcement (for infringement as described by Section D)
5. The different approach with some types of regulated industries (the formerly state controlled reg. industries)
6. From mere enforcement (and ex ante regulation) to consideration of public interest and technological innovation
7. Example: structural v. functional remedies in essential facilities-related abuses
8. Towards a pro-innovation (forward looking) approach, because 'Winners should not (just) punish...' (Nowak)

1. Key remarks - State-of-play' of Art. 82 interpretation

Great expectations for the *Communication from the Commission 'Guidance on the Commission's Enforcement in Applying Article 82 Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*

[3 December 08] Com (2008)

[§6] It confirms that the Commission's enforcement policy is aimed at ensuring that 'undertakings which hold a dominant position do not exclude their rivals by other means than competing on the merits of the products or services they provide'.

Substantially recalled the consolidated ECJ case-law

Nothing new with respect to existing case-law: i.e. *dominance is that power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*

[See §10] Michelen 2 [case 322/81]
Tetra Pak II [case T-83/91]
Irish sugar [case T-228/97]
United Brands Company [case 27/76]

§12 – One of the conditions to assess dominance:

Constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors

[others: (i) constraints imposed by the existing supplies
(ii) constraints imposed by the bargaining strengths of the undertaking's customers (countervailing buyer power)]

What barriers to expansion?


[§17] [...] In fact 'they may take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale and scope, privileged access to essential inputs or natural resources, IMPORTANT TECHNOLOGIES *** or an established distribution and sales network [...]

*** Case T-30/89 Hilti v Commission [1991] ECR II-1439 para.19





follows ...


‘[t]he dominant undertaking’s own conduct may also create barriers to entry, for example where it has made significant investments which entrants or competitors would have to match [...]’




Economic assessment of the dominant undertaking's competitors and 'the position of the customers or input suppliers' [§20]

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- (i) A panoply of behaviours as well as the effective 'weight' of a minor competitor shall be taken into consideration, when assessing the dominant position of the incumbent . In regulated industries , this means that even an undertaking with a small market share but a highly innovative profile can play a key role when assessing the impact of a foreclosing conduct.

- (ii) The assessment of the real position of the competitor in the market shall be carried out having in mind a dynamic perspective, (even) in absence of the abusive conduct... i.e. possibility that the competitor would have been even more efficient in a certain period of time (because of potential network and learning effects) [§23]
- We can see here a reference to a 'dynamic perspective'
See Case Deutsche Telekom v Commission, 10 April 2008 (Case T-271/03)



2-The Guidance tackles the main forms of exclusionary conducts: exclusive dealing; tying and bundling; predation; refusal to supply and margin squeeze.

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- We are all aware that, in regulated industries, many of these conducts are directly and indirectly linked, or leveraged, by the direct ownership and control of the infrastructure, the network...
 - This is particularly evident in the electronic communications industry, but also in energy, railways, postal services.

In the 'refusal to supply and margin squeeze' section we find the 'chromosomes' of the main 'essential facilities' ECJ cases


- The Guidance re-assess the fundamental principle that 'any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property'
- Cases: Joined cases C-241/91 -242/91 RTE/ITP v Commission (Magill) [§ 50]
- Case C-418/01 IMS Health v NDC Health [2004] [§35]
- Case T-201/04 Microsoft v Commission [§319, 330-332 and 336]

Refusal to supply can take various forms

- (i) refusal to supply products to existing or new customers
- (ii) to license intellectual property rights [including when this is necessary to provide interface information (see judgment 17.09.07 Case T-201/04 Microsoft v Commission)]
- (iii) refusal to grant access to an essential facility or a network [see B&I Line v Sealink Harbours and Stena Sealink 1992; Sea Containers v Stena Sealink – interim measures 1993]

'Types' of refusal

- It is not required a plan refusal ('no, I do not let you get in')
- The abuse might also consist in 'constructive refusal'
- For example it can take the 'form of unduly delaying or otherwise degrading the supply of the product [I would add 'or the service'] or involve the imposition of unreasonable conditions in return for the supply' [see §78]



Margin squeeze is an example of subtle, difficult to detect (and prove), abuse

- It may include 'a situation in which an integrated firm that sells a 'system' of complementary products refuses to sell one of the complementary products on an unbundled basis to a competitor that produces the other complementary product'
- [footnote 54]

3. What we could learn from the recent Deutsche Telekom and Telefónica experience

- a. Deutsche Telekom (Commission 2003 and CFI 2008) as a vertically integrated company had abused through 'margin squeeze' with competitors
- b. In appeal, the Court did not take into consideration the cost generated by the competitors... even though they could be more efficient
- c. The Court confirmed that EVEN in presence of regulation (establishing price-cap), nevertheless DT had abused

Deutsche Telekom (follows)

- d. Decision diametrically opposite to (Chicago-oriented) Verizon v. Trinko (2004) judgment in the US
- e. The infringement is taken as 'stand alone'
- f. The Commission somehow rejected the importance of 'unilateral effects' and did not ask whether in the long term DT had favoured the penetration of its services in the German territory
- g. Rather, underlined a sort of 'special responsibility' for the formerly State-subsidized and controlled company

Telefónica (Commission decision 4.7.07)

- Similar conclusions...
- a) the Commission considered the margin squeeze in the access price to the network at local level as a form of refusal to supply
- b) Telefonica, on the basis of the Oscar Bronner case, stated that in the captioned matter there was no essential facility
- c) the Commission kept the point that to duplicate is expensive, but not impossible
- d) evidently the decision risks to discourage future investments

4. A three-partitioned, cumulative, assessment When dealing with refusal to supply/margin squeeze

- It must ascertain that:
 - (i) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market
 - (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market; and
 - (iii) the refusal is likely to lead to consumer harm

5. Special (strict) approach with formerly State-controlled 'regulated industries' (Telecoms, Postal services) [§81]


- Some companies, through State or EC regulation, might be forced to provide access, having in mind the financial support received in the past
- Under the circumstances, §81 stresses that the abusive conduct can be ascertained even without taking into consideration the three above-mentioned criteria
- In other words, in presence of formerly State-controlled regulated industries, the Commission (the national competition authorities) *'in such specific cases [have] no reason to deviate from its [their] general enforcement standard and it may show likely anticompetitive foreclosure without considering whether the above three cumulative circumstances are present'*

6. From mere enforcement (and ex ante regulation) to consideration of public interest and technological innovation

- A window in the Guidance... the so-called DE NOVO refusal to supply –
- Of course the refusal to continue to supply a previous service will be particularly serious
- But what about the refusal to supply a potentially new product or service decisive for technological development (and general interests reasons) ?

The Guidance on this point are not bold

- § 83 makes clear that it is 'more likely' (or 'easy to show and prove'?) that 'the termination of an existing supply arrangement is found to be abusive than a *de novo* refusal to supply'
- And, again, it states [§88 and 89] and concludes, that the Commission will consider claims by the dominant undertaking that a refusal to supply is necessary to allow a dominant undertaking to realise an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account'
- It's evident the impact of Microsoft judg. T-201/04 (17.09.07) – the dominant undertaking will have to demonstrate its own constraints to further innovate



Towards the conclusions:
why in the regulated industries section of the Guidance 'the innovation constraints' are just mentioned as a further factor of the burden of proof of the dominant company having allegedly abused of its position?




- * The Commission could probably devote more space to provide the companies, and the innovative companies in particular, with more 'espace de manoeuvre' with respect to what shall be considered an 'innovation target'

Doctrine of 'general interest' – Section 16 ECT v. Art. 82 ECT

- In March 2008, Nature publishes a seminal article of Prof. Nowak, 'Winners do not punish'
- The team concluded that '*winners do not use costly punishment, whereas losers *punish* and perish ...*'
- **Interestingly, the team carried out their study on the basis of mathematical models, closely reflecting Nash's games theory**
- * Ref.: 'Anna Dreber, David G. Rand, Drew Fudenberg and Martin A. Nowak, 'Winners do not punish', Nature, Nature Publishing Group, vol. 452, 2010308.

Costly punishment v. co-operation ...

- Starting from the analysis of the same reasoning behind the 'Prisoner Dilemma', Nowak concluded that at the end the 'reasonable' individuals (the undertakings, the institutions?) more often adopt a co-operative solution (they prefer to co-operate or turn away)


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- 'Those people who gain the highest total payoff tend not to use costly punishment: winners don't punish. This suggests that costly punishment behaviour is maladaptive in cooperation games and might have evolved for other reasons'.

7. The Commission, the OFT, now the Italian Competition Authority, have been developing various forms of 'co-operative' tools – Structural v. Functional separation

- (i) Commitments under Sect. 9 of EC Reg. 1/2003
- (ii) Sect. 31 A of Competition Act 98 (as amended in 2004)
- (iii) Art. 14 *ter* of Law 287/90 ('impegni'), introduced by Bersani law decree of July 06

Evolution of the commitments ... The 'undertakings *in lieu* of reference'

- Undertakings *in lieu* of reference [to market investigations], as per Sect. 154 of the UK Enterprise Act 02, signed by the management of British Telecom in Sept. 2005, avoided a long, costly and burdensome market investigation, which could potentially force BT to structurally separate its network
- They rather accepted to 'functionally separate' the network, and they created 'Openreach', the functionally separate division of BT Group



Openreach became the model for the current reform of Art. 7 of the ‘Frame’ Directive (EC Directives 2002/21)

- It was adopted a co-operative approach, rather than a potentially disruptive radical, draconian approach
- The question now is to see if, in certain economies, a structural remedy might also provide a viable solution
- What is the reasoning which should justify the choice?


8. Innovation and, above all, general interest

- J. Baker in 2007 published 'Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation' ***, followed, after Deutsche Telekom, by G. Monti (LSE), both underlying the importance, for the enforcement agencies, to take into consideration both general interest reasons and the perspective of technological innovation
- *** in Antitrust Law Journal, vol 74, 3, 2007

Back to functional v. structural separation as exemple of remedies


- The dilemma is not punish or not to punish
- 'Dissolution is not a penalty; it is a remedy'

United States v. Aluminium Co. of America
(ALCOA) 148 F 2d 416, 446 (1945)




The choice of the remedy (commitments, undertakings, leading to functional or even structural separation)...

- ... even the 'sanction' (Art. 7 – Reg. 1/2003 expressly recalls functional and structural measures), should rather take into consideration the future scenarios in terms of innovation (take the example of the creation of a New Generation Network that the current incumbent could not be in condition to create)



Conclusions: even a structural remedy, the ‘most draconian’ of remedies, could go beyond the reasons of mere punishment

- A structural remedy can open the doors to new investors (consortia of competitors; revolving doors of the State?)
 - A renewed, highly performant, structurally separated network, in certain economies can make some types of abuses history
 - General interest targets, as well as technological innovation scopes, could be also met.
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Conclusions

- With respect to the December 08 Guidance the Commission has recalled a relevant part of the Art. 82 EC DNA – useful – but ...the final section, as referred to regulated industries, could probably devote more space to remedies and alternative (to mere enforcement) tools without going beyond the scope of indicating the 'Commission's priorities' .

It seems very likely that future guidelines will begin to include 'general interest reasons' (and a panoply of further targets, including technological development or enhancement) when considering the best approach to take.

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