Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)
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Abuse of Dominance Review
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Submission to the European Commission Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses

1. Introduction

These comments are submitted on behalf of the UK Competition Law Association (CLA) which is affiliated to the Ligue International du Droit de la Concurrence (LIDC).[1] The CLA welcomes the efforts of DG Competition in examining this difficult area of law and appreciates the opportunity to make a contribution to this debate.

The CLA does not seek to address every aspect of the very full and detailed Discussion Paper (DP) but confines its comments to particular matters that we wish to highlight.

1 The membership of the CLA includes barristers, solicitors and in-house lawyers, academics and other professionals including economists, patent agents and trade mark agents. The main object of the CLA is to promote freedom of competition and to combat unfair competition.

2. General Observations

2.1 The objective

The CLA would welcome greater clarity on the objective of the Discussion Paper and, ultimately, of issuing Guidelines in this area of law. If the purpose is to summarise and clarify in a structured way the case law, then that is indeed welcome and would no doubt be very useful; but if the purpose is to develop the law, then that appears to go beyond the Commission's responsibility for orientation of competition policy.2 However, our greatest concern would be a failure to make clear which parts of the ultimate document represent the law as the Commission understands it and which parts represent the law as the Commission would like it to become. In the DP, sometimes the latter appears in the guise of the former. We think it is of fundamental importance to distinguish between them.

In the UK, according to Section 60(2) of the Competition Act 1998, the UK court must ensure that there is no inconsistency between decisions reached by it and the principles laid down by the Treaty and the European Court. In addition, the UK court under Section 60(3) must have regard to any relevant decision or statement of the Commission. This is a lesser obligation than the obligation to ensure that there is no inconsistency under Section 60(2). Were the Commission to issue Guidelines, which do not directly follow jurisprudence, it would create confusion as to their application in the UK.

There is also potential for confusion in other Member States, particularly those who have only joined the EU relatively recently, which may look to the Guidelines as an apparent exposition of the law.

Further, in case of inconsistency as outlined above between Court jurisprudence and administrative Guidelines, the UK court has an obligation to follow CFI/ECJ jurisprudence; and therefore may end up with a body of case law which is inconsistent both with any Commission decisions that reflect the Guidelines, and with the law as applied in other member states. In the event that the CFI and the ECJ were to decide not follow any Guidelines which the Commission might issue. this would raise questions of the status of the Guidelines and legal certainty throughout the EU.

However, the CLA suggests that the Commission might formally recognise that although it can not take a change in the law forward by means of Guidelines, it can use them to explain (i) its priorities as to the cases it would be most likely to pursue and those which it would be unlikely to pursue and (ii) its policy on particular issues while making clear where this may diverge from existing case law.

2.2 Hypothetical examples

In any event, if it is decided to proceed to develop Guidelines, it would be helpful if those Guidelines were to include detailed examples of how the principles would be applied in practice, as the Commission does in its very helpful Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements.

3. Specific Issues

3.1 Alignment of Article 81 and 82 of the Treaty

The commitment to consumer welfare and an analysis based on the conduct's likely effect on the market is an important part of the new approach signalled in the paper.[3] However, the origin of this welfare standard as a basis for the application of Article 82 is unclear. According to case law the objective of Article 82, as recently set out by Advocate General Kokott in her opinion in *British Airways v Commission* at paragraph 86, is as follows:

> Article 82 EC is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. Accordingly, Article 82 EC applies not only to conduct which can directly prejudice consumers, but also to conduct which can prejudice them indirectly in that it is detrimental to a state of effective competition for the purposes of Article 3(1)(g) EC.

Moreover, as yet there has been no binding court decision or legislation to the effect that the standard under Article 82 is either consumer welfare or total welfare. The Commission alone would be unable to decide this point. The DP states that the essential objective of Article 82 is the protection of competition to enhance consumer welfare. This is similar to the approach taken by the Commission in its Guidelines to Article 81(3).[4] If the Commission is trying to align Article 81 and 82 by imposing a consumer welfare objective, it is important to recognise the different ways in which the two provisions are framed. Any <u>direct</u> alignment of the application of Article 82 with the mechanisms of Article 81 (for example through the introduction of an efficiency defence, as discussed below) is misguided - whatever the underlying goals. It is one thing to seek to align the objective (subject to what is said above) and quite another to seek to mirror the structure of one provision in the application of the other where the legislator made a clear choice to distinguish the two provisions: the Commission must be careful to avoid confusing objective with the legal structure.

3.2 Framework for analysis of exclusionary abuses

3.2.1 The central concern and proof of foreclosure

The section starts by reiterating that the essential objective is the protection of competition as a means of enhancing consumer welfare and ensuring an efficient allocation of resources[5] and that Article 82 prohibits exclusionary conduct which produces actual or likely anticompetitive effects in the

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2 C-234/89 *Delimitis Brau v Commission*.
3 DP, paragraph 4.
4 Article 81(3) Guidelines paragraph 13.
5 DP paragraph 54.

market.[6] Article 82 must obviously cover likely as well as actual anticompetitive effects because sometimes a competition authority is trying to predict what will happen as well as to establish what has happened. The CLA considers that careful consideration must be given to aspects such as the time over which any assessment of harm is made - something that could be beneficial in the short term could well be less benign when looked at over a longer period.

The DP also states that harm to intermediate buyers is generally presumed to create harm to final consumers.[7] This presumption is valid only where there are no other alternative routes to consumers and the harm to the intermediate buyers leads to harm to the final consumer.

The CLA welcomes the proposed framework for the identification of exclusionary abuses, in particular, the 3 step test described in Section five. The first two steps explained in paragraph 58: capability to foreclose competitors from the market; and likely market distorting foreclosure effects, fit well with existing jurisprudence.[8] The DP states that to establish foreclosure, it is enough that rivals are disadvantaged and compete less aggressively.[9] This reflects the current interpretation of the protection of competition as a means of protecting the economic freedom of the market players by condemning conduct that hinders the production of competitors.[10] However, it should be noted that this approach does not support the view that the test under Article 82 is the effect on consumer welfare.

The DP recognises that, on balance, when establishing market distorting foreclosure effect it is, in general, not sufficient to consider the form of the conduct; incidence must also be considered.[11] The CLA welcomes the express acknowledgment of the concept of a sliding scale, recognising that the degree of dominance (short of "super-dominance") will influence the effect of any potentially foreclosing conduct and should be taken into account. Unfortunately, it is unclear what exactly the DP means when discussing incidence on the market. For example, does it mean that the Commission will consider whether the dominant firm uses the full weight of its dominance to foreclose the market?[12] Regrettably, this favourable principle is somewhat lost in the specific discussion of rebates in Section seven.

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6 DP paragraph 55.
7 *Ibid.*
8 In general the case law is very facts specific and on rebates it is very strict, in particular *British Airways v Commission*. However, case law does acknowledge effects, for example *Hoffmann-La Roche*.
9 DP paragraph 58.
10 Case C-6-7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309, para 25; case 53/87 *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault* [1988] ECR 6039, para 16; Case 238/87 *AB Volvo v Erik Veng* (UK) Ltd [1988] ECR 6211, para 9; C-241-242/91P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd v Commission*, [1995] ECR I-743, [1995] 4 CMLR 718, para 54; Commission's decision 97/624/EC, *Irish Sugar* PLC OJ [1997], L 258/1, para 134; Commission's decision 92/213/EC, *British Midland v Aer Lingus*, OJ [1992], L 96/34, para 25 and Commission's decision 89/113/EC, *Decca Navigator system*, OJ [1989], L 43/27, para 97 ff.
11 DP paragraph 59.
12 A dominant firm with 60% foreclosing 40% of the retail channel would be significant foreclosure, but a firm with 60% foreclosing 10% would not.

3.2.2 Price versus non-price based exclusionary conduct

The methodology adopted for price-abuses is the 'as efficient' competitors test.[13] The CLA acknowledges that this test takes the dynamics of competition into consideration, but notes that such a test will be very difficult to apply in practice.[14] This is to some extent recognised by the DP, which states that it may be necessary to look at revenues in a wider context. This is an improvement compared to the current situation.[15] It also suggests an alternative cost test which is the 'apparently efficient' competitors test.[16] This cost test is, however, equally difficult to apply in practice. It is important to bear in mind that application of Article 82 is not only an issue for competition authorities: it is applied in private actions, which the Commission is now seeking to encourage; and in self-assessment by dominant undertakings deciding what commercial strategies are lawful (most dominant companies are keen not to infringe the law and should be assisted to achieve this objective).

The DP notes that it may sometimes be necessary in the consumers' interest to protect competitors that are not (yet) as efficient as the dominant undertaking.[17] Whilst this note is welcomed by the CLA, it raises the practical issue of the period for which such protection of the less efficient (but perhaps still efficient) competitors as well as the circumstances which may justify such an approach, An expansion of paragraph 67 with practical examples would be much appreciated.

The 'as efficient' competitors test may be a good methodology for price-based abuses, in particular, margin squeeze. However, the test focuses on price and costs only, leaving the impression that other factors such as quality and service are less important to competition or the effect on consumers. A good example of the importance of considering other factors was highlighted in a recent UK case *Harwood Park Crematorium Ltd*[18] concerning funeral services. In this case, a crematorium that was vertically integrated with one funeral director had denied access to another funeral director, operating in the same local area. The question was whether this refusal of access to the crematorium constituted an abuse of a dominant position infringing the domestic equivalent of Article 82 (Chapter II of the Competition Act 1998). The OFT reached a decision of non-infringement, but the Competition Appeal Tribunal (CAT) annulled this decision and found that there had been an abuse of a dominant position. Part of the difference of conclusion between the CAT and the OFT concerned the relevant geographic market. But the CAT also held, that the OFT should have looked at actual consumer preferences, such as consumer choice and personal service, instead of taking a theoretical approach

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13 DP paragraph 63.
14 The way the 'as efficient' competitors test is adopted in relation to conditional rebates on all purchases is by calculating the required share and alternatively the commercially viable share where it is not clear from the required share itself whether or not the rebate system is likely to have a foreclosure effect. The latter is not a reliable measurement as the price of raw materials can increase from day to day which would alter the commercially viable share.
15 In *Wanadoo* and *Tetra Pak II*, the Commission ignored some streams of revenue and profit made by the parent company.
16 DP paragraph 67.
17 *Ibid.*
18 Case No. 1044/2/1/04 *Burgess v OFT* [2005] CAT 25. Available at: http://www.catribunal.org.uk/documents/Jdg1044Burgess06072005.pdf

to refusal to supply based only on lack of effect on price.[19]

3.2.3 Possible Defences: Objective Justifications and Efficiencies

The third and final step of the analysis of exclusionary abuses consists of two parts - objective justification and the efficiency defence. The former is recognised in case law but the latter is a new concept in the area of Article 82. It appears that this raises the question whether the Commission is in effect, trying to create an Article 82(3) by introducing an efficiency defence similar to that in Article 81(3).[20] This is contrary to case law as highlighted by the CFI in *Atlantic Container Line AB and others v Commission* (TACA)[21]:

> Before considering those grounds for justification, it must be noted at the outset that there is no exception to the principle in Community competition law prohibiting abuse of a dominant position. Unlike Article 85 of the Treaty, Article 86 of the Treaty does not allow undertakings in a dominant position to seek to obtain exemption for their abusive practices (Case 66/86 Ahmed Saeed Flugreisen and Silver Line Reisebüro [1989] ECR 803, paragraph 32, and CEWAL I, cited at paragraph 568 above, paragraph 152). Furthermore, according to the case-law, dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market (Michelin, cited at paragraph 337 above, paragraph 57, and Irish Sugar, cited at paragraph 152 above, paragraph 112). Consequently, there can be no exceptions to the prohibition of abuse by dominant undertakings. (Paragraph 1109)
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> It is true that, according to the case-law, the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its interests, provided however that the purpose of such behaviour is not to strengthen this dominant position and abuse it (see, for example, United Brands, cited at paragraph 853 above, paragraph 189; CEWAL I, cited at paragraph 568 above, paragraphs 107 and 146; and Irish Sugar, cited at paragraph 152 above, paragraph 112). It follows therefore that a dominant undertaking may seek to rely on grounds to justify the practices it adopts. (Paragraph 1113)
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> However, the justifications permitted by the case-law in respect of Article 86 of the Treaty cannot result in creating exemptions from the application of that provision. The sole purpose of those grounds of justification is to enable a dominant undertaking to show not that the practices in question should be permitted because they confer certain advantages, but only that the purpose of those practices is reasonably to protect its commercial interests in the face of action taken by certain third parties and that they do not therefore in fact constitute an abuse. (Paragraph 1114)
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> It follows that, by the present justifications, the applicants thus seek in fact to obtain an exemption for

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19 *Ibid.* paragraph 242: the CAT held "that we do not accept the OFT's apparent submission that in defining a relevant geographic market it is sufficient that the end consumer should have "a choice", however inconvenient the "choice" may be, and however much that "choice" may diverge from the consumer's "preference". As the Commission's Notice on the Definition of the Relevant Market points out at paragraph 46, it is consumer preferences which have a strong potential to limit geographic markets. Such preferences in our view are highly relevant to the analysis."
20 DP paragraph 84.
21 Joined Cases T-191/98, T-212/98 to T- 214/98.

> the abuse in question on the ground that those practices are necessary to achieve certain advantages resulting from the conference system. (Paragraph 1116)
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> Although that is sufficient reason to reject all of the justifications alleging that the rules in question are necessary, it must also be stated that even if such justifications could be upheld under Article 86 of the Treaty, the applicants fail to show why the practices in question are necessary to bring about the alleged advantages. (Paragraph 1117)

The CFI notes that there is no exemption to Article 82 but recognises objective justification although it makes clear that it is not a defence as such.[22] This point is also accepted by the DP, which distinguishes between objective justification and an efficiency defence.[23] But by introducing efficiency as a defence, rather than a possible aspect of objective justification, the DP is proposing to make new law. Efficiencies as such may well be welcome, but if there is to be an efficiency "defence" or justification, it must be developed by case law or by legislation and not by Guidelines.

Another related point is that of the legal burden of proof which is placed on the dominant undertaking for both objective justification and an efficiency defence.[24] Case law makes clear that the requirement to show an objective justification is on the dominant undertaking. But this indicates no more than an evidential burden of proof: ie. to provide evidence to support this contention which the party alleging abuse must then rebut. Moreover, imposing a legal burden of proof for either objective justification or any efficiency "defence" on the dominant undertaking is inconsistent with Regulation 1/2003, Article 2, and contrary to Article 6 of the European Convention on Human Rights.

Conclusion

The CLA acknowledges that it is a difficult task to incorporate a coherent consideration of effects, seeking to apply the law in a manner that is 'more economics oriented', while at the same time articulating tests that are consistent with existing jurisprudence, operationally effective and manageable in practice for all those who have to apply Article 82: competition authorities, national courts, and dominant companies themselves. The CLA nevertheless would encourage the Commission at least or as a first step, to adopt Guidelines which are consistent with current law, as this would help to provide predictability for business and valuable assistance for national courts across the 25 Member States.

The CLA would be happy to discuss any of the above in more detail if the DG Competition would find that helpful. Please initially contact Geraldine Tickle at geraldine.tickle@martjohn.com or call on 44 (0) 870 763 1529.

Competition Law Association
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22 This is supported by AG Jacobs in paragraph 72 of his opinion in *Syfait* and AG Kokott in paragraph 43 of her opinion in *British Airways*, which both consider an objective justification a part of showing unlawful conduct not a defence.
23 DP paragraphs 78-79.
24 DP paragraph 77.