The European, Middle Eastern and African Antitrust Review 2017

Published by Global Competition Review in association with

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European Union: Abuse of Dominance

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Unfulfilled promise: Is the Commission's Guidance going the way of the dodo?

The most important development in the enforcement of article 102 of the Treaty on the Functioning of the European Union (article 102) in recent years should have been the European Commission's (the Commission's) publication of its 'Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty[1] to abusive exclusionary conduct by dominant undertakings' (the Guidance Paper).[2] This Guidance Paper was long awaited. The Commission had 'modernised' many other aspects of EU competition law in previous years and article 102 could not unreasonably have felt like the Commission's neglected and unmodernised child. Moreover, practitioners and companies needed guidance on article 102; in particular, EU law on rebates, grounded in a handful of mostly fairly old judgments of the Court of Justice of the European Union (CJEU), diverged markedly from US law and practice.

Eight years on, it is a good time to consider the status of the Guidance Paper. The Commission itself has not adopted any decision on rebates since 2009. Optimists may see in this apparent inaction proof that the Guidance Paper's more 'economic' approach is being used as an effective screen to prevent investigations of pricing practices that could be seen as falling foul of the pre-Guidance Paper case law. Pessimists will, however, note that the Commission's own Legal Service does not seem to be fully on board: when addressing the courts, the Legal Service barely acknowledges the Guidance Paper and, when it does, it is generally to deny all relevance to this key policy statement. As for the EU courts, in a number of cases concerning rebates, most recently *Intel v Commission*[3] and *Post Danmark II*,[4] they have shown reluctance and even some hostility towards the Guidance Paper and instead continued to apply older case law that at times is inconsistent with the Guidance Paper. Perhaps because there were no old precedents, in cases concerning margin squeeze and selective price cutting, the courts have adopted an approach and tenor that is more aligned with the Guidance Paper albeit without endorsing it expressly.

The Guidance Paper

The Guidance Paper was the latest step in a series of reforms designed to modernise the substantive rules of European competition law.[5] However, unlike other Commission modernisation instruments, it does not formally aim to state the Commission's views as to what conduct is likely to constitute an infringement of competition law. Rather, it indicates the enforcement priorities that should guide the Commission when considering whether to initiate a case under article 102.[6] Its purpose is to clarify 'the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct'.[7] Nevertheless, it aims to help undertakings better assess whether their decisions risk infringing EU law.[8]

As previous Competition Commissioner Neelie Kroes stated at the time, 'the paper provides guidance by setting out an approach to deal with abuses of a dominant position by companies. This is in line with our approach to restrictive business practices and merger control, and to recent individual cases of abuses of dominant position. It will ensure that the Commission's intervention is effective, and should leave dominant undertakings in no doubt that they will find the Commission in their way wherever their conduct risks increasing prices, limiting consumer choice or dissuading innovation. Clear rules protecting consumers and promoting innovation are all the more important in times of economic difficulty such as these.'[9]

The enforcement of article 102 had long been criticised for being too formalistic and legalistic and for placing greater emphasis on characterising particular kinds of conduct rather than examining their actual effects on the market.[10] In response to this criticism, the Guidance Paper states that the purpose of enforcement is to 'protect an effective competitive process and not simply competitors'.[11] Moreover, the Guidance Paper states the Commission will intervene under article 102 only where, on the basis of cogent and convincing evidence, the conduct is likely to lead to anticompetitive foreclosure.[12] 'Anticompetitive foreclosure' is defined as when 'effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers'.[13] The Guidance Paper states that the Commission will act only if it is proved that the effect of conduct is actual or likely harm to consumers. Moreover, the Commission will take into account the economic context rather than the exact form of the conduct. The Guidance Paper therefore advocates a more 'economics' or 'effects-based' approach (albeit for some economists and lawyers the Guidance Paper may not have gone far enough)[14] rather than a traditional 'formalistic' or 'per se illegality' based approach.

One of the Guidance Paper's central themes is its emphasis on avoiding potential foreclosure of 'equally efficient competitors'.[15] Accordingly, it states that when assessing conditional rebates (namely rebates granted in return for a particular type of purchasing behaviour such as purchasing a stated quantity over a defined period), it will apply an 'as efficient competitor' (AEC) test, which examines whether a competitor that is as efficient as the dominant firm can profitably price at the same level as the dominant firm.[16] The Guidance Paper thus sets out the cost benchmarks that the Commission will use in its analysis, namely the average avoidable cost (AAC) and the long-run average incremental cost (LRAIC).[17]

The Commission's practice

The Commission has adopted two decisions concerning rebates since 2006.

The *Tomra* decision was adopted in March 2006 and nicely illustrates the Commission's pre-Guidance Paper approach to enforcing article 102 in the rebates context.[18] Relying on the pre-existing case law such as *Michelin II*,[19] the Commission effectively states that it can find that a company infringed article 102 without showing that

its conduct affected the market: 'the effect referred to in the case law cited in the preceding paragraph does not necessarily relate to the actual effect of the abusive conduct complained of. For the purpose of establishing an infringement of Article [102 TFEU], it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect'.[20] The Commission finds that the rebates were conditioned on customers exclusively purchasing from Tomra and that 'exclusivity has, by its nature, the capability to foreclose because it requires the customer to purchase all or almost all its requirements from the dominant supplier'.[21]

To bolster its conclusion, the Commission claims to have 'completed its analysis […] by considering the likely effects of Tomra's practices';[22] however, this additional analysis was mainly an examination of Tomra's stable market shares during the period in which its rebates were in force rather than a more thorough analysis such as that required under an AEC test. Moreover, before the EU courts on appeal, the Commission's Legal Service appears to have distanced itself from the effects analysis and instead emphasised that its decision was consistent with the courts' case law.

In the 2009 *Intel* decision,[23] the Commission notes that the Guidance Paper was a statement regarding its future enforcement intentions and it was not therefore applicable to the *Intel* proceedings, which had been initiated before the Guidance Paper's publication.[24] Moreover, the Commission considers that the relevant Intel rebates were 'in themselves sufficient to find an infringement' under article 102 TFEU and it therefore is not obliged to analyse any of the surrounding context nor prove actual foreclosure.[25]

Nonetheless, while noting that this was 'not indispensable' the Commission seeks to demonstrate that Intel's exclusivity rebates were capable of causing or likely to cause anticompetitive foreclosure.[26] In particular, the Commission (almost bashfully) notes that an AEC analysis was 'one possible way' of examining whether the rebates were capable of foreclosing a hypothetical competitor who was as efficient as Intel. Using a modified version of the Guidance Paper's AEC test, the Commission concluded that this efficient competitor would have had to offer its products at a price that was below its AAC to compete against Intel's rebates, which would not be viable.[27] Again, however, before the General Court on appeal, the Commission's Legal Service seems to have de-emphasised this aspect of its decision.

This Commission's approach in *Intel* is similar to what it did in previous cases, such as *Wanadoo*,[28] *Microsoft*[29] and *Telefónica*,[30] where the Commission examined the impact of conduct on the market only after having stated that there was no requirement for it to demonstrate that the abuse in question had concrete effects on competition/the market. In effect, the Commission covers all its bases and concludes that either under the EU courts' case law or under an economics-based approach, the conduct infringed article 102. One can hardly imagine that, having found an infringement based on the EU courts' formalistic approach, the Commission's economic analysis could subsequently reach the opposite conclusion that conduct already condemned as abusive would in fact be unlikely to adversely impact the market. The usefulness of conducting an economic analysis under these circumstances is questionable.

The courts' reaction

The Guidance Paper itself recognises that it is not intended to be a statement of the law on article 102 and that it is without prejudice to the European courts' interpretation of article 102.[31] This follows from the principle of separation of powers and the EU courts' prerogative to interpret EU law. Nonetheless, if the Guidance Paper is to be of optimal use to companies and their advisers, it would seem appropriate for the courts to uphold the Commission's methodology in the Guidance Paper; this is not what has happened. Instead, the courts have mostly remained attached to the earlier case law, which often does not require an economic analysis proving damage to competition or consumers.

In *Tomra*, the CJEU upheld the General Court's dismissal of Tomra's appeal against the Commission's decision.[32] It expressly stated that under article 102 it was sufficient to show that Tomra's conduct tended to restrict competition or that its conduct was capable of doing this.[33] It was not therefore necessary for the Commission's decision to go further and analyse the actual impact of Tomra's rebates on competition.[34]

The CJEU noted that Tomra had highlighted that the Guidance Paper provided for a comparison of prices and costs but the CJEU considered this of 'no relevance' since the *Tomra* decision pre-dated the Guidance Paper.[35] Perhaps this conclusion is not surprising and the CJEU arguably left open the possibility for it or the General Court to endorse the Guidance Paper in future cases. For this reason, the General Court's *Intel* judgment[36] is of particular interest since the Commission had effectively applied its Guidance in that case notwithstanding that it was not formally obliged to do so.

In *Intel*, the General Court states that exclusivity rebates granted by an undertaking in a dominant position are, 'by their very nature', capable of restricting competition and foreclosing competitors from the market.[37] For the General Court it is thus once again unnecessary under article 102 to show that the rebates are capable of restricting competition.[38]

Turning to the Commission's AEC analysis, the General Court reiterates that for exclusivity rebates there is no requirement to show an anticompetitive effect so therefore no need to use an AEC test.[39] Furthermore, the General Court states that an AEC test is not required even if the rebates do not require exclusivity provided 'the mechanism for granting the rebate' has a 'fidelity-building effect';[40] this directly contradicts the Guidance Paper's endorsement of the AEC test. Moreover, even if an AEC test is applied and it shows that an equally efficient competitor could compete with the dominant company, the General Court considers that this would not be conclusive evidence of article 102 not being infringed.[41] This last statement effectively means that dominant companies cannot rely on the Guidance Paper to determine if their conduct complies with article 102; there is no safe harbour. While the General Court correctly notes that the Commission was not required to follow the Guidance Paper in the *Intel* case (and therefore again leaves open the possibility that the courts could endorse the Commission's approach in future cases) the broad nature of the criticism of the AEC test does not augur well for this possibility.

Most recently, in *Post Danmark II*,[42] the CJEU had the opportunity to give further guidance on rebates, including the potential applicability of the Guidance Paper's AEC test. This case reached the CJEU via the preliminary reference procedure from a Danish court, which asked a number of questions on the interpretation of article 102 and its applicability to rebates. Among these were questions regarding the relevance of the Guidance Paper's AEC test.

The CJEU concluded that the AEC was of no relevance in the particular factual circumstances owing to Post Danmark's very large market share and its structural advantages on the market in the form of a statutory monopoly; in such circumstances the emergence of an as efficient competitor was practically impossible.[43] More generally, the CJEU confirmed what the General Court had stated in *Intel* namely that the Guidance Paper sets out the Commission's

administrative practice and is not binding on national competition authorities or courts[44] and that there is no legal obligation to assess rebates according to the AEC test.[45] At best, the AEC is 'one tool amongst others' for assessing whether article 102 has been infringed and recourse to the AEC test is not excluded.[46]

The courts' scepticism towards the Guidance Paper is perhaps best summed up by Advocate General Kokott in her opinion in *Post Denmark II* where she cautioned against adopting 'a more economic approach' in these words: 'the Court should not allow itself to be influenced so much by current thinking ('Zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law'.[47]

The judgments in *Intel* and *Post Danmark II* sit somewhat uneasily with three CJEU judgments concerning margin squeeze and selective price cutting.

In *Deutsche Telekom*, the CJEU endorsed the Commission (and General Court's) application of an AEC test to assess the legality of an alleged margin squeeze.[48] Deutsche Telekom maintained that the test had been incorrectly applied in particular since, like in the approach outlined in the Guidance Paper, the General Court's AEC test had analysed Deutsche Telekom's prices and costs rather than its competitors. The CJEU rejected this criticism, noting that it was 'consistent with the general principle of legal certainty' to use Deutsche Telekom's costs since these costs would be known to Deutsche Telekom.[49]

TeliaSonera also concerned an alleged margin squeeze.[50] Here the CJEU again emphasised that article 102 prohibits pricing practices that could potentially exclude equally efficient competitors from the market.

In *Post Danmark I*, it was alleged that a dominant company had selectively reduced its prices in order to win certain customers from a competitor.[51] In particular, the prices offered to one customer were below Post Danmark's average total costs but above its average incremental costs.[52] The CJEU considered that this did not amount to an abuse since an as efficient competitor could as a rule compete against prices that covered the bulk of the dominant company's costs of providing services to that one customer.[53] In language that strongly echoes the Guidance Paper, the CJEU noted that article 102 did not seek to 'ensure that competitors less efficient than the undertaking with the dominant position should remain on the market'.[54]

While the CJEU did not expressly mention the Guidance Paper in any of *Deutsche Telekom*, *TeliaSonera* or *Post Danmark I*, the three cases all are subsequent to the Guidance Paper and inspired by it or, at the very least, clearly in harmony with it. In *Intel*, the General Court seeks to distinguish those cases from the rebates at issue in *Intel* noting that the three other cases concerned 'pricing practices' while *Intel* concerned rebates that were 'conditional on exclusive or quasi-exclusive supply'.[55] Even supposing that it is possible to distinguish between 'pricing practices' and rebates in this manner – in many cases rebates can incorporate elements of other pricing practices – it has to be asked why this distinction should mean that a different methodology is applied under article 102.

Conclusion

One of the Guidance Paper's purposes was to provide greater clarity and predictability to potentially dominant companies.[56] Has it achieved this?

To a degree, companies can look to the Guidance Paper for reliable guidance on whether their proposed strategies comply with article 102.

With the CJEU's endorsement of price/cost based AEC tests in *Deutsche Telekom*, *TeliaSonera* and *Post Danmark I*, this seems to be the case for alleged margin squeezing and allegedly selectively low prices. The CJEU has also long applied such a test to alleged predatory pricing. For tying/bundling, neither the Commission nor the EU courts have expressly applied the cost-based test suggested in the Guidance Paper to multi-product rebates.[57] Nonetheless, given that this test is closely linked to the established tests for analysing allegedly predatory prices it seems reasonable to assume that in so far as the Guidance Paper emphasises the need to consider equally efficient competitors, the courts will do the same. On the other hand, the fact that both the Commission and the General Court analysed the effects of tying in *Microsoft*[58] offers little comfort, given that both, and in particular the General Court, took pains to make it clear that this analysis was not required under law.

When, however, it comes to rebates, the situation is very different and potentially dominant companies cannot just rely on the Guidance Paper. Faced with divergence between the Commission (or at least DG Comp), which stated that it will normally only intervene when there is concrete proof of harm to competition (albeit leaving room to intervene in other exceptional cases) and the EU courts (apparently spurred on by the Commission's own Legal Service),[59] which regard the Guidance Paper as a mere policy statement and continue to apply their well-established case law, dominant companies continue to lack the necessary legal certainty when devising rebate programmes. If they satisfy the Guidance Paper's AEC test, they may be reasonably confident that the Commission is unlikely to open a formal investigation or fine them. However, since national competition authorities and national courts are not bound by the Guidance Paper and national courts – in particular – will be slow to disregard the EU courts' adherence to its case law, prudent dominant companies have no alternative but to ensure that they comply with the courts' case law. This risks companies deciding not to introduce rebates that may actually be pro-competitive, which chills competition.

Eight years on since the Guidance Paper's publication, the Commission needs to commit wholeheartedly to the economics-based approach lest the Guidance Paper become insignificant. The 'have your cake and eat it' approach in cases like *Intel* (albeit the *Intel* investigation admittedly was initiated pre-Guidance Paper) – where, on the one hand, the Commission demonstrates that rebates are unlawful under the courts' case law and, on the other, purports to apply an AEC test while making it clear it feels such a step is not necessary – is all too comfortable with the Commission ensuring that it will win either way. Moreover, such an approach perpetuates the relevance of the case law. If it believes in the Guidance Paper's approach to rebates, the Commission should act consistently and, in a suitable case, only apply an AEC test to find an infringement of article 102 and defend its findings in court based on this sole approach. This would appreciably increase the confidence that companies could place in the Guidance Paper as a whole and would also encourage national authorities and national courts to apply the AEC test to rebates.

To conclude therefore, it may be too early to pronounce the Guidance Paper extinct but decisive; consistent action is required on the part of the Commission to take it off the endangered species list.

Notes

1 Now article 102 TFEU.

2 Communication from the commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' issued in December 2008, [2009] OJ C45/7.

3 Case T-286/09, *Intel v Commission*, 12 June 2014.
4 Case C-23/14, *Post Danmark II*, 6 October 2015.
5 See, eg, Guidelines on Vertical Restraints [2000] OJ C291/1; Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings [2004] OJ C31/5; Guidelines on the Application of article 81 of the Treaty to Technology Transfer Agreements [2004] OJ C101/2; Guidelines on the Application of article 81(3) of the Treaty [2004] OJ C101/97; Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings [2008] OJ C265/6.
6 Guidance Paper, paragraph 2. The original idea was for the Commission to issue guidelines on the type of conduct likely to infringe article 102. However, the sponsors faced considerable pushback, both from inside the Commission and from certain National Competition Authorities that were opposed to the use of a more economic approach to constrain enforcement action in the field of article 102.
7 Ibid. The Guidance Paper only covers exclusionary abuses and not exploitative abuses such as alleged supra-competitive pricing.
8 Ibid.
9 See Commission press release IP/08/1877, 3 December 2008.
10 See, eg, Kallaugher and Sher, Rebates Revisited: Anticompetitive Effects and Exclusionary Abuse Under Article 82, [2004] E.C.L.R. 263, 268.
11 Guidance Paper, paragraph 6.
12 Id, paragraph 20.
13 Id, paragraph 19.
14 See, eg, Geradin, Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful? (12 March 2010), available at SSRN: http://srrn.com/abstract=1569502.
15 See, eg, Guidance Paper paragraphs 23 and 27.
16 Id, paragraphs 37 to 45.
17 Id, paragraph 26.
18 Case COMP/E-1/38.113, *Prokent-Tomra*, 29 March 2006. It should be noted, however, that within DG Comp, the case was seen, at least by some, as 'an important step towards the envisaged reform of the application of [article 102 TFEU]', see Maier-Rigaud and Vaigauskaite, Prokent/Tomra, a textbook case? Abuse of dominant position under perfect information?, Competition Policy Newsletter 2006, No. 2 Summer 2006, pp. 19–24, at p. 24.
19 Case T-203/01, *Michelin v Commission*, 30 September 2003.
20 Case COMP/E-1/38.113, *Prokent-Tomra*, paragraph 285 citing Case T-203/01, *Michelin II*, paragraph 239.
21 Case COMP/E-1/38.113, *Prokent-Tomra*, paragraph 333.
22 Id, paragraph 332.
23 Case COMP/C-3 /37.990, *Intel*, 13 May 2009.
24 Id, paragraph 916.
25 Id, paragraphs 923, 925.
26 Id, paragraph 925, section 4.2.3
27 Id, paragraph 1517.
28 Case COMP/38.233, *Wanadoo*, 16 July 2003.
29 Case COMP/C-3/37.792, *Microsoft*, 24 March 2004.
30 Case COMP/38.784, *Telefónica*, 4 July 2007.
31 Guidance Paper, paragraph 3.
32 Case C-549/10 P, *Tomra e.a. v Commission*, 19 April 2012.
33 Id, paragraph 68. Intel has appealed the General Court's judgment to the CJEU.
34 Id, paragraph 79.
35 Id, paragraph 81.
36 Case T-286/09, *Intel v Commission*, 12 June 2014.
37 Id, paragraphs 85 to 87.
38 Id, paragraphs 86 and 143.
39 Id, paragraph 143.
40 Id, paragraphs 144 to 154.
41 Id, paragraphs 150 to 151.
42 Case C-23/14, *Post Danmark II*, 6 October 2015.
43 Id, paragraph 59. Arguably indeed, the potential structural disadvantages faced by new entrants on a number of former legal monopoly markets in the EU constitute circumstances that are not discussed in detail in the Guidance Paper. Yet, the Guidance Paper offers sufficient flexibility to include these factors in the analysis without there being a need to jettison its economic approach.
44 Id, paragraph 52.
45 Id, paragraphs 57 and 62.
46 Id, paragraphs 58 and 61. See Petit, Rebates and article 102 TFEU: The European Commission's duty to apply the guidance paper, Competition Law & Policy Debate, Volume 2, Issue 1, March 2016, p. 4 where the author argues that the AEC test is 'unscathed' by either *Intel* or *Post Danmark II*. See also Whish, Intel v Commission: Keep Calm and Carry on!, (2014) 5 *Journal of European Competition Law & Practice*, 603.
47 Opinion of Advocate General Kokott in Case C-23/14, *Post Danmark II*, paragraph 4.
48 Case C-280/08P, *Deutsche Telekom*, 14 October 2010.
49 Id, paragraph 202.
50 Case C-52/09, *TeliaSonera Sverige*, 17 February 2011.
51 Case C-209/10, *Post Danmark I*, 27 March 2012.
52 Id, paragraph 9.
53 Id, paragraphs 37 to 38. The EU courts have also repeatedly used price/cost comparators when assessing the legality of alleged predatory pricing.
54 Id, paragraph 21.
55 Case T-286/09, *Intel v Commission*, paragraphs 98 and 99.
56 Guidance Paper, paragraph 2.
57 Guidance Paper, paragraphs 59 to 61.
58 Case COMP/C-3/37.792, *Microsoft* (24 March 2004) and Case T-201/04, *Microsoft v Commission* (17 September 2007).
59 During the oral hearing in Case C-413/14 P, Intel's appeal of the General Court's judgment, Advocate General Wahl is reported to have referred to the Guidance Paper and asked the Commission's lawyer if the Commission has 'different approaches when it comes to priorities for enforcement and then later on your position in court?'

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Frédéric Louis focuses on all aspects of EU competition law, in particular, behavioural investigations (cartels and abuse of dominance), merger clearances and state aid. In addition, he has extensive litigation experience, having represented clients in more than 35 proceedings before the European courts in Luxembourg. He has successfully challenged a number of cartel decisions in the EU courts, obtaining annulments or substantial reductions in fines.

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Mr Louis has filed a number of complaints with the European Commission alleging abuse of dominance and has defended clients against such allegations. He won an annulment of a decision imposing a €19 million fine on one of his clients.

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Cormac O'Daly advises on a wide range of EU and UK competition law issues. These have included merger control, cartels and related litigation, licensing and other vertical and horizontal agreements, other potentially restrictive practices and alleged abuses of market power. He regularly advises on areas at the convergence of competition and intellectual property laws including regarding abuse of dominance.

Mr O'Daly's clients have ranged from software companies, hardware manufacturers, oil and gas producers, companies appealing fines imposed by the European Commission (including Wabco in its 2013 fine reduction of over €200 million and Guardian in its 2014 reduction of over €44 million), companies seeking merger approval, and trade associations.

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THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ANTITRUST REVIEW 2017 ISSN 2398-7766