



# Abuse of Dominance Under Art 102 Towards multiple standards?

Giorgio Monti

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# Article 102

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

# Outline

- What is the significance and role of the Guidance Paper on Exclusionary abuse?
- What lessons can we derive from recent case law and Commission decisions as to the significance and role of the Guidance Paper?



# Summary of conclusions

- Multiple standards applied:
  - Guidance Paper standards
  - Case Law of the Courts
    - Divergence from Commission
    - Differences among judges
  - New directions by Commission
    - Regulatory decisions
    - Novel concepts

# International Context

- DOJ *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (September 2008 – December 2008)
- *Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings* (December 2008)
- Canadian Competition Bureau *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions* (Original 2001, consultation January 2009)
- American Antitrust Institute *The Next Antitrust Agenda* (July 2008)
- International Competition Network (2006 - ongoing)
  - Workbook on Dominance (May 2011)

# Background

- 1978-2011: concern that COM/ECJ apply Art 102 to conduct that harms competitors, but does not harm competition (e.g. *British Airways*)
- 2004-2008: review of Art 102
  - EAGCP Report (July 2005)
  - DG Comp 'Discussion Paper' (2005)
  - *British Airways, Microsoft* judgments
- 2009: Guidance on the Commission's Enforcement Priorities in Applying Article [102] to abusive exclusionary conduct



# DG Comp's first attempt (2005): Guidelines

- Soft law's hard basis:
  - Guidelines are bound by relevant primary/secondary law (which they interpret; clarify) (AG Kokott in *British Airways*)
    - So overruling past cases impossible!
  - Soft law creates entitlements to equal treatment; legal certainty; legitimate expectations
  - Soft law is justiciable under the standards fixed in primary/secondary law (e.g. fining guidelines)

## Second time round: enforcement priorities?

- ‘focus on those types of conduct that are most harmful to consumers.’ (¶15)
- ‘Commission will normally intervene where... conduct is likely to lead to anticompetitive foreclosure. (¶20)
- Refusals to supply – enforcement priority if: (1) the refusal relates to a product that is objectively necessary to compete effectively downstream; (2) the refusal is likely to lead to the elimination of effective competition downstream; (3) the refusal is likely to lead to consumer harm (¶81)
- Other descriptions:
  - ‘general enforcement principles’ (¶18)
  - ‘general enforcement standard’ (¶82, referring to ¶20)



# Guidance on enforcement priorities?

- More latitude? (e.g. reject line of attack taken in the past)
- Justiciable?
  - Can Commission turn down a complaint identifying abuse which is an enforcement priority?
  - Can Commission reject a complaint identifying abuse which is not a priority but where facts show abuse under the case law?
  - Can Commission apply different abuse standards than those developed (and ratified) by the ECJ?
- Is this document less than 'soft law' but potentially more powerful?



# Possible Commission Agenda

- 'Enforcement priorities'
  - GP one of several indicators of the Community interest; so a statement of prosecutorial discretion.
- Short term impact
  - Technical abuses outside GP framework not investigated (and so doctrine fades away)
  - GP raises enforcer's own standard of proof (e.g. rebates; tying)
- Long term impact
  - GP de facto (de jure?) changes the constitutive elements of abuse

# GP in outline

- Parts I and II: mood music
- Part III: overall approach to dominance; abuse; efficiency defence
- Part IV: detailed application of part III to selected abuses

## Part III(A): Market Power

'an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time [normally two years] does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant.' (GP ¶ 11)

- Focus on power to exploit & durability
- Dominance = Significant Market Power (SMP)
- Policy shift in line with themes in Guidance Paper
- Narrower definition than under the case law? (Would *Michelin*, *United Brands*, *British Airways* still be dominant under this test?)

# Re-formation of abuse doctrine

- GP section III.B & C
  - Anticompetitive foreclosure ¶19
  - Of a rival as efficient as the dominant firm ¶23
  - Which allows the dominant player to increase prices to the detriment of consumers ¶¶19; 27
- Support of [23] from Vickers; Posner

# Partial application

- Anti-competitive foreclosure is inferred (seven indicators suggested (¶20))
- A not-yet-as-efficient competitor may be worth protecting (¶24)
- The as-efficient competitor test is not applied in simple tying (it is for multi-product rebates) and refusals to deal
- The as-efficient competitor test is applied only if data is available (¶¶ 41, 67)
- Ability to raise prices... But no likely recoupment test in predatory pricing/rebate situations!
- Per se abuses (eg ¶ 82)

# Summary

- GP is the first document outlining a major competition authority's position on abuse of dominance
- GP focuses enforcement away from ECJ case law:
  - Higher dominance threshold
  - Effects-based approach (focusing on foreclosure causing exit of as-efficient competitor) – as an enforcement principle, not a legal standard?
  - GP part of criteria to determine prosecutorial discretion



# After the Guidance Paper

1. Application of Guidance in rebates? (*Tomra Intex*)
2. 'New' abuses:
  - price squeeze (*Deutsche Telekom; Telia Sonera*)
  - Google
3. ECJ case law (*Sot Lelos; Telia Sonera*)
4. New principles (*Intex*)
5. Commitment decisions: new theories of abuse
  - a) Strategic underinvestment & divestiture (ENI)
  - b) Patent ambush/excessive pricing (Rambus)
  - c) Long-term contracts (E.ON)

# Rebates – what reform strategy?

- Old law
  - ‘rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition’  
*Michelin 2* (1960)
- New principle/priority case
  - Distinguish between non-contestable and contestable market of DomCo
  - Allocate all discount to contestable share
  - Is such discount predatory?



## *Intel & Tomra*

- *Intel*(COM, 2009)
  - First part carries out traditional analysis to find abuse
  - Second part applies new standard as set out in Guidance Paper (appeal (T-286/09) challenges the detailed findings here – why?)
- *Tomra*(COM,2006)
  - Supplements conventional appraisal with economic analysis



## Case T-155/06 *Tomra*

- Yes to an effects analysis – of sorts:
  - ‘For the purposes of establishing an infringement of [Art 102] it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets. It is sufficient to show that the abusive conduct... Is capable of having that effect’ [Tomra, 288]
- An attempts doctrine too?
  - When a dominant company implements a margin squeeze ‘with the purpose of driving [competitors] from the market, the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse [TeliaSonera, 65]



# Price Squeeze in TeliaSonera

ADSL wholesale

Own Retail Broadband

Competitors' Retail  
Broadband



# Two theories of harm

- Retail price of DomCo is predatory
- Wholesale price set by DomCo to downstream firm is so high that it cannot compete with DomCo downstream
  - ‘constructive’ refusal to deal
  - Wholesale price means that the incremental cost of the retail product of the competitor is higher than that of DomCo (i.e. Price squeeze excludes an as-efficient competitor)



# Price Squeeze as a distinct abuse?

## Yes Case C-52/09 TeliaSonera

'A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking is... **in itself** capable of constituting an abuse. [31]

'... Although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss **or at artificially reduced levels of profitability.**' [33]

No: *Pacific Bell et al v LinkLine*  
(2009)

'If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then **a firm is certainly not required to price both of these services in a manner that preserves its rivals' profit margins.**' Roberts J.



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# Leverage

- From on-line search market (80% market share) to vertical search markets
- How
  - Preferential treatment to its vertical search engines; unfavourable treatment of competitors
  - Exclusivity obligations on advertising sites
- Why?
  - Offensive leverage: vertical search engines are a new market with additional profits (Microsoft EU)
  - Defensive leverage: vertical search markets can kill off on-line search market (Microsoft US)



# When is leverage an abuse?

- Anticompetitive foreclosure
  - Large market share allows for exclusion; no buyer power; high entry barriers
- Of a competitor as efficient as DomCo
  - ‘No economic sense better test?’
    - E.g. Case T-321/05 AstraZeneca (2010) [824-828]
    - E.g. GP ¶ 22
- Causing likely consumer harm
  - Higher advertising costs with a monopsony
  - Less consumer choice for vertical search
  - Reduced innovation in vertical search

# Regulatory antitrust

- ENI (2010)
  - abuse: ‘strategic underinvestment’
  - agreed remedy: divest pipelines (including TAG)
- New type of abuse
- Structural unbundling goes beyond Directive 2009/73 (even beyond Art 7 Reg 1/2003?)
- Commitment decision (remedy ‘proposed’ by parties)



# Post GP: new principles

- GP's potential: reformulate abuse doctrine
- Decision-making practice more relevant
  - New abuses – price squeeze (*TeliaSonera*); leveraging (*Google*)
  - New principles – single and continuous infringement ; anticompetitive object; meeting competition defence (*Intel*);
  - Other priorities – regulated industries (9 energy decisions); excessive pricing (*Rambus*)
  - Other enforcement styles – settlement ('nudge') over prohibition (Cf. C-441/07 *Alrosa*)



# Why apply Article 102?

- COM 'will focus on those types of conduct that are most harmful for consumers' (GP ¶8)
- 'The function of [Art 102] is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.' (Case C-52/09 *TeliaSonera*[22])