

## **Chapter 2: Is the Guidance Paper on the Commission’s Enforcement Priorities in Enforcing Article 102 TFEU Useful?**

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In December 2008, the European Commission (hereafter, the “Commission”) published a guidance paper on its enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings (hereafter, the “Guidance Paper”).<sup>1</sup> This document is of a *sui generis* nature as it “sets out the enforcement priorities that will guide the Commission’s action in applying Article [102] to exclusionary conduct by dominant undertakings.”<sup>2</sup> The Commission does not therefore state or restate the way in which Article 102 should be interpreted, a task which falls within the exclusive remit of the European Court of Justice (hereafter, the ECJ”), but explains the circumstances in which a given dominant firm’s conduct is likely to be subject to enforcement action by the Commission.<sup>3</sup>

Against this background, this paper seeks to answer the following question: Is the Guidance Paper useful? Considering that the Guidance Paper has generally been well received by commentators, one could be tempted to respond to this question positively, but a careful review of the document suggests that the answer may be less straightforward

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<sup>1</sup> 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.

<sup>2</sup> Id. at § 2.

<sup>3</sup> See Commission Decision of 13 May 2009, COMP/37-990 Intel, available at <http://ec.europa.eu/competition/sectors/ict/intel.html>, at § 916: “The guidance paper is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article [102] by the Court of Justice or the Court of First Instance. As a document intended to set priorities for the cases that the Commission will focus upon in the future, it does not apply to proceedings that had already been initiated before it was published, such as this case.”

than would appear at first blush. To respond to the question posed above, this paper is divided into five parts. Part I explains the context leading to the adoption of the Guidance Paper. Part II briefly describes the content of the Guidance Paper, focusing on the general principles that will guide the Commission's assessment of foreclosure rather than on its review of the various types of conduct that are likely to fall within the purview of Article 102. Part III addresses the question of whether the Guidance Paper provides sufficient guidance to dominant firms and their advisors as to whether certain conduct they may wish to pursue is compatible with Article 102. Part IV discusses whether the Commission is likely to comply with the effects-based approach promoted in its Guidance Paper or is likely to revert to a form-based approach when this better suits its enforcement objectives. Finally, Part V concludes that while the Guidance Paper gives encouraging signs that the Commission will adopt a modern, effects-based approach when defining its enforcement priorities questions remain as to the practical impact of this document for dominant firms. First, the principles contained in the Guidance Paper are subject to significant exceptions and caveats and provide no safe harbors, hence reducing the overall level of guidance provided for in this document. Second, the approach taken by the Commission in the *Intel* case suggests that the Commission may still be tempted to rely on the formalistic case-law of the ECJ in order to ensure that its decision does not become subject to a successful appeal.

## **I. The context leading to the adoption of the Guidance Paper**

It is hard to understand the contribution of the Guidance Paper without placing this document in the broader context of the reforms undertaken by the Commission in the area of competition law over the last ten years. EU competition law has been historically criticized for being too “legalistic” or “formalistic”, i.e. for placing greater emphasis on the form of a given conduct than on its effects on competition.<sup>4</sup> To address such criticism, the Commission has engaged in a series of reforms designed to modernize the

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<sup>4</sup> See R. O'Donoghue & J. Padilla, *The Law and Economics of Article 82 EC* (Oxford: Hart Publishing, 2006), at Chapter IV.

enforcement of Article 101 TFEU so as to bring it into line with the teachings of economic analysis.<sup>5</sup> This reform triggered the adoption of new block exemption regulations and explicative guidelines,<sup>6</sup> which were well received by competition law and economics experts.

The enforcement of Article 101 being modernized, the Commission logically turned its attention to Article 102. This latter provision creates significant challenges for reformists. First, Article 102 has been enforced very strictly by the Commission, which often took positions hard to reconcile with basic economics. Second, the ECJ and the General Court largely supported the decisional practice of the Commission by systematically rejecting appeals against these decisions by private parties,<sup>7</sup> often making matters worse by adding a strong “ordoliberal” flavor to their judgments.<sup>8</sup> A good example of the unfortunate state of the abuse of dominance case-law of the ECJ can be found in the field of loyalty rebates,<sup>9</sup> which are condemned as *per se* illegal despite the presence of efficiencies.<sup>10</sup>

The Commission’s efforts to modernize the enforcement of Article 102 can be traced back to the major policy speech given by Commissioner Kroes at the Fordham international antitrust conference in September 2005 in which she declared that she was “convinced that the exercise of market power must be assessed essentially on the basis of

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<sup>5</sup> See Chapter 1 by Etro and Kokkoris in this Volume.

<sup>6</sup> See, e.g., Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29 December 1999, 21; the Commission notice – Guidelines on Vertical Restraints, OJ C 291, 13 October 2000, 1; Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements O.J. C 3 of 6 January 2001, 2; Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, O.J. L 123, 27 April 2004, 11; Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. C 101, 27 April 2004, at 2.

<sup>7</sup> According to Neven, the Commission has a 98% success rate in Article 82 cases, DG COMP Chief Economist D. J. Neven, “Competition Economics and Antitrust in Europe”, 21(48) *Economic Policy* (2006) 741, 761–2. Evans and Padilla point out that the Commission has not lost a single Article 82 appeal on substance in twenty years. See C. Ahlborn and D. Evans, (2009) 75 *Antitrust Law Journal*, 887.

<sup>8</sup> See Ahlborn and Evans, *supra* note 6.

<sup>9</sup> See Damien Geradin, “A Proposed Test for Separating Pro-competitive Conditional Rebates from Anti-competitive Ones”, (2009) 32 *World Competition*, 41.

<sup>10</sup> *Id.*

its effects in the market, although there are exceptions such as the per se illegality of horizontal price fixing. [...] Article [102] enforcement should focus on real competition problems: In other words, behavior that has actual or likely restrictive effects on the market, which harm consumers. [...] Low prices and rebates are, normally, to be welcomed as they are beneficial to consumers.”<sup>11</sup>

Commissioner Kroes’ speech was immediately followed by a Commission Discussion Paper on Article 102 TFEU,<sup>12</sup> which promoted the very effects-based approach announced by the Commissioner. While the new economics-based principles guiding the approach proposed in the Discussion Paper were largely welcomed by commentators, the ways in which the Commission proposed to analyze certain categories of conduct were criticized as too reminiscent of the old formalistic approach.<sup>13</sup> The Commission was of course operating under tight constraints. First, it was somehow “prisoner” to unhelpful case-law to which it had in large measure contributed. Second, a number of highly sensitive cases were still being investigated<sup>14</sup> or subject to appeal<sup>15</sup> at the time and the Commission did not want to tie its hands. This being said, the Discussion Paper largely met its objective of stimulating debate as it was subject to abundant commentary, conferences, and events.

The next steps for the Commission were not clear as there was, for instance, speculation on whether the Discussion Paper would be turned into guidelines. While Commission officials were regularly recalling the Commission’s intention to pursue an

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<sup>11</sup> Neelie Kroes, “Preliminary Thoughts on Policy Review of Article 82”, Speech at the Fordham Corporate Law Institute New York, 23 September 2005.

<sup>12</sup> DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>

<sup>13</sup> Christian Ahlborn , Vincenzo Denicolò , Damien Geradin and Jorge Padilla, “DG Comp Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries”, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=894466](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894466)

<sup>14</sup> The *Intel* case was still being investigated at the time of adoption of the Discussion Paper. The Commission Decision was adopted in May 2009. Commission Decision of 13 May 2009, COMP/37-990 Intel, available at <http://ec.europa.eu/competition/sectors/ict/intel.html>

<sup>15</sup> The decision of the Commission in Microsoft (Commission Decision of 24 March 2004 (Case COMP/C-3/37.792 Microsoft), C(2004)900 final) was the subject of an appeal to the General Court whose judgment was adopted in September 2007, Case T-201/04, Microsoft v. Commission, judgment of 17 September 2007, 2007 ECR II-3601.

effects-based approach, no further move was made for almost three years before the Guidance Paper was adopted in December 2008. During that period, the ECJ and the General Court continued to hand down judgments largely unfavourable to dominant firms.<sup>16</sup> The appointment of Advocate General Kokott also meant that ordoliberalism had a new powerful ally within the ECJ.<sup>17</sup>

## II. The Content of the Guidance Paper

As the content of the Guidance Paper has already been described by numerous commentators,<sup>18</sup> the following paragraphs will briefly summarize its most striking aspects focusing on its general principles rather than on the Commission's analysis of specific conduct which is likely to fall within the ambit of Article 102.

*Dominance.* The Commission adopts an economic definition of dominance when it states that “an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant.”<sup>19</sup> The Commission does not refer to a certain market share above which (or below which) dominance will be presumed (or excluded), but lists a number of factors that it will consider in its dominance assessment, including the presence of “constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the

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<sup>16</sup> Case C-95/04 P, *British Airways plc v Commission of the European Communities, Virgin Atlantic Airways Ltd*, Judgment of 15 March 2007, 2007 ECR I-2331

<sup>17</sup> Advocate General Juliane Kokott's opinions in the area of competition law generally embrace an ordoliberal approach. See, for instance, her opinion in the *British Airways* case at § 68 where she underlines that the goal of Article 102 TFEU is to protect the “structure of the market” : “Article 82 EC, like the other competition rules of the Treaty, 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.”

<sup>18</sup> See, for instance, Chapter 2 by Marsden and Chapter 6 by Art and Ibáñez Colomo in this Volume, and Nicolas Petit, “From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC”, (2002) 32 *World Competition*, 485; James Killick and Assimakis Komninos, “Schizophrenia in the Commission's Article 82 Guidance Paper: Formalism Alongside Increased Recourse to Economic Analysis”, *Competition Policy International*, February 2009.

<sup>19</sup> Guidance Paper, *supra* note 1, at § 10.

market position of the dominant undertaking and its competitors); constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry); constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).”<sup>20</sup>

*Anti-competitive foreclosure.* The Guidance Paper focuses only on one category of abuse that falls within the scope of Article 102, i.e. abuses that foreclose competitors (generally referred to as “exclusionary abuses”). The Guidance Paper defines the term “anticompetitive foreclosure” as “a situation where 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.”<sup>21</sup> This definition suggests that a two-stage test will be relied upon to assess whether a given conduct is anti-competitive. In accordance with such test the Commission should first establish the presence of foreclosure and then prove that such foreclosure will likely harm consumer welfare. The reference to consumer welfare is important as it suggests that a conduct that would merely affect the “structure of competition” by, for instance, eliminating less efficient competitors but that would have no effect on prices or on the quality of products, or innovation, and thus would not harm consumers, would not lead to enforcement action by the Commission under Article 102. It is thus the presence of (likely) consumer harm that will trigger the intervention of the Commission.

The Guidance Paper then lists a number of factors that will generally be relevant to its assessment of foreclosure, including: the position of the dominant undertaking, the conditions on the relevant market, the position of the dominant undertaking's competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure, and direct evidence of any exclusionary strategy.<sup>22</sup> This list triggers two observations. First, the majority of these

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<sup>20</sup> Id. at § 12 et seq.

<sup>21</sup> Id. at § 19.

<sup>22</sup> Id.

factors relate to the “structure of the market”, which is surprising considering the Commission’s apparent attempt to move away from the ordoliberal perspective. Second, none of these factors relate to the assessment of the presence of consumer welfare, which is again quite surprising considering the emphasis placed on consumer harm in the definition of anti-competitive foreclosure provided for in the Guidance Paper. The Guidance Paper merely says that “[t]he identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence.”<sup>23</sup> In this respect, the rather cursory treatment of consumer harm in the Commission’s *Intel* decision is not particularly reassuring.<sup>24</sup>

Finally, the Guidance Paper indicates that the Commission will normally intervene under Article 82 where there is “cogent and convincing evidence” that the allegedly abusive conduct “is likely to lead to anticompetitive foreclosure.”<sup>25</sup> It also provides that the assessment of a given conduct will “be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.”<sup>26</sup>

*Price-based exclusionary conduct.* The Guidance Paper states that to prevent anti-competitive foreclosure, the Commission “will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.”<sup>27</sup> As the objective of competition is not to protect (less efficient) competitors, the “as efficient test” is certainly conceptually correct, although its application may at times raise significant difficulties.<sup>28</sup>

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<sup>23</sup> Id.

<sup>24</sup> Damien Geradin, “The Decision of the Commission of 13 May 2009 in the Intel case: Where is the Foreclosure and Consumer Harm?”, (2009) 2 *Journal of European Competition Law & Practice*, 1, at 9.

<sup>25</sup> Guidance Paper, supra note 1, at § 20.

<sup>26</sup> Id.

<sup>27</sup> Id. at § 22.

<sup>28</sup> See infra text accompanying notes 49 et seq..

The Guidance Paper states that the cost benchmarks the Commission will normally use to perform the “as efficient competitor” test are the average avoidable cost (AAC) and long-run average incremental cost (LRAIC).<sup>29</sup> In practice, when the price of a product is not sufficient to cover the AAC of producing the good or service in question ( $P_e < AAC$ ),<sup>30</sup> this means that the dominant firm sacrifices profits in the short term and that an “as efficient competitor” will not be able to serve the targeted customers without incurring a loss.<sup>31</sup> Failure to cover LRAIC ( $P_e < LRAIC$ ) indicates that the dominant firm is not recovering all the fixed costs of producing the good or service in question and that an “as efficient competitor” could be foreclosed from the market.<sup>32</sup>

The Guidance Paper provides that if the data clearly suggest that an as efficient competitor can compete effectively with the dominant firm’s price conduct, the Commission will “in principle” infer that this conduct is unlikely to adversely impact effective competition, and thus consumers, and will be therefore unlikely to intervene.<sup>33</sup> If, by contrast, the data suggest that the price charged by the dominant firm has the potential to foreclose as efficient competitors, the Commission will integrate this into the general assessment of anticompetitive foreclosure, taking into account other relevant quantitative and/or qualitative evidence (see the foreclosure analysis discussed above).<sup>34</sup> This language is important as it makes clear that under the Guidance Paper the performance of a price cost test is necessary, but not sufficient to determine the presence of foreclosure. Indeed, while a price cost test may establish that by granting aggressive rebates to a given customer a dominant firm may foreclose as efficient competitors from such customer, the demand of such customer may be insufficient (because it for instance only represents 5% of the overall demand) to drive as efficient competitors from the market.

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<sup>29</sup> Id. at § 25.

<sup>30</sup>  $P_e$  is the price effectively paid by the customer (for instance, the list price minus a rebate).

<sup>31</sup> Id. at § 25.

<sup>32</sup> Id.

<sup>33</sup> Id. at § 26.

<sup>34</sup> Id.

*Objective justification and efficiencies.* The Guidance Paper indicates that the Commission intends to examine claims by a dominant firm that its conduct is objectively “justified” or that it generates “efficiencies” that are sufficient to guarantee that no net harm to consumers is likely to arise.<sup>35</sup>

As far as efficiencies are concerned, the dominant firm that adopted the conduct leading to the foreclosure of competitors must “demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence” that the following cumulative conditions are met: (i) “the efficiencies have been, or are likely to be, realised as a result of the conduct”; (ii) “the conduct is indispensable to the realisation of these efficiencies”; (iii) “the likely efficiencies brought about by the conduct concerned outweigh any likely negative effects on competition and consumer welfare in the affected markets”; (iv) “the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.”<sup>36</sup>

The Commission will thus accept efficiency defenses provided that conditions comparable to those found in Article 101(3) TFEU are met. It is questionable whether many dominant firms that engage in a conduct that leads to anti-competitive foreclosure will be able to satisfy this test as the conditions are particularly stringent when placed in a dominance context. In any event, this test cannot be passed successfully by so-called “ultra-dominant” firms as the Guidance Paper provides that “exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.”<sup>37</sup>

The Guidance Paper then goes on to analyse the circumstances under which it will intervene with respect to the traditional categories of abuse, including exclusive

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<sup>35</sup> Id. at §§ 27-30.

<sup>36</sup> Id. at § 29.

<sup>37</sup> Id.

dealing,<sup>38</sup> tying and bundling,<sup>39</sup> predation<sup>40</sup> and refusal to supply and margin squeeze.<sup>41</sup> The discussion of such circumstances would, however, go beyond the scope of this short paper although some references to the Commission's proposed assessment of rebates will be discussed below.

### **III. Does the Guidance Paper offer sufficient guidance?**

In its introduction, the Guidance Paper indicates that “it is intended to provide greater clarity and predictability on the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether a certain behaviour is likely to result in intervention by the Commission under Article [102].”<sup>42</sup>

Receiving guidance from the Commission as to the type of conduct that will be subject to enforcement is of considerable importance for dominant firms and their counsel. Regrettably, Article 102 is an area where both in-house and external counsel have considerable difficulties advising their clients. The area of rebates is for instance particularly confusing. On the one hand, the case-law of the ECJ appears very restrictive prohibiting, for instance, loyalty rebates *per se*.<sup>43</sup> On the other hand, the Commission made it clear in the Discussion Paper that its assessments of rebates would be based on a rigorous price-cost analysis.<sup>44</sup> Tying and bundling are also an area that is not particularly clear. The case-law of the ECJ is very restrictive, especially after the General Court's

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<sup>38</sup> Id. at §§ 31 et seq.

<sup>39</sup> Id. at §§ 46 et seq.

<sup>40</sup> Id. at §§ 62 et seq.

<sup>41</sup> Id. at §§ 74 et seq.

<sup>42</sup> Id. at § 2.

<sup>43</sup> See Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461; Case 322/81, *Michelin v Commission* [1983] ECR 3461, §71; Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission* (Michelin II), [2003] ECR II-4071 ; Case T-219/99, *British Airways plc v Commission*, [2003] ECR II-5917 and Case C-95/04 P, *British Airways plc v Commission*, [2007] ECR I-2331.

<sup>44</sup> See Discussion Paper, *supra* note 1, at §§ 151 et seq.

decision in *Microsoft*.<sup>45</sup> But this case-law is not necessarily in line with the effects-based approach, which should place a heavier evidentiary burden on the Commission. Hence, self-assessment in the above areas is particularly difficult.

The question is, of course, whether the Guidance Paper offers the level of guidance needed for dominant firms and their advisors. The answer is mixed. On the one hand, the Commission has now made it clear that key to its assessment of dominant firm conduct will be the extent to which the *effects* of the conduct in question are (likely) to harm effective competition and consumer welfare. Hence, conduct that does not produce anti-competitive foreclosure effects should thus not trigger antitrust intervention by the Commission, although such conduct could still be subject to enforcement action by the national competition authorities and/or actions before the national courts.<sup>46</sup> On the other hand, for reasons that will be discussed below, it can be argued that the Guidance Paper missed some opportunities to clarify the Commission's enforcement policy in certain areas and to give comfort to dominant firms that certain categories of conduct will not trigger enforcement action by the Commission.

First, the Guidance Paper does not cover exploitative pricing and price discrimination. That is a significant limitation considering that there has been a resurgence of exploitative cases in recent years<sup>47</sup> and that price discrimination is one of the most confusing and unsettled areas of EU competition law.<sup>48</sup> While the Commission raised price discrimination claims in a wide range of cases of abuse, very few of such claims were actually supported by Article 102(c) of the TFEU, which should only cover

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<sup>45</sup> See Alborn and Evans, *supra* note 6.

<sup>46</sup> The Guidance Paper does not bind the national competition authorities or the national courts, although the former are likely to be influenced by its content.

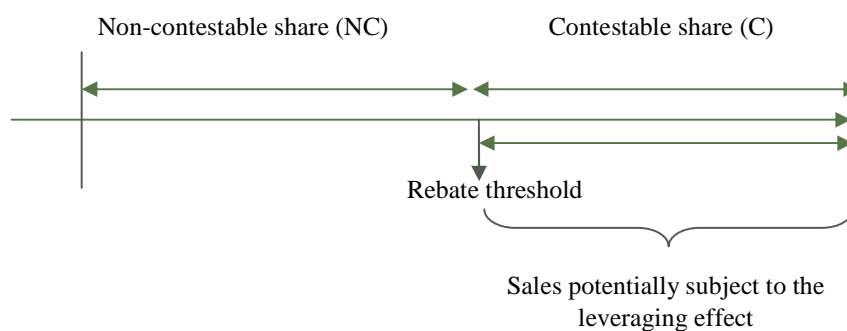
<sup>47</sup> See Damien Geradin, "The Necessary Limits to the Control of 'Excessive' Prices by Competition Authorities - A View from Europe", available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022678](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022678)

<sup>48</sup> See Damien Geradin and Nicolas Petit, "Price Discrimination Under EC Competition Law: Another Antitrust Theory in Search of Limiting Principles", 2 (2006) *Journal of Competition Law and Economics*, 479 ("While the European Commission (hereafter, the "Commission") and the Community courts have applied Article 82(c) to many different practices, there are good reasons to believe that this provision should be applied to a limited set of circumstances, most forms of discrimination being adequately covered by Article 82(b) or other provisions of the Treaty".)

scenarios of so-called “secondary line” injury.<sup>49</sup> Thus, guidance on exploitative pricing and price discrimination would have been invaluable.

Second, it is questionable whether the analytical approach proposed by the Commission will necessarily be of great help to dominant firms seeking to self-assess their conduct. For instance, while it may be analytically correct, the approach proposed by the Commission for the analysis of “retroactive” rebates,<sup>50</sup> such as those that were at stake in *Intel*, raises significant implementation issues. The competition concern was that, given that Intel is an “unavoidable trading partner”, its rebates may enable it to “use the inelastic or ‘non-contestable’ share of the demand of each customer, that is to say the amount that would anyhow be purchased by the customer from the dominant undertaking, as leverage to decrease the price for the elastic or ‘contestable’ share of demand, that is to say the amount for which the customer may prefer and be able to find substitutes.”<sup>51</sup>

This scenario is illustrated by the graph below.



<sup>49</sup> See Santiago Martinez Lage and Rafael Allendesalazar, "Community Policy on Discriminatory Pricing: A Practitioner's Perspective", *Paper presented at the 2003 Annual EU Competition Law and Policy Workshops - What is an Abuse of a Dominant Position?*, Florence at 14; Van Bael&Bellis, Van Bael&Bellis, *Competition Law of the European Community*, Kluwer Law International, 2005, at 915; Richard Whish, *Competition Law*, 5<sup>th</sup> ed., LexisNexis Butterworths, 2003, at 716 and 710

<sup>50</sup> Retroactive rebates apply to applying to both units below and above the threshold (in terms of percentage of requirements or quantities purchases) set by the dominant firm for the granting of the rebates.

<sup>51</sup> See *Intel* decision, *supra* note 3, at §§ 1005.

When the non-contestable part (*NC*) of the customer demand in question is large compared to the contestable part (*C*), the retroactive rebate may allow the dominant supplier to leverage its position of strength in the non-contestable part to the contestable part of a customer's sales. Indeed, while the dominant supplier can recoup the rebate on its overall sales including both contestable and non-contestable parts (i.e. the dominant firm does not incur losses on the whole range of sales), competing suppliers will have to recoup the rebate over a smaller base represented by the contestable part. This retroactive rebate scheme could thus have the effect of excluding equally efficient rivals from that part of the customer's sales that would otherwise be contestable.

As I have shown elsewhere,<sup>52</sup> the problem with this approach is that it the determination of the "contestable" share, which is a central element of the test, is extremely difficult, hence creating significant risks of mistakes in the assessment of relevant conduct. In addition, because a dominant firm is generally unable to determine the "constable" share of the customers to which it grants rebates, it is not in a position to self-assess whether the rebates in question are compatible with Article 102.<sup>53</sup> Thus, while the test proposed by the Commission is conceptually correct, and certainly more in line with economics than a *per se* prohibition, such as the one found in the case law, it is very hard to implement in practice and offers very little, if any, guidance to dominant firms wishing to grant rebates to, or asked to grant rebates by, their customers.

Finally, the Guidance Paper contains so many caveats and possible exceptions that even dominant firm carefully assessing their conduct under the analytical frameworks provided by this paper would remain exposed to enforcement actions.<sup>54</sup> For

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<sup>52</sup> See Geradin, *supra* note 8.

<sup>53</sup> While dominant firms obviously know their cost structure, they are in no position to know the costs of their competitors and thus could not self-assess their pricing practices. This aspect was recently emphasised by the Court of First Instance in *Deutsche Telekom* in which the Commission had applied the "as efficient competitor" test. The Court condoned this test, holding that any other approach would be contrary to the general principle of legal certainty. See judgment of the Court of First Instance, 10 June 2008, Case T-271/03 *Deutsche Telekom* (not yet published) at § 192.

<sup>54</sup> The Guidance Paper's use makes of terms such as "generally" (eighteen times) or "in principle" (five times) is particularly striking and creates considerable uncertainty as to the Commission's likely course of action faced with a given conduct.

instance, while the Guidance Paper rightly states that in cases of alleged pricing abuses the Commission will base its assessment on an “as efficient competitor” test, it provides that the Commission may in certain circumstances deviate from the “as efficient” standard to protect less efficient competitors:

“the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether a particular price-based conduct leads to anticompetitive foreclosure. The Commission will take a dynamic view of this constraint, given that in the absence of an abusive practice such a competitor may benefit from demand- related advantages, such as network and learning effects, which will tend to enhance its efficiency.”<sup>55</sup>

This approach is regrettable since it leaves dominant firms in a situation of uncertainty. They may decide not to grant some forms of pro-competitive rebates due to the fact they are concerned by the possible antitrust implications.<sup>56</sup> Even if there are settings where above cost-pricing could arguably lead to foreclosure, such settings seem very rare to say the least. More generally, the benefits of preventing dominant firms from cutting their prices on the ground that this may eliminate competitors that may later force them to provide for even lower prices are speculative.<sup>57</sup> As pointed out by the then judge (now Justice) Breyer in *Barry Wright*:

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<sup>55</sup> Guidance Paper, supra note 1, at § 23.

<sup>56</sup> Moreover, if they decide to go ahead with a rebate regime which *prima facie* appears in line with EC competition law (and which they need to grant to realize pro-competitive efficiencies or meet competition), but is *in fine* challenged by the European Commission, the resulting investigation will result in significant legal costs, management distraction, damage to the brand, possible fines and injunctions and follow-on private litigation.

<sup>57</sup> See Hovenkamp, supra note 1, at 847 (“Are there any circumstances in which an above-cost single-item discount is anticompetitive? Perhaps. One can imagine situations in which a discount increases the dominant firm's sales so much that it denies rivals economies of scale because they cannot get their own output high enough. Although that might be true as a matter of fact, any antitrust remedy must be denied on grounds of both principle and application. On grounds of principle, there is no way of drawing boundaries around the point. In any industry subject to significant economies of scale in production or distribution, a firm with a high volume of sales may be able to undersell firms that have a lower volume of sales. But no firm, not even a monopolist, is a trustee for another firm's economies of scale. To force such a firm to hold

“a price cut that ends up with a price exceeding total cost-in all likelihood a cut made by a firm with market power-is almost certainly moving price in the ‘right’ direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such beneficial “birds in hand” for the sake of more speculative (future low-price) ‘birds in the bush.’”<sup>58</sup>

Consumer welfare is thus better served by giving dominant firms assurances that when  $P_e > ATC$  or  $LRAIC$  the rebate in question is lawful.<sup>59</sup> As far as the Commission is concerned, its inability to define safe harbors in its *Guidance Paper* is also surprising considering that it has provided safe harbors in many other areas of competition law, such as for instance in the fields of vertical restraints<sup>60</sup> and horizontal cooperation agreements.<sup>61</sup>

#### **IV. Will the Commission comply with its own Guidance Paper?**

One central question is of course whether the Commission will comply with its own Guidance Paper, i.e. whether it will base its decisions to enforce Article 102 on the

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a price umbrella over its rivals, selling at above-cost prices in order to protect the rivals' inefficiently small production, would be a blatant example of protecting competitors at the expense of consumers.”)

<sup>58</sup> See *Barry Wright Corp. v. ITT Grinnell Corp.*, supra note at 234. See also Einer Elhauge, “Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory and the Implications for Defining Costs and Market Power” (2003) 112 *Yale Law Journal*, 681; Aaron S. Edlin, “Stopping Above-Cost Predatory Pricing” (2002) 111 *Yale Law Journal*, 941.

<sup>59</sup> Competition experts generally believe that competition authorities (and courts) should provide “safe harbors” designed to give firms immediate assurances, without the need to invest significant resources in a full-scale competitive analysis, that a given rebate regime will not be challenged by a competition authority or, more generally, create antitrust liability. As pointed out by Baumol: “In a world in which vigorous competition is all too easily mistaken for predation, and in which firms can unintentionally overstep the line, it is important to provide managers with guidelines as unambiguous as the issue permits, to enable them to tailor their decisions in a way that ensures compliance with the law and minimizes vulnerability to anticompetitive lawsuits intended to handicap vigorous competition.” See William J. Baumol, “Predation and the Logic of the Average Variable Cost Test”, (1996) 39 *Journal of Law & Economics* 49, 51.

<sup>60</sup> Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, O.J. 1999, L 336/21.

<sup>61</sup> Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements, O.J. 2001, C 3/2.

principles developed in the Guidance Paper. Let us for instance assume that the Commission receives a complaint alleging that a dominant firm has granted loyalty rebates to some of its large customers. Given the strict case-law of the European Court of Justice in the field of rebates, the Commission could in theory initiate an investigation and adopt a negative decision on the ground that the rebates in question are exclusionary under the *Hoffman La Roche*,<sup>62</sup> *Michelin I and II*,<sup>63</sup> and *British Airways*<sup>64</sup> case-law. If appealed, this decision would most likely be sustained by the General Court. Such an approach would, however, stand in contradiction with the Guidance Paper which makes it clear that the Commission will enforce Article 102 against dominant firms adopting rebates that can exclude “equally efficient” competitors. The Commission should thus analyse the rebates regime in question to determine whether it is able to exclude such competitors. If that is not the case, the Commission should abstain from intervening *even if* it could adopt a decision in the negative and impose a fine under the formalistic case-law of the ECJ. Failing that the Guidance Paper would be entirely meaningless.

The above question raises the issue of whether the Guidance Paper can create “legitimate expectations” to the benefit of dominant firms. The case-law of the ECJ makes it clear that soft law instruments (e.g., guidelines, communications, etc.) may give rise to a legal duty on the part of the Commission to abide by its pronouncements on pain of having decisions that diverge from them annulled for being in breach of general principles of EU law.<sup>65</sup> As pointed out by the ECJ in the *Dansk Rørindustri and others v. Commission* judgment:

“In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate

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<sup>62</sup> See supra note 42.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> See Petit, supra note 17, at 501-02.

expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.”<sup>66</sup>

That is probably the reason why the Commission was careful not to produce “guidelines” on the application of Article 102, but limited itself to a statement of prosecutorial discretion outlining how it will define its enforcement priorities.<sup>67</sup> This being said, there remains some ambiguity regarding the true nature of the Guidance Paper as it provides a series of analytical principles – designed to determine the presence of anti-competitive discretion – of the type that would normally be found in Commission guidelines.<sup>68</sup>

Assuming that the Commission is serious about modernizing the application of EU competition rules, the question nevertheless remains whether it might be tempted to opportunistically deviate from its proposed approach when it wants to bring infringement proceedings in areas where the formalistic case law of the ECJ is particularly unfavourable to dominant firms. The *Intel* decision is a case in point.<sup>69</sup> While in that decision the Commission carried out an “as efficient competitor” analysis to demonstrate that Intel’s rebates were exclusionary, it claimed that this analysis was “not indispensable

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<sup>66</sup> Case C-189/02 P, *Dansk Rørindustri and others v. Commission*, 2005 ECR I-5425, at § 211

<sup>67</sup> The Commission enjoys broad discretionary powers as to the questions of whether and when EU competition rules should be enforced. As the General Court made clear in *Automec*: “In the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law ‘where those priorities have not been determined by the legislature’ is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.” Case T-24/90, *Automec Srl v. Commission*, 1992 ECR II-2223 at § 77.

<sup>68</sup> See Liza Lodvdahl Gormsen, “Why the European Commission’s Enforcement Priorities on Article 82 EC Should be Withdrawn”, (2010) *European Competition Law Review* 45, at 46: (“Labelling the Guidance Paper as “enforcement priorities” is a false dichotomy, because they are *in effect* substantive guidelines.”)

<sup>69</sup> In *Intel*, the Commission considered that the Guidance Paper did not apply on the ground that this document “was published only after Intel had been given the opportunity to make its views known on the 26 July 2007 SO, the 17 July 2008 SSO and the Commission’s letter of 19 December 2008.” *Intel* decision, supra note \_\_, at § 916. The Commission however specified in its decision that it was “in line with the orientations set out in the guidance paper.” *Id.*

for finding an infringement under Article 82 of the Treaty according to the case-law.”<sup>70</sup> Referring to *British Airways* and *Michelin II*, the Commission indeed notes that “for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned.”<sup>71</sup> The Commission thus appears to be saying that no evidence of foreclosure is needed.

While this approach would provide the Commission with the advantage that its decisions would become de facto “appeal proof”,<sup>72</sup> it would be highly detrimental to the objectives of the Guidance Paper for at least two reasons.

First, this approach would hardly give any incentives to the Commission to carry out a serious effects-based analysis as in any event the case can be won on the basis of the strict case-law of the ECJ. At best, the effects-based analysis is added to the decision to give the defendant the impression that the matter was thoroughly assessed by the Commission even if that thorough assessment was not necessary in the end.

Second, this approach would give very little hope to dominant firms that the case-law of the ECJ could evolve in a direction that is more in line with economics. If the Commission were serious about reforming the enforcement of Article 102, it would be better for the Commission to justify its finding of anti-competitive behaviour exclusively on the basis of an effects-based analysis and explain to the EU courts that it did so as it believes that the old case-law of the ECJ is no longer in line with modern antitrust enforcement. As judges tend to be sensible individuals, this would incentivize them to reassess their case-law and perhaps to modernize it as well. This would not be the first time the ECJ would abandon old case-law in favour of a new analytical framework. While this approach by the Commission would be courageous and may garner support among reformists, it is most unlikely to be appealing to case teams and the Commission’s

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<sup>70</sup> Id. at § 925.

<sup>71</sup> Id. at § 922.

<sup>72</sup> The General Court and the ECJ would be most likely to uphold this decision as in line with their case-law.

Legal Service, which are certainly more interested in winning their cases by producing appeal proof decisions than in reforming the law.

## **VI. Conclusions**

While the Guidance Paper is a welcome contribution to the modernization of the enforcement of Article 102 TFEU, its practical impact is questionable for several reasons. First, while the Guidance Paper provides dominant firms and their advisors with a series of principles that should allow them to better self-assess the legality of categories of practices that can fall within the scope of Article 102, the significant exceptions and caveats it contains considerably limit the guidance it offers. The absence of safe harbours is also disappointing especially considering the Commission had successfully opted for safe harbors in its application of Article 101. Moreover, while the principles contained in the Guidance Paper certainly represent an improvement on the legalistic approach which has dominated the enforcement of Article 102 for many years, it remains to be seen to what extent the Commission will apply these principles when the case-law of the ECJ provides it with an easy win.