

Chapter 7: The Assessment of Efficiencies under Article 102 and the Commission's Guidance Paper

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1. INTRODUCTION: THE NEED FOR GUIDANCE

Over the years, the development of competition law and policy in the area of Article 82 through the decisional practice of the European Commission and the case law handed down by the European Court of Justice ("ECJ"), has had many antitrust practitioners clamouring for a "*reform*" of the law in this area.

This is so first because the case law of the ECJ and the decisional practice of the Commission have been **often obscure**. Taking for instance the treatment of the question of whether "*meeting competition*" constitutes a defence, it is hard to find a consistent line:

- in *AKZO*, the Court found that meeting competition could be considered a defence but only where the alignment of the price with the prices offered by the competitor is a defensive measure,¹
- in *Hilti* it was held that meeting competition was a defence but only under the condition that there was no intention ("*pre-established policy*") to affect competitors²,
- in *Tetra Pak II*, the Court refuted all arguments that prices below costs could be justified by reference to the prices charged by the main competitor,³
- in *Digital* meeting competition was unconditionally accepted as a defence⁴,

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¹ Case C-62/86, *AKZO v Commission*, [1991] ECR 3359, para 156.

² Decision of the Commission of 22 December 1987, [1988] OJ L 65/19, point 80.

³ T-83/91, *Tetra Pak International v Commission*, [1994] 755, paras 147 to 152.

- in *Napier Brown* meeting competition was found legitimate but only where it consisted not in "meeting" but in "beating" competition⁵,
- in *BPB Industries* or *Irish Sugar*, meeting competition was accepted as a defence when not systematic⁶,
- in *Compagnie Maritime Belge* the Court held that while that the meeting competition defence was only available where the company in question was not superdominant⁷, etc.

Similar inconsistencies can be found for each and any abuse.

Further, and even beyond those inconsistencies, the concept of abuse has in the past been defined increasingly in such a way that *in effect most behaviour by a dominant company is currently prohibited*. For example, in *Michelin II*⁸, the Court found that there was no need to look at the effect of a practice, that an intention to compete was to be considered anticompetitive, and decided that the decline in market shares which Michelin had been subject to was irrelevant, arguing that the decline in market share might have been even greater if Michelin had not behaved in the manner which it had.

This extension of the categories of behaviour caught by Article 102 has also been furthered by the use of a number of overly wide *per se* rules and explicit or implicit presumptions of abuse. For example, in *Microsoft*⁹ the Court held that Microsoft had abused its dominant position by tying the sale of its Windows Media Player to the operating system, which gave it an "advantage" over its competitors as Microsoft was dominant. In practice it is difficult to see the difference between such a test and a *per se* prohibition of tying for any dominant undertaking.¹⁰

⁴ See Dolmans & Pickering "The 1997 Digital Undertaking" [1998] ECLR vge. 19 (2) p. 108 with full text of the undertaking.

⁵ Decision of the Commission of 18 July 1988; [1988] IH K 284/41.

⁶ Commission Decision *BPB* IV/31.900, O.J. (1989) L 10/50, paras 132 and 133; T-228/97, *Irish Sugar*, 7 October 1999, para. 190.

⁷ C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, 16 March 2000, para 119.

⁸ Case T-203/01, *Michelin v Commission*, [2003] ECR II-4071, see at paras 258 and 235-246.

⁹ See Chapter in Chapter 6 by Komninos and Czapracka in this Volume.

¹⁰ Case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 1039-1047.

Clearly, the absence of economic analysis displayed in these pronouncements is not only disquieting in itself but also *inconsistent with the increasingly economic approach*¹¹ adopted in the other areas of competition law enforcement. As regards Article 101, the effects of an agreement play henceforth an important role in its assessment. In recent years, the publication by the Commission of block exemptions setting out categories of agreements which on the basis of an economic analysis of their likely effects could be regarded as normally not infringing competition law has determined the enforcement of Article 81. In the area of merger law, the assessment of the competitive effects of the merger which naturally includes the question of any efficiencies which may result from the concentration has always relied heavily on economic analysis.

Interestingly, in both Article 101 EC and European merger law, the move towards a more careful economic analysis of the effects in question has not only been driven by the Commission. In fact, in many instances it was the Court which has held the Commission to a high standard of economic reasoning before agreements or mergers could be legitimately allowed (or prohibited). On the contrary this emphasis on an economic analysis which firmly grounds any prohibition decision on the facts and actual impact of the conduct on the market has been missing in the case-law of the Court on the enforcement of Article 102, the Court being in fact more "*conservative*" on this question even than the Commission.

In this regard, the recent publication of a Guidance Paper taking an effect based approach to the enforcement of Article 102 and recognising the role of efficiencies is to be welcomed. However, the Guidance Paper also has a number of serious shortcomings. Notably, as will be discussed in the present contribution, while on the one hand, it is stated that dominant companies are "*entitled to compete on the merits*"¹² and that the enforcement of Article 102 is designed to "*protect competition not competitors*", on the other hand the Guidance Paper allows for so many exceptions than efficiencies can mostly be invoked only "*defence*" and under very strict conditions.

In order to analyse the important role played by efficiencies in the assessment of behaviour under Article 102, this paper will first recall how an abuse of a dominant position is defined.

¹¹ See Chapter 1 by Etro and Kokkoris in this Volume for a wide discussion of an economic approach to antitrust policy and exclusionary abuses in particular.

¹² Guidance Paper, para 1.

It will then show that the Guidance Paper presents a departure from these principles. The main part of this paper then analyses the problems raised by importing an Article 101(3) style "efficiency defence" into the application of Article 102.

2. BACK TO BASICS: THE CONCEPT OF ABUSE OF A DOMINANT POSITION

Traditionally, the notion of abuse is defined by reference to competition "*on the merits*", as can be seen from this quote from the ECJ's judgment in *Hoffmann LaRoche*¹³:

*“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market ... and which, through recourse to **methods different from those which condition normal competition ... on the basis of the transactions of commercial operators**, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”*

Thus, where a company, even if it is dominant, competes "*on the merits*", its behaviour does not constitute an abuse of its dominant position. This results even more clearly from the later statement of the ECJ in *Michelin I*,¹⁴ in which the Court refers to "*methods different from those governing **normal competition ... based on a trader's performance***".

In practice, this means that dominant companies are not prohibited to compete even aggressively and thereby take away market shares from their competitors, provided this is the result of this greater efficiency and not of mere "*abusive devices*" where under they leverage their market power. Or to give examples, it means for instance that:

- lower prices or better products are not an abuse, even if they affect competitors negatively by hindering the maintenance or growth of competition. It is only exceptionally, if low prices are part of a predatory strategy to foreclose the market

¹³ Case 85/76, *Hoffmann LaRoche*, [1979] ECR 461, at para 91.

¹⁴ Case 322/81, *Michelin v Commission*, [1982] ECR 3461, at para 70.

and where the dominant company is in a position to recoup its losses in the long term to the detriment of consumers, that this is not competition “*on the merits*”;

- similarly, exclusivities, are normally competition “*on the merits*”, i.e. if they allow for instance lower prices, or more interbrand competition etc but if they are a mere unjustified device designed solely to foreclose the market to the detriment of consumers, this is not competition “*on the merits*” anymore;
- in the same vein, tying and bundling, are generally “*common practices intended to provide customers with better products or offerings in more cost effective ways*”¹⁵, and it is only where tying or bundling –rather than being efficiency enhancing– are a *de facto* device to foreclose competition on a neighbouring market to the detriment of consumers, that they do not constitute competition “*on the merits*”;
- also keeping an IPR for oneself is normal and not an abuse. It is only if access is denied to third parties who intend to put on the market a new product, that this is not competition “*on the merits*”, etc.

In practice it is difficult to find any behaviour by a dominant company which is not otherwise normal behaviour adopted also by non dominant undertakings and which does not present a number of efficiencies. Whether such a behaviour is an abuse or not depends then therefore greatly on the possible foreclosure effect of the behaviour on the market relative to the real efficiency of the conduct.

This is crucial also because Article 102 ought not to be interpreted in a way which contradicts Article 101. If Article 102 is enforced in a way which prohibits companies from pricing their products “*too aggressively*” or which punishes the development of products which are superior to the products they are competing with, less efficient companies can easily shelter under the umbrella of a less “*aggressive*” dominant company – in the same way in which they could protect themselves from competition by agreeing their prices or product strategy with each other. Thus, if companies are not allowed and encouraged to compete vigorously “*on the merits*”, Article 82 risks having in practice the same effect as cartels, i.e. protecting

¹⁵ Guidance Paper, para 49.

competitors and not the consumer. It is evident that such a lack of competition will ultimately not be beneficial to consumers. In order to protect effective competition, even dominant companies must be encouraged to compete vigorously.¹⁶

This being said, a key distinguishing element between Articles 101 and 102 is that it is more difficult to find "*per se*" prohibitions in the field of Article 102 than of Article 101. Indeed, as far as anticompetitive agreements are concerned, enforcement practice has developed a number of categories of "*hardcore*" restrictions which almost always have anticompetitive effects. While these may still exceptionally be justified under Article 101(3), such practices are so widely recognised as "*bad*" that there is a *prima facie* presumption of illegality, and thus a reversal of the burden of proof, i.e. it is for the companies concerned to prove the legality of their behaviour and not for the plaintiff or the authority. Conversely, the introduction of presumptions of illegality under Article 102 is more difficult to justify. In fact, as indicated most abuses are perfectly normal and legal behaviour for a non-dominant company but may become prohibited for dominant companies simply because of their exclusionary effects and insufficient justification by competition on the merits. Therefore the legality of a given conduct by a dominant company ought almost always depend on an analysis of the effects and efficiencies of the conduct on competition.

3. A REDEFINITION OF THE PRINCIPLES? THE GUIDANCE PAPER

In accordance with the above principles, the Commission's recent Guidance Paper rightly sets out to adopt a "*more economic*" approach and requires a more careful analysis of the effects of allegedly abusive behaviour on the market.¹⁷ Further, the Guidance Paper has recourse to the "*as efficient competitor*" test, thus indicating that efficiencies are a key element of the test as the purpose is indeed not to protect competitors but competition. Indeed, only where as efficient competitors would be excluded, this would be detrimental for the consumer.¹⁸

¹⁶ On aggressive competition by leaders and on the conditions under which this can be abusive see Chapter 1 by Etro and Kokkoris in this Volume.

¹⁷ See also Chapter 6 by Art and Ibáñez Colomo in this Volume for an evaluation of the Guidance Paper.

¹⁸ Whether an "*as efficient competitor*" could compete (i.e. win customers away from the dominant company) without incurring a loss is determined by reference to cost benchmarks, namely Average Avoidable Cost (AAC) and Long-Run Average Incremental Cost (LRAIC). Where the dominant company's prices are above AAC, this indicates a sacrifice of profits in the short term. Pricing below LRAIC indicates that not all costs which can be attributed to selling the products in question; in that case, there is a risk that an as efficient competitor might be foreclosed (see Guidance Paper, para 26).

However, it is to be regretted that after having set out these principles, the Guidance Paper does not apply them consistently. For instance, the Commission, in the Guidance Paper, insists on also investigating instances of alleged predatory pricing where there is no indication of pricing below cost but where there are indications that the dominant company might be merely "*foregoing profits*".¹⁹ However, under a consistent application of the "*as efficient competitor*" test, it would be difficult to see how above cost pricing can be considered illegal, as any "*efficient competitor*" should be able to win customers away from the dominant company without making a loss.

This is exacerbated by the amount of discretion left to the Commission in many instances, such as where it indicates that "*in certain circumstances, a less efficient competitor may also exert a constraint*"²⁰ or that high market shares held for a long time may "*in certain circumstances*" constitute an indication "*of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article [102]*".²¹

While it may be understandable that the Commission as the enforcement body does not want to limit itself too strictly, such an approach is both unjustifiable and clearly fails to achieve the two main aims the Commission has given itself, namely to "*provide greater clarity and predictability*"²² and to "*focus on those types of conduct that are most harmful to consumers*"²³. It is precisely because it introduces so many exceptions and presumptions that the Guidance Paper has then to reintroduce efficiencies not as an element of the definition of the abuse but this time as a "*defence*" only.

4. THE EFFICIENCY DEFENCE – PRACTICAL AND THEORETICAL PROBLEMS

As indicated, conduct adopted by a dominant company which may be regarded as abusive in one set of circumstances can simultaneously give rise to efficiencies and thus be beneficial for consumers in other circumstances. The enforcement of Article 102 EC therefore has to

¹⁹ Guidance Paper, para 65.

²⁰ Guidance Paper, para 24.

²¹ Guidance Paper, para 15.

²² Guidance Paper, para 2.

²³ Guidance Paper, para 5.

find a way in which potential efficiencies which result from dominant firm behaviour are taken into account and properly analysed in order to prevent efficient and procompetitive behaviour causing no consumer harm from being prohibited. In the Guidance Paper, the Commission proposes to do so by way of an "*efficiency defence*" which allows companies to put forward arguments to justify their conduct by reference to such efficiencies. *Mutatis mutandis*, the efficiency defence is modelled on Article 101(3) and requires a company to show that:

- efficiencies "*result from*" the conduct in question;
- the conduct is "*indispensable*" to the achievement of the efficiencies;
- the efficiencies benefit consumers – i.e. that they "*outweigh*" any negative effects on competition; and
- competition is "*not eliminated*" as a result of the conduct.²⁴

There are a number of fundamental problems however with the introduction of such a defence. Beyond the fact that there is no Article 102(3) in the EC Treaty and that the Commission is thus effectively rewriting the text of the Article by way of a simple communication, the main concerns are that:

- the Commission does so in a way which conflicts obviously with the intention of this Article. As set out above, the notion of abuse is in itself defined by reference to competition "*based on a trader's performance*". In other words, "*competition on the merits*" is legal and does not have to be justified in any way. Article 82 therefore does not lend itself to a "*presumption of culpability*" as regards efficient behaviour by dominant companies who then have bear the burden of proving that their conduct is nevertheless legitimate and procompetitive; and moreover

²⁴ See para 28 et seq. of the Guidance Paper.

- the individual criteria of the efficiency defence as set out in the Guidance Paper are manifestly entirely ill suited to deal with unilateral conducts by dominant companies.

Whilst it is difficult to dispute that efficiencies "*must result from the conduct in question*", the basic problem concerns however the other three conditions:

4.1 The requirement that the conduct in question be "indispensable" for the achievement of the efficiencies

The requirement that the conduct be "*indispensable*" to the achievement of the efficiencies to be considered –whilst it makes perfect sense in Article 101(3)– is arguably much more difficult to accept for Article 82, for a number of reasons:

- First, it is very questionable whether it is desirable to require dominant companies to do "no more than what is indispensable" to support their market position. As set out above, it is important that all companies, including dominant companies, compete as vigorously as possible. Otherwise less efficient companies might shelter under the umbrella opened above them by competition law enforcement.
- Secondly, in the context of Article 101, the restriction is constrained in an agreement between undertakings which itself –whilst it may present many efficiencies– is not in itself inherently "meritorious". In the case of unilateral conduct however (for instance a lower price, a rebate, etc.), such behaviour generally reflects the merits of a company *acting on its own*. Agreements and mergers are moreover not agreed on a daily basis while rules on unilateral conduct affect hundreds of decisions per day for a company.
- Thirdly, still in the context of Article 101, agreements are reached between the parties in full transparency and with full information as to what restrictions are indeed needed to achieve the efficiencies in question (for instance the question of whether territorial protection is indeed the only way to encourage investment by the distributors in a distribution system, or whether a non-compete clause is necessary,

etc.). This is however not the case for dominant companies assessing the impact of their conduct on competition in the market: they do not have detailed knowledge about the prices, costs, or general strategy of their competitors. And indeed, they are not even supposed to have this information, as having it generally would result from an infringement of EC Article 101.

- Finally, the question of whether competition exercised by a dominant company was "*too intense*" cannot be answered by reference to the criteria developed in relation to the question of whether competition was "*on the merits*" or not. This lack of criteria opens the door to arbitrariness on the part of the enforcement authorities and the courts.

4.2 The requirement that the conduct must not "eliminate effective competition"

Also the condition according to which competition must not be eliminated again considerably extends the conduct caught by Article 102. As set out above, Article 82 does not prohibit dominant companies from existing –whatever their size– nor from competing vigorously and thereby excluding competitors as long as this competition is "*on the merits*" (charging lower prices, having better quality products, etc.). The *Hoffmann La Roche* test²⁵ does not prohibit dominant companies from influencing the structure of a market as such, provided the dominant company can be shown to have had recourse to methods "*other than those which govern normal competition...based on trader's performance*". Under the non-elimination of competition test efficiencies will become effectively an "offence" for the biggest companies as any behaviour affecting the structure of competition will be regarded as abusive. What will be prohibited is the dominant position and not the abuse. Again, this ignores the basic differences between Article 101 and Article 102.

Where dominant companies are forced to take care that their smaller competitors are not eliminated from the market by their innovations or price cuts, this will only result in less efficient companies being protected from the rigorous competition they would otherwise be subject to. The arguments that less efficient competitors might grow into efficient companies in the future, or that they might exercise some competitive restraint on the dominant company

²⁵ *Hoffmann La Roche, supra* fn 13.

are purely speculative and may never materialise even in the long term over very real and short term advantages for consumers (in the form of lower prices or better products). Again, this is not different from a cartel in which the small player may also be protected but this gives him no guarantee of growth.

In effect, where dominant companies fear that they might be accused and sanctioned for abusing their dominant position where their competitors leave the market because they were unable to compete with the products or prices of the dominant company, they are likely to reduce their competitive efforts in the market place, which will have an overall chilling effect on competition.

The test therefore amounts to punishing dominant companies for being efficient, i.e. introducing an "*efficiency offence*" rather than an "*efficiency defence*". A so-called "*superdominant company*" will not be able to defend itself by reference to the efficiencies created by its behaviour if this behaviour also had the effect of eliminating less efficient competitors from the market. Where a company can be regarded as having a position "*approaching that of a monopoly*", its ability to compete legally will therefore be severely limited although it is arguably particularly important in such markets not to introduce policies which further restrict the possibilities of effective competition.

Again, introducing such a test of "*non-elimination of competition*" in Article 82 ignores the basic difference between Article 81 and 82. The crucial difference between the situations regulated by Article 101 (or merger law) on the one hand and Article 82 on the other hand is that the former concern a form of competition, namely agreements (or concentrations), which by their nature –*whilst mostly efficient*– are not inherently founded "*on the merits*". There is maybe an efficiency in the agreement (or in a merger) but there is no intrinsic "*merit*" in it. The introduction of a criterion that competition may not be eliminated as a result of an agreement or a merger can therefore more easily be defended than in analysing the everyday conduct of dominant companies.

4.3 The requirement that the benefits achieved must "outweigh negative effects" on competition

Rather than examining –as in Article 101(3) EC– whether consumers receive a fair share of the benefit of the restriction of competition, i.e. whether the benefit is "*passed on*" to consumers. The Guidance Paper favours a "*balancing exercise*", i.e. weighing whether positive effects "*outweigh*" negative effects. Requiring that an efficiency benefits the consumers is probably fair (even through the burden of proving that it does not should arguably be vested on the authority). It forms an integral part of the analysis of whether competition is taking place "*on the merits*". Thus, to come back to some of the examples given above,²⁶ low prices are competition "*on the merits*" where they are passed on to the consumers, i.e. unless there is a predatory strategy behind them which allows recoupment of the losses in the long term to the detriment of consumers; exclusivities result in lower prices or increase interbrand competition which benefit consumers, unless they are used to foreclose the market in a way which is detrimental to the final consumer, etc.

However, the way in which the Commission proposes to analyse whether benefits are passed on to the consumers, namely by enquiring whether consumers are better off "*on balance*" and requiring the dominant company to show that the benefits which result from likely efficiencies outweigh the negative effects which its conduct may have on consumer welfare²⁷ raises three distinct problems:

- First, it is very difficult indeed for a dominant company to determine whether the benefits it achieves through its actions outweigh the negative effects on competition. This is partly due to the lack of information on the part of the dominant company as regards the conditions of the market which are much easier to assess for the Commission which has wide-ranging investigative powers.
- Secondly, the balancing exercise is set out in the Guidance Paper in the shortest terms (merely one sentence). As the balancing exercise has not been a requisite for a successful Article 102 action (or defence) in the past, there is very little guidance from the case law to guide dominant companies in their assessment. The unfettered

²⁶ See "*back to basics*", *supra* in Section 4.

²⁷ Guidance Paper, para 30.

power given to the authority through this test must give rise to concerns about its arbitrary exercise.

- Thirdly and finally, as has been demonstrated by the examples given above, the imposition of such a "*balancing exercise*" is neither useful nor necessary in order to determine whether consumers benefit from the efficiencies achieved by the conduct of the dominant company. In fact, either a given behaviour represents competition on the merits and there is therefore no reason to prohibit it or competition is not "*on the merits*" but forecloses the market (such as where a monopoly in an upstream market is used to foreclose a downstream market) in which case there is no place for balancing any positive and negative effects as the conclusion that such behaviour is anticompetitive is clear.

Burden of Proof

The Guidance Paper foresees that it is for the dominant company to furnish proof that its behaviour fulfils the criteria set out above. Again, this logic, which may be appropriate when enforcing Article 101, e.g. where there is an agreement involving a serious restriction of competition, or for mergers which lead to a dominant position, fails to respect the particularities of Article 82 and imposes an unjustified burden on dominant companies which is likely to have a negative effect on their willingness to compete.

Even if some of the case law handed down in the past has indeed tended to reverse the burden of proof from the authority to the dominant company²⁸ - it must be strongly questioned whether this reversal of the burden of proof is at all justified.

²⁸ See, for example, Tetra Pak II: "*It must be ascertained if, as claimed by the applicant...*", para 136, or "*in the absence of any argument by the applicant*", para 207 (and not: in the absence of any proof by the applicant); however, Microsoft: "*The Court notes, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.*", para 688.

Rules of law should not rely on "*presumptions of guilt*". Companies should be presumed innocent unless the opposite can be established. It is not for them to "*justify*" each and every of their acts.

Neither the text nor the logic of Article 102 does foresee the need for justification by the dominant company once the authority has fulfilled the initial burden of showing a *prima facie* case. As indicated, Article 102 does not follow the two-step analysis undertaken by Article 101 but rather asks one question, namely whether the conduct constitutes an abuse of a dominant position – which as defined in *Hoffmann La Roche* is competition which not "*on the merits*" - or not. The spirit of Article 102 thus requires a careful analysis of the effects of any behaviour and does not rely on presumptions of illegality as is the case under Article 101. This can also be demonstrated by reference to Article 2 of Regulation 1/2003 which provides that "*the burden of proving an infringement of Article [101](1) or of Article [102] of the Treaty shall rest on the party of the authority alleging the infringement*" and that "*the undertaking ... claiming the benefit of Article [101](3) if the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled*".

Further, imposing the burden of proving that on balance, consumers are better off would violate the principle of effectiveness – as has been expressed in *San Giorgio*, a "*requirement of which has the effect of making it virtually impossible or excessively difficult*" to prove entitlement (to a payment, a defence etc.) "*would be incompatible with community law*".²⁹

This is supported in practice by the fact that dominant companies are usually not privy to all the information needed to properly assess whether an abuse has taken place or whether consumers are actually better off as a result of the behaviour of the dominant company. In fact, such an assessment will always have to rely on a certain amount of cooperation between the accused company, which is best placed to determine whether, for example, their prices comply with the cost benchmarks set by Community law, and the authority, which has the relevant investigative powers to come to a clear understanding of the market conditions outside of the relevant dominant company. Companies eager to see their name cleared of allegations of abuse of dominance will cooperate with the Commission in that manner (and where they do not it has the means to obtain the information from them in any event). As a result, this reversal of the burden of proof is not only unjustified but also unnecessary.

²⁹ Case 199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, [1983] ECR 3595, para 14.

5. CONCLUSION

In conclusion, whilst the Guidance Paper must be welcome, and in particular the fact that it sets out to achieve the laudable aim of providing greater clarity and predictability and focussing on the types of conduct which have the most negative effects on consumers, it seems to us that by introducing an "*efficiency defence*" modelled on Article 101(3) has the opposite effect, namely introducing a rule of presumptive illegality which the relevant company then has to rebut under very strict conditions (in a way which effectively mostly amounts to a "*probatio diabolica*"). Such a policy carries the risk of a considerable chilling effect on competition.