THE EUROPEAN COMMISSION’S DOMINANCE GUIDANCE: TOWARDS A REVIEW OR ABANDONMENT?

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A Law & Economics Workshop on the European Commission’s Article 102 Guidance Paper was organized by Concurrences Review in partnership with Shearman & Sterling and Oxera. A panel of speakers including Nicolas Petit (Professor, University of Liège), Trevor Soames (Partner, Shearman & Sterling), Pascale Déchamps (Partner, Oxera) and Miguel de la Mano (Executive Vice President, Compass Lexecon) shared their views on the relevance of the European Commission’s Article 102 Guidance Paper. The views expressed by the speakers are their own and do not necessarily represent the views of their organizations or clients.

THE ARTICLE 102 GUIDANCE PAPER: STILL ALIVE?

When the then-Commissioner Neelie Kroes announced a detailed review of the enforcement of Article 102 TFEU, one expected that the exercise would result in the issuance of Guidelines on the application of Article 102 TFEU to exclusionary abuses. However, the much-awaited “Guidelines” ultimately turned into a document called “Guidance Paper” and setting out the Commission’s enforcement priorities. It is understood that this change of approach emanated from pressure exercised, in particular by the Commission’s Legal Service and a number of national competition authorities. Today, the Commission rarely, if ever, relies upon the Guidance Paper.

Does this mean that the Guidance Paper shall be considered as irrelevant in EU competition law?

According to Trevor Soames, that cannot be. Trevor navigated the website of DG Comp and pointed to the section “Legislation in force” which lists “instruments which are currently in force”. This list includes the Guidance Paper.

The Guidance Paper has also been referred to in recent cases. In Post Danmark II, the Court of Justice held in respect of the enforcement of EU competition law by the Danish competition authority that the Guidance Paper was “not binding on national competition authorities and courts”. More recently, at the oral hearing in Intel, AG Wahl – though noting that the Guidance Paper was irrelevant in temporal terms to the facts at issue – questioned the Commission about it, implying that the Guidance Paper could be relevant in EU competition law.

Companies have relied on the Guidance Paper. According to Trevor, the Commission itself actually invited them to do so. The press release accompanying the issuance of the Guidance Paper provided, e.g.: “[The Guidance Paper] provides for the first time comprehensive guidance to stakeholders, in particular to the business community and competition law enforcers at national level, as to how the Commission uses an effect-based approach to establish its enforcement priorities under Article 102”.

Companies have self-assessed their behaviours under the Guidance Paper and have sought to comply with it. Companies had the right, and even the obligation to do so.

When questioned by AG Wahl about the relevance of the Guidance Paper in the Commission’s enforcement practice, the
Miguel de la Mano’s intervention was peppered with humour. Drawing subtle comparisons, Miguel said that, just like a dress code, the purpose of the Commission’s Guidance Paper is to give clear and concrete indications on how to “look good if you are dominant”. Article 102 TFEU is a pretty short provision which encompasses a number of undefined concepts. Given that the Commission, national competition authorities and national courts are required to apply this provision, the issuance of the Guidance Paper was welcome for providing clarity and ex ante predictability. The wording of the Guidance Paper makes it clear: “it is intended to provide greater clarity and predictability as regards 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 certain behaviour is likely to result in intervention by the Commission under [Article 102].” Yet, the Guidance Paper has led to a number of controversies: form based vs effects analysis, dominance vs significant market power, anticompetitive foreclosure vs protecting competitors, efficiencies, consumer welfare standard, etc. According to Miguel, the debate is not whether to retain or withdraw the Guidance Paper but rather how to improve it to address the controversies that have arisen. Miguel is of the view that it is the duty of the Commission to elaborate upon its practice and develop principles of enforcement that companies could rely upon. The world is uncertain, facts change from one case to the other. The Guidance Paper acknowledges that an approach based on sound principles of economics is required to “take into account the specific facts and circumstances of each case”. The Commission cannot simply ignore it. The Commission cannot prosecute without providing an explanation of what conduct is illegal, and why it is illegal. A statement that tying two products (say hardware and software) restricts competition by its very nature provides neither guidance nor an explanation of why a tie is illegal if customers demand it and improves welfare. Indeed tying is pervasive and common. It is also per se legal for non-dominant firms. It cannot be right that tying is illegal for a dominant firm on the formalistic grounds that it has a special responsibility not to tie. 1

Trevor found the Commission’s “filtering” approach to the Guidance Paper to be inappropriate and noted that Advocate-General Wahl seemed to find the Commission’s position difficult to understand. He urged the Commission either to retain the Guidance Paper but then comply with it or to withdraw it and stop creating confusion for companies.

IT CANNOT BE RIGHT THAT TYING IS ILLEGAL FOR A DOMINANT FIRM ON THE FORMALISTIC GROUNDS THAT IT HAS A SPECIAL RESPONSIBILITY NOT TO TIE.”

MIGUEL DE LA MANO

1. AG Wahl said, emphasis added: “My question is this, assuming that it actually has a role to play and the Commission in its enforcement paper says that yes, positive indications are of importance, does that mean that you have different approaches when it comes to priorities for enforcement and then, later on, your position in Court? While one takes into account the positive results of the AEC test, but the other, no? If it went the other way, I would not have any problems with it. If you would say that we would concentrate our assessment of efficiencies (AEC) when we see that something is going on and have a different approach when you come to the Court that I can see. Is it just me, am I misunderstanding your position in this case, or what? I know you do not want to discuss the Priorities Paper but this is a more general question. Do you have a different approach, or not?”

CONFORMING TO A “DRESS CODE”
CAN WE LIVE WITHOUT THE EC’S GUIDANCE PAPER?

Pascale Déchamps dived into the substance of the EC’s Guidance Paper and outlined the role of economics in rebate cases. Pascale looked at the three categories of rebates defined by the EU Court of Justice in Post Danmark II (i.e. non-retroactive) quantity rebates, exclusivity rebates and loyalty-inducing rebates (incl. retroactive rebates) and stressed the difficulty, from both an economic and a legal perspective, in classifying rebates into one of these categories. She explained for instance in relation to the second category that exclusivity often comes in degree. If provided to very few customers, exclusivity rebates are not harmful and can even be pro-competitive as companies compete for entire customer needs instead of marginal sales.

Pascale pointed to the General Court’s statement in Intel that “exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition” and observed that it has resulted in many companies now showing concerns about the form of their rebates, rather than looking at their actual impact on the relevant market. Yet, the Commission’s Guidance Paper advocates for an approach grounded in the analysis of the effects of the impugned practices. Pascale warned that treating differently different forms of rebates even if they end up having the same effect would be highly problematic.

Pascale closed her contribution by wondering about a life without the Guidance Paper and more particularly without the AEC test. She said that any assessment of rebates shall be grounded in sound economic principles even in the absence of an AEC test. The assessment of whether a conduct is likely to lead to anti-competitive effects (short of running a full AEC test) should be centred on key factual questions: What is the degree of dominance? What is the degree of foreclosure? Is the exclusionary strategy likely to succeed? These are exactly the questions the Court of Justice addressed in Post Danmark II.

THE BINDING NATURE OF THE COMMISSION’S GUIDANCE PAPER AND ITS AEC TEST

The Guidance Paper has its advocates and its detractors. Critics deny any binding effect to the Commission’s Guidance Paper and its AEC test for two reasons. They first argue that the Guidance Paper is in fact a priority paper, which sets out a test to determine the Commission’s priorities, not to assess whether a given conduct constitutes an infringement of Article 102. They also contend that even if the Commission has published guidance setting out its priorities, the Commission is not prevented from departing from it and pursue all kinds of infringements.

Nicolas Petit dismissed these arguments.

In addressing the first argument, Nicolas argued that “content prevails over form”. The form of, or the denomination given to, a document is not decisive from a legal perspective: it cannot alter its nature. To address the argument that the Guidance Paper would not contain rules of law but rather criteria for determining which case constitutes a priority for the Commission, Nicolas cited the Court of Justice in Dansk Rørindustri: although certain measures “may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons”. So the question arises: does the Guidance Paper contain “rules of practice”? According to Nicolas, the AEC test appears indeed to amount to a rule of practice (see, e.g., opinion of AG Kokott in Post Danmark II qualifying the AEC test as an “administrative practice”). He believes that in any event, there is no convincing reason for rejecting the Guidance Paper or the AEC test as not constituting rules of practice.

Turning to the second argument, Nicolas noted that when it comes to prioritizing, the Commission cannot leave situations that may infringe Article 101 and 102 TFEU automatically outside of its vigilance. On close analysis, however, this proposition seems unsupported as a matter of law. And it does not seem that this is what the Guidance Paper does as a matter of fact.

To start with, in case Spain v Commission - a State aid case - the General Court held that “in the exercise of its discretion to assess the possible economic effects of aid”, the Commission could decide in a soft law instrument that some types of State aid did not deserve to be controlled under the Treaty rules. It noted that the Commission is “however, bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules of the Treaty". It concluded that the “The Commission may not therefore refuse to apply the de minimis rule”. Against this backdrop, the interesting feature of the case is that the self-binding effects identified by the Court here concern a notice whose whole purpose seems to be about prioritisation. The recitals of the Notice, explain that the idea behind it is to help the Commission “concentrate its resources on cases of real importance to the Community”.

Besides, as a matter of fact, the Guidance Paper does not create an automatic type II problem, regardless of the merits of the case. It has been frequently reminded that some flexibility clauses are hardwired into the document, notably at §24.

Nicolas concluded that while the Commission appears to be under a duty to apply its Guidance Paper and the AEC test in deciding whether or not to pursue a case, it may under certain circumstances depart from it.

TREATING DIFFERENTLY DIFFERENT FORMS OF REBATES EVEN IF THEY END UP HAVING THE SAME EFFECT WOULD BE HIGHLY PROBLEMATIC."

Pascale Déchamps

"WHILE THE COMMISSION APPEARS TO BE UNDER A DUTY TO APPLY ITS GUIDANCE PAPER AND THE AEC TEST IN DECIDING WHETHER OR NOT TO PURSUE A CASE, IT MAY UNDER CERTAIN CIRCUMSTANCES DEPART FROM IT."

Nicolas Petit

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