



European Commission

Competition

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Exclusionary Abuses A European Perspective

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- * The views expressed are my own and do not necessarily reflect those of DG COMP, the European Commission, or any other EU official.

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Presentation Outline

- The Guidance Paper on Exclusionary Abuses:
General Principles
- A Recent Application: Intel
- Conclusion



Guidance Paper on Exclusionary Abuses

- General approach: Safeguarding the competitive process and not the protection of competitors
=> What is the effect of the conduct on consumers?
- The guidance paper sets out the enforcement priorities for the application of Article 82 to exclusionary conduct by dominant undertakings
- The Guidance Paper is not intended to constitute a statement of the law



The Concept of Dominance

- High market share are only a first indication
- A dominant firm enjoys substantial market power over a period of time
- The extent to which a firm can behave independently relates to the degree of competitive constraints exerted on the firm (in particular, competitive constraints imposed by actual competitors, by the threat of expansion and entry of potential competitors, and by the bargaining strength of customers)
- Low market share (below 40 %) are a good proxy for the absence of substantial market power



Anticompetitive Foreclosure

- Anticompetitive foreclosure = foreclosure leading to consumer harm
- A dominant firm may justify a conduct leading to foreclosure on the ground that efficiencies are sufficient to guarantee that consumers are not harmed (the conduct must be indispensable, i.e. there must be no less anti-competitive alternatives conducts creating the same efficiencies)
- Qualified use of the “as efficient competitor test”:
“If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anticompetitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.”
- Take a dynamic view of the constraint imposed by competitors (e.g. network effects)



Abuses Covered in the Guidance Paper

- Exclusive dealing (including conditional rebates)
- Tying/Bundling
- Predation
- Refusal to supply and margin squeeze



A Recent Application: Intel

Conditional rebates and payments

- The Commission found that Intel had given rebates to computer manufacturers on condition that they bought all, or almost all, their x86 CPUs from Intel.
- The Commission also found that Intel had made direct payments to a major retailer on condition that it stock only computers with Intel x86 CPUs.

Payments to prevent sales of specific rival products

- The Commission found that Intel had made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs and to limit the sales channels available to these products.

➤ **Commission imposes fine of €1.06 billion on Intel for abuse of dominant position and orders Intel to cease illegal practices**



Commission's Guidance On The Assessment of Conditional Rebates?

- Can the rebate foreclose an as efficient competitor?
 - Determine the contestable share of demand (defined as the amount for which the customer may prefer and be able to find substitutes)
 - Determine the effective price over the contestable share: the normal (list) price less the rebate the customer loses by switching
 - If the effective price over the contestable share is below AAC, the rebate is capable of foreclosing (If the effective price is in between AAC and LRAIC, additional evidence is required to conclude that as efficient competitors -in a dynamic sense- would be prevented from expanding or entering)



- Importance of sensitivity analysis!
 - *“The Commission will take into account the margin of error that may be caused by the uncertainties inherent in this kind of analysis.”* (guidance paper, par. 41)
 - In particular, assessing the contestable share precisely is generally more difficult than assessing marginal cost.
- The analysis must be integrated in the general framework of the guidance paper to determine the effect of the conduct on consumer (including possible efficiencies), taking into account other relevant quantitative or qualitative evidence.



Commission's Assessment Of The Conditional Rebates Offered By Intel

- **Limited share of the market that could be supplied by AMD**

"In its decision, the Commission does not object to rebates in themselves but to the conditions Intel attached to those rebates. Because computer manufacturers are dependent on Intel for a majority of their x86 CPU supplies, only a limited part of a computer manufacturer's x86 CPU requirements is open to competition at any given time." Commission Press release May 13, 2009

- **Significant rebates would be lost by customers on the non-contestable share of the market if they bought AMD CPUs**

"Intel structured its pricing policy to ensure that a computer manufacturer which opted to buy AMD CPUs for that part of its needs that was open to competition would consequently lose the rebate (or a large part of it) that Intel provided for the much greater part of its needs for which the computer manufacturer had no choice but to buy from Intel." Commission Press release May 13, 2009

- **As efficient competitor test**

"Moreover, in order to be able to compete with the Intel rebates, for the part of the computer manufacturers' supplies that was up for grabs, a competitor that was just as efficient as Intel would have had to offer a price for its CPUs lower than its costs of producing those CPUs, even if the average price of its CPUs was lower than that of Intel." Commission Press release May 13, 2009



Focus on Harm to Customers

- *"Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for computer chips for many years. Such a serious and sustained violation of the EU's antitrust rules cannot be tolerated".* (Competition Commissioner Neelie Kroes, Commission Press release May 13, 2009)
- *"Intel takes strong exception to this decision. [...] There has been absolutely zero harm to consumers. Intel will appeal."* (Intel Press Release May 13, 2009)



Conclusion

- Unavoidable tension between traditional case law and effects-based analysis in the guidance paper
- Increased willingness of the Court to consider an effects-based analysis (e.g. *British Airways*, *Microsoft*)
- Commission's commitment to an effects-based analysis likely to reinforce this willingness