

23 November 2005

THE SECRETARY GENERAL

Ms Neelie Kroes
Member of the European Commission
DG Competition
200, Rue de la Loi
B-1049 Brussels

Dear Commissioner,

UNICE is very pleased that you intend to review and improve enforcement of the rules on abuse of market power as laid down in Article 82 of the Treaty. This provision is an important tool of competition policy which should be applied in ways which support economic growth and UNICE is looking forward to providing you with detailed comments and suggestions once the Commission decides on concrete review proposals.

UNICE is resolutely in favour of developing and sustaining a competitive commercial environment in the EU and it is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice. Over the years, UNICE has always supported a more economic approach for assessing anti-competitive effects of business behaviour as opposed to a strict legalistic interpretation and a form-based approach that would unnecessarily impose constraints on undertakings. UNICE has therefore welcomed recent Commission efforts to develop a more economic approach in its assessment of various cooperation agreements and to refocus the scope of Article 81 para 1 and 3.

The rules on abuse of market power now similarly need to be reviewed. The review should aim at applying sound economic analysis and an investigatory approach that takes efficiencies into account in a single step analysis.. Enforcement should focus on cases where the conduct of dominant firms would have significant adverse effects on competition and ultimately consumers.

Companies should be able to enhance their competitive position through behaviour which on balance has more positive than negative effects on competition. The current legal situation is perceived as unsatisfactory leading to companies avoiding potentially pro-competitive behaviour because this might be covered by the broad interpretation of Article 82, thereby restricting their ability to compete on the merits and hampering their competitiveness.

The assessment of dominance is a critical element in the analysis of the need for any enforcement action under Article 82. It should be fully assessed on a case by case basis with proper regard to the dynamics of the relevant product and geographic markets. It should not be determined primarily on market share. There should thus be no presumption that a certain market share amounts necessarily to dominance.

It should be clear that the assessment of dominance depends on key issues such as the market position of the company, the market position of competitors, barriers to expansion and entry, innovation, and the market position of buyers.

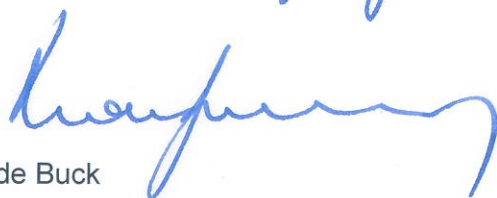
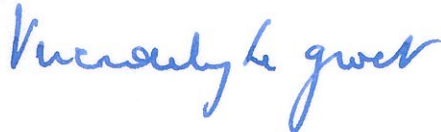
In assessing abuse, the focus should be on harm to competition that will also harm consumers. A finding of an actual or likely adverse effect on competition should be a necessary condition for any intervention under Article 82. The concept of *per se* abuses should thus be rejected as it leads to a rigid formalistic approach under which certain behaviour can be found to be abusive even when it has no material effect on competition and consumer welfare. Abuse should be assessed on a case by case basis taking into account substantial effects on competition and consumers. The assessment of competitive harm should be plausible and have a real factual basis.

Such a market based approach would do full justice to the fact that Article 82 cases involve a complex and dynamic mix of economic and legal factors. Less legalistic requirements would allow companies more flexibility to improve their competitive position in the market and reinforced emphasis on the economic analysis of market structures and behaviour would contribute to increased productivity and economic growth.

In addition, we would like to point out that in the knowledge-based economy, abuses and remedies will increasingly have to take account of intellectual property rights. It is important for the future growth of business in the EU that these rights are fully recognised by the Commission.

UNICE is looking forward to partaking in discussions about the reform of Article 82 and would strongly support refocusing enforcement of this provision along the lines set out above. In doing so, we hope to help ensuring that a pro-active approach to enforcing Community competition rules will contribute to achieving more growth and jobs in the EU.

Yours sincerely,



Philippe de Buck