UNICE
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COMMENTS

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DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 EC TO EXCLUSIONARY ABUSES

1. INTRODUCTION

The Commission is reviewing its policy towards the application of Article 82 to exclusionary abuses, and also exploitative and discriminatory abuses. In this context, it has published a Staff Discussion Paper in which a framework for the enforcement of Article 82 to exclusionary abuses is suggested. In addition, the Paper sets out a possible methodology for the assessment of predatory pricing, single branding and rebates, tying and bundling, and refusal to supply.

UNICE supports a review of the rules on abuse of market power as laid down in Article 82. This provision is an important tool of competition policy which should be applied in ways which support economic growth. UNICE is therefore pleased with the publication of the Discussion Paper as a first step in the review process. It is important that the Commission's policy is transparent and clear so that companies, national judges and competition authorities know how to establish whether certain behaviour is illegal or not. UNICE thus appreciates the Commission's willingness to give guidance on Article 82.

In UNICE's view, enforcement of Article 82 should aim at applying sound economic analysis and an investigatory approach that takes efficiencies into account in a single-step analysis. It 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 companies to avoiding potentially pro-competitive behaviour because this might be covered by an overly broad interpretation of Article 82, thereby restricting their ability to compete on merit and hampering their competitiveness.

In assessing abuse, the focus should be on harm to competition that will also harm consumers. A finding of an 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 genuinely factual basis.

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In the light of the above, UNICE welcomes the Discussion Paper clearly stating that the essential objective of Article 82 is the protection of competition, and not competitors as such. In addition, UNICE welcomes the Paper's openness to taking efficiencies into account and proposing an approach focusing on economic effects. UNICE would be very pleased if this approach would lead to a more refined economic analysis and better argumentation in future alleged abuse cases.

However, UNICE regrets to say that in spite of the objective of a more economic approach, parts of the Discussion Paper show a genuine distrust of dominant companies' behaviour and a general bias against dominance as such. UNICE would like to stress that there is no evidence that dominance necessarily leads to abusive practices. On the contrary, even companies with a strong market position have to compete on merit, increase efficiencies, and innovate in order to sustain their position.

Having said this, UNICE welcomes taking part in discussions on how best to shape future policy in this area and its views and recommendations are set out below. Considering that the Discussion Paper proposes a framework for the enforcement of Article 82 to exclusionary abuses only, UNICE's views are preliminary. It will give its final views when further proposals regarding the enforcement of Article 82 are decided.

2. STAFF DISCUSSION PAPER

Dominance

The assessment of dominance is a critical element in the analysis of the need for any enforcement action under Article 82. In UNICE's view 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, as presently suggested by para 31 of the Discussion Paper. The assessment of dominance should depend on key issues such as the market position of the company, the market position of its competitors, barriers to expansion and entry, innovation, the existence of bidding markets, pricing behaviour of the company, and the market position of buyers.

UNICE is therefore pleased that the Discussion Paper states that for dominance to exist an undertaking must not be subject to effective competitive constraints and that it is relevant in this context to consider not only the market position of the allegedly dominant undertaking but also the market position of competitors, barriers to expansion and entry, and the market position of buyers.

UNICE regrets though that the Discussion Paper does not consider more extensively the particularities of situations where markets are rapidly evolving and where dynamic industries are competing on innovation. In such situations dominance is often temporary. UNICE suggests that it is set out more clearly that

in such cases the Commission adopts a dynamic analysis and long-term view of the markets.

The Discussion Paper lists several factors that may indicate a lack of competitive constraints; in addition it clearly sets out that there is in general no situation of dominance if an undertaking is compelled to lower its prices due to pressure of price reductions by its competitors. Given the importance for companies to know what demonstrates the existence of competitive constraints, UNICE would welcome more examples of what proves the existence of such constraints.

In spite of the Discussion Paper acknowledging that market shares provide useful first indications of dominance and that the strength of any indication based on market share depends on the facts of each individual case, it also appears that a certain market share may be presumed to amount to dominance. UNICE considers that this is inconsistent with the economic approach which is adopted elsewhere and suggests that it is more clearly set out that it is a comprehensive economic analysis which determines dominance, regardless of the size of a firm's market share.

In addition, UNICE would find it helpful if the Commission were to give clear guidance when dominance is unlikely to exist below a particular market share threshold. UNICE believes that, in general, it is unlikely that firms with a market share of below 50% are able to act to an appreciable extent independently from competitors, customers and ultimately consumers.

Framework for analysis of exclusionary abuse

The Discussion Paper clearly sets out that the essential objective of Article 82 is the protection of competition, and not competitors as such. The purpose of Article 82 is not to protect competitors from dominant firms' genuine competition based on factors such as higher quality, novel products, opportune innovation, or otherwise better performance. In addition, the Discussion Paper suggests that the extent to which a dominant firm's behaviour leads to efficiencies should be a central part of any analysis under Article 82. UNICE firmly agrees with this. As set out above, enforcement of Article 82 should aim at applying sound economic analysis and an investigatory approach that takes efficiencies into account in a single-step analysis. It should focus on cases where the conduct of dominant firms would have significant adverse effects on competition and consumers. Companies should be able to enhance their competitive position through behaviour which on balance has more positive than negative effects on competition and consumers.

Whilst warmly welcoming these fundamental principles of the Discussion Paper, UNICE is worried though that important elements of the suggested framework which implement these principles would make it doubtful whether companies can rely on them being applied properly in practice.

For example, the Discussion Paper suggests that under certain circumstances some behaviour will be illegal even if the benefits of the conduct outweigh the negative effects. Also, the Discussion Paper suggests that the burden of proving

efficiencies should always and only be on the dominant firm, whilst at the same time imposing a very high standard of proof. Another example relates to the Discussion Paper's suggestion that not only short-term harm to consumers arising from foreclosure, but also medium- and long-term harm, should be taken into account. Predicting medium- and long-term harm often involves very unclear chains of cause and effect between the conduct, the foreclosure and, ultimately, the consumer harm, and this undermines the principle that in ex-post assessments a key element is the causal connection between the alleged abusive behaviour and the negative effects on consumers.

Especially the suggestion that the burden of proving efficiencies should be placed always and only on the dominant company whilst at the same time imposing very strict conditions, the fulfilment of which may be extremely difficult to demonstrate for the company concerned, would not significantly change a situation where dominant companies avoid potentially pro-competitive behaviour, to the detriment of their ability to compete on merit and their overall competitiveness.

The Discussion Paper suggests that for the efficiency defence to be invoked successfully, the dominant company must demonstrate that efficiencies are realised or likely to be realised as a result of the allegedly abusive conduct; that this conduct is indispensable to realise the efficiencies; that the efficiencies benefit consumers; and that competition in respect of a substantial part of the products concerned is not eliminated.

Particularly the requirement to prove that the conduct is indispensable may make it extremely hard for a dominant company to rely on the efficiency defence unless the Commission adopts a more flexible approach with respect to both the burden and standard of proof. Often it may be impossible for dominant companies to demonstrate that there are no other economically practicable and less anti-competitive alternatives to certain innovative behaviour which would bring clear benefits. The prospect of this requirement being applied rigidly by a national court or competition authority could easily deter companies from engaging in innovative efficiency-enhancing behaviour because there may be doubt as to whether an alternative way of doing things would have had less negative effects on competitors.

Similarly, fulfilling the last condition, which requires that competition in respect of a substantial part of the products concerned is not eliminated, may be impossible for a dominant company with high market shares. The Discussion Paper acknowledges this when it sets out that it is unlikely that abusive conduct of a dominant company with market shares exceeding 75% could be justified on the grounds that efficiency gains would be sufficient to counteract its actual or likely anti-competitive effects. The Paper clearly states in this context that ultimately the protection of rivalry and the competitive process is given priority over possible pro-competitive efficiency gains.

Apart from the fact that this would bring about a clear re-introduction of the use of presumptions in the application of Article 82 to the detriment of an approach which better reflects economic reality, it also seems to indicate a competitor-focused

approach which sits uncomfortably with the fundamental premise of the Discussion Paper to give better consideration to efficiency gains. In fact, as said above, in UNICE's view dominant companies should be able to enhance their competitive position through behaviour which on balance has more positive than negative effects on competition and consumers. If the efficiencies outweigh the negative effects on competition and consumers, certain conduct is not abusive and should not be considered as such. Therefore, as set out above, enforcement of Article 82 should aim at applying sound economic analysis and an investigatory approach that takes efficiencies into account in a single-step analysis.

The assessment of efficiencies is an integral part of the analysis of whether or not behaviour amounts to an abuse under Article 82. UNICE believes that, contrary to Article 81 where the burden of establishing that the conditions for exemption are fulfilled is expressly put on the defendant, the analysis under Article 82 of whether behaviour of a dominant firm constitutes an abuse or not in including an analysis of efficiencies, puts the burden of proof on the Commission. When the efficiencies outweigh the negative effects on competition and consumers, the conduct concerned should not infringe Article 82.

Consequently, it is for the investigating authority to argue its case and demonstrate abuse comprising evidence that the conduct is not justified by efficiencies, especially when the dominant company has put forward a prima facie efficiency claim. UNICE strongly believes that such a framework would greatly help in devising a pro-active approach to enforcing Community competition rules which will provide a valuable contribution to achieving more growth and jobs in the EU.

Exclusionary abuses

The Discussion Paper sets out a possible methodology for the assessment of certain exclusionary abuses, such as predatory pricing, single branding and rebates, tying and bundling, and refusal to supply.

As a preliminary remark to discussing the different abuses below, UNICE, in line with what it has said above, believes that a concrete methodology for the assessment of exclusionary abuses should take efficiencies into account in a single-step analysis to properly assess effects on competition and consumers.

Regarding predatory pricing the Discussion Paper rightly states that it is in practice often difficult to distinguish from normal price competition. This is why, in UNICE's view, the Commission should take a very cautious approach when intervening in companies' pricing policies. Even in the case of direct or indirect evidence about the predatory strategy, it is important to assess properly that the behaviour has a negative effect on competition and consumers. There is no reason to depart from the fundamental approach only to intervene in companies' behaviour if it on balance has more negative than positive effects on competition and consumers.

There should thus be no presumption of abuse merely because the enforcement authority believes that a dominant company intended to engage in predatory

pricing. Under a competition-focused effects-based approach the economic effects of a dominant company's behaviour should always be fully considered and not just the intention of the company concerned.

Similarly to predatory pricing, UNICE believes that the Commission should be cautious when regulating rebates and single branding. Often rebates and single branding benefit consumers without harming competition.

Several suggestions in the Discussion Paper related to rebates are unclear and likely to confuse companies, for example regarding the concept of 'duration', 'effective price', and 'required share' as used in the section on conditional rebates, especially when presumptions of abuse are largely based on these concepts. Similarly, the concept of 'must stock item' suggests that it is too readily assumed that a dominant firm does not face any significant competitive constraints over part of its sales. It is unclear how these concepts will be applied in practice; they in fact give too much discretion for intervention. To counter this uncertainty, UNICE suggests that more examples are given under which dominant companies are free to offer rebates and discounts, particularly if the companies can show that the rebates and discounts are offered at the request of customers.

With respect to tying and bundling, UNICE is pleased that the Discussion Paper acknowledges that tying and bundling are common practices that often have no anti-competitive consequences but which, on the contrary, often lead to improved quality and significant savings in production, distribution and transaction costs. UNICE regrets to say that these generally positive effects are not always reflected in the proposed analysis of these practices.

With respect to the distinct products requirement, the Discussion Paper states that two products are distinct if, in the absence of tying or bundling, the consumer would purchase the products separately. UNICE welcomes this statement, which reflects a consumer-welfare-oriented approach focusing on consumer demand, but notes that this approach is not consistently applied considering that the Discussion Paper also states that the mere fact that certain products are supplied separately would also be an indication that there are separate products. Focusing on separate supply does not take into account specific demand for combined products as well as product innovation and changing demand. To be comprehensive, UNICE suggests that the Discussion Paper also clarifies that there are no distinct products if there is consumer demand for only one of the two products and not for the tied product separately. It is not unlikely that in certain circumstances one of the two products would never be purchased if not tied to the other product and provision should be made for this situation.

Also with respect to tying and bundling, the Discussion Paper states that when the Commission finds that a dominant company ties a sufficient part of the market, the Commission is likely to reach the rebuttable conclusion that the tying practice has a market-distorting foreclosure effect and thus constitutes an abuse of dominant position.

Again, UNICE is surprised that in spite of an advocated competition-focussed and effects-based approach, vague notions such as the 'tying of a sufficient part of the market' suffice to link the tying automatically to foreclosure and subsequently foreclosure to abuse. As set out above, such presumptions should be rejected and will only deter dominant companies from engaging in pro-competitive practices such as tying, which, as the Discussion Paper rightly describes, often lead to improved quality and significant savings in production, distribution and transaction costs that directly benefit consumers.

Lastly, with respect to the practice of refusal to supply, UNICE is pleased that the Discussion Paper acknowledges that dominant companies are generally entitled to determine whom to supply and whom not to supply. Requiring a company to supply products, to provide information, to license intellectual property rights, or to grant access to an essential facility or network, could deter investment in innovation by allowing competitors to use innovations of others instead of encouraging them to invest in innovation themselves.

However, the Discussion Paper appears to rely too heavily on a presumption that continuing a supply relationship is pro-competitive (see para 217). By doing so, there would be no need to demonstrate that access to the input is indispensable to avoid negative effects on competition in a situation where the dominant firm has already supplied the input. UNICE believes that this can lead to unwarranted intervention where a dominant firm is forced to deal with another firm out of consideration for, or for the convenience of, the requesting firm. Accordingly, a requesting company should in all circumstances have the burden of proving that the access to the input is indispensable to avoid negative effects on competition.

The suggestions in the Discussion Paper regarding refusal to supply deal extensively with the issue of compulsory licensing of intellectual property rights (IPR). In the knowledge-based economy, enforcement of Article 82 increasingly has to take account of intellectual property rights. In UNICE's view, it is important for the future growth of business in the EU that these rights are fully recognised by the Commission.

UNICE is thus pleased that the Discussion Paper acknowledges that there is no general obligation for a dominant IPR holder to license the IPR and that the very aim of the exclusive right is to prevent third parties from applying the IPR to produce and distribute products without the consent of the holder of the rights.

The Discussion Paper, however, also suggests that a refusal to license an IPR-protected technology which is indispensable as a basis for follow-on innovation by competitors may be abusive, even if the licence is not sought to directly incorporate the technology in clearly identifiable new goods and services. Similarly, the Discussion Paper fails to provide guidance on which products or services constitute a 'new product' and at para 236 it lists a number of speculative and impractical criteria that suggest that the nature and magnitude of investments in innovation co-support the finding of abusive behaviour. In addition, the Discussion Paper suggests that refusing interoperability information may also be

an abuse when market power from one market to another is leveraged, even if such information may be considered a trade secret.

UNICE believes that these suggestions unduly erode the exclusiveness of the IPR. They doubt whether compulsory licensing will be limited to the exceptional circumstances as required by the European Court of Justice, which will give rise to harmful uncertainty which may deter IPR holders from exercising their rights in a pro-competitive way. Similarly, the Commission should refrain from de facto imposing a broad duty to disclose interoperability information and trade secrets without sufficient support from the Community Courts. The protection of trade secrets plays an important role for research and development investment and thereby fosters innovation. UNICE therefore rejects the creation of a category of second-tier intellectual property rights whose value is reduced by the establishment of imprecisely defined exceptional circumstances under which competition rules can obstruct the exclusivity which is inherent to these rights.

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