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Client Alert: European Commission Issues Guidance on Its Analysis of Single-Firm Conduct

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On December 3, 2008, the European Commission published *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, in which the Commission sets forth the approach it will take to assess whether conduct by a single firm constitutes an unlawful abuse of a dominant position. The specific conduct addressed by the Guidance Paper includes exclusionary practices such as exclusive dealing, tying and bundling, predatory pricing, and refusals to deal.

In the United States, such practices are governed by the Sherman and Clayton Acts and their state analogs, which prohibit monopolization, attempted monopolization and exclusive dealing agreements that "substantially lessen competition or tend to create a monopoly in any line of commerce." At present, there is disagreement among U.S. courts and enforcement authorities over the standards for determining when single-firm conduct rises to the level of an antitrust violation under U.S. law.

Although Article 82 of the EC Treaty differs from U.S. antitrust statutes in significant ways, the analysis of single-firm exclusionary conduct in the Commission's Guidance Paper shares much in common with the economics-based approach favored by many U.S. courts. This approach begins with the premise that even an entity with market power (which, in EC terms, would be a "dominant" firm) is entitled to compete aggressively on the merits and intervention is only appropriate when necessary to protect consumers and the process of competition—not individual competitors.

The EC states that its analysis will begin with an assessment of whether a firm in fact holds a dominant position in the relevant market and has market power such that the firm's customers, competitors, or potential competitors cannot effectively check its ability to raise prices above competitive levels for a significant period of time. The Guidance Paper provides a safe harbor in the form of a rebuttable presumption that dominance is not likely if the firm's market share is below 40%. Consistent with the EC's historical practice, the determination of dominance results from the consideration of many factors, however, not a bright line test.

Once a determination of dominance has been made, the Commission looks at whether the conduct has foreclosed or has the potential to foreclose competition and thereby harm consumers. That analysis considers whether the likely economic effects of the conduct under investigation could have an adverse impact on consumer welfare in the form of higher, supracompetitive prices or reduced consumer choices or product quality.

If the Commission concludes that exclusionary practices of a dominant firm have caused or are likely to cause anticompetitive foreclosure, the firm will be permitted an opportunity to demonstrate that its conduct "is objectively necessary" (e.g., for health or safety reasons) or "produces substantial efficiencies which outweigh any anticompetitive effects on consumers" (e.g., technical improvements or reduced transaction costs). The firm will further be required to prove that there are "no less anti-competitive alternatives . . . capable of producing the same efficiencies," the likely efficiencies outweigh any likely negative effects on competition and consumer welfare, and the conduct does not eliminate all or most existing and potential competitors.

The Guidance Paper outlines in detail how the Commission intends to implement this approach in its investigations of certain specific exclusionary practices: exclusive purchasing and supply arrangements; conditional rebates offered as rewards for meeting certain minimum purchase thresholds; tying and bundling; predatory pricing; refusals to supply; and margin squeeze (i.e., selling essential input goods or services to downstream competitors at high prices that effectively preclude downstream competition). The Guidance Paper identifies several factors relevant to the determination that such conduct is abusive, including the period of time over which the conduct occurs, the extent to which consumers are unable to switch to alternative offerings by non-dominant firms, and the extent to which rivals are unable to implement realistic and effective counterstrategies. Depending on the nature of the conduct at issue, some of the possible efficiency defenses anticipated by the Commission are that the conduct results in cost savings that are ultimately passed on to consumers, or allows the dominant firm to realize an adequate return on its investment, thereby encouraging further investment and pro-consumer innovation.

Although it does not carry the force of law, the Guidance Paper is notable for its elevation of the interests of consumers over those of individual competitors and its embrace of an effects-based approach to analyzing single-form exclusionary conduct that invites consideration of evidence proffered by the firm under investigation of legitimate, objective business justifications and procompetitive efficiencies before condemning practices as an abuse of dominance.

Firms will certainly rely on the Guidance Paper's framework to develop evidence and arguments in their defense, but the Commission's broadly stated principles provide no bright line rules to aid dominant firms in trying to predict, with respect to a particular program or arrangement, their potential exposure to investigation and sanctions.

Although the Guidance Paper fills a void in the EC's library of written guidance as to its enforcement priorities, what has not changed is the need for dominant firms to ascertain whether procompetitive benefits might plausibly result from any proposed exclusive dealing arrangements, refusals to deal, or tied, bundled, or other discounted offerings, and to refrain from such conduct if the true intent—and the only plausible result—of the proposed conduct is anticompetitive foreclosure to the detriment of consumers.

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