



Competition Law Forum

***The Reform of Article 82:
Reactions to the DG-Competition Discussion Paper on the Application of
Article 82 of the Treaty to Exclusionary Abuses***

- prepared by the Competition Law Forum's *Article 82 Review Group* -

The Competition Law Forum¹ congratulates DG-Competition on its *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* and for its recognition that 'the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.²

The CLF welcomes the modernising movement away from an approach that prohibits certain categories or forms of conduct by dominant firms, and towards an approach that is based on evaluating the likely or actual effects a practice has on competition and consumer welfare.

Interventions against alleged abusive conduct should only be based on evidence of likely or actual harm to consumers.

¹ The British Institute of International and Comparative Law launched the Competition Law Forum (CLF) in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum is comprised of leading practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to the area of competition law and policy. For further information, please see www.competitionlawforum.org or contact its Director, Dr Philip Marsden, at p.marsden@biicl.org or (ph.) 44 207 862 5151. This submission was prepared by the Members of the CLF *Article 82 Review Group*: Christian Ahlborn, Linklaters; Margaret Bloom, King's College London and Freshfield Bruckhaus Deringer; Oliver Bretz, Clifford Chance LLP; Mark Clough QC, Ashurst; Liam Colley, PriceWaterhouseCoopers; Tim Cowen, BT; Thomas Hoehn, PriceWaterhouseCoopers; Michael Hutchings; Helen Jenkins, OXERA; Margaret Moore, Travers Smith; Frances Murphy, Mayer Brown Rowe & Mawe; Gunnar Niels, OXERA; and Mike Walker, Charles River Associates. The group's chairman is Philip Marsden. Liza Lovdahl Gormsen, King's College London acted as rapporteur at our meetings. This submission is not attributable to any individual member or consultative member of the CLF or to their organisations.

² *Discussion Paper*, paragraph 4

We note however that this approach is not fully followed through in the *Discussion Paper*. There are also some areas where more clarity and firm guidance is needed in order to ensure that Article 82 is applied and enforced throughout Europe using an effects-based consumer–welfare approach.

The CLF thus offers the following suggestions to help the Commission to complete that journey to a true effects-based approach that focuses on preventing harm to competition and consumer welfare.

The Competition Law Forum urges the European Commission to issue Guidelines on Abuse of Dominance. Our comments relate to these three themes:

I. The Need for Guidelines

II. The Assessment of Abuse

III. The Relevance of Dominance

In essence:

- Guidelines are needed to ensure that Article 82 is applied and enforced throughout Europe to the modernised standard of preventing likely consumer welfare harm.
- Throughout such Guidelines the analysis of abusive conduct should be based on a consistent story of economic harm to consumer welfare.
- In order to improve predictability, efficiency, and effective enforcement recommend the use of safe harbours for firms that are not dominant, and conduct that is not abusive, rather than presumptions of dominance and abuse.

I. **The Need for Guidelines**

1. **Guidelines ensure that there is less discretion on the part of agencies and courts to depart from the consumer welfare model proposed through the Modernisation of Article 82.**
2. **Most dominant firm conduct is pro-competitive, even when it appears to exclude rivals.**

Assessing whether or not dominant firm conduct is anti-competitive is difficult. Indeed, aggressive competition that provides benefits to consumers will often result in some rivals being excluded at least to some degree. Often they are simply not keeping up with some innovation or a more competitive offer. As with all conduct, dominant firm conduct should only be considered to be anti-competitive where it involves likely or actual harm to consumers. Sometimes this can be due to the exclusion of rivals. However, it is crucial that likely consumer harm itself be identified. If interventions are based on anything less than that, then pro-competitive conduct is likely to be prevented and deterred in the future, thus causing harm by denying consumers innovative and lower-priced products.³

3. **This focus on identifying consumer harm is the primary impetus of the Modernisation of Article 82. It is the rationale for the reform, and thus needs to be stated clearly.**

At present, the *Discussion Paper* retains too much discretion for enforcers and creates a real risk of deterring pro-competitive conduct by firms with market power. This risk is exacerbated by the increasing number of enforcers following Modernisation and the expected growth in private actions in national courts. Some of these authorities and courts have limited experience of applying Community competition law. All will benefit

³ Forcing dominant companies to refrain from competing aggressively can result in consumer harm as well, whether through a reduction in innovative products, or increased prices. For the same reason, interventions by competition authorities to raise price to address a supposed abuse should be limited.

from clear guidance particularly given the growing recognition that sound economic and legal analysis are both required in competition cases. There is inevitably a tension between the need for business certainty from bright-line rules and the conduct of a case-by-case analysis based on economic analysis. Hence it is important to establish clear guidelines with decent safe harbours for dominance and potential abuses rather than presumptions. Otherwise, uncertainty risks chilling competitive conduct – especially when there are multiple enforcers.

4. Guidelines should state clearly that Article 82 should be applied to prevent likely consumer welfare harm.

Guidelines help to provide much-needed predictability for business. Guidelines provide standards by which the European Commission can be held to account by the courts. Guidelines are an important signal to those national enforcement agencies and national courts in Europe.

II. The Assessment of Abuse

5. Findings of an abuse should be based on evidence of likely or actual harm to consumer welfare.

The *Discussion Paper* makes it clear that when examining allegedly exclusionary abuses the test for harm is market-distorting foreclosure. The most relevant issue, however, is not foreclosure, but likely harm to consumers. Paragraph 1, for example, states that:

[b]y exclusionary abuses are meant behaviours by dominant firms which are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a

market to actual or potential competitors *and which ultimately harm consumers*.⁴

Paragraph 58 continues the consumer focus:

[f]oreclosure is said to be market distorting if it likely hinders the maintenance of the degree of competition still existing in the market or the growth of that competition *and thus have as a likely effect that prices will increase or remain at a supra-competitive level*.⁵

This is clearly a test for consumer harm. It is not enough that rivals are foreclosed. The test is clear: foreclosure must be to such an extent that this has ‘as a likely effect that prices will increase or remain at a supra-competitive level’. However, this consumer welfare approach is not followed through the rest of the *Discussion Paper*. For example, the detailed steps in Paragraph 162 for determining market-distorting foreclosure make no mention of likely consumer harm. Similarly:

- Paragraph 55 refers to ‘conduct which produces actual or likely anticompetitive effects in the market and which *can harm consumers*’.⁶ Surely the focus should be on requiring evidence of actual or likely harm to consumers?
- Paragraph 55 also states that ‘Harm to intermediate buyers is generally presumed to create harm to final consumers’. Surely harm to intermediate buyers is only likely to harm final consumers if there are no other effective routes to the final market and a significant proportion of intermediate buyers are harmed?
- Paragraph 60 states ‘Where a certain exclusionary conduct is clearly not competition on the merits, in particular conduct which clearly creates no efficiencies and which only raises obstacles to residual competition, such conduct is presumed to be an abuse’. Why is there no apparent requirement to show

⁴ Emphasis added.

⁵ Emphasis added.

⁶ Emphasis added.

actual or likely harm to consumers? If it is indeed true that the abuse so clearly leads to consumer harm, then that evidence should be easy to provide, and would be preferable to a formalistic presumption with no regard for evidence of likely consumer welfare harm.

Guidelines must more clearly set out that the consumer welfare harm must be demonstrated, and not presumed purely from a particular form of conduct.

6. Future Guidelines need to set out clearly that actual or likely harm to consumers should be established before conduct is found to be an abuse. Evidence of foreclosure is not enough. Abuses should only be found where conduct likely harms consumer welfare.

Mere possible or even actual exclusion is not enough to find an abuse. Rivals are often excluded, or appear to be, by pro-competitive efficiency-enhancing conduct, i.e. by competition itself. Only abnormal conduct should not be tolerated, i.e. that which is not based on normal or natural modes of competition, and which in turn is likely to harm consumer welfare.

A practice should not be found to be an abuse until its effects on competition have been examined (and this includes an assessment of any relevant efficiencies) and it has been proven to lead to likely consumer harm. As such, no reversal of the burden of proof should occur simply following proof of likely or even actual foreclosure.

Anti-competitive market distorting foreclosure should only mean conduct that excludes competitors on some basis other than efficiency with the effect of ultimately harming consumers.

Efficient practices that are based on normal or natural modes of competition cannot be abuses, as they will not harm consumer welfare. As such, with respect to such practices, there is no need for an efficiency 'defence'. An analysis of the conduct's effect

on competition includes an examination of practices' efficiency-enhancing benefits.⁷ As such, an abuse should not be found until this examination has been conducted. It is not for the authorities to find some exclusion, and then for the dominant company to put forward a defence or justification based on efficiencies. That is an inappropriate reversal of the burden of proving the abuse. It is clear that the finding of an abuse must reveal some likely net harm to consumers, and this burden is on the authorities, not the dominant company.

The Commission Guidelines should set out clearly the fact that low-pricing practices (predation, loyalty rebates, for example) generate the most immediate form of consumer welfare: low prices. To prove consumer harm, therefore the immediate price-reducing or value-adding benefits of the practice must be shown to be likely to be outweighed by high prices in the future.

7. Authorities should not protect less efficient rivals.

There should be no abuse unless rivals who are 'as efficient' as the dominant company are excluded, and this in turn is shown to be likely to lead to consumer harm. Any other standard would protect less efficient competitors, which sends the wrong signal to the market. Protecting 'less efficient' or 'not yet as efficient' competitors would distort market incentives, and involve improper regulation of the market. Companies should all be given the same incentives to become competitive and efficient.

8. The exclusion of an 'as efficient competitor' cannot always be presumed to harm consumers.

We urge authorities to ensure that the issue of likely consumer harm is specifically tested for, and not presumed from the mere alleged exclusion of any rival. At the very least, a consistent economic story should be required which shows that that the behaviour harms competition on a sustained basis (and in particular that this can be expected to continue

⁷ It is only if the authorities maintain simply a formalistic examination of foreclosure alone (containing no separate consumer welfare harm test) that a separate efficiency defence would be needed to ensure that the consumer welfare model proposed in the reform is maintained.

in the face of attempts to harm consumers and recoup upfront losses). Reliance on a pass/fail 'as efficient competitor' test, without consideration of the way in which consumers will be harmed ultimately, places excessive reliance on uncertain modelling approaches, is too simplistic, and is likely to lead to over-intervention.

9. A complete effects analysis is not necessary and would risk allowing competitive harm.

It should be possible for authorities to examine claims of potential abuses using a standard of likely consumer harm, without having to engage in elaborate economic studies to prove actual harm or not. What is sought here is a plausible story of harm to competition, not a definitive finding of harm.

10. Cost benchmarks for low-pricing conduct should be the same no matter what practice is being examined. Ideally, this should be average avoidable cost.

The *Discussion Paper* proposes below average avoidable cost or between average avoidable cost and average total cost plus intent (and, very exceptionally, above average total cost) as benchmarks for a presumption of predation; whereas the cost benchmark for a presumption of exclusion through rebates is below average total cost (and exceptionally, above average total cost). For bundled rebates a benchmark of long run incremental costs is proposed. We urge a consistent story on harm and as such recommend one standard for all of these practices, which should be average avoidable cost.

III. The Relevance of Dominance

Dominance is an important criterion that should be maintained. Without it, all manner of practices by all sizes of firms would come open to unnecessary scrutiny. The finding of

dominance thus provides an important safeguard (i.e. screen), and assurance to business. Nevertheless, the concept of dominance needs to be related to the harm we are trying to prevent: consumer harm.

11. Dominance means a position of substantial market power capable of substantially increasing prices above the competitive level for a significant period of time.

The CLF welcomes the recognition that for dominance to exist an undertaking must have substantial market power that means it must be 'capable of substantially increasing prices above the competitive level for a significant period of time'.⁸ The *Discussion Paper* rightly explains that whether or not an undertaking has substantial market power will depend upon the constraints upon it from its existing competitors, potential competitors and buyer power. Market shares are an indication of this first constraint only, and, as the *Discussion Paper* states, they are just a starting point of any analysis of dominance. Hence, market shares should be used as safe harbours rather than for providing any initial presumption of dominance.

12. Market shares screens should be applied to create safe harbours, not presumptions of dominance.

The CLF welcomes the application of economic concepts in the discussion of dominance. However this approach has not been adequately carried through the *Discussion Paper*. Parts of Paragraph 31, for example, seem inconsistent with the statement that substantial market power means an ability to substantially increase prices above the competitive level. It is unlikely to be possible, for example, for an undertaking with less than 40-50% market share unilaterally to increase prices substantially unless its competitors are uncharacteristically weak or barriers to entry are high. Indeed, even most undertakings with a market share between 40% and 50% are unlikely to have substantial market power.

⁸ *Discussion Paper*, paragraph 24.

Instead of the initial presumptions of dominance in Paragraph 31, there should be a safe harbour of at least 40% (perhaps 50%) market share. Given the pro-competitive nature of most dominant firm practices, it is preferable to have a larger safe harbour - with some riders on exceptional circumstances when it may not apply - than a lower one.

Having such a safe harbour would provide much-needed assurance to many companies with respect to their conduct. It is very difficult to determine between pro-competitive and anti-competitive conduct. Making the wrong decision can have serious and harmful effects on the company, the market, and future practices. As such, so long as excessively narrow market definitions are avoided, market share safe harbours would provide comfort for some companies, while minimizing the risk of non-enforcement errors.

Above those safe harbour thresholds, dominance should not be presumed, however. In such situations, authorities should still examine closely whether the firm has substantial market power and, in any event, whether the effects of the conduct are likely to harm consumers.