

CLIENT ALERT

EU Antitrust: European Commission issues its guidance paper on the application of Art. 82 EC Treaty to exclusionary abuses

December 5, 2008

On Wednesday 3 December 2008, the European Commission issued the long awaited guidance paper on abuse of a dominant market position in exclusionary cases. The paper provides guidance on the economic and effect-based approach the Commission intends to use when assessing abuse of dominance cases. The scope of the paper is limited to exclusionary abuses. It does not cover so-called exploitative abuses.

The paper follows three years of review and consultation on the Commission's approach to the enforcement of Article 82. The review process started with the publication in 2005 of the Commission Staff Discussion Paper on exclusionary abuses which was followed by a lengthy consultation process and a public hearing in June 2006.

The new guidance paper describes the legal and economic principles the Commission will follow when dealing with certain types of exclusionary abuses, in particular exclusive purchasing, conditional rebates, tying and bundling, predation, refusals to supply and margin squeeze.

The declared aim of the guidance paper, is to provide clarity and predictability to stakeholders, in particular the business community and competition law enforcers at the national level. However, the paper is short and rather generic. In consequence, it remains to be seen whether its objective will in actual fact be achieved.

Interesting elements in the paper include the following:

- Dominance is unlikely with market shares below 40%.
- The focus of the Commission's enforcement policy will be on protecting consumer welfare and the competitive process rather than individual competitors. In practice, this means for example that for pricing conduct, the Commission will examine whether the conduct is likely to prevent competitors that are as efficient as the dominant undertaking from expanding on or entering the market.
- In order to establish an infringement of Article 82 the Commission does not need to establish that the abusive conduct actually harmed competition. It suffices that there is convincing evidence that harm is likely.
- The Commission confirms that it is willing to consider efficiency justifications. For an efficiency defense to be accepted by the Commission, the dominant undertaking will have to demonstrate the indispensability of the conduct to achieve the said efficiencies, the benefit to consumers and the non-elimination of effective competition.
- [Click for the press release of the Commission.](#)
- [Click for the FAQ.](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas De Meese

Partner – Brussels

Phone: +32.2.282.1842

Email: tdemeese@crowell.com