

Deutsche Vereinigung
für gewerblichen Rechtsschutz
und Urheberrecht e.V.

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Konrad-Adenauer-Ufer 11 • RheinAtrium • 50668 Köln

Der Generalsekretär

Konrad-Adenauer-Ufer 11
RheinAtrium
50668 Köln

Telefon (0221) 650 65-151
Telefax (0221) 650 65-205
e-mail: office@grur.de
www.grur.de

Europäische Kommission
- Generaldirektion IV/Wettbewerb -
Herrn Generaldirektor Philip Lowe
Rue Joseph II / Jozef II-Straat 70

B-1000 Brüssel

Mittwoch, 5. April 2006

Response to the Commission Discussion Paper on the Interpretation of Art 82 EC

Dear Mr. Lowe,

In December 2005, the Commission published a Staff Discussion Paper concerning the applicability of Art 82 EC to certain exclusionary market abuses, and called upon interested parties and institutions to submit comments on the Discussion Paper.

The German Association for Intellectual Property Law (*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht*, GRUR) is a research association, the founding objectives of which include the provision of legal advice to legislative bodies on issues of intellectual property law. Amongst its members are representatives of all professional groups who have an interest in intellectual property law, including lawyers and patent attorneys, judges, professors, officials of specialist authorities as well as government ministries and company representatives engaged in the relevant issues. Accordingly, the German Association for Intellectual Property Law has traditionally submitted its opinion on all major draft legislation concerning aspects of intellectual property law. Since the Discussion Paper, which may serve as a basis of future officially published interpretation guidelines, proposes fundamental changes in the assessment of various business practices under Art 82 EC, the Antitrust and Competition Law Committee

(*Fachausschuss Kartellrecht*) of the Association, which is composed of members specialising in the area of antitrust and competition law, has carefully reviewed the Discussion Paper and has drawn up its comments as set forth herein.

Unlike in connection with the change of system regarding Art 81 EC to a legal exception regime based upon EC Regulation 1/2003 and the resultant mandatory application of Art 81 (3) EC by undertakings (“self-evaluation”), courts and authorities, there is no direct and pressing need for the introduction of the present interpretation principles. The courts have substantially developed the requirements of Art 82 EC by reviewing the Commission practice, and have therefore created sufficient legal certainty.

In principle, however, the Association has no reservations with regard to the publication of “guidelines on the application of Art 82”, provided that such guidelines offer affected undertakings greater legal certainty and assist the competent national authorities and courts in the application of Art 82 EC. In its present form the Discussion Paper is not yet able to fulfil such a task. In particular, the Association has significant doubts regarding the use of “principles of interpretation” to introduce fundamental changes to the individual requirements for applying Art 82 EC by reference to an “efficiency” doctrine and an effects approach, particularly given the absence of even basic judicial guidance from the European courts on this issue (see 1 below). Furthermore, it would be conducive to legal certainty if a “safe harbour” were created for undertakings up to a certain market share or for certain kinds of conduct (see 2 below). Finally, the Association wishes to submit its views on the parts of the Discussion Paper which are of pivotal importance to its members in connection with Art 82 EC, namely the parts on “refusal to supply” and “aftermarkets” (see 3 below).

1. The “efficiency” approach is problematic for various reasons: Firstly, the question arises as to whether the “efficiency” approach adopted by the Discussion Paper is compatible with Art 82 EC and the relevant case law of the European courts (indeed, the ECJ in the “Michelin” case expressly refused to consider the effects of certain conduct). In particular, the assessment as to the objective justification of certain practices based upon Art 81 (3) EC goes far beyond the current approach of the courts regarding the justification of anti-competitive practices by dominant

undertakings. If one were to apply the criteria of Art 81 (3) EC to Art 82 EC without distinction, this would blur the boundaries between these two hitherto clearly separated provisions. Substantial confusion would arise if one should construe the criteria of Art 82 EC differently.

Irrespective of the above, it is difficult to imagine that competition would not be restricted by certain conduct of a dominant undertaking. By its very nature, a dominant undertaking possesses the freedom to act in a manner that is not sufficiently restrained by competitive forces. Accordingly, there is a danger that, as a result of the interpretation principles, the reach of the prohibition of Art 82 EC will be extended substantially, and will be restricted only at the justification stage by reference to consumer interests and the efficiency approach.

Given that Art 82 EC serves primarily to protect competitors against abusive anti-competitive behaviour, the question arises as to whether the reference to consumer benefits constitutes a suitable criterion for the application of Art 82 EC. Even if one assumes that this is the case, the issue remains as to who is required to present, and in the event of a dispute, prove the justificatory requirements. To date, the onus has generally been on the competition authorities or – in civil proceedings – the plaintiff to adduce evidence of the lack of objective justification. Various passages of the Discussion Paper, however, suggest that this rule is to be abandoned and, by introducing an efficiency analysis, the burden of proof should lie fully with the undertaking occupying a dominant position. This is not consistent with the case-law of the European courts, according to which authorities are required to demonstrate and prove all requirements of Art 82 EC as well as the lack of objective justification; furthermore, such an approach also conflicts with Art 2 of EC Regulation 1/2003.

In addition, the reference to consumer benefits creates further legal uncertainty since there are no clear and generally acknowledged criteria or indeed any business-endorsed methods of ascertaining a consumer benefit. Another remaining question is whether it is the short-term, medium-term or long-term benefits that are of relevance.

2. Moreover, the Association recommends expressly identifying certain situations in which the existence of a dominant position and/or abusive conduct can be ruled out (“safe harbour”). By contrast, the findings at paragraph 31 of the Discussion Paper give rise to considerable legal uncertainty since, even with market shares of less than 25 %, the existence of a dominant position is not categorically ruled out. This finding of the Discussion Paper creates further legal uncertainty with regard to the Block Exemption Regulation concerning “vertical agreements”: Pursuant to Art 3 of EC Regulation 2790/99, the block exemption is applicable up to a market share of 30 %. There is fear that, even with a market share below the 30 %-threshold, it cannot be excluded that certain behaviour exempted under Regulation 2790/99 will conceivably be challenged on the basis of Art 82 EC.

Also in relation to the individual forms of abuse, it would be advisable in the interest of legal certainty to remove various scenarios from the scope of Art 82 EC, even where a dominant position exists. For instance and in particular, this concerns the finding that the matching of competitors’ offers does not in itself constitute an abuse of a dominant position (this does not extend to the assessment of ‘most favoured customer’ clauses, including the ‘English clause’).

However, the presumptions set forth in greater detail in the Discussion Paper are not an appropriate means of bringing about the requisite legal certainty. On the contrary, they create additional legal uncertainty, since, by their very nature, presumptions can be rebutted. This is all the more problematic as neither Art 82 EC nor EC Regulation 1/2003 provides for a procedure to create sufficient legal certainty with regard to the compatibility of certain conduct with Art 82 EC by means of a formal decision.

3. The chapters “refusal to supply” and “aftermarkets” have a particular impact on the interests of companies advised by members of the Association. The Discussion Paper is not sufficiently clear with regard to an undertaking’s freedom in structuring its own distribution system or deciding on the licensing of intellectual property rights or know-how. The Discussion Paper fails to make a consistent distinction between competitive conduct that is removed from competition law rules from the very outset

(having regard to the block exemption regulations) and the abuse of a dominant position. This results in considerable legal uncertainty, particularly with regard to intellectual property rights.

- a) With regard to “refusal to supply”, it is generally acknowledged that even an undertaking in a dominant position enjoys a free hand in the structuring of its distribution channels and, provided its conduct does not fall within the ambit of Art 81 EC, is free to determine the customers for its products. The Association therefore recommends further clarification of this principle.
- b) As far as the Discussion Paper deals with the “aftermarkets” issue (from paragraph 243), it creates additional ambiguities and therefore also legal uncertainty. Although intellectual property rights should, according to paragraph 238, generally take precedence, paragraph 264 explicitly classifies the refusal to license as a potential abuse of a dominant position, thereby further restricting the principle of licensing freedom. This is not provided for at all in the case law of the ECJ, or subject to strict preconditions, particularly with regard to “aftermarkets”. Special emphasis should therefore be placed on the primacy of the freedom to exercise intellectual property rights, and any qualification to this principle should be eliminated.

The fact that the comments set out above are limited to certain issues deemed by the Association as being of particular importance does not mean that the Association agrees with all remaining parts of the Discussion Paper. Indeed, the Association assumes that it will receive an opportunity to submit further comments on individual aspects of the Discussion Paper in the course of the proceedings, particularly if the Commission should intend to publish the contents of the Discussion Paper as guidelines on the interpretation of Art 82 EC.

The Association would be pleased to elaborate on the concerns outlined above in the course of a hearing or a meeting.

Yours sincerely