

EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR COMPETITION – UNIT A1

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HT.100055 GUIDELINES ON EXCLUSIONARY ABUSES

RE: A.I.I.P. COMMENTS TO “DRAFT GUIDELINES ON THE APPLICATION OF ARTICLE 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS” - HT.100055 GUIDELINES ON EXCLUSIONARY ABUSES

Associazione Italiana Internet Provider (“AIIP”) has been established in 1996 and represents more than 60 (sixty) Italian ECS providers, mainly SMEs and a couple of large ones, many of which provide Very High Capacity Networks (“VHCN”) and Ultra-Broadband (“UBB”) electronic communications services, by installing VHCN with both fiber and wireless access technologies.

In addition, many AIIP members operate public Data Centres and also provide Cloud and Edge Computing services to the public.

During these years, AIIP has been involved (many times as claimant as well as intervener) in many antitrust cases involving electronic networks and communications as well as digital services, both at domestic and EU level, most of them relating to exclusionary abuses of dominant position.

1. AIIP appreciates the Commission approach in the Draft Guidelines, which will be prove to be very useful in public and private antitrust enforcement in the above markets.

In this regard, with a particular focus to the electronic communications markets, on which its members are active, AIIP points out that *ex-ante* regulation is being progressively lifted and is likely to disappear at all in the short/medium term from more competitive markets or from such markets where the incumbent is no longer vertically integrated (as may apparently be the case of Italy, but AIIP has significant doubts in this regard, considering that – as outlined by the Commission at § 123 and fn. 285 of the Guidelines – vertical integration may also take place due to long term supply/distribution contracts linking the two entities, in spite of any formal proprietary separation between two different entities...).

However, this “regulatory release” is taking place in spite of the following factors which suggest keeping an open eye on the sector, which is featured by:

- presence of high barriers to entry;

- strong direct and indirect network effects¹, giving ground to a concentrative dynamic known as the “*winner takes it all*” economic theory²;
- the above referred concentrative dynamic is also boosted by the large scale and scope economies which feature such markets;
- substantial “lock-in” effects with respect to the customers, due to offers of bundled products and services (“*quadruple play*”, etc.).

AIIP stresses the need to keep into account and to carefully assess the (cumulative and exponential) concentrative effects of all the above features of the electronic communications and digital markets.

2. Therefore, AIIP underlines the importance of an effective and timely application of art. 102 TFEU to the electronic communications sector and will focus its comments on a couple of specific topics which, in its view, should be subject to a deeper analysis by the Commission Guidelines.

In this regard, AIIP points out:

- (i) the need to correctly assess the existence of a dominant position in the electronic communications network and services markets as well as in the digital services ones, by keeping into due account the cumulative and exponential effects of the abovementioned features of such markets and their fast concentrative dynamics;
- (ii) the need to keep into account the above factors and not to be “refrained” when assessing whether a collective dominant position or only an oligopoly exist in Very High Capacity Networks (“VHCN”) and UBB services or with respect to mobile services.
- (iii) the need to correctly assess the “efficiency defence”, especially in case of “volume discounts”.

¹ In *economics*, a network effect ... is the phenomenon by which the value or utility a user derives from a good or service depends on the number of users of compatible products ... The adoption of a product by an additional user can be broken into two effects: an increase in the value to all other users (total effect) and also the enhancement of other non-users' motivation for using the product (marginal effect).

Network effects can be direct or indirect. Direct network effects arise when a given user's utility increases with the number of other users of the same product or technology, Direct network effects can be seen with social networking services ... telecommunications ... Indirect ... network effects arise when there are “at least two different customer groups that are interdependent, and the utility of at least one group grows as the other group(s) grow”. For example, hardware may become more valuable to consumers with the growth of compatible software.” (https://en.wikipedia.org/wiki/Network_effect).

² <https://www.forbes.com/sites/forbesbusinesscouncil/2024/03/05/understanding-the-dynamics-of-winner-take-all-markets/>

3. The concept of collective dominance has been firstly affirmed in *Vetro Piano Italiano* case³, reiterated in *Municipality of Almelo*⁴, explored in depth in *France v. Commission*⁵ and *Gencor*⁶ and analytically developed in the *Airtours* judgment⁷, where it was considered to be existing in case of “*structural or other interconnections*”, which is one of the criteria for verifying the existence of collective dominance.

Such definition appears a bit cryptic and it is worth of being further clarified by the Guidelines as “*the presence of economic or personal links*”⁸ between the firms.

AIIP would welcome a clarification by the Guidelines with respect to the standards to prove the existence of a collective dominance solely on the basis of a “*relevant market structure ... such as to lead to coordinated effects, i.e., such as to encourage anticompetitive behavior of parallelism or alignment in the market,*” i.e., a situation of economic interdependence such as to cause uniform behavior (and thus the absence of competition)⁹.

As a matter of fact, the European Court of First Instance in the *Airtours* case¹⁰ made a thorough analysis of collective dominance, strictly distinguished from a merely oligopolistic market, clarifying that there are three conditions for there to be collective dominance that significantly impedes competition:

- 1) “*There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;*
- 2) *second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. ... [O]nly if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy ... [F]or a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative (see, to that effect, Gencor v Commission, paragraph 276);*
- 3) *third, to prove ... that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy*”¹¹; the common course of action of collectively dominant firms must be independent of the reaction of competitors (even potential

³ O.J., 1989, L 33/44; on appeal, *S.I.V. v. Commission*, in CMLR 1990, 4, 535.

⁴ Judgment April 27, 1994, C393/92, [1994] ECR I-1477.

⁵ Judgments C-68/94 and 30/95 *France v. Commission* and *SCPA v. Commission* Rec., 1998, 1375.

⁶ Judgment T-102/96, CMLR 1999, 971.

⁷ Judgment T342/99, appeal of decision M1524 *Airtours/First Choice*, O.J. 2000, L093/01.

⁸ The case of cross-shareholdings or so-called “*interlocking directorates*.”

⁹ See, *inter alia*, *Gencor*, T-102/96, in ECR, 1999, p. II-753 and *Compagnie Maritime Belge*, C-396/96 and 397/96, in ECR, 2000, p.I-36.

¹⁰ Case T-342/99, *Airtours v. Commission*, June 6, 2002.

¹¹ *Airtours*, cit, par. 62.

competitors) and consumers¹².

Therefore, firms operating in a markedly oligopolistic market do not, by themselves, have a collective dominant position, but a careful economic analysis of the market is required (also by NRAs in order to decide whether to enact regulatory releases), both from a static standpoint (typical of “structuralist” theory¹³ and its subsequent evolutions¹⁴, reproduced in the 1st criterion in *Airtours*) and in a dynamic profile (typical of “game theory” and “repeated games”¹⁵, reproduced in the 2nd and 3rd criteria in *Airtours*), in order to take into account both the reaction of potential competitors and consumers with respect to *tacit collusion* and the possibility of “retaliation” (and its effectiveness) against the firm deviating from *tacit collusion*.

Such an analysis, both because of its intrinsic difficulty (due to the huge number of variables to be analysed) and because of the discretion in assessing the conduct of oligopolists (a price reduction by an oligopolist in response to a previous reduction may constitute a retaliation, but may also be interpreted as a sign of competition) is full of uncertainties and may lead to an erroneous conclusion that there are no collectively dominant firms in an oligopolistic market or generate protracted litigation.

The application of extremely sophisticated tools to determine whether a market is a merely oligopolistic one or whether it is featured by the presence of a collective dominance may lead to difficult enforcement and much uncertainty (and the system may implode and fail precisely because of the lack or wrong application of the *antitrust* tools).

AIIP therefore suggests that the Commission examines in further detail the issue relating to the elements triggering the existence of a collective dominant position and not only an oligopoly which is vital not only as to antitrust private and public enforcement, but also as to the possibility of regulating a given market¹⁶.

¹² The Court annulled the *Airtours* decision because it did not adequately prove the probable *tacit collusion* of the oligopolists nor the existence of retaliatory mechanisms against the firm deviating therefrom.

¹³ Developed by E.S. MASON, “*Price and Production Policies of large Sale Enterprise*,” in *Am.Econ.Rev.*, 1939, 61-74 and, then, by J.S. BAIN, *Industrial Organization*, New York, 1959: according to which the outcome of the actions of firms depends on the structure of the market on which they operate (according to the well-known “*Structure → Conduct → Performance*” scheme).

¹⁴ According to which structure, conduct and outcome are interdependent and the “conduct” of firms affects the market structure to the point of changing it: F.M. Scherer, *Industrial Market Structure and Economic Performance*, New York, 1970 and, with D.R. ROSS, 3rd ed., New York, 1990; D.W. CARLTON - J.M. PERLOFF, *Modern Industrial Organization*, New York, 1994 and D. JACOBSON - B. ANDREOSSO O'CALLAGHAN, *Industrial Economics and Organization - A European Perspective*, London, 1996.

¹⁵ K.BAGWELL - A.WOLINSKY, *Game Theory and Industrial Organization*, April 2000, para. 4.

¹⁶ Indeed, in the light of the economic considerations on the special structure of electronic communications markets and digital services, as well as their concentrative dynamics, it is difficult to correctly assess whether an oligopoly conceals a collective dominance thus leaving open an insidious loophole, likely to sink the entire new regulatory system.

4. Finally, AIIP stresses the need to correctly assess the “efficiency defence”, especially in case of “volume discounts” made by dominant operators.

As a matter of fact, AIIP is recently assisting to a case¹⁷ of application of volume discounts merely linked to minimum quantities (arbitrarily fixed) to be achieved on the national market.

As a matter of fact, especially in the VHCN networks and in the UBB services, according to AIIP there is a general misunderstanding due to an overestimation of the role of the “economies of scale”, to which often is made undue reference in order to privilege large operators (e.g.: with 500,000 clients spread over 110 provinces, and maybe concentrated into the largest cities), without taking into account other factors, which in this sector are more relevant, such as “economies of density” which are more relevant in this markets and are often better achieved by Medium sized operators locally focused (e.g.: with 10,000 clients in one province). The unit costs of the latter are much less than the former.

Without a sound economic analysis there is a serious risk and likelihood to legitimate unlawful and abusive conducts. In the above referred case, a quantity discount mechanism merely based on achieving certain quantities without any sound economic justification is highly penalizing and discriminating especially the most efficient operators (those with the largest density economies in given areas, which are more important than economies of scale, in VHCN networks and UBB services).

In the light of the above, AIIP stresses the need that the Commission clarifies §§ 167-169 of the Guidelines by keeping into account the above comments.

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Should you need any clarification on the above contribution, please do not hesitate to contact us at presidenza@aiip.it, segre@aiip.it and andrea.valli@vallimancuso.it

Kindest regards

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Presidente

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¹⁷ Reference is made to the MSA between NetCo and TIM.