Comments on the DG Competition Discussion Paper on the application of article 82 of the Treaty to exclusionary abuses

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1. INTRODUCTION

1.1 Guidelines on exclusionary abuses may be useful

Article 82 of the EC Treaty, prohibiting the abuse of a dominant position, is applied by the European Commission, national competition authorities and national courts according to the procedural rules contained in Council Regulation (EC) no. 1/2003. Recital 1 of this Regulation states that “in order to establish a system which ensures that competition in the common market is not distorted, articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community”.

Effectiveness and consistency do not require only adequate powers and procedures for the implementation of EC competition rules. They require, above all, that the substantive criteria for the enforcement of such rules be clearly identified.

While for the assessment of agreements and horizontal mergers under EC rules there have already been extensive policy reviews which led to the adoption of Commission regulations and notices, so far the Commission has not published any kind of general guidance on the objectives and principles for the application of article 82.

The case-law of the Community Courts already indicated some important criteria for enforcement, for instance with respect to refusals to supply; however, these clarifications and developments were strictly linked to the individual cases under consideration.

Dangerously the notion of the “special responsibility” of the dominant company, which merely describes the existence of an ad hoc provision on the conduct of dominant companies in the EC Treaty, is sometimes taken as the legal basis to justify any kind of obligation on dominant companies under article 82. This notion in itself does not give any help to distinguish between legitimate and unlawful conduct. The main risk entailed by the lack of a clear legal and economic framework for identifying unlawful conduct under article 82 is an unjustified reduction of the incentives to compete and to invest. The resulting market distortions hamper competitiveness and, at the end, may harm consumers.
Therefore the policy review of the application of article 82 promoted by the European Commission, which led to the publication of the Discussion Paper and may lead to the adoption of Guidelines, is welcome, since it answers a real need for clarification of the criteria which should guide the proper enforcement of the prohibition of the abuse of dominance.

The Discussion Paper focuses on exclusionary abuses; it does not deal with exploitative abuses and non-exclusionary discrimination. This limitation in coverage should not lead to underestimate the importance of the document. By far, exclusionary abuses represent the most important category for the future application of article 82. If the Commission Guidelines succeed in providing a clearer definition of the objectives and of the framework for the assessment of companies’ exclusionary conduct, they will give a fundamental contribution to a more effective and consistent application of EC competition rules.

In setting out the principles for the future application of article 82 to exclusionary abuses, the Guidelines will certainly have to “draw and elaborate on the Commission’s evolving experience with the application of article 82 as well as on the case-law of the Court of Justice and the Court of First Instance” (¶ 5). However, the Commission is not bound to provide in the Guidelines a detailed and comprehensive review of all precedents. It enjoys a significant margin of discretion in the choice of the assessment criteria which will be elaborated upon in the Guidelines and in the emphasis to be placed on the different elements. It is important to underline that the Commission, in its central role as enforcer of EC competition rules\textsuperscript{1}, has the freedom to innovate with respect to past approaches. For instance, in the Guidelines it might usefully identify safe harbours for the application of article 82 (market share thresholds below which individual dominance is always excluded; cost benchmarks above which predation is always excluded).

1.2 The objective of article 82

The Discussion Paper specifies that “with regard to exclusionary abuses, 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” (¶ 4).

\textsuperscript{1} Council Regulation (EC) no. 1/2003, recital 34.
This approach, which is consistent with the one already adopted by the Commission in the application of article 81\(^2\), is particularly relevant when discussing exclusionary abuses. Indeed, it clarifies that foreclosure, i.e. behaviour that discourages entry or expansion of rivals or encourages their exit, should only be prohibited under article 82 when it harms consumers (¶ 1). Protection of competitors is not the objective.

A first important screening device is therefore provided: foreclosure that harms competitors but not consumers is not prohibited under article 82. This approach should be strictly followed in all sections of the Guidelines.

1.3 Need for focus in public enforcement

As for public enforcement, the Guidelines might usefully include a paragraph stressing that in the modernization context there is a need both for the Commission and for national competition authorities to focus on real competition problems. Indeed, “enforcement agencies should be cautious about intervening in the functioning of markets unless there is clear evidence that they are not functioning well”; “enforcement agencies don’t have unlimited resources and need to focus their efforts on what makes a real difference”\(^3\).

1.4 Economic approach and legal safeguards

The Discussion Paper contains a commitment to adopt “an approach which is based on the likely effects on the market” (¶ 4).

The focus on the external economic impact of the conduct, and not merely on its form, is consistent with the approach already followed in the Guidelines on the application of article 81 and provides a valuable clarification. In particular, this more economic approach should mean that a conduct which has no negative effects, or has positive effects on consumers, does not fall within the article 82 prohibition.

\(^3\) Neelie Kroes (2005), Preliminary Thoughts on Policy Review of Article 82, speech at the Fordham Corporate Law Institute, New York, 23 September 2005.
The issue of the desirability and risks of the so-called economic approach in the application of article 82 deserves a brief discussion.

Antitrust rules do not exist in a vacuum: they are part of an institutional setting. Enforcement should be structured so as to pursue the relevant policy objectives while ensuring the effectiveness of the parties' rights of defence. For this reason, an economic approach to competition policy can never neglect the legal framework within which the rules will be applied and, in particular, issues like the burden of proof, the use of presumptions, the standard of proof. The system has to incorporate sufficient safeguards to allow a firm to predict whether a given conduct is likely to be prohibited under article 82 and to defend itself from insufficiently substantiated allegations of abuse. Accordingly, the assessment process should be articulated so as to satisfy both the need for focus on the economic impact of the conduct and the need for the legal safeguards necessary for the effectiveness of the rights of defence.

2. RELATIONSHIP OF ARTICLE 82 WITH OTHER PROVISIONS

Section 2 of the Discussion Paper usefully clarifies that dominance does not exclude the possibility for a company to benefit from an exemption under article 81(3) of the Treaty when the four conditions listed therein are fulfilled. In particular dominance does not automatically imply that the fourth condition is not satisfied, i.e. the agreement affords undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Although this issue had already been addressed by the Court of Justice\(^4\) and commented upon in the Guidelines on the application of article 81(3), it is worthwhile recalling it in the future Guidelines on article 82. Indeed, Section 2 usefully shows that in the application of article 81(3) there has been an evolution, from a per se negative assessment of agreements stipulated by dominant firms to a case by case approach which focuses on the actual impact of such agreements on competition.

3. DOMINANCE

The Report by the Economic Advisory Group on Competition Policy on “An economic approach to Article 82” argued that there is no need for a demonstration of dominance separate from the demonstration of abuse, since the anti-competitive effects of an abusive conduct may be observed only in the presence of dominance.

This argument may be correct in principle, but if translated into a practical rule for the application of article 82 would entail serious dangers. It assumes that a bottom-up assessment process, going from the observed effect to the qualification of a conduct as abusive and then to the existence of dominance, is straightforward and more precise that a top-down process, going from dominance to the analysis of the impact of a conduct on the market. In practice, this approach would require a clear identification of the anti-competitive effects resulting from abusive conduct, accompanied by sufficiently precise and reliable empirical evidence to provide a predictable standard for prohibition. The administrative costs of this approach are likely to be significant. The risk of mistakes is probably higher than in the current system. Eventually, this approach might also lead to a broader application of article 82 to any company holding some market power.

In practice, the need for the Commission and national competition authorities to prove the existence of a dominant position, together with the need to prove the abuse of such position, ensures a greater predictability and therefore represents an important safeguard for undertakings. Rightly, the Discussion Paper does not follow the EAGCP Report on this aspect, and maintains the rule according to which a separate assessment of dominance is needed in the application of article 82.

As for the assessment of dominance, the Discussion Paper correctly argues that market shares are a necessary but not sufficient clue to the existence of market power. Therefore, especially when taking into account the difficulty of defining relevant markets in article 82 cases, it is necessary to extend the dominance analysis beyond market shares (¶ 32); if the barriers to expansion and entry faced by rivals are low a high market share may not be indicative of dominance (¶ 34).

This approach is consistent with the adoption of safe harbours, i.e. market share thresholds below which dominance is excluded. In this respect, the approach of the
Discussion Paper, which mentions cases of dominance with 32% and 36% market shares and does not exclude dominance with market shares of “no more than 25%”, seems excessively cautious. In providing guidance on the future application of article 82, the Commission might well exclude dominance for market shares below 35% without any significant risk for the protection of competition and consumers.

Paragraph 29 discusses the relevance of the stability of market shares in the assessment of dominance. It might be added that the observed stability of a high market share may also be the result of effective performance by a company exposed to significant competitive pressures. On the other hand, a finding of dominance should be unlikely when the company has been experiencing a continuing and substantial reduction of its market shares.

For innovative products, the assessment of dominance requires a full understanding of how the market evolves and of the dynamic competitive challenges that may constrain a company’s market power even in the presence of very high market shares. There is no need for special rules. What is needed is a correct application of the general rules for the assessment of dominance, taking the characteristics of these markets into account.

4. COLLECTIVE DOMINANCE

The issue of collective dominance under article 82 deserves a careful examination. Article 82 expressly refers to abuse “by one or more undertakings” of a dominant position. It therefore covers situations of collective dominance, where two or more undertakings present themselves or act on a particular market as a collective entity.

The issue to be addressed is which factors may give rise to such a collective entity on the market in the context of the application of article 82 to exclusionary abuses.

Collective dominance under article 82 may result from agreements between the undertakings concerned, ownership interests and other links in law that lead the undertakings concerned to coordinate their behaviour on the market. Indeed “the case law so far with respect to exclusionary abuse of a collective dominant position has dealt with situations where there were strong structural links between the undertakings holding the dominant position” (¶ 76).
It is more troublesome to establish whether collective dominance under article 82 may also result from the mere structure of the relevant market. In the Discussion Paper the Commission seems to propose a full parallelism between the criteria used in the assessment of collective dominance under merger control and the criteria to be used when applying article 82.

Although in recent case-law the Court of Justice expressly mentioned the three cumulative conditions of the Airtours judgement in the context of the assessment of collective dominance under article 82\(^5\), a full parallelism between the assessment of dominance under merger control and under article 82 would be misleading.

First, the standard of proof for assessing collective dominance in merger control and in the application of article 82 is different. In the first case, the enforcing authority has to assess ex ante the probability of a future market situation, whereas in applying article 82 it has to show that a situation of collective dominance actually exists.

Moreover, collective dominance under article 82 requires that the companies present themselves as a single entity on the market with respect to the specific conduct under scrutiny. With reference to exclusionary behaviour, this task may not be straightforward.

Finally, the Guidelines might usefully clarify that under the Airtours approach oligopolistic interdependence as such does not give rise to collective dominance, either for merger control or for the application of article 82. The three cumulative conditions set out by the Court in Airtours describe a special situation of oligopolistic collusion, sustained by deterrence mechanisms and quite different from a mere oligopolistic market structure.

5. FRAMEWORK FOR THE ANALYSIS OF EXCLUSIONARY ABUSES

5.1 The general framework for assessing infringements

The general framework for the analysis of exclusionary abuses outlined in Section 5 of the Discussion Paper will be the core of the future Guidelines. Therefore, it is essential that its content be clear.

The first important statement contained in this Section is that consumer welfare and an efficient allocation of resources are the ultimate objectives of the application of article 82 to exclusionary abuses (¶ 54). We suggest to eliminate all ambiguities relating to other possible objectives6.

Second, the Discussion Paper recognizes that the prohibition of exclusionary conduct under article 82 requires evidence of actual or likely anticompetitive effects in the market and of consumers harm (¶ 55).

Third, the Discussion Paper specifies that an analysis of the capability to foreclose competitors based on the form and nature of the conduct is not sufficient to establish an abuse. A “likely market distorting foreclosure effect” must also be established. The focus is not on foreclosure as such (defined as any disadvantage for rivals resulting from the dominant company’s conduct, which would be also the result of an effective competitive conduct by the dominant company), but on market distorting foreclosure, resulting in a restriction of competition significant enough to have a likely negative impact on prices to the prejudice of consumers (¶ 58).

To establish a market distorting foreclosure effect it is necessary to consider the incidence of the conduct and other market characteristics (¶ 59).

6 Consistently with ¶4, paragraph 54 should state that the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources is “the objective” of Article 82 when analysing exclusionary conduct, and not “the essential objective”. Moreover, we suggest to redraft the last sentence of paragraph 54 as follows: “Furthermore, the purpose of Therefore, Article 82 is—does not to protect competitors from dominant firms’ genuine competition based on factors such as higher quality, novel products, opportune innovation or otherwise better performance, but to ensures that these competitors are also able to expand in or enter the market and compete therein on the merits, without facing competition conditions which are distorted or impaired by the dominant firm so that consumers are harmed.”
This framework seems adequate to allow a rule of reason analysis of unilateral conduct by a dominant company based on its impact on the market.

It is within this analytical framework that the issues of the burden of proof and of the standard of proof must be discussed.

**Burden of proof**

Article 2 of the Council Regulation (EC) No. 1/2003 establishes that in any national or Community proceedings for the application of article 82 of the Treaty the burden of proving an infringement of article 82 rests on the party or the authority alleging the infringement. This legal rule cannot be neglected in enforcement and should be properly recalled in the future Guidelines.

The jurisprudence of Community Courts on article 82 admitted the possibility for the Commission to provide prima facie evidence of abuse and to shift on the dominant company the burden of “providing convincing evidence that the conduct does not and will not have the alleged likely exclusionary effect” (¶ 60).

The threshold of prima facie evidence required from the authority alleging the infringement cannot be set too low without jeopardizing the balanced operation of a system which is based on the presumption of innocence. The Guidelines should clarify that a truncated analysis of abuses can be resorted to only in the exceptional cases where shifting the evidential burden on the dominant company is strictly justified.

**Standard of proof**

Exclusionary abuses cause damage to consumers through their impact on market structure. In several circumstances consumer harm may arise only in the medium or long term.

The Discussion Paper underlines that this postponed harm should not be neglected in the application of article 82 (¶ 55). However, the prediction of future harm may be difficult and uncertain. It depends, among other things, on the competitive reactions of rivals and potential entrants. Because of this forecast feature, the standard of proof for the prohibition of unilateral conduct should not be weaker than the one used for vertical
and conglomerate mergers. Or rather it should be stricter since, differently from ex ante merger control, under article 82 the prohibited conduct may be fined. The future harm to consumers cannot be predicted just on the basis of the current foreclosure effect. A consistent story supported by evidence should be provided showing that, in the specific case under consideration, future consumer harm is likely. As required by the Court in the review of decisions concerning conglomerate and vertical mergers, evidence should be factually accurate, reliable and consistent, contain all the information which must be taken into account in order to assess a complex situation and capable of substantiating the conclusions drawn from it.

5.2 Price based exclusionary abuses

In the short term lower prices are beneficial to consumers, even when applied by dominant companies. Therefore, for low prices to be prohibited under article 82 the likelihood should be proven of a significant future consumer harm.

The quasi-per se prohibition system traditionally used in the assessment of discounts under article 82 has been widely criticized. The Discussion Paper usefully proposes a different approach.

**The “as efficient competitor” criterion as a safe harbour**

The Discussion Paper clarifies that only price based exclusionary conduct which would exclude an “as efficient” competitor is abusive. An “as efficient competitor” is a hypothetical competitor having the same costs as the dominant company (¶ 63).

This criterion, already followed in a few cases, is welcome since it excludes that under article 82 the dominant company has a positive duty to favour less efficient competitors. Indeed, a ‘regulatory’ approach requiring the dominant company to favour less efficient competitors would not result in a definite standard of conduct and therefore would be at odds with the prohibition system for the application of article 82, which is accompanied by fines and recovery of damages.

In contrast with the “as efficient competitor” general criterion, a few paragraphs of the Discussion Paper refer to a duty on the dominant company, under article 82, to protect not (yet) as efficient competitors(¶ 67, last two sentences; ¶ 129; ¶ 165). In order to
eliminate unacceptable uncertainties on the legitimate conduct by dominant companies under article 82, all such references should be avoided in the future Guidelines.

Correctly, the “as efficient competitor” criterion is proposed as a safe harbour; outside the safe harbour the Commission should have the duty to assess whether the conduct has a likely negative impact on consumers7.

Cost benchmarks

The “as efficient competitor” approach takes the costs of the dominant company as a benchmark for defining the safe harbour and thus strongly simplifies the analysis8.

Outside the safe harbour, however, in assessing the impact of the price conduct of the dominant company on the market one should consider that the observed costs of the dominant company may reflect historical investment decisions, sometimes imposed by an external constraint, and may therefore exceed the costs of an unconstrained efficient competitor.

5.3 Non-price based exclusionary abuses

For non-price based abuses, such as contractual tying, single branding and refusals to supply, the Discussion Paper does not add further guidance to the general statements contained in paragraphs 54-60. It simply argues that “In these situations it is clear that some “foreclosure” takes place; the question is whether this foreclosure may be characterised as anticompetitive” (¶ 61). Therefore, a rule of reason approach should be followed to assess whether the conduct results in consumer harm.

Parallel to the “as efficient competitor” approach to price-based abuses, some additional indication might be usefully provided for non-price based abuses to exclude that article 82 places on the dominant company a positive obligation to favour

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7 According to ¶ 66, “If examination of a dominant company’s price schedule or rebate system according to these principles leads to the conclusion that an as efficient competitor can compete with the dominant company, the Commission will normally reach the conclusion that the dominant company's price schedule or rebate system is not abusive (safe harbour). If, however, an as efficient competitor cannot compete with the dominant company, the Commission will consider the conduct to have the capability to foreclose competitors and therefore examine the likely market impact of the price schedule or rebate system”.

8 When information on these costs is not available, the assessment becomes significantly more difficult.
competitors. Such an obligation would result in an indefinite benchmark, incompatible with a prohibition system.

In particular the Guidelines might clarify that in order to avoid antitrust liability under article 82 the conduct of the dominant company should not “limit production, markets or technical development to the prejudice of consumers” by creating artificial obstacles; dominant firms are not required to help competitors overcome existing obstacles. Consistently with this approach, the prohibition of refusals to supply has to be narrowly construed.

5.4 Defences: objective justifications and efficiencies

Differently from article 81 of the Treaty, article 82 is not divided in two sections relating, respectively, to the prohibited conduct and exceptions to the prohibition. It only provides the prohibition of the abuse of dominance.

Consistently, with reference to article 82 of the Treaty, Regulation no. 1/2003 only establishes that the burden of proving an infringement is on the parties alleging the infringement or on the enforcing authority and does not contain any specific provision concerning the burden on undertakings to prove that the conditions provided for benefiting from a defence are fulfilled.

According to the case law dominant companies may escape the prohibition of article 82 when they can provide an objective justification for their behaviour. Such justifications must satisfy necessity and proportionality requirements.

In the Discussion Paper the DG Comp qualifies such justifications as stricto sensu defences. Consistently, it argues that the burden of proof is on the dominant company: it is for the undertaking “invoking the benefit of a defence against a finding of an infringement” to demonstrate to the required legal standard that the conditions for applying such defence are satisfied (¶77)\(^9\).

An alternative interpretation of the case-law may argue that objective justifications cannot be considered “defences” in a technical sense, since if a conduct is objectively

justified there is no infringement at all. Of course, under this interpretation the Commission still has the possibility to shift the burden to provide evidence on the actual existence of the justification on the dominant company.

Further consideration of this issue would be appreciable.

The Discussion Paper contains a detailed list of situations which would exclude the admissibility of an objective necessity defence or a meeting competition defence. We suggest to avoid too much detail in the future Guidelines: it would be sufficient to recall the need to satisfy necessity and proportionality requirements and to leave to the courts the assessment of whether these conditions are fulfilled in the specific case under examination.

As for so called efficiency defences, the Discussion Paper proposes a line of reasoning parallel to the one which must be followed when applying article 81(3). In practice, it will be quite difficult to show that the conditions for an efficiency defence are met. More importantly, however, the overall impact of a conduct on consumer welfare should generally be considered at a previous stage, when assessing the alleged infringement. If a conduct is expected to produce net benefits for consumers in the relevant market, this conduct should not be considered an abuse, independently from the formal assessment of whether the four conditions listed in ¶ 84 are fulfilled. In general, there should not be artificial “regulatory” obstacles to the adoption of a conduct which is beneficial for consumers. Only in cases of serious trade-offs (e.g. a significant consumer loss in the short term versus a consumer benefit in the medium/long term) the formal reasoning outlined in section 5.5.3 of the Discussion Paper seems justifiable.

6. PREDATORY PRICING

The Discussion Paper explains that for the purposes of article 82 predatory pricing is the practice where the dominant company deliberately incurs losses or foregoes profits in the short run so as to foreclose rivals “thereby hindering the maintenance of the degree of competition still existing in the market or the growth of that competition” (¶ 93); the company “will make this sacrifice when it considers that it is likely to be able to

recoup the losses or lost profits at a later stage after its actions have had the foreclosure effect. The exclusion should thus allow the predator to return to, maintain or obtain high prices afterwards. Although consumers may have benefited from the lower predatory prices in the short term, in the longer term they will be worse off due to weakened competition resulting in higher process, reduced quality and less choice”.

The Guidelines should usefully provide a further clarification: limit pricing, as such, should not be considered an abuse under article 82.

The Discussion Paper proposes the use of AAC (average avoidable costs) instead of AVC (average variable costs) as the appropriate cost benchmark. For some sectors, in particular network industries, it proposes LAIC (long run average incremental cost) as the proper benchmark.

The calculation of both AAC and LAIC benchmarks is more difficult and uncertain than the traditional calculation of AVC.

In order to evaluate whether the proposed LAIC benchmark represents an improvement, it should be clarified whether in the view of the Commission LAIC takes into account prospective technological developments and innovation. In a dynamic perspective where technological developments and innovation significantly reduce production costs, there may be good reasons for adopting such a LAIC benchmark. The assessment would be different if LAIC was based on historical costs.

The whole issue of cost benchmarks deserves further consideration.

For prices below the AAC or LAIC cost benchmark, the Discussion Paper sets a rebuttable presumption of abusive predation. The presumption should be rebuttable by showing that there is not a market distorting foreclosure leading to recoupment. Since the proper identification of cost benchmarks is often difficult and uncertain, also in these cases it seems advisable to set on the Commission at least the burden to assess that the specific market conditions do not clearly exclude the future recoupment of losses.

For prices above the AAC or LAIC cost benchmark but below ATC, the explanation of how the Commission might prove predation seems too detailed and focuses too much
on intent. It would be preferable just to require the Commission to prove the likelihood of recoupment.

Of course for prices above AAC or LAIC, as explained in ¶123, the dominant company should always be able to defend itself by showing that the conduct will not have an exclusionary effect or recoupment is not possible and therefore consumers are not and will not be harmed.

Finally, for prices above average total costs predation should be excluded altogether. The case Compagnie Maritime (¶ 128) does not provide useful guidance for the application of article 82 to price conduct. Moreover, as already anticipated, the prohibition system of article 82 is not a proper instrument to promote the growth of not (yet) as efficient competitors (¶ 129).

As already emphasized, it should be clear that the dominant company is always allowed to rebut an allegation of predation by showing that the price conduct does not give rise to a market distorting foreclosure leading to recoupment and consumer harm. This possibility should be kept distinct from objective justification or efficiency “defences”.

With respect to abusive prices above AAC, the Discussion Paper allows a meeting competition defence only if it is shown that the response is suitable, indispensable and proportionate. This requirement already provides strict guarantees; we suggest to eliminate the further specification that there should be “no other less anti-competitive means to minimise the losses” and that “the conduct is limited in time to the absolute minimum and does not significantly delay or hamper entry or expansion by competitors”.

7. SINGLE BRANDING AND REBATES

For single branding and rebates the Discussion Paper recognises that both the positive and negative effects depend on several factors: the form of the obligation and/or rebate system, the extent to which it is used by the supplier and the circumstances on the market where they are applied (¶ 138). The Commission will make its assessment of the obligation or system in the light of its foreclosure effects. In that context it will also
consider the possibility that competitors curb and counter the fidelity enhancing potential (¶ 144).

Therefore, the approach is different from a quasi - per se prohibition. For rebates, in particular, the Discussion Paper abandons the much criticised traditional approach under which rebates by dominant companies were generally prohibited unless justifiable in terms of productive efficiencies.

For single branding obligations, which require the buyer on a particular market to concentrate its purchases to a large extent with one supplier, the Discussion Paper adopts a rule of reason approach which is consistent with the current assessment of vertical agreements.

As for conditional rebates on all purchases, the method proposed by the Commission requires to assess whether the effective price over the commercially viable amount which a rival may offer to an individual customer is at least as high as the average total cost of the dominant company. For the Commission to conclude that the rebate system creates a market distorting foreclosure effect all five conditions listed in ¶ 162 must be fulfilled; in particular, the Commission has to assess the incidence of the rebate system on a substantial part of market demand and the absence of clear indications of a lack of foreclosure effect such as aggressive and significant entry and/or expansion by competitors and/or switching of customers. Moreover, the Discussion Paper expressly provides that the dominant company may rebut the Commission’s preliminary conclusion by showing that the rebate system nonetheless does not and will not have a foreclosure effect (¶ 164).

The calculation of the commercially viable amount may be difficult, both for the Commission and for the dominant company. Therefore, in practice it may be wise to start the analysis of an alleged infringement with the assessment of other factors which may exclude the risk of foreclosure (evolution of market shares, incidence of the rebate system with respect to market demand, evidence of absence of obstacles to entry or to expansion of competitors).

When the conditional rebate only applies to incremental purchases above the threshold, the rebate system will be deemed abusive only if the resulting price for these incremental purchases is below average total cost and the part of demand to which the
rebate is applied is important enough to create a foreclosure effect. The presumption of predation where the price of incremental purchases is below average total cost does not seem adequately justified and it is not fully clear how the dominant company might rebut the allegation of abuse. Section 7.2.2. therefore deserves further consideration.

For selective unconditional rebates, the Commission will apply the same rebuttable presumption of predation when the price is below average total costs.

When a single branding obligation or a rebate system with a significant foreclosure effect results in cost savings or provides companies incentives that are beneficial to consumers and to the efficient allocation of resources, like in the examples contained in ¶ 173-175, it is reasonable to allow the dominant company to propose objective justification and efficiency defences.

8. TYPING AND BUNDLING

The Discussion Paper recognises that tying (making the sale of one product conditional upon the purchase of another product) and bundling (offering a package of two or more goods) are common practices in which both companies with and without market power may engage into in order to obtain cost savings and improved quality.

Because of the generally beneficial impact of tying and bundling on competition and consumers, there should be no negative presumption against such practices.

A rule of reason approach may be followed to avoid that in specific cases tying or bundling by dominant companies significantly restrict competition and result in consumer harm.

The Discussion Paper, while adopting a more flexible approach than in the past, especially with reference to mixed bundling, does not completely eliminate the negative presumption against tying and bundling by dominant firms.

For such practices to be prohibited under article 82, the presence of four conditions is usually required: the company is dominant in the tying market; the tying and tied goods are two distinct products; the tying practice is likely to have a market distorting foreclosure effect; the tying practice is not justified objectively or by efficiencies.
With reference to the second condition, the Discussion Paper rightly recognizes that the innovative integration of two products that were previously distinct may change consumer habits so that in the future the combination will be considered one product (¶ 187).

As for the third condition, the Discussion Paper proposes a truncated rule, based more on foreclosure than on market distorting foreclosure (“Where the Commission on the basis of the elements described below finds that the dominant company ties a sufficient part of the market, the Commission is likely to reach the rebuttable presumption that the tying practice has a market distorting foreclosure effect and thus constitutes an abuse of dominant position”, ¶ 188). It would have been preferable to maintain on the Commission the burden to consider whether possible counterstrategies by rivals or customers make the scenario of market distorting foreclosure unlikely. The dominant company should always be allowed to rebut the allegation of abuse by showing the absence of a market distorting foreclosure resulting in consumer harm, with no need to resort to objective justification and efficiency defences. The use of such defences, which in practice is very difficult, should be necessary only in cases where the tying or bundling practices, because of their market distorting impact, have an ascertained negative effect on consumers.

More generally, the evaluation process must be flexible enough to allow a proper consideration of the several possible pro-competitive justifications of tying and bundling, in the assessment of the infringement and when considering defences.

9. REFUSAL TO SUPPLY

The Discussion Paper recognizes that all undertakings, including dominant companies, are generally entitled to determine whom to supply and to decide not to continue to supply certain trading partners (¶ 207).

Moreover, where a dominant company denies a buyer access to an input in order to exclude that buyer from participating in an economic activity (vertical foreclosure) and as a result this undertaking is either driven out of the market, marginalized or prevented from entering the market, the refusal to supply is abusive under article 82 only if it has “a likely anticompetitive impact on the market which is detrimental to consumer welfare”
(¶ 210). Therefore, prejudice to one or more competitors is not sufficient to prove an abuse: a significant negative impact on market competition, capable of harming consumers, is also needed.

In addition, the negative impact on investment incentives of forcing a company to supply is duly taken into account ("The knowledge that they may have a duty to supply against their will might lead companies not to invest in the first place or to invest less. Other companies may be tempted to free ride on the investment made by the dominant company instead of investing themselves. Enforcement policy towards refusals to supply has to take into account both the effect of having more short run competition and the possible long-run effects on investment incentives", ¶ 213).

The Discussion Paper mentions a possible positive effect of the obligation to supply on the investment incentives of the companies which obtain access to the input. Such effect cannot be excluded, but is certainly less direct and more uncertain than the negative effect on the investment incentives of the dominant company. In order to provide guidance for enforcement, the two effects should not be presented as equivalent.

Taking into account the need to prove the significant anticompetitive impact of the refusal to supply as well as the need to consider the influence that an obligation to supply would have on investment incentives, the Discussion Paper establishes that “any obligation to supply pursuant to article 82 can be established only after a very close scrutiny of the factual and economic context” (¶ 214).

Consistently with this sound effect-based approach, any conduct by a dominant company that may be classified in the refusal to supply category cannot be prohibited by a generic reference to the "special responsibility" of the dominant company.

**Termination of an existing supply relationship**

A termination of a supply relationship can only raise problems if the undertaking refusing to supply has, with respect to the input or resource to which access is refused, a dominant position on a defined market (¶ 221; the same should be specified in ¶ 226, for refusals to start supplying an input).
Refusal to start supplying an input

The Discussion Paper clarifies that refusals to start supplying an input are abusive only when the additional requirement of indispensability of the input is fulfilled.

When describing the conditions which make a facility indispensable, it should be specified that the duplication of the facility should not be economically viable for an efficient competitor (¶ 229). The non duplicability should be an objective notion; it is not sufficient that duplication is unprofitable for the plaintiff.\(^{11}\)

In order to clarify the criteria for assessing the likely market distorting foreclosure effect, it seems advisable to specify that “an abuse only may arise when the exclusion of competitors is likely to have a negative effect on competition on the downstream market so as to harm consumers” (¶231). For more effective guidance, we suggest to focus on assessment criteria and to eliminate the examples contained in the last two sentences of paragraph 231.

The inclusion of the “need to maintain investment incentives, taking the risk of failed projects into account” among the objective justifications is of overwhelming importance. It signals an increasing consideration by the Commission of ex ante incentives, consistently with the position already taken in the Notice Guidelines on the application of Article 81(3) of the Treaty. The Discussion Paper expressly recognizes that in some circumstances “the risks facing the parties and the sunk investment that must be committed may thus mean that a dominant firm should be allowed to exclude others for a certain period of time in order to ensure an adequate return on such investment, even when this entails eliminating effective competition during this period” (¶ 235).

In the assessment of refusal to licence IPRs under article 82, it should be recalled that an IPR does not necessarily result in a dominant position on a relevant market. Moreover, intellectual property law already provides compulsory licences for dependent inventions in cases where a second patent cannot be exploited without infringing the first patent and the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent.

\(^{11}\) Case 7/97, Oscar Bronner (1998) ECR I-7791.
Consistently with the case-law, the Discussion Paper states that “only under exceptional circumstances” can the refusal to license an IPR be considered an abuse (¶ 239). In particular, abuse can be excluded where the undertaking which requests the licence intends to limit itself essentially to duplicating the goods or services already offered on the market by the owner of the IPR.

The Discussion Paper also argues that a refusal by a dominant company to license an IPR could be considered abusive when the five conditions required for refusal to start supplying an input (refusal to supply, dominance, indispensability, negative effect on competition, absence of objective justifications) are all fulfilled and “furthermore, the refusal to grant a licence prevents the development of the market for which the licence is an indispensable input to the detriment of consumers”. In this last respect, the Discussion Paper mentions the “new product” criterion developed by the Court in IMS12: “this may only be the case if the undertaking requesting the licence ….intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand” (¶ 239).

The “new product” criterion is less demanding than the requirement of indispensability for a second invention provided for compulsory licences under IP law. A crucial issue is how the novelty requirement should be interpreted in practice. Within a system of effective protection of IPRs the obligation to licence, even by dominant companies, must remain an exception. Therefore, the novelty criterion and the potential benefit for consumers resulting from the obligation to license should not be interpreted loosely.

Paragraph 240 states that a refusal to licence an IPR protected technology “which is indispensable as a basis for follow-on innovation by competitors” may be abusive even if the licence is not sought to directly incorporate the technology in clearly identifiable new goods and services. This criterion is too vague to provide any useful guidance.

As for refusal to supply information needed for interoperability, the Discussion Paper states that “even if such information may be considered a trade secret it may not be appropriate to apply to such refusals to supply information the same high standards for interventions as those described in the previous subsection” (¶ 242).

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12 Case C-418/01, IMS Health (2004), ECR I-5039.
The future Guidelines should not indicate that for trade secrets low standards for interventions are generally adequate. They should clarify that the five criteria normally followed for refusals to start supplying an input, including in particular the requirement of a negative effect on competition leading to consumer harm, must be strictly fulfilled also for refusals to supply information.

10. AFTERMARKETS

The Discussion Paper usefully emphasizes that the assessment of unilateral conduct in aftermarkets requires a careful identification of the relevant markets with respect to which dominance has to be evaluated.