

Response to
DG Competition discussion paper on the
application of Article 82 of the Treaty to exclusionary abuses



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INTRODUCTION AND EXECUTIVE SUMMARY

Freshfields Bruckhaus Deringer welcomes the opportunity to comment on DG Competition's discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (*the Discussion Paper*). Our competition practice comprises over 250 lawyers in offices in Europe, the US and Asia and we are frequently called on to advise clients on the legal implications of the exercise of market power, both within the EU and beyond, and both as defendants and complainants in competition law enforcement proceedings.

The comments contained in this submission reflect and synthesize many of the views expressed in several workshops and seminars organised by Freshfields Bruckhaus Deringer in various offices and including representatives of many companies doing business in the EU, current and former competition enforcement officials, academic and consulting economists, and competition lawyers from across the firm's network. This submission does not necessarily represent the position of any individual client or participant in these workshops and seminars, including individual Freshfields Bruckhaus Deringer lawyers.

We very much welcome the Commission's initiative in opening up a policy debate and attempting to formulate guidance in this difficult area. Benefiting from this opportunity to comment, we set out in this response some suggestions on ways in which the approach proposed by the Discussion Paper could be developed and amended so as better to achieve the aims stated there.

1. GENERAL REMARKS AND SUMMARY OF MAIN SUGGESTIONS

1.1 This review of Article 82 enforcement policy is a very positive step, not least because it seeks to bring the Commission's approach in this area into line with its approach to Article 81, where it has for some years now been focusing on the market effects of conduct rather than the legal form of that conduct. Awareness and understanding of competition economics, and therefore of the impact of given behaviour on markets, has increased in the competition law community in recent years. In the light of these developments it is therefore correct that the Commission should be extending an effects-based approach grounded in economics to its application of Article 82, and that it should take the initiative in establishing new approaches to old issues, even where EU case law already exists.

The concept of dominance

1.2 As far as the assessment of dominance is concerned, in order to address the need for legal certainty we encourage the Commission to introduce, as a matter of enforcement policy, a clear safe harbour at a market share level of no less than 40% below which dominance will not be found except in truly exceptional circumstances, together with a clear statement that there is no automatic finding of dominance above that threshold. While we recognise it would be inconsistent with an effects-based approach to create an absolute safe harbour, such a threshold should represent a strong presumption of legality. While it should be clearly stated that dominance would be found below this market share only in highly unusual circumstances, examples should be given of circumstances in which the presumption could be rebutted. In connection with abuse of collective dominance we suggest that it be made clear that it will only

be found in exceptional circumstances, and that specific guidance be given as to what conduct by an individual company can constitute abuse of collective dominance.

1.3 The analysis of dominance and abuse need to be retained as two separate steps, not only for legal reasons but also because the dominance test should act as an important filter, ensuring that issues of abuse are investigated only in cases where there are real risks of anti-competitive foreclosure effects on the market, and that companies are not unnecessarily inhibited in their commercial decision-making by the fear of being held to have infringed Article 82. However, the Discussion Paper is right to make the connection between these two elements, to the extent that it advocates a “sliding scale”, so that the higher the level of market power (but not necessarily of market share), the higher the likelihood that given conduct will be found to cause foreclosure of the market.

The concept of abuse

1.4 As to the general concept of abuse, there is a need to develop a more concrete definition, both to ensure consistency across the different types of abuse discussed in the Discussion Paper and to provide guidance in situations not expressly covered by any precedent. Also, the abuse analysis should itself incorporate consideration of efficiencies. A unified approach is required legally and is conceptually more satisfactory than considering efficiencies as a separate, subsequent step.

1.5 The Commission is correct to propose abandoning absolute *per se* prohibitions for specific types of conduct (e.g., exclusivity), but retaining some form-based rules, based on sound economic principles. Formal rules often are necessary for the efficient and practicable administration of the law. Such form-based rules should take the form as far as possible of clearly formulated presumptions, thereby striking a balance between providing a reasonable level of legal certainty and allowing companies to use economics-based arguments to rebut the presumptions where exceptional circumstances justify this. Such presumptions should be based on substantial experience in prior cases and/or uncontroversial economic empirical record. It is also important that the rules be sufficiently clear for companies to assess the legality of their conduct without applying complex economic concepts, as there are many situations in which decisions need to be taken quickly or where a resource-intensive economic assessment is not commercially justified. Any guidance should expressly state where such form-based presumptions are being established, and also indicate in what circumstances rebuttal is feasible, without unduly restricting such circumstances. Such an approach leaves open a genuine option of recourse to sophisticated economic tools where the issue is sufficiently important for a company to decide to devote the necessary resources to it. Importantly, even where presumptions may shift the burden of producing arguments and evidence, the ultimate burden of proving anticompetitive effects should remain with the competition authority or other plaintiff alleging an infringement.

1.6 Given that Article 82 will frequently be applied in situations where the alleged foreclosure effects have not yet occurred, but are said to be likely to do so in the future, it would be useful to state that particularly plausible evidence of the likelihood of such effects is necessary.

1.7 The Discussion Paper at some points suggests indirectly the application of an “appreciability” criterion under Article 82. It would be useful to include a clearer statement in connection with the “effects-based” approach that such effects must be appreciable before an infringement will be found.

1.8 Finally, published guidance on these issues is highly desirable. Such guidance must be drafted in the light of the fact that Article 82 will be applied not only by the Commission but also by national competition authorities (*NCA*s), and by national courts. Whilst many *NCA*s may be expected to have a similar level of expertise to that of the Commission, national courts throughout the EU may need more assistance. This is particularly so given that private enforcement of competition law is increasing in importance as a means of controlling unilateral conduct, and that the possibility of seeking rapid national court injunctions may frequently be appropriate in cases involving abuse of market power.

Main suggestions

1.9 In summary, our main suggestions in relation to the different sections of the Discussion Paper are as follows:

Market definition and dominance

- The SSNIP test, though not always appropriate in Article 82 cases, should be used wherever possible.
- Guidance should include the introduction, as a matter of enforcement policy, of a safe harbour at a market share level of no less than 40% below which dominance will not be found except in truly exceptional circumstances, together with a clear statement that there is no automatic finding of dominance above that threshold.
- The Commission should deal explicitly with the specific issues raised by the assessment of dominance in heavily regulated sectors, nascent markets and bidding markets.
- The concept of abuse of collective dominance should be limited to situations of high market concentration and even then should apply only where there is a structural or contractual link or evidence of concerted action.

Framework of analysis of exclusionary abuses

- Where a presumption applies to a specific type of conduct this should be clearly stated, as should the circumstances in which the presumption may be rebutted.
- In situations where the alleged foreclosure effects have not yet occurred, but may do so in the future, particularly plausible evidence of the likelihood of such effects should be required to establish abuse.
- A more concrete definition of abuse needs to be developed and it should be clearly stated that certain efficiency factors (e.g., having an efficient distribution network) do not constitute abuse.

- The efficiencies defence should be incorporated into the abuse analysis and not applied as a separate step. It should not be limited to situations of market share below 75%.
- There should be an express “appreciability” test, requiring that foreclosure effects be more than *de minimis* before an infringement can be found.

Predatory pricing

- It should be made clear that predatory pricing must be established on the basis of objective evidence, including the likelihood of recoupment, which as a matter of enforcement policy should be applied at an early stage to predatory pricing allegations, as a filter to decide whether the case should be taken further.
- Predatory pricing should never be found above average total cost (*ATC*). The circumstances in which it may not be found below average variable or avoidable cost (*AVC* or *AAC*) should be clarified.
- Generally, the meeting competition defence should be available in predatory pricing cases.

Single branding and rebates

- The rules on single branding and rebates should be clarified so as not to stifle legitimate pricing schemes. In particular, clear guidance is needed as to how the test should be applied to different types of rebate. The method proposed for analysing conditional rebates should be amended as it is confusing and unnecessarily complex.
- The Commission should clarify whether there is an analytical distinction between the various types of rebate to reflect the varying severity of the possible economic effect and, if so, outline more clearly how each type of scheme should be treated.
- Further guidance should be provided on critical concepts such as the “commercially viable share” and the “required share”.
- Rebates resulting in an effective price below ATC should not lead to an automatic presumption of abuse. The same cost benchmarks should be used for predatory pricing as for single product rebates – and for bundled rebates.
- It should be clarified that the length of the reference period is relevant to the foreclosure analysis.

Tying and bundling

- The “distinct products” concept requires refinement, in particular to avoid discouraging technological innovation.
- Clearer indication of when there may be foreclosure effects is required.

Refusal to supply

- The exceptional nature of abuse through refusal to supply should be stated more clearly.
- Only refusals to supply which lead to a substantial reduction of competition should be capable of being an abuse, and not those that merely have (or are likely to have) a negative effect on competition.
- “Demonstrable potential consumer demand” for the downstream product should be a requirement of a finding of abuse.
- The same analysis should apply to refusals to supply regardless of whether or not they represent the termination of an existing supply relationship.
- The approach to refusal to licence IP rights should be clarified to avoid serious interference with patent protection and incentives to innovate.
- A “no economic sense” test might be useful in connection with refusal to supply, but even if it is not adopted, there is no justification for imposing a particularly high burden on dominant companies seeking to establish a defence.

Aftermarkets

- Competition in the aftermarket increasingly takes place at the time of the original equipment sale. In these circumstances, there should be a clear presumption that there is no separate aftermarket to be dominated by the equipment supplier.
- The distinction made between existing and future customers is unnecessary and would result in the finding of separate aftermarkets in situations where this is not justified.
- The suggestion that a “change of policy” may cause a company to become dominant should be deleted as this may dissuade suppliers from pro-competitive behaviour.

These suggestions are explained in further detail below.

2. MARKET DEFINITION AND DOMINANCE

2.1 The SSNIP test, though not always appropriate in Article 82 cases, should be used wherever possible.

2.1.1 As a general point, the Discussion Paper is right to point out the limitations of the SSNIP test in the context of Article 82 (paras. 13-15). However, the SSNIP provides an objective standard that should be used whenever possible. This would ensure both internal consistency in the analysis of the various elements of a particular case and would improve consistency and predictability of analysis across cases.

2.2. Guidance should include a safe harbour at a market share level of no less than 40% below which dominance will not be found except in truly exceptional circumstances.

2.2.1. The references to various market share thresholds (para.31) are a cause for concern, as they could be understood as creating presumptions of dominance at quite low market shares levels. More satisfactory would be the establishment, as a matter of enforcement policy, of a safe harbour at 40 or 50%, together with a clear statement that there is no automatic finding of dominance above that threshold. For companies with very many product lines the use of such thresholds is the only practical way of proceeding, and any lower threshold would have a high cost in terms of reduced investment incentives. On the other hand, in certain circumstances, dominance may exist at low market share levels, and it should be made clear, by the use of examples, in what type of circumstances this may occur.

2.3 The Commission should deal explicitly with the specific issues raised by the assessment of dominance in heavily regulated sectors, nascent markets and bidding markets.

2.3.1 The liberalisation of legal monopolies (e.g., in the energy sector) often involves a high degree of sector regulation. Guidance is needed on assessing dominance in cases where such sectors are concerned.

2.3.2 In nascent markets (i.e., markets in the process of liberalisation or the development of new products) the risk of monopolisation is real but the changing nature of the regulatory framework (i.e., from a legal monopoly to a liberalised activity) or the pace of change in the relevant economic environment (i.e., the development of a new high tech products) complicates this task. It is important to clarify how the assessment of dominance is carried out in such markets. For example, in the case of markets that are in the process of being opened or are liberalised recently, exclusionary strategies may be implemented *before* the final elimination of the legal barriers but the anti-competitive effects occur only *after* the actual market opening. Thus, it would be useful to state clearly that, in assessing dominance, it is necessary to take into account the market structure also at the time when the relevant behaviour takes place and not only in the period in which the investigation is carried out. Similar considerations apply in markets where the high degree of technological development and innovation is key and exclusionary strategies may prevent the emergence of new markets or may impede the growth of existing or new competitors.

2.3.3 Bidding markets have distinctive features that may require a specific dominance analysis. For example, it may be useful to provide some precise guidance

on whether and to what extent past bidding practices may be relevant (e.g., how many bids need to be considered? What are the relevant elements to consider? How far back should one look?), and some guidance could be given as to the relevance of the role played by other bidders in past bids. Guidance should also consider the fact that in some bidding markets bid-takers often have far more control over the competitive process than an ordinary buyer does. Also, there are cases where dominance may derive from links or marketing activity *vis-à-vis* the bid-taker itself; and cases where the winner may set technology standards which may influence the subsequent bids. Another consideration is whether particular design of bidding procedures can foster/reduce market power.

2.4. The concept of abuse of collective dominance should be limited to situations of high market concentration and even then should apply only where there is a structural or contractual link or evidence of concerted action.

2.4.1 The Discussion Paper states that in order to establish collective dominance, it is necessary to examine the legal or factual connecting factors in particular in the light of the relevant market structure (para.46). For the analysis of the factual connecting factors, it refers to the collective dominance test developed by the Court of First Instance in the *Airtours* case. However, it may be that a different test is needed here since merger cases deal with future effects and Article 82 is frequently applied to existing or past effects. In the merger context, the prospective analysis aims at identifying and preventing the creation of market structures that would increase the likelihood of express or tacit collusion *amongst the market players*, to the detriment of consumers. In Article 82 cases, the concern is that, *through the exclusion of competitors*, a collectively dominant entity has harmed or is harming consumers. In this situation it is not appropriate to ask whether “the common policy” (i.e., the exclusion of a competitor) is sustainable over time, or to assess whether “external competitive constraints” are capable of jeopardizing the implementation of the common policy.

2.4.2 Whatever the test adopted, it should be clearly stated that abuse of collective dominance in the context of Article 82 will be found only in exceptional situations of very few market players and a high degree of market concentration, and only where there is a structural or contractual link or evidence of concerted action. Clear guidance should also be given on what conduct by an individual company, if any, can constitute abuse of a collective dominant position.

3. FRAMEWORK FOR ANALYSIS OF EXCLUSIONARY ABUSES

3.1 A more concrete definition of abuse needs to be developed and it should be clearly stated that certain efficiency factors (e.g., having an efficient distribution network) do not constitute abuse.

3.1.1 While the move towards a general standard for abuse based on an effects-based approach focused on consumer welfare is to be welcomed, the approach set out in the Discussion Paper is in fact based on a combination of an effects analysis and form-based presumptions. This is a sensible compromise. However, an effects-based approach requires a clearer and more concrete definition of abuse, as it is crucial to have guidance on how to distinguish between a company competing aggressively but legitimately for market share and a company committing on abuse.

3.1.2 For example, it would be helpful to have clear guidance that, save in exceptional circumstances, a firm will never commit an abuse simply by adopting strategies which are more efficient than its competitor(s) for example by having an excellent distribution network or technological leadership. While para. 54 does state that the purpose of Article 82 “*is not to protect competitors from dominant firms’ genuine competition based on factors such as higher quality, novel products, opportune innovation or otherwise better performance*”, paras.55 and 67 may be read as conflicting with this. Also, examples of barriers to entry cited in the Discussion Paper include branding and reputation, and high quality distribution and sales networks. Though these relate to dominance rather than abuse, they could suggest an “efficiency offence”.

3.2 The efficiencies defence should be incorporated into the abuse analysis and not applied as a separate step. It should not be limited to situations of market share below 75%.

3.2.1 The Discussion Paper does not present efficiencies as part of the abuse analysis but rather as a separate stage of the analysis. Legally, conceptually and practically this is unsatisfactory, as Article 82 refers simply to “abuse” and does not provide for “defences”. In addition, under an effects-based approach the right conclusion as to the consumer welfare effects can, we suggest, only be drawn by a unified consideration of the evidence as a whole. There is no principled way to separate out the efficiency analysis from the foreclosure analysis.

3.2.2 Nor is there, under an effects-based approach, any justification for restricting the relevance of efficiencies to cases where the relevant market share does not exceed 75%.

3.2.3 As for the burden of proof, contrary to what is stated at para.77, such issues should be considered as part of the abuse analysis as Article 2 of Regulation 1/2003 states, without qualification, that the burden of proof of an infringement of Article 82 is on the party or the authority alleging the infringement.

3.3 There should be an express “appreciability” test, requiring that foreclosure effects be more than *de minimis* before an infringement can be found.

3.3.1 The Discussion Paper at some points suggests indirectly the application of an “appreciability” criterion under Article 82. For example, in connection with tying “*a sufficient part of the market*”, it states that there is likely to be a market-distorting foreclosure effect (para.188). An express statement that any foreclosure effects must be appreciable before an infringement will be found, is to be favoured.

3.3.2 Ultimately, of course, the test for an infringement should be whether the competitive foreclosure has an adverse effect on consumer welfare and consumer choice in the relevant market(s).

4. PREDATORY PRICING

4.1 It should be made clear that predatory pricing must be established on the basis of objective evidence, including the possibility of recoupment, which as a matter of enforcement policy should be applied at an early stage to predatory pricing allegations, as a filter to decide whether the case should be taken further.

4.1.1 The Discussion Paper's approach to predation is overly formalistic, focusing more on finding the right cost benchmark and comparing prices and costs, rather than on attempting to grasp the underlying economic rationale behind the commercial/pricing policy of an undertaking and to identify the market conditions which lead to predation. The key issues when trying to determine if an undertaking has engaged in predatory pricing should be first to determine if this behaviour could be explained otherwise than as an attempt to impede competition. Below cost pricing is only anti-competitive if it leads to an impediment of competition. Indeed, low prices are clearly beneficial to consumers.

4.1.2 Direct evidence of strategy or intent should also be considered an important influence on the interpretation of objective evidence and important evidence of the likely effects of a firm's pricing conduct, although it should not serve as a substitute for the elements of the violation.

4.1.3 Furthermore, the static approach set out in the Discussion Paper may be appropriate for one-off products/services, but does not take into account time issues, which are particularly relevant for more complex products/services which generate costs and revenues over a longer period of time.

4.1.4 As to recoupment, this should be an essential element of predatory pricing, although proof of a likelihood of recoupment should be sufficient (without the need to prove effective recoupment). This is partly because the broad definition of barriers to entry used by the Commission means that a finding of dominance does not necessarily mean that the necessary market conditions for recoupment are present. In addition, by requiring no separate proof of the likelihood of recoupment, the Commission tends towards prohibiting low pricing *per se*, and thus moving away from its consumer protection objective.

4.2 Predatory pricing should never be found above ATC, and the circumstances in which it may not be found below AVC/AAC should be clarified.

4.2.1 It is important to stress explicitly that below cost pricing is only an issue to the extent that it harms competition, and ultimately consumers, by excluding efficient competitors of the dominant undertaking. Indeed, it would be worth making it clearer that genuine competition from a more efficient dominant firm is perfectly legitimate, and that dominant undertakings are entitled in principle to enter into price competition.

4.2.2 With respect to the proposed cost benchmark, using an AAC benchmark tends to make the predation test harsher (as recognised in footnote 68). Moreover, introducing a new cost benchmark, which departs from the Court of Justice's case law, may lead to increased legal uncertainty.

4.2.3 Furthermore, it is not justified to treat pricing below AVC/AAC as an almost *per se* prohibition (as at para.109), without even indicating when pricing below AVC/AAC could be found competitive. A better approach would be a presumption that prices above AVC/AAC are not abusive other than in very exceptional circumstances. Para.131 on objective justifications and efficiencies mentions that below cost pricing can be justified in very rare cases but says that this is unlikely for pricing below the AAC benchmark, and para.133 states that an efficiency defence can in general not be applied to predatory pricing. It would be preferable to state the circumstances in which prices can legitimately be established by a dominant undertaking at a level below AVC/AAC. For example, this may be justified by network or learning effects but also in the context of making new products known to consumers.

4.2.4 The Discussion Paper provides that even prices above ATC can be predatory, for example “*where a single dominant company operates in a market where it has certain non-replicable advantages or where economies of scale are very important and entrants necessarily will have to operate for an initial period at a significant cost disadvantage because entry can practically only take place below the minimum efficient scale*” (para.129). This amounts to requiring dominant companies to assist new entry, which goes beyond preventing abuse of dominance. Instead it should be clearly stated that pricing above ATC will never be found predatory (the same comment applies to para.190 of the Discussion Paper, which cross-refers to para.129).

4.3 The meeting competition defence should be available in predatory pricing cases.

4.3.1 With the exception of selective price cuts that are part of a strategy to force out competitors, a dominant firm should be allowed to align its prices to those of its competitors, even if this results in pricing below cost.

4.4 Proposed alternative approach to analysis of predation.

4.4.1 In the light of the foregoing, a more structured analytical approach to predatory pricing would include the following steps:

- step 1: do the market conditions make predation (i.e., elimination or reduction of competition) possible?
- step 2: can an objective predation strategy be established, and with sufficient elements of proof?
- step 3: is recoupment of losses likely?
- step 4: comparison of price and costs.
- step 5: are there any efficiencies/objective justifications?

4.4.2 Such an approach would be more convenient and easier to use and, importantly, it would rule out the risk of condemning an undertaking for low prices which were in fact to the benefit of consumers.

5. SINGLE BRANDING AND REBATES

5.1 As a general matter, these rules should be clarified so as not to stifle legitimate pricing schemes.

5.1.1 We recognise that the concepts being described in this section are complex ones to articulate but are nonetheless concerned that as drafted, it will be difficult for the business community and advisers to apply the principles outlined in practice.

5.1.2 We are concerned that the drafting of the section is unclear and hard to follow in places. Such a lack of clarity may have negative implications for the degree of legal certainty available to dominant companies wishing to operate legitimate pricing schemes. In view of the significant financial and reputational costs of fighting an abuse case, dominant companies may continue to err on the side of caution – thus depriving their trading partners of the benefits of perfectly legitimate pricing schemes – rather than venturing into uncertain territory.

5.2 The Commission should clarify whether there is an analytical distinction between the various types of rebate to reflect the varying severity of the possible economic effect and, if so, outline more clearly how each type of scheme should be treated.

5.2.1 The Discussion Paper distinguishes between unconditional and conditional rebates. Unconditional rebates (as described) are more akin to selective price cuts and as such, would sit more comfortably with a discussion of discriminatory practices, which is outside the scope of the Discussion Paper. Most of the discussion in the Discussion Paper focuses on “conditional rebates”, a term which groups together all rebates “*designed to reward a certain purchasing behaviour*” (para. 151).

5.2.2 The use of this unfamiliar taxonomy (instead of the more usual labels such as “roll back rebates”, “incremental rebates” and “target rebates”) makes it difficult to establish whether the Commission considers that there is any analytical distinction to be drawn between the different types of conditional rebate schemes. This uniform approach is at odds with the varying severity of the economic effects of different types of rebates and indeed with other statements in the section:

- (a) para.138 states clearly that “*Both the positive and negative effects [of the scheme] depend on the form of the single branding obligation and/or rebate system*”;
- (b) para.151 goes even further stating: “*It makes an important difference for the assessment whether the rebate is granted on all purchases during that period or only on incremental purchases above the threshold. It will also be important for the assessment in what terms the threshold is formulated, for instance as a percentage of total requirements of the buyer, as an individualised volume target or as a standardised volume target*”; and
- (c) paras.159 and 169 state that standardised roll back and incremental rebates are “*less likely*” and “*unlikely*” to have loyalty enhancing effects, in comparison with individualised schemes.

5.2.3 The Commission should clarify whether it believes there to be an analytical distinction between the various types of rebate to reflect the varying severity of the possible economic effect and, if so, to outline more clearly how each type of scheme should be treated.

5.3 Further guidance should be provided on critical concepts such as the “commercially viable share” and the “required share”.

5.3.1 Paras.154–158 of the Paper are extremely difficult to follow, both conceptually and in terms of the drafting. In particular, there is insufficient explanation of critical concepts such as the “commercially viable share” and the “required share” which are used throughout the remainder of the section to assess whether a rebate system is likely to have anticompetitive effects.

5.3.2 By way of example, para.155 of the Paper discusses how “*as a first step*” the Commission will consider the actual market shares of competitors and their shares of the customers’ requirements, while para.156 outlines another approach based on the commercially viable share. However, it seems to us that these are essentially the same assessment – in effect, the Commission is stating that it intends to use the shares of actual rivals as a proxy for the commercially viable share. The methodology described by the Commission would be simpler and more easily understood if one uniform approach is set out.

5.3.3 As regards the concept of the commercially viable share, the Commission should consider whether it has provided enough guidance to allow a dominant company to determine this variable in any particular case, as it appears open to more subjective value judgments than other elements of the assessment (such as the required share, average total costs and avoidable costs). In particular, the term “minimum efficient scale” needs further explanation and more guidance is required as to how the “likely” scale of entry or expansion by new entrants and incumbent competitors is to be estimated, and the assumptions that need to be made in doing so.

5.4 Rebates resulting in an effective price below ATC should not lead to an automatic presumption of abuse. The same cost benchmarks should be used for predatory pricing as for single product rebates – and for bundled rebates.

5.4.1 The Discussion Paper introduces (para.154) a presumption of abuse where a rebate results in an effective price below ATC.

5.4.2 There are two important concerns in relation to this proposed approach:

- (a) transferring the burden of proof to the dominant company at this stage of the analysis is inconsistent with Article 2 of Regulation 1/2003 which states that “*the burden of proving an infringement of Article 81(1) or Article 82 of the Treaty shall rest on the party or the authority alleging the infringement*”; and
- (b) it shifts the burden of proof to the dominant company at an early stage of the analysis and places the dominant company in a worse position under a rebate scheme than under a predatory pricing analysis (whereas under the *Akzo* case law, only prices below AVC are presumed abusive).

5.4.3. Instead, the same cost benchmarks should be used for predatory pricing as for single product rebates – and for bundled rebates.

5.5 It should be clarified that the length of the reference period is relevant to the foreclosure analysis.

5.5.1 The Discussion Paper suggests (at para.161) that “*in most cases the length of the reference period has no bearing on the loyalty enhancing effect*” of the rebate. Not only does this appear to contradict the approach of the CFI in *Michelin II*, but as a matter of principle, the length of the period must be relevant to the incentives generated by the rebate and therefore to the foreclosure analysis.

5.5.2 Moreover, the statement sits rather uncomfortably with the remainder of para.161 which outlines two seemingly commonplace scenarios in which the length of the reference period is relevant to the assessment, suggesting that it is not appropriate to dismiss it as a matter of principle.

6. TYING AND BUNDLING

6.1 The “distinct products” concept requires refinement, in particular to avoid discouraging technological innovation.

6.1.1 In its analysis of the “distinct products” requirement (paras.185-187), the Commission focuses on the existence of separate consumer demand for the tying product and the tied product, but this test is not always helpful, especially where technologically integrated products are concerned, as it focuses on the existence of consumer demand in the past.

6.1.2 As a result, a firm that merges distinct technologies risks being condemned as having tied two separate products because at the moment of product integration there appeared to be a separate consumer demand. Such an approach may therefore stifle product innovation.

6.2 Clearer indication of when there may be foreclosure effects is required.

6.2.1 In the case of single branding the Commission has set out a detailed framework for assessing foreclosure, indicating that these may arise where loyalty-enhancing rebates would preclude competitors from operating on a minimum commercially viable scale. A similar tool for analysing whether tying and bundling are anti-competitive would be useful, since the Discussion Paper’s wording on this point does not provide sufficient guidance.

6.2.2. Evidence of substantial efficiencies resulting from the tying arrangement and/or that suggests the tying arrangement is an industry practice should preclude an Article 82 tying claim.

7. REFUSAL TO SUPPLY

7.1 The exceptional nature of abuse through refusal to supply should be stated more clearly.

7.1.1 The Discussion Paper expressly acknowledges the restriction of abuse to exceptional circumstances only for the licensing of IP rights. In view of the great importance that is placed on contractual freedom both in the laws of the Member States and in Community law, the exceptional nature of abuse through refusal to supply should be reflected more clearly in any published guidance.

7.2 Only refusals to supply which lead to a substantial reduction of competition should be capable of being an abuse, and not those that merely have a negative effect on competition.

7.2.1 According to the Discussion Paper abuse may arise where the exclusion of competitors is likely to have a negative effect on competition on the downstream market. The substantial reduction of competition should be an essential criterion of abuse through refusal to supply.

7.3 “Demonstrable potential consumer demand” for the downstream product should be a requirement of a finding of abuse.

7.3.1 The precondition established in case law that there must be a “demonstrable potential consumer demand” for the downstream product (to be produced/delivered by the undertaking requesting supply) is absent from the Discussion Paper. Such a precondition is of particular importance where the undertaking requesting supply asserts that the supply is required for the development/manufacture of a future product. Without demonstrable potential consumer demand the refusal to supply has no competitive significance.

7.4 The same analysis should apply to refusals to supply regardless of whether or not they represent the termination of an existing supply relationship.

7.4.1 The Discussion Paper sets a lower threshold for the establishment of abuse in the case of termination of supply as compared with refusal to start supplying. The preconditions for the establishment of an abuse should be the same in each case. It is clear that in some concrete “termination of supply” cases certain conditions are more likely fulfilled than in cases of refusals to commence supply (e.g., where there has been a previous history of dealing it may be harder for the dominant undertaking to explain why there has been a change of circumstances which objectively justify a termination of supply). Also, there may be factual circumstances where termination of supply makes no economic sense but for exclusionary effects. However, this is a matter of evidence and does not justify the use of a different test.

7.5 The approach to refusal to licence IP rights should be clarified to avoid serious interference with patent protection and incentives to innovate.

7.5.1 The Discussion Paper recognises that an obligation to grant an IP licence would deprive the holder of the substance of the exclusive right and, therefore, can only be considered abusive under exceptional circumstances. However, this is at odds with other statements. The aspect raising the most concern is para.240 which

envisages compulsory licensing “*even if the licence is not sought to directly incorporate the technology in clearly identifiable new goods and services*”. This approach seriously interferes with patent protection and incentives to innovate.

7.5.2 It is not clear on the face of the Discussion Paper whether refusal to continue an IP licence would be considered as refusal to continue an existing supply relationship or as refusal to license an IP right. As stated above, no distinction should be made between the refusal to commence new commercial relationships and the termination of an existing commercial relationship, and that this is even more important in the context of IP rights.

7.6 A “no economic sense” test might be useful in connection with refusal to supply, but even if it is not adopted, there is no justification for imposing a particularly high burden on dominant companies seeking to establish a defence.

7.6.1 It may be worth considering the value of the “no economic sense” test in determining whether a refusal to supply, or to continue to supply, can be objectively justified. If the refusal to supply makes economic sense even in the absence of exclusionary effects it may indicate that the refusal is objectively justified. However, the Discussion Paper suggests that, where a dominant company argues that it is terminating a supply relationship because it wants to integrate downstream, it must “*show that consumers are better off with the supply relationship terminated*”, which imposes a particularly high burden on dominant companies which even goes beyond showing that the *status quo* would be maintained following the termination of an existing supply arrangement. Even in the absence of a “no economic sense” test, there is no reason for a particularly high burden on the defence of dominant companies in cases of abuse through refusal to supply.

7.6.2 In particular, according to the Discussion Paper, it may be possible to justify a refusal to license an IP right if exclusive use of the right is required in order to ensure that the undertaking can recoup the investment it has made in creating that IP right (para.235). Consequently, within the framework of the efficiency defence, it is necessary to show that the ability to refuse to deal with others was indispensable to the initial investment. Conversely, the Discussion Paper indicates that a refusal is more likely to be deemed abusive where the investment which led to the indispensable input would have been made even if the investor had known that it would have a duty to supply. The efficiency defence should prevail whenever the refusal to deal is indispensable to the initial investment, and it should not be decisive whether the indispensable input had been made despite knowledge about the future duty to supply. First, any undertaking making an investment would have to know that there *could* be a duty to supply. Secondly, the argument is circular as, in principle, there cannot be a duty to supply where the refusal was indispensable to the initial investment, but – according to the Commission – there would be a duty to supply if the refusal was indispensable to the investment and the dominant undertaking knew about there being a duty to supply.

7.6.3 Similarly, in the case of refusal to supply information for interoperability it may as a matter of evidence be easier to show that the indispensability test is not met, but in principle, the criteria should be identical for refusal to supply information for interoperability and refusal to license IP rights.

8. AFTERMARKETS

8.1 The distinction made between existing and future customers is unjustified and would result in the finding of separate aftermarkets in situations where this is not justified.

8.1.1 The Discussion Paper correctly notes the importance, in cases involving aftermarkets, of competition in the primary market, both in assessing whether there is a separate aftermarket and in analysing whether there is dominance and abuse on that market. However, there should be a clear presumption that there is no separate aftermarket where competition for the aftermarket takes place at the same time as the original equipment sale. Furthermore, it is not desirable to distinguish, as the Commission does, between existing and future customers. Existing customers were once future customers, and will again be future customers if and when they come to replace their primary market purchase. Existing customers will also be protected by the effect on the supplier's reputation of its aftermarkets policy.

8.1.2 As to "installed base opportunism", the Discussion Paper correctly recognises that this will occur only in very specific market circumstances, and that purchasers should be able to protect themselves contractually from such conduct.

8.2 The suggestion that a "change of policy" may cause a company to become dominant should be deleted as this may dissuade suppliers from pro-competitive behaviour.

8.2.1 The suggestion that a "change of policy" (para.261) may cause a company to become dominant may dissuade suppliers from pro-competitive behaviour such as making aftermarket products available to independent suppliers or repairers. A supplier may at one time wish to involve third parties in its commercial strategy, for example to expand into new geographical areas or to achieve better local coverage by supplying and even providing training to third parties.

8.2.2 The Discussion Paper's wording may discourage such pro-competitive behaviour as it indicates that such a firm may later not be able to change its policy so as to provide the relevant parts and services itself without becoming dominant, and thereby running a greater risk of being held to infringe Article 82.

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