1 INTRODUCTION

1.1 Burges Salmon LLP ("Burges Salmon") welcomes the opportunity to respond to DG Competition's Discussion Paper on the Application of Article 82 to 'Exclusionary Abuses' ("the Discussion Paper").

1.2 We support the progress made towards an economics based approach to the implementation of Article 82 – in a similar way to that now in place for Article 81 and the EC merger control regime following the recent reviews in those areas. However, we feel that it is necessary to go further towards an economics based approach than the position adopted by the Discussion Paper. Indeed, while the Discussion Paper takes some steps forwards in some places, there are often corresponding retrenchments to the old-style legalistic approach in other places. In particular, the first part of the paper focuses on what might be termed a 'brave new world' of economics based assessments, however, when the latter stages on individual abuses are reached we find ourselves firmly back in established methodology.

1.3 Section 2 of this response sets out our view of how Article 82 should be applied bearing in mind on the one hand the economic nature of the test and on the other hand the legal context and consequences involved. In this connection, Burges Salmon generally agrees with the line of approach advocated in the EAGCP Report "An economic approach to Article 82" (July 2005) ("the EAGCP Report"). The focus for testing whether a commercial activity amounts to an abuse of a dominant position should be on whether it harms consumers, not how it has impacted on competitors. However, we do not necessarily agree with all of the proposals in the EAGCP Report, and would, in particular, be very cautious about the increased use of economic modelling techniques to inform decision-making.

1.4 Section 3 of this response sets out our response to some particular issues raised by the Discussion Paper.

2 APPLICATION OF ARTICLE 82

Background

2.1 Article 82 of the EC Treaty states:

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited..."

2.2 As the Discussion Paper states: "[t]he essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources" (emphasis added). In our view, this is the right way to approach the question of abuse under Article 82, with the focus on consumer welfare.

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1 Although, ultimately, determining the effect on consumers will often involve as one aspect looking at the effect on competitors.

2 Paragraph 54.
2.3 The question for the European Commission, is how this can be achieved given:

(a) the existing case law of the European Court of Justice that tends to focus on a more legalistic/form-based approach to assessment, which is arguably more suited to protecting competitors than consumers; and

(b) the practical problems of developing appropriate economic methods for applying the effect on consumers test.

Historical approach to Article 82

2.4 Historically, in our view, Article 82 seems to have been applied with more emphasis on competitors than on consumers. One reason for this may be that it is much easier to observe the effects of conduct on competitors than it is to observe and predict the effects of conduct on consumers. Focussing in this way on the undertaking itself and on market competitors has led to the current situation where there is a perception that Article 82 has a tendency to stifle competition and innovation by large companies rather than promote it.

2.5 This historical application of Article 82 has tended to adopt a step-by-step approach, which is based on first assessing whether an undertaking is 'dominant' and second on whether its conduct amounts to an abuse of that dominant position.

2.6 Once an undertaking is assessed to be dominant (possibly on the basis of high market shares), it is then in a situation where any activity it takes which: "has the effect of hindering the maintenance of ... the degree of competition still existing in the market or the growth of that competition" is an abuse. Logically, this prevents it from engaging in any competitive activity, as all competitive activity is aimed at damaging the market shares and prospects of other competitors. The onus is then on that undertaking to prove to the relevant regulator that any competitive activity that it undertakes is 'objectively justified'.

2.7 In our view, this puts the 'cart before the horse'. That is, it is looking at the problem the wrong way around, and placing too much of the burden of proof on the dominant undertaking in question (or worse, an undertaking assumed to be dominant due to high market shares) and not enough on the regulatory authority.

2.8 We believe that the approach adopted by the European Commission's FAQ document of 19 December adopts an interesting stance in relation to the existing caselaw, and one which provides a clear way forwards for the European Commission. The FAQ document states that: "if the discussion paper leads to a more refined economic analysis [in future cases], [such that] the Commission would in future argue a case in a different way than in the past, [this] does not mean that the decision taken in a past case was wrong, only that the argumentation would today have been different". Unfortunately, we do not have the requisite information to comment on the accuracy of this statement. However, in our view, taking this approach provides ample room for switching the focus of Article 82 investigations and the basis of decisions in future cases to consumer harm. As indicated above, we would argue that the application of Article 82 should primarily focus on consumer harm – not harm to competitors.

Relevant test

2.9 As regards the appropriate economic methodology for applying this approach, we would tend towards the line of thinking set out in the EAGCP Report. Our concern

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with the approach set out in the Discussion Paper starts with its focus on 'foreclosure' – which is nothing less than the effect of the conduct in question on competitors. This relies on the assumption that the exclusion of one or more competitors is detrimental to consumers. Hence, paragraph 56 of the Discussion Paper states: "[t]he central concern of Article 82 with regard to exclusionary abuses is thus foreclosure that hinders competition and thereby harms consumers". In most cases this assumption remains unproven, despite being the foundation of the rationale for applying Article 82 to the conduct in question.

2.10 The EAGCP Report is interesting in its advocacy of increased reliance on economic theory and 'established' economic models. This is one area where our suggested approach would diverge from that put forward in the EAGCP Report. In our view, detailed modelling exercises are only likely to be of substantial assistance in a relatively small number of cases. All economic models are filled with various assumptions – very few of which hold in the real world. While such models may reflect reality and help us to understand it (when we fully understand the implications and sensitivities of all of the various assumptions), these are not generally of assistance in real world markets where circumstances are different in every case. The over-reliance on such models would also lead to consistency arguments being raised between one case and the next about which model was more appropriate.

2.11 We do, however, support the EAGCP Report in its advocacy of reduced reliance on market share thresholds and presumptions based on analyses of costs. These are, at best, only rough indicators of market power and abusive strategies.

2.12 Simply changing the focus of the investigation will lead to substantially better results for the competitive process and consumers – and will bring consumer interests to the heart of the analysis. We believe that providing the right question is asked at the start of the process – that is, "what is the harm to consumers of the conduct in question?" – there is no reason to substantially change the kinds of information considered in Article 82 cases or the analytical tools applied.

3 SPECIFIC ISSUES WITH THE DISCUSSION PAPER

Classification of 'exclusionary' and 'exploitative' abuses

3.1 One of the issues that arises following the discussion above is whether there is a useful distinction to be made between 'exclusionary' and 'exploitative' abuses. The Discussion Paper addresses specifically only 'exclusionary' abuses. However, in our view, if a genuinely economics based approach is to be taken to the application of Article 82, this distinction is unhelpful.

3.2 Our view is that both 'categories' of abuse involve the common factor of harm to consumers – essentially, in the form of high prices. These are sustainable because of the dominance of the undertaking(s) in question. This is by definition: a dominant undertaking is one that "has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers". The abuse, however, is not the dominance, but the conduct that harms consumers. The difference between 'exclusionary' and 'exploitative' abuses is merely that one involves direct harm to consumers and the other indirect harm.

3.3 The test for an 'exclusionary' abuse is whether consumers will be materially harmed in the future by the conduct in question, the test for an 'exploitative' abuse is whether consumers are being harmed. We do not believe that it is necessary to begin an

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4 Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 39
investigation into the two by asking a substantially different question. In each case, the starting question should be: "where is the harm to consumers?".

Sections on particular types of potential abuse

3.4 Following on from the previous comments, we do not believe that the individual sections on particular types of potentially abusive behaviour are helpful in a document such as this.

3.5 There are three reasons for this. First, for the most part, they merely repeat existing caselaw (in a guideline sort of way). Rather than helping to move the assessment of Article 82 forwards, these have the effect of freezing it in time. Second, just as dividing abuses between 'exclusionary' and 'exploitative' is not helpful, so dividing the types of conduct that may be an abuse is not helpful. The reason for this is that each of these categories has historically been defined from the wrong perspective – the perspective of competitors, not the perspective of consumers. If the focus of Article 82 investigations is genuinely to be moved onto a more economic footing and accordingly, be based on the promotion of consumer welfare, then it does not assist to create a document that enshrines these old perspectives. Third, it is often not clear how best to categorise potential abuses. Some circumstances might be described as both predatory and price discriminatory. Other circumstances might be described as (constructive) refusal to supply or margin squeeze. The focus in all of these cases should not be on what is happening to competitors, but to customers. Accordingly, such dividing lines are potentially unhelpful.

4 CONCLUSION

4.1 We believe that the Discussion Paper takes some helpful steps forwards. However, we do not believe that it goes far enough towards re-focussing Article 82 on consumer welfare. We believe that there is scope to do this within the existing legal framework and caselaw – it is merely a matter of the way in which potentially abusive behaviour is analysed.

4.2 The OFT has today published the text of a speech by its Chairman, Philip Collins (given at the British Institute of International and Comparative Law on 24 February 2006). We would support many of the comments and much of the general approach advocated in that speech5.

4.3 Please do not hesitate to contact Noel Beale (noel.beale@burges-salmon.com, +44 (0) 117 902 7191) should we be able to be of any further assistance.

Burges Salmon LLP

31 March 2006