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

On 19 December 2005, the Commission published a staff discussion paper on the application of Article 82 of the EC Treaty to exclusionary abuses, inviting third parties to submit their observations. The Simmons & Simmons pan-European competition practice welcomes the opportunity to comment on the Commission’s discussion paper.

General comments

1. We are of the view that competition itself is the best mechanism for avoiding inefficiencies, and hence consumer harm, and that on this basis Article 82 should be applied in as non-interventionist a way as possible to avoid doing more harm than good to competition. We therefore welcome the Commission’s move towards the adoption of an effects-based approach, based on economic principles, with the ultimate aim of preventing foreclosure and consumer harm.

2. We believe it is important to move away from a formalistic approach which equates a certain level of market share to dominance (see, for example, paragraph 31 of the Paper). An economically robust assessment of whether or not a company is in a dominant position constitutes an important filter to guard against over-rigorous application of Article 82, which would itself be detrimental to consumer welfare.

3. As a contribution to business certainty and predictability, we would encourage the Commission to include in any guidelines examples of how it is likely to apply the economic theory set out in those guidelines. Such examples would enable business to identify likely safe harbours, and would also assist potential claimants in distinguishing between legitimate and abusive behaviour.

4. All of the pricing abuses (predatory pricing, rebates, mixed bundling) are grouped within the same type of competitive harm in section 5.3 of the Paper, namely foreclosure of rivals in the same market as the dominant company. We consider, therefore, that it is inconsistent with the effects-based approach to use different cost-based tests to establish whether or not the pricing is anti-competitive. A better, more consistent approach, would be to use one cost benchmark to determine whether or not any type of pricing behaviour could result in foreclosure. In our view, and as explained in detail below in paragraphs 44 and 45, the appropriate way to assess this is by reference to predatory pricing principles,
using the AAC/ATC test (subject to the detailed comments we make below in paragraphs 27 to 34 on that test).

5. For the reasons explained below in paragraphs 20 to 26, we do not consider it appropriate to adopt the Article 81(3) criteria in the context of Article 82. Nor do we agree that the burden of proof should shift to the dominant company to establish that it should benefit from an objective justification, the “meeting competition” defence or the “efficiencies” defence. We distinguish here the legal burden of proof and the evidential burden. The latter may shift to the dominant company, but not the former. That said, the circumstances in which the evidential burden is shifted to the dominant company (and a “presumption” of abuse established) should be clear and based on economically sound principles. In our view, this is not always the case throughout the Paper, and we identify the relevant cases below in our specific comments.

6. We are concerned that the section on rebates is complex, theoretical, and difficult for companies and their advisers to apply. In particular, we believe that it is inappropriate for a legal presumption of abuse to be established on the basis of the criteria set out in section 7.2.2.1. We have a number of detailed comments on the rebates section, which we make below in paragraphs 39 to 50.

7. In a number of places (eg paragraphs 67, 103, 129, 164, 165, 191) the Paper states that an assessment of abuse may depend upon an analysis of the costs of the dominant company’s rivals, or of competitors which would be “as efficient” as the dominant company but for economies of scale or other non-replicable advantages available to the dominant company. For the reasons explained below in paragraphs 18 and 34, we do not consider such an approach to be appropriate.

8. Finally, we note that the Paper does not deal, at this stage, with exploitative or discriminatory abuses. Clearly, some conduct can have discriminatory effects in addition to exclusionary effects, and it will therefore be important to ensure that a consistent approach is taken to the categories of behaviour identified in this Paper.

Specific Comments

Market Definition

9. We acknowledge and agree that the SSNIP test has limitations in the context of defining the market in Article 82 cases, but are concerned that the Paper does not give enough guidance on how the Commission will therefore approach market definition.
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10. Paragraphs 18 and 19 of the Paper are a useful starting point, referring to an assessment of the characteristics and intended use of the products concerned, and comparisons with other geographic areas, as possible methods of establishing the relevant market, and identifying false substitutes. However, the Commission’s approach could, in our view, usefully be expanded further by giving examples of the kinds of evidence which competition authorities will have regard to, and the weight which they will attach to them. For example, in terms of characteristics and intended use, there are a number of potential sources of information: customer surveys, internal evidence of the dominant company regarding the companies and products with whom it considers itself to compete, evidence from competitors, market research reports etc.

Dominance

11. The application of robust economic analysis to the assessment of dominance can go a long way towards ensuring that Article 82 is not applied to conduct and in situations which are consumer welfare enhancing. Paragraph 31 of the Paper suggests an unnecessarily formalistic use of market shares as an indicator of dominance. We would hope that through examples which could be included in any future guidelines businesses would be able to identify likely safe harbours.

12. The 75% level in paragraph 92 of the Paper seems very low for a near-monopoly position to exist. Case law has indicated that a company will be in a position approaching a monopoly where it has at least 90% of the market\(^1\), and we would suggest that this is a more appropriate level. It does not seem right to say, as a general proposition, that if a company has 75% market share there is almost no competition left from other actual competitors in the market, as at least one-quarter of the market has shown itself to be contestable.

13. Paragraphs 43 to 50 of the Paper discuss the possibility of undertakings holding a collective dominant position, and clearly state that the existence of structural or legal links is not indispensable to a finding of collective dominance. Whilst it is possible to envisage a situation where collectively dominant undertakings might tacitly coordinate to raise prices above the competitive level, to limit production or to divide the market (see paragraph 47 of the Paper), it is far less clear how collectively dominant undertakings could individually or collectively but without an express agreement commit an exclusionary

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abuse of the kinds discussed in the Paper. The test for collective dominance involves establishing the maintenance of a common policy, and if one of the undertakings deviates from that policy (e.g., by introducing a rebate scheme, or mixed bundling) then the collective dominant position is necessarily undermined, and the deviating undertaking is no longer part of the collective dominant position. To the extent that collectively dominant undertakings expressly agree on a course of exclusionary behaviour, that behaviour would be more appropriately dealt with under Article 81. We would welcome more clarity on this issue.

Framework for analysis of exclusionary abuses

The central concern and proof of foreclosure

14. Overall, we welcome the Commission’s move towards an effects-based approach, aimed at protecting competition and consumers, rather than competitors.

15. We disagree with the statement made in paragraph 55 of the Paper that “harm to intermediate buyers is generally presumed to create harm to final consumers”. This will not always be the case, as explained below in the sections on single branding and tying and bundling. We propose that there should always be full consideration of whether or not harm to consumers arises as a result of the conduct in question.

16. Paragraph 56 of the Paper states that “where in a particular case it proves not possible to apply the more detailed principles and tests, for instance because of insufficient access to relevant data, the Commission will analyse the case using the general principles in view of the central concern described above”. We are not clear what this means in practice, and such a statement seems to give the competition authorities potentially broad powers to find an abuse in the absence of supporting evidence. If the competition authorities have been unable to obtain sufficient evidence to establish an abuse in accordance with the economic tests and frameworks laid down by the Commission, despite their compulsory information gathering powers, then in our view that could indicate that there is no abuse.

17. We do not believe that there should be a presumption of abuse in circumstances where conduct “clearly creates no efficiencies and… only raises obstacles to residual competition”, as is proposed in paragraph 60 of the Paper. As explained below in paragraphs 23 to 25, it is for the competition authorities to establish that the behaviour is abusive, and that assessment should involve establishing that the behaviour is not
objectively justified (e.g. because it is in response to competition or certain efficiencies are generated).

**Price versus non-price based exclusionary conduct**

18. Paragraph 67 of the Paper suggests that it may sometimes be necessary to protect competitors that are not yet as efficient as the dominant company, such that advantages of the dominant company arising from economies of scale and scope, learning curve effects or first mover advantages should be taken out of the “as efficient” competitor test. Whilst in principle we can see the rationale for such an approach, we do not believe that it is appropriate since it would be extremely difficult for a dominant company to self-assess whether or not their proposed conduct is abusive on this basis. It is important that companies are able to apply Article 82 with certainty, and that courts and competition authorities look at what a dominant company knew, or should have known at the time, and do not assess conduct in light of complete information with hindsight. The same comment applies to paragraphs 129 and 165 of the Paper, which relate specifically to predatory pricing and rebate schemes.

**Abuse of collective dominance**

19. Please see our comments, above, in relation to dominance.

**Possible defences**

20. In our view, use of the Article 81(3) criteria in the Article 82 context is inappropriate.

21. Firstly, we do not believe that the *Laurent Piau* case\(^2\) represents a sound basis for adopting such an approach. In that case, the Court simply found that, on the specific facts of that case, an abuse of dominant position had not been established because the factors considered by the Commission in its analysis of a potential exemption under Article 81(3) resulted in there being no scope for abuse. The case did not, in our opinion, go further than that and set down a general principle that if the conduct of a dominant company satisfies the conditions of Article 81(3), it should not be classified as an abuse.

22. Secondly, the two-step process used in the context of Article 81, of identifying appreciable anti-competitive effects, and then applying the Article 81(3) criteria to determine whether or not those effects can be justified by pro-competitive efficiencies, cannot be read across

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into the Article 82 assessment. The text of the Article 82 prohibition is not framed in that way. There is only one assessment of whether a dominant company has committed an “abuse”, and the question of whether the behaviour creates efficiencies is intricately bound up in the question of whether or not the behaviour should be classed as legitimate competitive behaviour or as anti-competitive. In our view, dominant companies should be encouraged to pursue efficiencies, and if there is an efficiency explanation for the behaviour, the dominant company should be given the benefit of the doubt unless there are severe anti-competitive “side effects”. Adopting the formulaic two-step approach laid down in Article 81 would result in rigid and unduly interventionist application of Article 82.

23. With regard to the burden of proof, we do not agree with the approach that the legal burden should be on the dominant company to establish to the required standard of proof that the conditions for applying objective justification or efficiency defences are satisfied. Although, in practice, it is clearly incumbent upon the defendant company (and in its interests) to provide reasons why the behaviour is rational competitive behaviour which creates efficiencies (the evidentiary burden), the competition authorities / claimant should be obliged to take these reasons into account, and to balance them against the available evidence in favour of an abuse finding, before reaching a view one way or the other. The legal burden of establishing an abuse should remain on them, and should not shift to the defendant company.

24. Article 2 of Regulation 1/2003 states that the burden of proving an infringement of Article 82 shall rest on the party or authority alleging the infringement. It goes on to say that the undertaking claiming the benefit of Article 81(3) shall bear the burden of proving that the conditions of that paragraph are fulfilled, but makes no mention of a similar shift in burden of proof in the context of Article 82. This is despite the fact that the “objective justification” concept was already in existence at the time of drafting Article 2. In our view, the “meeting competition defence”, and the “efficiency defence” are simply further non-exhaustive examples of objective justifications, and there is no justification for shifting the legal (as opposed to the evidentiary) burden of proof onto the defendant.

25. The scope of the defences appear to be very narrowly drawn, and somewhat rigid in their application. For example, the “objective necessity” defence is stated to apply only where the conduct is necessary for all undertakings in the market. This seems too strict, and would not cover, for example, the situation where a dominant company refuses supply because the customer cannot offer the appropriate commercial assurances (see paragraph 224 of the Paper). Also, the “meeting competition” defence requires the
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behaviour to be indispensable to achieve the objective of minimising short run losses, and

to be “proportionate” to the competitive threat. The Commission does not envisage that

such a defence will be available for pricing below AAC, and that it is unlikely to apply even

where pricing is above AAC. This is in our view too strict an approach. A dominant

company should, we believe, be able to sell below cost where its competitors are doing

the same, in response to competition. The very fact that the company is being required to

respond to such aggressive competition could, in itself, undermine the finding of

dominance.

26. In summary, we believe that a better approach would be to incorporate the consideration

of whether or not there are any objective justifications for the behaviour into the overall

assessment of whether or not there is an abuse. Such an approach allows for more focus

on the key issue, namely whether or not the behaviour is likely, when taken in the round,
to cause appreciable consumer harm.

**Predatory pricing**

**Presumptions based on costs benchmarks**

**Pricing below AAC**

27. We accept that EC case law has established that there should be a presumption of abuse

where a dominant company prices below AAC (insofar as AAC is likely to coincide with

AVC).

28. However, we are concerned that this presumption should not be applied in a mechanistic

way, without paying due regard to the circumstances of the individual case. For example,
as explained below, it may not always be the case that the company would be able to

recoup any losses it has made, such that there is no significant foreclosure or harm to the

consumer. Alternatively, there may be a rational commercial explanation for the

behaviour, for example, the company may simply be responding to competition. As

explained above, it is our view that dominant companies should be able to sell below AAC

where its competitors are doing the same. We believe paragraph 132 of the Paper, which

states that the meeting competition defence is generally unlikely to be satisfied on the

basis that it is unsuitable and indispensable to the minimisation of short term losses,

should take this into account.
Pricing below ATC but above AAC

29. We do not agree with the proposition in paragraph 114 of the Paper that where documentary evidence exists demonstrating that the use of pricing below ATC but above AAC is intended to exclude a rival, this should be sufficient to establish an abuse, and to place the evidentiary burden on the dominant company. The move towards an effects-based approach necessarily means that it is the effects on competition which are important, not the intent of the dominant company. Just because there is intent, does not mean that the behaviour is in fact likely to have a foreclosing effect, or to lead to consumer harm, which are the central policy considerations underpinning the enforcement of Article 82.

30. In order to establish indirect evidence of a strategy to predate, paragraph 115 of the Paper requires a fuller assessment of the behaviour and its actual or likely exclusionary effects, and we agree with this approach. We believe that such an analysis should be carried out in all cases of pricing below ATC but above AAC, and do not believe that it is appropriate to assume predation if “...the pricing behaviour only makes commercial sense as part of a predatory strategy and there are no other reasonable explanations” (paragraph 116). This, together with paragraph 123, suggests a shifting of the burden of proof to the dominant company, which in our view would be unjustified.

Pricing above ATC

31. We believe that as a general principle, pricing above ATC should be presumed not to be predatory.

32. We acknowledge that in the Compagnie Maritime Belge case\(^3\), selective price cutting above cost was held to be abusive. However, the Court declined to establish a general rule for selective price cutting, and the case had a number of unusual features: the behaviour was undertaken by a liner conference in a collectively dominant position, there was only one competitor outside the conference; and there was clear evidence of an agreed intention on the part of the liner conference members to eliminate the competitor. We believe that this case should be viewed as exceptional, and specific to its unusual facts.

\(^3\) Cited supra, at footnote 1.
33. We disagree with paragraph 129 of the Paper, which envisages that above ATC prices could be problematic where the structure of the market is such that the dominant company has non-replicable advantages, or economies of scale are very important. Such an approach would require the dominant company to second-guess the level of its competitors’ costs, and would leave the dominant company in an uncertain position.

**Ability to self-assess**

34. Paragraph 103 of the Paper states that where reliable information on the dominant company’s costs is not available, the Commission may instead use cost data of apparently efficient competitors. This seems inappropriate as it will be impossible for potentially dominant companies to know what the appropriate cost threshold is, and hence to assess whether their behaviour is likely to be abusive. Such an approach leaves companies in a position of legal uncertainty. The same comment applies to paragraphs 164 and 191 of the Paper, which propose a similar approach in relation to rebates and tying/bundling.

**Recoupment**

35. Whilst the Paper recognises that recoupment is an element of predatory pricing (which we welcome), insofar as the exclusion of the prey should allow the predator to return to, maintain or obtain high prices afterwards in order to be profitable for the company and harmful to the consumer, there appears to be a presumption that recoupment is likely in certain circumstances, thereby shifting the evidentiary burden onto the dominant company to demonstrate that this is not the case. We do not agree with this approach.

36. Firstly, a finding of dominance does not automatically mean that the company could recoup its losses once the “prey” has been excluded from the market (see paragraph 122 of the Paper). There may well be sufficient competition in the market place to prevent this from happening, and each case will need to be examined in the light of the surrounding market circumstances to establish whether or not recoupment is likely.

37. Secondly, it is not possible to presume that recoupment is likely as a result of observed cost levels (paragraph 110 of the Paper) or of evidence of intention/plans to exclude competition (which seems to be implied by paragraph 122). Pricing below AAC, or the availability of direct or indirect evidence that the conduct is intended to be predatory, whilst helpful in establishing whether or not the conduct is predatory in nature, tells us nothing about whether or not the conduct is likely to result in foreclosure or a subsequent rise in price for the consumer.
38. We are of the view that, in order for a predatory pricing abuse to be made out, the party or competition authority alleging the abuse should be required to demonstrate that recoupment is likely, or at the very least, plausible.

**Single branding and rebates**

**General comments**

39. We welcome the acknowledgement by the Commission that the assessment of single branding obligations and rebate systems must be made in the light of the likely and actual foreclosure effects. However, we have a number of concerns about this section, which we found complex and likely to be difficult to use by the business reader.

40. Firstly, there is a tendency in the Paper to deal with rebates by reference to the way in which those rebates are structured (e.g. conditional rebates on all purchases, conditional rebates on incremental purchases, unconditional rebates etc), and their “capability” to have loyalty inducing effects, rather than focussing on actual or likely foreclosure effects. Paragraph 158 of the Paper, for example, states that where rebate thresholds are formulated in terms of a percentage of total requirements of the buyer or an individualised volume target the Commission will normally presume that they enhance loyalty. This seems to adopt an unduly interventionist approach in that it would mean, in practice, that a dominant company could never offer individually negotiated discounts to customers without raising a presumption of abuse.

41. Secondly, insofar as the Paper provides frames of reference for establishing whether or not conditional rebates on all purchases are likely to foreclose the market (paragraphs 154 to 157 of the Paper), these are theoretical and extremely difficult for dominant companies to apply to self-assess whether their rebate schemes are likely to be problematic.

42. In the context of rebates on all purchases, paragraphs 162 and 163 of the Paper seek to shift the evidentiary burden from the party or competition authority alleging the abuse to the dominant company on the basis of various theoretical criteria. One of these criteria, paragraph 162(b), is expressed in the negative, and does not even appear to require the Commission positively to establish a loyalty inducing effect before triggering the presumption. A presumption of abuse should only be created where the evidence establishes, on the basis of clear and economically sound principles, that the behaviour is very likely to be abusive. We do not consider that such a standard is met by section 7.2.2.1 of the Paper.
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43. It is important that the behaviour of dominant companies is not judged with the benefit of hindsight, and that clear and practically applicable principles are established for dominant companies to assess whether their proposed pricing schemes, which are central to their ability to compete, are likely to infringe Article 82 on the basis of information which is reasonably available to them at the time.

44. The potential competitive harm arising from rebate schemes is the same as that for predatory pricing and tying. This is recognised in paragraphs 69 and 70 of the Paper, which state that predatory pricing, single branding and rebates, tying and bundling fall within one group of abuses, having in common that the foreclosure effect arises from the attempt to exclude rivals at the level of the dominant company. It therefore makes sense to use one consistent cost benchmark to establish the circumstances in which all three types of pricing behaviour will be abusive.

45. In our view, the appropriate approach to all types of exclusionary pricing is to treat them as abusive only where they are predatory in nature. This would create more legal certainty, and would ensure that intervention does not, in itself, have anti-competitive effects. We would therefore propose that the test used to establish predatory pricing (set out in section 6 of the Paper) be adopted for rebates, subject to the comments we have made above regarding that test (see paragraphs 27 to 34 above).

46. We believe that paragraph 148 of the Paper goes too far when it says that single branding obligations can give rise to a market distorting anti-competitive effect even if only a modest part of market demand is affected.

47. Firstly, the dominant company may only have a relatively low market share given the low threshold required for dominance, and if this is the case, then even if the company ties all of its customers, a considerable proportion of the market will remain contestable.

48. Secondly, where the single branding obligations are entered into by intermediate buyers/sellers, exclusive dealing is only likely to harm competition where the firms concerned are particularly important as gatekeepers to effective competition on the relevant downstream market for the final product. The key question is how much access to distribution rivals need and whether exclusive dealing requirements by the dominant firm limit their possibilities of accessing that necessary portion. If alternative, viable
distribution of sales strategies are open to rivals, the fact that the dominant firm has tied certain distributors with an exclusive deal should be irrelevant.

49. These comments apply equally to the assessment of rebates, and we believe that there should be greater recognition of this point in the Paper, and that further guidance on the circumstances in which rebates and single branding are unlikely to give rise to foreclosure (i.e. on the basis of the proportion of the market left untied and contestable), should be provided.

Possible defences

50. We note that there is no “meeting competition” defence identified in relation to rebate schemes, and believe that this is a significant omission. As mentioned above, in our view, dominant companies should be allowed to respond to competition by lowering their prices, and this should include the ability to price below cost if this is what their rivals are doing. To prevent dominant companies from doing this would have a chilling effect on competition.

Tying and bundling

51. The Paper acknowledges in paragraphs 188 and 196 that a crucial element in the assessment of tying and bundling arrangements is to consider the extent to which the market as a whole is, or is likely to be, foreclosed. We welcome this approach.

52. We note that there is no guidance on what proportion of tied customers will constitute a “sufficient” (paragraph 188 of the Paper) part of the market to establish appreciable foreclosure. Although the strength of the dominant company’s position in the market will be relevant, as explained above in relation to single branding, it is possible that even if a dominant company tied all of its customers, a significant proportion of the market would remain contestable. We would therefore welcome further guidance on the circumstances in which tying is unlikely to give rise to foreclosure by reference to the proportion of the market left untied.

53. Paragraph 190 of the Paper introduces a cost-based analysis for mixed bundling. For the reasons explained above, at paragraph 45, we believe that one consistent cost-based test should be used to determine whether or not there is an exclusionary pricing abuse. The cost-based test should focus on whether or not the pricing is predatory, and the most appropriate approach is therefore to adopt the AAC/ATC framework set out in section 6 of
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the Paper (subject to the comments we have made above, in paragraphs 27 to 34, in relation to that framework).

54. Paragraph 206 of the Paper states that tying would be considered abusive when a retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions as those offered by the supplier, as evidently the pass-on is not realised. It seems to us that if this is the case, then there is a question mark over whether or not the conduct has foreclosed the market in the first place. We would welcome further guidance from the Commission on this point.

Refusal to supply

55. Making the EU an attractive marketplace, in particular for high-technology companies, which are willing to invest large sums in new technologies and products, is an important objective. Intervention by the Commission should therefore be limited to those cases which are a manifestation of clear market failure. An effects-based analysis is the right approach to identify whether a market has failed and a refusal to supply stifles competition or whether a dominant company is competing on the merits and deserves to be protected from free-riders.

56. We welcome the fact that the Commission recognises that a key concern is the detrimental effect a general duty to supply would have on the incentive to innovate (see paragraphs 207, 213, 222, 238 of the Paper). Hence a dominant company should be able to choose whom to supply and the ‘likely exclusion of an individual competitor for the downstream market does not in itself constitute an abuse’ (paragraph 213).

57. However, we have a number of specific comments on the refusal to supply section, as follows:

Termination of an existing supply relationship

58. Paragraph 222 of the Paper appears to introduce a rebuttable presumption (by the use of the wording ‘it will normally be presumed’) that the termination of supply of an existing customer has negative effects if the supplier is itself active in the downstream market with few competitors. If there are other competitors in the market, which do not depend on the input owner, it is likely that the company is exiting the market as a result of market forces. There clearly need to be other factors which justify the finding of abusive behaviour (this applies also to paragraph 231 of the Paper). This may be different when all downstream competitors depend on the input owner.
59. In paragraph 218 of the Paper (repeated in paragraph 222 and related headings), the Commission mentions four conditions which need to be met in order to find an abusive refusal to supply. Under (iii), the Commission requires that the refusal be “likely” to have a negative effect on competition. In applying this particular test, the Commission must be required to assess such likelihood on the basis of reasonable certainty, otherwise it will risk a serious chilling effect on innovation (this applies equally to paragraph 231). We suggest that the Commission could expand on this third condition, and provide more certainty that this is consistent with an effects-based approach.

60. By leaving out the condition that “the input is indispensable” (which is included in the conditions which have to be fulfilled in order for a refusal to start supplying to be abusive) in paragraph 218 of the Paper, the Commission seems to suggest that the refusal to supply of a non-indispensable input to an existing customer would be presumed to be abusive. We believe that this goes too far and that such behaviour should not be subject to a rebuttable presumption.

61. It would be helpful if the Commission, in particular in this section, would give examples of how the exclusion of a competitor or downstream player can lead to consumer harm. In particular, the mere fact that the consumer has one less supplier might, as such, not be harmful provided the prices remain the same. It is therefore unclear why it needs to be shown that the termination leads to consumers being “better off” (paragraph 214) rather than unharmed.

Refusal to start supplying

62. We would welcome more guidance on how the Commission proposes to establish dominance in the case of a potential or hypothetical market (paragraph 227 of the Paper). This section will have to be read in conjunction with paragraphs 23 and 70 of the Commission’s Guidelines on the Technology Transfer Block Exemption Regulation[^4], to which a reference could be made.

63. It should also be noted that paragraph 44 of the ECJ’s judgment in IMS[^5], to which the Commission refers (footnote 136), relates to the question of whether a secondary market needs to be established and on what basis to conclude that competition on that market


Refusal to licence intellectual property rights

64. We welcome the Commission’s recognition of the importance of intellectual property rights (paragraphs 237 to 239 of the Paper). Against the background of recent case law and given that the Microsoft decision is currently on appeal it seems sensible for the Commission not to try to provide any further guidance in this respect. The cases where access to intellectual property rights is compelled should be extremely limited and decided on the particular facts of the individual case. All the cases cited by the Commission (Magill, Volvo, IMS, Microsoft) are based on very specific facts which makes the adoption of firm, general guidance difficult, if not impossible.

65. The notion of exceptional circumstances, mentioned in paragraph 239 of the Paper, is potentially very broad. It will be interesting to see whether the European Courts follow the Commission’s approach in broadening its scope (see Microsoft) beyond the principles set down in Magill.

Aftermarkets

66. We welcome the Commission’s consideration of market definition and dominance in relation to aftermarkets. We agree with the Commission’s formulation at paragraph 260 of the Paper that a company that is dominant on a primary market is unlikely to be considered to be dominant on the aftermarket. However, it should be made clear that dominance in aftermarkets is only likely to arise in exceptional circumstances, and we believe that the Commission could do more to clarify its intended approach towards “installed-base opportunism” and the circumstances in which such behaviour is likely to lead to an abuse.