Introduction

In December 2005, the European Commission DG Competition published a Discussion Paper setting out possible principles for the Commission’s application of Article 82 of the Treaty to exclusionary abuses. Interested parties were invited to make comments on the Discussion Paper no later than 31 March 2006.

The following comments are submitted on behalf of Eversheds LLP in response to the Consultation.

General Comments

Economics based approach

Broadly, we welcome the move towards a more economics, effects based analysis of behaviour by dominant companies, and the explicit acknowledgment that Article 82 should protect competition and not competitors. However, we perceive an inherent tension between this approach and the move towards encouraging more private litigation. A greater focus on a purely economics based assessment may increase the already heavy evidential burden on private litigants and further dissuade them from bringing action.

Complexity of Analysis

We recognise the complexity of the issues surrounding Article 82 cases and welcome the Commission’s desire to deliver clarity and direction, and uniformity of application across the EU. However, we consider that the Discussion Paper in its current form is unnecessarily complex and in parts represents more academic speculation than practical guidance. The consultation draft is much too complex and uncertain as it stands to form the basis of guidelines which business and its advisers could readily apply. We would prefer stronger, much shorter guidance and less academic speculation and hypothesis.

Specific Comments

Comments on Section 4: Dominance (paragraphs 20-50)

1. We welcome the approach suggested in paragraph 24 of an economics based approach to the definition of dominance and agree with the importance of focusing on whether an undertaking holds “substantial market power”.

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COMMENTS ON THE

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2. That said, we are concerned that the remainder of this section falls short in not expanding on this notion. For the most part, this section recites the settled case law on the concept of dominance, adding little to the understanding of the concept. Crucially, it misses the opportunity to provide useful and reliable guidance to business, for example, as to how the Commission will assess relevant factors such as ease of entry, future market developments etc.

3. We are concerned that the focus on market shares in paragraph 31 and, in particular, the presumption of dominance above 50% market share (provided that rivals hold a much smaller share) undermines the economics based approach and may encourage unnecessary intervention by competition authorities. The Commission should, in our opinion, propose a “safe harbour” based on market share thresholds below which the Commission and National Competition Authorities (NCAs) would not intervene using Article 82 unless exceptional circumstances are present.

4. We believe that the threshold should be 50% but recognise that a 40% market share would be a safe harbour more consistent with current case law.

5. This approach would be consistent with the realities of the vast majority of markets and not inconsistent with the jurisprudence of the ECJ (e.g. Hoffman La Roche¹).

6. In a system of multiple enforcement agencies, use of a safe harbour will assist the Commission in the exercise of its role of ensuring uniform application of the competition rules.

7. The sort of economic analysis proposed in Section 5 (et seq) is neither straightforward nor cheap for companies. The real risk is that casting the Article 82 net too widely will have a chilling effect with companies avoiding behaviour (even if potentially efficiency enhancing) which would require complex and expensive assessment. A secondary risk is of interventionist NCAs commencing investigations into markets in which dominance does not exist.

8. The use of a safe harbour will not preclude an effects-based analysis on a case-by-case basis. It will encourage competition authorities and companies to focus analysis on markets in which the risk of harm from abusive conduct is more likely to exist.

Comments on Section 5: Framework for Analysis of Exclusionary Abuses (paragraphs 51-92)

9. We strongly welcome the clear statement of principle that the essential objective of Article 82 when analysing exclusionary conduct is the protection of

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¹ Hoffman La-Roche & Co AG v Commission of the European Communities, Case 85/76 [1979] ECR 461, [1979] 3 CMLR
competition on the market as a means of enhancing consumer welfare and that “it is competition, and not competitors as such that is to be protected”.

10. However, we are concerned that the Discussion Paper appears not always to follow this principle through. In particular we are concerned that dominant firms should not be penalised for using methods which are no different from those which condition normal competition, subject only to the “special responsibility” of a dominant undertaking not to allow its conduct to impair genuine undistorted competition.

11. In this regard, we note that according to the case law “the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened” (Tetra Pak² and Compagnie Maritime Belge³). Although the Discussion Paper, at paragraph 59, considers the relevance of the degree of dominance to the establishment of a market distorting foreclosure effect, the significance of this factor for finding an abuse is relegated to a footnote. We would like to see explicit recognition of the importance of the degree of dominance for finding abuse and the principle that a “sliding scale” may apply in determining the availability of a defence (see the comments below in relation to the “meeting competition” defence).

Price versus non price-based exclusionary conduct

12. We welcome the statement in paragraph 63, that pricing conduct is only to be regarded as abusive where it would exclude an “as efficient“ competitor.

13. However, we note that the proxy of the “as efficient“ competitor is not without problems. First, as the Commission states in paragraph 67, to apply the as efficient competitor test, “the authority in principle needs to have reliable information on the pricing conduct and costs of the dominant company” and that, where “reliable information on the dominant company's costs is not available it may be necessary to apply the as efficient competitor test using cost data of apparently efficient competitors”. It is difficult to imagine a situation in which the Commission could not obtain the information it needs, and raising the possibility of reliance on hypothetical “apparently efficient” competitors creates unnecessary uncertainty.

14. Second, even though the Commission proposes protecting only the as efficient competitor, in paragraph 67 the Commission also states that “it may sometimes be necessary ... to also protect competitors that are not (yet) as efficient as the dominant company”. If this language is retained, the guidelines should state

² Tetra Pak International SA v Commission of the European Communities Case C-33/94P [19799] 4 CMLR 662.
that this exemption will only apply in circumstances in which there is no realistic alternative source of competition.

Possible defences: Objective justifications and efficiencies

Meeting Competition Defence

15. We are concerned that the Commission has drawn unnecessarily narrowly the circumstances in which the “meeting competition” defence may be applicable. The case law does not support the statement at paragraph 81 that this defence “is only applicable in relation to behaviour which otherwise would constitute a pricing abuse”. The statement of principle (cited at footnote 62, paragraph 81 of the Discussion Paper) in United Brands⁴ does not limit the application of the defence in this way.

16. The Commission has also previously acknowledged the application of this defence in principle to non-price abuses. For example, in the case of Boosey & Hawkes,⁵ the Commission indicated that “where a customer transfers its central activities to the promotion of a competing brand it may be that even a dominant producer is entitled to review its commercial relations with that customer and on giving adequate notice terminate any special relationship”. More recently, in Syfait⁶ Advocate General Jacobs confirmed that a dominant company is not obliged to meet orders that are out of the ordinary and will be entitled to take such reasonable steps as may be necessary to defend its commercial interests.

17. The key element in establishing this defence is that the actions taken by the dominant producer must not go beyond the legitimate defence of its commercial interests. In this respect, we do not consider that the proportionality test set out by the Commission at paragraph 82 of the Discussion Paper reflects the principles established by the case law of the Court. The statement of principle in United Brands,⁷ cited with approval in BPB Industries⁸ and Irish Sugar⁹ is:

“Although it is true ... that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it”

⁶ Synethairismos Farmakopoiion Aitolias & Arkananias (Syfait) & Others v Glaxosmithkline AEVE, Case C-53/03 [2004] E.C.R.
⁷ See footnote 4.
(United Brands, at paragraph 189)

18. In our view, this indicates that the correct test has two elements:

18.1 the actions taken by the dominant undertaking to protect its commercial interests must be “reasonable”.

18.2 the purpose of the actions must be a genuine response to the perceived threat and not merely aimed at strengthening the undertaking’s dominant position and abusing it.

19. In addition, the above statement of the Court in United Brands makes clear that in the face of an attack on its commercial interests, a dominant undertaking must be permitted to take such reasonable steps “as it deems appropriate to protect its said interests” (emphasis added). There is no room in this statement of principle for an indispensability criterion of the sort advocated by the Commission at paragraph 82 in the Discussion Paper which would remove any freedom for the dominant undertaking to determine for itself the steps it deems appropriate to protect its own commercial interests.

20. The better approach in our view is to acknowledge that the principle set out in United Brands and described above applies across the board, regardless of the type of conduct at issue, but that, as the Court pointed out in United Brands, “even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other” (emphasis added). Thus it may be that abusive conduct of a dominant company with a market position approaching that of a monopoly could not be justified on the grounds of the “meeting competition” defence although the same conduct engaged in by a less powerful but nevertheless dominant undertaking facing an attack by its nearest rival might well be acceptable in defence of its own commercial interests.

21. In other words, in cases where a dominant firm has otherwise satisfied the above elements of the “meeting competition” test there should be a presumption that such a defence is available (regardless of the type of conduct at issue) unless the degree of dominance was such that only conduct justified on efficiency grounds would be sufficient to counteract the actual or likely anti-competitive effects (see Irish Sugar10, paragraph 189).

Efficiency Defence

22. We agree with the recognition of the importance of efficiencies as a defence to an allegation of abuse. We consider that the evidential burden for enforcement of Article 82 should remain on the Commission or NCA. If efficiencies are

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10 See footnote 9.
advanced to justify a particular conduct then it is incumbent on the Commission to prove on the basis of evidence (as opposed to speculation) that those efficiencies are not sufficient as a defence.

Comments on Section 6: Predatory Pricing (paragraphs 93-133)

23. See the general comments above in relation to the application of the “as efficient” competitor test.

24. In the context of predatory pricing, we note that application of the “as efficient” competitor test raises a timing issue in practice. In order to prevent irreversible damage to competition, such as the removal of a competitor from a market, predatory pricing must be stopped as quickly as possible. A true effects-based approach to competition, would only enable the Commission to react after the damage has been done. An "expected effects" approach is speculative and uncertain. This raises the question also of what costs measures to apply, and over what period, since short-term below-cost pricing may be a sensible strategy to meet competition even though technically predatory. Clearer guidance on these points would be welcome. As a more general point, the question must be asked how the various mathematical approaches to establishing an abuse tie in with the Commission's aim, made explicit in paragraph 4 of the Discussion Paper, to base the evaluation of price-related abuse on likely effects on a market rather than on fixed definitions of abuse.

Comments on Section 7: Single Branding and Rebates (paragraphs 134-176)

25. We welcome the Commission’s recognition that rebates and single branding behaviours should be regarded as abusive only in circumstances where they result in foreclosure effects which harm consumer welfare. However, on the basis of much of the case law, if dominance is assumed, then, it seems that evidence of implementation of pricing practices such as fidelity rebates has been sufficient to found an infringement decision, without there being a detailed analysis of the extent of actual or potential foreclosure, or indeed assessment of any objective justification (or efficiency defence) that there may be for the conduct of the dominant company.

26. The principles in the paper will undoubtedly prove valuable in terms of guidance for National Competition Authorities and may well help dominant companies to shape their rebate policies to ensure that they are defensible in Article 82 terms. However, they provide little encouragement for a complainant competitor. On the contrary, they seem to emphasize the magnitude of the task that will lie ahead of a competitor if it wishes to complain or indeed to bring proceedings in the national courts. Information on ATC to enable a complainant competitor to establish the required share is unlikely to be readily available.

Comments on Section 8: Tying and Bundling (paragraphs 177-206)
27. We welcome the statement at paragraph 183 of a clear test to establish whether or not a practice constitutes tying or bundling is prohibited under Article 82.

28. We also welcome the acknowledgement by the Commission, as an express element of this test, the question as to whether the tying practice is justified objectively or by efficiencies. This element had been omitted from the test for a tying abuse under Article 82 as set out in the Commission’s decision in Microsoft\textsuperscript{11} and we note that there is apparently no attempt to reconcile the Microsoft test with the approach set out in the Discussion Paper.

29. However, we note that the Discussion Paper does not consider the application of the “meeting competition” defence in connection with mixed bundling practices. In our view the principles of the “meeting competition” defence are capable of having particular relevance to a scenario in which a dominant company offers economic inducements to customers to buy a bundle of its products in order to defend its legitimate business interests in the face of similar actions from competitors, for the reasons set out above.

**Comments on Section 9: Refusal to Supply (paragraphs 207-242)**

30. We welcome the Commission’s endorsement in Section 9 of the Discussion Paper of the essential facilities doctrine approved by the Court in the Oscar Bronner\textsuperscript{12}, Magill\textsuperscript{13} and IMS Health\textsuperscript{14} line of cases. We agree with the emphasis given to the indispensability criterion both when assessing a refusal to start supplying an input and a refusal to licence IPRs.

31. We are, however, concerned about the apparent extension of the principles set out in the above case law (at paragraph 240 of the Discussion Paper) to the effect that a refusal to license an indispensable IPR may be abusive “even if the licence is not sought to directly incorporate the technology in clearly identifiable new goods and services”. This appears to cut across the criterion endorsed by the Court in IMS Health that the refusal must prevent the emergence of a new product for which there is a consumer demand. The Commission has offered no explanation for this and in our view such an approach is inconsistent with the emphasis placed by the Court on the exceptional nature of the circumstances in which a refusal to licence IPR can constitute an abuse.

32. In relation to termination of an existing supply relationship, we are concerned that the discussion of “behaviour properly characterised as termination” at


\textsuperscript{14} IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG Case C-418/01, OJ C118.
paragraphs 219 and 220 of the Discussion Paper makes no mention of the case law of the Court which makes clear that in certain circumstances dominant suppliers could prioritise long standing customers over occasional customers, e.g. during a period of shortage. Such a practice would not be regarded as a "constructive" refusal to supply.

33. No guidance is provided in relation to the circumstances in which refusal to supply information needed for interoperability would constitute an abuse. If this situation is indeed to be regarded as a "special case" in light of the Microsoft\textsuperscript{15} case we would urge the Commission to include detailed guidance on this issue in any published guidelines.

34. Furthermore, we are concerned by the statement at paragraph 242 of the Discussion Paper to the effect that lower standards for intervention may be applied to refusals to supply interoperability information, even if such information may be considered a trade secret. In our view there is no basis for distinguishing information necessary for interoperability between one market and another and refusal to start supplying an input which is indispensable to carry on business in a downstream market.

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\textsuperscript{15} See footnote 11.