COMMENTS ON DG-COMP DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 EC TO EXCLUSIONARY ABUSES*

Overview – General Comments

We welcome the Commission’s initiative¹ to revisit Article 82 EC and to produce Guidelines on its application. The recent modernisation of both the substance and procedure of Article 81 EC and the amendment of the Merger Regulation have left Article 82 EC as the last non-modernised area of Community competition law.

The introduction of a more economic approach in Article 82 EC has long been a pressing need, for two main reasons:

- while EC competition law does not condemn dominance as such, but only its abuse, the relative ease of finding dominance and the “special responsibilities” imposed upon dominant companies essentially amount to a condemnation of dominance and market power; this is a serious problem, particularly for companies that have achieved their dominant position on the market as a result of competition on the merits;

- some of the cases of abusive behaviour under EC competition law are not in accordance with the latest economic thinking and betray a certain formalistic approach: this is particularly the case for exclusionary abuses.

In this regard, the Commission is correct in stating that there is a need to apply economic analysis, with a view to maximising consumer welfare and protecting the competitive process. We also commend the Commission for clearly stating that the objective of Article 82 EC is not the protection of competitors, but rather “the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources”². We also agree with the statement that “effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation”. We note the Commission’s proposition that “competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers”, but we also think that the single market objective should not be elevated to a principle of general and unqualified application, when it goes against economic realities.

We understand that the Staff Discussion Paper deals only with exclusionary abuses and that there will soon be a further Paper on exploitative and discriminatory practices, after which the two Papers will probably be merged in draft Guidelines and will eventually emerge as Commission Guidelines. We encourage the Commission to proceed in this regard promptly,

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* These comments are offered by the Brussels office of White & Case LLP in response to DG-Comp’s invitation to comment. They are designed to assist DG-Comp in its ongoing work in this area and should be used for no other purpose, either by the Commission or by third parties. They do not represent the views of the Firm or of its clients.

¹ We realise that the Staff Discussion Paper is a DG-COMP and not a Commission product, but in these comments we use the terms “Commission” and DG-COMP interchangeably.

² Paragraphs 4 and 54 of the Discussion Paper.
and to make it clear that the DG-COMP Discussion Paper ought to be seen in this context, rather than as a mere reflection exercise by DG-COMP officials, with no policy value. The problems stemming from the formalistic approach under Article 82 EC are urgent, and companies need assurances as to the forthcoming change of approach. Attention must be given to Advocate General Kokott’s Opinion in the British Airways appeal, which denies the Discussion Paper enforcement status and stresses that “any reorientation in the application of Article 82 EC can be of relevance only for future decisions of the Commission, not for the legal assessment of a decision already taken”.3 In other words, the Community Courts seem to await the intellectual initiative in this area from the Commission. This state of flux is damaging for legal certainty, as it is not clear in the short and perhaps the medium term how dominant undertakings and their legal advisers can evaluate those undertakings’ existing or future business practices.

**Dominance (§§ 20-50)**

We welcome the clarification that in defining dominance, there must be a link between the position of economic strength held by an undertaking and the competitive process. The Commission is also right to stress that the undertaking concerned must have “substantial market power”.4 In paragraph 27, however, there seems to be a confusion between the finding of dominance and the finding of abuse. According to the Discussion Paper, an undertaking may be found to be dominant without having necessarily eliminated all opportunity for competition on the market. On its own, this statement is not controversial, but the following sentence seems to confuse dominance with the finding of abuse: “for Article 82 to apply it is not a condition that competition has been eliminated”. This proposition, however - and the accompanying footnote - clearly refers to the finding of abuse and not to dominance and thus is an unhelpful addition.

With regard to market shares, the Commission’s approach betrays a certain degree of formalism. Firstly, the Commission links market shares directly to dominance, thus supposing, or rather assuming, market strength. It is advisable for the Commission to clarify how its analysis in paragraph 31 relates to its statements in paragraphs 21 to 25, which distinguish between dominance and market strength, the latter being one constituent element of the former, but not the only one. Then, while the Commission starts from the premise that “market shares provide useful first indications of the market structure and of the competitive importance of various undertakings active on the market”, it goes on to say that “in the case of lower market shares, dominance is more likely to be found in the market share range of 40 % to 50 % than below 40 %, although also undertakings with market shares below 40 % could be considered to be in a dominant position”.5 The language used in this sentence (“more likely to be found”) is rather unfortunate, since we are, after all, in the area of lower market shares, i.e. below 50%. It would be more appropriate for the Commission to stress that situation more emphatically and distinguish it from the situation of higher market shares.

**Framework of Analysis (§§ 51-92)**

4 Paragraph 23 of the Discussion Paper, emphasis added.
5 Paragraphs 29 and 31 of the Discussion Paper.
This is the most important part of the Discussion Paper, since it sets out the Commission’s proposed analytical framework for all exclusionary abuses. It also includes a substantial chapter on so-called “objective justification” and “efficiency” defences; this is novel, as little systematic attention has previously been given to these defences under Article 82 EC.

The Commission starts its analysis with the concept of “foreclosure”. Its concern is “to prevent exclusionary conduct of the dominant firm which is likely to limit the remaining competitive constraints on the dominant company, including entry of newcomers, so as to avoid that consumers are harmed”. The emphasis on consumer welfare here is very important, not only because Article 82(b) EC specifically mentions consumers, but also because any control of abuse tends to protect competitors rather than competition unless the antitrust enforcer bears this in mind.

The introduction of a more economic approach is a necessity and not a luxury, because Article 82 EC, unlike Article 81 EC, is a system based on control of abuse rather than on the principle of prohibition. This leaves no possibility for a per se illegality approach, but necessitates a “rule of reason” approach. We agree that in order to conduct a proper economic analysis of whether competition is foreclosed, pro-competitive efficiencies must be weighed against anti-competitive effects. However, we are not convinced that such a result can be achieved if certain key concepts, such as foreclosure and efficiencies, continue to be defined as currently in the Discussion Paper.

The Discussion Paper makes it clear 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, but to ensure that these competitors are also able to expand in or enter the market and compete therein on the merits, without facing competition conditions which are distorted or impaired by the dominant firm”.

There may, however, be an inconsistency between the first and second clauses, in that a dominant firm’s competitors may be failing to enter the market and succeed therein precisely as a direct result of the dominant firm’s “genuine competition.” It would make sense for the Commission to stress at this point that the aim of Article 82 EC is not to assist less efficient competitors. A further problem arises from the fact that the Discussion Paper seems to assume that foreclosure is more likely when a market is characterised by network effects and economies of scale and scope. In fact the latter are usually merely the result of efficiencies and “better performance”. If we also take into account the rather lax standard of foreclosure in paragraph 58 of the Discussion Paper, which speaks of foreclosure even when actual or

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6 Paragraph 54 of the Discussion Paper.
7 The pre-eminence of consumer welfare is also evident from the fact that the French version of the Treaty refers in Article 82(b) EC to “consommateurs” as opposed to “utilisateurs”, which is used in Article 81(3) EC.
9 Paragraph 54 of the Discussion Paper, emphasis added.
10 Compare paragraph 67 of the Discussion Paper: “it may sometimes be necessary in the consumers’ interest to also protect competitors that are not (yet) as efficient as the dominant company”. This means that, as a matter of principle, the Commission will look at equally efficient competitors, but the open-endedness of this exception is rather alarming.
potential competitors are merely “disadvantaged and consequently led to compete less aggressively”.

Then, there is a problem with the very narrow definitions of the “objective justification” and “efficiency” defences. The Discussion Paper speaks of three categories of defences, the first being “objective necessity”, the second “meeting competition” and the third “efficiency”.

In order to demonstrate that its conduct is objectively necessary, a dominant undertaking must show that “without the conduct the products concerned cannot or will not be produced or distributed in the market”. In other words, exclusionary conduct may only “escape” the prohibition of Article 82 EC if it is “indispensable”, a requirement the Community Courts have applied strictly, as indeed the Discussion Paper admits. It is unfortunate that the text of the Discussion Paper is here too narrow. For example, the recent Opinion of Advocate General Jacobs in Syfait placed emphasis on the pervasive State regulation of price and distribution in certain industries, such as pharmaceuticals. This could have been easily imported into the objective necessity concept. A final point to add here is that the specific concept of “objective necessity” has some analogies with the “ancillary restraint” doctrine or other “force majeure” or “regulatory ancillarity” concepts under Article 81 EC. But it is again unfortunate that while the latter doctrines fall under Article 81(1) EC and are parameters in finding that an agreement is not restrictive in the first place, the Discussion Paper treats the concept of “objective necessity” only as a “defence” which plays no role in the finding of foreclosure or exclusionary conduct.

On the “meeting competition defence”, the Discussion Paper rightly states that it should be available in relation to behaviour which would otherwise constitute a pricing abuse and that a proportionality test should be followed. Again, the circumstances under which such a “defence” may be successful are rather narrow.

The Discussion Paper is most unsatisfactory when stating how efficiencies will be taken into account. Unlike a rule of reason analysis, the Discussion Paper, mirroring Article 81(3) EC, considers efficiencies only after the behaviour is found to “hinder competition and thereby

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14 Ibid.
15 Opinion of AG Jacobs in Case C-53/03, Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline AEVE, [2005] ECR I-4609, paragraphs 77 to 88.
16 See e.g. Case C-309/99, J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten, [2002] ECR I-1577 and its commentary in Richard Whish, Competition Law (London, 2003), p. 120. Compare Case T-193/02, Laurent Piau v. Commission, judgment of 26 January 2005, not yet published, which is the “Wouters” “equivalent” under Article 82 EC. There, the Court of First Instance found no abuse because the FIFA regulations merely imposed “qualitative restrictions that may be justified in the present circumstances” (paragraph 117).
17 See below our critical comments on the more general question of the two-stage analysis introduced by the Discussion Paper.
18 See e.g. paragraph 82: “In order to fulfil the proportionality test the dominant company must in the first place show that the chosen conduct is a suitable way to achieve the legitimate aim .... In case it is shown that the chosen conduct is a suitable way to achieve the legitimate aim, the dominant company must in the second place show that the conduct is indispensable, i.e. that the legitimate aim cannot be achieved to a similar extent by less anticompetitive alternatives and that the conduct is limited in time to the absolute minimum ... [I]t must [further] be shown that meeting competition is a proportionate response in view of the aim of Article 82. This requires, with a view to protect the consumers' interest, a case by case weighing of the interest of the dominant company to minimise its losses and the interest of its competitors to enter or expand.”
harm consumers", rather than when determining whether conduct should be deemed “exclusionary” in the first place. We think that this system of analysis introduces confusion with regard to the role of “efficiencies” and “objective justification” in general. At times the Discussion Paper gives the impression that these concepts are viewed as a kind of implicit “paragraph 3” in Article 82 EC. Indeed, paragraph 84 of the Discussion Paper is a copy of Article 81(3) EC. However, there is no space for a “paragraph 3” in Article 82 EC, firstly because that provision follows the system of control of abuse, and secondly, because the Treaty itself has opted for a unitary norm. Thus, abuses contrary to Article 82 EC “are prohibited without exception”, while on the other hand a valid objective justification means that there is no (exclusionary) abuse in the first place. Advocate General Jacobs makes this very clear in his Opinion in *Syfait*:

“I would add that the two-stage analysis suggested by the distinction between an abuse and its objective justification is to my mind somewhat artificial. Article 82 EC, by contrast with Article 81 EC, does not contain any explicit provision for the exemption of conduct otherwise falling within it. Indeed, the very fact that conduct is characterised as an ‘abuse’ suggests that a negative conclusion has already been reached, by contrast with the more neutral terminology of ‘prevention, restriction, or distortion of competition’ under Article 81 EC. In my view, it is therefore more accurate to say that certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all.”

In our view, the Discussion Paper should not have followed a system of analysis which first establishes foreclosure and thus exclusionary conduct, and only then proceeds to examine objective justification and efficiencies. Such an approach is reminiscent of the Article 81 EC two-stage analysis, where conduct falling under the first paragraph must then satisfy the cumulative and stringent conditions of the third paragraph. In the Commission’s “second stage” analysis under Article 82 EC, the objective justification and efficiency defences are very slim. To give an example, paragraph 88 of the Discussion Paper, again transposing a principle from the Article 81(3) Guidelines, provides that benefits under an efficiency defence must be passed on to consumers only in the specific affected market, and not to other markets, even related ones. Besides, the finding of exclusionary conduct carries with it a highly negative connotation which will be difficult to reverse under the “defence” approach. Proof of efficiencies thus amounts to a *probatio diabolica*. Instead, the dominant firm’s objective justification and efficiencies should be considered when determining whether the relevant conduct should be deemed “exclusionary” in the first place.

The Commission’s answer to these concerns may be that it uses the concept of “foreclosure” objectively. However, this approach goes beyond semantics to represent a flawed

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20 This is clear from paragraph 77 of the Discussion Paper.
22 Opinion of AG Jacobs in *Syfait*, op.cit., paragraph 72.
23 See e.g. paragraph 60 of the Discussion Paper.
25 “If consumers in an affected relevant market are worse off following the exclusionary conduct, that conduct can not be justified on efficiency grounds”, emphasis added.
26 See e.g. paragraph 61 of the Discussion Paper distinguishing between anti-competitive and by implication pro-competitive “foreclosure”.
transposition of the Article 81 EC analysis to Article 82 EC; what makes sense under the prohibition system cannot be transposed to a system of control of abuse. There is a further problem with the burden of proof. The text of Article 2 of Regulation 1/2003 is unequivocal: it makes a distinction between Articles 81(1) and 82 EC on the one hand, where the enforcement agency carries the burden of proof, and Article 81(3) EC on the other hand, where the burden of proof is borne by the undertakings concerned. Of course, we are mindful that a dominant company’s efficiency defence may well be supported by elements of fact, and that those elements may belong to that company’s sphere of influence and control. In such cases, it will obviously be up to the dominant company to bring forward that evidence. But reasonableness cannot be equated with one-sidedness in relegating the whole burden of proof to the dominant company. Otherwise, from an easy finding of exclusion-foreclosure, one would go to an almost impossible-to-prove “defence”.

**Predatory Pricing (§§ 93-133)**

In contrast with other areas such as rebates, the Discussion Paper envisages only minor modifications to the Commission’s policy in relation to predatory pricing. It puts forward a number of pertinent propositions. Firstly, it suggests using average avoidable costs (AAC), i.e. variable costs plus any non-sunk fixed costs, instead of the traditionally used standard of average variable costs (AVC), as the relevant cost benchmark by which to evaluate predatory pricing. Although the difference between AAC and AVC will often be small, there will be situations where a dominant undertaking has to expand production in order to engage in predatory behaviour effectively, and in such cases the AAC standard will be more useful in evaluating the predatory nature of the dominant undertaking’s strategy. Secondly, the Discussion Paper is to be applauded for attempting to clarify the current grey area, resulting from the AKZO case, when a dominant undertaking’s pricing is above AAC/AVC but below average total cost (ATC). The clarification of how and under what circumstances a dominant undertaking can rely on possible defences in such cases is helpful. However, while the Discussion Paper is correct in recognising that such a defence should be possible provided the dominant undertaking can show its response is suitable, indispensable and proportionate, this section of the Discussion Paper is too succinct, and the examples of possible justifications should be fleshed out and developed.

Predictably, the Discussion Paper maintains that the likely recoupment of profits is not a requirement for proving predation, unlike the situation under US law. As stated in the Discussion Paper, “predation is a risky strategy because the self-inflicted losses may not be regained”, and it would be contrary to the rationale of Article 82 EC if such conduct were only caught when the dominant undertaking was successful in reducing/eliminating competition and recouping its losses. Recoupment is only relevant if a dominant undertaking

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27 It is not evident how Recital 5 of that Regulation or judgments issued by the Community Courts before that Regulation came into effect can help the Commission’s argument here. See paragraph 77 of the Discussion Paper and the accompanying references.
30 Paragraphs 111 and 112 of the Discussion Paper.
31 Paragraphs 130 to 133 of the Discussion Paper.
33 Paragraph 97 of the Discussion Paper.
can show that such recouping will never be possible.\textsuperscript{34} The Discussion Paper provides that recoupment can be taken into account when assessing whether there is any indirect evidence that the dominant undertaking has engaged in a predatory strategy,\textsuperscript{35} and/or in assessing whether an undertaking can be considered as dominant on a specific market.\textsuperscript{36}

There are a number of issues where the Discussion Paper requires improvement and development. Firstly, it could have gone a bit further in reconciling the EU and US approaches on recoupment, so we consider this a missed opportunity. Secondly, the continuing reference to formalistic price-cost tests does not fit well with the intention to move towards a more effects-based approach in the enforcement of Article 82 EC. While it is true that the Discussion Paper defines predatory pricing in terms of effects rather than of cost,\textsuperscript{37} there is still an underlying reliance on formal price-cost tests and on whether the undertaking’s pricing strategy falls within a particular price-cost category. This does not seem to be in line with the greater emphasis on economic analysis in the rest of the Discussion Paper. The Commission’s enforcement of Article 82 EC in relation to predatory pricing should be based on its ability to prove, through the use of sound economic evidence, that the necessary criteria for a successful predation strategy are present, and that the conduct of the undertaking fulfils those criteria.

Thirdly, as also explained above, the Discussion Paper does not go far enough in its consideration of the possible justifications dominant undertakings can put forward for their pricing behaviour. It acknowledges that when the price charged by the dominant undertaking is under AAC, such pricing behaviour can still be justified, but adds that it must be shown that “there is no possibility that it (the pricing behaviour) could have an exclusionary effect on rivals”.\textsuperscript{38} This statement fails to recognise that there may be a number of other reasons why a dominant undertaking may price below AAC and which may be pro-competitive, such as the short-term promotion of a new product.

**Single Branding Obligations and Other Exclusivity Clauses (§§ 134-150)**

The Discussion Paper defines single branding obligations as “obligations which require the buyer on a particular market to concentrate its purchases to a large extent with one supplier” and “English clauses” as clauses “requiring the buyer to report any better offer and allowing it only to accept such an offer when the supplier does not match it”.\textsuperscript{39} For the Commission, these two types of clauses should be considered in the same light, as they both have the same effect “of concentrating the purchases with one supplier”.

\textsuperscript{34} Paragraph 123 of the Discussion Paper.

\textsuperscript{35} Paragraph 115 of the Discussion Paper.

\textsuperscript{36} Paragraph 122 of the Discussion Paper: “As dominance is already established this normally means that entry barriers are sufficiently high to presume the possibility to recoup”. See also John Vickers, “Abuse of Market Power”, Speech to the 31\textsuperscript{st} Conference of EARIE (Berlin, 3 September 2004), p. 7.

\textsuperscript{37} According to paragraph 93 of the Discussion Paper, “predatory pricing can be defined as the practice where a dominant company lowers its price and thereby deliberately incurs losses or foregoes profits in the short run so as to enable it to eliminate or discipline one or more rivals or to prevent entry by one or more potential rivals thereby hindering the maintenance or the degree of competition still existing in the market or the growth of that competition.”

\textsuperscript{38} Paragraph 110 of the Discussion Paper.

\textsuperscript{39} Paragraph 148 of the Discussion Paper.
While one would have expected a shift away from the formalistic view that such clauses constitute more or less per se violations of Article 82 EC, because their inherent nature is to restrict competition, the language of the Discussion Paper does not depart substantially from the rationale of per se abuse; indeed it contains several negative presumptions. For example, the Paper concludes that “where the dominant company applies a single branding obligation to a good part of its buyers and this obligation therefore affects, if not most, at least a substantial part of market demand, the Commission is likely to conclude that the obligation has a market distorting foreclosure effect and thus constitutes an abuse of the dominant position”. In other words, it is assumed that by its very nature a single branding obligation is likely to have an anti-competitive effect and will violate Article 82 EC. Furthermore, the Discussion Paper is right to argue in favour of a more economic approach, but this should not be limited simply to the question of evaluating what percentage of the market is tied by single branding and/or English clauses. What is important is not so much whether in theory a large degree of the market may be tied, but whether barriers to entry to the relevant market are so high as to prevent access to the downstream market by other actual or potential competitors.

**Rebates (§§ 151-176)**

The application of Article 82 EC to rebates is one of the most controversial aspects of the Commission’s current enforcement policy, and thus one of the areas where the proposals of the Discussion Paper were the most eagerly awaited. Recent Commission decisions, as accepted by the Community Courts, have essentially treated certain forms of rebates as abusive per se, thereby dispensing with any requirement to assess the actual economic effects of the rebate system. As the Courts have put it, in “establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect”. The result of the current situation is that it is very difficult for practitioners to provide clear advice to dominant undertakings on rebate systems. For most companies, the current law is simply counterintuitive.

We consider that the Discussion Paper marks a step in the right direction by recognising that dominant undertakings use rebates for both efficiency-enhancing and anti-competitive reasons and that such use cannot be condemned as abusive per se. It is also encouraging that the Commission explains how and on what basis the potential pro-competitive and anti-competitive effects must be balanced. The Commission specifically lists a number of factors which it will consider when making its assessment.

Importantly, the Discussion Paper also recognises that the dominant position of an undertaking on a market will mean that even without loyalty-inducing measures such as

41 Paragraph 149 of the Discussion Paper.
43 Michelin II, op.cit., paragraph 239.
44 Paragraph 138 of the Discussion Paper: “A supplier may use single branding obligations and rebate systems for efficiency enhancing reasons and for anti-competitive reasons and they may have efficiency enhancing effects and anti-competitive effects.”
rebates, buyers will have to buy a large part of their supplies from the dominant undertaking.\textsuperscript{46} With regard to conditional rebates on all purchases, the Commission proposes to examine the pervasiveness of the rebate system not in relation to the entirety of the dominant firm’s sales but only on the basis of the \textit{“commercially viable amounts”}, i.e. the amounts that equally efficient competitors could supply to the same customers.\textsuperscript{47} The Discussion Paper sets out a detailed method for assessing the commercially viable amount, but there are serious doubts as to how a dominant undertaking can, on the basis of this formula, evaluate \textit{ex ante} the likely foreclosure effect of its system.\textsuperscript{48}

The Discussion Paper recognises that even when a rebate system is found to have an appreciable foreclosure effect, a dominant undertaking may propose efficiency considerations.\textsuperscript{49} As explained above, efficiencies are structured in a four-prong test which mimics the four cumulative criteria of Article 81(3) EC. We have expressed above our concerns with this bifurcation of the analysis.

To conclude on this section, although the Discussion Paper clearly focuses on the need for an economic approach, its language still contains worrying indications that certain presumptions are still lingering in the background and have not been completely abandoned. For example, the Discussion Paper suggests that certain rebate systems formulated in terms of a percentage of the buyer’s total requirements, or as an individualised volume target, will be considered more likely to have a loyalty-enhancing effect than a rebate system formulated as a standardised volume threshold.\textsuperscript{50} Similarly, rebates which are applied to a buyer’s total purchases once a certain threshold is met are more likely to be considered as having a loyalty-enhancing effect than rebates applied only to incremental purchases above the threshold.\textsuperscript{51} However, a more economic approach in the application of Article 82 EC to rebates should leave no room for the existence of presumptions and inferences of abuse.

\textbf{Tying and Bundling (§§ 177-206)}

The Discussion Paper limits its analysis of the potential anti-competitive effects of tying and bundling to foreclosure, leaving analysis of the anti-competitive effects of price discrimination and higher prices for the forthcoming Paper on exploitative and discriminatory practices.\textsuperscript{52}

In relation to contractual and technological tying, in assessing when there is a new single integrated product, the Discussion Paper proposes that there will only be a single product when there is \textit{“no more independent demand for the tied product”}.\textsuperscript{53} It also gives, as an example of indirect evidence for the proposition that two differentiated products exist, \textit{“the situation where there are already on the market independent companies who are specialised in the manufacture and sale of the tied product without the tying product”}.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{46} Paragraph 143 of the Discussion Paper.
\item \textsuperscript{47} Paragraph 154 of the Discussion Paper.
\item \textsuperscript{48} This is due to lack of information on the relative efficiency of its current competitors and on what constitutes the “minimum efficient scale” for entry.
\item \textsuperscript{49} Paragraphs 172-175 of the Discussion Paper.
\item \textsuperscript{50} Paragraphs 158 and 159 of the Discussion Paper.
\item \textsuperscript{51} Paragraphs 153 and 166 of the Discussion Paper.
\item \textsuperscript{52} Paragraph 179 of the Discussion Paper.
\item \textsuperscript{53} Paragraph 187 of the Discussion Paper.
\item \textsuperscript{54} Paragraph 186 of the Discussion Paper.
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The Discussion Paper also indicates certain areas where the Commission appears ready to depart from its previous reasoning. For example, past Commission decisions, confirmed by the Community Courts, have treated mixed bundling, i.e. where a dominant undertaking offers two or more of its products at a combined lower price than if each product was purchased individually, as constituting an abuse under Article 82 EC by its very nature, unless it could be objectively justified. The Discussion Paper now proposes looking at the long-term incremental costs of the bundled products; if the bundled price covers such costs, the bundle should be lawful, although the Commission may still exceptionally conclude that although the “price [which customers pay for each of the dominant company’s products in the bundle] exceeds the long run incremental costs, the mixed bundling nonetheless is considered exclusionary”.

This section is still influenced by the Commission’s previous approach based on presumptions of abuse. The Paper states that where the Commission has difficulties in calculating the incremental costs of the dominant undertaking, it can make a comparison with a rival’s available cost data, provided there “are no good reasons to believe that the rival is less efficient than the dominant company”, or if no such cost data are available, it can show that the rival was actually excluded or marginalised following the bundling by the dominant company. However, this means that it will then be for the dominant undertaking to rebut such a finding of exclusion, and not for the Commission to prove it. Such a reversal of the burden of proof is problematic and runs contrary to the Discussion Paper’s proclaimed intention of moving towards a more economic approach.

Refusal to Supply (§§ 207-242)

In the refusal to supply chapter, the Discussion Paper attempts to summarise and systematise the existing case law, but we fear that the result is to contradict that case law and adopt a more interventionist and formalistic approach. We therefore give more emphasis to this chapter.

The Discussion Paper starts from the premise that dominant undertakings have in principle the right to determine whom to supply, and that an obligation to supply can be established only after a close scrutiny of the factual and economic context. The finding of abuse is, according to the Commission, highly dependent on the specific economic and regulatory context. In other words, these basic principles mean that a refusal to supply case can only be seen through a rule of reason analysis. While we agree with these general principles, we are disappointed that the Commission, while copying paragraph 53 of Advocate General Jacobs’s Opinion in Syfait, i.e. that “any obligation to deal pursuant to Article 82 EC can be established only after a close scrutiny of the factual and economic context”, did not include the last phrase of the Advocate General’s sentence, i.e. “and even then only within somewhat narrow limits”. We hope that this omission does not indicate a lower standard.

55 Paragraphs 189 and 190 of the Discussion Paper.
The Discussion Paper rightly states that a refusal to supply may be the instrument that achieves a purpose which essentially amounts to exclusive dealing or tying. These cases do not, in the Commission’s view, constitute a refusal to supply abuse in the strict sense and should therefore be examined under the rules on tying or single branding. Instead, the Commission speaks of a refusal to supply abuse only when “a dominant company denies a buyer access to an input in order to exclude that buyer from participating in an economic activity (vertical foreclosure)”.

These cases are always sensitive because a dominant undertaking is ordered to assist its rivals, and the Commission’s clarification that we are dealing here with anti-competitive effects on the market which are “detrimental to consumer welfare” is a welcome reminder.

In this context, it is also positive that the Commission attempts to identify the main problem underlying forcing dominant companies to supply their rivals. Thus the Discussion Paper alludes to a balancing between improving the competitive process in the downstream market, i.e. protecting allocative efficiency, and investment incentives, i.e. dynamic efficiency. The Commission, however, intends to take into account in this balancing not just the dominant company’s investment incentives, which may suffer as a result of forced dealing, but also those of other firms, i.e. the dominant company’s rivals’ investment incentives “in, for instance, follow-on research and development that would otherwise not be possible or profitable”.

We find this addition to the balancing exercise at variance with standard economic theory. The very essence of the exercise in such cases lies in balancing the short-term benefits of antitrust intervention, i.e. the need to protect competition, against the long-term prejudice of that intervention, i.e. the reduction of companies’ incentives to engage in research and development and innovate, for fear that they may be obliged to give their competitors access to their assets. The literature does not support taking into account any other elements here. Taking into account the investment incentives of the dominant undertaking’s competitors always inadvertently tips the balance in favour of antitrust intervention. Besides, the Commission shows here a certain prejudice against dominant companies’ incentives to invest and innovate, which at the end of the day are tangible, since dominance is to a great extent the result of such investment and innovation.

On the other hand, its favouring of the dominant company’s rivals’ incentives to invest and innovate is based on the assumption that those rivals will actually invest and innovate. This is not a concrete reality however, rather a hypothesis, and the Commission should not favour the hypothetical over the concrete.

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64 See e.g. Carles Esteva Mosso and Stephen Ryan, “Article 82 – Abuse of A dominant Position”, in: Faull & Nikpay (Eds.), The EC Law of Competition (Oxford, 1999), p. 152. Compare also AG Jacobs’s Opinion in Case C-7/97, Oscar Bromer GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others, [1998] ECR I-7791, paragraph 57: “[T]he justification in terms of competition policy for interfering with a dominant undertaking’s freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.”
65 Of course, when this is not the case, for example when a dominant company has merely been granted exclusive rights by means of state regulation, there should be less immunity from antitrust intervention.
The Discussion Paper then adopts a categorisation in refusal to deal cases which restates the existing case law and follows the restatement by Advocate General Jacobs in *Syfait*. The Commission now speaks of four kinds of refusal to deal: (a) a refusal to supply an existing customer (discontinuation of supply), (b) a refusal to supply a new customer with input for the first time, (c) a refusal to start supplying a new customer with an input covered by intellectual property rights; and (d) a refusal to supply information needed for interoperability.

We begin by noting that this is the first time the Commission has clearly distinguished between discontinuation of supply and first refusal to supply a new customer. Previously, the Commission’s approach was that from an economic point of view both cases result in elimination of competition; therefore, refusal to deal for the first time should not be subject to stricter rules than discontinuation of supply. We do not think that this distinction is flawed, at least conceptually. Advocate General Jacobs in *Syfait* follows it too. The problem does not lie in the categorisation as such, but rather in the conditions or constituent elements of the two categories of refusal to supply.

The Discussion Paper’s approach with regard to discontinuation of supply gives rise to serious concerns. It starts from the following startling premise:

> “That the dominant company in the past has found it in its interest to supply an input to one or more customers shows that the dominant company at a certain point in time considered it efficient to engage in such supply relationships. This and the fact that its customers are likely to have made investments connected to these supply relationships create a rebuttable presumption that continuing these relationships is pro-competitive.”

The first problem with this presumption is that it is not entirely clear in which part of the Commission’s analysis it is taken into account. It is unclear whether it is a separate basic condition or part of the objective justification test. We fear it may be viewed as a *per se* abuse that immediately shifts the burden of proof onto the dominant undertaking. The second problem with this presumption is that from an economic point of view, it creates serious disincentives for dominant undertakings to enter into commercial agreements in the first place, for fear that once they supply someone, they will be stuck in that relationship forever. This may create significant problems for dominant companies doing business in Europe, as well as for their potential customers. The Commission should think twice before adopting such a presumption.

Also, the four conditions that, according to the Discussion Paper, “normally” have to be fulfilled for a finding of abuse in this area are surprising. The Commission has omitted one very important condition, and one of the existing conditions has been adapted to facilitate intervention. The conditions listed are: (a) the behaviour must be properly characterised as

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66 Paragraphs 53 to 65 of AG Jacobs’s Opinion in *Syfait*, op.cit.
68 We note that paragraph 217, which includes it, precedes the paragraph listing the conditions that have to be fulfilled in order to find a discontinuation of supply abusive (paragraph 218 of the Discussion Paper).
69 This presumption creates more problems than it solves. It would be sufficient for the Commission to be satisfied with the narrower objective justification defence in discontinuation of supply cases, but not in first refusal ones, instead of introducing such an overarching formalistic presumption.
termination; (b) the refusing undertaking is dominant; (c) the refusal is likely to have a negative effect on competition; and (d) the refusal is not justified objectively or by efficiencies. The problem lies here in condition (c), whose description by the Commission does not correspond to the Community Courts’ case law that is supposedly followed here. Cases like Commercial Solvents and Télémarketing, both of which dealt with refusals to supply an existing customer, do not speak of a refusal which, as the Commission phrases it in the Discussion Paper, “is likely to have a negative effect on competition”, but speak rather of conduct that “risks eliminating all competition on the part of this customer” and of “possibility of eliminating all competition from that customer”. More importantly, the language used in these cases implies that the input which the dominant company has refused to supply is indispensable to enable the specific customer to compete in the downstream market. If this were not true, all competition from that undertaking would not be eliminated. In other words, there is also an indispensability condition, which the Commission omits from the Discussion Paper. In that sense, the conditions for antitrust intervention are the same in cases of both discontinuation of supply and first refusal to supply a non-intellectual property-related input.

As to the requirement of elimination of competition, the Discussion Paper adopts an approach which is not as narrow as that employed by the Community Courts. It speaks of a “negative effect on competition”, and further clarifies that it should not “be understood to mean the complete elimination of all competition”. While this definition is in line with generic case law on Article 82 EC, in the specific area of refusal to supply, the Community Courts have been more reserved. In addition, it is noteworthy that the Discussion Paper again uses a presumption of abuse if the dominant company that refuses to supply is itself active in the downstream market. Finally, the Commission makes clear that objective justification in discontinuation of supply cases will be very difficult.

When we move to cases of refusal to start supplying an input to a new customer, we find that the four conditions referred to above are restated, but here, unlike in cases of discontinuation of supply, the Commission adds indispensability. As we explained above, the Community Courts’ case law requires the condition of indispensability to be present not only in first refusals to supply but also in cases of discontinuation of supply. As to indispensability as


71 Télémarketing is more explicit than Commercial Solvents as to the indispensability condition: “That ruling [Commercial Solvents] also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market” (op.cit., paragraph 26, emphasis added).


73 Compare Case 85/76, Hoffmann-La Roche & Co. AG v. Commission, [1979] ECR 461, paragraph 91, speaking of conduct that has “the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.

74 See e.g. Commercial Solvents, op.cit., paragraph 25 (see above); Télémarketing, op.cit., paragraphs 25 to 27 (see above); Joined Cases C-241/91 P and C-242/91 P, Radio Téléfis Éireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission (Magill), [1995] ECR I-743, paragraph 56 (“excluding all competition in the market”); Case T-504/93, Tiercé Ladbroke SA v. Commission, [1997] ECR II-923, paragraph 130 (in the part that interprets the elimination of competition condition in Magill); Bronner, op.cit., paragraph 41 (“likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service”); Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, [2004] ECR I-5039, paragraph 40 (“likelihood of excluding all competition on a secondary market”).
such, the Discussion Paper refers to Bronner, but omits an important principle: that this condition will be examined through the angle of an equally efficient competitor, otherwise indispensability is transformed into convenience.\textsuperscript{75} On the condition of exclusion of competition, the Discussion Paper here too follows a much more open-ended standard: “\textit{likely negative effect on competition}” or “\textit{likely market-distorting foreclosure effect}”.\textsuperscript{76} Again, we think that this standard is at odds with the much narrower concept of “elimination of competition” used in the case law.

Unlike the first category of cases concerning discontinuation of supply, the Discussion Paper is somewhat more relaxed in accepting objective justification defences in this second category. Thus, one defence may be commercial assurance that the other party is solvent and that it will perform, another that the input requested is capacity-constrained, or that granting access would jeopardise the dominant company’s economic viability, or that the requesting company cannot use the input in a technically correct manner.\textsuperscript{77} The Discussion Paper then repeats that in all these cases there must be a balancing between compelling access and protecting incentives to invest and innovate.\textsuperscript{78}

While one would have expected the Commission to stop here, another negative presumption follows. A refusal to supply a new customer is more likely to be abusive in three circumstances: (a) if the investments by the dominant company that led to the indispensable input would have been made in any case (the Commission uses as an example former State monopolies); (b) if the original investment “\textit{primarily was made for reasons not related to the market in which the company asking access to the input intends to use the input}”; (c) in intellectual property-related cases if the investments behind innovations leading to intellectual property rights “\textit{may not have been particularly significant}”. Regarding the third circumstance, which is surprising, “\textit{the Commission will take account of the respective values that are at stake, including the possible positive effects on incentives to follow-on investment from allowing access}”.\textsuperscript{79} We have already provided critical comments on the latter statement in the Discussion Paper.\textsuperscript{80} It is sufficient here to stress that the way in which the Discussion Paper employs this negative presumption - whose rebuttal falls entirely on the dominant company – amounts to a \textit{probatio diabolica}, because the Commission introduces an assumption, based on purely hypothetical grounds, that the dominant firm’s rivals will actually invest and innovate. The Commission seems also to make a value judgment here that dominant undertakings’ concrete incentives to invest and innovate are less valuable than their rivals’ hypothetical incentives.\textsuperscript{81}

Many of the comments made above are also applicable to the Discussion Paper’s treatment of refusals to license intellectual property rights. First of all, the Discussion Paper refers to the five conditions for the finding of an abuse in cases of first refusal to supply, i.e. (a) behaviour properly characterised as refusal, (b) dominance, (c) indispensability, (d) “\textit{negative effect on competition}”, and (e) absence of objective justification. It adds a sixth condition that “\textit{may have to be met}”, which is the “\textit{prevention of the development of the market for which the}”

\textsuperscript{75} Compare Bronner, \textit{op.cit.}, paragraphs 42 to 46.
\textsuperscript{76} Paragraph 234 of the Discussion Paper.
\textsuperscript{77} Paragraph 236 of the Discussion Paper.
\textsuperscript{78} See above our comments on this balancing test.
\textsuperscript{79} Paragraph 240 of the Discussion Paper.
\textsuperscript{80} See our comments above on paragraph 213 of the Discussion Paper.
\textsuperscript{81} The same critical comments are \textit{a fortiori} applicable to paragraph 240 of the Discussion Paper, which deals specifically with IP-related cases.
\textsuperscript{82} Paragraph 237 of the Discussion Paper, emphasis added.
licence is an indispensable input”. Two comments can be made here: (i) The European Court of Justice has restated the law on compulsory licensing of intellectual property rights very recently in the IMS judgment, and the “sixth condition” of the Discussion Paper is not one that “may” have to be met, but rather a condition that is cumulative with the other conditions described above. (ii) The Discussion Paper lists as an “additional condition” the prevention of the development of the market for which the licence is an indispensable input, instead of following the very specific text of paragraph 38 of IMS, which speaks of a refusal that “is preventing the emergence of a new product for which there is a potential consumer demand”. Of course, the Discussion Paper later admits that the prevention of market development for which the compulsory licence is an indispensable input “may only” be present “if the undertaking which requests the licence does not intend to limit itself essentially to duplicating the goods or services already offered on this market by the owner of the IPR, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand”. But it would have been more straightforward for the Commission to refer directly to the prevention of the emergence of a new product satisfying unmet consumer demand as the “sixth” condition here, as the Court of Justice held in IMS.

The “new product meeting unmet consumer demand” condition lies at the core of IP compulsory licensing cases, precisely because it guards against undue antitrust intervention. It represents the dynamic efficiency consideration, and at the end of the day, guarantees that we have a system of competition by substitution, as opposed to competition by imitation.

Finally, we note that the Discussion Paper examines a new category of cases of refusal to supply information needed for interoperability. The Commission does not consider this category under Section 9.2.2 of the Discussion Paper, but rather as a separate category.

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For further discussion of these and other questions, please contact Mark Powell at mpowell@whitecase.com and Assimakis Komninos at akomninos@whitecase.com.

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83 Paragraph 239 of the Discussion Paper.
84 IMS Health, op.cit., paragraph 38, speaking of “cumulative conditions”.
85 IMS has taken this text over from Magill (op.cit., paragraph 54).
88 Since these issues lie at the heart of the pending litigation before the Court of First Instance in Microsoft v. Commission, we refrain from commenting on this section. Reference is made to Commission Decision of 24 March 2004 (COMP/32.792-Microsoft) and to Case T-204/01, Microsoft Corporation v. Commission, currently pending.