April 4th 2006

Comments on the DG competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses

Introduction

1. The American Chamber of Commerce to the European Union (AmCham EU) is the key organisation in Europe representing the views of European companies of American parentage. Its member companies are drawn from a broad cross-section of the European business community and typically are present in most Member States of the European Union. As such, it represents some of the earliest and most committed business supporters of the European ideal and, in particular, of the single market concept.

2. AmCham EU welcomes the Commission’s initiative to review and improve its enforcement of Article 82 of the EC Treaty. AmCham EU believes that one of the main goals of improving the enforcement practice of Article 82 should be to better align this enforcement with some of the objectives of the Lisbon Agenda, namely the stimulation of competitiveness, innovation and growth. Accordingly, AmCham EU welcomes the Discussion Paper’s (the “Paper”) statements according to which Article 82 should be used to protect competition and not competitors, with the ultimate goal of avoiding consumer harm. By appropriately focusing on avoiding consumer detriment, the Commission, National Competition Authorities (“NCA”), and courts should be able to avoid a misguided application of Article 82, resulting in insulating firms from fierce competition created by even dominant companies, and in penalising undertakings, even those with a certain degree of market power, for competing. This would clearly not be beneficial to achieving the Lisbon Agenda objectives.

3. AmCham EU commends the Commission for aspiring to the pursuit of an enforcement policy based on sound economics, and the likely and predictable effects of a particular conduct. At the same time, AmCham EU believes that if the Paper turns into enforcement guidelines, these need to be practical and workable to provide the business community with a sufficient amount of predictability and legal certainty. In particular, AmCham EU does not believe that the guidelines should consist of a detailed theoretical explanation of the circumstances under which a particular conduct may give rise to anticompetitive harm. This is because this is likely to create a heavy burden on businesses in causing them to engage in very detailed market analysis exercises (including for instance an analysis of potential allocative, productive and other types of efficiencies of a specific conduct) to determine whether (often

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1 Discussion Paper, paragraph 54.
pervasive) commercial conduct is legal under Article 82. At the same time, a formalistic *per se* approach identifying illegal conduct may not be appropriate when the business practices in question do not have likely exclusionary effect and/or do not reduce consumer welfare.

4. In this context, AmCham EU would like to underline the very real risk that the lack of clarity surrounding the application of Article 82 has a significant “chilling effect” on the ability of dominant firms to engage in legitimate competitive conduct and, just as worryingly, on the commercial freedom of companies with market shares in the region of 40%. Such companies may legitimately fear that, should they be the subject of complaints, they could be found to be dominant erroneously. The blanket nature of recent EU precedents coupled with the inconsistent approach amongst national competition authorities and the cost implications of carrying out detailed and, in many cases, speculative economic analysis, means that many businesses today choose to adopt conservative policies that unduly restrict their pricing or general entrepreneurial freedom to the detriment of consumers.

5. Hence, AmCham EU would not support guidelines that would consist of descriptions of when conduct should be presumed to be abusive and accordingly imposing a burden of proof on allegedly dominant companies to rebut such presumptions.

6. AmCham EU believes that a better approach would consist of adopting guidelines that set forth, based on past experience and sound economic theory, the circumstances under which it is unlikely that unilateral conduct will cause consumer detriment (even though the conduct in question may create disadvantages to certain competitors). For instance, this would be the case when conduct provides a clear short-term benefit to customers and when the conduct is pursued at the request or at the preference of customers. Under this approach, the party claiming the Article 82 violation would carry the burden of proving that the conduct in question would have a detrimental effect on consumers (or could not be justified as legitimate competition), and in doing so, such party would have to overcome the pro-competitive presumptions set forth in the guidelines. These presumptions would be more difficult to overcome to the extent that in specific cases the theories of anticompetitive harm are complex, novel, and predict consumer detriment in the medium or the long term. Indeed, the key test should be a clear and demonstrable proof of likely and significant foreclosure in the short to mid-term.

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2 As articulated for instance by RBB Economics in its recent report to the OFT.

3 These distortions are most prevalent in the context of rebate schemes and differential pricing. Requiring price advantages to be justified by cost savings or other apparent objective justification places an unnecessary burden on companies and often results in schemes dressed up to look “objective” and at least some customers paying higher prices than they otherwise would have, with no regard to any underlying theory of competitive harm.

4 This may, for instance, be as a result of the fact that certain conduct should be presumed to create efficiencies. Hence, efficiencies as explained further in these comments, should be assessed in a single step analysis, rather than as a defense in a two-step analysis.
AmCham EU believes that such an approach, pursuant to which undertakings generally do not have the burden of proving that they are not dominant nor that their conduct is not abusive, would be more balanced and would lead to better enforcement of Article 82. AmCham EU in particular advocates such an approach to the burden of proof in connection with rebates (see paragraphs 45-50), tying (see paragraphs 67-71), and refusals to supply (see paragraphs 96).

Finally, AmCham EU is of the opinion that the utility of the guidelines will be of significance only if and to the extent practical and economically sound guidance is provided on the concept of dominance. In particular, pursuant to the current Article 82 enforcement practice, dominance is or can often be found in situations where an undertaking is, in reality, not able to behave to an appreciable extent independently of customers and competitors. The Commission should take the opportunity to clearly confirm that market shares alone are not a sufficient indicator of market power. The guidelines should also confirm that in addition to market shares, other indicators are useful to assess dominance or absence of dominance, such as: the fact that a company has been compelled to offer price reductions, the existence of bidding markets, the ease of entry or of expansion, countervailing buyer power, and the degree of innovation in a market. In fast-moving high-tech markets, it is also important to recognise that competition is often dynamic in the sense that competition can take place for the market in a “winner takes all” race. Undertakings may have high market shares in those markets, but their market position may be transitory and market shares may not be true indicators of market power as they are subject to permanent threat from innovative competitors. Such an approach should reduce the risk of the competition law enforcers in the EU generally committing “type 1 errors”, consisting of intervention when none is really warranted.

I. Dominance

Introduction

AmCham EU welcomes the Paper’s introductory remarks on dominance and agrees in particular with the general concept that for dominance to exist, the undertakings concerned must not be subject to effective competitive constraints and that they therefore must have substantial market power. The paper correctly (i) equates the “ability to act to an appreciable extent independently of competitors, customers and consumers” with substantial market power, and (ii) recognises that when undertakings are compelled by the pressure of competitors’ price reductions to lower their own prices, there cannot be a finding of dominance. This provides a sound basis for a more economic approach to Article 82.

Discussion Paper, paragraph 23.
10. The Paper explains in paragraph 26 that “higher than normal profits” may be an indication of a lack of competitive constraints, but that even short-run losses are not incompatible with a dominant position. However, the Paper does not clarify that it is extremely difficult, if not impossible, to determine in real-world economic situations when profits are “normal” and when they are “higher than normal”. In addition, the Paper does not illustrate why high profits are often consistent with competitive markets. This is regrettable, since economic literature has shown that high and persistent profits are, more often than not, the result of the fact that firms are more efficient, innovative, and entrepreneurial than their competitors as opposed to the result of significant market power. Hence, AmCham EU believes that in future guidance from the Commission, paragraph 26 should either be deleted or should be amended to include that clarification and illustration to avoid undertakings being at greater risk of being found dominant in part because they are earning high profits in situations where these high profits are consistent with a competitive outcome.

11. AmCham EU believes that the sections discussing specifically Single Dominance and Collective Dominance are in a number of respects inconsistent with the general and economically valid basic concepts set forth in the introduction on Dominance (see paragraph 10 above). It is of crucial importance to improve these sections, since a sound analysis of the exclusionary nature of a particular conduct can only occur when the underlying premise, dominance or substantial market power, is appropriately analysed and addressed. Article 82 should only be enforced when competition is, as a result of dominance exercised by a company, already weak. Article 82 should not be enforced in circumstances where there is simply a company that is stronger or more successful than other players on the market.

12. The Paper relies extensively on the fact that an undertaking has substantial market power to reach a particular conclusion regarding the analysis of and the methodology to determine when a conduct should be viewed as abusive. For instance, in analysing predatory pricing, the Commission concludes that separate proof of recoupment is not necessary, since "dominance is already established [and this] normally means that entry barriers are sufficiently high to presume the possibility to recoup". AmCham EU believes that some of the shortcomings of current Article 82 enforcement (inconsistent outcomes, false positives, intervention that damages incentives to compete) derive in part from failing to have economically sound and workable guidance regarding the first element - when a firm will be viewed as having a position of "dominance" in a relevant market.

**Single Dominance**

13. First, the Paper seems to rely too heavily on market shares as a first indication of the competitive importance of various undertakings (see paragraphs 29 and 31 of the Paper). In particular, there is no sound basis to suggest that market

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6 Discussion Paper, paragraph 122.
shares in the range of 40% to 50% or shares below 40% are a reliable indication of substantial market power, and that these shares allow an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. A share of more than 75% seems a better indicator, as referred to in paragraph 92. Market shares can be a good indicator of economic strength (referred to in paragraph 21 of the Paper), but the Commission should point out that, in addition, there needs to be a separate finding (and not simply a presumption) based on economic analysis and the specific market circumstances of each case, that this strength is such that it allows an undertaking to act independently. In the absence of this separate finding, paragraph 21 of the Paper would be meaningless, and undertakings with market shares in the range of 40%-50% which may, depending on the circumstances, enjoy a certain degree of economic strength, would have the burden of proving that they are not dominant. Accordingly, paragraph 31 should be amended to point out that market shares are only a good indicator of economic strength, but not necessarily of dominance without further economic analysis. Future guidance of the Commission should incorporate a clearer reference in paragraph 32 to the need to engage in a careful examination of how competition works in each particular market to analyse whether the indicia of economic strength are also indicative of dominance.

14. In addition, the Commission could outline a more systematic approach to assessing single firm dominance with market shares as a point of departure. In this respect, helpful guidance would be first to set out the general rule according to which market shares are only of relative importance. Second, an analysis of current market shares should be conducted. Third, if these current market shares are indicative of economic strength, an analysis of historic (with a definition of the appropriate period to take into account) market shares should be conducted. Lastly, the analysis should always involve an analysis of characteristics of the market (stability/instability due to growth, innovation, product differentiation and substitutability, ability to meet demand, costs, entry barriers, etc.).

15. The Paper’s reliance on market shares as a first indicator of dominance is in part based on the ECJ’s judgment in Hoffman-La Roche. The Paper does not explain why in that specific case the ECJ found that very large market shares [qualified at 50%] are in themselves evidence of the existence of a dominant position, and therefore suggests that any undertaking with such market shares are likely to enjoy a dominant position on the market concerned. The stated reason for reaching this conclusion is an undertaking which as a very large market share […] is in a position of strength which makes it an unavoidable trading partner based on the strength of a particular brand, and those having much smaller market shares are not able to rapidly meet the demand from those who would like to break away from the undertaking with the largest market share.

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7 The problem appears to result in part from the fact that the concept of dominance has historically been based to a significant extent on a view that effective competition is best promoted by having a market structure consisting of a number of firms of roughly equal size and resources (supported in older case law, referred to in the Paper).
Accordingly, the Paper could point out that high market shares do not provide a reliable indication of dominance if it is clear that rivals can rapidly meet demand from those customers who would like to break away from the firm with the high market shares.

16. AmCham EU notes that in other jurisdictions, undertakings with shares below 50% are viewed as "unlikely" to possess the requisite "substantial market power". The Paper could rely on market share "screens" to provide a rule of thumb for identifying firms that are unlikely to be "dominant" or to possess "monopoly power"; perhaps using the 40% screen employed in the OFT guidelines or the 50% screen suggested by the U.S. case law. AmCham EU encourages the Commission to adopt similar screens or comfort zones. In particular, AmCham EU encourages the Commission to adopt guidelines expressly stating that (i) in the market share range of 40% to 50%, firms are unlikely to be dominant, and additional supporting evidence of other factors are always required to find dominance (see United Brands case), (ii) below 40% firms are even less likely to be dominant, unless special circumstances exist (see Goetrupp-Klim case), and (iii) below 30%, dominance is extremely unlikely (see Tenth Report on Competition Policy and the Vertical Agreements Block Exemption, which sets 30% as the general start for possible market power).

17. The Paper could be substantially improved by exploring and providing guidance on other key economic factors, in addition to barriers to entry and expansion, and market position of buyers, to analyse whether an undertaking (even one with a large market share) has substantial market power:

**Pricing:** The Paper should signal that an analysis into the pricing behavior of the undertaking in question would be useful to indicate the possible existence of significant market power. If the prices of the largest undertaking in a given market are influenced by the pricing of its rivals, then the undertaking should not be viewed as dominant (as recognised in paragraph 27 of the Paper).

**Bidding markets:** As noted in the July 2005 “Report by the EAGCP ‘An Economic Approach to Article 82,’” (hereinafter “EAGCP”), an economic-based approach requires a careful examination of how competition works in each particular market in order to evaluate how specific company strategies affect consumer welfare. Capital goods markets are usually characterised by heated bidding – winner takes all - competitions to provide the goods over the lifecycle of the product, which may last between 10 and 40 years. In these situations, market shares are generally a less appropriate indicator of superior economic strength than in other markets. This is implicitly recognised in the Paper’s assessment of single branding (paragraph 146 and footnote 92), which states that “if competitors are competing on equal terms for all the customers and for each customer’s entire demand, […] it is unlikely that a dominant position is found, even at high market shares.” This is due to
the fact that when the largest firm in a bidding market faces credible bidders, even bidders who do not have a significant share, it will be prevented to act to a significant extent independently from its competitors and customers, since the bidders with low shares can in effect win the contract. Accordingly, AmCham EU believes that the Paper should more clearly explain that high market shares are not a good indicator for dominance in bidding markets.

Role of innovation: If rivals compete by developing new technologies or lower cost products, historically successful firms may not have any significant market power. Hence the Paper should clarify that in markets where undertakings compete on the basis of developing new technologies, market shares may have only limited value to assess market power. This is because rivals can effectively and quickly ‘leapfrog’ the position of incumbent undertakings with new products that successfully incorporate inventions, preventing the latter from acting to a significant extent independently.

Market Position of Buyers: AmCham EU questions how an undertaking could be viewed as dominant, if a market is characterised by a sufficient number of powerful and sophisticated buyers – who in effect may exercise buyer power – even if these strong buyers only protect themselves, without necessarily immediately paving the way for new entry (which is usually triggered by prices above competitive levels anyway) or lead rivals to increase output to defeat a price increase. AmCham EU believes that the existence of effective buyer power can often be incompatible with the independent conduct which is the hallmark of a dominant position. This is confirmed by the Commission in its guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.  

Collective Dominance

18. Pursuant to paragraph 46 of the Paper, it would seem that completely independent acts taken by a non-leading firm with a “safe harbor” market share could be viewed as “abusive” if the firm’s competitors independently engage in similar conduct. AmCham EU is particularly concerned about this suggestion, since this not only creates issues for Article 82 enforcement by the Commission (although the concept has rarely actually been relied by the Commission in an Article 82 context), but more worryingly, it could be relied upon by Member State courts or NCAs who have less experience with EU competition law enforcement.

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8 According to these guidelines, even firms with a high market share may not be in a position, post merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power. [emphasis added].
19. Hence, AmCham EU believes that paragraph 46 should be deleted from the Paper and any future guidance that the Commission may adopt. If the finding of a collective dominant position is not predicated on the existence of an agreement or on other links in law, undertakings in an oligopoly could in theory be deemed dominant if the oligopoly causes prices to raise above competitive levels. This concept seems arbitrary and unworkable. In such a scenario, undertakings will be unable to predict whether proposed conduct will be viewed as abusive. Finally, AmCham EU notes that paragraph 76 and footnote 57 duly recognise that the case law regarding exclusionary abuse in the context of collective dominance has “so far” involved situations in which there are “strong structural links” between the firms. AmCham EU does not understand why therefore there is a need to broaden the notion of collective dominance beyond the “strong structural links” situations, particularly since it would be impossible for undertakings to avoid a finding of an abuse in these circumstances.

The Central Concern and Proof of Foreclosure

20. AmCham EU welcomes and supports the Paper’s analysis of the essential objective of Article 82 when analysing exclusionary conduct, namely the protection of competition as a means of enhancing consumer welfare and of ensuring efficient allocation of resources. In this respect, AmCham EU believes that the Paper correctly focuses on the issue of foreclosure as set out in paragraph 54 of the Paper.

21. However, any future guidance should clearly point out that it is not sufficient to show some foreclosure to find a conduct abusive. It is necessary to demonstrate that (1) the conduct in question is capable of foreclosing, (2) the actual or likely foreclosure is such that it harms competition, and (3) there are no legitimate justifications for the conduct. With regard to the first step of the analysis, AmCham EU notes that the Paper does not make an attempt to distinguish competition on the merits from inherently exclusionary conduct, while offering a definition of foreclosure in relation only to pricing conduct (pricing that would harm an equally efficient rival), and not to non-price related conduct. With respect to the second step of the analysis, future guidance should point out that some or even significant harm to competitors does not necessarily mean that there is harm to competition. A competition authority should be looking at evidence of price rises/lower quality products, i.e., consumer harm to conclude that the conduct is abusive.

22. AmCham EU would encourage the Commission to clarify further the concept of foreclosure (and, for instance, to better explain what is meant by ‘marginalisation’ in paragraph 70). The Paper usefully recognises that it is competition and not competitors that is to be protected, but then appears to qualify this in an apparent contradiction in paragraph 58 by suggesting that it is sufficient to find ‘foreclosure’ when rivals are disadvantaged and consequently led to compete less aggressively (emphasis added). AmCham EU urges the
Commission to remove this quotation from the final guidelines it may adopt to solve this apparent contradiction.\(^9\) All genuine competitive activity (based on factors such as higher quality, novel products, opportune innovation, or otherwise better performance) leads to some foreclosure of rivals (partial denial of profitable access to a market), and these factors can mean different things to different, reasonable people. Hence, the Paper provides insufficient guidance on the extent to which companies that could be viewed as dominant are allowed to compete on the merits. Moreover, in paragraph 67 of the Paper, the Commission states that it may also protect competitors that are not (yet) as efficient as the dominant company, and this seems to contradict the Commission’s stated objective in paragraph 54 of the Paper.

23. In addition, AmCham EU notes that the Paper uses a variety of expressions to describe the degree of foreclosure that will give rise to concern (e.g. “good part”, “significant part”, “substantial part”). The Commission should use a single term in future guidance and describe with more clarity as to what the term would mean in practice. One manner of resolving this uncertainty is by adopting comfort zones relating to the degree of foreclosure in which dominant companies can presume that their conduct is lawful (similar to market share thresholds adopted by the Commission in its various notices on Article 81 enforcement). For instance, future guidance from the Commission could adopt thresholds relating to the percentage of customers or percentage of the market affected by a particular conduct. For instance, in a refusal to deal situation, this could be the \(\%\) of foreclosure in the downstream market, where the refusing company is often not dominant or, alternatively, the threshold could be the creation of a dominant position on the downstream market. Similarly, with respect to tying, the Paper does not define foreclosure in the tied market, but rather refers to foreclosure of “competitors” rather than “efficient competitors.” Also, a finding of foreclosure can take place even if competitors are merely “disadvantaged” rather than excluded from a market. Hence, AmCham EU would encourage the Commission to reflect on a threshold that, for each type of abuse, would function as a guideline to businesses as to when foreclosure is likely to exist. This approach would not be inconsistent with the Paper’s idea of a ‘sliding scale’ in paragraph 59, which AmCham EU encourages, but paragraph 59 falls short in providing clear guidance on what these scales could consist of. We propose further in these comments, for each of category of exclusionary abuses treated in the Paper, such a threshold.\(^10\)

24. In addition, the Paper states that Article 82 must be enforced against conduct that harms consumers in a direct or indirect way, not only in the short term, but

\(^9\) There is also a contradiction between the Paper’s remarks regarding the “as efficient competitor test” (paragraph 67), and the fourth remark that states “it may sometimes be necessary in the consumers’ interest to also protect competitors that are not (yet) as efficient as the dominant company”.

\(^10\) See AmCham comments in this respect on paragraph 39 with respect to rebates, paragraph 72 with respect to tying and bundling, and paragraph 80-83 with respect to refusals to deal.
also in the medium and long term.\(^{11}\) AmCham EU believes that it would be appropriate and useful to establish an additional sliding scale relating to the burden of proving indirect and/or long-term consumer harm. In particular, the Paper should recognise that the more a prediction of harm is based on indirect means or a longer duration of time, the greater the difficulty to establish that the conduct will likely harm competition. It should be recognised that when intervention is based on a prediction of medium and long term harm, the chains of cause and effect (between the conduct, the foreclosure and ultimately the consumer harm) will often be dimly discernable, difficult to establish, and uncertain, and that hence a competition authority should have to rely only on convincing evidence that is able to ultimately support the conclusion of such consumer harm. The Commission should signal that these types of enforcement actions (where consumer harm is predicted to take place indirectly or in the long term) should only be pursued under exceptional circumstances. This would be consistent with the Commission’s treatment of efficiency claims where the party invoking the efficiencies must demonstrate that the efficiencies will be timely.\(^{12}\) In this respect, AmCham EU welcomes the Commission’s statement at paragraph 55 of the Paper, according to which “the longer the conduct has already been going on, the more weight will in general be given to actual effects.” However, we believe that the Commission should go further in this respect and signal that the assessment should be based on actual effects alone in those cases where the relevant practice has been in place for a period of time that is sufficiently long for it to have already produced effects in the market.

Efficiencies

25. AmCham EU welcomes the Paper’s recognition that exclusionary conduct can generate efficiencies. However, AmCham EU believes that it will be extremely difficult, if not impossible to establish that exclusionary conduct generates efficiencies if these efficiencies will only be taken into account following the conditions set forth in the Paper. Hence, AmCham EU believes efficiencies should be taken into account in a single step approach to determine whether a conduct is, on balance, anticompetitive. Under such an approach, a competition authority or plaintiff would have the burden of showing that the conduct in question cannot be justified as a legitimate manner of competing nor as a result of efficiencies. In particular, AmCham EU notes that, in contrast to the two-step approach to evaluating anti-competitive agreements under Article 81, the assessment of efficiencies can be an integral part of the analysis under Article 82 of whether conduct is abusive. In an Article 81 case, once the Commission has shown that an agreement restricts competition, the burden shifts to the defendant to establish that it qualifies for an exemption under Article 81(3). This approach flows from the text of Article 81 itself. Article 82, by contrast, establishes a unified analysis that necessarily should include an evaluation of efficiencies. The assessment of efficiencies is essential because, if the

\(^{11}\) Discussion Paper, paragraph 55.

\(^{12}\) As provided for in paragraph 89 of the Paper.
efficiencies generated by the dominant firm’s conduct outweigh any anti-competitive effects, the conduct is not abusive as a matter of law. Regulation 1/2003 reflects this essential difference between Articles 81 and 82 because it specifically places the burden of proof of establishing that the conditions for exemption under Article 81(3) are met on the defendant, but does not place the corresponding burden on the defendant in an Article 82 case. The only reasonable inference is that the burden must fall on the party charging abuse.

26. In addition, were the Commission to pursue an approach to efficiencies under Article 82 similar to the exemption system provided under Article 81, AmCham EU would note that the European Courts and the Commission, when applying Article 81 (3) in the past, have always considered goals of the Treaty other than related to the process of free competition. While it is understood that following modernisation the recent Article 81 (3) Guidelines to a greater extent emphasise economically justified efficiencies, AmCham EU suggests that the Commission consider whether legitimate justifications or efficiencies in the context of abusive conduct can also include other public interest goals (such as, e.g., market integration, supply security, environment, stability of jobs and economic branches) which are established in the Treaty.13

27. AmCham EU fears that the approach to efficiencies suggested by the Paper will, from a practical perspective, result in a situation where efficiencies will never be accepted as outweighing allegedly abusive behavior. This is because a dominant company would have to meet four conditions, at least two of which are interpreted in such a way that they will systematically place the interests of rivals of the dominant firm over the goal of enhancing efficiency. First, the dominant firms must demonstrate that the conduct in question was “indispensable” to realise the claimed efficiencies.14 To satisfy this condition, the defendant must “demonstrate that there are no other economically practicable and less anti-competitive alternatives to achieve the claimed efficiencies.”15 This requirement ignores the business realities in which firms operate. Businesses that decide to engage in a particular conduct to win customers (that can promote efficiencies or consumer welfare) do not, and cannot be expected to, first evaluate whether there might be alternative courses of action that would have less impact on rivals. Imposing such a duty on dominant firms will simply result in prohibiting practices that generate net efficiencies because competition authorities are able to identify post hoc an

13 Article 81 and Article 82 are central articles of the EC Treaty, and they constitute essential pillars of the “system ensuring that competition in the internal market is not distorted” (Article 3 (g)). Article 3 (g) is not a programmatic goal only, but rather directly applicable. Free competition is a means to achieve the overriding goal of establishing market integration. The Community Courts have traditionally interpreted the competition rules teleologically from Article 3(g). EC competition law therefore is – unlike US antitrust law which focuses on consumer welfare only – uniquely very much applied with the issue of single market integration in mind. AmCham EU suggests that the European Commission considers whether this single market imperative may have effects on the assessment of Article 82 conduct, and in particular, whether this may have an implication on the legitimacy of efficiencies.

14 Discussion Paper, paragraph 84.

15 Ibid., paragraph 86.
alternative that was more protective of the interests of rivals. AmCham EU believes that the indispensability requirement, as described in the Paper, will in many cases force dominant firms to forego altogether certain practices that improve efficiency in order to avoid any risk of liability under Article 82.  

28. Second, the dominant firm must demonstrate that “competition in respect of a substantial portion of the products concerned is not eliminated.” This condition expressly places the interests of competitors over the goal of improving efficiency. In this context, the Paper also states that undertakings with market shares exceeding 75 percent will face a virtual prohibition on using the efficiency defense to justify actions that disadvantage rivals—regardless of the magnitude of the efficiency gains and corresponding consumer benefits. AmCham EU opposes such an approach, as it believes efficiency gains should almost always be taken into account, even if a firm has a share in excess of 75%.

29. These and other general points in connection with efficiencies are discussed in more detail in our comments relating to single branding and rebates, and tying and bundling.

II. Aftermarkets

30. AmCham EU notes that it is often the firms with smaller positions in the primary equipment market that may have larger shares of their brand’s aftermarket. This is because third-party suppliers and the more successful primary market firms typically focus on their successful primary equipment, since those products provide the largest aftermarket revenue opportunity. As a result, an Article 82 enforcement policy that relies only or heavily on an aftermarket consisting of products and services for their individual brand of equipment, creates a risk that firms with quite modest positions in the primary market would be viewed as dominant in the aftermarket, while the larger firms or the largest firm in the primary market will often not be running that risk. Hence, AmCham EU welcomes the proposition developed by the Paper according to which if a separate relevant aftermarket has been found to exist, a dominant position on this market can only be established after analysis of competition in both the aftermarket and the primary market.

31. However, AmCham EU believes that a separate examination of a single brand aftermarket under Article 82 is rarely, if ever, appropriate. First, AmCham EU
agrees with the Paper’s apparent conclusions that either because consumers may base their choice on accurate life cycle calculations, or because suppliers are able to make such calculations (and hence suppliers will cause potential high aftermarket profits to be competed away in their attempts to secure the sales of the primary products), it is unlikely that a supplier can be considered dominant in an aftermarket when competition is strong in the primary market (paragraphs 258 to 260).

32. Second, AmCham EU notes that there is usually no scope for anticompetitive behavior by a supplier vis-à-vis the aftermarket should a supplier adopt a ‘policy change’ with respect to aftermarket products where there is/was effective competition in the primary market (“installed-base opportunism”). This is essentially because every “existing” customer was by definition a “future” customer (at the time when the first purchase is made) and, as a result, competition in the primary market will cause this category of customers (usually sophisticated business customers) to protect themselves against installed-base opportunism by demanding and obtaining contractual protection against potentially harmful future policy changes. In addition, as recognised in paragraph 262, even if a customer did not negotiate sufficient protection, customers are often protected against policy changes due to the fact that these customers may be repeat customers in the primary market and/or that any policy change will harm the supplier’s reputation in the primary or other markets.

33. As a result, AmCham EU would encourage the Commission to provide clearer guidance as to why, in circumstances where there is vigorous competition in the primary market, supplier behavior in the aftermarket will usually not raise competition concerns. In the absence of such guidance, undertakings will be faced with the risk of unwarranted intervention, causing often the smaller firms (who usually derive more revenues from aftermarket sales than larger firms operating in competitive primary markets) to face the prospect of being found dominant. The absence of such guidance can cause an unjustified and counterproductive deterrent on undertakings wishing to implement flexible and/or customer friendly aftermarket polices at initial stages of a commercial relationship, to avoid being found to abuse Article 82 as a result of a potential change to such policies. It can also result in inappropriate intervention by competition authorities as a consequence of attempts by firms to renegotiate commercial terms of agreements entered into at arm’s length where there is no real competitive problem.

III. Predatory Pricing

34. AmCham EU welcomes the Commission’s view that lowering prices is an essential element of competition and that pricing is not predatory just because the lower price means incurring losses or foregoing profits in the short run.

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35. AmCham EU also welcomes the Commission’s recognition that predatory pricing is a risky strategy and that predation is normally self-deterring.\(^{21}\)

36. In light of these views and the fact that the Paper is an attempt to bring an effects based approach to Article 82 EC, AmCham EU finds it surprising that the Section on predatory pricing contains practically no discussion of the importance of foreclosure and how the likelihood of foreclosure is to be analysed\(^{22}\). AmCham EU believes that, in addition to applying the correct cost test for predation, the Commission should also (i) show in all cases that foreclosure effects are likely in order to conclude that a given pricing practice is predatory and (ii) provide clear guidance as to how it intends to measure the likelihood of foreclosure effects.

37. AmCham EU also urges the Commission to recognise recoupment as an essential element of predation. In this respect, paragraph 110 of the Paper expressly denies any role to the recoupment element as regards pricing practices below AAC. On the other hand, the Paper does attach importance to recoupment as a justification for applying a stricter cost test (i.e., to find that pricing between AAV and ATC is abusive)\(^{23}\). However, even in such a case, paragraph 122 of the Paper suggests that a likelihood of recoupment can always be presumed. AmCham EU believes that the Commission should always have to prove the likelihood of recoupment given that, like foreclosure, it constitutes an indispensable element for predatory pricing to succeed.

38. Last, as the Commission recognises at paragraph 102 of the Paper, under most market conditions, a dominant company is unlikely to price below ATC (its market power enables the company to price well above ATC). Therefore, if a dominant company reacts to entry or to competition by lowering prices below ATC, the Commission should not prejudge the practice as predatory but should also question, when assessing the practice, whether the company in question is no longer dominant.

*Pricing above AAC but below ATC*

39. AmCham EU notes that, as a matter of principle, prices above AAC but below ATC should not be considered predatory. This is because prices that cover variable costs and also some fixed costs do not sacrifice profits and thus make economic sense. Further, these prices can be matched by “as efficient” competitors and therefore are not capable of excluding such competitors from the market.

40. AmCham EU is also concerned that the use of indirect evidence of intent may have a chilling effect on competition by deterring potential pro-competitive

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\(^{21}\) Paragraph 97 of the Discussion Paper.

\(^{22}\) Only paragraph 117 of the Discussion Paper appears to require the Commission to show in specific circumstances that a foreclosure effect is likely.

\(^{23}\) See for example paragraphs 112, 115, 118 and 121 of the Discussion Paper.
practices. It should be noted that the intention to outperform competitors in the market is the very essence of competition and that this may result in less efficient competitors being eliminated from the market. It is thus very difficult to distinguish between this legitimate intention and the intent to predate. This difficulty is aggravated where the distinction is based on indirect evidence. Many of the examples of indirect evidence of a predatory strategy that paragraphs 115 et seq. of the Paper set out may have a reasonable economic explanation. Therefore, AmCham EU urges the Commission to state in any final guidelines that evidence of intent will always be used with great care and that the Commission will consider such evidence as relevant (but not in itself sufficient) only where it reveals a detailed, express plan to predate in circumstances in which it was reasonable and plausible to believe that such a strategy would succeed.

Burden of proof

41. The imbalance between the standard of proof that the Paper imposes upon the Commission and the dominant firm respectively is striking.

42. In the case of pricing below AAC, paragraph 110 of the Paper states that once the Commission has established that the price charged was below AAC, it does not need to prove actual or likely exclusion of the “prey”. However, the same paragraph requires the dominant firm to justify its pricing by showing that “there is no possibility that it could have an exclusionary effect on rivals”.

43. In the case of pricing between AAC and ATC, the Commission is also exempted from showing any likelihood of foreclosure effects (other than in cases where the predatory intent is based on indirect evidence for which there is a reasonable economic explanation). However, paragraph 123 of the Paper states that the dominant firm may rebut the Commission’s case by showing that its conduct “has not and will not have the alleged exclusionary effect”. Equally, whereas paragraph 122 appears to presume the possibility to recoup, paragraph 123 requires the dominant firm to show that “recoupment will never be possible”.

Pricing above ATC

44. As a matter of principle, pricing above ATC should never be predatory. Paragraph 129 of the Paper contemplates a possible case of predation where entry can only take place below the minimum efficient scale and the dominant firm is pricing below the entrant’s ATC. However, this negates the “as efficient” competitor test that the Paper proposes for assessing price based conduct and penalises pricing conduct that is rational because it is not loss generating.
IV. Single Branding and Rebates

Introduction

45. AmCham EU considers that sound competition policy should encourage companies, even dominant companies, to offer discounts. This is because rebates and discounts are generally pro-competitive and welfare enhancing, and only exceptionally anticompetitive. The Paper does not take sufficient account of the consumer benefits that are brought about by rebates and fails to recognise that rebates are used pervasively as normal commercial practice, including by dominant firms, without causing any harmful effects to competition. Sound economic theory suggests that there are many pro-competitive reasons for exclusive dealing arrangements and that rebates are generally pro-competitive, so that dominant firms should not, in general, have to justify their discounts. Hence, the Commission should remove in future guidance the express presumptions that are reflected in paragraphs 158, 159 and 169 of the Paper, according to which certain rebate schemes are loyalty enhancing. If these presumptions remain, there is significant risk that excessive intervention by competition authorities may in fact stifle pro-competitive behavior, instead of encouraging it.

46. Similarly, AmCham EU believes that single branding conduct, whether pursued by dominant firms or not, is often the result of customers’ ability to obtain lower prices. In fact, single branding obligations may be an important pro-competitive bargaining tool vis-à-vis the allegedly dominant firm. Applying a presumption of abuse to single branding obligations may place buyers at a competitive disadvantage vis-à-vis the allegedly dominant firm, and may therefore also stifle competition, instead of encouraging it. Specifically, in certain markets, it may be industry practice for buyers to invite suppliers to bid for the entirety of each buyer’s demand in return for exclusivity. In such bidding markets, the single branding obligations bargained for by the allegedly dominant firm (and other firms) will naturally affect a “substantial part of market demand”. It would be wholly inappropriate, in such markets characterised by winner-take-all competitions, to presume that the use of single branding obligations by the allegedly dominant firm is anticompetitive, subject to proving the contrary. Indeed, in such situations the single branding obligation is in the interest of the customer and these situations create a forum (an open tender) to compete aggressively for a buyer’s entire demand. AmCham EU strongly urges the Commission to recognise that these types of single branding obligations constitute legitimate forms of competition on the merits.

47. Hence, AmCham EU recommends that the Commission should at the outset recognise the substantial consumer benefits that are generally associated with

25 EAGCP Report, pages 9-12; and RBB Report, paragraphs 1.10 and 1.12-1.13.
26 As the RBB Report correctly points out in paragraphs 4.34-4.35.
rebates and even single branding (in particular lower prices) as the Commission does for both tying (in paragraph 94) and predatory pricing (in paragraph 178).

48. AmCham EU also believes that the Paper’s section on rebates is often unclear and uses economic concepts that are difficult and likely to confuse without further explanation, such as ‘commercially viable share’, ‘effective price’ and ‘required share’. The Paper does not make clear how these concepts will be applied in practice; therefore, AmCham EU recommends that future guidance should provide more concrete examples to illustrate the Commission’s thinking. The goal should be to have guidance that is self-explanatory to the average manager or business lawyer who is not necessarily a competition law specialist.

49. As noted above in AmCham EU’s comments relating to the Paper’s treatment in Section 5 of the “Central Concern”, AmCham EU strongly encourages the Commission to adopt clearer guidelines on the concept of foreclosure. This is also particularly necessary in connection with the analysis of single branding and rebates, which seems to rely on foreclosure tests that are too discretionary and opaque. For instance:

- Although the Paper helpfully recognises that the incidence of a practice has to be taken into account when determining the foreclosure effects, the Paper suggests that rebates and single branding obligations can lead to foreclosure even if only a very modest part of the market is affected by the practice, due to customer selectivity, economies of scale, network effects or learning curve effects and intent.27

- Elsewhere, the Paper suggests that single branding obligations may result in foreclosure even if “only a modest part of market demand is affected by the obligation”, without explaining in what circumstances an effect on a “modest part of market demand” can nevertheless result in foreclosure, and without defining “modest” (paragraph 148).

- Paragraphs 149 and 162 create a rebuttable presumption of abuse if the single branding or rebate scheme affects “if not most, at least a substantial part of market demand”. “If not most” suggests that a presumption of foreclosure may apply if less than 50% of market demand is affected. It is also unclear what “substantial” means.

- Paragraph 168 suggests that conditional rebates will be abusive only if the part of demand to which the rebate is applied is “important enough” to create a foreclosure effect. The term “important enough” is subjective and unhelpful without further clarification.

50. Accordingly, AmCham EU considers that a de minimis threshold for foreclosure is appropriate below which dominant companies can have a degree of legal

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27 Discussion Paper, paragraph 145. It is unclear how these factors must be assessed in practice.
certainty that their conduct is lawful. Such a *de minimis* threshold could be set, for instance, at 33% of the market affected by the conduct. The Paper, at paragraph 198, already suggests obliquely a 33% share test in connection with tying. Under such a safe harbor approach, it should be recognised that (1) below the threshold, the authorities should be able to intervene if a dominant company engages in selective conduct that captures key customers with elastic demand, and (2) above the threshold there is no presumption of illegality.

*The Correct Measure of Cost*

51. The Paper proposes to take ATC as the appropriate cost benchmark to assess the loyalty enhancing effects of a rebate system. It is unclear to AmCham EU why ATC would be the appropriate cost benchmark, since this approach appears to be stricter than the approach suggested for predatory pricing. According to the Paper, both retroactive and non-retroactive rebates would be presumptively unlawful where the effective price for the “contestable” portion of demand is between AAC and ATC (see paragraphs 154 and 168.). However, if the rebate system were structured as one in which the price per unit for all units is exactly the same as the price per unit for all units under the rebate once the relevant threshold is met, such a system would be presumptively illegal only if the per unit price were below AAC, absent objective evidence of an exclusionary “intent”. Thus, two systems with the same economic impact would receive different treatment under the Paper with the stricter approach being applied to the system in which there is no possibility of any profit sacrifice. This is puzzling, since cutting prices constitutes the very essence of competition and thus rebates are in principle pro-competitive.

52. In light of the foregoing, AmCham EU would suggest, absent a sound justification, to treat conditional rebates on a similar footing as predatory pricing, i.e., using AAC as the appropriate cost benchmark. In fact, the Paper expressly agrees with this approach in connection with “incremental rebates” (see paragraph 168). However, it then goes on to apply ATC rather than AAC. If the ATC cost benchmark were to prevail, it (i) would ascribe a foreclosure intent to sales that contribute to a firm’s profits and can be matched by “as efficient” competitors, and (ii) would protect “less efficient” competitors thus undercutting the “as efficient” competitor approach that the Paper correctly proposes with respect to price-based conduct.

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28 As recognised in paragraph 141 of the Paper.
29 Paragraph 154 sets out the main reason to use this cost benchmark as regards “retroactive rebates”. The reason given is that the leveraging between the “non-contestable” and the “contestable” portion of demand allows the rebate system to operate without profit sacrifice and thus to operate for a long time. Paragraph 168 sets out the same reason to justify the use of ATC as the appropriate cost benchmark regarding “incremental rebates”. On its face, this rationale is puzzling. It suggests that a rebate system that operates without profit sacrifice may constitute an abuse, whereas it would seem that the absence of profit sacrifice should militate in favour of the opposite conclusion, i.e., that the conduct is not intended to be exclusionary.
30 AmCham EU agrees with RBB that there should be a strong presumption of legality for any rebate scheme above AAC (see RBB Report, paras 3.138-3.145 and 4.161). If the rebate scheme under
53. Paragraph 165 of the Paper states that pricing even above ATC may exceptionally be found to be abusive, for instance if the dominant firm has certain “non-replicable advantages”. AmCham EU considers this paragraph to be too vague to be helpful, as it does not clarify what types of exceptional circumstances might result in rebates above cost being found to be abusive, nor does it explain what is meant by “non-replicable advantages”.

54. AmCham EU considers that above cost rebates should not be condemned under Article 82, even where the rebates cannot be matched by competitors because the dominant firm has certain non-replicable advantages which it has obtained as a result of its own innovation or investment. Above cost pricing should be presumed to be lawful and any exceptional cases in which intervention is deemed to be appropriate should be carefully ‘ring-fenced’. Above cost rebates should never lead to the imposition of penalties. AmCham EU agrees with the EAGCP Report finding that policy intervention in respect of the (above cost) pricing behavior of dominant firms would only be warranted where the dominant firm has advantages that are “essential facilities”, of which duplication is not feasible or economically desirable (and which were presumably paid for, at least in part, by the state rather than the dominant firm). As a result, in those circumstances, intervention should be left to specialised regulators, rather than competition authorities.

The Commercially Viable Share Methodology

55. AmCham EU welcomes the effects-based approach that the Paper pursues with respect to rebates, which departs from the trend towards a virtually per se approach regarding certain type of rebates. However, AmCham EU believes that the methodology proposed to assess whether a rebate constitutes an exclusionary practice is very complex and requires significant clarification and may still result in pro-competitive conduct being found to be exclusionary. For example, the methodology to determine whether “retroactive rebates” are loyalty enhancing appears to propose two different tests based on the concept of “commercially viable share” (CVS). Whereas paragraph 154 appears to equate the CVS of an individual customer’s requirements with the contestable portion of purchases of such customer, paragraphs 155-156 define the CVS as the share of a customer’s requirements that an efficient entrant can reasonably be expected to capture so that effective price is at least as high as the ATC of the dominant company. This share does not seem to amount to the customer’s contestable portion of purchases. Rather, paragraph 157 appears to equate this share with the share of a potential competitor that wants to enter the market at minimum efficient scale and which would sell the same percentage to each customer in the market. However, the Commission does not define what a

investigation continues for a long period, the dominant firm’s costs increasingly become “avoidable”, so that the AAC cost measure will tend towards ATC anyway (as noted in the RBB Report, paras 3.67-3.68).

31 See EAGCP Report, page 11.
“minimum efficient scale” is. Further, entrants do not tend to sell the same share to each customer but rather to focus on certain buyers only.

56. AmCham EU suggests pursuing the methodology set out at paragraph 154, which consists in attributing the rebate on the “non-contestable” portion of the sales to the “contestable” portion; determining the effective price of such “contestable” portion, and comparing it with the relevant cost benchmark. Where the effective price is higher than the relevant cost benchmark the rebate would not be loyalty enhancing. Where the effective price is lower than the relevant cost benchmark the rebate would be loyalty enhancing. This methodology would require setting out clearly the parameters for determining what the “non-contestable share” is in each case.

Proposed Treatment of Different Types of Rebate Scheme

Percentage requirements/individualised targets versus standardised volume targets

57. Paragraphs 151 and 158-159 of the Paper suggest that rebates formulated as a percentage of the buyer’s total requirements, or as an individualised volume target are, in general, more likely to have an anticompetitive loyalty enhancing effect than rebates formulated as a standardised volume threshold. However, any future guidance should recognise that individualised targets can also generate greater efficiencies than standardised volume targets. For example, the former are likely to be a more effective way of encouraging and rewarding a buyer’s retail effort, particularly in cases where retail monitoring is difficult or costly.  

AmCham EU believes that a blanket statement according to which percentage requirements or individualised targets are almost always more likely to be anticompetitive than standardised volume targets will have a chilling effect by discouraging dominant firms from adopting rebate schemes that can be the most effective way of promoting competition.

Roll-back rebates versus incremental rebates

58. Paragraphs 151, 153 and 166 of the Paper unhelpfully suggest that “roll-back” rebates (rebates that are applied to a buyer’s total purchases once a certain threshold is met) are more likely to have anticompetitive loyalty enhancing effects than rebates applied only to incremental purchases above the threshold, as they create a greater ‘suction’ effect. This implicit assumption is carried through to the proposed test in paragraph 162 whereby a rebate scheme is presumed to have an unlawful market distorting foreclosure effect unless justified by efficiencies. However, economic theory suggests that whether a rebate scheme is expressed as a rollback rebate or an incremental rebate may make little to no difference in practice to the size of the overall rebate to be granted, and hence to the loyalty enhancing effect of the rebate scheme.  

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32 EAGCP Report, pages 36-37; and RBB Report, paras 4.21-4.25, and 4.31.
33 As the RBB Report points out at paras 5.80-5.81, it is artificial to consider that, if a rollback rebate is applied, buyers will feel a greater psychological ‘suction’ effect once they start to approach the threshold,
Rebates in return for services

59. The Paper recognises in paragraph 170 that conditional rebates in return for a service by the customer, will normally not be abusive. AmCham EU would urge the Commission to recognise that often the most economically efficient way for a dominant firm to reward customer effort, such as promotional activities may be to set individualised target rebates. Both the EAGCP Report and the RBB Report point out that individualised targets can be the most efficient way of encouraging and rewarding a buyer’s retail effort, particularly in cases where retail monitoring is difficult or costly. The Paper currently fails to recognise this and instead appears to suggest that individualised target rebates may be presumptively unlawful, while straight service rebates are not. In our view, this is overly simplistic and formalistic.

Efficiencies

60. As suggested above, since rebates are in generally more likely the result of competition than of market power, AmCham EU proposes a “rule of reason” approach to rebates under which the Commission would evaluate together the pro and anti-competitive effects of a rebate system in an initial, single step analysis. Under this approach, efficiencies would not constitute a second step (or defence stage) of the analysis but rather an integral part of a one-step assessment. AmCham EU does not believes that the Paper’s approach towards efficiencies in the context of rebates is sound and believes the pro-competitive effects of a rebate mechanism should be taken into account in determining whether a rebate mechanism is on balance either anticompetitive or pro-competitive. A competition authority or plaintiff should have the burden of showing that the practice in question cannot in fact be justified as a legitimate mode of competitive behaviour or as a result of efficiencies. Hence, in future guidance on the application of Article 82, the Commission should adopt a more balanced approach that steers away from providing a very low hurdle to demonstrating foreclosure, and a very high hurdle to demonstrating efficiencies.

61. AmCham EU also notes that the Paper virtually denies a dominant firm the benefit of the “meeting competition defence” as regards rebates. In effect, paragraph 83 states that this defence will normally not apply to pricing below AAC and it is unlikely to apply in cases of pricing above AAC. The proposed approach is striking, taking into account that the “as efficient competitor” test

than with incremental rebates. In practice, buyers will generally plan their purchases in advance based on the overall product price, which they can expect to receive from a particular supplier. Rollback rebates are often driven by customers who want to spread the effects of rebates across all purchases for internal accounting purposes. Furthermore, the proposed test does not distinguish properly between industries in which margins are generally high, and industries in which margins are typically thin. In practice, a roll-back rebate granted for products with thin margins is unlikely to escape the presumption of illegality unless competitors’ market shares are impossibly high, or the rebate offered is implausibly small. In AmCham’s view this is overly strict.

34 EAGCP Report, pages 36-37; and RBB Report, paras 4.21-4.25, and 5.97.
militates in favour of concluding that a rebate system with an “effective price” below ATC but above AAC should not even be considered exclusionary.

62. Further, AmCham EU notes that, given the requirement to fulfil the stringent criteria set forth in paragraph 84, the Paper virtually denies a dominant firm the benefit of the “efficiencies defence” as regards rebates. For example, the fourth criterion requires that competition in respect of a substantial part of the product concerned must not be eliminated. Paragraph 63 states that in general price based conduct is abusive only where it would exclude hypothetical “as efficient” competitors. In this light, it is possible to argue that all allegedly abusive rebates would by definition eliminate competition in respect of a substantial part of the product concerned. As a result, no efficiency defence would ever be available to justify an allegedly abusive rebate.

63. In addition, paragraphs 91-92 would deny companies with a market share exceeding 75% the benefit of the “efficiency defence” in an analysis which appears to abandon the “as efficient competitor” requirement set forth in paragraph 63. AmCham EU believes that the proposed approach would protect competitors at the expense of consumers since the latter would be automatically denied the pro-competitive efficiencies that conduct from these dominant firms may generate. Such approach would also protect less efficient rivals and reduce their incentives to innovate and compete. Last, it is surprising that in the current state of EU competition law and policy where the “market share” factor is only a proxy for market power, and only a starting point of an analysis, the Paper takes a numerical approach as the key factor for determining whether efficiencies may be taken into account when analysing conduct that benefits consumers through lower prices.

**Price Discrimination**

64. We agree with the statement in paragraph 140 of the Paper that a single branding obligation or rebate which discriminates between customers is unlikely to be anticompetitive, if it does not also foreclose competitors. Most forms of single branding and rebates will, by their very nature, discriminate between different buyers as well as being potentially exclusionary. Commission guidelines on the exclusionary effects of single branding and rebates will be of little comfort to potentially dominant firms if they do not also address price discrimination. As a minimum, any future guidelines should state explicitly that discrimination absent exclusionary effects is a low enforcement priority.

65. Price discrimination often has pro-competitive effects, particularly in oligopolistic markets, and the ability to discriminate on price may in fact reduce the market power of a dominant firm. AmCham EU regrets that the Paper, when outlining the potential anticompetitive effects of price discrimination in paragraph 141, fails to recognise that price discrimination can also be pro-

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35 As recognised by the EAGCP Report at pages 30-34.
competitive. AmCham EU hopes that any future guidance will point to these pro-competitive benefits.

V. Tying And Bundling

Introduction

66. AmCham EU notes that the Commission and the European Courts traditionally have adopted a relatively form-based approach under which a tie or bundle is presumed to be anti-competitive regardless of actual effects on competition or consumers. The Paper claims to dispense with this past practice and instead focus on the economic effects of the purported tie or bundle and its impact on consumer welfare. AmCham EU believes that the move toward a more economics- and effects-based analysis, and the corresponding shift away from an approach that views tying as presumptively suspect, would represent a positive and welcome step in the evolution of EU competition policy. AmCham EU has some concerns, however, that the actual analytic framework set out in the Paper does not fully embrace an economic-based approach and in fact retains remnants of the forms-based approach of past practice.

A “Rule-of-Reason” approach to tying

67. The Paper’s analysis begins by noting that tying and bundling are “common practices” and that firms often engage in tying or bundling “in order to provide their customers with better products or offerings in cost effective ways.” These general pronouncements, however, seem to fall by the wayside in the Paper’s proposed analysis, which in several respects focuses on the potential anti-competitive effects of tying and bundling. Economists, however, are not equivocal in their findings on the effects of tying. Extensive research has shown that tying very often produces positive efficiencies, such as lower production, transaction and distribution costs. The EAGCP Report notes that cases of anti-competitive tying are “relatively scarce.” Economists also agree that the pro-competitive effects of tying are particularly common in the case of technical tying. When companies innovate by technologically linking formerly separate products, consumers usually benefit. Efficiencies may result from improved product performance, more useful functionality, or improved quality. Technical tying may also lead to “system-based” competition, which is often more intense than “component-based” competition. Moreover, technological tying clearly often benefits consumers, for example, when the same product may be used to

38 See EAGCP Report , p. 39.
39 See EAGCP Report, pp. 40-41 for a discussion of many of the advantages to technological integration.
watch television, surf the Internet, listen to music, and respond to emails, time and money are saved.

68. The Paper, by contrast, takes a decidedly ambivalent approach to tying and in doing so retains some of the Commission’s traditional hostility to tying. This approach fails to recognise and build upon the large body of economic research demonstrating that tying and bundling is most often pro-competitive. A better approach—one more fully grounded in economic analysis and market realities—would begin from the principle that tying and bundling are generally pro-competitive, and therefore will be considered non-abusive unless proven otherwise. This approach would require competition authorities to evaluate and fully take into consideration both the pro- and anti-competitive effects of ties and bundles, and would prohibit only those arrangements whose net effect decreased efficiency or harmed consumers. AmCham EU believes that such a “rule-of-reason” analysis would best promote the competitive goals that Article 82 was meant to encourage.

A sounder allocation of the burden of proof

69. The analysis set forth in the Paper would place on defendants the burden of proving that efficiency gains from their conduct outweigh any negative effects on competition. In AmCham EU’s view, this approach ignores the fact that tying normally benefits consumers. Placing on dominant firms the burden of proving that their conduct promotes efficiency will simply discourage dominant firms from engaging in tying or bundling that might well enhance consumer welfare, but for which such firms do not want to assume the risk of being held to have violated Article 82. AmCham EU believes that a more equitable and economics-based approach would place the burden of proof on plaintiffs once the defendant has made a prima facie showing of efficiencies. In other words, the defendant will need to make an initial showing of the efficiencies associated with the specific tying practice at issue. In many cases, the plaintiff will be a competition authority, which will generally be in a better position than dominant companies to identify those infrequent cases in which tying or bundling does not promote efficiency. Specifically, competition authorities are more likely than dominant firms to have the time and resources to develop appropriate analytical tools for evaluating efficiencies and will have the opportunity during the course of their investigations to measure such efficiencies in practice. Finally, as a matter of institutional design, the burden of proof should normally fall on the entity best placed to carry it, which in this case is the competition authority.

70. AmCham EU notes again that, in contrast to the two-step approach to evaluating anti-competitive agreements under Article 81, the assessment of efficiencies is an integral part of the analysis under Article 82 of whether conduct is abusive (see above paragraphs 25-29 of our comments).

42 Discussion Paper, paras 77, 79.
71. For these reasons, AmCham EU urges the Commission to place the burden on investigating authorities to establish that the conduct at issue is not justified by efficiencies, once the dominant company has put forward a *prima facie* efficiency justification.

_Promoting efficiency-enhancing conduct_

72. In several instances, the standards of proof set out in the Paper seem to carry over the Commission’s and European Courts’ past practice of assuming that tying and bundling are anti-competitive unless proven otherwise. Specific examples of this approach include the following:

a. Market Foreclosure Effect

73. The Paper states that, in the case of a tying claim, proof of actual market foreclosure is not necessary —it is enough that such foreclosure is “likely” to occur. In other words, the mere risk of foreclosure can result in a finding against a dominant company. AmCham EU is concerned that this standard of proof is too low, unless the likelihood of the effects is supported by compelling and convincing evidence. This is because the analysis of foreclosure effects can be speculative in nature. The Paper is silent as to the degree of certainty that an authority must have before it can legitimately decide that foreclosure is ‘likely’. In _Tetra Laval_, the European Court of Justice (“ECJ”) held that, in the context of merger cases, the Commission must put forward convincing evidence to block a merger, as the Commission is trying to predict the future effects of the merger on a market. The ECJ explained that it was “particularly important” for the Commission to put forward convincing evidence in cases involving conglomerate mergers, _i.e._, where the parties are on neighboring markets and there is a concern that they will be able to leverage their power in one market to increase their power in another.

74. As the analysis of market foreclosure effect under Article 82 will often entail a prediction of future effects, the Commission should set a similarly high standard of “convincing evidence” for foreclosure in tying cases. In establishing foreclosure, the Commission must address a chain of causation that is similar to that involved in a conglomerate merger case, which, in the words of the ECJ, are “dimly discernable, uncertain and difficult to establish.” Establishing foreclosure not only requires the Commission to predict what will happen in the future if the tying practice continues, but requires it to establish that the dominant firm has the ability and the incentive to leverage its dominant position.

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43 _Ibid._, para 183.
45 _Ibid._, para 44. AmCham EU notes that the in that conglomerate merger case, the ECJ required that there were at least 2 steps that needed to be shown: (1) would the conduct [tying or bundling, for example] take place after the merger and, if so, (2) would the conduct lead to the creation/strengthening of a dominant position [or, now, a significant impediment to effective competition]. In the Article 82 context, the first step has taken place and it is the second step -- the effect of the conduct on competition that needs to be established.
on the tying product’s market to foreclose competition on the tied product’s market, on a going-forward basis (even if practice has occurred in the past). In the view of AmCham EU, a standard of proof that requires convincing evidence will help ensure that companies will not be deterred from bringing new products to market as a result of concerns about remote, potential, and highly speculative foreclosure effects.

75. AmCham EU welcomes DG Competition’s approach at paragraph 201 of the Paper in which the Commission takes also account of actual effects of a tying practice to assess its foreclosure effects. However, only actual effects should be taken into account in situations where the tying practice has been conducted for a period that is sufficiently long for it to have produced effects in the market.

b. The Efficiency Defense

76. As noted above in paragraph 25 of our comments, AmCham EU believes it would be extremely difficulty for many dominant companies to establish the efficiency defense in the form currently envisaged by the Paper. Indeed, the efficiency defense would likely be unavailable to most dominant firms. A defendant would have to meet four conditions, two of which are interpreted in such a way that they will systematically place the interests of rivals of the dominant firm over the goal of enhancing efficiency. Businesses that decide to tie or bundle two products in order to promote efficiency or consumer welfare do not, and cannot be expected to, first evaluate whether there might be alternative courses of action that would have less impact on rivals. Imposing such a duty on dominant firms will simply wind up prohibiting tying practices that generate net efficiencies because competition authorities are able to identify post hoc an alternative that was more protective of the interests of rivals. AmCham EU believes that the indispensability requirement, as described in the Paper, will in many cases force dominant firms to forego altogether tying and bundling arrangements that improve efficiency in order to avoid any risk of liability under Article 82.  

77. The Paper also states that undertakings with market shares exceeding 75 percent will face a virtual prohibition on using the efficiency defense to justify actions that disadvantage rivals—regardless of the magnitude of the efficiency gains and corresponding consumer benefits. AmCham EU believes this prohibition makes no economic sense, if there is no analysis of harm to competition in the separately relevant market for the tied product.

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46 This condition also applies to the “meeting competition” defence and is subject to the same criticisms in that context as well. See ibid., para 82.
47 Ibid., paras 91-92 (stating that its “highly unlikely that abusive conduct of a dominant company with a market position approaching that of a monopoly, or with a similar level of market power, could be justified on the ground that the efficiency gains would be sufficient to counteract is actual or likely anti-competitive effects”).
78. Taken together, these aspects of the analytic framework set forth in the Paper run the risk of deterring dominant firms from undertaking conduct that could improve efficiency and consumer welfare—i.e., conduct that is ultimately pro-competitive. AmCham EU urges the Commission to amend the efficiency defense to avoid this undesirable outcome.

The distinct products test

79. In assessing whether a purported tie or bundle involves two distinct products, the Paper states that “two products are distinct if, in the absence of tying or bundling, from the customers’ perspective, the products are or would be purchased separately.” AmCham EU commends this focus on consumer demand as it follows logically from the ultimate purpose of Article 82 as an instrument to protect consumers and should lead to efficiency-enhancing results.

a. Consumer Demand

80. The Paper errs, however, in viewing separate consumer demand for the tied product as an indicator of distinct products. Specifically, the existence of consumer demand for the tied product does not shed any light on the ultimate questions at issue --namely, whether there is any material consumer demand for the tying product without the tied product, or whether any particular tying arrangement produces efficiencies. Thus, whether there is consumer demand for pencil lead and shoe laces provides no basis for concluding that pencils with lead or shoes with laces involve two distinct products, or that there is any consumer demand for pencils without lead or shoes without laces. In short, AmCham EU believes that a focus on independent consumer demand for the tied product asks the wrong question and, in doing so, may erroneously find two distinct products where in fact there is only one.

81. AmCham EU is also concerned that the distinct products test might lead to incorrect results in cases involving the technical integration of two products that were previously distinct on the ground that, by definition, the test is backward-looking. When a firm adds new functionality to an existing product, such as email functionality to a mobile phone, a new market emerges for that product that is neither the market for mobile phones nor for email devices. Under the consumer demand test, however, mobile phones and email devices would always be considered separate products because, until their integration, they were always purchased separately. This analytic flaw in the Paper means that technological integration of previously distinct products will almost invariably

48 Ibid., paras 185.
50 In case of technical integration the test could be whether the integrated product brings new relevant functionalities to the market, in which case it may be assumed that there will be consumer demand for the integrated product. In these circumstances, it should be irrelevant not only whether there is a separate consumer demand for the tied product standing alone, but also whether there is a separate consumer demand for the tying product standing alone.
be considered a tie. The Paper states that, in cases of such integration, the test should be “whether consumer demand has shifted as a consequence of the product integration so that there is no more independent demand for the tied product.”

Unless the market shifts overnight, however, so that consumers no longer purchase the products separately, it is unlikely that a dominant firm will be able to make such a showing. In the opinion of AmCham EU, a better approach would be to ask whether the company integrating the previously distinct products can make a prima facie showing of efficiency gains, or of the introduction of new functionalities. Since technical tying is normally efficient, market-leading companies would be able to continue producing innovative products benefiting consumers without running afoul of the prohibitions on tying—unless the competition authority could rebut the innovating firm’s prima facie case.

b. Commercial Usage

82. If commercial usage demonstrates that the tying product is generally not offered separately from the tied product, the analysis should end there because tying is only possible if there are two distinct products. The Paper, however, suggests that a tie or bundle by a dominant firm may violate Article 82 even if commercial usage indicates that products are not distinct. AmCham EU is concerned that this interpretation would eviscerate the distinct products requirement and, indeed, would not make sense because, by definition, tying requires two products. The confusion presumably stems from the fact that the “commercial usage” portion of the Article 82 test may be used in two ways in a tying case: as part of the separate products test and, in cases where separate products are shown to exist, as a justification for why the tying practice is not abusive.

83. AmCham EU believes it would be helpful for the Paper to clarify that commercial usage can be decisive on the separate products issue, even if it is not on the question of justifications for the tying practice. If commercial usage shows that there is no separate demand for the products, the matter should end there because tying is only possible if there are two distinct products. If there is separate demand for distinct products (even though commercial usage may

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51 Discussion Paper, paragraph 187. Similarly, note 125 suggests that it would be necessary to show that “the whole industry in the future will offer the integrated product instead of two separate products.”

52 Paragraph 186 states that “[c]ommercial usage may … indicate that two products are not distinct,” but the footnote to that sentence states “[h]owever … commercial usage does not automatically bring a certain practice outside the scope of Article 82.”

53 This is precisely what happened in Tetra Pak. (Case T-83-91, Tetra Pak v. Commission, [1994] ECR II-755, confirmed on appeal in Case C-333/94 P, Tetra Pak v. Commission, [1996] ECR I-5951). Tetra Pak first pleaded commercial usage in the aseptic packaging market to show that packaging machines and cartons were one integrated system. When the CFI rejected this argument on the grounds that commercial usage in the neighboring non-aseptic packaging market showed that machines and cartons were sold separately, Tetra Pak then pleaded commercial usage as justifying the practice i.e. that since most firms did not sell the products separately, there was no abuse. The CFI rejected this argument as well, noting that, even if a dominant firm were able to show that the most firms did not sell the products separately, this would not necessarily mean that they tying practice was justified.
show that many firms bundle the products, commercial usage may become relevant in considering whether the tie is justified.

The permissible degree of foreclosure

84. AmCham EU is also concerned that the Paper’s description of market foreclosure as it applies to tying and bundling is vague and could be used to find illegal foreclosure in an overly broad range of tying and bundling cases. Total foreclosure is not necessary—it is enough if competitors are “disadvantaged,” which is deemed to occur when demand for their products is reduced. The Paper goes on to state that a tying practice will be presumed to result in market-distorting foreclosure where it ties a “sufficient part” of the market, but fails to provide guidance as to the meaning of “sufficient.” These statements could be read to stand for the proposition that any tying arrangement that reduces demand for a competitor’s product constitutes illegal market foreclosure, irrespective of the benefits to consumers or whether these effects are solely the result of competition on the merits. Thus, a dominant company whose innovative new product attracts new customers and thereby “disadvantages” rivals could be held to have engaged in illegal market foreclosure. Unless clearer guidance is provided on the degree of foreclosure that is presumed to give rise to anti-competitive effects, companies will be left in a state of uncertainty in assessing tying arrangements. Such guidance would include the establishment of a “comfort zone” or threshold below which the tying conduct would not be considered exclusionary. In this respect, AmCham EU notes that paragraph 198 refers to a “one-third of the market” threshold, but the reference is not completely clear. A better approach, in the view of AmCham EU, would be to state explicitly that conduct by a dominant firm is abusive only if its net effect is to harm consumer welfare. AmCham EU further suggests, that, for purposes of making that test practical, conduct should only be viewed as abusive, if it is likely to create dominance in the tied product market. In the absence of such a standard, it is unclear how tying or bundling would harm competition in the tied market.

85. The Paper also fails to provide clear guidance on the effect of bundling by competitors of the dominant firm with respect to the analysis of market foreclosure. In some passages, it suggests that bundling is less problematic if competitors also offer bundles. At another point, it indicates that the foreclosure effect might be greater if others in the industry also bundle. This inconsistency should be resolved in favor of the former position: the fact that

54 Ibid.
55 Ibid., para 188.
56 See, e.g., Commissioner Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, at 3 (23 Sept. 2005) (stating that, in the analysis of exclusionary conduct under Article 82, “ultimately the aim is to avoid consumers harm”).
57 Ibid., paras 195, 202.
58 Ibid., paras 197.
other firms in the market also offer bundles is a strong presumption that bundling generates efficiencies and meets consumer demand.

Presumptions against dominant companies

86. As noted above, the Paper establishes a number of presumptions against dominant companies who are accused of engaging in abusive conduct. As a general matter, AmCham EU believes these presumptions are inconsistent with an effects-based approach, which would prohibit only that conduct whose negative impact on competition outweighs any efficiency gains or consumer benefits. Such presumptions against dominant companies make even less sense in a tying context, because tying is almost always efficient and the market position of a company engaging in tying arrangement does not affect the benefits consumers derive from the arrangement. Examples of such presumptions include the following:

- The Paper states that, where a firm holds a market share above 75 percent, any pro-competitive efficiencies generated by the conduct in question will automatically be given lower priority than the conduct’s impact on competitors. In AmCham EU’s view, there is no economic basis to impose such a presumption against firms with high market shares. Firms, whether dominant or not, should never be under an obligation to place the interests of their competitors over those of consumers. Such a rule will end up protecting less efficient rivals and restricting the behavior of dominant firms in a manner that undermines Article 82’s purpose of promoting efficient markets and consumer welfare. Protecting rivals against competition in this manner will also reduce their incentives to compete aggressively.

- Certain passages in the Paper suggest that, because conduct that harms competitors could decrease competition or consumer welfare in the longer term, efficiencies generated by such conduct should be discounted. Accurately predicting the long-run harm to competition or consumers that may result from conduct that is efficiency-enhancing in the short- and medium term is almost always fraught with uncertainty. Such predictions are particularly unreliable with respect to technical tying. Accurately predicting the course of product innovation or technological change is notoriously difficult, which is why high-technology markets are nearly always far more fluid, dynamic, and risky than traditional markets. Technical tying in these markets is nearly always driven by a desire to remain competitive, which is why such tying will almost never be anti-competitive, regardless of a firm’s market share or its actual impact on competitors. An analysis that focuses too heavily on long-run harms risks under-estimating the capacity of rivals and new entrants to exert

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59 Ibid., paras 91-92.
60 See, e.g., Discussion Paper, paragraphs 54-60.
competitive pressures through product innovation or other means. Rather than assume long-term harm to consumers whenever competitors are disadvantaged, AmCham EU believes the analysis should examine, based on the unique facts of each case, whether the impact on competitors will cause long-run harm to consumers and whether such harm, if any, exceeds both short- and long-run gains in consumer welfare.

*Treatment of mixed bundling*

87. AmCham EU agrees with the Paper that the distinction between mixed bundling and pure bundling is not necessarily clear-cut. From an analytical perspective, AmCham EU suggests that the Commission should make a distinction between, on the one hand mixed bundling that in effect constitutes an economic tie, where the prices charged for the products make the purchase of the bundle the only rational or viable option, and other forms of mixed bundling, where prices charged for the products create a mere incentive for the customer to purchase the bundle. The former should be analysed as pure bundling or contractual tying, the latter as rebates.

88. In connection with the latter, the Commission should clarify, as the Paper suggests in paragraphs 190 to 194, that mixed bundling should be presumed to be legal when the incremental price that customers pay for each of the dominant company’s products equals at least the incremental cost of the dominant company of including the product in the bundle. In addition future guidance should point out that a mixed bundling practice is not necessarily abusive if this presumption is not met. Indeed, even if the incremental price is lower than the incremental costs, it cannot be excluded that other companies operating in the tied product market have in reality lower costs than the dominant firm and may be therefore more efficient. In addition, it is possible that only a small amount of purchases of the tied product are in fact made by customers who also purchase the tying product. Finally, in any event, a competition authority or plaintiff should be able to show harm to competition in the tied product market (see paragraph 84 of our comments above). However, this would need to include a demonstration of recoupment of the profit sacrificed from the tying product to subsidise the tied product. Contrary to pure predatory pricing, in a mixed bundling scenario, the dominant firm is not dominant in the tied product market. Hence, even following the Paper’s own logic in relation to recoupment, in mixed bundling, recoupment cannot be presumed.

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61 See Discussion Paper, footnote 112 and paragraph 189.
VI. Refusals to Supply

Introduction

89. AmCham EU notes that the Paper does not attempt in any significant manner to modernise the current treatment and method of analysis of refusals to supply under Article 82. Rather, the Paper seeks to summarise the jurisprudence of the European courts to date. Hence, AmCham EU believes that this section of the Paper would benefit from further reflections on how an effects and economic based approach to refusals to supply could be implemented. In addition, AmCham EU provides in the following paragraphs further suggestions as to how Article 82 should be enforced in connection with refusals to supply.

90. A brief review of the cases and decisions under Article 82 suggests there is more jurisprudence to draw on than other exclusionary abuses discussed in the Paper, which suggests that a refusal to supply is more common and/or more contentious than other abuses. A brief review of communications produced by Member States' competition authorities reflects this, with expressions in such communications being typical, for example,

"...Each year the Competition Authority ("the Authority") receives numerous complaints about refusals to supply – approximately one in ten of all complaints fall under this heading. These complaints, however, usually merit little or no action. The refusal to supply in question may arise from a dispute between a seller and a buyer with no implications for competition. Even where competition is affected, the effect is often neutral or pro-competitive, rather than distorting competition and thus harming consumers."\(^{62}\)

91. AmCham EU agrees with this statement, and believes that the area of “refusals to supply” is particularly vulnerable to type 1 errors, since these practices are often raised by firms who may have a commercial interest in obtaining supplies, but in a situation where the supplies (or the absence thereof) will not have the required exclusionary impact on competition. Accordingly, AmCham EU believes that refusals to supply are practices that deserve particular attention in any future guidance to avoid inappropriate application of Article 82, consisting of forcing a company to supply when it is not proved that this supply is necessary to enhance consumer welfare and in order to ensure an efficient allocation of resources, or where this may even reduce consumer welfare and misallocate resources.\(^{63}\)

Effect of the refusal to deal in the downstream market

92. AmCham EU encourages the Commission to better clarify the definition of 'effect of the refusal to deal in the downstream market'. Although the Paper notes that for a refusal to be abusive it must have a likely anticompetitive effect

\(^{62}\) Competition Authority Guidance Note: Refusal to Supply, December 2005 – Ireland

\(^{63}\) This is because forcing a company to supply can affect incentives to invest and innovate.
on the market that is detrimental to consumer welfare, the Paper is unclear as to the extent to which the downstream market must be affected by the refusal before intervention would be warranted. The explanation given in the Paper differentiates between the situation where the company refusing to supply is active in the downstream market and the situation where the refusing company is not present on the downstream market, and suggests that when the refusing company is not itself active in the downstream market, the impact on competition may be small. However, the Paper leaves room for interpretation that even in the case where the refusing company is not active in the downstream market, an abuse may be found. Furthermore, in a situation where the refusing company is active in the downstream market, the Paper appears to suggest that a refusal will only constitute an abuse if there are few competitors operating in the downstream market. AmCham EU would propose, as a remedy to resolve the uncertainty described above, to provide that, in general, companies will only be forced to supply when this is necessary to avoid the likely creation (or maintaining) of a dominant position on the downstream market leading to increased prices on that downstream market. In the absence of such a clear standard, AmCham EU fears that Article 82 will continue to be sometimes applied in a situation where competition on the downstream market is not negatively affected by the refusal to supply.

93. For instance, a dominant undertaking, not active on the downstream market, may wish to refuse to supply to a company that engages in heavy price cutting of branded goods. This is sometimes also referred to as the 'brand-erosion' problem for suppliers. Such refusals may well have positive effects on inter-brand competition and hence would not be caught by Article 82 in these circumstances, to the extent the refusal would not create a dominant position on the downstream market.

94. In addition, to analyse whether there is a link between dominance of the refusing company on the one hand, and the anticompetitive effect of exclusion of competitors on the other hand, AmCham EU notes that it would be appropriate and useful to analyse whether the conduct would not make economic sense “but for” its tendency to eliminate or lessen competition. The Paper does not discuss this "but for" test, but AmCham EU would support its adoption in the context of refusals to supply.

95. Finally, given the importance of questions concerning interoperability, the Paper should provide further insight into why it considers the threshold for regulatory intervention in cases of refusal to supply information on interoperability to be lower than in other cases of refusal to supply.

Distinction between de novo refusals to supply and terminations of existing contracts

96. The Paper distinguishes the termination of an existing supply relationship (paragraph 217) from the refusal to start supplying an input (before paragraph 225). AmCham EU strongly believes that the fact that a dominant company in the past found it efficient to engage in a supply relationship, and that the customer may have made investments, should not be sufficient for the presumption of an abusive conduct if the supplying company decides to terminate the supply relationship. The distinction appears to rely too extensively on a presumption that continuing a supply relationship is pro-competitive, and does not include proof that the input is indispensable among the requirements for an abuse to be found in cases of termination of a supply relationship. AmCham EU believes that the “indispensability” requirement should never be assumed, and parties requesting supplies should have the burden of demonstrating that the input is indispensable to carry on normal economic activity in the downstream market, whether the supply relationship is new or existing.

97. Furthermore, making this distinction creates a strong disincentive for undertakings, which could be viewed as dominant or are on the edge of dominance, to enter into a supply arrangement in the first place. Companies which could be viewed as dominant should have the right to review commercial choices they have made from time to time and freely decide except in very limited circumstances to discontinue a supply under the terms of the underlying agreements. Many Member States already have specific provisions in place in the area of “unfair competition” and “economic dependency” outside the scope of competition law to deal with circumstances of termination of existing supply relationship. A presumption that continuing a supply relationship is always pro-competitive and that there is no need to demonstrate that access to an input is indispensable to avoid anti-competitive effects downstream will create a strong disincentive both to invest in new technology and to supply certain customers at the outset. This is arguably of greater detriment to consumers than if the dominant company should later decide to discontinue supply to one or the other customer. Hence, it seems appropriate to adopt the view that firms, even dominant ones, should have the right to ‘change their minds’, and therefore not to presume that because a supply relationship was commercially sensible in the past, its termination is abusive in the present.

Identification of the appropriate tools of analysis in constructive refusal to supplies scenarios, in particular in margin squeeze cases

98. The Paper fails to recognise the problem of enforceability of intervention in the area of “constructive” refusals to supply. The problem concerns how to monitor and correct delays in supplying, imposing “unfair” trading conditions, charging

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67 The Commission should therefore remove the burden that paragraph 224 of the Paper imposes on a dominant firm to prove that consumers would be better off with the supply relationship terminated.
excessive prices, or making unjustified technical specifications. Competition authorities may be drawn into activity that is not typical for them, such as calculating what a “normal” profit constitutes. As a result, in doing so, AmCham EU believes that there is a significant risk that intervention can take place in the area of constructive refusals to supply to protect competitors as opposed to intervention geared at protecting competition.

99. A competition authority should only intervene to ensure that an efficient, downstream, non-vertically integrated competitor of the dominant firm can achieve sufficient margins, when, in the absence of that intervention, convincing evidence demonstrates that the net effect will harm consumer welfare. AmCham EU further suggests that, for purposes of making that test practical, conduct should only be viewed as abusive, if it is likely to create (or maintain) dominance in the downstream product market. In the absence of such a standard, it is unclear how a constructive refusal to deal would harm competition in the downstream market, and Article 82 could simply be abused to allow firms to negotiate better commercial bargains.

Refusal of supply in the context of the licensing of intellectual property rights

100. AmCham EU notes that the Paper considers the refusal to supply in the context of licensing of intellectual property rights (“IPRs”) only relatively briefly. The Paper appears to acknowledge the benefits to consumer welfare of IPRs and their protection, by setting forth that the refusal of licensing IPRs could be abusive only in exceptional circumstances, subject to a greater amount of conditions than other types of refusals to supply. In particular, the Paper follows the case law (Magill and IMS Health) and adds as a condition that a refusal to license must prevent the development of the market for which the IP is indispensable to the detriment of consumers, only where the undertaking that requests the license intends to produce new goods for which there is a potential consumer demand.

However, AmCham EU notes that the Paper does not define what constitutes a “new” product or service and suggests that if guidelines are issues further to the Paper, this requirement should be substantiated and clarified, for example by stating expressly that the “new” product or service should meet consumer demand that is not satisfied by existing products or services. Moreover, the dominance requirement as set out in paragraph 227 of the Paper (which refers to a “captive”, “potential” or even “hypothetical” upstream market) seems to extend the potential scope of compulsory licensing to IPRs that are only used as an input without identifying an individual product or service that would be sold or licensed separately.

101. Moreover, the Paper appears to contradict itself by stating that a refusal to license may be abusive even if the license sought is not to be incorporated in clearly identifiable new goods and new services, if protected technology is

68 See, e.g., Commissioner Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, at 3 (23 Sept. 2005) (stating that, in the analysis of exclusionary conduct under Article 82, “ultimately the aim is to avoid consumers harm”).

69 Discussion Paper, para 239.
indispensable as a basis for "follow-on innovation" (paragraph 240). Paragraph 240 introduces a highly undesirable degree of uncertainty and goes beyond the exiting case law (Magill and IMS cases). Furthermore, the Paper does not define the scope of what it considers "follow-on innovation".

102. AmCham EU believes that the Commission should very clearly signal that competition authorities and courts should be very reluctant to interfere in IP licenses and should not expropriate an undertaking from the results of intellectual investments and innovation efforts unless the very exceptional circumstances set forth in paragraph 239 are clearly present. Furthermore, paragraph 239 does not require that competition be eliminated altogether in the downstream market. AmCham EU urges the Commission to recognise this condition in cases of refusals to license IP rights to be consistent with existing case law. By introducing the rather vague concept of “follow-on innovation”, AmCham EU regrets that the Commission appears to undermine the case law and go beyond a sound restrictive approach towards compulsory licensing. AmCham EU urges the Commission not to adopt such an open-ended approach that is at odds with the need to encourage greater efforts in R&D and innovation in the EU.

103. AmCham EU has the same concern in relation to the content of paragraphs 241 and 242 of the Paper. First, the Paper introduces the concept of “leveraging market power from one market to another by refusing interoperability information” without a clear explanation of what conditions should be present in order to qualify “market power leveraging conduct” and/or “refusing interoperability information” as abusive. The terminology appears very open-ended, which creates significant risk of unwarranted intervention. Second, it is unclear why the degree of protection to trade secrets should be lower than for other type of intellectual property rights. Trade secrets protection, as the protection of other intellectual property, encourages innovation and rewards intellectual efforts. Hence, AmCham EU does not support an approach that would subject the obligation to supply interoperability information to fewer or less stringent conditions than those conditions that apply to the obligation to license other forms of intellectual property rights under Article 82.

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The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure an optimum business and investment climate in Europe. AmCham EU facilitates the resolution of EU – US issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to $850 billion, and currently supports over 3.5 million jobs.

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