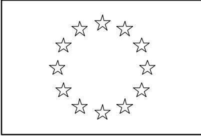
LIMITED



EUROPEAN COMMISSION

Brussels,
DRAFT 24.06.2005

Discussion Paper for the formulation of

Guidelines on the application of Article 82 of the Treaty

Text references and case references in footnotes will be completed at a later stage.

LIMITED

DISCUSSION PAPER

DRAFT 24.06.2005
LIMITED

TABLE OF CONTENTS

1. Introduction 5

2. Relationship of Article 82 with other provisions 6

3. Market definition in Article 82 cases 7

4. Dominance 10

4.1 Introduction 10

4.2. Single dominance 12

4.2.1 Market position of allegedly dominant undertaking and its rivals 12

4.2.2 Barriers to expansion and entry 14

4.2.3 Market position of buyers 17

4.3 Collective dominance 17

5. Framework for analysis of exclusionary abuses 19

5.1 Proof of anti-competitive effect 19

5.2 Abuse of collective dominance 24

5.3 Possible defences: objective justifications and efficiencies 25

5.3.1 Objective necessity defence 26

5.3.2 Meeting competition defence 26

5.3.3 Efficiency defence 27

6. Predatory pricing 29

6.1 Introduction 29

6.2 Assessment 31

6.2.1 Pricing below average avoidable cost 32

6.2.2 Pricing above average avoidable cost but below average total cost 33
6.2.2.1 Direct evidence of a predatory strategy 34
6.2.2.2 Indirect evidence of a predatory strategy 35
6.2.3 Pricing below long-run average incremental costs 37
6.2.4 Pricing above average total cost 38
6.2.5 Possible defences: objective justifications and efficiencies 39
7. Single branding and rebates 40
7.1 Introduction 40
7.2 Assessment 43
7.2.1 Single branding obligations and English clauses 45
7.2.2 Conditional rebate systems 47
7.2.2.1 Conditional rebates on all purchases 47
7.2.2.2 Conditional rebates on incremental purchases above the threshold 53
7.2.3 Rebates in return for the supply of a service by the buyer 54
7.2.4 Unconditional rebates 54
7.2.5 Possible defences: objective justifications and efficiencies 55
8. Tying and bundling 56
8.1 Introduction 56
8.2 Assessment 57
8.2.1 Dominance in the tying market 58
8.2.2 Distinct products 58
8.2.3 Practice either tying or bundling 59
8.2.4 Foreclosure of competition 60
8.2.5 Possible defences: objective justifications and efficiencies 62
9. Refusal to supply 63
9.1 Introduction 63
9.2 Assessment 65
9.2.1 Refusal to supply an input 65

9.2.1.1 Behaviour properly characterized as refusal to supply 66

9.2.1.2 Dominance 66

9.2.1.3 Indispensability.. 67

9.2.1.4 Likely negative effect on competition 67

9.2.1.5 Possible defences: objective justifications and efficiencies 68

9.2.2 Refusal to licence intellectual property rights 69

9.2.3 Refusal to supply information needed for interoperability............................. 70

10. Aftermarkets.. 70

10.1 Introduction.. 70

10.2 Assessment 71

10.2.1 Market definition.. 71

10.2.2 Dominance 72

10.2.3 Abuse of dominant position 72

10.2.4 Possible defences: Objective justifications and efficiencies 75

DISCUSSION PAPER FOR THE FORMULATION OF GUIDELINES ON THE APPLICATION OF ARTICLE 82 OF THE TREATY

1. INTRODUCTION

1. These guidelines set out the principles for the Commission's application of Article 82 of the Treaty to abuse of a dominant position. The guidelines are structured in the following way:

    - Section 2 (paragraphs 7 to 9) describes the relationship between Article 82 of the Treaty with other provisions;
    - Section 3 (paragraphs 10 to 19) addresses market definition issues;
    - Section 4 (paragraphs 20 to 52) describes the principles used for finding a dominant position;
    - Section 5 (paragraphs 53 to 89) describes the general framework for the analysis of exclusionary abuses;
    - Sections 6 to 9 (paragraphs 90 to 233) describes the enforcement policy of the Commission for a number of exclusionary abuses;
    - Section 10 (paragraphs 234 to 258) describes the approach to the analysis of aftermarkets.

2. By issuing these guidelines the Commission aims to help companies to make their own assessment of their various business practices under the EC competition rules. While the guidelines present the analytical approach used by the Commission they cannot provide details of all possible applications of this approach. The Commission applies the approach described in the guidelines to the particular facts and circumstances of each case.

3. A wide variety of practices may be abusive if carried out by an undertaking in a dominant position. Sections 6-10 describe the enforcement policy of the Commission for a number of practices that have been found abusive. The guidelines are not exhaustive in the sense that all possible abusive practices are described.

4. The objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

In applying Article 82, the Commission will adopt an approach which is based on the effects on the market.[1]

5. The guidance set out in these guidelines draws and elaborates on the Commission's evolving experience with the application of Article 82 as well as on the case-law of the Court of Justice and the Court of First Instance of the European Communities. The principles contained here will be applied and further developed and refined by the Commission in individual cases. The Commission may revise these guidelines from time to time in the light of future developments.

6. The Commission's interpretation of Article 82 is without prejudice to the interpretation that may be given by the Court of Justice or the Court of First Instance of the European Communities.

2. RELATIONSHIP OF ARTICLE 82 WITH OTHER PROVISIONS[2]

7. Articles 81 and 82 of the Treaty both pursue the aim of maintaining effective competition on the market and, according to settled case law, can be applied simultaneously.[3] A company holding a dominant position is capable of benefiting from an exemption under Article 81(3) of the EC Treaty.Consistency requires that where, taking into account the market power of the dominant company, the conduct involved generates efficiencies to an extent that it benefits from an exemption under Article 81(3), such conduct should not be classified as an abuse under Article 82 of the EC Treaty[4]..

8. Article 82 may be infringed by conduct of public undertakings or undertakings to which Member States have granted special or exclusive rights.[5] Article 82 may also be infringed where a Member State adopts or maintains in force measures, which create a situation in which such undertakings are led to, or cannot avoid, abusing their dominant position.[6] The conditions of applying Article 82 to such

---

1 See section 5 below.

2 See also Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101/97, 27.4.2004, paragraph 106.

3 See Joined cases C-395/96 P and C-396/96 P, Compagnie maritime belge, [2000] ECR I-1365, paragraph 130.

4 See also the Guidelines on the application of Article 81 (3) of the Treaty, OJ C 101/97, par 106, where it is stated that consistency requires that Article 81(3) be interpreted as precluding any application of this provision to restrictive agreements that constitute an abuse of a dominant position. See in this respect also United Brands, par. 113, Hoffmann-La Roche, par. 39 and TAA, ¨Par 330) Case T-51/89 Tetra Pak (I), [1990] ECR II-309, and Joined Cases T-191/98, T-212/98 and T-214/98, Atlantic Container Line (TACA), [2003] ECR II-000, paragraph 1456

5 See for example 127/73 BRT II [1974] ECR 318; Case 41/83 Italian Republic v Commission of the [1985] ECR 873; Case C-393/92 Almelo v Energiebedrijf IJsselmij NV[1994] ECR I-1477.

6 C-18/88 GB-Inno-BM [1991] ECR I-5941, paragraph 20;Case C-41/90, Höfner aus Elser v Macrotron [1991] ECR I-1979, paragraph 26- 29, Case C-242/95 GT-Link [1997] ECR I-4449, paragraph 33; Case C-203/96 Dusseldorp and Others [1998] ECR I-4075, paragraph 61; Case C-340/99, TNT Traco SpA v Poste Italiane SpA and Others [2001] ECR I-4109 paragraph 44.

abuses and the conditions for their justifications are laid down in Article 86 EC. Due to the specificity of Article 86 and its conditions, the application of Article 82 in conjunction with Article 86 remains outside of the scope of the present guidelines.

9. Article 10 of the Treaty obliges Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty. This article, which imposes on the Member States a duty to cooperate, read in conjunction with Articles 81 EC and 82 EC requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.[7] These specific situations will not be addressed in the present guidelines, either.

3. MARKET DEFINITION IN ARTICLE 82 CASES

10. The concept of dominance contained in Article 82 of the Treaty relates to a position of economic strength on a market. In the application of Article 82 it is therefore necessary to define a relevant market. The relevant market provides a framework for analysing whether the undertaking concerned holds a dominant position and, therefore, whether its conduct may be abusive within the meaning of Article 82.[8]

11. The main purpose of market definition is to identify in a systematic way the immediate competitive constraints faced by an undertaking. The objective of defining a market in both its product and geographic dimension is to identify all actual competitors of the undertaking concerned that are capable of constraining its behaviour. Guidance on this issue can be found in the Commission Notice on the definition of the relevant market for the purposes of Community competition law.[9] That Notice will not be further explained in these guidelines and should serve as the basis for market definition issues also for the application of Article 82.

12. These guidelines do, however, provide additional guidance with respect to one specific market definition issue that may arise in the context of Article 82 cases[10]: the price charged by the allegedly dominant undertaking – if it is indeed dominant – will almost inevitably have been raised above the competitive level. Unless

---

[7] See Case C-198/01, ECJ 9 September 2003, Consorzio Industrie Fiammiferi (CIF), [2003] ECR …,Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31; Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 20; and Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 34.

[8] See e.g. judgment of 6.7.2000, Case T-62/98, *Volkswagen*, ECR II-2707, paragraph 230.

[9] OJ C372, 9.12.1997, p.5.

[10] Issues relating to market definition in aftermarket cases are discussed in section 10.

appropriately accounted for, this can lead to markets being defined too widely.[11] This problem relates to the so-called SSNIP test and the “cellophane fallacy” [12], which are both described in more detail below. The existence of the cellophane fallacy implies that market definition in Article 82 cases needs to be particularly carefully considered and that any single method of market definition, including in particular the SSNIP-test, is likely to be inadequate. It is necessary to rely on a variety of methods for checking the robustness of possible alternative market definitions.[13]

13. A widely applicable approach is to examine the characteristics and intended use of the products[14] concerned and to assess whether they are capable of satisfying an inelastic consumer need.[15] It is thus examined whether the characteristics of the products and their intended use are such that they differentiate the products in question from other products to such an extent that they are only to a small degree interchangeable with such other products and therefore not effectively constrained by them.[16] In making this assessment regard must in particular be had to the needs of marginal consumers. In most cases it is not decisive that a certain group of consumers does not consider the products in question to be good substitutes. What matters is that a sufficiently large number of consumers do consider that a product is a good substitute for the product supplied by the undertaking concerned. If so, the two products form part of the same market, unless a single supplier of the product in question would be able to sell to consumers with less elastic demand at a higher price and prevent consumers with more elastic demand from reselling to the former group of consumers. In that case the group of consumers with less elastic demand may be in a market of their own.[17]

14. It may also be relevant to compare prices across various regions. If an undertaking supplies a product in several regions and charges higher prices in regions where it has a higher share of sales of that type of product in question, it is an indication that the main competitive constraint comes from other suppliers of that type of product and not from suppliers of other types of products. Even if the undertaking in question does not itself supply a product in different regions, a

---

[11] It is assumed that undertakings seek to maximise their profits. As long as the demand facing the undertaking is relatively inelastic, it has an incentive to increase prices.

[12] This problem has received its name from a United States case involving a producer of cellophane, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct 994 (1956).

[13] See paragraph 25 of the market definition notice, cf. note 5.

[14] The term “product” as used in these guidelines encompasses both goods and services.

[15] See judgment of 21.2.1973, Case 6/72, *Continental Can*, ECR p. 215, paragraph 32, and of 12.12.1991, Case T-30/89, *Hilti*, ECR II-1439, paragraph 64.

[16] See in this respect judgment of 28.2.2002, Case T-86/95, *Compagnie Générale Maritime*, ECR-1011, paragraph 122, and of 11.4.1989, Case 66/86, *Ahmed Saeed Flugreisen*, ECT p. 803, paragraphs 39 and 40.

[17] See paragraph 43 of the market definition notice, cf. note 9.

similar analysis may be possible if the same type of product is sold in other regions by other undertakings. Price comparisons across regions should, however, take into account whether there are other factors differing between the regions than the intensity of competition.

15. It may also be relevant to check the conduct of the undertaking in question against one or more candidate market definitions. The way in which an undertaking acts in a market may in itself be indicative of substantial market power.[18] For instance, the fact that an undertaking imposes clearly abusive contract terms against the protests of its buyers may be indication that the undertaking has substantial market power, as the buyers in such a situation likely would have chosen another supplier if they had had realistic alternatives. This may be an element in discarding market definitions that would lead to a finding of no substantial market power on the part of the undertaking in question.

16. Under the SSNIP-test, which in particular in merger cases constitutes a central part of the Commission's approach to market definition, it is asked whether the customers of the undertaking(s) concerned would switch to readily available substitutes or to suppliers located elsewhere to such an extent that it would be unprofitable to implement a small but significant (normally in the range 5%-10%), non-transitory increase in relative prices for the products and the areas being considered. If answered in the affirmative, additional substitutes and areas are added to the relevant market until such a price increase would be profitable. At that point, a hypothetical single seller of the now included products and within the now included areas would be able to profitably raise prices by 5%-10%, signifying that the products and areas in question constitute a market that is worth monopolising. As a consequence thereof it constitutes an appropriate framework for competition analysis.

17. In the context of Article 82 it is essential to take account of the fact that the SSNIP-test normally is based on the assumption that prevailing prices constitute the appropriate benchmark for the analysis. This is often not the case in Article 82 cases. The very notion of dominance involves an assessment of whether or not the undertaking in question is subject to effective competitive constraints. The appropriate benchmark for this assessment is the competitive price, which may not be the prevailing price. Indeed, the prevailing price may already have been substantially increased, a fact which must be taken into account.[19] Otherwise, the market could be defined too widely, as it might include products or geographic areas, which only impose a competitive constraint due to the fact that prices have already been elevated above competitive levels. The failure to take account of this reality is normally referred to as the cellophane fallacy.

18. The SSNIP-test at prevailing prices remains useful in the sense that it is indicative of substitution patterns at such prices. Products and areas that can be excluded from the relevant market at prevailing prices would also be excluded at any lower

---

[18] See judgment of 14.2.1978, Case 27/76, *United Brands*, ECR p. 207, paragraph 68, and paragraph 93 of the judgment in *Hilti* cited in note ?.

[19] See paragraph 19 of the market definition notice, cf. note 9.

competitive price. However, additional tools are required to check whether the market has been defined too widely so as to include false substitutes. One method of checking for false substitution patterns would involve reconstructing the competitive price, i.e. to estimate the competitive price and use that price for the purposes of applying the SSNIP-test. However, in most cases it is not possible to reconstruct the competitive price with the requisite degree of accuracy. As a correct application of the SSNIP-test also involves some knowledge of the demand curve at the competitive prices, this method is rather difficult to apply in practice.

19. Article 82 cases may also involve markets in which there is no dominant company. For instance, the problem being investigated could be claims that an allegedly dominant company "leverages" its market power from one market into another market. In this second market, the SSNIP test may be more readily applicable, as there may be no reason to suspect that the prices in that market are already above competitive levels.

4. DOMINANCE

4.1 INTRODUCTION

20. According to settled case law, dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.[20] Dominance can exist on the part of one undertaking (single dominance) or two or more undertakings (collective dominance).[21] In the case of collective dominance the undertakings concerned must, from an economic point of view, present themselves or act together on a particular market as a collective entity.[22]

21. This definition of dominance consists of three elements, two of which are closely linked: (a) there must be a position of economic strength on a market which (b) enables the undertaking(s) in question to prevent effective competition being maintained on that market by (c) affording it the power to behave independently to an appreciable extent.

22. The first element implies that dominance exists in relation to a market. It cannot exist in the abstract.[23] It also implies that an undertaking either on its own or together with other undertakings must hold a strong position on that market compared to its rivals.

---

[20] See e.g paragraph 65 of judgment in *United Brands*, cited in note ?? above, and judgment of 13.2.1979, Case 85/76, *Hoffmann-La Roche*, ECR p. 461, paragraph 38.

[21] See e.g. judgment of 16.3.2000, Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge*, ECR I-1365, paragraph 36.

[22] Idem.

[23] See paragraph 10 above.

23. The second and third elements concern the link between the position of economic strength held by the undertaking concerned and the competitive process, i.e. the way in which the undertaking and other players act and inter-act on the market. Dominance is the ability to prevent effective competition being maintained on the market and to act to an appreciable extent independently of other players. The notion of independence, which is the special feature of dominance[24], is related to the level of competitive constraint facing the undertaking(s) in question. For dominance to exist the undertaking(s) concerned must not be subject to effective competitive constraints. In other words, it thus must have substantial market power.

24. Market power is the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time. In these guidelines, the expression "increase prices" is often used as shorthand for the various ways these parameters of competition can be influenced to the harm of consumers. An undertaking that is capable of substantially increasing prices above the competitive level for a significant period of time holds substantial market power and possesses the requisite ability to act to an appreciable extent independently of competitors, customers and consumers. Unlike undertakings in a market characterised by effective competition, a dominant undertaking not subject to effective competitive constraints is able to price above the competitive level. It can do so by reducing its own output or by causing rivals to reduce their output. The exclusion of competitors may allow the dominant company to subsequently raise price or keep prices high.

25. Both suppliers and buyers can have market power. However, for clarity, market power will usually refer here to a supplier's market power. Where a buyer's market power is the issue, the term 'buyer power' is employed.

26. Higher than normal profits may be an indication of a lack of competitive constraints on an undertaking. However, an undertaking's economic strength cannot be measured by its profitability at any specific point in time; even short-run losses for a time are not incompatible with a dominant position.[25]

27. It is also not required for a finding of dominance that the undertaking in question has eliminated all opportunity for competition on the market.[26] For Article 82 to apply it is not a condition that competition has been eliminated.[27] On the other hand, the fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices is in general incompatible with the independent conduct which is the hallmark of a dominant position. In that case

---

24 See paragraph 42 of the judgment in *Hoffmann-La Roche* cited in note ?.

25 See paragraph 126 of the judgment in *United Brands* cited in note ?, and judgment of 9.11.1983, Case 322/81, *Michelin*, EXR p. 3461, paragraph 59.

26 See paragraph 113 of the judgment in *United Brands*, cited in note ?, and judgment of 28.2.2002, Case T-395/94, *Atlantic Container Line*, ECR II-875, paragraph 330.

27 See paragraphs 88-89.

the undertaking concerned is likely to be subject to effective competitive constraints, which is incompatible with the existence of substantial market power.

4.2. SINGLE DOMINANCE

28. When the relevant market has been defined, it can be analysed whether on that market the allegedly dominant undertaking "has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers", that is, whether it holds substantial market power. In conducting this analysis it is relevant to consider in particular the market position of the allegedly dominant undertaking, the market position of competitors, barriers to expansion and entry, and the market position of buyers. The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative.[28]

4.2.1 MARKET POSITION OF ALLEGEDLY DOMINANT UNDERTAKING AND ITS RIVALS

29. The analysis of the market position of the allegedly dominant undertaking and its rivals provides insight into the degree of actual competition on the market. The starting point for this analysis is the market shares of the various players. Market shares provide useful first indications of the market structure and of the competitive importance of various undertakings active on the market. If the undertaking concerned has a high market share compared to other players on the market, it is an indication of dominance, provided that this market share has been held for some time.[29] If market shares have fluctuated significantly over time, it is an indication of effective competition. However, this is only true where fluctuations are caused by rivalry between undertakings on the market. Fluctuations caused, for instance, by mergers are not in themselves indicative of such rivalry.

30. Normally, the Commission uses current market shares in its competitive analysis.[30] However, historic market shares may be used if market shares have been volatile, for instance when the market is characterised by large, lumpy orders. Changes in historic market shares may also provide useful information about the competitive process and the likely future importance of the various competitors, for instance, by indicating whether firms have been gaining or losing market shares. In any event, the Commission interprets market shares in the light of likely market conditions, for instance, whether the market is highly dynamic in character and whether the market structure is unstable due to innovation or growth.

---

[28] See paragraph 39 of the judgment in *Hoffmann-La Roche*, cited in note ?.

[29] See e.g. paragraph 111 of the judgment in *United Brands,* cited in note??, and paragraph 41 of the judgment in *Hoffmann-La Roche*, cited in note ?.

[30] As to the calculation of market shares, see also Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 3, paragraphs 54-55.

31. It is very likely that very high markets shares, which have been held for some time, indicate a dominant position.[31] This would be the case where an undertaking holds 50 % or more of the market, provided that rivals hold a much smaller share of the market.[32] In the case of lower market shares, dominance is more likely to be found in the market share range of 40 % to 50 % than below 40 %, although also undertakings with market shares below 40 % could be considered to be in a dominant position.[33] However, undertakings with market shares of no more than 25 %[34] are not likely to enjoy a (single) dominant position on the market concerned.[35]

32. The strength of any indication based on market share depends on the facts of each individual case. Market share is only a proxy for market power, which is the decisive factor. It is therefore necessary in most cases to extend the dominance analysis beyond market shares, especially when taking into account the difficulty of defining relevant markets in Article 82 cases, cf. section III above.

33. The importance of market shares may be qualified by an analysis of the degree of product differentiation in the market. Products are differentiated when they differ in the eyes of consumers for instance due to brand image, product features, product quality, level of service or the location of the seller. The level of advertising in a market may be an indicator of the firms' efforts to differentiate their products. When products are differentiated the competitive constraint that they impose on each other is likely to differ even where they form part of the same relevant market. Substitutability is a question of degree. In assessing the competitive constraint imposed by rivals, it must therefore be taken into account what is the degree of substitutability of their products with those offered by the allegedly dominant undertaking. It may be that a rival with 10% market share imposes a greater competitive constraint on an undertaking with 50% market share than another rival supplying 20% of the market. This may for instance be the case where the undertaking with the lower market share and the allegedly dominant undertaking both sell premium branded products whereas the rival with the larger market share sells a bargain brand.

---

31 See paragraph 41 of the judgment in *Hoffmann-La Roche*, cited in note ?.

32 See paragraph 328 of the judgment in *Atlantic Container Line*, cited in note ?, and judgment of 3.7.1991, Case C-62/86, *AKZO*, ECR I-3359, paragraph 60, and paragraph 41 of the judgment in *Hoffmann-La Roche* cited in note ?.

33 See e.g. paragraphs 108 to 110 of the judgment in *United Brands*, cited in note ?, where the undertaking concerned was found to be dominant with a market share between 40 % and 45 %. See also judgment of 15.12.1994, Case C-250/92, *Gøttrup-Klim*, ECR I-5641, paragraph 48, where the undertaking concerned held market shares of 36 % and 32 %, and the ECJ stated that an undertaking holding market shares of that size may, depending on the strength and number of its competitors, be considered to be in a dominant position.

34 The calculation of market shares depends critically on market definition. It must be emphasised that the Commission does not necessarily accept the market definitions proposed by the allegedly dominant undertaking or by third parties.

35 Recital 32 of Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.1.2004, p. 1.

4.2.2 Barriers to expansion and entry

34. If the barriers to expansion faced by rivals and to entry faced by potential rivals are low, the fact that one undertaking has a high market share may not be indicative of dominance. Any attempt by an undertaking to increase prices above the competitive level would attract expansion or new entry by rivals thereby undermining the price increase.

35. Abuse of dominance cases are concerned with past and perhaps ongoing behaviour. Also the issue of dominant position therefore relates to the past and perhaps the present. For potential expansion or new entry to counter an indication of dominance based on market shares, such expansion or entry, or the threat of it, must not only either have happened or would have been likely to happen in case of a price increase, but also timely and of sufficient scope and magnitude. In assessing whether expansion or entry have been or would have been timely, the Commission will look at whether any such expansion or entry have been or would have been sufficiently immediate and persistent to prevent the exercise of substantial market power. The appropriate time period depends on the characteristics and dynamics of the market. The period of time needed for undertakings already on the market to adjust their capacity can be used as a yardstick to determine this period. Expansion or entry which is not of sufficient scope and magnitude is not likely to constitute an effective constraint on the undertaking concerned. Small-scale entry, for instance into some market 'niche', may not be considered sufficient.

36. The Commission will look carefully at the history of the industry when assessing barriers to expansion or entry. It is not likely that the Commission will find barriers to expansion and entry in an industry that has experienced frequent and successful examples of entry. On the other hand if previous attempts to expand in or enter into the market have been unsuccessful, perhaps due to deterring behaviour by incumbents, then expansion and entry would seem less likely to have constituted an effective constraint.

37. Entry is particularly likely if suppliers in other markets already possess production facilities that could be used to enter the market in question, thus reducing the sunk costs of entry.

38. Barriers to expansion and entry are factors that make entry impossible or unprofitable while permitting established undertakings to charge prices above the competitive level. Undertakings expand output and enter markets to earn profits. Whether expansion or entry is profitable depends in particular on the cost of (efficient) expansion or entry and the likely prices post expansion or entry. The higher the cost of expansion or entry and the lower the likely post expansion or entry prices, the greater the risk that expansion or entry will be unprofitable and therefore not attempted.

39. The prices post expansion or entry depend firstly on the impact on prices of the additional output put on the market by the expansion or by the new entrant, but also on the reaction of incumbents, in particular the allegedly dominant undertaking. Likely strategic responses from the incumbents are therefore taken into account. An aggressive competitive response from incumbents would be particularly likely if they have committed to large excess capacity. The allegedly

dominant undertakings may also have built a reputation of responding aggressively to expansion or entry. When assessing whether or not expansion or entry would be profitable, the likely evolution of the market should also be taken into account. Expansion or entry is more likely to be profitable in a market that is expected to experience high growth in the future relative to a market that is expected to decline or stagnate.

40. When identifying possible barriers to expansion and entry it is important to focus on whether rivals can reasonably replicate circumstances that give advantages to the allegedly dominant undertaking. Barriers to expansion and entry can have a number of origins relating to the legal or economic environment that pertains on the relevant market:

- Legal barriers: the legislative framework covering the relevant market can be an important barrier. Such legislation may limit the number of market participants, for example by granting special or exclusive rights in the shape of concessions, licenses or intellectual property rights. Legislative measures that grant a single undertaking the exclusive right to perform a certain activity excludes rivals and may lead to such an undertaking having a legal monopoly in a relevant market. Planning laws and licensing laws that impose limits on the number of retail outlets limits expansion possibilities of existing and entry possibilities for new retailers, which in turn may make it more difficult for suppliers to gain access to efficient distribution. Intellectual property rights may also prevent expansion and entry or make it more difficult. However, intellectual property rights do not as such confer dominance on the holder. The impact of intellectual property rights on expansion and entry depends on the nature and actual strength of the intellectual property right held by the allegedly dominant undertaking. Finally, also tariff and non-tariff barriers can give advantages to incumbent firms.

- Capacity constraints: competitors may have to commit large sunk investments in order to expand capacity. An investment or cost is sunk when it cannot be recovered if the undertaking exits the market. Moreover, even existing excess capacity may be so expensive to employ that these costs constitute a barrier to expansion; for instance, the costs of introducing another shift in a factory may constitute a barrier to expansion.

- Economies of scale and scope: large-scale production or distribution may give the allegedly dominant undertaking an advantage over smaller competitors. Scale and scope economies result from the spreading of fixed costs over larger output or a broader set of products, leading to a reduction of average costs. When economies of scale or scope are large compared to the size of the market, efficient expansion or entry is more costly and risky. Large fixed costs have to be committed and the output produced will constitute a significant increase in output, which is likely in itself to have a significant impact on price post expansion or entry. If expansion or entry occurs at an inefficient scale, the competitive constraint imposed on the incumbents will be less effective. In assessing barriers to expansion and entry it is therefore useful to consider the minimum efficient scale in the market concerned. The minimum efficient

scale is the level of output required to minimise average cost, exhausting economies of scale.[36]

- Absolute cost advantages: these include preferential access to essential facilities, natural resources, innovation and R&D, intellectual property rights and capital conferring a competitive advantage on the allegedly dominant undertaking, which makes it difficult for other undertakings to compete effectively. In the large majority of cases financial strength is unlikely to be an issue. However, in some cases it may be one of the factors that contribute to a finding of a dominant position, in particular in those cases where (i) finance is relevant to the competitive process in the industry under review; (ii) there are significant asymmetries between competitors in terms of their internal financing capabilities; and (iii) particular features of the industry make it difficult for firms to attract external funds.

- Privileged access to supply: the allegedly dominant undertaking may be vertically integrated or may have established sufficient control or influence over the supply of inputs that expansion or entry by smaller rival firms may be difficult or costly.

- A highly developed distribution and sales network: the allegedly dominant undertaking may have its own dense outlet network, established distribution logistics or wide geographical coverage that would be difficult for rivals to replicate.

- The established position of the incumbent firms on the market: it may be difficult to enter an industry where experience or reputation is necessary to compete effectively, both of which may be difficult to obtain as an entrant. Factors such as consumer loyalty to a particular brand, the closeness of relationships between suppliers and customers, the importance of promotion or advertising, or other reputational advantages will be taken into account. Advertising and other investments in reputation are often sunk costs which cannot be recovered in the case of exit and which therefore make entry more risky.

- Other strategic barriers to expansion or entry: these encompass situations where it is costly for customers to switch to a new supplier. This may for example be the case where personnel has been trained to use the product of the allegedly dominant undertaking or where due to network effects the value of rivals' products are lower because they do not have a large installed base of customers. For instance the value of a piece of software may not only depend on the intrinsic qualities of the product but also on how many people use it and thus with whom the new buyers can exchange files. Finally, the incumbent firms may through the use of long-term contracts with customers have made it difficult for rivals at a

[36] Scale economies are normally exhausted at a certain point. Thereafter average costs will stabilise and eventually rise due to, for example, capacity constraints and bottlenecks.

particular point in time to find a sufficient number of customers able to switch supplier that expansion or entry would be profitable.

4.2.3 MARKET POSITION OF BUYERS

41. The market position of buyers provides an indication of the extent to which they are likely to constrain the allegedly dominant undertaking. However, given the fact that dominance is assessed in relation to a market, it is not sufficient that certain strong buyers may be able to extract more favourable conditions from the allegedly dominant undertaking than their weaker competitors. The presence of strong buyers can only serve to counter a *prima facie* finding of dominance if it is likely that in response to prices being increased above the competitive level, the buyers in question will pave the way for effective new entry or lead existing suppliers in the market to significantly expand their output so as to defeat the price increase.[37]

42. On the other hand, if one or more strong buyers are able to extract more favourable conditions from the allegedly dominant undertaking than their weaker competitors, it may be appropriate to define separate relevant markets for, respectively, strong and weak buyers.[38]

4.3 COLLECTIVE DOMINANCE

43. Article 82 prohibits any abuse by one or more undertakings of a dominant position. It follows that the application of Article 82 is not confined to cases where a single undertaking holds a dominant position; it is also applicable where two or more undertakings together hold a dominant position.

44. Collective dominance normally may exist between undertakings that operate at the same level of the supply chain. However, exceptionally it may exist between undertakings that operate at different levels of the supply chain.[39]

45. For collective dominance to exist under Article 82, two or more undertakings must from an economic point of view present themselves or act together on a particular market as a collective entity.[40] It is not required that the undertakings concerned adopt identical conduct on the market in every respect.[41] What matters is that they are able to adopt a common policy on the market and act to a

---

[37] See in this respect judgment of 7.10.1999, Case T-228/97, *Irish Sugar*, ECR II-2969, paragraph 101.

[38] See paragraph 43 of the market definition notice, cited in note ??.

[39] See paragraph 63 of the judgment in *Irish Sugar* cited in note ?.

[40] See paragraph 36 of the judgment in *Compagnie maritime belge* cited in note ?.

[41] See in this respect paragraph 66 of the judgment in *Irish Sugar* cited in note ?.

considerable extent independently of their competitors, their customers, and also of consumers.[42]

46. In order to establish the existence of such a collective entity on the market, it is necessary to examine the economic links and factors that give rise to a connection between the undertakings concerned.[43] Such links and factors may flow from the nature and terms of an agreement between the undertakings in question or from the way in which it is implemented[44], provided that the agreement leads the undertakings in question to present themselves or act together as a collective entity. This may, for instance, be the case if undertakings have concluded cooperation agreements that lead them to co-ordinate their conduct on the market. It may also be the case if ownership interests and other links in law lead the undertakings concerned to co-ordinate.

47. However, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position. Such a finding may be based on other connecting factors and depends on an economic assessment and, in particular, on an assessment of the structure of the market in question.[45] It follows that the structure of the market and the way in which undertakings interact on the market may give rise to a finding of collective dominance.[46]

48. Undertakings in oligopolistic markets may sometimes be able to raise prices substantially above the competitive level without having recourse to any explicit agreement or concerted practice. Indeed, they may by able to co-ordinate their behaviour on the market by observing and reacting to each other's behaviour. In other words, they may be able to adopt a common strategy that allows them to present themselves or act together as a collective entity. Coordination may take various forms. In some markets, the most likely coordination may involve directly coordinating on prices in order to keep them above the competitive level. In other markets, coordination may aim at limiting production or the amount of new capacity brought to the market. Firms may also coordinate by dividing the market, for instance by geographic area or other customer characteristics, or by allocating contracts in bidding markets. The ability to arrive at and sustain such co-ordination depends on a number of factors, the presence of which must be carefully examined in each case.

---

[42] See judgment of 31.3.1998. Joined Cases C-68/94 and C-30/95, *France v Commission*, ECR I-1375, paragraph 221.

[43] Idem paragraph 41.

[44] Idem paragraph 45, and judgment of 27.4.1994, Case C-393/92, *Almelo*, ECR I-1477, paragraphs 41 to 43.

[45] See the paragraph 36 of the judgment in *Compagnie maritime belge* cited in note ?.

[46] See also the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31, 5.2.2004, p.5, paragraphs 39-57.

49. Firstly, the undertakings concerned must come to a common understanding of what should be the terms of co-ordination. The simpler and more stable the economic environment, the easier it is for undertakings to do so.

50. Secondly, each undertaking must be able to monitor whether or not the other undertakings are adhering to the common policy. It is not sufficient for each undertaking to be aware that interdependent market conduct is profitable for all of them, because each undertaking will be tempted to increase his share of the market by deviating from the common strategy. There must, therefore, be sufficient market transparency for all undertakings concerned to be aware, sufficiently precisely and quickly, of the market conduct of the others.[47]

51. Thirdly, the implementation of the common policy must be sustainable over time, which presupposes the existence of sufficient deterrent mechanisms, which are sufficiently severe to convince all the undertakings concerned that it is in their best interest to adhere to the common policy.[48]

52. Finally, it must be established that competitive constraints do not jeopardise the implementation of the common strategy.[49] As in the case of single dominance, it must be analysed what is the market position and strength of rivals that do not form part of the collective entity, what is the market position and strength of buyers and what is the potential for new entry as indicated by the height of entry barriers.

5. FRAMEWORK FOR ANALYSIS OF EXCLUSIONARY ABUSES

53. This section describes in general terms the framework used by the Commission in its analysis of exclusionary abuses. More detailed descriptions of the analysis of individual abuses are given in the following sections.

54. This part of the guidelines only deals with exclusionary abuses and in that category only with the most common abuses, that is, predatory pricing, single branding and rebates, tying and bundling, and refusal to supply.

55. The fact that these guidelines only deal with exclusionary abuses means that some abuses are not analysed in this part of the guidelines (excessive pricing) and that others are only analysed to the extent that they may have exclusionary effects (discrimination).

5.1 PROOF OF ANTI-COMPETITIVE EFFECT

56. The European Court of Justice has defined the term "abuse" as prohibited by Article 82 EC in the following way:

---

[47] See judgment of 6.6.2002, Case T-342/99, *Airtours*, ECR II-2585, paragraph 62, and judgment of 26.1.2005, Case T-193/02, *Piau*, ECR-0000, paragraph 111.

[48] Idem.

[49] Idem.

"An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[50]

57. This definition implies that the conduct in question must in the first place have the capability, by its nature, to foreclose efficient competitors from the market. To establish such capability it is in general sufficient to investigate the form and nature of the conduct in question. It secondly implies that, in the specific market context, a likely market distorting foreclosure effect must be established. By foreclosure is meant that actual or potential competitors are completely or partially denied profitable access to a market. Foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure is said to be market distorting if it likely hinders the maintenance of the degree of competition still existing in the market or the growth of that competition and thus have as a likely effect that prices will increase or remain at a supra-competitive level.

58. To establish such a market distorting foreclosure effect it is in general necessary not only to consider the nature or form of the conduct, but also its incidence, i.e. the extent that the dominant company is applying it in the market, including the market coverage of the conduct or the selective foreclosure of customers to newcomers or residual competitors, and the degree of dominance. In general, the higher the capability of conduct and the wider its application and the stronger the dominant position, the higher the likelihood that an appreciable foreclosure effect results.[51] In view of these sliding scales, where in the following sections various factors are used to indicate circumstances under which a likely foreclosure effect is considered to occur with high(er) or low(er) likelihood, it needs to be kept in mind that these descriptions can not be applied mechanically. The Commission will make its assessment of the conduct in question in light of the potential and actual foreclosure effects.

59. When analysing the effects of a certain conduct on the market, it should be kept in mind that the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. This means that, first, it is competition, and not competitors as such, that is to be protected, and, second, that ultimately the aim is to avoid that consumers are harmed by anticompetitive conduct of dominant companies.

---

[50] Case 85/76, Hoffmann-La Roche v. Commission, [1979] ECR 461.

[51] As to the importance of the degree of dominance for finding abuse, see Case C-395/96 Compagnie Maritime Belge Transports SA v Commission P[2000] ECR I –1365, paragraph 119; Case T-228/97 Irish Sugar v Commission[1999] ECR II-2969 paragraph 186.

60. The analysis focuses on anticompetitive effects which are likely, and not only on actual effects. Both direct and indirect harm to consumers are relevant. Furthermore, not only short term harm, but also medium and long term harm arising from the exclusion of competitors, is taken into account.

61. Exclusionary abuses may be both price based and non-price based. Examples of non-price based abuses are contractual tying, single branding contracts and "naked" refusals to supply. In these situations it is clear that some "exclusion" takes place; the question is whether this exclusion may be characterized as anticompetitive.

62. It is evident that similar exclusionary effects may be achieved through pricing. Very high stand-alone prices in comparison to a bundled price for two products may "tie" these two products together as effectively as contractual tying. High rebates given on condition of single branding may have the same effect as contractual exclusive dealing. Asking a very high price for a product or combining a high upstream price with a low downstream price may amount to a "constructive" refusal to supply. Furthermore, predatory pricing is, of course, also a price-based exclusionary abuse.

63. As regards pricing behaviour a certain conduct may have different exclusionary effects depending on how efficient the rivals are. A very efficient rival may be able to thrive in a market where the dominant company prices in a certain way, while a less efficient rival may be excluded from the market. The "rules" described in these guidelines for assessing alleged price based exclusionary conduct are based on the premise that only the exclusion of "as efficient" competitors is abusive. The benchmark for "as efficient" is normally the costs of the dominant company. However, as described in the sections below, in some situations it may be necessary to allow for other considerations of what is the appropriate concept of an "as efficient" competitor. In this context it is important to retain that although estimates of efficiency may often be based on available historical cost data, the concept of efficient competitors is general and dynamic and includes companies that are or will be able in the foreseeable future to operate efficiently. For instance, companies currently producing at higher costs because they are operating below the minimum efficient scale or because they have not yet reaped certain learning effects may have to be considered efficient competitors. The concept of an as efficient competitor may therefore have to be interpreted in its specific market context.

64. The benchmark for "as efficient" is normally the costs of the dominant company and will have to specify which costs are concerned. The following are often mentioned as possible cost benchmarks: marginal cost (MC), average variable cost (AVC), average avoidable cost (AAC), long-run average incremental cost (LAIC) and average total cost (ATC). Marginal cost is the cost of producing the last unit of output. Average variable cost is the average of the costs that vary directly with the output of the company. Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case usually the amount allegedly subject to predatory pricing. Long-run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. Average total cost is the average of all the variable and fixed costs.

65. In case of multi-product companies it may be difficult to calculate ATC because of certain common costs, which are fixed costs that are necessary for the production of more than one product and where it is difficult to allocate these costs to the different products. Where necessary to apply a cost benchmark based on ATC, the Commission will allocate common costs in proportion to the turnover achieved by the different products unless other cost allocation methods are for good reasons standard in the sector in question or in case the abuse biases the allocation based on turnover. Whereas ATC takes account of all variable and fixed costs, LAIC takes account of only the product-specific variable and fixed costs. The LAIC will thus usually fall below ATC because it does not take into account (non-attributable) common costs. The LAIC will usually be above AAC because LAIC takes into account all product-specific fixed costs, including product-specific fixed costs made before the period of predatory pricing, whereas AAC only takes product specific fixed costs into account that are made in order to predate. The AAC will be higher than AVC to the extent that the company does make product specific fixed costs to predate, otherwise AAC and AVC are the same by taking into account the variable costs only. Finally, MC, because it concerns the additional cost made to produce one extra unit of output and does not concern an average, can be lower or higher than all the other cost benchmarks, depending on the actual output and capacity constraints of the company in question.

66. For price-based alleged abuses, "rules" are therefore developed to evaluate whether a competitor, which is as efficient as the dominant company, can compete against the price schedule or rebate system of the dominant company. The exact formulation of these rules varies from abuse to abuse, depending on, for instance, considerations about whether potentially abusive low prices or rebate schemes are offered to the whole market or only a part of it and whether low prices apply to all of a customer's requirements or only a part of them. If examination of a dominant company's price schedule or rebate system according to these rules leads to the conclusion that an "as efficient" competitor can compete with the dominant company, the Commission will normally reach the conclusion that the dominant company's price schedule or rebate system is not abusive. If, however, an "as efficient" competitor cannot compete with the dominant company, the Commission will consider the likely market impact of the price schedule or rebate system. .

67. When analysing exclusionary behaviour by a dominant company it is in addition useful to distinguish whether the dominant company is attempting to exclude an upstream or a downstream rival. The abuses analysed in the following sections can be divided in two groups. The first group consists of predatory pricing, single branding and rebates, and tying and bundling. The second group consists of refusal to supply

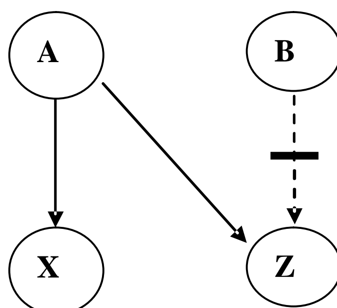
68. The abuses in the first group have in common that the possible anticompetitive effect arises from a dominant company attempting to exclude or marginalise a rival at its own level in the supply chain by foreclosing its access to customers[52].

---

[52] For ease of exposition the term "exclude" should in the following be understood also to cover "marginalise". That is, "exclude" should not be understood in the literal sense of complete exclusion

The terms "upstream" and "downstream" market are often used to distinguish between two different levels: the closer to the final consumer a market is, the further "downstream" it is[53]. This is illustrated in Figure 1, where A is dominant in the upstream market and tries to foreclose access of an actual or potential upstream rival B to customers such as X and Z in the downstream market.

FIGURE 1



69. In some situations there is more than one upstream market. The dominant company A typically is or wants to be present on all of these markets while B may be present on only one or a few of these adjacent markets. The concern may then be that A is trying to exclude B from one or more of these markets through foreclosing its access to the downstream customers X and Z, for instance through tying the products from the various upstream markets. This, however, does not change the basic point that A is trying to exclude an upstream rival from one or more of the upstream markets.

70. The second group of abuses consists of refusal to supply, which here includes margin squeeze cases. Whereas the aim in the situations described above is to exclude B, a rival in the upstream market, in the typical refusal to supply case the aim is to exclude an already active or a potential participant in the downstream market, for instance Z. From a competition policy point of view, this is mostly only a worry if the dominant company A is itself active downstream. This is illustrated in Figure 2, where Xa is now a downstream company owned by A. It is this type of refusal to supply that is analysed in section 9, "Refusal to supply".[54]

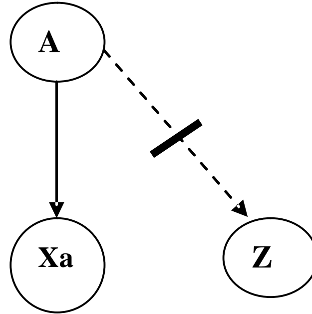
---

but also covers situations where a dominant company impairs the ability of a rival to compete in an effective way so that it becomes "marginalised".

[53] The terminology "upstream" and "downstream" may not always be completely appropriate in that the two markets may in some ways be considered as equally "close" to the final consumer. However, in such a case, for a competitive concern to arise, it will be the case that one market (which is then called the "upstream" market) will provide an input to the other market (the "downstream" market).

[54] Sometimes the form of a conduct might seem to be a refusal to supply but in reality the refusal to supply is best seen as an "instrument" to achieve, for instance, single branding or tying and should therefore be analysed according to the framework developed for these abuses in sections 7 and 8. That is, in some refusal to supply cases the concern is similar to the ones described for the group 1 abuses.

FIGURE 2



71. The above two-way characterisation of price versus non-price based conduct and exclusion of an upstream versus exclusion of a downstream rival may be visualised in the following table.

TABLE 1

	Group 1	Group 2
Non-price	Single branding Tying	Refusal to supply
Price	Loyalty rebates Mixed bundling Predation	Margin squeeze

5.2 ABUSE OF COLLECTIVE DOMINANCE

72. A finding of abuse of a collective dominant position is typically based on showing that the collectively dominant undertakings have tacitly or expressly been following a common policy on the market, at least in regard to the abusive

---

The aim of the refusal to supply is to foreclose an upstream rival from access to downstream customers with the purpose of excluding this rival from its upstream activities. This could, for instance, be the case where A refuses to supply Z if Z also buys from B (a form of single branding) or refuses to supply Z unless Z buys a whole range of products from A (a form of tying).

conduct. For instance, the undertakings concerned may follow a common policy of denying potential rivals access to infrastructure or a policy to charge allegedly excessive prices to their customers. However, the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of the collective dominant position.[55]

73. This could, for instance, be the case if it could be shown that the dominant undertakings had different tasks, for instance that each should "defend" a certain area or group of customers in case of entry, and that the allegedly abusive conduct had only been observed on the part of one of the dominant undertakings as entry had only occurred in the area or customer group that it was supposed to defend.

5.3 POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

74. Abusive conduct may escape the prohibition of Article 82 in case the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition.[56] The burden of proof for such an objective justification or efficiency defence will be on the dominant company.[57] It should be for the company invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied.[58]

75. In general there are two types of possible objective justifications. The first type of objective justification is where the dominant company is able to show that the prima facie abusive conduct is actually necessary conduct on the basis of objective factors external to the parties involved and in particular external to the dominant company ('objective necessity defence'). The second type of objective justification is where the dominant company is able to show that the prima facie abusive conduct is actually a loss minimising reaction to competition from others ('meeting competition defence').

76. In relation to the efficiency defence the dominant company must be able to show that the efficiencies brought about by the conduct concerned outweigh the likely negative effects on competition resulting from the conduct and therewith the likely harm to consumers that the conduct might otherwise have.

---

[55] See para. 66 of *Irish Sugar* (cited somewhere??) and para. 633 of *TACA* (cited somewhere?)

[56] See for instance case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69, para 17; case 24/67 Parke Davis v Probel [1968] ECR 55; case 78/70 Deutsche grammophon v Metro [1971] ECR 487; Tournier; United Brands; BP para 33-34; Telemarketing; Magill; Hilti para 118?; Terta Pak2; Irish Sugar; Portugal v Commission.

[57] See Michelin II, para ..

[58] See recital 5 and article 2 of Council Regulation (EC) No 1/2003, OJ L 1, 4.1.2003.

5.3.1 OBJECTIVE NECESSITY DEFENCE

77. The dominant company may be able to show that the conduct concerned is objectively necessary, for instance because of reasons of safety or health related to the dangerous nature of the product in question or in order to minimise losses in the short run in reaction to a general and dramatic fall in demand. Such necessity must be based on objective factors that apply in general for all undertakings in the market. On the basis of these factors the dominant company must be able to show that without the conduct the products concerned can not or will not be produced or distributed in that market. In these situations the Community Courts apply strictly the condition of indispensability. For instance, when there are laws and authorities who can protect the health and safety of the customers, it is considered not the task of a dominant company to take steps on its own initiative to eliminate products which it regards, rightly or wrongly, as dangerous or inferior to its own product.[59]

5.3.2 MEETING COMPETITION DEFENCE

78. The meeting competition defence is only applicable in relation to behaviour which otherwise would constitute a pricing abuse. For this second type of objective justification it is necessary to apply a proportionality test. The Community Courts have considered that defending its own commercial and economic interests in the face of action taken by certain competitors may be a legitimate aim.[60] In other words, to minimise the short run losses resulting directly from competitors' actions can be a legitimate aim. This automatically implies that an objective justification is not possible if the dominant company is not able to show that its conduct is only a response to low pricing by others or if the Commission, for instance through documents seized at the company, has been able to demonstrate that the objective aim of the conduct is to directly exclude competitors.

79. In order to fulfil the proportionality test the dominant company must in the first place show that the chosen conduct is a suitable way to achieve the legitimate aim. An objective justification is not possible if upon examination it is, for instance, established that the conduct also involves extra investments in capacity and is therewith not minimising losses directly resulting from the action taken by certain competitors. In case it is shown that the chosen conduct is a suitable way to achieve the legitimate aim, the dominant company must in the second place show that the conduct is indispensable, i.e. that the legitimate aim cannot be achieved to a similar extent by less anticompetitive alternatives and that the conduct is limited in time to the absolute minimum. It is for the dominant company to provide all the relevant information necessary to demonstrate that there are no other economically practicable and less anticompetitive alternatives which limit its short run losses, taking into account the market conditions and

---

[59] Judgment in Case T-30/89 Hilti v Commission [1991] ECR II-163, para 118; also Tetra Pak II, paras 83-84.

[60] United Brands, para 189-191 ; BPB Industries, para 117-118, Irish Sugar para 185-187, Compagnie Maritime Belge para 148.

business realities facing the dominant company. As to the third condition of the proportionality test, it must be shown that meeting competition is a proportionate response. This requires a case by case weighing of the interest of the dominant company in minimising its losses and the interest for competition of entry or expansion of its competitors.

80. In view of the above, in case the pricing abuse concerns pricing below average avoidable cost the meeting competition defence can not be applied. Pricing below average avoidable cost is neither suitable nor indispensable to minimise the dominant company's losses. In case the abuse concerns pricing above average avoidable cost the meeting competition defence can be applied only if all the conditions of the proportionality test described in the previous paragraph are fulfilled, which in general is considered unlikely to be the case.

5.3.3 EFFICIENCY DEFENCE

81. For this defence the dominant company must demonstrate that the following conditions are fulfilled:

i) that efficiencies are realised or likely to be realised as a result of the conduct concerned;

ii) that the conduct concerned is indispensable to realise these efficiencies;

iii) that the efficiencies benefit consumers;

iv) that competition in respect of a substantial part of the products concerned is not eliminated.

82. The dominant company must thus in the first place be able to show that the conduct is undertaken to contribute to improving the production or distribution of products or to promote technical or economic progress, for instance by improving the quality of its product or by obtaining specific cost reductions or other efficiencies. The Commission considers any substantiated efficiency claim in the overall assessment of the conduct. Such claim may for instance concern the protection of client-specific investments made by the dominant company.

83. The dominant company must in the second place show that the conduct is indispensable to achieve the alleged efficiencies. It is for the dominant company to demonstrate that there are no other economically practicable and less anticompetitive alternatives to achieve the claimed efficiencies, taking into account the market conditions and business realities facing the dominant company. The dominant company is not required to consider hypothetical or theoretical alternatives. The Commission will only contest the claim where it is reasonably clear that there are realistic and attainable alternatives. The dominant company must explain and demonstrate why seemingly realistic and less restrictive alternatives would be significantly less efficient.

84. In order to fulfil the third condition the dominant company needs to show that efficiencies brought about by the conduct concerned outweigh the likely negative effects on competition and therewith the likely harm to consumers that the

conduct might otherwise have. This will be the case when the Commission on the basis of sufficient evidence is in a position to conclude that the efficiencies generated by the conduct are likely to enhance the ability and incentive of the dominant company to act pro-competitively for the benefit of consumers and that as a result competition in the market is and will not be reduced.[61]

85. The Community competition rules protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. This requires that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the conduct concerned. If consumers in an affected relevant market are worse off following the prima facie abusive conduct, the conduct can not be justified on efficiency grounds.

86. In making this assessment it must be taken into account that the value of a gain for consumers in the future is not the same as a present gain for consumers. In general, the later the efficiencies are expected to materialise in the future, the less weight the Commission can assign to them. This implies that, in order to be considered as a counteracting factor, the efficiencies must be timely.

87. The incentive on the part of the dominant company to pass cost efficiencies on to consumers is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. This incentive may often be already small as a result of the dominant position. The greater the actual or likely negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to consumers. It is therefore, when assessing the pass-on requirement, highly unlikely that prima facie abusive conduct of a dominant company with a market position approaching that of a monopoly, or with a similar level of market power, can be justified on the ground that efficiency gains would be sufficient to outweigh its actual or likely anti-competitive effects and would benefit consumers. Similarly, in a market where demand is very inelastic it is highly unlikely that abusive conduct of a dominant company which strengthens its dominant position can be justified on the ground that efficiency gains would be sufficient to counteract the actual or likely anti-competitive effects and would benefit consumers.

88. The fourth condition is that competition in respect of a substantial part of the products concerned is not and will not be eliminated. When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditures incurred by the dominant company to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices. This is a recognition of the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. Ultimately the protection of rivalry and the competitive process is given priority over possible pro-competitive efficiency gains. This is also required for a consistent application of Articles 81 and 82. It is therefore, also when assessing

[61] See United Brands, Irish Sugar.

the no-elimination-of competition requirement, 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 efficiency gains would be sufficient to counteract its actual or likely anti-competitive effects.

89. A dominant company is in general considered to have a market position approaching that of a monopoly if its market share exceeds 75% and there is almost no competition left from other actual competitors in the market, for instance because they are producing at considerably higher costs and/or are severely capacity constrained for a longer period of time, and entry barriers are so substantial that relevant entry can not be expected in the foreseeable future.[62]

6. PREDATORY PRICING

6.1 INTRODUCTION

90. Article 82 prohibits the abuse of a dominant position and predatory pricing is considered a possible abuse. For the purposes of Article 82 predatory pricing can be defined as the practice where a dominant company lowers its price and thereby deliberately incurs losses or foregoes profits in the short run so as to enable it to eliminate or discipline one or more rivals or to prevent entry by one or more potential rivals in order to protect or strengthen its dominant position.

91. Predatory pricing is in practice often difficult to distinguish from normal price competition. The lowering of prices, the directly visible part of predation, is also an essential element of competition. By lowering its price and/or improving the quality of its products a company competes on the market. This is competition that benefits consumers and that a competition authority wants to defend and protect. Pricing is not predatory only because a company is lowering its price.

92. Pricing is also not predatory just because the lower price means incurring losses or foregoing profits in the short run. An investment in temporarily lower prices may for instance be required to enter a market or to make more customers familiar with the product.

93. The predatory nature of charging lower prices to all or certain customers is found in the predator making a sacrifice by deliberately incurring short run losses with the intention to eliminate or discipline rivals or prevent their entry. The company will make this sacrifice when it considers that it is likely to be able to recoup the losses or lost profits at a later stage after its actions have had the exclusionary effect.[63] The exclusion should thus allow the predator to return to, maintain or obtain high prices afterwards. Although consumers may have benefited from the lower predatory prices in the short term, in the longer term they will be worse off

---

[62] See Hoffman-La Roche, Irish Sugar.

[63] Throughout this section exclusionary effect is used as the short form for the effect of eliminating or disciplining rivals or preventing their entry.

due to weakened competition resulting in higher prices, reduced quality and less choice.

94. Such exclusionary strategy can normally only be effective and profitable if a company has already substantial market power on the market in question. In order for predation to be abusive under Article 82 the exclusion should be instrumental in protecting or strengthening the predator's dominant position and thereby allow the predator to return to or obtain high prices afterwards. In a competitive market with many competitors the exclusion of some of them will in general not lead to a sufficient weakening of competition so as to allow the predator to recoup the 'investment'. Also in a market with only a few but strong competitors such an exclusionary strategy is unlikely to succeed. Predatory pricing is a risky strategy because the self-inflicted losses may not be regained if the predator makes a mistake about market conditions, for instance, if the prey is more resilient than expected, if mainly competitors benefit from the exclusion or if entry or re-entry occurs at a later stage. In other words, predation can be said to be to a certain extent self-deterring. However, predation is certainly not impossible, for instance in case of multiple markets where reputation effects are important and in case the dominant company is less dependent on external financing than (potential) entrants.

95. Such an exclusionary strategy can normally only be effectively applied if only one company has substantial market power on the market in question. Companies that are collectively dominant are less likely to be able to predate because it may be difficult for the dominant companies to distinguish predation against an outside competitor from price competition between the collective dominant companies and because they usually lack a (legal) mechanism to share the financial burden of the predatory action.

96. Predatory pricing is a concern not because it harms competitors but because and to the extent that it harms competition and reduces the remaining competitive constraints on the dominant company. In that connection it is said that only the exclusion of efficient competitors should be prevented.[64] The exclusion of clearly less efficient competitors which are not able to have a restraining effect on the dominant company should in general not be considered a competition problem. The purpose of Article 82 is not to protect other companies from dominant companies' genuine competition based on factors such as higher quality, novel combination of products, better performance, opportune innovation or higher efficiency, but to ensure that these other companies are also able to enter the market and compete therein on the merits, without facing competition conditions which are distorted or impaired by the dominant company.

97. Predation of actual competitors may work not only through elimination of these competitors from the market but also through disciplining these competitors. One of the risks for the dominant company of eliminating a competitor is that its assets may be sold at a low price and stay in the market, creating a new low cost entrant. Even though the dominant company may be best placed to acquire the assets, it may prefer disciplining the competitor without eliminating it, that is

---

[64] As to the concept of efficient competitors, see section 5, paragraphs 63-65.

making the competitor stop competing vigorously and to have the latter follow the pricing of the dominant company.

6.2 ASSESSMENT

98. The remainder of this section first deals with the necessary link between the dominant position and the market on which the predatory pricing takes place. Subsequently the use and appropriateness of different cost benchmarks is treated, after which separate sections deal with pricing below average avoidable cost, pricing above average avoidable cost but below average total cost, pricing below long-run average incremental cost and pricing above average total cost. The section concludes with a subsection on objective justifications.

99. In general predatory pricing will only be dealt with as an abuse under Article 82 if the dominant company applies it to protect or strengthen its dominant position. Usually it will do so by applying predatory pricing in the market where it has a dominant position. It may also do so by applying predatory pricing in another, for instance adjacent market, if it has the effect of protecting or strengthening its dominance in the dominated market.[65] For the latter to happen, there is usually a certain degree of economic interdependence between the two markets, for instance because the products are complements or because demand on the separate antitrust markets is or is expected to become interrelated. A company dominant on the market for a particular product may want to strengthen its market power in a complementary product market to make entry in the dominated market more difficult. Likewise, a company dominant in an older market may want to protect its dominant position by strengthening its market power in a new separate relevant market because demand on the old and new market is or will in the future become interrelated, possibly to the extent of becoming one market. The exception to the rule that predatory pricing is only dealt with as an abuse under Article 82 if it is used to protect or strengthen the dominant position, is the Commission's policy in sectors where activities are protected by legal monopoly. In these cases the dominant position is based on exclusive or special rights granted to the dominant company and while it does not need predation to protect its dominant position the concern is here the prevention of cross subsidisation (see below paragraph YYY). Predatory pricing by a dominant company in an unrelated market where it is not dominant and where the predation will only have effects in this unrelated market will normally not be an abuse under Article 82.[66]

---

65 Such was for instance the situation in the AKZO case, where AKZO was considered to predate in the flour additives market in order to protect its dominance in the organic peroxides market (case 62/86, AKZO Chemie BV v Commission, 1991).

66 The Court followed the Commission to prohibit predatory pricing that took place and had its effect only in a non-dominated market in the Tetra Pak II case (case T-83/91, Tetra Pak v Commission, 1994). The case can however be considered exceptional because the markets of aseptic and non-aseptic cartons were strongly linked and the Court and Commission considered that due to the quasi monopolistic position of Tetra Pak on the aseptic markets and its leading position on the closely associated non-aseptic markets it enjoyed a quasi dominant position also on the latter markets.

100. Under most market conditions a dominant company is unlikely to have to price below average total cost and make a loss. Its market share, the importance of its product on the market, the entry barriers, competitive constraints being absent or weak and its resulting power over the price usually enable the dominant company to price well above average total cost and thus to avoid making losses. If therefore a dominant company reacts to entry or to competition from a smaller company in the market by lowering its price and making a loss, in general or on certain specific sales, there may be good reasons for the Commission to look into such behaviour.

101. In its assessment the Commission may use certain cost benchmarks, below which there is more reason to assume predation may take place and/or below which no additional proof may need to be brought by the authority because predation can be presumed.

102. To use a cost benchmark one needs to decide on the relevant time period over which to measure the costs. This is important because what is a fixed cost in the short run may become a variable cost in the longer run. In the long run all factors of production become variable as the production process, the plant and machines will be replaced. What are fixed and variable costs can only be determined in the actual situation of the case.

103. The relevant period over which to measure the costs will in principle be the time period in which the alleged predatory pricing has taken place or, if still continuing, is expected to take place. However, in certain cases a different period of time may be appropriate. For instance, in particular liberalised sectors the Commission has used LAIC, which by definition looks at costs in the long run.

6.2.1 PRICING BELOW AVERAGE AVOIDABLE COST

104. In general the appropriate cost benchmark is the one that most accurately justifies the presumption that pricing below that benchmark can be expected to be predatory. The relevant question in that context is whether the dominant company, by charging a lower price for all or a particular part of its output over the relevant time period, incurred or incurs losses that could have been avoided by not producing that (particular part of its) output. If such avoidable losses are incurred, the pricing can be presumed to be predatory. At the same time the benchmark must be practical enough to be implemented.

105. In theory, the MC benchmark does answer the question for each individual unit of output separately; a price below MC means that the production and sale of that unit led to an immediate loss that could have been avoided by not producing that unit. However, not only is the per unit approach cumbersome, in most cases there will be no data available to calculate MC.

106. The AAC benchmark is the appropriate and practical answer to the question about avoidable losses. If a dominant company charges a price below AAC this means that the price it is charging for (that particular part of) its output is not covering the costs that could have been avoided by not producing that (particular part of its) output. Often the AAC benchmark will be the same as the AVC benchmark as in many cases only variable costs can be avoided. However, if the

dominant company, for instance, had to expand capacity in order to be able to predate, then also the fixed or sunk investments made for this extra capacity will have to be taken into account and will filter into the AAC benchmark. In the latter case AAC will, for good reasons, exceed AVC.

107. If the price charged by the dominant company is below AAC this means that the dominant company incurred a loss that it could have avoided. It is, at least in the short run, not minimising its losses. This is sufficient to presume that the dominant company made this sacrifice in order to exclude the targeted competitor. This is however a rebuttable presumption; there may be exceptional circumstances under which a price below AAC is justified (see below under possible defences: objective justifications and efficiencies). This presumption is reflected in the case law. In AKZO the ECJ held: "A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss…".[67]

108. The presumption that below AAC the pricing of a dominant company can be assessed as predatory implies that once the Commission has established that the price charged was below AAC it does not need to further justify its decision with elements concerning the actual or likely exclusion of the prey, the predatory intent of the dominant company, the possibility of the dominant company to set off its losses with profits earned on other sales, its possibility to recoup the losses in the future through (a return to) high prices and other elements that could be used to strengthen its case. In such a case, the dominant company may wish to take up these elements and other circumstances of the case to show that it can justify its pricing (see below paragraph YYY seq.). The dominant company may also wish to show that, although the price is below the relevant cost benchmark, for clear-cut reasons the dominant company's pricing behaviour should not be considered predatory pricing because there is no possibility that it could have an exclusionary effect on rivals. This may for instance be the case where the low price is part of a one-off temporary promotion campaign to introduce a new product and where the duration and extent of the campaign are such that exclusionary effects are excluded.

6.2.2 PRICING ABOVE AVERAGE AVOIDABLE COST BUT BELOW AVERAGE TOTAL COST[68]

109. Where in general a dominant company may have no reason to price below average avoidable cost as it does not maximise profits in the short term, it may have some more reason to price above average avoidable cost but below average total cost. For instance in case of a serious fall in demand the short run profit maximising price may temporarily fall below average total cost. Pricing below average total cost will not entail losses by the mere production of that (particular part of its) output. While the sales do not cover total costs, they still allow

[67] AKZO v Commission par. 71. In this case the Court actually referred to the AVC benchmark, stating that prices below AVC must be regarded abusive. However, as explained above, in most cases the AVC benchmark will coincide with the AAC benchmark.

[68] The assessment described below will also be followed in case cost levels can not be ascertained.

coverage of all variable costs and a part of the fixed costs. It is for this reason that above average avoidable cost predation can not be presumed. Extra elements of proof are required to substantiate a prohibition decision. This has also been expressed by the ECJ in the AKZO case: "Moreover, prices below average total costs … but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them".[69]

110. It will need to be shown on the basis of objective factors that the pricing of the dominant company has a predatory intent, that it objectively speaking is part of a strategy or plan to predate. This can be shown with the help of various elements, which individually or together may prove such a strategy. The following elements may in particular be important in this respect: direct evidence of intent, evidence that the pricing only makes commercial sense as part of a predatory strategy, the actual or likely exclusion of the prey, whether certain customers are selectively targeted, whether the dominant company actually incurred specific costs in order for instance to expand capacity, the scale, duration and continuity of the low pricing, the concurrent application of other exclusionary practices, the possibility of the dominant company to off-set its losses with profits earned on other sales and its possibility to recoup the losses in the future through (a return to) high prices.

6.2.2.1 DIRECT EVIDENCE OF A PREDATORY STRATEGY

111. Direct evidence of a predatory strategy can consist of documents from the dominant company, such as a detailed plan demonstrating the use of predatory prices to exclude a rival, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action. Such evidence needs to be clear cut about the predatory strategy and for instance indicate the specific steps the dominant company is taking and not just concern company internal general talk that the dominant company "will crush the competition".[70]

112. In case of such direct evidence it does not need to be shown that also other elements point towards predation. It may be assumed that the dominant company, as it has devised a clear strategy to predate, also has the means to predate and that its pricing behaviour does or will eliminate or discipline the rival in question and thereby have a negative effect on (the growth of) competition in the market.

---

[69] AKZO v Commission, par. 72.

[70] For instance in the AKZO case, the Court agreed with the Commission that there was clear evidence of AKZO threatening ECS in two meetings with below cost pricing if it did not withdraw from the organic peroxides market. In addition there was a detailed plan, with figures, describing the measures that AKZO would put into effect if ECS would not withdraw from the market.

6.2.2.2 INDIRECT EVIDENCE OF A PREDATORY STRATEGY

113. In case there is no direct evidence of a predatory strategy a case will have to be built on indirect evidence of such a strategy to predate. In arguing such a case the following elements will in particular be of relevance to show a plausible scheme of predation: does the pricing behaviour only make commercial sense as part of a predatory strategy or are there also other reasonable explanations, is there an actual or likely exclusionary effect, the scale, duration and continuity of the low pricing, does the dominant company actually incur specific costs in order for instance to expand capacity which enables it to react to entry, are certain customers selectively targeted, is there concurrent application of other exclusionary practices, does the dominant company have the possibility to off-set its losses with profits earned on other sales, does it have the possibility to recoup the losses in the foreseeable future through (a return to) high prices, can predation on one market have a reputation effect on other markets, is the prey particularly dependent on external financing and does the prey have counter strategies. The relevance of the different elements for individual cases may not always be the same and it is not possible to define in the abstract and in advance what is exactly required in an individual case to show a predatory strategy with such indirect evidence. However the following can be said on the importance of the various elements.

114. If the pricing behaviour only makes commercial sense as part of a predatory strategy and there are no other reasonable explanations, such will normally suffice to show a strategy to predate, certainly if also other exclusionary practices are applied by the dominant company. In such a case it will not be necessary to show that an exclusionary effect is likely.

115. In all other cases it is at least necessary to show that an exclusionary effect is likely in view of the scale, duration and continuity of the low pricing before predatory pricing can be found to exist. In general it will not suffice to show only the likely exclusionary effect. The investigation of more elements is usually necessary before a strategy to predate can be convincingly shown.

116. If the dominant company with its low prices selectively targets specific customers and in particular when these customers are the actual customers of one or more particular rivals in the market, this may be an important part of the evidence of a predatory strategy. Such prices can be designed to damage a competitor's viability and to foreclose the market while limiting the losses incurred by the dominant company to those arising from the targeted sales.[71] The same holds in case the low prices are selectively targeted at those customers that might switch to a potential entrant in case entry is imminent. Such evidence may be considered stronger if also other exclusionary practices can be shown. On the other hand, a general price decrease applied to all the output of the dominant company is in general less likely to be part of a predatory strategy. With a general price decrease the dominant company will not have the possibility to off-set its losses with profits earned on other sales and the losses will usually be higher, making recoupment less likely. The latter point about a market wide price decrease may have less force of argument if the market is more prone to pre-emption due to

---

[71] Judgment of the Court of Justice in AKZO v Commission, paras 81, 114 and 115.

characteristics such as network effects or if the dominant company is active on a number of adjacent markets where predation in one market may help to build up a reputation of being an aggressive competitor for all markets.

117. To show a plausible scheme of predation it may be necessary to investigate whether the predation and its effects are limited to one market or one period of potential entry or whether the effects may also be felt on other markets or in future periods of possible successive entry. In the latter case of multiple markets or multiple periods it may be rational for the dominant company to 'invest' in a reputation of being a 'rough' competitor and it may want to sacrifice more profits than what would seem rational if only one market or period is taken into account (see also below on recoupment). This argumentation requires evidence not only that multiple markets or periods exist, but also that the dominant company pursues such a reputation effect strategy and that the (successive) potential entrants can observe the adverse conditions imposed on or the exit of the current prey.

118. To show a plausible scheme of predation it may be necessary to investigate whether the prey is dependent on external financing and whether the lowering of prices by the dominant company has such an adverse effect on the prey's initial performance that it seriously undermines its supply of further financing. This argumentation requires showing not only of the negative effects on the prey's financial situation, but also that the dominant company is less dependent on external financing than the prey and that the dominant company has or can reasonably be expected to have knowledge of this difference in dependency.

119. The fact that the dominant company can off-set its losses with profits earned on other sales can generally not be proof on its own of predatory pricing. It can show that the dominant company is actually capable of financing the losses with the profits made on other sales in the same period and may therefore be less dependent on external financing. In specific circumstances such as a multi-market situation or selective price cutting it may also be an indication that recoupment already takes place while the predatory pricing occurs. Similarly, if the dominant company can not off-set its losses with profits earned in the same period on other sales, this is not sufficient to disprove predation. While ability to directly finance the losses incurred may be relevant, it is more important to investigate the incentive to predate and investigate whether the losses can be recouped.

120. The issue of recoupment concerns the question whether the negative effect on (the growth of) competition in the market makes the sacrifice of the temporarily incurred losses a good 'investment' from the dominant company's perspective. Is it reasonable to assume that the predation and its exclusionary effect will allow the dominant company to have higher prices in the future than it otherwise would have had and can it thus recoup its losses? This does not require that the dominant company will be able to increase its prices above the level persisting in the market before the predation. For recoupment it is sufficient that the predation avoids or delays a decline in prices that would otherwise occur as a result of the increased competition that would have come from the companies that are now eliminated, disciplined or whose entry is prevented. It may often be impossible to

exactly quantify the likely price and profit effects.[72] It will in general be sufficient to show the likelihood of recoupment by investigating the entry barriers to the market, the (strengthened) position of the company and foreseeable changes to the future structure of the market. As dominance is already established this normally means that entry barriers are sufficiently high to presume the possibility to recoup.[73] In case it is observed that the dominant company's price that was lowered upon entry is again increased after exit or disciplining of the entrant, this may be an indication that recoupment is likely and can help to convincingly show the existence of a predatory strategy. In case of disciplining it should then be observed that also the entrant is raising its price after the dominant company's lowering of price.

6.2.3 PRICING BELOW LONG-RUN AVERAGE INCREMENTAL COSTS

121. In certain sectors the decisional practice of the Commission has deviated from the cost benchmarks based on AAC and ATC and has chosen to use LAIC as the benchmark. As explained above, in case of multi-product companies it may be difficult to calculate ATC because of certain common costs. There may thus be a good practical reason in such cases to use the LAIC benchmark instead of the ATC benchmark. However, in these cases there were additional reasons why the LAIC benchmark did not just replace the ATC benchmark but replaced the AAC benchmark, that is was used as the benchmark below which predation is presumed.

122. Firstly, it is presumed that pricing below LAIC is predatory in cases concerning activities protected by a legal monopoly. In such cases it is considered that a company dominant in the protected market should not be allowed to use the profits made in that market to establish itself or defend its position in another, often related, market which is open to competition. In order to prevent such cross-subsidisation the decisional practice requires the dominant company to cover with its pricing in the free market at least all the variable and fixed costs it makes in order to be active on that market, in other words to price above LAIC.[74] In these cases pricing below LAIC is presumed to be an abuse under Article 82, not only if the dominant company is in addition dominant in the free market but also if it is not dominant in that market and the predation will only have effects in that market (see paragraph YYY above).

---

[72] One particular problem with quantifying recoupment is that predation may be applied by the dominant company not just to exclude an identified rival but also in order to build up an aggressive reputation with effect further into the future and on other markets.

[73] This was confirmed by the Court in Tetra Pak II, where the Court stated that proof of actual recoupment is not required. More in general, as predation may be more difficult than expected, the total costs to the dominant company of predating could outweigh its later profits and thus make recoupment impossible while it may still be rational to decide to continue with the predatory strategy that it started some time ago.

[74] See the Commission decision in the case Deutsche Post AG (Commission Decision 2001/354/EC of 20.3.2001, OJ L 125 of 5.5.2001, p. 27).

123. Secondly, it is presumed that pricing below LAIC is predatory in cases concerning sectors which recently have been liberalised or which are undergoing liberalisation, such as the telecom sector.[75] It is considered important that the liberalisation efforts in these sectors are not undermined by predatory behaviour by the incumbent dominant companies, which may try to protect and maintain their monopoly positions that resulted from their previous legal monopoly and access to state funds. In addition these sectors often concern network industries, with very high fixed costs and very low variable costs, where it is considered that the use of an AVC or AAC benchmark would not reflect the specific economic realities of these industries. The Commission in its policy towards the telecommunications sector stated that "[i]n order to trade a service or group of services profitably, an operator must adopt a pricing strategy whereby its total additional costs in providing that service or group of services are covered by the additional revenues earned as a result of the provision of that service or group of services. Where a dominant operator sets a price for a particular product or service which is below its average total costs of providing that service, the operator should justify this price in commercial terms: a dominant operator which would benefit from such a pricing policy only if one or more of its competitors was weakened would be committing an abuse."[76]

6.2.4 PRICING ABOVE AVERAGE TOTAL COST

124. Price cuts where the resulting price remains above average total costs are in general not considered to be predatory because such pricing can usually only exclude less efficient competitors. Companies that are equally or more efficient will, if challenged by the dominant company, be able to follow such price cuts and the ensuing price competition would normally be characterised as competition on the merits. Where it can be established that the price also after the price cut remains above average total cost, such pricing will therefore not be assessed as predatory unless exceptional circumstances occur.[77]

125. An example of such an exceptional situation is where companies in a collective dominant situation apply a clear strategy to collectively exclude or discipline a competitor by selectively undercutting the competitor and thereby putting pressure on its margins, while collectively sharing the loss of revenues.[78] In the case Compagnie Maritime Belge the Court prohibited such a 'collective boycott' where a liner conference in a dominant position selectively cut its prices in order deliberately to match those of a competitor, thereby eliminating the principal, and

---

[75] See the Notice on the application of competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles, in particular paragraphs 110-115, OJ C 265, 22.8.1998, p. 2-28.

[76] Notice on the application of competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles, paragraph 112.

[77] This assessment may be different in case the price cuts are combined with other exclusionary practices.

[78] Such a case can in general be looked at both under Article 81 and 82.

possibly only, competitor facing the liner conference.[79] The collectively dominant companies in the liner conference used "fighting ships", that are vessels used by the maritime conference to sail in competition with the non-conference carrier. The "fighting ships" called at the same ports as the non-conference competitor, and they charged the same or lower rates as the outsider while such rates were well below the conference tariff.[80] Financial losses or losses of revenue of the "fighting vessels" were distributed over the several members of the conference, each of whom suffering proportionately much less than the non-conference carrier while at the same time having the advantage of obtaining higher rates on their other sailings. If in such an exceptional case it can be shown that there is a clear strategy to exclude or discipline including a mechanism to share the sacrifice in lost revenues between the collectively dominant companies and that there are negative effects on competition in the market or that there is a high likelihood that such effects will materialise, then also selective price cuts above average total costs will be assessed as predatory.

126. Another example of such an exceptional situation where price cuts above average total costs could be deemed predatory is where a single dominant company operates in a market where economies of scale are very important and entrants necessarily will have to operate for an initial period at a significant cost disadvantage because entry can practically only take place below the minimum efficient scale. In such a situation the dominant company could prevent entry or eliminate entrants by pricing below the average total cost of the entrant while staying above its own average total cost. For such pricing to be assessed as predatory it has to be shown that the incumbent dominant company has a clear strategy to exclude, that the entrant will only temporarily be less efficient because of its scale, that the market now or in the near future is big enough to sustain more than one company of minimum efficient scale and that entry is being prevented because of the disincentive to enter resulting from the price cuts.

6.2.5 POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

127. In a case where predatory pricing behaviour is likely to be found, the dominant company may argue that, while the price was below the relevant cost benchmark and in spite of the other elements investigated, it can justify its pricing behaviour.

128. A first justification could be that although the price is below the relevant cost benchmark and although there is a likely exclusionary effect, the dominant company is actually minimising its losses in the short run. Such justification is, for the reasons explained above, unlikely for pricing below the AAC benchmark, although in exceptional cases there may even be a reason which could justify temporary prices below AAC. This could for instance be the case where there is an issue of re-start up costs or strong learning effects.[81] Another example may be

---

[79] Joined cases C-395/96P and C-396/96P, Compagnie Maritime Belge and others v Commission, 2000.

[80] Instead or in addition to lowering its price on the route where the rival is operating the conference could also predate by adding capacity to that route.

[81] More accurately, in case of learning effects the price may be below AAC if calculated using historical cost data of the period during which the learning effects are achieved, but could be above AAC if the

where certain longer term supply contracts with fixed prices have become loss making due to unforeseen and significant increases in input prices and where the dominant company is obliged to honour the supply obligations. Above the AAC benchmark the company may show that its low price is actually a short run loss minimising response to changed conditions in the market, such as resulting from a dramatic fall in demand leading to excess capacity. This could also be the case where there is a need to sell off perishable inventory or phased out or obsolete products or where the costs of storage have become prohibitive.[82]

129. A change in market conditions could also be provoked by entry by a rival. In case the rival is asking a price lower than the dominant company, the dominant company may invoke the meeting competition defence, to the extent that this is the response that minimises its short run losses. A dominant company can not use the meeting competition argument to justify responding to entry with a predatory price where it incurs deliberate losses to prevent, frustrate or slow down entry by a rival. Therefore, in case the pricing abuse concerns pricing below average avoidable cost the meeting competition defence can not be applied. Pricing below average avoidable cost is neither suitable nor indispensable to minimise the dominant company's losses. In case the pricing abuse concerns pricing above average avoidable cost the meeting competition defence will only apply if it is shown that the response is suitable, indispensable and proportionate. This requires that there are no other less anti-competitive means to minimise the losses and that the conduct is limited in time to the absolute minimum and does not significantly delay or hamper entry or expansion by competitors.

130. An efficiency defence can in general not be applied to predatory pricing. It is highly unlikely that clear efficiencies from predation can be shown and even when existing that predation is the least restrictive way to achieve them. In addition it is similarly unlikely that, in the case that such benefits arise, that in the longer run some of these benefits are passed on to the customers and that these benefits outweigh the loss of competition brought about by the predation.

7. SINGLE BRANDING AND REBATES

7.1 INTRODUCTION

131. A supplier, whether manufacturer or distributor, has various ways in which it can oblige or induce its buyers to purchase all or at least a significant proportion of

---

calculation is based on a longer period including the period after the learning effects have had their cost reducing effect.

82 Sometimes a certain pricing behaviour may be justified for more than one reason. For instance, the need to sell off perishable inventory or phased out or obsolete products at a loss making price may just as well indicate that there will be no (lasting) exclusionary effect on rivals. In such cases it may also have to be taken into account that certain costs that would under normal circumstances be considered variable costs may have become fixed costs at the time of sale.

their requirements from it[83]. Most straightforwardly, its product, in terms of price/quality ratio, may simply be more attractive than competing products. A superior price/quality ratio for individual orders of customers is unobjectionable under Article 82 because it is competition solely based on the merits, apart from what is said on predation in section 6. The supplier may however also use single branding obligations and rebate systems to attract more customers. Article 82 addresses such behaviour to the extent that it is conduct "which, through recourse to methods different from those which condition normal competition [.....], has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[84] Such an effect will have a negative impact on consumers as prices on the market will increase or remain high.

132. Single branding obligations are obligations which require the buyer to purchase practically all its requirements on a particular market from only one supplier (a non-compete obligation) or which require the buyer to concentrate its purchases to a large extent with one supplier (quantity forcing). A so-called 'English clause', requiring the buyer to report any better offer and allowing it only to accept such an offer when the supplier does not match it, can be expected to have the same effect as a single branding obligation of concentrating the purchases with one supplier, especially when the buyer has to reveal who makes the better offer.

133. Rebate systems can be formulated and modulated in many ways and it is therefore not possible to provide an exhaustive list. The supplier may simply offer a rebate, in general from a list price, on an individual order of the buyer. Rebate systems can also be more complex where the supplier for instance offers a rebate on an aggregated number of orders of the buyer.

134. A basic distinction for rebates is between unconditional rebates and conditional rebates. Unconditional rebates, while granted to certain customers and not to others, are granted for every purchase of these particular customers, independently of their purchasing behaviour.[85] For instance, a rebate that is offered only to customers that might more easily switch to foreign suppliers because they are located in the border region. Unconditional rebates differentiate the purchase price between customer groups. Conditional rebates are granted to customers to reward a certain (purchasing) behaviour of these customers. The latter type of rebates may depend on a number of aspects of the customer's behaviour, such as the amount purchased in a preceding period from the same supplier or the percentage of total requirements purchased in a preceding period

---

[83] The reverse may also be the case, i.e. a buyer, whether manufacturer or distributor, can oblige or induce its suppliers to sell all or at least a significant proportion of their output to it. Such possibly abusive practices are not dealt with here.

[84] Case – 85/76 Hoffmann-La Roche & Co AG v Commission [1979] ECR 461, paragraph 91.

[85] Such rebates are termed unconditional because they are granted independently of the purchasing behaviour of the customer in question. However, an unconditional rebate is not available to all customers as it would otherwise be a general price decrease, but is only made available to certain customers depending on characteristics other than their purchasing behaviour.

from the same supplier or the supply of a certain service by the customer. These conditional rebates differentiate the purchase price for each customer depending on its behaviour. Although not necessarily so, this may also lead to a differentiation in purchase price between buyers.

135. A supplier may use single branding obligations and rebate systems for efficiency enhancing reasons and for anti-competitive reasons and they may have efficiency enhancing effects and anti-competitive effects. An efficiency may for instance be obtained in case the supplier, in order to supply a particular customer, makes a relationship specific investment. In order to be able to earn back the investment, the supplier may require that the buyer purchases a certain minimum amount of the product, which may be ensured by a single branding obligation or a rebate system. The possible positive effects of single branding obligations and rebate systems are dealt with mainly in the section on possible defences. Before that the possible negative effects will be dealt with. Both the positive and negative effects depend on the form of the single branding obligation and/or rebate system, on the extent such obligations or rebate systems are used by the supplier and on the circumstances on the market where they are applied.

136. The main possible negative effect of single branding obligations and rebate systems is foreclosure of the market to competing suppliers and potential suppliers, which maintains or strengthens the dominant position by hindering the maintenance or growth of residual competition. In case such obligations or systems are used by several, collectively dominant, suppliers, this may have a cumulative foreclosure effect and may in addition further facilitate collusion. In case the buyers are retailers selling to final consumers the foreclosure may also lead to a loss of in-store inter-brand competition. Article 82 prohibits the use, by a dominant company or collectively dominant companies, of single branding obligations and rebate systems which are loyalty enhancing and help to maintain or strengthen the dominant position by hindering the maintenance or growth of residual competition.

137. Another possible negative effect of rebate systems is price discrimination between the different buyers. In a number of cases the Commission and European Courts have stressed not only the intent and/or effect to foreclose, but also the discrimination which resulted from the applied rebate system, in particular discrimination between competitors on a down-stream market.[86] This section does not deal with discrimination of companies on the down-stream market where the rebate system is used to protect the dominant company's own position on the down-stream market. Such situations of margin squeeze are dealt with in

---

[86] See Case – 85/76 Hoffmann-La Roche &Co AG v Commission [1979] ECR 461, paragraph 106; Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969 , in particular paragraphs 140-141; Case T-203/01 Michelin v Commission [2003] ECR II-4071, paragraph 158. Case T- 219/99 British Airways v Commission (17 December 2003) not yet reported, paragraphs 233-240. It should be noted that a discriminatory effect may be an indication for an abuse but absence of such an effect does not place a rebates system out of the reach of Article 82. See Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission, ECR [1983] 3461 where the Court of justice found breach of Article 82 although it did not uphold the Commission's complaint that the rebates were discriminatory, see also Case T- 219/99 British Airways v Commission (17 December 2003) not yet reported, paragraph 248-249.

the section on refusal to deal (see section 9).[87] This section deals with the use of rebate systems to foreclose competing suppliers and potential suppliers on the up-stream market. Where, in addition to such foreclosure, the use of a rebate system also leads to discrimination between the buyers and has as effect to distort competition between these buyers on the down-stream market, this effect is usually not intended by the dominant company, as it will not benefit from such distortion of competition on the down-stream market. It is considered that in general a negative effect on competition between the customers on the down-stream market is unlikely unless there is also a negative effect on the up-stream market.

138. To the extent that the discrimination has the intention and/or effect to directly exploit (certain of) the customers, this will be dealt with in the section on discrimination. This may in particular be the case where unconditional rebates are used.[88] The direct exploitation takes place by discriminating between customers and making customers with a higher willingness to pay and less switching possibilities pay a higher price than others.[89] The exclusionary rebates dealt with in this section do not result in higher prices for those customers that can not and do not switch, but higher prices for the customers that are less loyal to the supplier, i.e. the customers that do switch. Exclusionary rebates are in general conditional rebates which may differentiate the price for each customer, depending on its purchasing behaviour, in order to obtain more purchases from these customers, thus leading to infra-personal but not necessarily inter-personal price discrimination. To the extent that this may also lead to discrimination between customers, this may have the effect of distorting competition between the buyers on the down-stream market as described in the previous paragraph.

7.2 ASSESSMENT

139. The single branding obligations and rebate systems that are dealt with in this section are applied by the dominant company for a particular product and have their possible negative effects in the market where it is dominant. Single branding obligations and rebate systems that have effects in other markets are dealt with in the section on tying and bundling. Rebate systems that lead to mixed bundling of different products in the same market are also dealt with in the section on tying and bundling.

140. The dominant position of the supplier will make that on average the buyers, also without loyalty enhancing measures, will buy a large part or even most of their purchases from the dominant supplier. The dominant position usually implies that for a good part of demand on the market there are no proper substitutes to the

---

[87] Case C-163/99 Portugal v Commission [2001] ECR I-2613 is an example of such a situation.

[88] As indicated by the example in paragraph YYY of a rebate that is offered only to customers that might more easily switch to foreign suppliers because they are located in the border region, unconditional rebates can also be used for exclusionary purposes.

[89] The lower price for other customers may at the same time induce extra customers to purchase from the supplier.

dominant supplier's product, because for instance its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a good part of demand can only be provided for by the dominant supplier. For distributors it may be necessary to trade in the dominant supplier's products in order to be able to satisfy an important part of their customers' demand and in order to reach a viable scale of business.[90]

141. Article 82 addresses single branding obligations and rebate systems to the extent that these are methods different from those which condition normal competition and which have as effect to hinder the maintenance of the degree of competition still existing in the market or the growth of that competition.[91] This implies that the conduct in question must in the first place have the capability, by its nature, to foreclose efficient competitors from the market. To establish such capability it is in general sufficient to investigate the form and nature of the obligation or system in question. It secondly implies that, in the specific market context, a likely market distorting foreclosure effect must be established. This means that the foreclosure must likely hinder the maintenance of the degree of competition still existing in the market or the growth of that competition and thus have as likely effect that prices will increase or remain high. To establish such a market distorting foreclosure effect it is in general necessary not only to consider the nature or form of the obligation or system, but also its incidence, i.e. the extent that the dominant company is applying it in the market, and the degree of dominance. In general, the higher the capability of the obligation or system and the wider its application and the stronger the dominant position, the higher the likelihood that an appreciable foreclosure effect results.[92] In view of these sliding scales, where in the remainder of the text various factors are used to indicate circumstances under which a likely foreclosure effect is considered to occur with high(er) or low(er) likelihood, it needs to be kept in mind that these descriptions can not be applied mechanically. The Commission will make its assessment of the obligation or system in the light of the potential and actual foreclosure effects and the possibilities of the existing and possible future competitors to curb and counter their fidelity enhancing potential.

142. The incidence, i.e. the extent that the dominant company is applying the single branding obligation or rebate system in the market, is the same as its tied market share, i.e. that part of its market share sold under the single branding obligation or rebate system. The potential negative effects will in general depend on the size of the tied market share. In case the dominant company does not apply the single branding obligation or rebate system to a good part of its buyers but only selectively to some and not to others, the Commission will investigate whether or not these selected buyers are of particular importance for the possibilities of entry

---

[90] See section 4 on dominance. See also Case T-219/99 British Airways v Commission judgment of 17 December 2003 (not yet reported), paragraphs 276-278, and Case T-65/98 Van den Bergh Foods Ltd v Commission [2003] ECR II-4653, para 154.

[91] Case – 85/76 Hoffmann-La Roche & Co AG v Commission [1979] ECR 461, paragraph 91.

[92] As to the importance of the degree of dominance for finding abuse, see Case C-395/96 Compagnie Maritime Belge Transports SA v Commission P[2000] ECR I –1365, paragraph 119; Case T-228/97 Irish Sugar v Commission[1999] ECR II-2969 paragraph 186.

or expansion of competitors. It will for instance investigate whether the tied customers are the ones that are most likely to be responsive to offers from alternative suppliers. These customers may form a particular way of distributing the product that would be suitable for a new entrant. Or they may be customers situated in a geographic area well suited to new entry, for example because of proximity to suppliers in other geographical areas. The Commission will also take into account whether there are network effects.[93] The Commission will also investigate whether the selective use of the single branding obligation or rebate system is targeted at the customers of specific competitors. In such cases the Commission may find that a market distorting foreclosure effect results even though the tied market share is very modest.

143. In markets where for all or most part of demand there are proper substitutes, for instance where the product is homogeneous and the competitors to the allegedly dominant company are not capacity constrained, rebate systems will generally not have a market distorting foreclosure effect. If competitors are competing on equal terms for all the customers and for each individual customer's entire demand, then a rebate system is unlikely to have a foreclosure effect unless the effective price under the rebate system, calculated over all sales by the dominant company to its customer(s), is found to be predatory (see section 6 on predatory pricing).[94] In case in a homogeneous product market the competitors of the allegedly dominant company are capacity constrained, a rebate system may in particular have a foreclosure effect in case the average customer's demand exceeds the capacity of an individual competitor or entrant.

144. The remainder of this section will first deal with the way in which single branding obligations and rebate systems may have a market distorting foreclosure effect. This must not be seen as an effort to describe an exhaustive list of the various forms that these obligations and systems may take. The purpose is to describe the key elements of such obligations and systems that will in general influence and determine the capability and likelihood to foreclose. The text concludes with a section on possible defences.

7.2.1 SINGLE BRANDING OBLIGATIONS AND ENGLISH CLAUSES

145. Single branding obligations, because they require the buyer to purchase all or a significant part of its requirements from the dominant supplier, have by their nature the capability to foreclose. The obligation may for instance require the buyer to purchase a significant percentage of its total requirements or a minimum amount which constitutes a significant percentage of its total requirements from the dominant supplier. The higher the percentage, the stronger the foreclosure potential. Such an obligation may lead to market distorting anti-competitive

---

[93] Network effects arise when consumers place greater value on larger networks than small ones. Examples include telephone networks where users directly derive value from being able to communicate with many other users, but also networks of users of computers where users indirectly derive value from more software being made available to large networks.

[94] In general, if the market conditions are as described here, it is unlikely that a dominant position is found, even at high market shares.

effects even if only a modest part of market demand is affected by the obligation.[95] The dominant position already enables the dominant company to prevent effective competition to be maintained or to emerge in the market and it thus becomes particularly important to protect the limited degree of competition still existing in the market and the growth of that residual competition.[96]

146. Where the dominant company applies a single branding obligation to a good part of its buyers and this obligation therefore affects, if not most, at least a substantial part of market demand, the Commission is likely to conclude that the obligation has a market distorting foreclosure effect and thus constitutes an abuse of the dominant position. In its assessment the Commission will however not only look at the capability of the obligation, the degree of dominance and the level of the tied market share, but will also take into account evidence why for particular reasons no market distorting foreclosure effect may result. For instance, whereas in general a short duration or a right to terminate the single branding obligation does not limit its likely foreclosure effect, under particular circumstances a short duration or right to terminate at short notice may make a market distorting foreclosure effect unlikely.[97] Such may be the case where the product is a homogeneous good and competitors are not capacity constrained. In case the dominant company does not apply the single branding obligation to a good part of its buyers but only selectively to some and not to others, the Commission will investigate whether or not these selected buyers are of particular importance for the possibilities of entry or expansion of competitors.

147. The Commission will apply the same approach to so-called ‘English clauses’, requiring the buyer to report any better offer and allowing it only to accept such an offer when the supplier does not match it. They can be expected to have the same effect as a single branding obligation as the dominant company will only have to lower its price where there is a risk that customers switch. The foreclosure effect may be especially strong when the buyer has to reveal who

---

[95] Case – 85/76 Hoffmann-La Roche & Co AG v Commission [1979] ECR 461, paragraphs 89-90; 109; Case T-65/89 BPB Industries Plc and British Gypsum Ltd v Commission [1993] ECR II-39, paragraph 68.

[96] As indicated above this is not an exhaustive list of single branding obligations. Obligations such as cooler exclusivity or stocking requirements may become single branding obligations to the extent that they effectively require the buyer to purchase all or a significant part of its requirements from the dominant supplier and possibly even lead to outlet exclusivity. See T-65/98 Van den Bergh Foods Ltd v Commission [2003] ECR II-04653.

[97] In general the European Courts have not considered duration of single branding obligations to be of relevance for their assessment under Article 82. There are indeed good reasons to ignore duration as the dominant position implies that for a good part of demand on the market there are no proper substitutes to the dominant supplier’s product, because for instance its brand is a ‘must stock item’ preferred by many final consumers or because the capacity constraints on the other suppliers are such that a good part of demand can only be provided for by the dominant supplier. In such a case a short duration or the right to terminate the obligation are found to be illusory by the European Courts, see Case T-65/89 BPB Industries Plc and British Gypsum Ltd v Commission [1993] ECR II-39, paragraph 73.

makes the better offer, as this may discourage competitors to make competing offers to the dominant companies' customers.[98]

7.2.2 CONDITIONAL REBATE SYSTEMS

148. Conditional rebates are granted to customers to reward a certain (purchasing) behaviour of these customers in a particular period of time. The usual form is that the customer is rewarded if its purchases exceed a certain threshold during a defined reference period. It makes an important difference for the assessment whether the rebate is granted on all purchases during that period or only on incremental purchases above the threshold. It will also be important for the assessment in what terms the threshold is formulated, for instance as a percentage of total requirements of the buyer, as an individualised volume target or as a standardised volume target. Also other characteristics may make a certain difference in the assessment, such as whether there is only one threshold and rebate or whether a grid of thresholds and rebates is established.[99]

7.2.2.1 CONDITIONAL REBATES ON ALL PURCHASES

149. Conditional rebates that are granted on all purchases in the reference period once a certain threshold is exceeded can have a strong foreclosure effect.[100] To induce such an effect it is necessary that the dominant supplier sets the threshold above the level that the buyer would purchase in the absence of any loyalty enhancing obligation or rebate. As explained in paragraph YYY above, the dominant position will in general ensure that most buyers will anyhow purchase most of their requirements from the dominant supplier, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a good part of demand can only be provided by the dominant supplier. If the threshold is only set at the level that would anyhow be purchased by the buyer, the rebate will not have a loyalty enhancing effect. If the threshold is set above the amount that would otherwise be purchased, the rebate may induce the buyer to purchase more than it would otherwise do in order to be able to benefit from the rebate on all its purchases and thus effectively lower the price for all its purchases.

150. The strength of the inducement to purchase more from the dominant supplier, i.e. the loyalty enhancing effect, will depend amongst others on the level of the rebate percentage and on the level of the threshold. The higher the rebate percentage and the higher the amount that needs to be purchased before the

---

[98] See in the context of Article 81 BP Kemi (Commission Decision 79/934) OJ L 286, 14/11/1979 p. 0032 – 0052, paragraphs 64-65; In the context of Article 82, see IRI/ AC Nielsen Company, reported in the XXVIth Report on Competition Policy 1996, paragraph 64. See Case – 85/76 Hoffmann-La Roche & Co AG v Commission [1979] ECR, paragraphs 104-108.

[99] If a company uses different conditional and/or unconditional rebate systems for the same product, the Commission will both assess their individual and their collective effects.

[100] Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission, ECR [1983] 3461 paragraphs 70-73.

rebate kicks in, the stronger the inducement.[101] This inducement will in particular be felt for those purchases just below the threshold. The fact that exceeding the threshold will not only reduce the price for all purchases above the threshold, but also for all previous purchases during the reference period, will create a so-called 'suction' effect. The price of the units of the last transaction before the threshold is exceeded will effectively be seriously lower and is possibly even negative because this transaction triggers the rebate for all the purchases below the threshold in the reference period. The higher the amount that constitutes the threshold and the higher the rebate percentage, the stronger the suction effect will be near the threshold.[102] The rebate enables the dominant supplier to use the inelastic or 'non contestable' portion of demand of each buyer, i.e. the amount that would anyhow be purchased by the buyer, as leverage to decrease the price for the elastic or 'contestable' portion of demand, i.e. the amount for which the buyer may prefer and be able to find substitutes.[103]

151. The suction effect in principle is strongest on the last purchased unit of the product before the threshold is exceeded. However, what is relevant for an assessment of the loyalty enhancing effect is not competition to provide an individual unit, but the foreclosing effect of the rebate system on commercially viable amounts supplied by (potential) competitors of the dominant supplier. These competitors are smaller rivals already active in the market and potential entrants. The rebate system should not hinder equally efficient competitors to expand or enter. As these competitors can not compete for an individual customer's entire demand (see §136 above) the question is whether the rebate system hinders them to supply commercially viable amounts to individual customers. To answer this question the Commission will endeavour to calculate, in view of the level of the rebate percentage and the level of the threshold, what is the effective price for the buyer over such a commercially viable amount in case this amount would allow the buyer to benefit from the rebate on the purchases below the threshold. The lower the calculated effective price is compared to the average price of the dominant supplier, the stronger the loyalty enhancing effect. In case this effective price is below the average total cost of the dominant company, it will be very difficult and possibly even impossible for efficient competitors to compete with the dominant company for this part of demand. In case the effective price is above cost this may make it possible for efficient competitors (in the long run) to match the dominant company's offer, but it may exceptionally still work as a disincentive on expansion or entry by

---

[101] In case the rebate is granted not in the form of a percentage but in the form of a lump sum payment once the threshold is exceeded, the inducement will be higher if the lump sum rebate increases. However, in such a case the inducement will be inversely related with the threshold. Given the lump sum, a lower threshold will spread the rebate over a smaller amount of products and will thus lower more the price per unit.

[102] This has been recognised in the case law. Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission, ECR [1983] 3461, paragraph 81; Case T- 203/01 Michelin v Commission (Michelin II), [2003] ECR II-4071, para 87-88; Case T-219/99 British Airways v Commission judgment of 17 December 2003 (not yet reported), paragraphs 272-273.

[103] See Case T- 203/01 Michelin v Commission (Michelin II) [2003] ECR II-4071, paragraphs 162-163.

competitors.[104] Below is a box giving an example of the calculation of the effective price.

Box: A retro-active rebate system and calculation of effective price

Rebate system where the rebate is 2.5% on all sales once St>1,000,000

St is the purchased amount in the reference period

P per unit = 100 before rebate

P per unit = 97.5 after rebate

Commercially viable amount = 5% or 50,000 units

With rebate: 1,000,000 x 97.5 = 97,500,000

Without rebate: 950,000 x 100 = 95,000,000

The difference of 2,500,000 is what is paid for the last 50,000 units over which the suction effect is calculated

P effective over the last 5% = 2,500,000 / 50,000 = 50

The question is thus whether or not ATC > 50

152. As a first step the Commission will endeavour to calculate how big a share of customers' requirements on average the entrant at least should capture so that the effective price is at least as high as the average total cost of the dominant company ("the required share").[105] In a number of cases the size of this share, when compared to the actual market shares of competitors, may make it clear whether the rebate system is able to have a foreclosure effect. In case market shares of actual rivals are smaller than the required share, the rebate scheme is likely to have a foreclosure effect where there is in addition no indication that

---

[104] There are three main reasons to take ATC as the cost benchmark below which the rebate system is considered to lead to a predatory effective price. Firstly, a rebate system, especially when it is a requirements or individualised volume target rebate system, is considered an element of intent. Secondly, recoupment will be possible immediately because of the leveraging between the 'non-contestable' and the 'contestable' portion of demand, which allows the rebate system to operate without a profit sacrifice and thus to operate for a long time. Thirdly and related to the previous reason, the customer may not derive a direct benefit from the rebate system as the rebate may only bring the average price down to the level existing without the rebate system.

[105] In case the required share differs significantly between customers because of differing rebates, the Commission will not calculate the average share for all customers but an average share per group of customers with a similar rebate. It will evaluate the importance of these different groups of customers for entry and expansion.

these rivals are less efficient. In such a situation the rivals would have to more than double their output and sales to the customers to overcome the foreclosure effect. In case the market shares of all competitors are much bigger than the required share, the rebate system is unlikely to have a foreclosure effect that hinders competition.

153. Where it is not clear from the required share itself whether or not the rebate system is likely to have a foreclosure effect, the Commission will endeavour to assess the commercially viable amount an efficient competitor or entrant can be expected to supply and to compare this with the required share. Where the required share exceeds the commercially viable amount the rebate system is likely to have a foreclosure effect which reduces competition as the effective price that results from the rebate system over this commercially viable amount will be below the average total cost of the dominant company.[106]

154. The commercially viable amount needed to compete on the market will have to be assessed in its specific market and sector context. In its assessment the Commission will be in particular attentive that the rebate system does not foreclose potential competitors. As to the latter, the Commission will in general assess what is the effect of the rebate system on a company that wants to enter at minimum efficient scale.

155. It is also important for the assessment in what terms the threshold is formulated. An important distinction can be made between on the one hand a formulation in terms of a percentage of total requirements of the buyer or an individualised volume target and on the other hand a standardised volume threshold. The first two allow the dominant supplier to set the threshold at which the rebate kicks in at such a level to create a maximum loyalty enhancing effect. Setting the threshold in terms of a percentage of total requirements of the buyer is most straightforward in order to enhance loyalty.[107] Individualised volume targets allow the dominant supplier to create the same loyalty enhancing effect.[108] Such requirement percentage targets and individualised volume targets are normally set in view of the purchases made by the same buyer in the previous period. The loyalty enhancing effect may increase in case the threshold is increased in successive periods. In case there is some uncertainty about the optimal target to

---

106 In case the required share exceeds the commercially viable amount for certain customers but not for others, the ratio and importance of these two groups of customers will be taken into account in the assessment. The same holds if, in case of a grid of thresholds and rebates, the required share is above the commercially viable amount for some thresholds but not for others.

107 See Case – 85/76 Hoffmann-La Roche & Co AG v Commission [1979] ECR, paragraphs 89-90. Case T-65/89 BPB Industries Plc and British Gypsum Ltd v Commission [1993] ECR II-39, paragraphs 68, 120, Soda-ash-Solvay (Commission Decision 91/299) OJ 152, pp. 21-39, paragraphs 16-17.

108 See Case – 85/76 Hoffmann-La Roche & Co AG v Commission [1979] ECR, paragraphs 97. Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission, ECR [1983] 3461 paragraphs 72-73; 81-82; Case T-288/97 Irish Sugar plc v Commission [1999] ECR II- 2969 paragraph 213. Case T- 203/01 Michelin v Commission (Michelin II) [2003] ECR II-4071, paragraphs 75, 81, 207-208; Case T- 219/99 British Airways v Commission (17 December 2003) not yet reported, paragraphs 7-11 and 270-273.

be set, for instance because of changing loyalties or because of overall demand changes, the targets are sometimes formulated in the form of a grid of targets with different rebates.

156. For the assessment whether the loyalty enhancing effect and foreclosure effect of a rebate scheme are market distorting it may also make a difference whether the customers are left in uncertainty as to the level of the target threshold and/or the level of the rebate. Such uncertainty may, where the customers want to minimise the risk of not obtaining the rebate, induce further loyalty.[109] Similarly, uncertainty on the part of the customers whether they will be able during the reference period to reach the target threshold may, especially in case of a longer reference period, induce further loyalty. This will in particular play a role in case the rebate is so high that without the rebate the customer can not make a profit when using or reselling the product concerned.[110]

157. The length of the reference period has no direct bearing on the loyalty enhancing effect. Even in the case of a single transaction with a rebate that is conditional upon the buyer purchasing a certain threshold amount and where the reference period thus only concerns the period of that transaction, the rebate will create a suction effect below the threshold.[111] However, as in most cases the purchased amounts and the relevant threshold increase if the reference period is longer, there will in general be a positive correlation between the length of the reference period and the strength of the loyalty enhancing effect. The better the dominant supplier, when setting the threshold, has estimated the extra purchases that the rebate would induce within the reference period, the stronger the loyalty enhancing effect will be.[112]

158. In view of the above, where it is established that:

(a) the dominant company applies a conditional rebate system where the rebates are granted on all purchases in a particular period once a certain threshold is exceeded, and

(b) this threshold is set in terms of a percentage of total requirements of the buyer or an individualised volume target, and

---

[109] See Case – 85/76 Hoffmann-La Roche & Co AG v Commission [1979] ECR 461, paragraphs 98-100. Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission, ECR [1983] 3461, paragraphs 83 -84; Case T- 203/01 Michelin v Commission (Michelin II), [2003] ECR II-4071, paragraphs 111, 141;

[110] This is for instance clearly the case if the list price, i.e. the price without the rebate, is above the resale price on the downstream (distribution) market.

[111] There is a similarity here with the conclusion that in general the duration of single branding obligations is not relevant for their assessment under Article 82 (see footnote 97).

[112] The same correlation has been recognised in the case law, see Case T- 203/01 Michelin v Commission (Michelin II), [2003] ECR II-4071, paragraphs 85-88 and 90-95.
In case the purchases are linearly and proportionally increasing in time there is a perfect correlation between the length of the reference period, the amounts purchased and the suction effect.

(c) the required share exceeds the commercially viable amount per customer, and

(d) the dominant company applies the rebate system to a good part of its buyers and this system therefore affects, if not most, at least a substantial part of market demand, and

(e) there are no clear indications of a lack of foreclosure effect such as aggressive and significant entry and/or expansion by competitors and/or switching of customers,

the Commission is likely to conclude that the rebate system creates a market distorting foreclosure effect and thus constitutes an abuse of the dominant position. In case the dominant company does not apply the rebate system to a good part of its buyers but only selectively to some and not to others, the Commission will in addition investigate whether or not these selected buyers are of particular importance for the possibilities of entry and expansion of competitors. The Commission's preliminary conclusion will be strengthened where there are also clear indications of an actual foreclosure effect such as exit or declining market shares of competitors or de-listing of their products.

159. In case of such a situation of prima facie abuse the dominant company may rebut the Commission's preliminary conclusion by showing that the rebate system nonetheless does not and will not have a foreclosure effect, for instance because the individualised volume targets are set particularly low compared to the buyers total purchases. The dominant company may thus be able to show that the rebate system does not and will not create a suction effect because for most or all buyers reaching the target does not hinder them to also purchase substantial amounts from other suppliers. Another way to rebut the Commission's preliminary conclusion may be to show that entry or expansion of competitors is in effect not limited to the amount assessed by the Commission as the (minimum) commercially viable amount. In case the dominant company can show that entry or expansion can take place without extra difficulties at a larger scale, then the Commission will reassess the effective price in the light of this higher amount.

160. Where it is not possible to accurately establish the effective price for the (minimum) commercially viable amount per customer, the Commission will overall assess to what extent the rebate system hinders expansion or entry by competitors. It will do so by investigating the market performance of the dominant company and its competitors, preferably by comparing the situation before and after the rebate system was introduced. It will amongst others estimate the importance of the rebate by comparing its size to the full price per unit of product and will assess the indications of an actual foreclosure effect such as exit or declining market shares of competitors or de-listing of their products.

161. In case it is clearly established that the effective price is above cost, it is unlikely that the Commission will conclude that a market distorting foreclosure effect results. However, exceptionally such may be concluded, for instance if it is established that entrants, that would help the competitive situation on the market to improve, will have for an initial period certain cost disadvantages compared to the incumbent dominant company. Such cost disadvantages may result from the practical need to enter below the minimum efficient scale or from learning costs,

which only allow the entrant to obtain lower costs over time after it has grown and/or gained experience.

162. In case the threshold set is a standardised volume threshold, it will be less likely that the rebate system will have a loyalty enhancing effect. Because the volume threshold at which the rebate kicks in, is set at the same level for all buyers, the threshold may be too high for smaller buyers and/or too low for large buyers to have a loyalty enhancing effect. The smaller buyers may never reach the threshold, while the larger buyers may purchase considerably more than the threshold. In such a case the rebate system is unlikely to have a suction effect as switching to an alternative supplier for part of its demand will not make the buyer lose the rebate. In general a rebate system with standardised volume thresholds is therefore unlikely to be found abusive. If however it is established that the standard volume threshold is likely to have a suction effect for (most of) the buyers, for instance because most of the buyers are purchasing more or less the same amount or can be classified in a limited number of size groups while combined with a linked grid of thresholds, the rebate system will be dealt with as described above for conditional rebate systems where the threshold is set in terms of a percentage of total requirements of the buyer or an individualised volume target. The same applies in case it is established that the standard volume rebate happens to target selectively buyers that are of particular importance for the possibilities of entry and expansion of competitors.

7.2.2.2 CONDITIONAL REBATES ON INCREMENTAL PURCHASES ABOVE THE THRESHOLD

163. Whether the conditional rebate is available to all purchases below and above the threshold once the latter is exceeded or only to incremental purchases above the threshold makes an important difference to the way possible loyalty enhancing effects are induced and how they are assessed.[113] In case the rebate is only available to incremental purchases, the dominant supplier, in order to create a loyalty enhancing effect, must set the threshold at the level that the buyer would purchase in the absence of any loyalty enhancing obligation or rebate. If the threshold is set at the amount that would anyhow be purchased, the rebate may induce the buyer to purchase extra units in order to be able to benefit from the rebate on these incremental purchases.

164. The strength of the inducement to purchase more from the dominant supplier, i.e. the loyalty enhancing effect, will depend in the first place on the level of the rebate percentage: the higher this percentage, the lower the price for these additional purchases. It will not be important for the assessment whether the threshold is set in terms of a percentage of total requirements of the buyer or an individualised volume target, as both are ways to set the threshold at what would anyhow be purchased. Here too a grid may be used by the dominant supplier in case of uncertainty about the optimal threshold to be set, for instance because of changing loyalties or because of overall demand changes.

---

[113] This applies to percentage rebates. A rebate in the form of a lump sum once the threshold is exceeded is by definition available for all purchases.

165. In view of the above, once it is established that the dominant company grants conditional rebates only on incremental purchases and where the threshold is set in terms of a percentage of total requirements of the buyer or an individualised volume target, the Commission will conclude that the rebate system constitutes an abuse only if the resulting price for these incremental purchases is a predatory price. The Commission will apply to such a system the guidelines as developed in the section on predatory pricing. In that context, the individualised nature of the thresholds will be taken as an important and generally sufficient indication to show that there is an intent to predate and an abuse is therefore likely if the resulting price does not cover average total cost.

166. Also in case it is established that the dominant company grants conditional rebates on incremental purchases but that the threshold is set in terms of a standardised volume target, will the Commission apply the guidelines as developed in section 6 on predatory pricing. In such a case it is unlikely that the rebate system will have a loyalty enhancing effect. Because the volume target at which the rebate kicks in, is set at the same level for all buyers, the target may be too high for smaller buyers and/or too low for large buyers to have a loyalty inducing effect. The smaller buyers may never reach the threshold, while for the larger buyers the threshold may be easily reached. Where however it is established that most of the buyers are purchasing more or less the same amount and that the standard volume target happens to work as an individualised volume target for these buyers or where it is established that the standard volume rebate happens to target selectively buyers that are of particular importance for the possibilities of entry and expansion of competitors, the system may have loyalty enhancing effects and the Commission will apply the same rebuttable presumption of predation in case the price for the additional units is below average total cost.

7.2.3 REBATES IN RETURN FOR THE SUPPLY OF A SERVICE BY THE BUYER

167. Conditional rebates where the condition that triggers the rebate is the supply of a service by the customer, such as a rebate for payment in cash or payment upon delivery, will normally not be abusive. However, this does not mean that conditional rebate systems as described in the previous paragraphs can be justified by claiming that the buyers are encouraged to use the rebates obtained if they exceed a certain percentage of total requirements or an individualised volume target, for promotion or other activities.[114]

7.2.4 UNCONDITIONAL REBATES

168. Unconditional rebates, while granted to certain customers and not to others, are granted for every purchase of these particular customers, independently of their purchasing behaviour. Unconditional rebates differentiate the purchase price

---

[114] See Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission, ECR [1983] 3461, paragraphs 73; Case T-65/89 BPB Industries Plc and British Gypsum Ltd v Commission [1993] ECR II-39, paragraph 71; Case T- 203/01 Michelin v Commission (Michelin II), [2003] ECR II-4071, paragraph 137.

between customers and may have exploitative effects (see paragraph YYY above). However, unconditional rebates may also have exclusionary effects, for instance if a rebate is offered only to customers that might more easily switch to foreign suppliers because they are located in a border region. To assess possible exclusionary effects the Commission will apply to these unconditional rebates and the resulting lower prices for certain customers the guidelines as developed in the section on predatory pricing. In its assessment the Commission will take into account that the exclusionary effect may not only inhibit entry and competition for these customers that may more easily switch, but may also delay entry and competition that would benefit the other customers of the dominant company. In such a case recoupment may take place not just after but also during the time that the predation takes place (see section 6, paragraph YYY). Here too the selectivity will be taken as an important and generally sufficient indication to show that there is an intent to predate and the Commission will apply the same rebuttable presumption of predation in case the price for the additional units is below average total cost.

7.2.5 POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

169. In case a single branding obligation or a rebate system is likely to have an appreciable foreclosure effect, the dominant company may argue that it can justify its obligation or rebate system because of efficiency considerations. In order for the efficiency defence to apply to the obligation or rebate system, it must be shown that the four conditions described in section 5.3, paragraph YYY are fulfilled.

170. A first example could be that the rebate system is indispensable to obtain cost advantages and pass them on to the customers. These cost advantages may be related to the size of the individual transaction or delivery and to the size of total purchases by a customer in a particular period. Such cost savings need to be substantiated. General remarks about transaction cost savings or general claims of better production planning are not enough.[115] Such cost savings may require a rebate system using a (grid of) standardised volume target(s) but are unlikely to require and are unlikely to be efficiently achieved with a rebate system where the threshold is set in terms of a percentage of total requirements of the buyer or an individualised volume target.

171. A second example could be that the rebate system is indispensable to incite the customers to purchase and resell a higher volume and avoid double marginalisation. Here it needs to be shown in the first place that the customer has considerable market power and that without the rebate system the resulting resale price applied by the customer would be higher than the price a vertically integrated monopolist would ask and that thus without the rebate system total output would be lower. Such efficiency may require a rebate system with conditional rebates on incremental purchases above a certain threshold but is

[115] Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission, ECR [1983] 3461, paragraph 85; Case C-163/99 Portugal v Commission [2001] ECR I-2613 paragraphs 55-56; Case T-203/01 Michelin v Commission (Michelin II), [2003] ECR II-4071, paragraphs 107-108.

unlikely to require and is unlikely to be efficiently achieved with a rebate system with conditional rebates on all purchases.

172. A third example could be that the rebate system or the single branding obligation is indispensable to provide the incentive for the dominant supplier to make certain relationship-specific investments in order to be able to supply a particular customer. An investment is considered relationship-specific if, after termination of the supply contract with that particular customer, the investment cannot be used by the supplier to supply other customers and can only be sold at a loss. General or market-specific investments in (extra) capacity are normally not relationship-specific investments. In case of relationship-specific investments the dominant supplier may not want to commit these investments before particular supply arrangements are fixed. Before such can be considered necessary it must be shown that the relationship-specific investment is a significant long-term investment that is not recouped in the short term and that the investment is asymmetric, i.e. that the supplier invests more than the buyer. Under such circumstances it may be indispensable to require that the customer purchases at least a certain minimum amount over a period and to an extent necessary to allow depreciation of the relationship-specific investment and thus solve the hold-up problem. In case future demand is uncertain it may not be possible to require absolute minimum amounts to be purchased, in which case an alternative more adequate measure may be to impose a rebate system or a single branding obligation until the investment is depreciated.

173. Meeting competition can in general not be used as a justification for single branding obligations or rebate systems.[116] This holds both for those obligations or systems already in place before a competitive action took place as for obligations and systems introduced upon a competitive action in the market.

8. TYING AND BUNDLING

8.1 INTRODUCTION

174. Tying occurs when the supplier makes the sale of one product (the tying product) conditional upon the purchase of another distinct product (the tied product) from the supplier or someone designated by the latter. Only the tied product can be bought separately. Bundling refers to situations where a package of two or more goods is offered. Cases where only the bundle is available and not the components are referred to as pure bundling. Cases where both the bundle and some or all of the components are available on the market are referred to as mixed bundling if the bundle is sold at a discount to the sum of the prices of the components.[117] Tying and bundling have similar effects on competition.

---

[116] Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969 paragraphs 186-187, 189. .

[117] The distinction between mixed bundling and pure bundling is not necessarily clear-cut. Mixed bundling may come close to pure bundling when the prices charged for the individual offerings are high.

175. Tying and bundling are common practices that often have no anticompetitive consequences. Both companies with and without market power engage in tying and bundling in order to provide their customers with better products or offerings in cost effective ways. At the most basic level, bundling two or more components into one product is a fundamental part of many economic activities. Such bundling can lead to significant savings in production, distribution and transaction costs and to improved quality. Integrating two independent products into a new, single product can also enhance innovation. Companies furthermore engage in tying for reasons related to the safety, quality, reputation and good usage of the products. For example, the manufacturer of a machine may fear that the bad quality of another manufacturer's product used in conjunction with the machine could raise safety concerns. By tying the other product to the machine the manufacturer of the machine could avoid such quality problems.

176. Companies may, however, also engage in tying and bundling in order to protect, extend or exploit their market power. In particular, tying and bundling can lead to the following possible anticompetitive effects: foreclosure, price discrimination and higher prices. The present section deals only with the foreclosure effects of tying and bundling.

177. A company that is dominant in the tying market can through tying or bundling foreclose the tied market directly and the tying market indirectly. By tying the dominant company reduces the number of potential customers that is available for its competitors in the tied market. This may cause existing competitors to be marginalised or exit from the tied market and create a barrier for new entrants. Economies of scale, network effects and high entry barriers in the tied market all make such a strategy more likely and more successful.

178. The foreclosure of the tied market may allow the dominant company to achieve larger profits in the tied market, for example through catching more of the customers in that market. Moreover, tying may allow the dominant company to protect its dominant position in the tying market. If the tied good is important for buyers of the tying good, a reduction of alternative suppliers of the tied good can make entry in the tying market more difficult, since it may in the end be necessary to enter both the tying and the tied market in order to compete effectively. Furthermore, the dominant firm may through tying force the exit from the tied market of a product which is or may become itself a threat to the dominant product in the tying market.[118]

8.2 ASSESSMENT

179. Tying is mentioned by Article 82(d) as a possible abuse. According to this article it is abusive to make "…the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

[118] Pure and mixed bundling can have similar foreclosure effects to those described above for tying. However, the terminology used for tying may not be appropriate, since in a sense both markets become tied in the case of pure bundling, while none of them are "tied" in the traditional sense in the case of mixed bundling.

However, it may be abusive for a dominant company to tie sales of products even when this is in accordance with commercial usage in the market.[119] Classical tying involves the dominant undertaking by contract depriving its customers of the choice to obtain the tying product without the tied product. However, the dominant company may also as a matter of fact deprive its customers of this choice, if the dominant undertaking refuses to sell the tying good individually (tying) or any of the two products individually (pure bundling). Customers may also be deprived of the choice in less direct ways. The dominant company may, for example, refuse to acknowledge guarantees unless customers use its components, consumables or services. Also mixed bundling can be an abuse under Article 82(d).[120] Therefore, the possible abuse is the practice by which a dominant company either imposes on customers the acquisition of one product or service conditional upon the purchase of another (tying) or forces or economically induces customers to only buy a bundle consisting of the two products (pure or mixed bundling).

180. For such practices to be prohibited under Article 82, the presence of the following elements is usually required: (i) the company concerned is dominant in the tying market[121]; (ii) the tying and tied goods are two distinct products; (iii) the practice can be characterised as either tying or bundling; (iv) the tying forecloses competition; (v) the tying practice is not objectively justified.

8.2.1 DOMINANCE IN THE TYING MARKET

181. For tying to be abusive the company concerned needs to be dominant in the tying market.[122] It is not necessary that the company also is dominant in the tied market. However, dominance also in the tied market renders the finding of an abuse more likely. In order to assess this properly it is normally necessary to define the relevant market(s) on which both the tying and the tied product are sold.

8.2.2 DISTINCT PRODUCTS

182. What can be considered as distinct products is determined by the demand of the customers. Two products are distinct if, in the absence of tying or bundling, from the customers' perspective, the products are or would be purchased separately. It is, however, not necessary that the two products belong to two separate product markets. In a market with differentiated products, two products may be

---

[119] Judgement in Case C-333/94 P Tetra Pak International SA v Commission [1996] ECR I-5951, paragraph 37.

[120] Judgement in Case 85/76 Hoffman-La Roche & Co AG v Commission [1979] ECR 461, paragraph 111.

[121] The analysis differs in the special case of tying in aftermarkets, which is described in section 10.

[122] In case of bundling dominance in one of the markets concerned is necessary.

sufficiently differentiated that a company can be said to tie or bundle two distinct products.[123].

183. Evidence that two products are distinct can include direct evidence that, when given a choice, customers purchase the products separately. Or indirect evidence that companies with little market power, particularly in competitive markets, tend not to tie the two products, presumably because this best serves the demand of the customers. Such indirect evidence may come from other geographical markets with more competitive conditions. Commercial usage may also indicate that two products are not distinct, and that the tying may be done for non-exclusionary purposes.[124] For instance, since customers want to buy shoes with laces, it has become commercial usage for shoe manufacturers to supply shoes with laces. This is an indication that the sale of shoes with laces is not a tying practice.[125] Often combinations have become accepted practice because the nature of the product makes it technically difficult supplying one product without also supplying another product. Such combinations are more likely to be found not to be tying practices than is contractual tying or bundling.

184. A particular problem arises in determining whether a new product development integrating two products that previously were distinct would mean that the combination in the future should be considered to be one product. Deciding this entails evaluating whether the benefits for the customers from integrating the two products are likely to be so great that there will be a market-wide change so that effectively all companies operating in competitive markets will offer the integrated product instead of two separate products. It is more likely that such a conclusion can be reached in cases of technological integration than in cases of contractual tying or bundling.

8.2.3 PRACTICE EITHER TYING OR BUNDLING

185. It must be possible to properly characterise the practice as either tying or bundling. For instance, contractual tying involves the dominant firm imposing a direct obligation to purchase the tied product when buying the tying product. Commercial tying (mixed bundling) is an indirect measure to achieve the same result as through contractual tying by inducing customers to purchase the tied product through granting bonuses, rebates, discounts or any other commercial advantage. Technical tying occurs when the tied product is physically integrated in the tying product.

---

[123] In such a case it is necessary that the company concerned can be considered dominant by virtue of selling one of the two products (the tying product) on its own, since the sales of the tied product allegedly result from the tying or bundling practice. Practices involving two or more units of the same product, such as imposing minimum purchasing requirements and giving loyalty rebates, may also be abusive; such practices are analysed in the section on exclusive dealing and rebates.

[124] However, as mentioned in paragraph 179, commercial usage does not automatically bring a certain practice outside the scope of Article 82.

[125] Similar evidence may come from the behaviour of a dominant company before it achieved dominance.

8.2.4 FORECLOSURE OF COMPETITION

186. The main direct anticompetitive effect of tying and bundling is possible foreclosure on the market of the tied product.[126] For a tying practice to be abusive, it should normally have an appreciable foreclosure effect on the tied market. In principle, such an assessment can be considered to consist of two parts. First, to establish which customers are "tied" in the sense that competitors to the dominant company cannot compete for their business. Second, to establish whether these customers "add up" to a sufficient part of the market being tied so that the market can be considered to be foreclosed to the competitors. However, an overall assessment of the foreclosure effect of the tying or bundling practice will be made, which will combine an analysis of the practice, its application in the market, and the strength of the dominant position. The elements described below therefore cannot be applied in a mechanical way.

187. In the case of tying and pure bundling, the individual customers in question clearly are foreclosed to the competitors - at least until the expiry of contracts in the case of contractual tying. In the case of mixed bundling this is less clear. Both products are available but may be priced in such a way that it would not be rational for customers to buy individual products from the bundle to match them with complementary products produced by a competitor. Competitors are foreclosed if the discount is so large that efficient competitors offering only some but not all of the components, cannot compete against the discounted bundle.

188. The incremental price that customers pay for each of the dominant company's products in the bundle should therefore cover the long run incremental costs of the dominant company of including this product in the bundle. This would allow an equally efficient competitor with only one product to compete profitably against the bundle.[127]

189. A bundle may be discounted in various ways. In the simplest case, a bundle AB consisting of two products A and B has a separate price that is lower than the sum of the stand-alone prices of A and B. In that case the incremental price of product B is measured as the price of the bundle AB less the stand-alone price of product A. Similarly, the incremental price of a product C sold in a discounted bundle ABC is the price of ABC less the sum of the stand-alone prices of A and B (or the price of AB if such an option exists).

190. The calculation of the incremental price may be more complicated if the discount is given in the form of a multi-product rebate. The fact that a rebate is multi-product is not in itself problematic. A simple rebate giving a percentage discount on every purchase of a supplier's products does not in itself tie the products together. However, competition problems may arise if the granting or the size of

---

[126] For expositional ease the section on the foreclosure effect uses the terms "tying market" and "tied market". In the cases of pure and mixed bundling, these terms may not be immediately applicable and the analysis should be appropriately adapted.

[127] Long run incremental cost is used as the cost concept, since this captures the extra costs of the dominant company's activities in the market(s) in which it is not dominant. If a price charged by the dominant company covers its incremental costs, such a price cannot normally be considered predatory. The same must hold for the incremental prices described in this section.

such a rebate is, for instance, conditional on buying several products from the dominant company or on reaching sales targets either for several products individually or added together. In such a situation the granting or the size of a rebate for one product is dependent on the customer's purchases of one or more other products, and the products are therefore tied in the eyes of the customer. To calculate the effect of the rebate, the incremental price should therefore incorporate the loss of rebate that the customer would incur if it stopped purchasing one but continued to purchase the other products from the dominant company. Stopping purchasing a product may mean losing the entire rebate if, for instance, the rebate was given conditional on reaching a certain target purchase of the product that the customer considers to stop purchasing. Or it may mean that the rebates granted on the remaining purchases are lower, because a certain overall target purchase level is no longer reached.

191. As the amounts acquired of the various products that are part of the bundle may differ from customer to customer, the incremental price may also differ from customer to customer. In order to understand the foreclosure effect of a given multi-product rebate scheme, an assessment of the effect of the rebate on the incremental price paid by the various customers may therefore be necessary. If there are few customers in a market, this may be relatively straightforward. If there are many customers it may be necessary to look at various customer groups with similar purchasing behaviour and assess the incremental price for each of these groups. It may be a useful starting point to look at the market as a whole and calculate whether the "incremental market price" for the product covers the long run incremental costs for this product. However, as mentioned below, any analysis of the market-wide foreclosure effect also will need to pay attention to whether the multi-product rebate ties customers that are particularly important for the entry or expansion of rivals or whether the multi-product rebate is targeting the customers of specific competitors.

192. The second part of the assessment is to establish whether the market as a whole can be considered to be foreclosed. The analysis of the foreclosure effect will take into account several factors. In general, the higher the tied percentage of total sales on the tied market, the larger is normally the foreclosure effect. However, the overall strength of the dominant company on both the tying and the tied markets should also be taken into account. Another important factor is the identity of the tied customers. For example, some customers may be important from an entry-deterring point of view in that they would be most likely to be responsive to offers from alternative suppliers. These customers may form a particular way of distributing the tied product that would be suitable for a new entrant. They may also be customers situated in a geographic area well suited to new entry, for example because of proximity to suppliers in other geographical areas. Or they could be the customers of specific, targeted competitors. A growing share of a market with network effects may also be problematic even if the share is still fairly low.[128]

[128] Network effects arise when consumers place greater value on larger networks than small ones. Examples include telephone networks where users directly derive value from being able to communicate with many other users, but also networks of users of computers where users indirectly derive value from more software being made available to large networks.

193. The fact that other companies also tie may add to the foreclosure effect, since this can contribute to making entry more difficult.

194. Another factor that may be important in assessing whether there is an appreciable foreclosure effect is the number of customers that buy both products. For instance, if only a third of the customers in the tied market buy both products, tying may pose less of a risk, since the tying practice may remain contained to at most a third of the market. However, the tying could still in this case have an appreciable foreclosure effect, for example if some or all of the tied customers are particularly important from an entry-deterring point of view.

195. The foreclosure effect is likely to be stronger if there are significant scale economies, network effects or entry barriers in the tied market. Scale economies may mean that rivals in the tied market are not able to stay in the market if the dominant company forecloses part of the tied market through tying or bundling. Similarly, network effects may allow the dominant company to "tip" the market as the tying can deprive its rivals of the chance to derive network effects through the tied customers.[129] Finally, entry barriers in the tied market make it easier for the dominant company to protect itself from potential rivals in the tied market.

196. Product differentiation in the tied market may reduce the foreclosure effect as competitors are more likely to be able to survive in the market. Customers with strong preferences for the products of competitors in the tied market may, for instance, prefer to switch to a rival product in the tying market rather than forego their preferred product in the tied market.

197. The market performance of the dominant company and its competitors may provide evidence about the foreclosure effect. The market share of the dominant company in the tied market may rise after the company starts or intensifies the tying practice and some or all of its competitors may be marginalised or exit. Also entry attempts can provide evidence about possible foreclosure effects.

198. Rivals may have effective counter-strategies at their disposal that would allow them to protect themselves against the strategies of the dominant company. Such counter-strategies could, for instance, consist in buying from a producer in the other market in order to create a bundle that can compete with the combined offering of the dominant company.

199. Also important customers may have effective counter-strategies. This may, in particular, be the case for customers in the tied market, especially if the tying company is not also dominant in this market. If such buyers are not themselves tied they may be able to prevent the marginalisation of the rivals to the dominant company or sponsor new entry into the tied market.

8.2.5 POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

200. The dominant company may argue that it is an objective necessity to tie products for reasons of quality or good usage of the products necessary to protect the

[129] Commission decision in Case No COMP/37.792 Microsoft of 24.3.2004, OJ L ????.

health or safety of the customers. The general framework for analysis of such arguments are given in section 5.3.1. It is, however, worth recalling that when there are laws and authorities to protect the health and safety of the customers, it is not the task of a dominant company to take steps on its own initiative to eliminate products which it regards, rightly or wrongly, as dangerous or inferior to its own products.

201. The dominant company may also invoke an efficiency defence. Tying and bundling may help to produce savings in production, distribution or transaction costs. Combining two independent products into a new, single product may enhance innovation. Such combinations are more likely to be found to fulfil the conditions for an efficiency defence than is contractual tying or bundling.[130]

202. For tying not to be abusive, it must be shown that all of the conditions described in section 5.3.3 are fulfilled. For instance, tying would be considered abusive when a retailer is able to obtain, on a regular basis, supplies of the same or equivalent products on the same or better conditions than those offered by the supplier which applies the tying practice, as evidently the pass on is not realised. In many cases contractual tying may not be indispensable to achieve the efficiencies and the price incentive contained in mixed bundling normally needs only to reflect the effective cost efficiency that is realised. Similarly, for a claimed efficiency effect of tying helping to ensure a certain uniformity and quality standardisation, it needs to be demonstrated that the positive effects cannot be realised equally efficiently by requiring the buyer to use or resell products satisfying minimum quality standards, without requiring the buyer to purchase these from the supplier or someone designated by the latter.

9. REFUSAL TO SUPPLY

9.1 INTRODUCTION

203. Undertakings are generally entitled to determine whom to supply and to decide not to continue to supply certain trading partners. This is also true for dominant companies.

204. Dominant companies are, however, not entitled to use refusals to supply or threats of refusals to supply for anticompetitive purposes. Examples include halting supplies to punish buyers for dealing with competitors[131] and refusing to supply buyers that do not agree to exclusive dealing or tying arrangements. In such circumstances the refusal to supply is best viewed as an instrument to achieve another purpose, such as exclusive dealing or tying, and should therefore be analysed as part of a single branding or tying practice.[132] Such practices are

---

[130] A persuasive argument that it is so efficient to combine the two products into one that the whole industry in the future will offer the integrated product instead of two separate products may lead to the conclusion that the two products are no longer distinct (see paragraph 184).

[131] Case 27/76, United Brands v Commission, [1978] ECR 207.

[132] See sections 7 and 8.

normally not aimed at excluding the buyer but rather a competitor of the dominant company.

205. This section focuses instead on situations where a dominant company denies a buyer access to an input in order to exclude that buyer from participating in an economic activity. Although the excluded buyer could be only a customer, typically competition problems arise when it also is a rival to the dominant company in the economic activity for which the input is indispensable. This type of exclusion may cover a broad range of practices, such as the termination of an existing commercial relationship[133], the refusal to supply products, to provide information, to license intellectual property rights (IPR)[134] or to grant access to an essential facility or a network.[135] Practices such as delaying tactics in supplying, imposing unfair trading conditions and charging such prices that it is not economically viable for the buyer to continue its activity[136] may also in reality amount to a refusal to supply.

206. A refusal to supply may be classified as an exclusionary abuse. The dominant company prevents the requesting or terminated party from getting access to an indispensable input. As a result, this undertaking is either driven out of the market or is prevented from entering it. For a refusal to supply to be abusive, it must, however, have a likely anticompetitive effect on the market, not only on the individual company at which the refusal to supply is directed.

207. A refusal to supply by several companies that are in a collectively dominant position can also be an abuse. This could take the form of refusing access to an indispensable input that is collectively owned by a group of companies. In addition, several collectively dominant companies refusing access to their individually owned inputs also could be abusive.

208. Anticompetitive refusals to supply may have various motives. It is useful to distinguish between an "upstream" market for access to the input and a "downstream" market for which the input is indispensable in order to manufacture a product or provide a service.[137] The owner of the input may refuse to supply in order to achieve a larger share of the profits in the

---

[133] Joined Cases 6/73 and 7/73, Istituto Chemioterapico S.p.A. and Commercial Solvents Corporation v Commission, [1974] ECR 223.

[134] Case 238/87, AB Volvo v Erik Veng (UK) Ltd, [1988] ECR 6211; Joined Cases C-241/91 P and C-242/P, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission ("Magill"), [1995] ECR I-743; and Case C-418/01, IMS Health GmbH & Co. OHG v NDC GmhH & Co. KG, [2004] ECR I-0000.

[135] See, e.g., Commission Decisions *B&I Line plc v Sealink Harbours Ltd and Stena Sealink Ltd.* REF?; *Sea Containers v Stena Sealink – Interim Measures*, OJ 1994 L 15/8; *Port of Rødby*, OJ 1994 L 55/52; *British Midland v Aer Lingus*, OJ 1992 L 96/32;

[136] Ref

[137] The terminology "upstream" and "downstream" may not always be completely appropriate in that the indispensable input may be at the same level as or downstream from the market for which the indispensable input is needed. This may, for instance, arise where one undertaking controls a "downstream" distribution level that is indispensable in order to access customers.

downstream market. Moreover, the refusal to supply may allow the input owner to protect its position in the upstream market. If the downstream market is necessary as an outlet for a product or service from the upstream market, by eliminating competition in the downstream market the owner of the indispensable input may make it less attractive for potential rivals to challenge its position in the upstream market. Furthermore, eliminating competition in the downstream market can also eliminate the possible competition from a product in the downstream market which is or may become a threat to the input in the upstream market.

209. The main purpose of forcing companies to supply is to improve the competitive situation in the downstream market. However, investment incentives may also be influenced, both negatively and positively. The knowledge that they may have a duty to supply against their might lead companies not to invest in the first place or to invest less. Other companies may be tempted to free ride on the investment made by the dominant company instead of investing themselves. However, access to the indispensable input may also lead other firms to increase investment in, for instance, follow-on research and development that would otherwise not be possible or profitable. Enforcement policy towards refusals to supply has to take into account both the effect of having more short-run competition and the possible long-run effects on investment incentives.

210. Given these considerations, any obligation to supply pursuant to Article 82 can be established only after a very close scrutiny of the factual and economic context; the factors which go to demonstrate that an undertaking's conduct in refusing to supply is abusive are highly dependent on the specific economic and regulatory context in which the case arises.

9.2 ASSESSMENT

211. The concept refusal to supply covers a variety of practices and situations; it is not possible for these guidelines to cover all of them. The situations that are covered are the following: First, where one or more companies are refusing to supply an input; second, where this input is covered by intellectual property rights; third, where this input is information necessary for interoperability.

9.2.1 REFUSAL TO SUPPLY AN INPUT

212. Five conditions have to be fulfilled in order for a refusal to supply to be abusive:

(i) the behaviour can be properly characterized as a refusal to supply;

(ii) the refusing undertaking is dominant;

(iii) the input is indispensable;

(iv) the refusal is likely to have a negative effect on competition;

(v) the refusal is not objectively justified.

213. In the case of a refusal to license an IPR an additional condition may have to be met, which is described below in a special section; the same applies for issues related to information needed for interoperability. As far as specific issues of access to networks in the electronic communications sector are concerned, the principles laid down in the relevant notice on the application of the competition rules should be applied.[138]

9.2.1.1 BEHAVIOUR PROPERLY CHARACTERIZED AS REFUSAL TO SUPPLY

214. In many cases it is evident that an undertaking is refusing to supply, whether to new or to existing buyers. In other situations it will have to be established that a certain type of behaviour in reality amounts to a refusal to supply. This can involve evaluating practices such as, for instance, delaying tactics in supplying, imposing unfair trading conditions, or charging excessive prices for the input.[139]

215. A particular behaviour, which can amount to a refusal to supply, is a "margin" or "price squeeze". This may occur when the upstream input owner is integrated downstream and thus competing with actual or potential buyers of the input, and the margin between the price for the upstream input charged to competitors on the downstream market and the downstream price charged by the input owner is insufficient to allow a reasonably efficient competitor to obtain a normal profit. The typical benchmark for a reasonably efficient competitor is the integrated input owner. A margin squeeze could therefore be demonstrated by showing that the input owner's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by its upstream operating arm.[140]

9.2.1.2 DOMINANCE

216. A refusal to supply can only raise competition problems if the undertaking refusing to supply has a dominant position on a defined market. This will often be an "upstream" input market, but it may also be a distinct market where access is needed to link this market with another market, for example to interface information.[141]

217. In some circumstances, there may not be an existing market for the input in question as it is used only by the owner in a captive market. For example, an IPR may be nothing more than an input that is not marketed separately from the goods and services to which the IPR relates. However, it is sufficient that a captive market, that is, a potential market, or even a hypothetical market, can be identified. Such is the case where there is actual demand for the input on the part

---

[138] Notice on the application of the competition rules to access agreements in the telecommunications sector (98/C 265/02), OJ C265 of 22.8.1998, pp. 2-28, in particular paragraphs 83-130.

[139] Such practices are sometimes called "constructive" refusals to supply.

[140] See also the Commission's Access Notice, cited above in note ???, paragraphs 117-119.

[141] Commission Decision of 24.03.2004 in Case COMP/C-3/37.792 (Microsoft), recitals ???-???.

of undertakings seeking to carry out the activity for which the input is indispensable.[142]

9.2.1.3 INDISPENSABILITY

218. To be an abuse the refusal to supply must concern an input, which is indispensable to carry on normal economic activity in the downstream market. Without this input companies cannot manufacture their products or provide their usual service levels. Therefore, when real or potential substitutes exist in the market, the input of the dominant company is not indispensable. The same holds if it would be legally and economically possible for other companies to produce the input in question themselves.

219. A facility is an indispensable input only when duplication of the existing facility is impossible or extremely difficult, either because it is physically or legally impossible to duplicate, or because a second facility is not economically viable in the sense that it would not generate enough revenues to cover its costs.[143] One element that may be relevant for reaching such a conclusion is the switching costs that customers would have to incur in order to use an alternative structure.[144]

220. In the case of IPRs it must not be possible for competitors to turn to any workable alternative technology or to “invent around” the IPR. Such a requirement would likely be met where the technology has become the standard or where interoperability with the rightholder’s IPR protected product is necessary for a company to enter or remain on the product market.

9.2.1.4 LIKELY NEGATIVE EFFECT ON COMPETITION

221. The third criterion is the likely negative effect on competition. The likely exclusion of one individual competitor from the downstream market does not in itself constitute an abuse. An abuse only may arise when the exclusion of competitors is likely to have a negative effect on competition in the downstream market. This should however not be understood to mean the complete elimination of all competition. The extent to which the exclusion of one competitor has an impact on the level of competition depends on the pre-existing competition on the downstream market. In some cases, the exclusion of one competitor may have a detrimental effect on the level of competition; in other cases the impact may be small to insignificant. For instance, if there are several competitors in the downstream market and the owner of the indispensable input is not itself active in that market, the impact on competition of the exclusion may be small. It is more likely that there is a negative effect on competition on the

---

[142] Judgment in IMS Health, cited in note ???, paragraph 44.

[143] Case T-97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. K, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, [1998] ECR I-7791, paragraphs 43-46.

[144] Judgment in IMS Health, cited in note ???, paragraph 29.

downstream market if, for instance, the input owner is itself active in the downstream market and excludes one of its few competitors.

222. The identity of the excluded actual or potential competitor also may be important for the assessment of the effect on the level of competition of the exclusion. The exclusion of a particular competitor may have a special effect on competition, for instance if it follows a different business model than the established competitors on the market, while the exclusion of a competitor similar to the established competitors may not have the same negative effect on competition.

223. The exclusion may also have a negative impact on competition in a new and not yet existing downstream market, if the owner of the indispensable input refuses access to a buyer that would use the input to manufacture a new product or provide a new service in such a not yet existing market.

9.2.1.5 POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

224. A refusal to supply may be justified by an objective justification. It may be an objective justification that an undertaking seeking access is not creditworthy. In the case of an essential facility, access may be denied if the facility is capacity constrained or if granting access would lead to a substantial increase in cost that would jeopardize the economic viability of the facility holder. Access may also be denied if the undertaking seeking access is not technically able to use the facility in a proper manner.

225. In the assessment of a refusal to supply it must also be kept in mind that the indispensable input, be it a raw material, an essential facility or an intellectual property right, often is the result of substantial investments entailing significant risks. In order to maintain incentives to invest and innovate, the investor must not be unduly restricted in the exploitation of valuable results of the investment. For these reasons the investor should normally be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking the risk of failed projects into account. To achieve such compensation, it may be necessary for the investor to exclude others from access to the input for a certain period of time. The risks facing the parties and the sunk investment that must be committed may thus mean that an investor should be allowed to exclude others for a certain period of time in order to ensure an adequate return on such investment[145], even when this entails eliminating effective competition during this period.

226. The circumstances in which a refusal to supply by a dominant company may be abusive are therefore more likely to be present when it is likely that the investments that have led to the existence of the indispensable input would have been made even if the investor had known that it would have a duty to supply. This could be the case if the input is indispensable only because the owner enjoys or has enjoyed until recently special or exclusive rights within the meaning of

---

[145] See also Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p. 97, paragraphs 44 and 81 and Joined Cases T-374/94 and others, *European Night Services*, [1998] ECR II-3141, paragraphs 230.

Article 86(1) EC. Another example could be that the original investment primarily was made for reasons not related to the market in which the company asking access to the input intends to use the input. The original investment in a facility may also have been made by a public authority using investment criteria that likely would have led to the investment being made even if there would have been a duty to supply. And the investments behind innovations leading to intellectual property rights may not have been particularly significant, in which case it may be likely that the investment would have been made even knowing that a duty to supply would be imposed. In making such assessments the Commission will take account of the respective values that are at stake, including the possible positive effects on incentives to follow-on investment from allowing access.

227. It is more likely that the termination of a supply arrangement is found to be abusive than a de novo refusal to supply. The fact that the owner of the indispensable input in the past has found it in its interest to supply is an indication that supplying the input does not endanger that the owner receives adequate compensation for the original investment. It would therefore be up to the dominant company to show why circumstances have changed in such a way that the continuation of the supply relationship would endanger such compensation. Similarly, it would be more difficult to argue that giving access to further buyers would endanger adequate compensation than it would be to argue that giving access to a buyer for the first time would endanger such compensation.

9.2.2 REFUSAL TO LICENCE INTELLECTUAL PROPERTY RIGHTS

228. There is no general obligation for the IPR holder to license the IPR, not even where the holder acquires a dominant position in the technology or product market. The very aim of the exclusive right is to prevent third parties from applying the IPR to produce and distribute products without the consent of the holder of the rights. This protection would be eroded if the holder of a successful IPR would be required to grant a licence to competitors from the moment the IPR or the product incorporating the IPR becomes dominant in the market. Imposing on the holder of the rights the obligation to grant to third parties a licence for the supply of products incorporating the IPR, even in return for a reasonable royalty, would lead to the holder being deprived of the substance of the exclusive right.[146]

229. The refusal to license an intellectual property therefore does not in itself constitute an abuse.[147] Only under exceptional circumstances can the refusal to license an IPR be considered an abuse.[148] For example, the refusal by a dominant company to license access to the IPR could be considered abusive when the five

---

[146] Judgment in Volvo, cited in note ???, paragraph 8.

[147] On the other hand, the mere fact that the refused input is a licence to a valid IPR protected by law is not in itself an objective justification.

[148] Judgment in Volvo, paragraphs 8-9; judgment in Magill, paragraph 49; and judgment in IMS Health, paragraph 34, all cited in note ???.

conditions described above are all fulfilled and, furthermore, the IPR protection impedes the innovation process and blocks the emergence of a new product. However, a refusal to licence would not be abusive where the undertaking requesting a licence intends to limit itself basically to duplicating the goods or services already offered by the dominant company.[149]

230. A refusal to licence an IPR protected technology which is indispensable as a basis for further research and development may also be abusive even if the licence is not sought to directly incorporate the technology in clearly identifiable new goods and services.

9.2.3 REFUSAL TO SUPPLY INFORMATION NEEDED FOR INTEROPERABILITY

231. A special case arises when an undertaking refuses to supply information in a way that allows it to extend its dominance from one market to another. This is the case for information necessary for interoperability between one market and another. Although there is no general obligation even for dominant companies to ensure interoperability, leveraging market power from one market to another by refusing interoperability information may be an abuse of a dominant position.

232. Even if such information may be considered a trade secret it may not be appropriate to apply to such refusals to supply information the same high standards for intervention as those described in the previous subsection.

10. AFTERMARKETS

10.1 INTRODUCTION

233. Aftermarkets are also sometimes called “secondary markets”. Such markets comprise complementary products (or “secondary products”) that are purchased after the purchase of another product (the “primary product”) to which it relates. Standard examples include after sales services and spare parts for durable goods, as well as consumables such as ink cartridges and toner for printers and photocopiers. However, also upgrades of computer software may be considered aftermarkets.

234. Aftermarkets typically appear in competition cases when they are “proprietary”, that is, when they are brand-specific in that secondary products that can be used with one brand of primary product cannot be used with another brand of primary product, although the primary products themselves are substitutes. The contentious issue is often that the supplier of a primary product attempts to reserve the secondary market for itself.

235. The application of traditional market definition tools such as the SSNIP-test to aftermarkets often leads to the definition of markets comprising only the products of the supplier of the primary product. Often patents or know-how will

---

[149] Judgment in IMS Health, cited in note ???, paragraph 49.

allow the supplier of the primary product to have a monopolistic position on the aftermarket.

236. The strong position of the supplier on such product markets may, however, not be indicative of the actual degree of market power of the supplier, since it may be constrained by competition in the primary market. If the primary market is competitive, competition in the primary market may make price increases in the aftermarket unprofitable due to its impact on sales in the primary market, unless prices in the primary market are lowered to offset the higher aftermarket price. Competition in the primary market may thus ensure that the overall price of the bundle of goods and services comprising the primary product and the secondary product(s) is competitive.

237. These guidelines suggest incorporating the full effects from the primary market only at the stage of analysing the alleged abusive behaviour. It may also be possible to follow other approaches, such as incorporating the full effects from the primary market already in the dominance analysis or even at the market definition stage. In the end, what is important is that the link between primary and secondary product markets is properly accounted for at some stage in the analysis.

10.2 ASSESSMENT

10.2.1 MARKET DEFINITION[150]

238. At the market definition stage the Commission applies the normal approach described above in Section 3 on market definition.[151] This means asking whether the secondary products in a given aftermarket can be considered to form a relevant product market without taking into account effects on sales of the primary product giving rise to this particular aftermarket. In other words, the focus of the market definition exercise is on the aftermarket sales to customers who have already acquired the primary product and not on potential new future buyers of the primary product. The full effects of “bundle” or “systems” competition will thus be taken into account in the analysis of the alleged abusive behaviour.

239. An aftermarket consisting of the secondary products of one brand of primary product may not be a relevant product market in two situations. First, if it is possible to switch to the secondary products of other producers. Hence, even though a customer has bought one brand of primary product the customer may not be “locked in” in the aftermarket and would switch to the secondary products of other producers if prices in the aftermarket were to increase.

240. Secondly, it may be possible to switch to another primary product and thus avoid the higher prices in the aftermarket. This would require that switching costs are

---

150 See also paragraph 56 of the Commission’s market definition notice, cited in note ??.

151 See in this respect paragraph 66 of the judgment in *Hilti* cited in note ??.

not so high as to make such an option too expensive. Switching costs can basically be of two types. First, it may not be possible to sell the used primary product at a sufficiently attractive price that a switch would be economical. This is more likely to be important if the price of the primary product is high compared to the costs of the secondary product. It should be kept in mind that prices in the market for second-hand primary products may be influenced by the same actions that lead customers to consider switching. For instance, higher prices for spare parts will often lead to lower prices for second-hand primary products. Secondly, there may be significant investments other than the price involved in switching to another primary product. Examples of such investments are training, changing routines, installations, software etc. Such investment costs may restrain a customer from switching even where there is a well-functioning market for second-hand primary goods.

241. If the conclusion is reached that there is no separate aftermarket, the analysis must be conducted on the overall "systems" market. Dominance would then have to be established on this market and not on a separate aftermarket. The remainder of this section analyses the case where a separate aftermarket has been identified.

10.2.2 DOMINANCE

242. If an aftermarket consisting of the secondary products of one brand of primary product has been found to constitute a relevant product market it is usually also the case that a dominant position will be found, since the supplier of the primary product often has a very strong position on the aftermarket of its own product. Nevertheless, it is, of course, necessary to analyse the position of other undertakings present on the aftermarket before reaching this conclusion. This analysis should be performed according to the principles described in Section IV on dominance.

243. In the analysis of entry barriers attention should be given to the possibilities and incentives for suppliers of other brands of secondary products to adapt their products to allow entry into the aftermarket under investigation. In many aftermarkets the supplier of the primary product has proprietary rights - such as patents - or private information making entry difficult. Furthermore, suppliers of other primary products may be wary of entering the secondary market of a rival supplier for fear of retaliatory entry into their own secondary market.

10.2.3 ABUSE OF DOMINANT POSITION

244. The typical alleged abuse involving an aftermarket is that a supplier reserves an aftermarket for itself, mostly through either tying or a refusal to deal. The tying can come about in the various ways described in the section on tying. The refusal to deal may, for instance, involve a refusal to supply information needed to provide products or services in the aftermarket; a refusal to license intellectual property rights; or a refusal to supply spare parts needed in order to provide aftermarket services.

245. The first step in finding an abuse relative to a dominant position in an aftermarket is typically to establish that the supplier reserves an aftermarket for itself. The Commission presumes that prices are higher or quality is lower in such a proprietary aftermarket than would have been the case if rivals were allowed to compete in the aftermarket.[152] This is, however, a rebuttable presumption, and the supplier may be able to establish that competition in the aftermarket would not improve the welfare of the customers in the aftermarket. This could, for example, be done by showing that in similar aftermarkets with competition between several suppliers, the prices are not lower or the quality higher. In such a case the supplier is not behaving abusively by reserving the aftermarket for itself.

246. It is useful to distinguish between customers who may buy the primary product in the future and customers who have already bought the primary product.[153] As described in detail below, competition in the primary market may allow future customers to avoid negative effects of high aftermarket prices. However, competition in the primary market does not protect customers who have already bought the primary product from being harmed if the supplier changes policy and raises prices or lowers quality after the customer bought the primary product.

247. Future customers may be protected from harm by competition in the primary product market. If the supplier cannot rebut the presumption of high aftermarket prices, the assessment should therefore consider the link between the aftermarket and the primary market, which has been ignored at the market definition stage and in the dominance analysis. A supplier of a primary product will consider the effects on sales in the primary market of the price and quality of products and services in the aftermarket. The supplier may want to compensate for high aftermarket prices by lowering prices in the primary market. Such lower prices in the primary market could imply that high aftermarket prices are not abusive, if the overall price the customer pays for the "bundle" of primary and secondary products is not abusive.

248. High aftermarket prices may lead to lower primary product prices for two reasons. First, consumers may base their purchasing decision not only on the price of the primary product but also on the aftermarket prices. Secondly, even if consumers are not basing their choice on accurate life cycle calculations, the competitors of the supplier in the primary market are supposedly able to make such calculations and may compete hard on primary market prices while enjoying profits on the subsequent aftermarket sales. As a result, the supplier may not be enjoying high overall ("bundle" or "systems") profits even though aftermarket prices are high.

---

[152] In the following, the expression "higher prices" in the aftermarket should be understood to also cover the possibility of lower quality.

[153] Although some of those who have already bought the primary product probably are potential future customers as well; for instance, when they need to replace their existing equipment. However, as noted below, even with respect to future purchases their situation may be different from other customers who have not yet bought the primary product.

249. In both scenarios described above, primary market competition may therefore allow consumers to avoid suffering from high aftermarket prices. However, the two scenarios differ in what can be shown in a *prima facie* case of abuse of dominant position. Whether consumers base their purchasing decisions on life cycle calculations or not is an observable aspect of the market. It should therefore be part of a *prima facie* case to show that it is not likely that life cycle calculations protect consumers from the supplier's aftermarket policy. On the contrary, whether the supplier makes high systems profits is not likely to be possible for outsiders to observe. It is therefore up to the supplier to show as an objective justification that it does not make such high profits.

250. The amount of information available to consumers is an important factor for assessing the extent to which the customers, when buying the primary product, make a calculation of the overall cost of the bundle. The information available must enable customers to make accurate calculations. This is more likely to be so when the secondary product is a consumable used with the primary product in fixed proportions, than in the case of spare parts and services.

251. Moreover, for this competitive constraint from the primary market to function effectively, a sufficient number of customers must engage in life cycle cost calculations, and the supplier concerned must not be able to discriminate between customers that make such calculations and those that do not. For instance, a primary product may be purchased by both private and professional buyers. If only professional buyers make (accurate) life cycle calculations, the supplier may still have substantial market power in the aftermarket *vis-à-vis* private customers.

252. Existing customers may also be protected by competition in the primary market, if this leads the supplier to maintain low prices in the aftermarket or allow other suppliers to be active in the aftermarket. However, a supplier may at a certain point decide to change policy and raise prices in the aftermarket or restrict the possibilities of other suppliers in the aftermarket. It may attempt to partly compensate the effects of this on future customers by lowering prices in the primary market or promising future customers lower aftermarket prices than existing customers. This change in policy may lead to significant losses to existing customers and may therefore be an abuse of dominant position. Such a policy change is sometimes called "installed-base opportunism".

253. Installed-base opportunism is more likely to take place when the future prospects for the supplier in the market are poor, for instance because the market is declining or the supplier has decided to exit or is loosing market share. On the other hand, even a supplier in these conditions may hesitate to engage in installed-base opportunism if such behaviour can hurt its reputation in other markets.

254. Some customers may be protected against installed-base opportunism by contractual provisions such as long-term service contracts, non-discrimination clauses or the possibility to switch to other suppliers of primary or aftermarket products. If many customers are protected in this way, the overall damage to customers from the change in policy may be relatively limited.

10.2.4 POSSIBLE DEFENCES: OBJECTIVE JUSTIFICATIONS AND EFFICIENCIES

255. The dominant company may bring forward as possible objective justifications arguments similar to those described in the tying section; that is, arguments related to, for instance, the guarantee of the quality and good usage of the products. The comments made on such arguments in the tying section apply equally here.

256. Moreover, the dominant company may argue that strong competition in the primary market means that it is not enjoying high systems profits, even if customers are not basing their choice on accurate life cycle calculations. This may be the case even if aftermarket prices are high, since lower primary market prices may compensate for this. As the customers in the primary market and the aftermarket are the same, the customers paying higher prices in the aftermarket may be compensated by the lower prices they pay in the primary market.

257. The dominant company will thus have to show that the margin it earns on the sale of a system is not unusually high. This could be shown by various methods, including the following: First, the company could show that its system margin is similar to margins that it earns in other markets or for other products, where there is no proprietary aftermarket. Second, the company could show that the price of a system is similar to the price of systems in either the same or other markets sold by other companies without a proprietary product market. Third, the company could show that its system margin allows it a return on capital in the relevant market that is not unusually high for the industry sector in question.