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**FUNDAMENTAL ISSUES CONCERNING ABUSE UNDER ARTICLE 82 EC**

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The concept of “abuse” of a dominant position under Article 82 has given rise to much difficulty. I suggest that, at least in relation to certain important issues, that difficulty has been largely unnecessary, and that if the law were properly understood, it is clear and satisfactory, both from a legal and an economic viewpoint.

It is, or by now ought to be, clear that there are three kinds of abuse under Article 82:

- exploitative abuses, by which the dominant enterprise takes excessive advantage of its market power (Article 82(a))
- exclusionary or anticompetitive abuses, by which the dominant enterprise restricts competition still further (Article 82(b))<sup>2</sup>
- discriminatory abuses, by which the dominant enterprise differentiates seriously and unjustifiably between companies with which it is contracting (Article 82(c)).

(“Tying”, which is contrary to Article 82(d), can be either exploitative or exclusionary, or both).

The analysis required for each of these three kinds of abuse is so different that three separate concepts are required. However, exploitative abuse cases arise rarely in practice, and discriminatory abuses are the subject of an explicit prohibition in Article 82 which,

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<sup>2</sup> Temple Lang, Anticompetitive non-pricing abuses under European and national antitrust law, in Hawk (ed.), 2003 Fordham Corporate Law Institute (2004) 235-340; Temple Lang and O’Donoghue, Defining legitimate competition: how to clarify pricing abuses under Article 82 EC, 26 Fordham International Law Journal (2002) 83-162; Ehlermann & Atanasiu (eds.) 2003 European Competition Law Annual – What is an abuse of a dominant position? (Hart, 2005 in press); Eilmansberger, How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses, 42 Common Market Law Review (2005) 129-177; Elhauge, Defining better monopolization standards, 56 Stanford Law Review (2003) 253-344; Elhauge, Why above-cost price costs to drive out entrants are not predatory and the implications for defining costs and market power, 112 Yale L.J. 681-795 2003.

subject to clarification of a couple of issues discussed below, is clear and operational. The greatest difficulty, and the difficulty which I believe to be unnecessary, arises in defining exclusionary or anticompetitive abuses. As these are, or are alleged to be, much the most common kind of abuse in practice, and as the discussion of these abuses raises issues relevant to the other kinds of abuse, it is convenient to begin by discussing them.

Clarification of the issues considered here is more urgently needed than ever, because under Article 3 of Reg. 1/2003 national competition authorities are now obliged to apply Article 82 in appropriate cases, and because a number of national competition laws on unilateral conduct are intended to correspond to Article 82. If the Commission's interpretation of Article 82 is unclear, as it is in many respects, or if it is wrong,<sup>3</sup> the consequences everywhere will be serious.

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<sup>3</sup> Temple Lang, European competition law and compulsory licensing of intellectual property rights – a comprehensive principle, 4 *Europaettslig Tidskrift* (2004) 558-588, at pp. 580-588.

## Part I

### Exclusionary abuses

Article 82 (b) prohibits: “limiting production, markets or technical development to the prejudice of consumers”. The Court of Justice has on several occasions ruled that this clause prohibits conduct by which the dominant enterprise limits the production, marketing or technical development of its competitors.<sup>4</sup> It is not confined to conduct by which the dominant enterprise limits its own production, marketing or technical development, to keep up the prices of the goods or services which it is selling.

In other words, Article 82(b) prohibits all kinds of exclusionary conduct, if it causes prejudice to consumers. It is difficult to think of any kind of conduct by a dominant enterprise which should be regarded as anticompetitive which does not directly or indirectly limit the possibilities of competitors either to produce, to market, or to develop their products or services.

In *Arkin v. Borchard Lines* and others, High Court, London, [2003] EWHC 687, April 10, 2003, Colman J. said (at para. 293) “quite simply, an undertaking in a dominant position must not reduce or attempt to reduce the ability of other participants in the market or of the would-be entrants into the market to compete. This principle palpably underlies the reasoning of the European courts in all the authorities ...”

The Office of Fair Trading notice on the UK equivalent of Article 82<sup>5</sup> concisely summarises this by saying that what is prohibited under UK law (which is intended to correspond to Article 82) is “conduct which ... removes or limits competition from existing competitors, or because it excludes new undertakings from entering the market ...”

Once this is recalled, the question arises: why has this not been generally understood? There seem to be several reasons:

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<sup>4</sup> Joined cases 40-48/73 *Suiker Unie and others (Sugar Cartel)* [1975] ECR 1663, paras. 399, 482-483, and in particular paras. 523-527; Case 41/83, *Italy v. Commission (British Telecommunications)*, [1985] ECR 873; Case 311/84, *Telemarketing CBEM* [1985] ECR 3261, para. 26; Case 53/87, *CICR and Maxicar v. Renault* [1988] ECR 6039; Case 238/87, *Volvo v. Veng* [1988] ECR 6211; joined cases C-241/91P, *RTE and ITP (“Magill”)* [1995] ECR I 743 at para. 54; Case C-41/90, *Höfner and Elsnner* [1991] ECR I 1979 at pp. 2017-2018 in particular para. 30; Case C-55/96, *Job Centre* [1977] ECR I 7119 at pp. 7149-7150 paras. 31-36; Case C-258/98, *Carra*, [2000] ECR I 4217; Temple Lang, Abuse of dominant positions in European Community law, present and future: some aspects, in Hawk (ed.), Fifth Annual Fordham Corporate Law Institute (1979) 25-83, 52, 60. This point is not mentioned in Faull & Nikpay, *The EC Law of Competition* (1999) 194, but is correctly stated in e.g., Bellamy & Child, *European Community Law of Competition* (5<sup>th</sup> ed., 2001) 754-755 and in Ritter, Braun and Rawlinson, *EC Competition Law – a practitioner’s guide* (2<sup>nd</sup> ed., 2000) pp. 362-363; and in Waelbroeck & Frignani, *European Competition Law* (1999) p. 551 ff and in Mercier, Mach, Gilliéron & Affotten, *Grands principes du droit de la concurrence* (1999) 260-265, among others.

See also Gyselen, Abuse of monopoly power within the meaning of Article 86 of the EEC Treaty: Recent developments, in Hawk (ed.), 1989 Fordham Corporate Law Institute (1990) 597-650 at pp. 613-617, 635-636; Kauper, Whither Article 86? Observations on excessive prices and refusals to deal, in Hawk (ed.), 1989 op. cit. 651-686 at pp. 668-685.

<sup>5</sup> Office of Fair Trading, *The Chapter II Prohibition* (2004).

- The *Sugar cartel*<sup>6</sup> judgment is primarily concerned with Article 81 issues. It is very long, and it was given in 1975. It is not often re-read.
- By 1975, the Court had delivered the *Continental Can*<sup>7</sup> judgment. That judgment ruled that it was contrary to Article 82 (as it now is) for a dominant company to reduce or restrict competition by acquiring a significant competitor. However, the Court did not attribute this conclusion to any particular one of the four examples of abuse given in Article 82.
- This led the Commission, and the Community Courts, to underestimate the need to say which clause of Article 82 was being applied in any given case.
- Indeed, it led to the impression that there might be a residual fifth category of abuses which did not fall within any of the four clauses of Article 82. This impression was confirmed by the fact that in *Commercial Solvents*<sup>8</sup> the Court declared a refusal to contract to be an abuse, although it is not expressly or explicitly prohibited by any of the clauses of Article 82. Textbook writers tended to stress that the four clauses do not explicitly and exhaustively describe all kinds of abuse, and to ignore the need for limiting principles.
- It was not until the judgment in *Atlantic Container Lines*<sup>9</sup> in 2003 that the Community Courts made it clear that what had repeatedly been described as the “special responsibility” of dominant enterprises merely means that they are subject to Article 82 and non-dominant firms are not. The phrase does not mean that there is an unspecified fifth category of abuses outside the four clauses of Article 82. (Indeed, since Article 82 clearly prohibits exploitative, exclusionary and discriminatory conduct, it is difficult if not impossible to imagine what kind of conduct a fifth principle would prevent).
- The Commission has never had a clear plan or concept for defining any one of the three basic kinds of abuse. It has decided Article 82 cases opportunistically, as they arose from complaints, without having any overall strategy or plan, since *Continental Can* (which was of course an effort, ultimately successful, to get mergers made subject to Community competition rules). The Commission has never seriously tried to formulate a general test for distinguishing between legitimate and unlawful competition.
- The significance of the more recent judgments in which the Community Courts repeated that Article 82(b) prohibits conduct limiting the possibilities open to competitors has been underestimated.
- It is only recently that it began to be widely understood that a vague notion of abuse, without any limiting principles, is likely to lead to seriously anticompetitive decisions, by the Commission itself, and by national competition authorities and courts following the Commission's inadequately considered and ill-defined approach.

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<sup>6</sup> Joined Cases 40-48/73, *Suiker Unie and others*, [1975] ECR 1663.

<sup>7</sup> Case 6/72, *Continental Can* [1973] ECR 215.

<sup>8</sup> Cases 6 and 7/73, *Commercial Solvents* [1974] ECR 223.

<sup>9</sup> Case T-191/98 and others, *Atlantic Container Lines*, [2003] ECR II \_\_\_\_\_.

- Since the Commission has used the unsatisfactory “fidelity inducing” test, the Commission has made it more difficult to adopt the test based on the words of the Treaty.<sup>10</sup>
- The Court of First Instance in the second *Michelin* case<sup>11</sup> was so convinced by the evidence of exclusionary intent shown by Michelin’s “club” and service contract arrangements that it was not sufficiently critical of the test suggested by the Commission for rebates.
- The Office of Fair Trading competition law guideline on “The Chapter II Prohibition” (2004, OFT, T402) does not attempt an exhaustive or comprehensive definition of exclusionary abuses.

None of these explanations puts the interpretation of Article 82(b), as first stated in the *Sugar cartel* judgment, into question. Indeed, it cannot be seriously questioned that conduct which limits the production of competitors (*e.g.*, by depriving them of raw materials or important components) or which limits their marketing (*e.g.*, by depriving them of access to customers, by making exclusive buying arrangements with the customers) or which limits their technical development (*e.g.*, by preventing them from getting technology which would otherwise be available to them) is normally illegal, if there is harm to consumers as a result. Those kinds of conduct would be abuses on any possible interpretation of Article 82, and there is no reason to suggest that they are prohibited by any clauses other than Article 82(b). Any conduct which creates handicaps or difficulties for competitors which would not otherwise exist, and which are not due merely to offering lower prices or better value (because low prices and good value benefit consumers), should be illegal. There is no doubt that Article 82(b) prohibits a broad range of exclusionary conduct: the only question is what the limiting principles are.

Several comments are necessary:

- The Court of Justice has defined anticompetitive abuse (although it did not use that phrase) as involving “recourse to methods different from those which condition normal competition in products or services on the basis of the transactions 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”.<sup>12</sup> Interference with competitors’ possibilities is not “normal competition”, but “hinders” the maintenance or growth of competition.
- The normal rules of causation mean that conduct is illegal only if it “limits” the possibilities open to competitors in some way in which they would not otherwise have been limited.<sup>13</sup>

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<sup>10</sup> It may be argued that “fidelity inducing” is an inaccurate phrase, and that what is intended is to prohibit anything which “penalizes” a customer which buys from a rival. If this were what is intended, the test would correspond closely to the “limiting production” test. However, if this were intended, it would be wrong for the Commission to object to rebate schemes which involve no “penalty”, but which merely offer incentives to deal with the dominant company. A rebate cannot be illegal merely because rivals may find it difficult to match it.

<sup>11</sup> Case T-203/01, *Michelin* [2003] ECR II.

<sup>12</sup> Case 85/76, *Hoffmann LaRoche* [1979] ECR 461 at para. 91.

<sup>13</sup> If the limitation is not due to the conduct of the dominant enterprise, the conduct cannot be illegal. In the *National Carbonising* case, the Commission concluded that the complainant was making losses

- The illegal conduct need not involve taking advantage of market power: the *Continental Can* judgment made it clear that conduct which substantially reduces competition may be contrary to Article 82 even if it does not need or use market power.
- Article 82(b) avoids and resolves the insoluble difficulties caused by the Commission's use of "fidelity inducing" as a test for illegal pricing behaviour under Article 82. This test is hopelessly ambiguous, because a dominant enterprise which offers the lowest price or the best value will lead customers to buy only from it, obtaining "fidelity" in an entirely legitimate and desirable way. The Commission's test, which was adopted without serious consideration of the terms of Article 82(b), provides no way of distinguishing between legitimate and unlawful behaviour.
- Article 82(b), correctly interpreted in the light of the case law of the Community Courts, provides a comprehensive and useful rule applying to both pricing and non-pricing abuses.
- Article 82(b) provides the only legal basis for dealing with exclusionary or anticompetitive abuses. Article 82(a) and Article 82(c) plainly do not deal, except incidentally and partially, with exclusionary abuses, and Article 82(c) applies only to a narrow category of cases. Other tests which have been suggested are economic suggestions, which may be useful but which have no legal basis anywhere in Article 82.
- Article 82(b), correctly interpreted, protects competition and not competitors, because it prohibits interference with competitors' ability to compete, without protecting them from lawful competition.
- It provides a test for dealing with contractual arrangements restricting the ability or freedom to compete of companies with which the dominant enterprise has *e.g.*, technology transfer arrangements.
- It provides a test for dealing with "reprisal abuses", that is, behaviour by the dominant enterprise designed to discourage other companies from competing aggressively or from complaining to a competition authority, or to punish them for having done so (discussed below).
- The interpretation of Article 82(b) as applying to limiting the possibilities open to competitors does not exclude its application, in appropriate (no doubt unusual and extreme) circumstances, to conduct limiting the dominant enterprise's own production, marketing or technical development.
- This interpretation applies clearly and satisfactorily also to dominant buyers: they are not permitted to limit the production, marketing or

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because, for both companies, industrial coke was profitable and domestic coke was not (domestic coke was subject to competition from gas and electricity). In periods of reduced industrial activity, the dominant company sold a higher proportion of industrial coke than the complainant, because it had more long-term industrial supply contracts. The dominant company, due to its position, was better placed to make long-term contracts to supply bulk buyers, but this advantage was not one which could be complained of under competition law. The fact that this advantage was primarily a marketing advantage and not in itself a cost advantage did not affect the conclusion. A dominant company is never required to compensate its competitors for disadvantages which they may be under (unless of course, it has caused them). OJ. No L 35/6, October 2, 1976.

technical development of companies which would otherwise be able to sell to them or to their competitors.

The words of Article 82(b) provide the limiting principles which are needed. Only conduct which “limits” possibilities which would otherwise be open to competitors is prohibited. Conduct which makes difficulties for them without limiting their possibilities of offering their products on the market, because it makes the products of the dominant enterprise cheaper or more attractive, is legal, because it benefits consumers, and it does not “limit” the competitors' ability to improve their products or to offer them for sale to willing buyers who are free to buy.

#### The “limiting production” test for exclusionary abuses

The “limiting production” test describes well the key feature of exclusionary conduct, that it makes the competitors' product or service less attractive or less available, rather than making the dominant company's product better or more available. It must be undesirable to create handicaps or difficulties for competitors which do not result merely from offering better products than they do. Offering better or cheaper products must be legal, however great the difficulties it causes to rivals. But creating difficulties for competitors in other ways cannot be legal.

The “limiting production” test would mean that discounts are illegal only if they are conditional on exclusivity or near-exclusivity, or conditional on reaching quantities deliberately calculated by both buyers and sellers to be the buyer's total requirements. A seller may suspect that a quantity suggested by a buyer to get a better price represents the buyers' estimate of its requirements in the relevant period. But sellers must be free to offer discounts for quantity, since that is procompetitive, and a seller cannot know what the buyer's total requirements are unless the buyer discloses them. A buyer might be consistently choosing to buy from more than one source, to maximize the benefits of competition in the long term. This conclusion is not significantly more radical than the “equally efficient competitor” test, and the results which it produces are rational from both a legal and economic viewpoint. Nor is it significantly more radical than the profit sacrifice test, except that it produces clearer results. (The profit sacrifice test, for example, seems to imply that rebates conditional on exclusivity are illegal only if the revenue sacrificed is greater than the advantage gained by denying rivals access to the buyer in question: how are the latter figures to be estimated? And if it could be calculated, would a rational seller ever give such big rebates?)

Several other comments on this interpretation of Article 82(b) may be useful:

- It allows dominant companies to invest in capital assets and in patents and other intellectual property rights, because even when the investment may incidentally limit the possibilities open to its competitors, it normally benefits consumers for a dominant company to invest and expand its business in the long term. Intellectual property legislation is based on the assumption that in the long term consumers benefit if companies have the right to obtain the monopolies created by that legislation. In exceptional situations, the rule called “essential facilities” may be invoked.
- This interpretation of Article 82(b) allows efficiency justifications for what would otherwise be exclusionary practices. For example, it is normally exclusionary for a customer to agree to buy all of its

requirements from the dominant enterprise. But this would be justified if the dominant enterprise had needed to invest in new production capacity to meet the buyer's requirements, and if the new capacity would be economic only if it was certain that the extra production would be bought by the customer in question. Similarly, a loss-minimising pricing policy, or market-developing prices below average total cost, are clearly lawful under this interpretation. Difficult and controversial supposed abuses such as vexatious litigation and artificial multiplication of trade marks or patents can be dealt with by this interpretation, because these kinds of conduct would be unlawful if the principal or only effect of the conduct would be to create handicaps for competitors.

- This interpretation probably does change one view of Article 82. It has been assumed that unfair or misleading advertising, or enticing away executives, were not prohibited by Article 82, because they are not the result of using market power. That argument was incorrect, because it was contrary to the *Continental Can* judgment. The better view seems to be that if a dominant enterprise indulges in advertising untruthfully misrepresenting or criticising its competitors' products, or "poaching" its executives, that might be contrary to Article 82(b), because it would in practice limit their ability to sell their products.

Tests which have been suggested in the USA for use under Section 2 of the Sherman Act might be used under Article 82, although no effort has been made to show that any of them are compatible with the rather different words of that Article. The "profit sacrifice" test would suggest that conduct of a dominant enterprise is illegal if it involves a deliberate sacrifice of profit which can be explained only by exclusionary intent. The "equally efficient competitor" test suggests that any conduct which would harm a competitor which was as efficient as the dominant enterprise should be illegal. The "entry deterrence" test suggests that any conduct which would deter entry should be looked at critically. The "raising rivals' costs" test suggests that any conduct which raises the costs necessarily incurred by competitors should be illegal. For a variety of reasons, none of these tests seem satisfactory for the purposes of Article 82.

The "limiting production to the prejudice of consumers" test under Article 82(b) has several advantages in comparison with the other suggested tests:

- It is based on the words of the Treaty. The other two tests are suggested by economic theory and have no legal basis in European law (although they are useful as ways of verifying the "limiting production" test).
- It offers a test for distinguishing between legitimate competition and unlawful conduct.
- It offers an answer to the question of economies of scale (discussed below).
- It is consistent with, and provides a rational basis for, all of the EU judgments and decisions which are generally regarded as correct, clear, and satisfactory.
- The test can be applied by the dominant enterprise without knowing confidential details of its competitors' costs and without waiting to see what effects the conduct has on the market.

- It offers an intelligible basis for the *Continental Can* judgment, which otherwise appears to be (and perhaps was) a striking example of judicial legislation.
- It does not prevent the use of the other economic tests in circumstances in which they seem valid and useful, as supplementary tests.
- It provides a useful test for cases of “leverage” in second markets.<sup>14</sup>
- It offers an intelligible basis for dealing with refusal to deal cases, where the first refusal to deal is in question. These are the most difficult cases for which to provide a clear analysis, and which the other tests do not answer clearly. The “limiting production” test suggests that a refusal to contract is unlawful if it reduces existing competition or prevents the putting on the market of a new kind of product for which there is a clear and unsatisfied demand, or if it suppresses an existing product which consumers should be free to go on using. (Other cases involve discrimination, or the duty to contract is a remedy for some other identified abuse,<sup>15</sup> whether exploitative or exclusionary).
- It explains the distinction between a rebate conditional on exclusivity and the same rebate given without a condition: it is the condition, not the rebate, which is illegal, because it limits rivals’ production or marketing without any benefit to consumers.

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<sup>14</sup> Case 6/73 *Commercial Solvents* 1974 ECR 223; Case 238/87 *Volvo v. Veng*, [1988] ECR 6211; Case 53/87, *CICRA v. Renault*, [1988] ECR 6039; Case 311/84 *CBEM v. CNT and IPB* (“*Telemarketing*”) 1985 ECR 3261; Case C-310/93P, *BPB and British Gypsum* [1995] ECR I 865; Case C-62/86 *AKZO* 1991 ECR I 3359; Case C-18/88, *GB-Inno-BM*, 1991 ECR I 5941, paras. 19-28; Case C-260/89, *ERT*, 1991 ECR I 2925, para. 22-26; Case T-65/89 *BPB Industries and British Gypsum* 1993 ECR II 389; Case T-83/91, *Tetra Pak*, 1994 ECR II 755 and Case C-333/94P, *Tetra Pak*, 1996 ECR I 5951 paras. 21-32 and conclusions of Advocate General Colomer at pp. 5969-5979; Case C-241/91P, *RTE and ITP*, 1995 ECR I 743. Substantially the same legal principles apply whether the dominant firm is vertically or horizontally integrated. Leverage is a useful metaphor to describe situations in which a company has market power in the production of a product or service on one market which is an important input on a second, related, market. If the company uses its power to control the supply of the input in such a way as to restrict competition on the second market, (e.g., by cutting off access to an input needed on the second market), its use of this “leverage” is likely to be contrary to Article 82. Tying, bundling, and the essential facilities principle are all examples of “leverage”. But even for a dominant enterprise it must be legitimate to enjoy, and to pass on to its customers, the advantages of financial strength, integration, creditworthiness, management experience and reputation, and the benefits of economies of scale and scope, even if the effect is that, because it alone can spread its costs over two or more markets, it can charge lower prices than any other company. It is lawful to offer better bargains (unless the price is predatory). It is legitimate to offer two products which can be used together, even if no other company can produce them both. It is legitimate to improve one of two products, or both of them, which need to be used together, even if the effect is that the improved product(s) do not work with the unmodified versions of the competitors’ products. It is legitimate to accept a low rate of profit in one market, when the dominant company is making large profits in another market. It is legitimate to refuse to subsidize or help a competitor, or to refuse to share a competitive advantage with competitors.

In applying the principle that it is unlawful to use power on one market to restrict competition on another, as always the important distinction is between using an advantage which has been legitimately obtained (even if competitors have no comparable advantages), and taking action which “limits” or creates a handicap or an obstacle for competitors which would not otherwise exist, and which is not merely the result of offering better bargains, or a natural consequence of a lawful advantage enjoyed by the dominant company. Only the latter is unlawful.

<sup>15</sup> Temple Lang, *Compulsory licensing of intellectual property rights – a comprehensive solution*, 4 *Europarättslig Tidskrift* (2004) 558-588.

- It offers a useful and sound approach to cases in which the supposed exclusionary effect results from a combination of several kinds of conduct, such as *Irish Sugar* and *CEWAL*.<sup>16</sup>

#### Comparison of “limiting production” with other tests<sup>17</sup>

- The “profit sacrifice” test is unsatisfactory both in theory and in practice for several reasons which do not apply to the “limiting production” test. It does not prohibit conduct which excludes competitors but costs the dominant enterprise nothing. Sacrifice of profit by the dominant company does not necessarily harm consumers; indeed, it may benefit them, at least in the short term. Profit may be sacrificed in the short term for long-term pro-competitive purposes which benefit consumers. Predation, which is profit-sacrificing in the short term, may if successful lead to higher overall profits in the long term, so may involve no long term sacrifice of profits at all.<sup>18</sup>
- The “limiting production” test deals with price squeeze cases better than the “profit sacrifice” test, because a price squeeze may not involve any sacrifice of profit overall by a vertically integrated dominant company.
- The “limiting production” test is compatible with the “equally efficient competitor” test, but expresses the test more usefully. If a competitor is equally efficient in every respect, it can be unjustifiably disadvantaged or handicapped only by conduct which creates a difficulty which it would not otherwise have because it limits its production (*e.g.*, by cutting off supply of a raw material), or its marketing (by denying it access to buyers, *e.g.*, through exclusive agreements), or its technical development (*e.g.*, by depriving it of access to technology). Any other kind of harm would be due only to the supposedly dominant company charging lower prices, *i.e.*, accepting a lower profit margin.
- The “entry deterrence” test is unsatisfactory, because it fails to distinguish between the effects of procompetitive behaviour by the incumbent, including the results of efficiency, economies of scale, and substantial fixed capital investment, on one hand, and anticompetitive conduct, on the other.

<sup>16</sup> Case 27/76 *United Brands* 1978 ECR 207; Case 53/87, *CICRA v. Renault*, [1988] ECR 6039, 6073; T-83/91 *Tetra Pak*, 1994 ECR II 755 and 1996 ECR 5951; Case T-65/89 *British Gypsum* [1993] ECR II 389; Case T-228/97, *Irish Sugar*, 1999 ECR II 2969; C-395/96P, *Compagnie Maritime Belge* [2000] ECR I 1365.

In the Commission Merger Regulation case *Microsoft/Liberty Media/Telewest*, the Commission argued that Microsoft regularly set up working groups to influence buyers’ choice of software and used its minority shareholdings to arrange this: Thirtieth Report on Competition Policy (2000) 186.

In predatory prices cases under the second *Akzo* rule (price between average variable costs and average total costs, and evidence of intention to exclude a competitor) the evidence will necessarily be cumulative.

<sup>17</sup> See Elhauge, Defining better monopolization standards, 56 *Stanford Law Review* (2003) 253-344.

<sup>18</sup> The official US Government and Federal Trade Commission brief on *Verizon Communications v. Trinko* argued that “in the context of an alleged refusal to assist a rival, conduct is exclusionary only if it would not make business or economic sense apart from its tendency to reduce or eliminate competition”.

- The “raising rivals’ costs” test is unsatisfactory because it provides no means of assessing the welfare effects of the conduct, and therefore cannot be applied to practices which lead to both efficiencies and anticompetitive harm.

Some economists, without claiming to state a precise test, have suggested that any valid test must be based on the economic effects of the conduct. Some Commission officials have given the impression that if a competitor leaves the market, that is evidence of abuse. These views, as expressed, are wrong, for at least two fundamental reasons. First, legitimate competition by the dominant company, offering the best product or the lowest price, may cause competitors to leave the market. So the fact that any of them leave indicates nothing about whether the conduct was legal or not. Second, no test is workable which is inherently incapable of being used by the dominant enterprise before it begins the conduct in question. A test which depends on waiting to see if competitors later leave the market is unworkable and should not be considered. The lawfulness of conduct does not depend on the vulnerability of competitors.<sup>19</sup>

#### Criticisms of the “limiting production” test

One criticism which has been made of the “limiting production” test is that it appears to be inconsistent with dicta in several judgments of the Community Courts, in particular *Irish Sugar* and *CEWAL*. Several comments are appropriate:

- The “limiting production” test is in the Treaty.
- No other test is suggested in the case law (except the plainly unsatisfactory “fidelity-inducing” test).
- The test is consistent with the results in both cases: the production of rivals, and their freedom to market their products or services, was undoubtedly being deliberately limited in both cases.
- Both cases involved simultaneous use of several kinds of conduct to achieve the clear exclusionary aim. In these circumstances it would not necessarily be correct to consider separate kinds of conduct in isolation.
- The Community Courts, in both cases, were deciding whether individual Commission decisions were valid. Since the Commission had not proposed any comprehensive test, the Courts should not be criticized for not having adopted one. The judgments could hardly have been expected to be very much clearer than the decisions. Courts cannot be expected always to give judgments which are much better than the arguments which have been made to them.

A second criticism of the “limiting production” test is, in substance, that it may be “unfair” if a dominant firm takes advantage of economies of scale which enable it to charge lower prices than its smaller rivals. So it is said that the “limiting production” test is wrong, because the test would not prevent this. A dominant firm passing on unit cost savings due to economies of scale which its rivals have not got would not be, in the usual meaning of the

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<sup>19</sup> Eilmansberger, op.cit. supra f.n. 2 seems to imply that some otherwise legitimate conduct could be illegal only because of its effects: pp. 143-146. But exit can be induced, or entry deterred, or customers’ purchasing behaviour determined, by the dominant enterprise offering the lowest prices or the best value.

phrase, “limiting” its rivals’ production, and certainly not limiting it “to the prejudice of consumers”, which must be an important part of the test.

But it is not, and certainly should not be, illegal to pass on cost savings due to economies of scale, and rivals’ production is not “limited” in this way differently from the effects of the dominant firm selling at lower prices for any other reason, which must be legal. The “limiting production” test is valuable precisely because it enables a distinction to be drawn between *e.g.*, rebates conditional on buying only from the dominant company (where the condition, not the reduced price, limits the possibilities of rivals to sell), and generous rebates which rivals, for whatever reason, cannot match.

In short, neither criticism is valid.

### Conclusion on exclusionary abuses

The most authoritative definition of an exclusionary or anticompetitive abuse therefore is conduct which limits the production, marketing or technical development of competitors of the dominant enterprise, to the prejudice of consumers, by creating handicaps, difficulties or barriers for competitors which would not otherwise exist or be as serious. Such conduct may lead to change in the market structure, but can be illegal whether or not it does so.

This is a clear, simple rule, which naturally does not solve every problem or answer every question, but which seems very much more satisfactory and very much better based in the case law than any other definition which has been suggested.

If this is broadly accepted, it raises another question. What could be the purpose of having a national competition law on unilateral conduct which was “stricter”, in the words of Article 3(2) of Regulation 1/2003, than Article 82(b)? The only obvious reason for having a “stricter” rule on exclusionary conduct would be to protect competitors from competition. However, if there was a national law rule the principal distinguishing effect of which was to protect competitors against competition, that would be contrary to Article 3 and Article 10 EC, because the national law would be interfering with the achievement of Community policy on competition. If this was so, Article 3 of Regulation 1/2003 would not protect the national law, and decisions based on the national law would be open to challenge under Community law.

### Reprisal abuses

In a series of judgments beginning with *United Brands*,<sup>20</sup> the Community Courts have repeated a formula to the effect that although a dominant enterprise may defend its interests, it may not abuse its position when it does so. It is convenient to discuss this type of abuse

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<sup>20</sup> Case 27/76 *United Brands*, 1978 ECR 207, at paras. 189-191; Case T-65/89 *British Gypsum* [1993] ECR II 389 at p. 418; joined cases T-24/93, *Compagnie Maritime Belge* [1996] ECR II 1201 at p. 1243 and 1252; Case T-133/95 *International Express Carriers Conference*, [1998] ECR II 3645; Case T-111/96, *ITT Promedia*, [1998] ECR II 2937 para. 60; Case T-5/97, *Industrie des Poudres Sphériques*, [2000] ECR II 3755 paras. 211-218; see also Case T-228/97, *Irish Sugar*, 1999 ECR II-2965.

separately, although it should in most or all cases be regarded as a sub-set of situations under Article 82(b).

There are three principles involved:

1. If the conduct is an abuse, it is illegal, whatever may have prompted it.
2. If the conduct is intended to cause, or inherently is primarily likely to cause, loss or difficulties for other companies rather than benefiting the dominant enterprise, it is illegal, at least if there is evidence that it was adopted to discourage or punish another company from competing vigorously or from complaining to a competition authority or a court. This is so in particular when the dominant company is not prepared to contract with the complainant even on the same terms on which it usually contracts with other companies.
3. In all other situations, the fact that the dominant enterprise began to compete more aggressively in response to the actions of other companies is lawful under Article 82.

In the “reprisal” cases, the relevant provision could only have been Article 82(b), whether this was mentioned or not. A dominant enterprise “limits” or tries to limit the possibilities available to another company if it punishes the other company for competing vigorously, or discourages it from doing so. Both the possibilities available to the customers of the dominant company and those available to its competitors may be “limited” in this way. (Article 82(b) must apply when the conduct limits the production, marketing or development of the dominant company’s customers, although that does not seem to have been stated explicitly by the Court. Normally a dominant enterprise has no reason to limit the possibilities available to its customers, so the question does not arise).

In a number of these cases, the Community Courts considered that they were dealing with a well-recognised type of exclusionary or anticompetitive abuse. On that basis, it is clearly reasonable to say that if the dominant enterprise has committed an abuse, the fact that it may have done so as a reaction to a competitor’s initiative is not a defence. This is the first principle suggested above.

A clause in a contract enabling the dominant company to terminate the contract if the other party complained to a competition authority or competed aggressively would be illegal and contrary to public policy under the principle stated in *Eco-Swiss China v. Benetton*.<sup>21</sup>

The issues are more difficult when the conduct is not an example of a recognised kind of abuse, and it is suggested that the dominant company adopted it to punish the other company for competing, to discourage it or others from competing aggressively in future, or to punish or discourage complaints to competition authorities. In other words, can the supposed reason for the harmful conduct be enough to make it unlawful if it would not otherwise be so?

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<sup>21</sup> Case C-126/97, [1999] ECR I-3055.

Several comments can be made:

- If that was the real reason, it would achieve its purpose only if the company concerned (and other companies) were likely to suspect or understand it. However, they would not need to be certain: fear might be sufficient.
- Many companies are afraid to complain to competition authorities (except on an anonymous basis, which may not be possible) because of fear of reprisals, the reasons for which they might not be able to prove, and from which the competition authority might be unable to protect them.
- Even a dominant company is not always obliged to go on selling to a customer, so termination of supplies is not necessarily unlawful, and excuses can be found.
- A dominant company must always have some reason for terminating a profitable relationship. If the principal or only effect of termination is to harm the other company without benefiting the dominant enterprise directly, the reason must be that the dominant company intended to punish or to warn. This argument can be made even without internal evidence of the dominant company's intentions or purpose.<sup>22</sup>
- Another useful test is whether the dominant company's change of policy is selective (in which case it must be based on something specific to the companies concerned) or is generalised, and applied to all (in which case some policy explanation must be available).
- In practice, the conduct in question does not normally occur in isolation, but at substantially the same time as, or otherwise associated with, other conduct with probable or certain anticompetitive effects.
- The nature of the conduct is irrelevant, provided that it is recognisable as a retaliation, punishment or discouragement in response to a procompetitive act.

*United Brands* raised an important question: how far can a dominant company lawfully differentiate between customers which actively compete with its competitors and those which do not? Clearly it may not give them better terms on condition that they deal only with it, but the basis for the different treatment might not be disclosed. This question raises issues under Article 82(c) on discrimination, as well as issues which concern foreclosure under Article 82(b). Under the former clause, different treatment is lawful if the transactions are not "equivalent", but the different treatment might still be exclusionary and contrary to Article 82(b) if it harmed either the customers or the competitors.

Clearly, the justification for different treatment, and the extent and nature of any harm caused to customers or competitors, depend entirely on the specific circumstances. But certain questions seem particularly important. Has the dominant company any other reason for differentiating between the customers which cooperate with its competitors and those

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<sup>22</sup> The US Supreme Court in *Verizon Communications v. Trinko*, (2004) commenting on the *Aspen Skiing* case said: "The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end ... Similarly the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent" (italics in original).

which do not? Is there a risk that confidential information about the dominant company would reach its competitors through the customers which are cooperating with both?

If customers need to cooperate with the dominant firm, and suffer a disadvantage if they are unable to, its refusal to cooperate or contract with them, or its policy of giving them less favourable treatment for some reason, is likely to be unlawful unless there is some sufficient justification. However, in this type of situation the relevant legal rules are likely to be both Article 82(b) and Article 82(c). The customers are unjustifiably discriminated against because they are cooperating too closely with competitors, and the competitors' possibilities for cooperating with the customers are being limited or cut off.

#### Conclusion on reprisal abuses

A working definition of a reprisal abuse is therefore conduct which indirectly limits the production, marketing or technical development of a competitor or customer or supplier of the dominant enterprise by harming or penalising it in any significant way for competing aggressively or for complaining to a competition authority, or which discourages it from doing so.

## Part II

### Discriminatory abuses: consumer harm

Article 82(c) prohibits: “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”.

Any adequate consideration of Article 82(c) should begin with three fundamental questions, which have received surprisingly little attention.

The first question is whether harm to consumers is necessary for an abuse under Article 82(c). The fact that this issue has not been resolved explicitly may show that it has been widely assumed that harm to consumers is necessary, and this would explain why so few discrimination cases have arisen. This is an issue of great practical importance, because if harm to consumers is not necessary, it could be illegal *e.g.*, for manufacturers to supply supermarkets with large quantities of goods at lower prices than they are being supplied in smaller quantities to small retailers. If it is not necessary, it would be extremely important to know whether a case fell under Article 82(b), under which harm to consumers is explicitly required, or under Article 82(c). This issue is so basic that it is remarkable that it has not been resolved long ago. The fact that it has not shows how little the Commission has thought about Article 82, and how seldom legal authors think beyond the facts of cases which have actually arisen, to consider fundamental issues which are certain to arise.

One reason why Article 82(c) was included in the Treaty is that when the Treaty was drafted in 1956-57, it was feared that dominant enterprises would discriminate in favour of companies in their own Member States, and so perpetuate the division of the Community into separate national markets. This did not occur as widely as was expected, but Article 82(c) is still important in at least three cases: in new Member States, in the case of dominant companies such as performing rights societies which may have their own reasons for discriminating against non-nationals, and for State enterprises which may be tempted into protectionism.

The prohibition on discrimination looks as if it primarily protects competitors, and does not primarily protect competition or consumers. This is a reason for interpreting Article 82(c) narrowly. Article 82(c) contains no phrase like that found in Article 82(b), saying that the conduct is unlawful only if it is “to the prejudice of consumers”. Article 82(c) seems to imply that a disadvantage for a competitor is enough to give rise to an abuse, and that consumer welfare is either irrelevant or is presumed to result, even if in fact it was unlikely to do so, or certain not to do so. However, all the other provisions of Article 82 prohibit, more or less clearly, actions which are contrary to consumer welfare. If Article 82(c) should not be interpreted in this way, it is an exception, indeed an anomaly, because<sup>23</sup> a wide ban on discrimination is anticompetitive and damaging to consumers. If, as is certainly the case, efficiency defences are available under the other provisions of Article 82, it would be unreasonable if it was not a defence under Article 82(c) to show that there had been no prejudice to consumers, and that they would benefit from the different treatment. However, it

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<sup>23</sup> U.S. Department of Justice Report on the Robinson-Patman Act, J of Reprints for Antitrust Law and Economics (2000 Reprint), Vol. XXIX number 1, 259.

would be reasonable to presume harm to consumers in cases of discrimination on the basis of nationality.<sup>24</sup>

So the four clauses of Article 82 must be interpreted consistently, and therefore harm to consumers is a necessary element under all of them. To say that if Article 82(b) and Article 82(c) both apply, the stricter rule should apply, would be open to the criticism that there would be no legal or economic rationale for interpreting them differently, and that it would make no sense to have lower requirements under Article 82(c) in the case of second or subsequent contracts than in the case of a first contract under Article 82(b), when the need to promote competition is greater. It would be irrational if harm to consumers was necessary for abuse under Article 82(b) when the dominant company discriminates in its own favour (in exclusive buying and downstream market situations), but not under Article 82(c), when it discriminates between non-associated companies (when the temptation is less, economic harm is less likely, and a less strict test on the extent of the discrimination is appropriate, as the phrase “competitive disadvantage” requires).

This conclusion is confirmed by Article 3 EC which says that “a system ensuring that competition in the internal market is not distorted” is an EC objective.<sup>25</sup> Therefore Article 82 must be interpreted as not allowing antitrust decisions which protect competitors and discourage competition. So harm to consumers and to competition must be necessary for all abuses under Article 82. Articles 81-82 are there to safeguard effective competition, and consumers are always harmed if competition ceases to be effective.

The Community Courts do not always say which clause of Article 82 they are applying. This practice makes sense only if they are all to be interpreted in the same way.

So as long as there is effective competition in the downstream market, a dominant company selling to competitors in that market, but not itself on it, may stop dealing with some of those competitors. But if there are few competitors and competition would be ineffective if there were fewer of them, the dominant company cannot cut off supply to any of them, because consumers would be harmed. But in most situations it is hard to see why a dominant company would systematically stop selling to existing customers unless it was planning to enter the market itself, as in *Commercial Solvents*, which would be likely to make the refusal to supply illegal.

If harm to consumers is always necessary for abuse under Article 82(c), a later lower price must almost always be lawful, since it will always add to output and welfare (assuming the lower price is given to a company not related to the dominant enterprise, and that the different treatment is not based on nationality or on exclusionary conditions). So Article 82(c) should not be an excuse to refuse more favourable terms. Only if the lower price caused the higher price to harm consumers, there would be an infringement. This might occur if the higher price buyer left the market but consumers dealing with it were for some reason unable to switch to the lower price buyers, in spite of the fact that the buyers were in competition with one another.

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<sup>24</sup> Case C-18/93, *Corsica Ferries* [1994] ECR I 1783 and the performing rights societies cases; cp. Case C-281/98 *Angonese* [2000] ECR I 4139.

<sup>25</sup> Article 3 is relevant to the interpretation of Article 82: Case 6/72, *Continental Can* [1973] ECR 215, para. 24; Cases 6 and 7/73, *Commercial Solvents* [1974] ECR 223, para. 32; Case 27/76, *United Brands* [1978] ECR 207; Case 85/76, *Hoffmann LaRoche* [1979] ECR 461; Case T-51/89 *Tetra Pak* [1990] ECR II 309.

If harm to consumers is needed under Article 82(c), it is needed in all cases under Article 82, and the criticism that Article 82 protects competitors and not competition is incorrect.<sup>26</sup>

Many European lawyers regard Article 82(c) as a measure protecting small firms from competition, whether or not consumers are harmed. The conclusion suggested here would be regarded by those lawyers as a radical one. If the view expressed here is incorrect, and harm to consumers is not necessary for abuse under Article 82(c), the scope for anticompetitive consequences, by protecting competitors against competition, is obvious, and the principle based on Article 10 (that Community law prohibits national decisions protecting companies against competition) is extremely important.

### Discriminatory abuses: the scope of Article 82(b) and 82(c)

The second fundamental question which arises under Article 82(c) is whether it applies only to discrimination between companies not associated with the dominant enterprise, or whether it applies also where the dominant enterprise is discriminating in favour of its own downstream operations, and therefore causing foreclosure in its own favour. Of course, if harm to consumers is necessary under both Article 82(b) and Article 82(c), this second question is much less important. It is not, however, irrelevant, because there are reasons for saying that there is and should be a much stricter rule against discrimination in favour of the dominant enterprise's own activities than against discrimination between companies none of which are associated with the dominant enterprise. Therefore, it would be rational and tidy if there was a relatively lax rule against discrimination between non-associated companies, under Article 82(c), and a strict rule against discrimination in favour of the dominant company's activities, which involves foreclosure, under Article 82(b). This would also make sense because the analysis of the supposed abuse and the availability of certain defences depend on whether the real objection to the conduct is foreclosure or discrimination.

Apparently only Article 82(c), and not Article 82(b), can apply in cases of “pure” discrimination between companies not associated with the dominant enterprise (including discrimination on the grounds of nationality). But it also seems to have been applied in several situations essentially involving foreclosure of competitors of the dominant enterprise (price reductions given on condition of exclusivity, a selective lower price which is predatory, and discrimination by a vertically integrated dominant enterprise in favour of its own downstream operations).

If Article 82(c) was applied only to cases of discrimination between companies not associated with the dominant enterprise, the law would be clearer, more rational and more consistent with economic principles. All primary line discrimination and foreclosure cases would then fall under Article 82(b). The two provisions would not then apply simultaneously. In foreclosure cases a stricter rule is appropriate than in cases of different treatment of unrelated firms (meaning that a smaller difference in treatment would be illegal).

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<sup>26</sup> Article 82 applies to dominant buyers, which may abuse their dominant positions in their dealings with the companies from which they buy. If this occurs, it is the sellers which are harmed, or competitors of the dominant company which might be foreclosed by *e.g.*, exclusive agreements. In such situations it seems artificial to say that consumers are indirectly harmed, even if it is clearly Article 82(b) which applies. But the rules relating to dominant buyers are different in various respects from the rules on dominant sellers, and the issue of dominant buyers does not seem enough to invalidate the theory that harm to consumers is always necessary for a violation of Article 82.

In foreclosure cases, the victim is a competitor and the beneficiary is the dominant enterprise. The defence of meeting competitors' prices is valid in discrimination cases, but not relevant or valid in cases under Article 82(b) such as exclusivity cases, or discrimination in favour of the dominant enterprise's own downstream operations.

This view of Article 82(b) and 82(c) is confirmed by the *Ladbroke*<sup>27</sup> judgment, which drew a distinction between cases when the dominant enterprise is present in the downstream market and when it is not. If it is not present, it cannot be discriminating in favour of its own operations there.<sup>28</sup>

These distinctions are important for other reasons also. Under Article 82(b), there is a duty to contract if refusal would harm consumers by "limiting" the production, technical development or marketing of competitors, either in a way in which it would not otherwise be limited, or if consumers are harmed because the emergence or continuation of another kind of product, for which there is a clear demand, is being prevented. Under Article 82(c) there may also be a duty to grant access to the facility to a second or subsequent licensee, on non-discrimination grounds. It is primarily under Article 82(b), in the case of compulsory first licences, that controversy arises. But most of the reported cases have been discrimination cases under Article 82(c), although this has not always been clear. The distinction between foreclosure and discrimination is important because:

- There can be a duty to give access for the first time only under Article 82(b), which expressly requires proof of harm to consumers, for illegality.
- The most useful test of exclusionary conduct is under Article 82(b), whether it "limits" possibilities otherwise open to competitors.

As already explained, these two points make Article 82(b) the legal basis for all cases of exclusionary or anticompetitive abuse, much the commonest kind of abuse cases. (But the requirement of "limiting" rivals' possibilities must be applied with care in cases involving intellectual property, since intellectual property rights inherently limit rivals' possibilities).

- The dominant enterprise must be present in the relevant market for Article 82(b) to apply: that is not necessary under Article 82(c), although it is often the position.
- There is a duty under Article 82(c) only if the transactions are "equivalent". If they are not equivalent, there is no duty to give access under that clause, even on adjusted terms.<sup>29</sup>
- There is a duty under Article 82(c) only if the discrimination would create a "competitive disadvantage". So if the companies or individuals being treated differently are not in competition with one another, Article 82(c) cannot apply.

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<sup>27</sup> Case T-504/93, *Ladbroke*, [1997] ECR II-923.

A duty not to discriminate between unrelated firms does not discourage investment by the dominant enterprise. A duty to share an essential facility inevitably has this effect.

<sup>28</sup> The fact that the Commission refers to discrimination in foreclosure cases but does not say that the companies differently treated are in competition with one another, as Article 82(c) requires, shows that the Commission is really thinking about foreclosure and not discrimination.

<sup>29</sup> A second or subsequent licence of an intellectual property right is not necessarily "equivalent" to the first arm's-length licence.

- Under Article 82(c), the refusal to licence itself may constitute the abuse, if it is discriminatory. Under Article 82(b), the refusal to licence may constitute abuse only if, as a result of some other factor, it illegally causes foreclosure which would not otherwise have occurred.
- It is a defence under Article 82(c) to show that the dominant company is offering different terms in order to meet competition, but such a defence would be inapplicable or irrelevant in foreclosure cases under Article 82(b).
- If both Article 82(b) and Article 82(c) apply, the remedy is not necessarily a duty to grant access on the terms already given to a third party. To avoid foreclosure, it might be necessary to give access on the more favourable terms given to the dominant company's own downstream operations, even if the transactions were not "equivalent".<sup>30</sup>
- Under Article 82(c), it is not necessary to prove that the licensee would provide a new kind of product for which there is an unmet demand.

### Discrimination and the effect of customers' circumstances

A third issue which is fundamental to the definition of discriminatory abuses is whether a dominant enterprise must regard as "equivalent" all transactions which are the same as far as it is concerned, or whether it may adapt the terms it offers in the light of its customers' circumstances.

It is procompetitive for a dominant enterprise to charge lower prices to customers whose ability to pay is less and who could not or would not pay a price which was the same for all buyers. A dominant enterprise might *e.g.*, charge lower prices to a buyer which was starting up, to help it to launch itself on the market, and to expand output by establishing another regular buyer for the product or service involved. This argument is conclusive.

Again, the reason why this issue has never been decided is probably that it has always been assumed that a dominant enterprise is free to differentiate on these lines.

### Conclusion on discrimination

Illegal discrimination under Article 82(c) occurs when a dominant enterprise without justification applies different conditions to transactions which are equivalent for it and for other contracting parties with which it has no other significant relationship, if it thereby causes a significant competitive disadvantage in the competition between the other

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<sup>30</sup> The law should not allow a dominant company to rely on the fact that it has granted a licence at such a high royalty rate that the licensee's activity is unprofitable, in order to say that it need only grant subsequent licences at the same rate.

To get a second or subsequent licence of an intellectual property right under Article 82(c), it is not enough to show that one licence has already been granted, and that the transactions are "equivalent". It has never been suggested that if a dominant company grants one intellectual property licence, whether voluntarily or compulsorily, it is thereby obliged to grant an indefinite number of other licences on the same terms in "equivalent" cases. Any such obligation would discourage and seriously complicate granting of first licences, and might even discourage the dominant company from using its own technology, which would be clearly anticompetitive. Although the legal position is not clear, it seems therefore that even in the case of a second or subsequent licence of an intellectual property right, there is a duty to licence only if the conditions for a first compulsory licence under Article 82(b) are fulfilled.

contracting parties, and causes harm to consumers. The nationality or State of residence of a contracting party is never a justification for different treatment.

## Part III

### Exploitative abuses: Excessive selling prices: Article 82(a)

Article 82(a) prohibits “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”.

The objection to excessive prices<sup>31</sup> is not that they are exclusionary, but that they are exploitative and result from taking undue advantage of unconstrained market power. Several tests have been suggested by the Community Courts for “excessive” prices:

- Comparison with the dominant company’s relevant production costs.
- Comparison with competitors’ prices in the same market.
- Comparison with the dominant company’s prices, or with other similar companies’ prices, in comparable but competitive markets.
- Comparison with the “economic value” to the buyer.<sup>32</sup>

But no quantified test to say how much a price must exceed any of these levels has been suggested. A price is not excessive merely because it is above any of these levels. It must be so substantially above it as to be unreasonable, shocking and exceptional. If possible more than one test should be used cumulatively, and the tests should be applied in such a way that they tend to lead to similar results. Most national cases in which excessive prices have been found involved an excess of over 100%.<sup>33</sup>

In the only cases in which a price has been ruled to be excessive by the EU institutions (*British Leyland* and *Hilti*<sup>34</sup>), the excessive prices were four or six times the price charged by the same company for the same service at the same time in the same geographical market, and in *British Leyland* the higher price had been adopted to discourage imports – an indefensible combination. The comparison with the dominant company’s own prices in what is essentially the same market is the easiest, and is likely to be the most striking, comparison.

Since there are no precise tests of excessive prices, price regulation and “fine-tuning” are impossible, and competition law can be applied only in very obvious, serious, indefensible cases, in which the difficulty and imprecision of the tests cannot affect the validity of the conclusion. The test of comparison with production costs may not be applicable, conveniently or at all, to intellectual property or creative works, and a “value”

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<sup>31</sup> Temple Lang, Abuse of dominant positions in European Community law, present and future: some aspects, in Hawk (ed.), Fifth Fordham Corporate Law Institute (1979) 25-83. Exploitative abuses are not prohibited by US antitrust law.

<sup>32</sup> Case 26/75, *General Motors*, [1975] ECR 1367; Case 27/76, *United Brands* [1978] ECR 207; Case 226/84, *British Leyland* [1986] ECR 3263; Case 30/87 *Bodson v Pompes Funèbres* [1988] ECR 2479; Case 247/86 *Alsattel*, [1988] ECR 5987; Case 66/86, *Ahmed Saeed*, [1989] ECR 803, para. 43; Case 395/87, *Ministère Public v Tournier*, [1989] ECR 2521; Case C-111/88, *Lucazeau v SACEM* [1989] ECR 2811; Case T-30/89, *Hilti* [1991] ECR II-1439; Case T-89/98, *NALOO*, [2001] ECR II 515.

<sup>33</sup> It is not clear how many national excessive price decisions were based on legal rules corresponding to those under Article 82.

<sup>34</sup> [1986] ECR 3263 para. 25-34; Case T-30/89, *Hilti*, [1991] ECR II 1439, paras. 95-119, on appeal case C-53/92P, [1994] ECR I-667.

based test is also difficult to apply. However, more useful tests can usually be found in specific situations.

### Excessive royalties in standards cases

In standards cases, companies which own essential patents (whether they are dominant as a result or not)<sup>35</sup> have to commit themselves to licence on fair, reasonable and non-discriminatory terms. These obligations correspond closely to the obligations of a dominant company in these circumstances. Apart from the general tests already mentioned, there are several others which are relevant:

- A company in most cases<sup>36</sup> should not claim royalties out of proportion to the share of all the essential patents which it holds, for the standard for which its patents are essential.
- A company should not claim a royalty rate which, if it was charged by the other holders of patents in proportion to the number of essential patents which they hold, would lead to a cumulative royalty rate which would make the technology uneconomic or unduly delay its roll-out.
- A company should base its royalties only on the licences of the patents which licensees want or need, and cannot justify higher royalties by insisting on licensing other patents as well, *i.e.*, by “tying”.
- A company should not charge higher royalty rates than would otherwise be justified, in order to cause greater use of other technologies in which it has a greater interest.
- The royalty should correspond to the value of the patent invention, and should not include that proportion of the value which is due to the effects of standardisation,<sup>37</sup> or to the ability to exclude rivals from neighbouring markets, or to interoperability.
- A royalty rate cannot be legitimately increased by anticompetitive licence conditions.

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<sup>35</sup> A company which owns essential patents but which also has manufacturing operations using those patents is often constrained or prevented from charging the highest royalty rate by the need to avoid discouraging demand for its downstream products.

<sup>36</sup> In some cases a company might have essential patents of doubtful validity, or which were all about to expire, and if so it might be appropriate to charge lower royalties per patent. If a patent needs to be licensed only for interoperability, no royalty may be appropriate. But the royalty which a company could have obtained before the standard was adopted is normally a minimum FRAND royalty.

<sup>37</sup> Mark Patterson, Inventions, industry standards, licence conditions and intellectual property (2002) 17 Berkeley Technology Law Journal 1043.

## Other tests and indications

In individual cases other indications of excessive prices may be relevant, at least cumulatively:<sup>38</sup>

- In the absence of competition, if the company has continuing costs that are clearly unnecessarily high, or let its costs rise without trying to control them, or failed to make obvious cost savings. So excessive prices do not necessarily lead to excessive profits. (So it may be necessary to “disallow” unjustified costs in calculating profit margins).
- If the price has been increased substantially over a short period without any increase in costs or in investment needs, or other explanation.
- If the company obliges its customers to pay for products or services which they do not need, or charges the same high price to a variety of buyers including an identifiable sub-set who could easily be offered a lower price for what they really want.
- If the price was imposed or increased without warning, negotiation or consultation, or without any reason being given.
- If the dominant company took unreasonable advantage of reduced price elasticity of demand, or of weakening in the negotiating position of the other parties.
- If the price is a percentage of the buyer’s total revenues rather than an absolute sum (in situations in which a royalty is inappropriate).
- If the prices charged by the dominant company to different categories of buyers are manifestly disproportionate in comparison with one another.
- If the prices are made possible by being combined with or reinforced by anticompetitive conduct of the dominant company.<sup>39</sup>
- If the profits resulting from the price are very high in relation to the risk involved for the dominant seller.
- If the profits resulting from the price are much higher than the profits of all or most other companies in the chain of distribution or elsewhere in the same industry.

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<sup>38</sup> Temple Lang, Media, multimedia and European Community antitrust law, in Hawk (ed.), 1997 Fordham Corporate Law Institute (1998) 377-448 at pp. 422-428.

<sup>39</sup> In several cases the evidence of anticompetitive abuse has been cumulative. What would normally be lawful behaviour may be unlawful if it is part of a larger policy, pattern or series of actions together having exclusionary or anticompetitive aims or discriminatory effects. Although lawful actions do not become unlawful just because there are a lot of them, a series of actions targeted against specific competitors may be circumstantial evidence of exclusionary intent. Exploitative prices may be made possible by exclusionary abuses, especially abuses creating or raising barriers to entry.

Case 27/76, *United Brands*, 1978 ECR 207; Case 53/87 *CICRA v. Renault*, [1988] ECR 6039, 6073; T-83/91 *Tetra Pak* 1994 ECR II 755 and 1996 ECR 5951; T-65/89 *British Gypsum* 1993 ECR II 389; T-228/97 *Irish Sugar* 1999 ECR II 2969; C-395/96P, *Compagnie Maritime Belge* [2000] ECR I-1369.

Commission Merger Regulation decision *Microsoft/Liberty/Telewest*, JV 27, Thirtieth Report on Competition Policy (2000) pp. 186-187 (the Commission found that Microsoft regularly set up working groups to influence buyers’ choice of software). In predatory prices cases under the second *Akzo* rule (price between average variable costs and average total costs, plus evidence of intention to exclude a competitor), the evidence will necessarily be cumulative.

- If the price of a raw material or other input is so high that the price of the end product is uneconomic for a large proportion of potential final consumers or users.
- If the minimum royalty formula in an intellectual property licence causes the exercise of the licence to be uneconomic.

### Defences in high price cases

Excessive prices are exploitative, and if a competitor without market power can charge higher prices, the price cannot be exploitative. High profits due to superior efficiency or temporary high profits in a new or dynamic market are lawful.

Prices and profits are not the same things: Article 82 prohibits excessive prices, not excessive profits. A price for a product does not become illegal merely because the product is successful, or continues to be sold for a long time, or because the marginal cost of production falls to nearly zero, and so gives rise cumulatively to unusual profits.

High prices can be illegal only if they are imposed and difficult or impossible for buyers to avoid: so if customers can opt out, a price does not become illegal merely because some buyers do not exercise all their rights to do so, or do not choose to use their rights so as to reduce the profits made by the seller, or so as to get the best possible value for money.

Even if the price of one product appears excessive, it must be a defence to show that it is one of a class of related products or projects necessarily forming a single business, some of which inevitably lose money *e.g.*, if research and development costs are large and inevitably a large proportion of the products developed are never marketed (*e.g.*, in pharmaceuticals<sup>40</sup> or oil and gas exploration, or if penetration pricing of capital equipment to lead to sales of consumables is necessary).

In practice excessive pricing cases are rare, and usually also involve either statutory or other officially caused monopolies or other clearly anticompetitive (exclusionary) illegal conduct by the dominant company. Substantial barriers to entry and absence of price elasticity are necessary but not sufficient conditions for excessive prices.

Regulatory approval for the price of the product in question, if given, is evidence that it is reasonable and not excessive. But a regulatory decision is never proof, because regulators may take into account policy considerations which could not be taken into consideration under competition law. A regulatory ceiling on or approval for the price of another product or service, or for a group of products or services, or on the total profits of the company, would be irrelevant.

A price is not illegal merely because it is above a notional competitive level. Such a theory would mean that all prices in an oligopolistic market, and all prices for products or services subject to intellectual property rights, prices due to temporary shortages, and prices for new products in high technology industries, would be illegal. This has never been, and could not be, suggested. It would deprive companies of the incentive, and indeed the opportunity, to make substantial profits. As in the case of anticompetitive abuses, an over-strict interpretation of Article 82(a) would discourage competition instead of promoting it.

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<sup>40</sup> The argument rejected by the UK Competition Appeals Tribunal in *Napp Pharmaceuticals* did not concern inevitable losses on related products necessarily forming a single business: judgment dated January 15, 2002. The fact that a company has made losses on other unrelated activities is not a defence.

The risk of this happening is not purely theoretical: the UK Office of Fair Trading guidelines on abuse of dominant positions say:

*“In general to be excessively high the price must be higher than it would normally be in a competitive market ... prices would have to allow profits which significantly and persistently exceeded its cost of capital before an abuse could be established.”<sup>41</sup>*

While everything depends on the word “significantly”, and the guidelines themselves qualify it very substantially in various ways, this needs to be clarified by saying that a price can be illegal only if it is far above competitive level.

If there are very high prices but barriers to entry are relatively low, the situation should be self-correcting because entry will occur. It is therefore suggested that unfairly high prices are illegal only if there are high barriers to entry. They should be part of the legal concept of unfair prices under Article 82(a), and should not be regarded merely as a matter of enforcers’ discretion (although it should certainly be that). If there is no barrier to entry or other obstacle to competition, neither dominance nor excessive pricing is likely to continue for very long. If there is a high barrier to entry, the most appropriate remedy should be to eliminate or reduce it.

Proceedings under Article 82 are also appropriate if the excessive price was made possible by anticompetitive conduct of the dominant company, or took advantage of that conduct, or made its effects more serious.<sup>42</sup> This is another situation in which it is the combination of two or more kinds of conduct which is unlawful, and neither would necessarily be illegal by itself. The most effective remedy in such a case may be to end the anticompetitive conduct, rather than price regulation and continuing price supervision.

#### Exploitative abuses – unduly onerous non-price terms

The leading cases concern obligations imposed by national copyright collection societies and performing rights societies on holders of copyright in musical works, among other things unnecessarily to transfer their worldwide rights (and not merely to licence the rights which the societies in question were able to manage, directly or indirectly, for them).<sup>43</sup>

The test, as far as it is possible to formulate a general test, is whether the supposedly onerous clause is one which would be imposed and accepted in competitive conditions, and whether the gains in efficiency (for the other copyright owners, in the case of copyright societies), if they are shared or passed on, are sufficient to outweigh the onerous effect for the other parties bound by the clause. If the clause benefits only the dominant company, and provides no balancing benefits, it is difficult or impossible to justify. Some of the tests

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<sup>41</sup> OFT, The Competition Act 1998: The Chapter II prohibition, paras. 4.8-4.10. cp. OFT Assessment of Individual Agreements and Conduct, paras. 2.1-2.19. In the *Napp* judgment this was described as a “starting point ... soundly based in the circumstances of the present case” (para. 391).

<sup>42</sup> “Where the barriers to entry protecting an incumbent monopolist are already high, even a modest raising of further barriers by ... that monopolist is potentially a serious matter” – *Napp* judgment, para. 286. See however para. 434. The argument that proceedings should be brought under Art. 82(a) only when a structural remedy is available does not apply to unfair contract terms other than price.

<sup>43</sup> Joined Cases 110/88 and others, *Lucazeau v. SACEM*, 1989 ECR 2811; Case 395/87, *Tournier*, 1989 ECR 2521; *GEMA* OJ No. L-134/15, 1971; *GEMA II*, OJ No. L-166/22, 1972; Joined Cases 55/80, *Musik v. GEMA*, 1981 ECR 147; Case 127/73, *BRT v. SABAM*, 1974 ECR 51; Case 7/82, *GVL*, 1983 ECR 483; Case 155/73, *Sacchi*, 1974 ECR 409; Case 402/85, *Basset v. SACEM*, 1987 ECR 1747; Temple Lang, Media, Multimedia and EC Antitrust Law, in Hawk (ed.), 1997 Fordham Corporate Law Institute (1998) 377-448 at pp. 419-428.

suggested for excessive prices might be applicable. These principles would probably prohibit *e.g.*, clauses giving a public utility power to enter premises without permission or to cut off essential services without notice, or making itself immune from liability for negligence. Any other grossly unreasonable or entirely one-sided clauses would also be illegal, *e.g.*, an imposed obligation to cross-licence intellectual property rights royalty-free to the dominant company.

### Conclusion on exploitative abuses

The best definition of an exploitative abuse therefore seems to be pricing or other conduct which takes serious and unjustifiable advantage of dominant market power in a way which is possible only due to high barriers to entry, when the barriers to entry are due to exclusionary conduct by the dominant company itself, or to factors other than the dominant company's economies of scale or other advantages. "Unjustifiable" means that the conduct is grossly unreasonable and does not lead to any benefits or efficiencies which could be in proportion to the onerous effects.

It will be obvious that this definition involves several matters of degree, not qualitative distinctions. This seems to be unavoidable. However, in each specific case some of the more precise tests suggested above may be useful.

## Part IV

### Is there a concept of “fairness” in Article 82?

The word “unfair” occurs in Article 82(a), describing “prices” and “trading conditions”. The concept of “unfairness” is therefore used only in connection with the terms of contracts between the dominant enterprise and those with whom it is contracting, whether the contract is for sale or purchase, or for the transfer of technology. It is not used in connection with conduct affecting companies with which the dominant enterprise is not contracting, *i.e.*, its competitors. Insofar as Article 82(a) is concerned, “unfair” only means “exploitative”.

The concept of unfairness is not relevant to Article 82(c), which is written in wholly objective terms, “dissimilar conditions”, “equivalent transactions”, “competitive disadvantage”. It is therefore not relevant to the abuses described here, for convenience, as “discriminatory”.

The next important question is whether there is any room for a concept of “unfairness” under Article 82(b), either when the dominant enterprise limits its own production, marketing or technical development, or when it limits those of its competitors. When the enterprise limits its own production, the abuse is essentially either exploitative (production or marketing is cut down to increase the price) or anti-competitive in a special sense (development or sale of a kind of product for which there is a clear and unsatisfied demand is being delayed or prevented to avoid competition with the existing products of the dominant enterprise). The difficulties of dealing with this kind of situation are not made easier by using the concept of “fairness”.

The remaining issue concerns limitation of the possibilities of competitors, under Article 82(b). One certainly has the impression that, at least in some Member States, there is at least an implicit conception of fairness in competition law, the effect of which is to suggest that small or weak or less competitive firms should be sheltered from competition from larger, stronger or more competitive companies. However, this conception is more clearly identifiable in the rules on discrimination than in the case law on exclusionary abuses. Even if that impression is correct as a matter of national competition law, it does not follow that there is, or should be, a corresponding element in European competition law under Article 82.

The argument based on Article 10 EC, explained in the conclusion on exclusionary abuses, above, is relevant. Article 4 EC states that competition is an EU objective. Article 98 states that Member States accept the principle of an open market economy with free competition. Article 86 strictly limits the powers of Member States to protect even enterprises to which they have entrusted the operation of services of general economic interest (which would not be small or weak enterprises) from the effects of the EU competition rules. Freedom to provide services, freedom of establishment, free movement of goods and capital, all imply free competition in the interests of consumers. Member States have a number of very clear and practical duties under Article 10 EC.<sup>44</sup> Among those duties

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<sup>44</sup> On Article 10 generally, see General Report, The duties of cooperation of national authorities and courts and the Community institutions under Article 10 EC, XIX FIDE Congress, (Helsinki 2000), (ed. Sundström) Vol. I 373-426 and Vol. IV, 65-72; Durand, in *Commentaire Mégret: Le Droit de la CEE* (2<sup>nd</sup> edition, Brussels, 1992) Vol. 1, 25-43; Temple Lang, Article 5 of the EEC Treaty: the emergence of constitutional principles in the case law of the Court of Justice, 10 *Fordham International Law Journal* (1987) 503-537; Schermers & Waelbroeck, *Judicial protection in the European Union* (6<sup>th</sup> ed., 2001) pp. 112-115 and 330; Blanquet, *L'article 5 du traité CEE – Recherche sur les obligations de fidélité des Etats Membres de la Communauté* (Paris, 1994); Due, *Article 5 du traité CEE – une disposition de caractère fédérale?*, Schumann lecture (Florence, 1991); Temple Lang, *Community*

is the duty not to do anything which would make EU competition rules ineffective. Any rule of law which was based on the assumption that less competitive firms should be protected from competition in the interests of “fairness”, through re-interpretation of Article 82 rather than through some application of the State aid rules, would be inconsistent with the whole approach of the EU Treaty. The prohibition of discrimination on the grounds of nationality is absolute, and makes no concessions to any inconvenience or hardship which might result from exposing less competitive companies to competition from other Member States.

The next issue concerns “reprisal abuses”, illegal overreactions by dominant enterprises to aggressive competition or to competitors which complain to a competition authority. It is clear that aggressive competition does not justify abuse of a dominant position. Apparently also a reaction must be proportional, meaning apparently that it must not be so strong that it penalises or punishes legitimate competition. However precisely this rule should be interpreted and applied, it does not seem to be a rule about fairness, but a rule designed to protect competition and to protect the interests of companies which compete aggressively from victimisation.

“Tying” under Article 82(d), as already mentioned, is either an exploitative abuse (forcing customers to buy things they do not want) or an exclusionary abuse (preventing competitors from offering their products to buyers). There are obvious efficiency issues in most tying cases, but “fairness” does not seem to be either necessary or useful to resolve them.

There is nothing in the case law under Article 82 which suggests that there is a concept of “fairness” under that Article, except those elements already mentioned. The conclusion seems to be clear that there is no such concept under Article 82(b).

This general conclusion is confirmed by the statements of the Community Courts that the concept of “abuse” is an objective one, and is not dependent on the intention of the dominant enterprise.<sup>45</sup>

#### The concept of abuse in joint dominance cases

For completeness, something must be said about the concept of abuse in joint dominance cases, which is clearly contemplated by the express words of Article 82, although it has rarely arisen in practice.<sup>46</sup>

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constitutional law: Article 5 EEC Treaty, 27 *Common Market Law Review* (1990) 645-682; Lenaerts, *Le devoir de loyauté communautaire*, in Verhoeven (ed.), *La loyauté - mélange offert à Etienne Cerexhe* (1997) 229-247; Temple Lang, *The core of the constitutional law of the Community – Article 5 EC*, in Gormley (ed.), *Current and future perspectives on EC competition law* (1997, Kluwer) 41-72; Van Raepenbusch, *Le devoir de loyauté dans l’ordre juridique communautaire*, *Droit social*, No. 11, November 1999, 908-915; Gormley, *The development of general principles of law within Article 10 (ex Article 5) EC*, in Bernitz (ed.), *General principles of European Community Law* (Kluwer, 2000) 113-118; Temple Lang, *The duties of national courts under Community constitutional law*, 22 *European Law Review* (1997) 3-18; Temple Lang, *The duties of national authorities under Community constitutional law*, 23 *European Law Review* (1998) 109-131; Temple Lang, *The duties of cooperation on national authorities and courts under Article 10 EC, two more reflections*, *European Law Review* (2001) 84-93; Temple Lang, *Developments, issues and new remedies – the duties of national authorities and courts under Article 10 of the EC Treaty*, 27 *Fordham International Law Journal* (2004) 1904-1939.

<sup>45</sup> Case 85/76, *Hoffmann LaRoche*, [1979] ECR 461, para. 91; see however Case C-62/86, *Akzo* [1991] ECR I-3359 (prices above average variable cost unlawful only if part of an exclusionary policy or strategy).

<sup>46</sup> Temple Lang, *Oligopolies and joint dominance in Community antitrust law*, in Hawk (ed.), 2001 *Fordham Corporate Law Institute* (2002) 269-359, at pp. 335-338, 344-347.

It seems that in general conduct which would be contrary to Article 82 in the case of a single dominant enterprise would also be unlawful if it was committed by jointly dominant companies. Clearly, if all the jointly dominant companies charged excessive prices or imposed unduly onerous conditions, that would be contrary to Article 82(a). If all the jointly dominant companies adopted the same exclusionary or discriminatory conduct, that would be contrary to Article 82 also (and perhaps also to Article 81).

If one of the jointly dominant enterprises tried to charge excessive prices but the others did not, customers would switch to the enterprises charging the lower prices as soon as they were able to, and the attempt would fail. The same thing would happen if one enterprise tried to impose unduly onerous conditions.

Exclusionary conduct by one jointly dominant enterprise would not necessarily be harmless or unsuccessful merely because it was not imitated by the others. Of course, such conduct by one enterprise would normally have less economic effect than the same conduct practiced by a single dominant enterprise with a larger market share. But *e.g.*, exclusive contracts entered into by one jointly dominant company would reduce competition further even if they were not imitated by the others,<sup>47</sup> and would add further to barriers to entry.

However, that does not necessarily mean that conduct which would be illegal if practiced by a single dominant enterprise or by all the jointly dominant enterprises is always unlawful if practised by only one of them. If practised by the smallest oligopolist, the conduct might strengthen its position *vis-à-vis* the others, and this procompetitive effect might outweigh the anticompetitive effects *vis-à-vis* any non-oligopolists in the market. So what is needed is a more complex and thorough analysis of the economic effects of the conduct, but not a different concept of abuse.

A reprisal abuse could also be committed by one of several jointly dominant enterprises, and might be as effective as if it had been committed by all of them, depending on the circumstances.

If conduct which would normally be contrary to Article 82(c) was committed by one of several jointly dominant enterprises, whether the conduct was unlawful would again depend on its economic effects. These would usually be minimal if the companies discriminated against were able to change to other suppliers or buyers, but if this was possible the conduct might be unlikely anyway, or might be short-lived. If the companies discriminated against could not find other contracting parties which were not discriminating, there might be a single dominant position, or all the jointly dominant enterprises might be practising essentially similar kinds of discrimination. Once again, an analysis of the economic effects would certainly be needed, but no new or different concept of abuse.

#### Efficiency considerations in the assessment of abuse

There is no clause in Article 82 corresponding to Article 81(3). But apart from the basic principle that offering better bargains is legitimate competition, efficiency gains, if proved, sometimes in effect may constitute a defence for the dominant company in Article 82 cases. To distinguish between desirable and unlawful competition, it may be necessary to weigh efficiency benefits for users or buyers against anticompetitive effects. The relevance and strength of an efficiency argument, apart from being very fact-specific, is likely to be different for different kinds of abuse. It is relevant to the justification for price discrimination

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<sup>47</sup> In principle, an infringement of Article 82 may be committed by one of several jointly dominant enterprises: Case T-228/97, *Irish Sugar* [1999] ECR II 2969, para. 66.

between non-associated companies, tying, bundling, and onerous contract conditions.<sup>48</sup> It may also be relevant if the alleged abuse is acquiring key facilities or foreclosure of competitors from key inputs,<sup>49</sup> or practices in joint dominance cases facilitating collusion between competitors, or improving the competitiveness of a small oligopolist. In price squeeze cases, where there is imperfect competition at both stages of production, integrated firms usually appear to be more efficient and to be squeezing non-integrated competitors, because of the double profit margin or mark-up of the non-integrated companies. Efficiency makes it legitimate to supply only regular customers and customers with long-term supply contracts in times of shortage<sup>50</sup>.

Stronger efficiency arguments are needed to justify practices with lasting structural effects. Efficiency would also be a defence if a company making an intermediate product and a final product<sup>51</sup> ceased to produce and sell the former to a downstream competitor because it had found a cheaper way of producing the end product directly. A dominant company is never obliged to subsidise, or to discriminate in favour of, a competitor. An exclusive buying contract could be justified on efficiency grounds if the buyer had invested in increasing the seller's capacity, to secure supplies, or if the seller's increased capacity was economic only if it was assured of being able to sell the extra production to the buyer in question.

Evidence of anticompetitive purpose is likely to damage an efficiency argument, by showing that efficiency was not the primary or only reason for the practice, or that the efficiency aim could have been achieved in a way which restricted competition less.

Efficiency considerations are relevant to many of the possible justifications for refusing access to essential facilities. The basic principle is that if a reasonable owner of the facility who had no interest in any downstream operation would have a substantial interest, acting rationally, to refuse access, the owner is entitled to do so. So an owner may refuse access (subject to the principle of proportionality) :

1. If giving access to the applicant would reduce the efficiency of the downstream users, including ultimate users, or
2. Would reduce the efficiency or value of the facility, or
3. Would cause the facility to be used uneconomically, or at a lower price than the owner could otherwise obtain<sup>52</sup>, or for a purpose wholly different from its current use;
4. Would interfere with the improvement, expansion or development of the facility, or

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<sup>48</sup> For example, in all the performing rights societies cases the main question was whether the obligations on members and licensees were based on nationality or could be justified by the societies' need to be able to handle performing rights and reproduction rights efficiently; Case 127/73, *BRT v. SABAM*, 1974 ECR 51; Temple Lang, *Media, Multimedia and European Community Antitrust Law*, in Hawk (ed.), 1997 Fordham Corporate Law Institute (1998) 377-448, at pp. 419-422; See also Case T-83/91, *Tetra Pak II* [1994] ECR II 755; C-333/94P, [1996] ECR I 5951.

<sup>49</sup> Case T-51/89, *Tetra Pak (BTG Licence)*, [1990] ECR II-309.

<sup>50</sup> Case 77/77, *BP* [1978] ECR 1513; *National Carbonising*, O.J. No. L-35/6, February 10, 1976.

<sup>51</sup> See Cases 6 and 7/73, *Commercial Solvents* [1974] ECR 223.

<sup>52</sup> Except that the owner of the facility cannot insist on obtaining monopoly profits, or enabling downstream users to obtain them.

5. Would interfere with technical or safety or efficiency standards, e.g. by causing undue congestion.
6. If the owner can show genuine and objective advantages of vertical (or horizontal) integration which could not be achieved by reasonably close cooperation with an independent company, that might justify different treatment. But the advantages would have to be substantial enough to outweigh the anti-competitive effects of refusal. Normally, the dominant company should put its competitors out of the market by competing on the merits, not by refusing access to them. A dominant company cannot justify a refusal to give access by claiming to be more efficient than its competitors: it is not well-placed to judge, a dominant company cannot be allowed to decide the lawfulness of its own conduct, and the competitor, when put under pressure, might be able promptly to become more efficient.

It might be procompetitive and efficiency-promoting to provide differential treatment to encourage new entrants by giving them low initial charges, or to oblige new entrants to make an appropriate contribution to capital costs. If a user has financed some extra capacity, it is entitled to *some* priority, because the extra capacity was procompetitive.

However, the “limiting production” test for exclusionary abuses makes efficiency arguments less relevant, and less necessary, than they would otherwise be. It can rarely if ever be efficient, *i.e.*, welfare-inducing, to do something the principal effect of which is to limit the possibilities available to competitors. Efficiency considerations arise, if they arise at all, only when the supposedly abusive conduct has both procompetitive and anticompetitive effects, and it is necessary, in some sense, to balance them. This may arise clearly in some tying or bundling cases. But in all cases it is essential to carry out an analysis of the supposedly unlawful effects of the conduct in question, on the lines set out here, before assessing any efficiency considerations which may be relevant.