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Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?

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Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?

European competition law is currently undergoing major changes as since the mid-1990s, the European Commission subscribes to a *more economic approach* to the interpretation and application of Articles 81 and 82 EC. Following the wholesale reform of the block exemptions under Article 81 EC, the Commission has now turned to reconsidering its practice on Article 82 EC. In December 2005, the Commission published a Discussion Paper on the application of Article 82 EC. In this, the Commission lays out a general framework for analysing abusive exclusionary conduct by a dominant undertaking. Almost simultaneously, the Commission launched a public consultation on enhancing private enforcement of EC competition law. In its Green Paper of 2005 and in its recently published White Paper, the Commission proposes policy choices and specific measures to ensure that victims of infringements of EC competition law are fully compensated for the harm they have suffered. Although the proposed reforms have attracted a good measure of attention from competition law scholars and practitioners, little thought has been given to the interaction between these two policy areas.

In October 2006, the Max-Planck Institute for Intellectual Property, Competition and Tax Law in Munich hosted a conference to highlight and discuss the major changes proposed by the Commission, and their combined effects. The conference brought together academics from all over Europe. *Ulf Böge*, then President of the German Cartel Office (Bundeskartellamt), opened the conference as keynote speaker. He stressed the importance of considering the possible repercussions on private enforcement of an effects-based approach in the application of Article 82 EC. Against the backdrop of the analysis presented by *Ulf Böge,* academics from several countries presented papers on the proposed reform of Article 82 EC in the light of a *more economic approach* as well as the distinct features of private enforcement of Article 82 EC. These papers are published here. The developments until May 2008, in particular the publication of the White Paper by the Commission, have been heeded in the articles.

In the first article, *Wolfgang Wurmnest* offers a critical appraisal of the Commission's Discussion Paper on exclusionary abuses. The author reproaches the Commission for obscuring departures from existing case-law with confusing language. He also criticises that the Commission gives little guidance on which economic tools and insights should be applied when assessing alleged abuses. On the more fundamental question of the goals of EC competition law in general and of Article 82 EC in particular, *Wurmnest* argues that in the light of recent decision practice of the European Court of Justice, the Commission is not entitled to declare "consumer welfare" ought not to be the only goal of competition law. Instead, he advocates an approach which places welfare considerations on an equal footing with other goals, such as the protection of economic freedom, market integration, and the promotion of innovation.

The articles by *Emanuela Arezzo* and *Pranvera Këllezi* examine different aspects of the concept of dominance. *Arezzo* asks whether there is a role for market definition and dominance in an effects-based approach. She compares a formalistic approach with the effects-based, more economic approach as envisaged in the Commission's Discussion Paper and in the report by the Economic Advisory Group for Competition Policy (EAGCP). Having examined the interrelationship between the concepts of market power, consumer welfare and anti-competitive harm, she warns against a departure from well established concepts, like, in particular, the notion of dominance and, in general from the adoption of a metadology which risks undermining the very political rational of Article 82 EC.

Këllezi then turns to the issue of the abuse of economic dependence. The author reflects on the concept of economic dependence as developed in the case law of national competition laws. She considers whether this concept is consistent with the definition in European competition law of a dominant position, as well as with the concept of market power.

Dimitris Riziotis analyses the arguments in favour of and against an efficiency defence in the context of Article 82 EC. The introduction of an efficiency defence represents a trade-off between economic efficiency and freedom of market participants. It would thus mean a shift of EC competition policy objectives in favour of market performance. Whereas such a shift may benefit consumers, focussing solely on market performance may prove to be detrimental for consumer welfare in the long run. The Commission would thus be well-advised to make the maintenance of a competitive market structure (i.e. the openness of markets) the main condition for the consideration of any efficiency gains.

Ariel Ezrachi maps the developments which have shaped private enforcement of European competition law to date. He considers the value of private action in general and its significance to competition enforcement, and goes on to illustrate the main challenges for an effective private enforcement in Europe. In this context, he evaluates the consequences of an effects-based approach in the application of Article 82 EC for the volume and quality of Article 82 EC damage claims as well as for actions for injuctive relief and out-of-court settlements.

Hedvig Schmidt identifies a lack of guidance from the Commission on how to establish a causal link between the abuse and the harm caused to the claimant in a private action. Under the present case-law, it is sufficient for the Commission to prove a likelihood of harm to competition. This standard of proof gives private claimants not enough to found their own case in a follow-on action. The move to a more rigorous economic analysis, *Schmidt* argues, would benefit these claimants but would, at the same time, raise the benchmark for those bringing an independent action in national courts.

Mark-Oliver Mackenrodt argues that effective enforcement requires that exactly those cases should be selected for decision which cause the type of negative welfare effects that Article 82 EC seeks to prevent. He finds that public enforcers seek to repress business strategies causing harm to competition as protected by Article 82 EC. Private plaintiffs, by contrast, are motivated by the prospect of gaining damage awards. *Mackenrodt* distinguishes several groups of private plaintiffs. For each, he

asks whether there is a correlation between individual harm and harm to competition. As it turns out, there is a divergence in the incentives of public enforcers as compared to certain potential private enforcers. *Mackenrodt* concludes by discussing the consequences for reaching the optimum level of enforcement and the influence of a more economic understanding of Article 82 EC.

Fernando García Cachafeiro focuses on the role of consumer associations in the enforcement of Article 82 EC. As one of the measures to improve private enforcement of the EC competition rules, the Commission suggests that consumer associations be enabled to bring damages claims against dominant companies on behalf of their members. Taking the US experience on mechanisms of collective redress into account, the author analyses those factors that contribute to effective representative claims and contemplates what happens to individual claims if an association brings a claim, which association should have standing to sue and who should be the beneficiary of any compensation paid.

A number of people deserve special thanks for their contributions to the success of the conference and to the publication of this volume. In addition to the authors, who demonstrated great commitment throughout the course of the project, Professor *Josef Drexl* gave advice and encouragement, *Delia Zirilli* helped in the organisation of the conference, *Allison Felmy* and *Christine Herrick* revised the papers in English, and *Sebastian Kestler* and *Lorenz Marx* assisted in the editing of the papers. Finally, the editors' would like to thank *Dimitris Riziotis* for taking notes of the presentations and of the lively discussion throughout the conference.

Munich, June 2008

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The Reform of Article 82 EC in the Light of the "Economic Approach"

*Wolfgang Wurmnest**

1 Introduction

Approximately 25 years ago, under the influence of the Chicago School of antitrust analysis an "antitrust revolution" took place in the U.S. which, in the eyes of some, led to a flamboyant triumph of economics, and in the eyes of others, to a deplorable weakening of competition law enforcement, especially with regard to monopolisation cases. Is Europe travelling down the same path as U.S. antitrust law? Since the late 1990s, the European Commission has pursued an ambitious project to overhaul the interpretation and application of EC competition law. The cornerstone of the modernisation process is an increased role of economics in competition law. This redirection is often referred to as the "more economic approach", even though "modern" economic approach would be a more suitable description. Although the European Commission has never precisely defined the scope of the reorientation, one can say that it has three essential characteristics: First, strong emphasis is placed on the promotion of economic efficiency and consumer welfare. Second, only those practices are to be prohibited that have the effect of harming consumers. Third, the enforcement practice shall make increasing use of modern microeconomic insights and econometric tools when assessing allegedly anticompetitive conduct. To date,

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* With the exception of the recent White Paper on damages actions for breach of the EC antitrust rules [COM(2008) 165 final], this chapter reflects the law as of August 2007.

this policy shift has led to far-reaching reforms with regard to the enforcement of Article 81 EC[1] and to the adoption of new merger-control standards.[2]

The European Commission's attention has now shifted towards the development of a modernised approach to abuse control under Article 82 EC. In December 2005, the Commission published a Discussion Paper on the application of Article 82 EC to exclusionary abuses (the "Discussion Paper").[3] The Discussion Paper may eventually be transformed into guidelines, and guidelines on exploitative abuses and discrimination may follow. The review process leading to the Discussion Paper was accompanied by important decisions by the European Commission[4] and by judgments of the European courts (the European Court of Justice and the Court of First Instance) on the application of Article 82 EC.[5] These have triggered a lively debate on the criteria to be applied to assess dominant firms' business practices. Critics of the present enforcement practice argue that it lacks a clear and coherent basis and focuses primarily on the form of an alleged anticompetitive act.[6] It is argued that the

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1 *See, e.g.*, Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] OJ L 336/21; Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, [2001] OJ C 3/2. For a first assessment of the reform, *see* WAELBROECK, "Vertical Agreements: 4 Years of Liberalisation by Regulation n. 2790/99 after 40 Years of Legal Block Regulation", in: ULLRICH (ed.), "The Evolution of European Competition Law: Whose Regulation, Which Competition", 85 *et seq.* (2006).

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), [2004] OJ L 24/1. For an excellent description of the various econometric tools in the field of merger control, *see* SCHWALBE/ZIMMER, "Kartellrecht und Ökonomie: Moderne ökonomische Ansätze in der europäischen und deutschen Zusammenschlusskontrolle", (2006).

3 EUROPEAN COMMISSION "DG Competition discussion paper on the application of Article 82 EC to exclusionary abuses" (December 2005), available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

4 *See, e.g.*, Commission, Decision of 16 July 2003, Case COMP/38.233 *Wanadoo Interactive,* available at http://ec.europa.eu/comm/competition/index_en.html; Commission, Decision of 24 March 2004, Case COMP/C-3/37.792 *Microsoft*, available at http://ec.europa.eu/comm/competition/index_en.html.

5 *E.g.* Case T-203/01 *Manufacture française des pneumatiques Michelin v European Commission* [2003] ECR II-4071; Case T-219/99 *British Airways v European Commission* [2003] ECR II-5917; Case C-95/04 P *British Airways v European Commission* [2007] ECR I-2331.

6 *See, e.g.*, KALLAUGHER/SHER, "Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82", (2004) 25 E.C.L.R. 263, 268; EILMANSBERGER, "How to Distinguish Good from Bad Competition Under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses", (2005) 42 C.M.L.Rev 129, 131 *et seq.*; WAELBROECK, "Michelin II: A Per Se Rule Against Rebates by Dominant Companies?", (2005) 1 JCLE 149 *et seq.*; COMPETITION LAW FORUM'S ARTICLE 82 REVIEW GROUP, "The Reform of Article 82: Recommendations on Key Policy Objectives", (2005) 1 European Competition Journal 179 *et seq.*; EAGCP-REPORT, "An Economic Approach to 82", (2006) 1 Competition Policy International, 111 *et seq.*; *see also* the following contributions to EHLERMANN/ATANSIU (eds.), "European Competition Law 2003: What is an Abuse of a Dominant Position?", (2006): O'DONOGHUE, "Over-Regulating Lower Prices: Time for a Rethink on Pricing Abuses under Article 82 EC", 371 *et seq.*; RATLIFF, "Abuse of Dominant Position and Pricing Practices: A Practitioner's Viewpoint", 427 *et seq.*

effects of allegedly abusive behaviour on a particular market are not sufficiently taken into account, and so the current enforcement practice might chill competition by prohibiting procompetitive conduct. In turn, critics of the new approach argue that clear rules are necessary in order to enhance legal certainty and to ensure an expeditious handling of competition cases.[7] They further point out that the key objective of EC competition law is to protect economic freedom and not consumer welfare.[8]

As there will be separate chapters on the issues of dominance[9], and on the proposed efficiency defence[10], this chapter will be limited to the following points: First, a short overview of the Discussion Paper will be given, and some of its general shortcomings pointed out (2). Then, two particular problems arising in the context of a more economics-led control of abuse will be discussed. The second part contemplates to what extent the Discussion Paper purports to alter the objectives of Article 82 EC (3). In the third part, a critical look will be taken at the proposed "as efficient competitor-test" for pricing abuses (4).

2 The Discussion Paper in context

2.1 The structure of the Discussion Paper

The Discussion Paper starts with a general description on the relation of Article 82 EC to other provisions of the Treaty[11] and explains rather briefly how markets must be defined, and dominance assessed, under Article 82 EC.[12] Its main part is dedi-

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[7] *See* BASEDOW, "Das Kartelldeliktsrecht und der 'More Economic Approach'", (2006) EuZW 97; CHRISTIANSEN/KERBER, "Competition Policy With Optimally Differentiated Rules Instead of 'Per Se Rules v Rule of Reason'", (2006) 2 JCLE 215 *et seq.*; DREHER/ADAM, "The More Economic Approach to Article 82 EC and the Legal Process", (2006) ZWeR 259, 270 *et seq.*; IMMENGA, "Ökonomie und Recht in der europäischen Wettbewerbspolitik", (2006) ZWeR 346, 363 *et seq.*; SCHMIDT/VOIGT, "Der 'more economic approach' in der Missbrauchsaufsicht: Einige kritische Anmerkungen zu den Vorschlägen der Generaldirektion Wettbewerb", (2006) WuW 1097, 1105 *et seq.*

[8] *See, e.g.*, MESTMÄCKER, "Die Interdependenz von Recht und Ökonomie in der Wettbewerbspolitik", in: MONOPOLKOMMISSION (ed.), "Zukunftsperspektiven der Wettbewerbspolitik: Colloquium anlässlich des 30-jährigen Bestehens der Monopolkommission am 5. November 2004 in der Humboldt-Universität zu Berlin", 19 *et seq.* (2005); MÖSCHEL, "Wettbewerb zwischen Handlungsfreiheiten und Effizienzzielen", in: ENGEL/MÖSCHEL (eds.), "Recht und spontane Ordnung: Festschrift für Ernst-Joachim Mestmäcker zum achtzigsten Geburtstag", 355, 357 *et seq.* (2006); IMMENGA, "Grenzen der Rechtsauslegung – Das Diskussionspapier der EG-Kommission zu Artikel 82 EG", (2006) EuZW 481. Some commentators go even further and seem to reject the legitimacy of an economic analysis in competition cases, *cf.* BOY, "Abuse of Market Power: Controlling Dominance or Protecting Competition", in: ULLRICH (ed.), "The Evolution of European Competition Law: Whose Regulation, Which Competition", 201 *et seq.* (2006).

[9] *See* AREZZO, "Is there a role for market definition in the effects-based approach?", published in this volume; *see* KELLEZI, "Abuse below the threshold of dominance?", published in this volume.

[10] *See* RIZIOTIS, "Efficiency defence in Article 82 EC", published in this volume.

[11] EUROPEAN COMMISSION, note 3, paras 8 *et seq.*

[12] EUROPEAN COMMISSION, note 3, paras 11 *et seq.*

cated to the question of under which circumstances a certain conduct must be regarded as abusive.[13] The European Commission proposes a general framework to assess exclusionary conduct[14] and gives further indications on how to apply the general test to the most common abuses, namely predatory pricing, single branding and rebates, tying and bundling, and refusals to supply.[15]

The general test for assessing whether conduct is abusive under Article 82 EC comprises three steps: Firstly, the plaintiff has to show that the conduct in question is capable, by its nature, to foreclose competitors from the market.[16] Foreclosure means that actual or potential competitors are completely or partially denied profitable access to the market. Secondly, the plaintiff must demonstrate that the conduct is also likely to have a distorting effect on the specific market.[17] In a third step, the defendant can invoke objective defences. The Discussion Paper specifies three general defences: the "objective necessity" defence[18], the "meeting competition" defence, which applies to pricing abuses only[19], and the "efficiency" defence[20]. With regard to certain abuses, further screens are proposed, for example the "as efficient competitor"-test for pricing abuses. The Commission is convinced that its proposals will ensure a more systematic and predictable enforcement practice without – as Commissioner *Neelie Kroes* hastened to add – causing a radical shift in enforcement policy.[21]

2.2 The need for clear guidelines

There can be no doubt that guidelines on the application of Article 82 EC are needed at this point in time, and one has to commend the Commission for its efforts. The future guidelines are not only of great interest to the business community. As a result of the recent efforts to decentralise the enforcement of EC competition law, they will also guide national competition authorities and courts.

Since the coming into force of Regulation 1/2003, national competition authorities are obliged to apply Article 81 and Article 82 EC when trade between EC Member States is affected.[22] The national competition authorities are linked by the newly created European Competition Network, whose task it is to ensure close cooperation among the national authorities, and between the national authorities

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[13] EUROPEAN COMMISSION, note 3, paras 20 *et seq*.
[14] EUROPEAN COMMISSION, note 3, para. 51.
[15] EUROPEAN COMMISSION, note 3, paras 93 *et seq*.
[16] EUROPEAN COMMISSION, note 3, para. 58.
[17] EUROPEAN COMMISSION, note 3, para. 58.
[18] EUROPEAN COMMISSION, note 3, para. 80.
[19] EUROPEAN COMMISSION, note 3, paras 81 *et seq*.
[20] EUROPEAN COMMISSION, note 3, paras 84 *et seq*.
[21] KROES, "Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Article 82", in: HAWK (ed.), "Fordham Corporate Law Institute, International Antitrust Law & Policy 2005", 381, 383 (2006).
[22] *Cf.* Article 3 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

and the European Commission.[23] In order to supplement public enforcement, the Commission intends to enable victims of anticompetitive behaviour to invoke EC competition law as a "sword", and to obtain damages from, or injunctions against, cartels or dominant firms. At roughly the same time as the Discussion Paper, the Commission presented a Green Paper on this topic[24] which was recently followed by the White Paper on damages actions for breach of the EC competition rules.[25]

The increased application of EC competition rules by national competition authorities and courts creates the risk of divergent decisions. Competition law traditions differ widely among EC Member States. Furthermore, in most of the new Member States competition law and policy are relatively recent arrivals. This is particularly true with respect to Bulgaria and Romania which have recently joined the EC. Against this background, a proper restatement of the application of Article 82 EC through guidelines is indispensable in order to forestall diverging decisions. Even though guidelines would only bind the European Commission, they certainly represent persuasive authority for national competition authorities and courts as well.

2.3 Critical appraisal

It is very doubtful that the Discussion Paper as presently framed will provide the necessary guidance for assessing allegedly abusive conduct by dominant firms. It has some major shortcomings in this regard.

2.3.1 Proposed changes are often camouflaged by confusing language

It was an ill-conceived idea to begin with to draft the Discussion Paper in the style of guidelines. The crucial dilemma lies in the fact that the Discussion Paper does not merely restate the law as it stands. It also intends to bring EC law in line with modern economic thinking. This implies that in the Commission's opinion, part of the case-law is outdated and should be overruled.

No one can deny that the operating principles of every discipline must periodically be re-examined. The ongoing debate should therefore be seen as a chance to expound clear and consistent rules regarding the application of Article 82 EC. This implies that the Commission is to some extent entitled to weed out minor inconsistencies of previous practice, and to develop a systematic and comprehensive framework for assessing unilateral conduct by dominant firms. On the other hand, the

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[23] *See* the Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities of 10 December 2002, available at http://ec.europa.eu/comm/competition/index_en.html; Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43.

[24] EUROPEAN COMMISSION, "Green paper on damages actions for breach of the EC antitrust rules", COM(2005) 672 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html.

[25] EUROPEAN COMMISSION, "White paper on damages actions for breach of the EC antitrust rules", COM(2008) 165 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html.

need for clear guidelines demands that proposed changes with regard to the existing enforcement practice should be duly highlighted. In this regard the Discussion Paper falls short.

It would have been much more transparent to draft the Discussion Paper in a more narrative style in order to throw into relief any deviations from existing case-law. The Commission should first have outlined the current state of the law, it should then have explained why and to what extent the introduction of a more economic analysis was called for, before finally describing the results of the proposed changes in contrast with the existing standards. The Discussion Paper lacks this clear distinction. It is caught between restating the law and rewriting it, without alerting the reader to possible deviations. Departures from existing case-law are often camouflaged by confusing language. Even an informed reader needs to study certain passages carefully to spot the exact changes.[26] This makes it difficult to understand the precise scope of the proposed improvements and the reasoning behind the reform.

2.3.2 Flexibility v legal certainty

If one takes a closer look at the sections on specific abuses, one can further question whether the general approach pursued by the Commission satisfies the need for legal certainty described above. For each abusive practice, various sets of presumptions are proposed which can always be rebutted by the dominant firm. Although such an approach will ensure a flexible handling of cases, one should think of ways to define clearer standards as far as possible. It goes without saying that regarding abuse of dominance, telling procompetitive from anticompetitive practices turns on fine distinctions capable of graduation; it is also a very fact-specific endeavour. Nevertheless, one could have conceived of clearer rules. For example, even in relatively straight-forward cases such as pricing below a certain cost benchmark, the Commission does not preclude the efficiency defence. Rather, the Discussion Paper states that "an efficiency defence can *in general* not be applied to predatory pricing"[27]. In other words: it is difficult, but not impossible to convince the Commission that there are efficiencies. Such vague language may entice a defendant to concoct a story why, in his very special case, for example prices below average variable costs are beneficial to consumers. To my mind, there seems to be little room for accepting efficiencies under these circumstances. An efficiency defence should not, therefore, be allowed against allegations of predatory pricing. This would result in a clearer standard without leaving the dominant firm unprotected: it can still rely on other business justifications, such as short term promotional spending, to explain why its below-cost pricing makes economic sense.

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[26] *See, e.g.*, the critique voiced by MONTI, "The Concept of Dominance in Article 82", (2006) 2 European Competition Journal 31, 51 (with regard to the section on dominance); DREHER/ ADAM, "Abuse of Dominance Under Reform – Sound Economics and Established Case Law", (2006) 27 E.C.L.R. 278, 279 *et seq*. (with regard to the section on possible defences).

[27] EUROPEAN COMMISSION, note 3, para. 133 (emphasis added).

2.3.3 Which economics?

Another general shortcoming of the Discussion Paper is the almost complete lack of information on which economic tools and insights should be applied when assessing alleged abuses. It should be remembered that guidelines are not written to direct the Commission, but to make its decisions transparent to the business community. Many lawyers, let alone courts, do not possess much experience with economic theory. The Commission should, therefore, explain which economic theory it would consider as "robust" and to what extent one can apply these theories.

It seems as if the Commission has largely drawn on the insights of mainstream industrial-organisation theory when drafting the Discussion Paper. This "post-Chicago" current bases its findings on neoclassical equilibrium models with optimising agents and econometric studies. The problem with applying industrial-organisation insights to concrete competition cases is that there is a great variety of models which are often based on very tenuous assumptions. Furthermore, the various models even contradict each other.[28] Thus, normative choices have to be made to decide which model is the appropriate one for the case at hand ("get the right model").[29] What is more, it has to be noted that mainstream industrial economics not only ignores insights developed in the field of new institutional economics, such as the concept of "bounded rationality" as a broader concept of human behaviour. It also pays scarce attention to modern innovation economics as well as to dynamic concepts of competition in the tradition of *Schumpeter* and *Hayek*. Too strong a reliance on industrial-organisation insights thus entails the danger of reducing the assessment of competition policy to the question of changes in price and quantity of given products.[30] This can be especially detrimental in the assessment of IP cases concerning a refusal to license according to Article 82 EC.[31]

2.3.4 Sound economics v enforceable rules

A last remark is called for on the interplay between the modern economic approach and the risk of under-enforcement of EC competition law. There can be no doubt that abuse control requires a thorough analysis of economic aspects in order to reach a sound decision. Moreover, competition policy should heed modern economic insights as far as they can be considered "robust". The European Commission is therefore right to refine the existing case-law in order to further reduce the risk of

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[28] CHRISTIANSEN, "Die 'Ökonomisierung' der Fusionskontrolle: Mehr Kosten als Nutzen?", (2005) WuW 285, 290 *et seq*.

[29] SCHMIDTCHEN, "Effizienz als Leitbild der Wettbewerbspolitik: Für einen 'more economic approach'", in: OBERENDER (ed.), "Effizienz und Wettbewerb", 9, 31 (2006).

[30] KERBER, "Book Review of Motta, Competition Policy. Theory and Practice", (2006) ZWeR 102, 105.

[31] *See* the critique voiced by DREXL/CONDE GALLEGO/ENCHELMAIER/LEISTNER/MACKENRODT, "Comments of the Max Planck Institute for Intellectual Property, Commission and Tax Law on the Directorate-General Competition Discussion Paper of December 2005 on the Application of Article 82 of the EC Treaty to Exclusionary Abuses", (2006) 37 IIC 558, 568 *et seq*.

prohibiting procompetitive conduct ("type I errors" or "false positives"). However, if the economic threshold is set too high, the investigation process will be delayed, and swift intervention by competition authorities will become impossible. These delays may cause great structural harm, especially when rivals of the dominant firm are forced to leave the market. Even though, in theory, a monopolist will not enjoy an unchallenged position for long, as his monopoly prices will attract new entrants, experience has shown that once competition is lost, it is often difficult to restore.[32] In case the dominant firm manages to squeeze out its only competitor by illegal means, it will prolong its monopoly for quite some time even though it might ultimately be fined by the antitrust authority. Therefore, one should not underestimate the social cost of "false negatives" or "type II errors".

Moreover, the European Commission ought to be aware that an overly thorough economic assessment may hamper its efforts to strengthen the private enforcement of competition law. Private litigants should be enabled to complement public enforcement.[33] In other words, private plaintiffs must help to put an end to anticompetitive conduct and thus to increase the deterrent effect of EC competition law. For this reason, it is not sufficient merely to stimulate "follow-on actions", i.e. those that are brought after a competition authority has already investigated the case.[34] What is also needed is a strengthening of "stand-alone actions". The problem with these is that the fact-finding in competition cases is already very complex. An excessively meticulous economic analysis is bound to add to plaintiffs' difficulties, given that under most national procedural laws, private plaintiffs do not have the means to force the dominant firm or other market participants to disclose relevant economic data.[35] It is doubtful whether the recently presented White Paper on damages actions for breach of EC competition law will overcome these shortcomings. Although the Commission has addressed the problem of access to evidence[36], the proposed rules are rather modest in scope and will not introduce a U.S.-style discovery procedure. However, there are good reasons not to copy the U.S. litigation system, as U.S. experience teaches us that overly plaintiff-friendly litigation rules create the risk that dominant firms may become the object of "abusive" rival

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[32] *See* GAVIL, "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance", (2004) 72 Antitrust L. J. 3, 39 *et seq.* with examples from recent U.S. cases.

[33] *See* HEMPEL, "Privater Rechtsschutz im Kartellrecht: Eine rechtsvergleichende Analyse", 254 *et seq.* (2002); BASEDOW, "Perspektiven des Kartelldeliktsrechts", (2006) ZWeR 194 *et seq.*; BULST, "Private Antitrust Enforcement at a Roundabout", (2007) EBOR 725 *et seq.*

[34] On the recent efforts to strengthen follow-on actions under German Law, *see* BÖGE/OST, "Up and Running, or Is It? Private Enforcement – The Situation in Germany and Policy Perspectives", (2006) 27 E.C.L.R. 197, 199 *et seq.*; WURMNEST, "A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernised Law Against Restraints of Competition", (2005) 6 German L. J. 1173 *et seq.*

[35] BASEDOW, note 7, 97; BÖGE/OST, note 34, 204 *et seq.*; DREHER/ADAM, note 7, 276.

[36] *See* EUROPEAN COMMISSION, note 25, 5 *et seq.*; EUROPEAN COMMISSION, "Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules", 23 *et seq.*, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf.

suits.[37] Yet if the Commission thinks that certain abuses under Article 82 of the EC Treaty should not be subject to private enforcement actions, it should clearly say so, instead of "inefficiently" pursuing two rather conflicting policy goals.

3 The objective of Article 82 EC

One key issue of the current debate on the more economic approach is the question of what EC competition law in general and Article 82 EC in particular ought to protect. Broadly speaking, one can discern two opposing views. On the one hand, there is the traditional view to protect competition as a process of coordination, which has influenced the existing case-law of the European courts to some extent. On the other hand, there is the Anglo-Saxon consumer welfare approach. For a better understanding, foundational assumptions of both views are highlighted before analysing the changes introduced by the Discussion Paper.

3.1 The case-law of the European courts and its foundations

It is sometimes argued that the objectives of Article 82 EC have never been precisely articulated in any formal Community document or decision.[38] Not so: according to the settled case-law of the European Court of Justice (ECJ), Article 82 EC is an application of the general objective of the activities of the Community laid down by Article 3(1)(g) EC Treaty, that is, "the institution of a system ensuring that competition in the Common Market is not distorted"[39]. Article 82 EC thus concerns activities potentially disturbing the objective of maintaining effective and undistorted competition, or hindering economic integration between Member States.

Article 82 EC is not designed to protect the immediate interests of individual competitors or consumers directly, but aims also at the protection of residual competition. In *Hoffmann-La Roche* the ECJ defined the concept of abuse as "an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very

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[37] AT&T estimated that it spent approximately USD 100 million yearly to defend itself against charges of predation at the beginning of the 1980's; *see* EASTERBROOK, "Predatory Strategies and Counterstrategies", (1981) 48 U. Chi. L. Rev. 263, 334. Easterbrook estimated that the litigation cost of an "ordinary" predation case is USD 3 million; *ibid*, 335, fn. 187. The picture has changed much since then. The Supreme Court has set the burden of proof for predatory pricing very high, which has basically brought private predation cases to an end. After the landmark decision *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), no predatory pricing action in the federal courts has resulted in a final determination in favour of the plaintiff. However, in a very recent case the plaintiffs survived summary judgment; *see Spirit Airlines, Inc. v Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005). While the case was pending, the predator, however, filed for bankruptcy under chapter 11 of the U.S. Bankruptcy Code.

[38] O'DONOGHUE/PADILLA, "The Law and Economics of Article 82 EC", 4 (2006).

[39] *See* Case 6/72 *Continental Can v European Commission* [1973] ECR 215, para. 23; Case 85/76 *Hoffmann-La Roche v European Commission* [1979] ECR 461, para. 38.

presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on 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"[40].

In short, Article 82 EC, as the Court recently confirmed in *British Airways*, "is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC"[41].

The protection of competition does not generally collide with consumer welfare considerations. As a means of both enhancing consumer welfare and of ensuring an efficient allocation of resources, competition helps to prevent other welfare-reducing effects and thus society as a whole, including consumers, in this way benefits from competition.[42]

The emphasis on protecting competition as a process has often provoked lively criticism, especially but not exclusively in the U.S. It is often said that EC competition law tends to protect competitors instead of competition.[43] This is an empty slogan. It goes without saying that competition law should neither protect competitors nor a given structure of the market. The crucial problem is that in cases of market dominance, protection of competition has often the indirect effect of protecting competitors as in the absence of competitors, competition (understood as a process of rivalry) ceases to exist – at least for a certain time, until new competitors enter the market.[44]

To a certain extent, the case-law of the European courts was influenced by ordoliberal thought, which has its origin in the so-called Freiburg School.[45] The Freiburg School, composed of lawyers and economists, was established in the 1930s at the University of Freiburg. Their members endorsed a new form of liberal thought that was firmly rooted in the belief that a competitive economic system was necessary for a free and equitable society and saw the need to protect the economic freedom of market participants to enable them actively to engage in the

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[40] Case 85/76 *Hoffmann-La Roche v European Commission* [1979] ECR 461, para. 91; *see also* Case T-51/89 *Tetra Pak Rausing SA v European Commission* [1990] ECR II-309, para. 23.

[41] Case C-95/04 P *British Airways v European Commission* [2007] ECR I-2331, para. 106.

[42] *See* EILMANSBERGER, note 6, 135; ENGELSING, "Modernisierung von Artikel 82 EG: Konsumentenwohlfahrt und Effizienz als neue Leitbilder?", in: AHRENS/BEHRENS/DIETZE (eds.), "Marktmacht und Missbrauch", 89, 92 (2007).

[43] *See, e.g.,* ROUSSEVA, "Modernizing by Eradicating: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints", (2005) 42 C.M.L.Rev. 587, 592 ("[T]he emphasis on changes of market structure and reduction of consumer choice actually disguised a policy of protecting competitors").

[44] MESTMÄCKER/SCHWEITZER, "Europäisches Wettbewerbsrecht", 389 (2nd ed. 2004); BEHRENS, "Comment: Controlling Dominance or Protecting Competition: From Individual Abuses to Responsibility for Competition", in: ULLRICH (ed.), "The Evolution of European Competition Law: Whose Regulation, Which Competition", 230 (2006).

[45] *See, e.g.*, GERBER, "Law and Abuse of Economic Power in Europe", (1987) 62 Tulane L. Rev. 57, 85 *et seq*.

competitive process.[46] In their view, historical experience had shown that the market will not by itself generate and maintain a general framework to ensure its optimal performance. Market participants tend to destroy economic liberties conferred on private individuals mainly through collusion and exclusionary practices. Therefore, the ordoliberals advocated a strict legal framework and a strong role for the state in protecting the basic parameters of competition.[47] Competition was understood as a process of economic coordination on the basis of freedom of action. As a consequence, economic efficiency is only seen as an indirect and derived objective that is essentially a result of the realisation of individual freedom of action in a market system. Against this background, the protection of individual economic freedom – as a value in itself – against restraints through undue economic power was regarded as the primary objective of competition policy.[48] It is often contended that this line of thought wants to assess competition cases based on fairness arguments[49] and ignores the need for sound economic analysis.[50] These allegations are unfounded.[51] Protecting competition as an open process seeks to protect competitors as a part of the competitive process *only* from those kinds of harm which are not part of legitimate competitive activities. To determine which practices should be prohibited, modern economic theory must be taken into account to assess whether the conduct in question has an appreciable potential foreclosure effect that can harm competition. *Actual* exclusionary effects need not,

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[46] After an initial period in Freiburg, postwar research was continued in various locations. It should be noted that there were considerable differences on quite a number of economic issues; on the Freiburg School and ordoliberal theory in general *see* HEINEMANN "Die Freiburger Schule und ihre geistigen Wurzeln", 18 *et seq*. (1989); MÖSCHEL, "Competition Policy from an Ordo Point of View", in: PEACOCK/WILLIGERODT, "German Neo-Liberals and the Social Market Economy", 142 *et seq*. (1989); STREIT, "Economic Order, Private Law and Public Policy: The Freiburg School of Law and Economics in Perspective", (1992) 148 JITE 675 *et seq*.; GERBER, "Law and Competition in Twentieth Century Europe: Protecting Prometheus", 232 *et seq*. (1998); DREXL, "Die wirtschaftliche Selbstbestimmung des Verbrauchers: Eine Studie zum Privat- und Wirtschaftsrecht unter Berücksichtigung gemeinschaftsrechtlicher Bezüge", 106 *et seq*. (1998).

[47] Some members of the Freiburg School therefore embraced the idea that dominant firms should behave "as if" there was effective competition and advocated a strict supervision of those undertakings by competition authorities, *see, e.g.*, MIKSCH, "Wettbewerb als Aufgabe", 91 *et seq*. (2nd ed. 1947); EUCKEN, "Grundsätze der Wirtschaftspolitik", 295 *et seq*. (7th ed. 2004). These ideas never made it into the law and were not pursued by those who later shaped the ordoliberal philosophy, such as Ernst-Joachim Mestmäcker and Wernhard Möschel.

[48] *See* MÖSCHEL, note 46, 146.

[49] *See* FORRESTER, "Article 82: Remedies in Search of Theories?", (2005) 28 Fordham Int'l L.J. 919.

[50] *See* VENIT, "Article 82: The Last Frontier – Fighting Fire with Fire?", (2005) 28 Fordham Int'l L.J. 1157, 1163 ("It is clear from the foregoing that the basic tenets of ordoliberal doctrine do not cite to, nor rely on, any empirical economic evidence or micro-economic theory. Instead, they appear to be based on a philosophy of political or social economy.").

[51] *See* the thorough analysis provided by SCHWEITZER, "Parallels and Differences in the Attitude towards and Rules Regarding Market Power: What are the Reasons?", in: EHLERMANN/MARQUIS (eds.), "European Competition Law Annual 2007: A Reformed Approach to Article 82 EC", 8 *et seq*. (forthcoming 2008), available at http://www.iue.it/RSCAS/Research/Competition/2007(papers).shtml.

however, be proven in practice, as abuse control should not be restricted to cases where anticompetitive harm has already occurred.[52]

3.2 The consumer welfare approach

The consumer welfare approach was originally developed by the Chicago School of antitrust analysis[53] and became the dominant approach in the U.S. over time. By and large, all major approaches to competition law in the U.S., at least in academia and in the antitrust agencies – the courts are much less straightforward on this issue – now agree that the protection of economic welfare is at least a very important objective of U.S. antitrust law.[54] However, important differences remain on how to define this objective and on how to achieve it.[55]

Under the consumer welfare standard, the objective of competition policy must be to prevent practices that would harm consumer welfare as measured in terms of economic efficiency. There is a lively debate among economists on whether concerns of welfare under antitrust law should refer to (1) *consumer welfare*, defined as the difference between what a person is willing to pay for a commodity and the amount he is actually required to pay, or (2) *total welfare*, defined as the sum of consumer and producer surplus.[56] Both concepts are of a static nature – although more recently, efforts have been made to include *dynamic efficiency* in the analysis, i.e. to account for the advantages arising from the release of creative forces in competition, for example, by way of product innovation.[57]

In contrast with the proposition of the Chicago School, namely that the analysis should be based on the total welfare standard (confusingly labelled "consumer welfare standard")[58], it seems to be common ground today that the "true" consumer welfare standard (also called "consumer surplus standard") should serve as the yardstick of U.S. antitrust law.[59] Yet, no consensus has been reached which market

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[52] See BUNDESKARTELLAMT/COMPETITION LAW FORUM, "A Bundeskartellamt/Competition Law Forum Debate on Reform of Article 82: A 'Dialectic' on Competing Approaches", (2006) 2 European Competition Law Journal 211, 223.

[53] On the Chicago School *see* POSNER, "The Chicago School of Antitrust Analysis", (1979) 127 U. Pa. L. Rev. 925 *et seq.*; BORK, "The Antitrust Paradox: A Policy War with Itself" 107 *et seq.* (1993).

[54] It has to be noted that there is still no agreement on the question of whether economic efficiency is the only goal of antitrust law (or law in general), as claimed by the Chicago School of antitrust analysis. A good overview on this disputed question is given by HOVENKAMP, "Federal Antitrust Policy: The Law of Competition and its Practice", 48 *et seq.* (3rd ed. 2005).

[55] *See* HOVENKAMP, "The Antitrust Enterprise: Principle and Execution", 31 *et seq.* (2005).

[56] For a review of the competing arguments *see* VAN DEN BERGH/CAMESASCA, "European Competition Law and Economics", 63 *et seq.* (2001); MOTTA, "Competition Policy: Theory and Practice", 18 *et seq.* (2004); BISHOP/WALKER, "The Economics of EC Competition Law: Concepts, Application and Measurement", 23 *et seq.* (2002).

[57] SCHWALBE/ZIMMER, note 2, 10 *et seq.*

[58] BORK, note 53, 433.

[59] *See* BRODLEY, "Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress", (1987) 62 N.Y.U. L. Rev. 1020, 1025 *et seq.*; EDLIN, "Stopping Above-cost Predatory Pricing", (2002) 111 Yale L. J. 941, 984 Fn. 25; *but see* POSNER, "Antitrust Law", (2nd ed. 2001).

participants to protect as consumers. Whereas some argue that every market participant apart from the dominant firm and its competitors must be regarded as consumer, others seem to favour a stricter notion of consumer welfare under which only those practices may be prohibited which have adverse effects on the welfare of end consumers who buy goods or services at the end of a distribution chain.[60] Moreover, as welfare effects are usually difficult to measure in practice, there is a great debate on how this approach should be translated into operational rules.[61]

In Europe, the welfare approach was, at first, sternly rejected. On this side of the Atlantic, *Robert Bork* never had an "intellectual twin"[62]. It was the prevailing view that the combined objectives of achieving an internal market and promoting competition create a form of competition law which does not fit neatly with any particular school of economic analysis prevailing in other jurisdictions.[63] In the words of former Commissioner *Sir Leon Brittan*, the Chicago School was not directly relevant to EC competition policy as "Chicago does not need to worry about creating a single market. Rather, it presupposes the existence of an integrated market"[64]. Only when the goal of market integration is achieved could such an approach assume more importance in the formulation and implementation of competition policy.[65] Yet, over time, the welfare standard has become more influential in Europe.

3.3 The Discussion Paper

3.3.1 Overview

In line with the general drift of the economic approach, the Discussion Paper contains numerous references to consumer welfare – apparently understood as the consumer surplus standard without clearly defining which market participants are covered by the notion of consumers – and to consumer harm. The central passage dealing with the objective of Article 82 EC reads as follows: "The essential objec-

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[60] On this dispute *see* WERDEN, "Monopsony and the Sherman Act: Consumer Welfare in a New Light" (23 March, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975992.

[61] On the various approaches advanced to identify exclusionary conduct under Sec. 2 Sherman Act *see*, *e.g.*, MEESE, "Property, Aspen, and Refusals to Deal", (2006) 73 Antitrust L. J. 81 *et seq.*; LOPATKA/PAGE, "Bargaining and Monopolization: In Search of the 'Boundary of Section 2 Liability' Between Aspen and Trinko", (2006) 73 Antitrust L. J. 115 *et seq.*; FOX, "Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act", (2006) 73 Antitrust L. J. 153 *et seq.*; LAO, "Aspen Skiing and Trinko: Antitrust Intent and 'Sacrifice'", (2006) 73 Antitrust J. 171 *et seq.*; SALOP, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard", (2006) 73 Antitrust L. J. 311 *et seq.*; MELAMED, "Exclusive Dealing Agreements and Other Exclusionary Conduct: Are There Unifying Principles?", (2006) 73 Antitrust L. J. 375 *et seq.*; WERDEN, "Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test", (2006) 73 Antitrust L. J. 413 *et seq.*; POPOFSKY, "Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules", (2006) 73 Antitrust L. J. 435 *et seq.*

[62] MONTI, "EC Competition Law", 81 (2007).

[63] MONTI, note 62, 39.

[64] BRITTAN, "European Competition Policy: Keeping the Playing-Field Level", 3 (1992).

[65] BRITTAN, note 64, 3.

tive of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"[66]. According to *Michael Albers*, a senior official in the Directorate-General Competition, the Commission intends in the future to prohibit only those practices of a dominant undertaking that have a detrimental impact on the welfare of the consumers concerned.[67] Many commentators therefore stress that the Commission has departed from the traditional view and now embraces the consumer welfare approach as the sole "lode star" for European competition policy.[68] By contrast, the *Bundeskartellamt* understands the position of the Discussion Paper as saying that the traditional objective of Article 82 EC has – in principle – not changed.[69]

3.3.2 Critical appraisal

To my mind, the Discussion Paper departs from the traditional view to a certain extent. The most prominent shift in the Discussion Paper is the proposal of an efficiency defence.[70] Nonetheless, a careful reading of the Discussion Paper suggests that the numerous references to consumer harm are not meant to establish the maximisation of consumer welfare as the *only* objective of competition law. Some examples will prove the point:

In the section on the framework for analysing exclusionary conduct, the Commission concedes that Article 82 EC may also aim at safeguarding the competitive process. This would be so in cases in which the dominant company benefits from economies of scale and scope or from a first-mover advantage.[71]

A similar reference can also be found in the section on the proposed introduction of the efficiency defence. The Commission acknowledges that "rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation"[72]. Therefore, the Commission argues that in cases in which the dominant company has a market position coming close to that of

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[66] EUROPEAN COMMISSION, note 3, para. 4.

[67] ALBERS, "Der 'more economic approach' bei Verdrängungsmissbräuchen: Zum Stand der Überlegungen der Europäischen Kommission", in: AHRENS/BEHRENS/DIETZE (eds.), "Marktmacht und Missbrauch", 11 *et seq*. (2007).

[68] *See, e.g.,* COMPETITION LAW FORUM'S ARTICLE 82 REVIEW GROUP, "The Reform of Article 82", (2006) 2 European Competition Law Journal 169; NAZZINI, "The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 EC Cases", (2006) 31 E. L. Rev. 518, 521.

[69] *See* the "Written Statement of the German Bundeskartellamt and the German Ministry of Economics and Technology on the DG Competition discussion paper on the Application of Article 82 of the Treaty to Exclusionary Abuses", 5 (2006) ("We welcome the Commission's statement that the main objective of Article 82 EC is to protect competition itself (as a means of both enhancing an efficient allocation of resources and consumer welfare) and not competitors […]. Consequently, we reject the idea of moving to the protection of consumer welfare or consumer interests as the primary objective of competition law"); *see further* ENGELSING, note 42, 92.

[70] EUROPEAN COMMISSION, note 3, paras 84 *et seq*.

[71] EUROPEAN COMMISSION, note 3, para. 67.

[72] EUROPEAN COMMISSION, note 3, para. 91.

a monopoly, i.e. when its market share exceeds 75%, and there remains almost no competitive pressure, the protection of rivalry and of the competitive process must be in general "given priority over possible short-run procompetitive efficiency gains"[73].

Finally, the Commission does not fully embrace a strict recoupment test in predatory pricing actions[74] even though such a test is essential for judging predatory pricing claims under a true consumer welfare standard.

In sum, the various caveats make it doubtful whether it is the intention of the Commission to make the maximisation of consumer welfare the sole objective of EC competition law. If so, such an attempt cannot be endorsed.

Any shift in the Commission's competition policy has to be in line with the rules of the EC Treaty. The Commission has no legislative power to deviate substantially from the competition rules laid down in the EC Treaty as interpreted by the Community courts. Any revision of the objects of competition law – i.e. a shift towards an interpretation which is *solely* based on efficiency and consumer welfare considerations – is not possible without first reshaping the existing case law of the European courts.[75] As outlined above, the case law has thus far interpreted the competition rules as protecting competition as an open process. Most recently, the European Court of Justice has confirmed this approach in the aforementioned *British Airways* case by emphasising that Article 82 EC "is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure"[76]. However, the Court for the first time clearly states that an efficiency defence is permissible. The relevant passage reads:

> "Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case […]. It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse."[77]

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[73] EUROPEAN COMMISSION, note 3, para. 91.

[74] EUROPEAN COMMISSION, note 3, para. 122.

[75] SCHWEITZER, note 51, 17 *et seq.*; ZIMMER, „On Fairness and Welfare: The Objectives of Competition Policy – Comment on David J. Gerber, Christian Ahlborn and A. Jorge Padilla", in: EHLERMANN/MARQUIS (eds.), "European Competition Law Annual 2007: A Reformed Approach to Article 82 EC", 1 *et seq.* (forthcoming 2008), available at http://www.iue.it/RSCAS/Research/Competition/2007(papers).shtml.

[76] Case C-95/04 P *British Airways v European Commission* [2007] ECR I-2331, para. 106.

[77] Case C-95/04 P *British Airways v European Commission* [2007] ECR I-2331, para. 86.

Thus, similar to Article 81(3) EC, efficiency gains benefiting the consumer may constitute an "objective economic justification" which may be taken into account when assessing conduct under Article 82 EC. Given the cautious wording of the Court and the fact that it did uphold the rather cursory "efficiency analysis" undertaken by the CFI on procedural grounds, I would submit that the general objective remains the protection of competition.[78] Consequently, the Court by no means regarded the economic concept of consumer welfare as the primary or exclusive objective of competition law.

Moreover, future law reform would be ill-advised to regard (measurable) economic efficiency as the exclusive objective of competition law. The attractiveness of confining competition law to economic efficiency concerns is in large part caused by the apparent simplicity, certainty and objectivity of such an approach. However, competition is a (messy) process of exploration, i.e. of trial and error, in which different transactions have varying effects on each other.[79] As no one can gather all relevant information on complex real-world markets, it is practically impossible to measure the results of such a process in advance with precision. Any attempt to judge competition cases *solely* based on market outcomes, i.e. allocative efficiency in the neoclassical sense, must be seen, to quote *Friedrich A. von Hayek,* as "pretence of knowledge"[80]. Even those who favour a consumer welfare approach recognise that it is very difficult to gauge in a specific case the consequences, efficiencies or others, of a challenged practice.[81] These difficulties have led even *Richard Posner*, in the latest edition of his book on antitrust law, to concede that too strong a reliance on efficiencies is unsound, and that the protection of the competitive process will often be sufficient to solve antitrust cases.[82]

My critique should not be understood to say that efficiency considerations should be entirely disregarded to assess whether a conduct is abusive or not. Nonetheless, I have doubts as to whether efficiency gains can be assessed with precision in each and every case: quantifying efficiencies and balancing them against anticompetitive effects takes up a lot of resources and often amounts more to guesswork than to "hard science". Instead, the Court's case law appears founded on the very reasonable assumption that a competition policy essentially based on the protection of the competitive process will in general lead to a variety of welcome effects, such as the dispersion of private economic power, the promotion of technical progress and innovation and the enhancement of consumer welfare. However, as the Court rightly indicated in *British Airways*, economic explanations capable of justifying a given conduct by a dominant firm must be taken into account when assessing an

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[78] Although the Court's reasoning in *British Airways has* "something for everyone", my interpretation is shared by ENGELSING, note 42, 91 *et seq.*; ZIMMER, note 75, 1 *et seq*.

[79] HAYEK, "Der Wettbewerb als Entdeckungsverfahren", in: WALTER EUCKEN INSTITUT (ed.), "Freiburger Studien", 249 *et seq*. (1969).

[80] HAYEK, "Die Anmaßung von Wissen", (1975) 26 ORDO 12 *et seq*.

[81] *See, e.g.*, EVANS/PADILLA, "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach", (2005) 72 U. Chi. L. Rev. 73, 87.

[82] POSNER, note 59, 29 ("Efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further").

alleged abuse of a dominant position. They may in exceptional cases lead to a deviation from the principle of protecting competition as an open process. This approach does not make consumer welfare the exclusive objective of competition law but, by way of exemption, places welfare considerations next to the traditional objectives, such as market integration and the protection of economic freedom.

A final word of caution is in order. It sometimes seems the debate concerning the objectives of EC competition law has degenerated into a clash of faiths. Although the objectives of competition law are certainly important in construing the general clauses of competition law, they do not provide clear tests to tell legitimate competitive activities from "abuses" by dominant firms. Therefore, as *Daniel Zimmer* aptly emphasized, instead of engaging in fruitless debates on the question whether consumer welfare should be the only goal of competition law, lawyers and economists should focus more on appropriate tests for a better definition of anti-competitive conduct, combining economic thinking with the needs of the legal process.[83] The Commission has tried to develop such tests in the Discussion Paper. In the remaining part of the chapter, a closer look will be taken at the proposed "as efficient competitor"-test for pricing abuses.[84]

4 The "as efficient competitor"-test

4.1 The proposal

The "as efficient competitor"-test was developed by *Richard Posner*, who suggested that an exclusive practice is one that is "likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor"[85]. As competition is "a ruthless process"[86], inefficient competitors will sooner or later be forced to leave the market. Competition law should not seek to protect them. In order to ensure that pricing policies merely harming inefficient rivals will not be condemned, the question to be asked is whether the dominant company itself would be able to survive the exclusionary conduct if it were the target.[87] The Commission wants to investigate and compare cost structures in each individual case. According to the Discussion Paper, the "as efficient competitor"-test is even intended to provide a safe harbour for the dominant company.[88]

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[83] ZIMMER, "Wettbewerbspolitik am Scheideweg", Frankfurter Allgemeine Zeitung, 18 August 2007, 11.
[84] EUROPEAN COMMISSION, note 3, para. 66 *et seq*.
[85] POSNER, note 59, 196.
[86] *Ball Mem'l Hosp., Inc. v Mutual Hosp. Ins., Inc.,* 784 F. 2d 1325, 1338 (7th Cir. 1986).
[87] EUROPEAN COMMISSION, note 3, para. 66.
[88] EUROPEAN COMMISSION, note 3, para. 66.

4.2 Critical appraisal

The application of the proposed test raises some difficult problems. These diminish its practical value and make it doubtful whether it should be adopted as the standard test. In any case, the Commission's promise to offer a safe harbour is certainly inaccurate.

4.2.1 Application problems

The first problem with the proposed test is that it cannot be applied consistently in practice.[89] Not only is it a very resource-intensive task to collect the necessary cost data, its quality also depends to a large extent on the willingness of the dominant firm to cooperate with the competition authority. Private litigants will certainly not be able to collect the necessary data. Under many national laws, information on cost is regarded as a business secret. More importantly, there is no generally accepted standard for the definition and assessment of the various costs. Therefore, it can be predicted that the parties will argue in court about how certain overheads must be accounted for. The European Commission is aware of the difficulties in obtaining reliable information on pricing conduct and costs of the dominant company. It therefore wants to permit looking "at revenues or costs of the dominant company in a wider context"[90]. If, for example, there is no reliable information on the dominant company's cost structure, the Commission wants to use cost data of "apparently efficient" competitors.[91] Even when there is no reliable cost data at all, the Commission wants it to be permissible to build a credible case of abuse on other arguments.[92] These provisos demonstrate that the practical application of the "as efficient competitor"-test involves a great deal of guesswork that diminishes its practical value.

4.2.2 An overly narrow focus

The second and far more important shortcoming of the test, if applied consistently, is that it will not catch anticompetitive conduct in a number of important cases. Many markets prone to monopolisation exhibit significant economies of scale or scope, or bottlenecks which can exclude equally efficient firms. In such cases, a dominant company with a high market share has significant cost advantages over newcomers. As the dominant firm always produces in greater quantity than its competitors, its average costs can be lower than those of its competitors. If so, practices that would not exclude an equally efficient firm may in fact exclude the only actual rivals the dominant is ever likely to face.[93] Costs declining continuously as output increases are, for example, common characteristics of IP rights. They allow the dominant firm a cost advantage over smaller rivals. Moreover, pricing above

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[89] *See* the critique voiced by GAVIL, note 32, 59 *et seq*. and by BLOCH/KAMANN/BROWN/SCHMIDT, "A Comparative Analysis of Article 82 of the EC Treaty and Sec. 2 of the Sherman Act", (2005) ZWeR 325, 348.

[90] EUROPEAN COMMISSION, note 3, para. 67.

[91] EUROPEAN COMMISSION, note 3, para. 67.

[92] EUROPEAN COMMISSION, note 3, para. 67.

[93] HOVENKAMP, note 55, 153.

costs combined with additional measures may, in certain narrowly defined cases, also unduly restrict competition.[94]

The European Commission indirectly concedes that it may sometimes be necessary to protect a "not yet as efficient" competitor. The Discussion Paper allows applying the test in its specific market context. This means that "economies of scale and scope, learning-curve effects or first-mover advantages that later entrants cannot be expected to match even if they were able to achieve the same production volumes as the dominant company" should be taken into account.[95] By correctly pointing out the shortcomings of the "as efficient competitor"-test, it becomes apparent that the Commission falsely promised dominant firms a safe harbour in cases where their conduct passes muster under the "as efficient competitor"-test in its strict sense.

5 Conclusion

The Discussion Paper is a first step towards much-needed guidelines on the application of Article 82 EC. In its present form, however, it will not be of much help to the business community and to the courts. The Commission should, therefore, clarify its proposals, eliminate inconsistencies, and provide clearer rules that do not undermine the enforcement of competition law. When redrafting the guidelines, the Commission ought to have in mind that they should guide the average business lawyer and competition law enforcer, also in Member States with rather modest experience with competition law and economics.

The increased reliance on economics will make infringement proceedings lengthier and more complex. More data need to be collected, and it can be expected that dominant firms will regularly present expert opinions to prove that the allegations are economically unsound. As competition authorities must be able to evaluate and – if necessary – rebut the arguments advanced, their staff should be increased to shoulder these additional burdens. It has to be underlined again that economics is not always a "hard" science. Economists often differ in their assessment of efficiencies and of likely anticompetitive effects, given the variety of models and their underlying assumptions. Thus, we should be cautious not to place too much reliance on economic arguments. Further, sensible filters and reasonable procedural standards have to be developed in order to avoid the integration of faulty economic models into the law.[96]

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[94] *See* the examples given by MESTMÄCKER/SCHWEITZER, note 44, 436 *et seq.*; *see further* EILMANSBERGER, "How Effects-based Rules Could and Should Change Dominance Analysis", (2006) 2 European Competition Journal, Special Issue on Article 82, 15, 25 (arguing that only "superdominant" firms will normally be able to threaten the livelihood of competitors with above-cost price cuts). Currently, there is a lively debate in the U.S. about whether above-cost practices could be regarded as predatory, *see* EDLIN, note 59, 941 *et seq.*; *but see* ELHAUGE, "Why Above-Cost Price Cuts to Drive out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power", (2004) 112 Yale L. J. 681 *et seq.*

[95] EUROPEAN COMMISSION, note 3, para. 67.

[96] *See* GAVIL, "Competition Policy, Economics, and Economists: Are we Expecting too Much?", in: HAWK (ed.), "Fordham Corporate Law Institute, International Antitrust Law & Policy 2005", 575 *et seq.* (2006) (discussing shortcomings and possible filters for U.S. antitrust law).

To come back to the question asked at the beginning of this chapter: notwithstanding a certain amount of – at least at first sight – "Chicago-style" language in the Discussion Paper, I am confident that EC competition law will not take the same direction as U.S. antitrust law took a quarter of a century ago under the influence of the Chicago School. The Discussion Paper not only recognises the need to protect competition as a process but also aims at incorporating "post-Chicago" economics into the law. Moreover, any departure from the existing enforcement practice needs endorsement by the European courts. In the light of the recent *British Airways* case, it can be assumed that the ECJ will accept a more nuanced abuse control, without going so far as to depart radically from its settled jurisprudence. Otherwise, it would grant the Commission the power to abolish unwanted case-law with a soft law instrument!

Is there a Role for Market Definition and Dominance in an effects-based Approach?

*Emanuela Arezzo**

1 Introduction

As the old millennium was coming to an end, European Competition law began a massive reform project aimed at modernizing each and every of its constituent parts. As well known, this ambitious project started with the introduction of Regulation n. 2790/1999 on vertical restraints, and its accompanying Guidelines, it followed with the Guidelines on horizontal cooperation agreements, and made all its way up till the review of the Merger Regulation.

The underlying *leitmotif* of these reforms has been to introduce a more *economics-oriented* approach to the assessment of competition cases. In practice, these reforms have resulted in a progressive erosion of *per se rules* in favour of the more

* I would like to thank Prof. Josef Drexl, Mark-Oliver Mackenrodt, Beatriz Conde Gallego, Stefan Enchelmaier and all participants of The Max Planck Forum on Competition Law (October 2006, Munich) for the lively discussions and inputs provided during the conference. I also wish to thank Prof. Steven Anderman and Prof. Gustavo Ghidini for precious comments on previous drafts of this contribution.

flexible *rule of reason* which leaves the floor open to case by case considerations and seems better suited to take into account the appropriate circumstances (especially of economic nature) of the controversy at issue.

The turn has come now for abuse of a dominant position to go under review to determine the extent it should conform to the new mainstream trend which calls for a more substantive recourse to economics insights into the assessment of unilateral practices.

As we are about to see, European Commission's (and European competition authorities' in general) treatment of abuse cases has attracted a good deal of criticism for being rather formalistic and rigid and hence inapt to sufficiently take into consideration the economic circumstances of the cases, in particular to weigh the anticompetitive effects apparently caused by the conduct against the likely positive pro-competitive (or, more precisely, pro-consumer) efficiencies which, in the end, could tilt the balance and reverse an initial finding of abuse.

In order to do justice to these points of criticism, the European Commission has drafted a Discussion Paper on the application of Article 82 to exclusionary abuses and has called for open discussion on it. Unfortunately, the document, mainly because of its guideline style, is rather confusing and obscure. A coherent suggestion for a new approach, however, may be inferred by reference to the report presented by the Economic Advisory Group for Competition Policy (hereinafter EAGCP) which the Commission has surely considered in the course of preparing its Discussion Paper.

The *effects-based* approach (so called to differentiate itself from the current *formalistic* one) apparently carries a strong economic imprint and seems aimed at correcting the early methodology adopted by European agencies and courts by introducing two substantive changes. On the one hand, the competition authorities would be asked to prove, with strong economics-based analysis and studies, the anticompetitive harm produced by the presumably abusive conduct. This with specific regard to the ultimate effect that the practice will assert on consumer welfare. On the other hand, because it is extremely complex to discern the pro- from the anticompetitive aspects within the same conduct and, as economists strongly assert, pro-competitive effects can also arise from a unilateral conduct adopted by a dominant firm, the new approach would grant defendants the faculty to plead an *efficiency defense* against a finding of abuse.

This change would appear, at least at a first glance, in line with the assessment of agreements in restraint of competition under Article 81 EC and would make the overall assessment of competition law cases uniform. Nonetheless, as I will try to demonstrate, such alignment with current assessment of (horizontal or vertical) agreements between firms is nor welcome or desirable.

This contribution is divided in the following way. The first part of this study (paras 1-2) is focussed on the criticism raised against the practice of the European Commission regarding exclusionary practices and the way the new *effects-based approach* intends to correct these alleged flaws. It then focuses on the renewed importance consumer welfare has in the new approach and analyzes the practical implication of choosing consumer welfare as a tool to measure the anticompetitive

harm of the conduct. In particular, the Neoclassical economic theory teaches us that consumer welfare is directly measured *via* market power and this indeed explains economists' interest in discarding the old definition of dominance and adopting the concept of *substantial market power* (para. 3).

In what follows, I will explain the conceptual difference between dominance and SMP but I will also point out that the two concepts entail an entirely different methodology in the assessment of unilateral practices (para. 4). I will discuss the likely economic, legal and political consequences arising from the adoption of a SMP test (together with the broader effects-based approach) to see whether it fits the needs of European economic scenario (para. 5). Some final thoughts are referred to consumer welfare and its aptness to serve as benchmark to assess the anticompetitive character of exclusionary practices (para. 6).

2 Criticism of the current assessment of unilateral exclusionary practices under Article 82 of the EC Treaty

The European doctrine of abuse of dominance has often attracted criticism. The doctrine has occasionally been criticised for its inconsistency and its contradictory nature, for its improper implementation for the benefit of competitors rather than competition, and in general for its excessive use as a direct tool to regulate markets.[1]

The criticisms levied today against the application of Article 82 EC are even more structured and profound.[2] While other substantive branches of competition law have been reformed in the light of a more economics-based methodology,[3] commentators argue that the doctrine of abuse of dominance is now the only one

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[1] In this sense, *see* PROSPERETTI/SIRAGUSA/BERETTA/MERINI, "Economia e Diritto Antitrust", 210 *et seq.* (2006); DETHMERS/DODOO, "The Abuse of Hoffmann-La Roche: The Meaning of Dominance under EC Competition Law", (2006) 27 E.C.L.R. 537.

[2] Among the most relevant economic studies *see*: EAGPC-REPORT, "An economic approach to Article 82 EC", (2005), available at http://www.ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf; AHLBORN/DENICOLÒ/GERADIN/PADILLA, "DG Comp's Discussion Paper on Article 82 EC: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries", (2006), available at http://www.ssrn.com/abstract=894466; ALBERS, "Der '*more* economic approach' bei Verdrängungsmissbräuchen: Zum Stand der Überlegungen der Europäischen Kommission", (2006), available at http://www.ec.europa.eu/comm/competition/antitrust/others/albers.pdf.

[3] Commentators refer to Regulations on agreements in restraint of trade (Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) EC of the Treaty to categories of vertical agreements and concerted practices, [1999] OJ L 336/21; Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81(3) EC of the Treaty to categories of specialization agreements, [2000] OJ L 304/3; Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81(3) EC of the Treaty to categories of research and development agreements, [2000] OJ L 304/7) and to the Merger Regulations (Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24/1), which have all been reformed in light of a more economic-based approach through a broader recourse to rule of reason and the introduction of countervailing factors based on efficiency rationales.

which has rested on a mechanical and rigid, *form-based* assessment of unilateral conduct. They criticize the whole legal framework of Article 82 EC, blaming it to be excessively formalistic and, for this reason, not suited to take into account and properly evaluate the specific economics-based factors that feature each unilateral conduct case.[4]

2.1 Rule of reason v. per se rule in the application of Article 82 EC

The first source of formalism stems from the fact that allegedly the Commission (and probably national competition authorities) would place undue weight on the list of presumptively abusive conduct contained in Article 82 EC rather than on the actual anticompetitive effects caused by the conduct. In fact, as well known, EC founders did not provide us with a definition of dominance nor of abuse. However, legislators have drafted a non-exhaustive list of conduct whose anticompetitive character is generally presumed.

According to mainstream criticism, over-reliance on the above list of anticompetitive conduct would reduce the overall abuse inquiry on unilateral practices to some sort of matching exercise, to see whether the circumstances of the case at issue correspond to one of the classified practices.[5] In their opinion, the framework envisioned in Article 82 EC does not require proof of a causal relationship between position of dominance and the committed abuse,[6] rather current methodology wrongly induces the Commission to focus on the form that the conduct has taken rather than the substance, i.e. the actual effect that the conduct has (or has not) caused.[7]

This point is extremely important because, as economists explain, any conduct – regardless of the degree of economic power the undertaking may hold – is capable of bringing about both positive and negative effects for competition and it is not an easy task to balance the two in order to eventually decide whether the conduct is or is not anticompetitive.[8] Clearly, this balancing task cannot be performed by recourse to presumption.

Moreover, because the Commission allegedly affords a different treatment – more or less favorable – to the behaviors banned by Article 82 EC[9] and because the same anticompetitive goal can be achieved through different behaviors, commenta-

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4 EAGPC-REPORT, note 2, 13.

5 *See* NIELS/JENKINS, "Reform of Article 82 EC: Where the Link between Dominance and Effects Breaks Down", (2005) 26 E.C.L.R. 605.

6 EILMANSBERGER, "Dominance-The Lost Child? How Effects-Based Rules Could and Should Change Dominance Analysis", (2006) 2 European Competition Journal 15, 19.

7 VICKERS, "Abuse of Market Power", (2005) 115 The Economic Journal 244; VICKERS, "The Reform of Article 82 EC: Recommendations on Key Policy Objectives", (2005) 1 European Competition Review 179; EAGPC-REPORT, note 2, 5 *et seq*.

8 EAGPC-REPORT, note 2, 6.

9 At this regard, Sinclair has explained that the case law under Article 82 EC has developed by considering various category of abuse distinctly, which led to the development of different and inconsistent tests based merely on the specific characteristics of the abuse-situation. SINCLAIR, "Abuse of Dominance at a Crossroads – Potential Effect, Object and Appreciability under Article 82 EC", (2004) 25 E.C.L.R. 491, 492.

tors argue that this may lead undertakings to engage in a sort of "conduct-shopping", where firms would choose the conduct which – they believe – is less likely to attract antitrust scrutiny.[10]

2.2 Formalistic assessment of dominance

In a formal framework like the one depicted above, where the assessment of the abusive conduct hinges strongly on a preliminary assessment of dominance, clearly the way such analysis is performed appears extremely important in that it practically becomes a "short-cut" to infer abuse.[11]

The definition of dominance, as elaborated by the case law of the European Courts, as a "[…] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers",[12] has attracted several criticisms.[13]

The most obvious economic-based critique attacks the second prong of the above definition of dominance as power to behave independently. Because all undertakings, even near-monopolists, face a downward sloping demand curve and the pressure of competition from substitute products or services, economists claim that no firm will ever have the power to behave independently from any constraints; hence, independence is not a good proxy to infer dominance.[14] [Needless to say, economists often seem incapable of grasping the flexibility inherent the wording "to an appreciable extent".[15]] Other commentators have criticized this definition for assuming a causal correlation between the power to exclude or hinder (i.e. the power "to prevent effective competition") and the ability to exploit (implicit in the

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[10] EAGPC-REPORT, note 2, 5 *et seq*.

[11] NIELS/JENKINS, note 5, 606.

[12] Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 65; Case 85/67 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 38.

[13] On this subject see: GERADIN/HOFER/LOUIS/PETIT/WALKER, "The Concept of Dominance in EC Competition Law", (2005) Research Paper on the Modernization of Article 82 EC, Global Competition Law Center, College d'Europe; MONTI, "The Concept of Dominance in Article 82 EC", (2006) 2 European Competition Journal 31; EILMANSBERGER, note 6; OLIVER, "The Concept of 'Abuse' of a Dominant Position Under Article 82 EC: Recent Developments in Relation to Pricing", (2005) 26 European Competition Journal 315.

[14] PROSPERETTI/SIRAGUSA/BERETTA/MERINI, note 1, 210. Similarly, *see* GERADIN/HOFER/LOUIS/PETIT/WALKER, note 13. As we will see para 4.1.1, the concept of elasticity of demand (*i.e*. consumers' and customers' responsiveness toward a price increase of the dominant undertaking's product) and elasticity of supply (competitors' responsiveness – in terms of goods provision – to a price increase of the dominant undertaking's product) are the variables to be taken into account when measuring market power.

[15] In fact, the ECJ explains immediately after that finding of dominance does not imply total absence of competition in the market. Rather, dominance enables the undertaking "[…] if not to determine, to have an appreciable influence on the conditions under which competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment". Case 85/67 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 39.

power to behave independently), improperly implying that the former results from the latter.[16]

On a similar footing, competition law & economics scholars have highly criticized the Commission for a rather mechanical calculation of dominance mainly based on market shares threshold (this even when such threshold did not reach the 50% of the relevant market) and for being insufficiently concerned with relevant countervailing factors which could disprove the initial finding of dominance inferred *via* market shares.[17]

The first criticism usually points to cases like AKZO where the ECJ found a position of dominance in the case of an undertaking holding 50% of the market and it seemed to move away from its balanced opinion formerly expressed in Hoffman La Roche[18] by asserting that when high degree of market share is found – for this purpose being sufficiently a threshold of 50% – very high shares, save in exceptional circumstances, are themselves evidence of dominance.[19] The second criticism stems from the famous GE-Honeywell case where apparently the Commission strongly relied on dominance as commercial rather than economic power and failed to take into account significant countervailing factors.[20]

While some commentators admit that sometimes (and indeed quite often, in my modest opinion) other market factors have also been taken into account, like barriers to entry and expansion, they argue that it is rather unclear how much weight each of them should be afforded and they fear that the dominance test risks resorting to kind of a mere check-list analysis.[21]

Eventually, on a lighter note, economists warn about the implementation of the so called SSNIP test in unilateral conduct cases as instrument to define relevant markets because of the so called *cellophane fallacy,*[22] which could lead to unduly broad market definition, hence altering the overall dominance outcome.[23]

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[16] This, indeed, according to Eilmansberger would be proper only of leveraging cases and not for the remaining exclusionary abuses. EILMANSBERGER, note 6, 16 *et seq*.

[17] MAJUMDAR, "Whither Dominance", (2006) 27 E.C.L.R. 161.

[18] In Case 85/67 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, the ECJ seemed to balance the finding of high market shares with other relevant economic factors such as the time dimension, the volume of production and the scale of supply, *et cet*. *See* Case 85/67 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 41.

[19] Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para. 60.

[20] More extensively on this *see* MONTI, note 13, 40 *et seq*.

[21] NIELS/JENKINS, note 5, 606.

[22] The Cellophane fallacy is named after the American case *United States v E.I. du Pont de Nemours & Co.* 351 U.S. 377 (1956) where the Supreme Court wrongly defined the relevant market measuring cross-elasticity of demand from the monopolistic price set by du Pont. Indeed, the Court did not realize that because du Pont was already exercising its market power, the price the Court took into account to measure cross-elasticity of demand was not the competitive price. Clearly, the higher the benchmark price, the greater will be the degree of cross-elasticity of demand: this, in turn, will lead to a broader market definition and, consequently, will lessen the chances that the firm will be found dominant.

[23] It is interesting to notice, however, that despite the dangers this concern warns us against, many commentators have often blamed the Commission to get to unduly narrow market definition which, conversely, would ease the likelihood that dominance is found. *See* UTTON, "Market Dominance and Antitrust Policy", 79 (2003); KORAH, "EC Competition Law & Practice", 99 *et seq*. (2004).

According to mainstream critics this formalism and presumed lack of considerations of significant economics factors in both the assessment of dominance and abusive conduct is responsible for an inappropriate abuse policy.

In their opinion, such a formalistic assessment, where presumptions substitute economics-based market analysis, makes it easier for competition authorities to draw a wrong conclusion from the case, leading to misconstrued outcomes.[24] In other words, commentators argue that the current formalistic approach strongly favors so called *false positives* – namely, the cases where conduct which do not cause any actual damage to the market is wrongly punished – which, according to mainstream thinking, affect competition adversely as they chill undertakings' incentives to compete and innovate fiercely.[25]

In this framework, commentators further notice that the situation is worsened by the fact that the allegedly dominant firm is not granted the right to disprove the finding of abuse by showing the pro-competitive effects that her conduct is also likely to create and pass on to consumers (as it is permitted in the case of mergers and agreements in restraint of competition under Article 81 EC).[26]

3 Towards the adoption of the new *effects-based* approach

To combat the evils of the current formalistic approach, the new effects-based approach proposes an inversion of route towards a method of analysis strongly supported by economic tools and specifically oriented at assessing the anticompetitive effects caused by the business behavior.

According to this new view, it is no longer sufficient to infer the anticompetitive character of the conduct simply by the fact that it matches one of the practices described at Article 82 EC. Presumption of anticompetitiveness – hence of abuse – must be substituted by the absolute certainty that the conduct is anticompetitive. Because, as mentioned earlier, economists of the EAGCP postulate that every conduct, no matter the undertaking's position on the market vis-à-vis her rivals, is capable of bringing about both pro- and anticompetitive effects, they explain that such evaluation necessarily calls for a balancing test. Therefore, Competition authorities should first identify an (***actual***) harm to competition and substantiate it with economics instruments; second, they should identify ***likely*** efficiency gains the conduct is capable of producing and then see whether the latter might offset the former. The practice would be punished only if it is found to bring about more negative than pos-

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[24] NIELS/JENKINS, note 5, 609; DETHMERS/DODOO, note 1, 548 *et seq*.

[25] It is generally argued that false negatives would be less dangerous for the market because new entry would mitigate the market power implemented by the dominant firm. In this sense *see* EASTERBROOK, "The Limits of Antitrust", (1984) 63 Tex. L. Rev. 1, 3. Similarly, MCGOWAN, "Between Logic and Experience: Error Costs and United States v Microsoft", (2005) 20 Berkeley Tech. L.J. 1185.

[26] The discussion on the efficiency defense and its role within the new *effects-based* approach is beyond the scope of this paper.

itive effects to competition,[27] regardless of the specific category of abuse under which the conduct of the case would fall.[28]

Within the new framework, effects on competition are to be assessed with regard to consumer welfare which stands out as the prominent goal of Article 82 EC.[29] This means that the assessment of what effect is pro- or anticompetitive would be dependent on whether consumers are better or worse off as result of the conduct. Accordingly, the overall unilateral practice will be deemed *anticompetitive* – hence abusive – only when its effects, on balance, will clearly harm consumers.[30]

As mentioned, this approach would guarantee a diminution in false positives and, by impeding undertakings to engage in "conduct-shopping", would ensure a more consistent treatment of practices, as only the truly anticompetitive conduct would be punished, despite its form. However, it is impossible not to notice a strong departure from notions and policies well settled in European competition law. For example, proof of actual and direct consumer harm has never been required to determine the anticompetitive character of an exclusionary practice. In addition to the fact that consumer welfare and not the restriction of competition would be the focus of the new approach, the burden of proving an abusive conduct would be sensibly worsened were the Commission compelled to prove *actual* – rather than simply *potential* – consumers' harm.[31] In contrast, following the economists suggested approach would make offsetting findings of abusive conduct particularly easier because the efficiency gains might well be *potential.*

This approach would be clearly in contrast to well settled and recent case law which has firmly ruled out the need to prove concrete effect on the market concerned and has expressly stated that "it is sufficient to show that the abusive conduct of the undertaking in a dominant position *tends to restrict competition* or, in other words, that the conduct *is capable of having such an effect*" (emphasis added)[32].

Moreover, as we are about to see in the following paragraphs, the new effects-based approach, in embracing consumer welfare as the paramount goal of competition policy, would completely overturn the current assessment of unilateral practices. In fact, the new approach in introducing the assessment of substantial market power which, regardless of the form of the conduct, simultaneously accounts for the pro- and anticompetitive effects caused by the practice, would practically cut off the very essence of Article 82 EC. Indeed, not simply current notion and assessment of dominance would be eliminated but also the whole conception of abuses as further

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[27] EAGPC-REPORT, note 2, 3.

[28] A second substantive part of the proposed reform regards the introduction of the so called *efficiency defense* which will not be specifically addressed in this study.

[29] EAGPC-REPORT, note 2, 2.

[30] From here it follows that, in the above framework, an exclusionary conduct which is likely to drive a competitor off the market will not be deemed anticompetitive unless the exclusion immediately causes a diminution of consumer welfare (for example through an immediate price increase as result of lessening of competition).

[31] *See infra* para. 5.2.

[32] *See* Case T-203/01 *Manufacture Francaise des Pneumatiques Michelin v Commission* [2003] ECR II-4071, paras 239 and 241; Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para. 293.

step beyond mere possession of dominance would be cancelled,[33] as well as the references to the list of presumptively abusive conduct which would be no longer taken into account.[34]

This substantive change has been expressly acknowledged by the economists of the EAGCP;[35] what has been less clearly recognized is that the proposed approach, advertised as the "more economic" approach, does not necessarily reflects a generalistic more economics-based methodology but rather it seems to fully embrace the tenets of a specific economic school of thought.[36]

4 Getting rid of dominance? The long path from dominance to substantial market power

The economists of the EAGCP explain that because, in the effects-based approach, all the focus of the inquiry goes directly toward the assessment of the effects and their impact on consumer welfare, "there is no need to establish a preliminary and separate assessment of dominance" nor to take into account the list of presumptively abusive conduct contained at Article 82 EC.[37]

This assumption stems from the belief that an anticompetitive harm from a unilateral conduct (thus, an abuse) is only possible if the firm holds a position of dominance; therefore once the conduct has been proved to be abusive there should be no need of a separate analysis of dominance.[38]

This alarming proposal is somewhat smoothed in the same report where commentators explain their intention not to completely eliminate the part of inquiry which is currently devoted to dominance but to integrate it into the broader verification of the anticompetitive effects produced by the practice at issue.[39] The implica-

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[33] In Case 85/67 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 91, the ECJ explained that: "The concept of an abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on 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".

[34] As a side note, because the list of presumptively abusive conduct contained at Article 82 EC mirrors the one contained at Article 81 EC, it is not entirely clear why eliminating recourse to such list would make assessment of Article 82 EC more in line with the assessment of agreements in restraint of trade.

[35] EAGPC-REPORT, note 2, 6, where they expressly hold: "In proposing to reduce the role of separate assessments of dominance and to integrate the substantive assessment of dominance with the procedure for establishing competitive harm itself, we depart from the tradition of case law concerning Article 82 EC, but *not,* we believe, from the legal norm itself" (emphasis in the original).

[36] Indeed, as we are about to see, the idea of eliminating legal presumptions in antitrust cases and revert the overall analysis to a substantial evidence of consumer harm, even regardless of the distinction between unilateral practices and horizontal and vertical agreements in restriction of competition, comes directly from Richard Posner. *Cf.* POSNER, "Antitrust Law", 194 *et seq* (2001).

[37] EAGPC-REPORT, note 2, 14. This second proposition is not expressly written but it is implicit in the overall proposal.

tions of this statement, however, are not sufficiently clear at a first glance. The assessment of dominance, meaning the toolbox of instruments used to determine dominance (i. e. market shares considerations, entry barriers, capacity constraints faced by likely rivals, etc.) would be still in use but they would not serve the original purpose (checking whether there is dominance) as they would only be needed at a later stages of analysis to confirm or disprove the presence of anticompetitive harm. In other words, it seems that according to EAGCP, the so called "dominance toolbox" should only come into play within the assessment of this significant anticompetitive harm with the sole function of substantiating or disproving the finding of abuse.

Fortunately, the majority of commentators (both lawyers and economists) have refused the idea of eliminating a preliminary assessment of dominance and merging this moment with the verification of the likely anticompetitive harm caused by the conduct.[40] Conversely, they simply call for a reconceptualization of the concept of dominance in a more economic-oriented fashion and for a deeper implementation and *interpretation* of economics-based insights.[41]

As for the reconceptualization of the concept of dominance, these commentators all agree in configuring dominance as some sort of market power. As I mentioned at the very beginning of this paper, the definition of dominance as the power to behave independently from rivals, customers and consumers has never attracted sympathy from economists who have regarded it as unclear and vague. On the contrary, economists have liked more the part where the ECJ defines dominance as the power to impede effective competition being maintained in the relevant market. They claim that this part of the jurisprudential definition of dominance could be more in line with economics as the concept of maintenance of effective competition on the market could be equated with absence of market power, intended as the ability to raise price above the competitive level (i.e. above marginal costs) throughout a reduction in quantity.[42]

However because, as economists recognize, market power is not a zero-one matter and even non-dominant firm may hold some degree of market power, there is a widespread consensus that thinks appropriate to connect dominance with the concept of *substantial market power.*[43]

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[38] Note how this assumption clearly departs from our common understanding of the abuse doctrine in general whereby EU founders have specifically inserted the reference to dominance just to punish only the anticompetitive conduct put into practice by firms holding a special position of strength on the market. Moreover, it has been noted that anticompetitive harm might well result from the cumulative effect of similar practices pursued by the allegedly dominant firm and its competitors. In this sense *see* EILMANSBERGER, note 6, 25.

[39] EAGPC-REPORT, note 2, 14.

[40] VICKERS, "Market Power in Competition Cases", (2006) 2 European Competition Journal 3, 12.

[41] GERADIN/HOFER/LOUIS/PETIT/WALKER, note 13, *passim;* MONTI, note 13, *passim.*

[42] GERADIN/HOFER/LOUIS/PETIT/WALKER, note 13, 5 *et seq*.

[43] Whether substantial market power is easier to assess in practise is not shown by economists who, on the contrary, often explain how difficult can be to calculate the competitive price in a given market and then see whether the current price is indeed monopolistic.

Economists do not clearly explain when market power can be deemed substantial. However, as I will show later, the shift in the definition of dominance towards the economics-based test of market power seems surely in line with the new proposed approach which has proclaimed consumer welfare as the ultimate goal of antitrust law.

4.1 From dominance to substantial market power

As is well known, the traditional notion of dominance as the power to behave independently on a certain market involves a comprehensive evaluation that begins with the delineation of the relevant market(s) where all (existing and potential) competitors play and is specifically intended to measure whether one of such players holds a particularly strong position in that market.

The power to behave independently of rivals, customers and consumers, which is the special feature of dominance,[44] can stem from a variety of factors of different nature. Sources of strength can be well found in exclusive rights the firm has been vested with by the Government, or exclusive faculties the firm has contracted with a special supplier; or because the firm is itself the sole supplier of a raw material et cetera. Hence, while the sources of this power can be of economic nature, they can also come in form of legal and/or commercial privileges.

An inquiry in this sense tries to take into account all the likely factors of whatever nature that can reasonably put a certain firm on a pedestal and vest it with a far stronger power than her rivals'. At this regard, it is worth noting that rivals' market shares as well as rivals' competitive advantages are often taken into account at the dominance stage in order to simply assess whether the firm holds a position of dominance on a certain market vis-à-vis her competitors, if any. Having determined dominance the analysis proceeds to assess whether such a position of economic and commercial strength has been abused to further distort competition.

In the traditional analysis of dominance it can well happen that an undertaking holding 50% of a highly concentrated market will not be found dominant unless she is found to hold other significant competitive advantages. Clearly, once dominance has been found, it might be easy under the current regime, to prove the abuse, thanks to the formalistic approach discussed above and its over-reliance on the list of presumptively abusive conduct.[45] However, because at least in theory, as the ECJ has explained, the abusive conduct amounts to a separate moment from dominance, it could well happen that violation of Article 82 EC is not found even when dominance has been ascertained.

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[44] Case 85/67 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, paras 42-48.

[45] Moreover, it must be said that Commission analysis does not end when the dominant company is found to have engaged into one of the practices listed by Article 82 EC. The Commission has developed, for almost any of such practices, doctrines aimed at further analyzing whether, in light of the peculiar circumstances of the case, the conduct amounts to an abuse. Take, for example, the *essential facility doctrine.*

4.1.1 Market power in economic terms

The economic concept of market power seems undoubtedly narrower, if compared to the notion of dominance.

There is widespread consensus in (neoclassical) economics that market power means the ability of a seller or a buyer to affect the price of a good.[46] As we have seen above, market power is directly related to a firm's ability to raise price above its marginal costs in a way to maximize its profits.

Although there is a lot of debate upon whether the concept of market power should be broadened in order to take into account other variables beyond price and quantity, in its simpler microeconomic formulation market power is usually measured by the so called Lerner index whereby:

$$L = (P - MC)/P = -1/E_d$$

The first part of the equation tells us that the Lerner Index, L, (which always results in a number between 1 and 0) is given by the difference between the price charged by the firm minus its marginal costs, divided again for the price. For a perfectly competitive firm the price equals marginal costs so in the end L = 0. Conversely, because a monopolist will try to set its price higher than its marginal cost in order to maximize its profit, the ratio will result in a number greater than 0. The larger is L the greater is monopoly power held by the firm.

The second part of the equation further explains that the markup (i.e. the markup over marginal cost as a percentage of price) should equal minus the inverse the elasticity of demand faced by the firm (E_d).[47] The elasticity of firm's demand tells the firm how consumers will react to a likely price increase. If consumers' preferences are highly elastic (hence, willing to switch to rivals' product) monopoly power cannot be strong so: the greater E_d, the smaller L.

According to current microeconomics thinking, firm's demand elasticity is determined by three factors: demand elasticity of the whole market, number of firms competing on the market, and interaction among firms. These are the factors to be directly taken into account to calculate a single firm's demand elasticity, hence market power.[48]

Because collecting the data outlined above has never amounted to an easy task, Posner and Landes in their seminal article on market power, have further defined the Lerner index as:

$$L = (P - MC)/P = s/\eta + (1 - s)\sigma$$

Where s is the market share of the dominant firm, η is the industry elasticity of demand and σ is the elasticity of supply of the competitive fringe.

This equation is somewhat more complex but also more comprehensive because it directly relates market shares held by the dominant firm with rivals' responsiveness to a likely price increase and it also takes into account consumers' elasticity of

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[46] PINDYCK/RUBINFELD, "Microeconomics", 328 *et seq*. (5th ed. 2001).
[47] PINDYCK/RUBINFELD, note 46, 334 *et seq*.
[48] PINDYCK/RUBINFELD, note 46, 345 *et seq*.

demand for the overall market. Clearly, absent any competitors, the Lerner index will only result in the ratio between monopolist's market shares and industry elasticity of demand; however, rivals' presence in the market will proportionally lessen the overall ratio, hence the degree of market power.[49]

In 1981 Landes and Posner suggested that Court would adopt their equation to concretely measure market power in antitrust cases, arguing that the adoption of their methodology would not cause a substantive departure from Courts' assessment of market power.

4.2 Substantial market power and the link with consumer welfare

It clearly emerges from the preceding paragraph that the economic concept of market power, mainly intended as power over prices, may result poorly suited to take into account the vast and diverse set of variables which can contribute in granting a position of dominance to a certain firm. Nonetheless, economists strongly assert the superiority of market power over dominance and urge the need to discard the latter and only adopt the test of SMP. Such urge can be easily explained: in fact, the shift from dominance towards the economics-based test of market power seems surely in line with the new proposed approach which has proclaimed consumer welfare as the sole and ultimate goal of antitrust law.

4.2.1 Antitrust as a "consumer welfare prescription"

The EAGCP begins its report by asserting that "an economic approach to Article 82 EC focuses on *improved consumer welfare* (emphasis added)" and it further explains, to eliminate any possible doubts, that "the ultimate yardstick of competition policy is the satisfaction of consumer needs".[50]

Such declaration of principle is extremely important because it does not simply affects competition law from a policy perspectives, as will be seen later, but it provides for a practical benchmark to determine when the firm has actually caused, with its conduct, substantial competitive harm. In other words, an exclusionary practice will be found abusive only when such practice, on balance, produces more negative than positive effects for consumer welfare.[51] Thus, at this point of the analysis the time has come to ask what is consumer welfare as well as what is the way to measure it.

Consumer welfare in general could be intended in various ways. Consumers might be benefited by the introduction of new products, by the availability of new services, by the availability of both at a convenient price and in quantities satisfying the overall demand. Equally, consumers are benefited when they have access to employment, which in turn gives them money to get products and services. Con-

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[49] LANDES/POSNER, "Market Power in Antitrust Cases", (1981) 94 Harv. L. Rev. 937.

[50] EAGPC-REPORT, note 2, 2.

[51] Note, indeed, that the "more economic approach" calls for increased attention on the actual effects produced by a certain conduct but such attention goes to the effects on consumers and not anymore on the competitive structure of the market, which is no longer focus of antitrust concern.

sumer welfare is all of this and even more, but we need a precise definition and especially an analytical framework to measure it in order to determine the magnitude of the relevant effects for antitrust purposes.

4.2.2 Consumer welfare in microeconomics

In economic terms consumer welfare is generally equated with the concept of consumer surplus. Neoclassical microeconomics teaches us an undertaking willing to maximize her profits will set a price right where her marginal revenue curve intersects her marginal costs curve. The theory shows that in perfect competition competitors' marginal revenue curve equals the overall demand curve yielding a price which is optimal for consumers.[52] Conversely, when a firm holds monopoly power, her marginal revenue curve is distinct from the market demand.[53] As a consequence, the price given by the intersection of marginal revenues' and costs' curve will be higher and the quantity offered lower.

This change in price and quantity graphically shows that consumers will be worse off: indeed, part of them will no longer be able to afford buying the item and others will have to bear a higher price for it. Accordingly, the theory shows a clear correlation between increase of monopoly power and decrease of consumer surplus.[54]

Although the EAGCP does not say it expressly, it is crystal clear that the kind of consumer welfare it refers to is the one borrowed from microeconomics. Indeed, in the neoclassical model just described, measurement of consumer welfare increase or decrease is directly given *via* market power assessment.

As it has been observed some years ago, an interpretation of antitrust as consumer welfare gatekeeper does not anyhow ease the overall analysis nor does it help formulating reasonable forecasts about a likely outcome of the case. From a practical point of view, bringing up consumer welfare as primary goal of Article 82 EC carries the only but significant consequence of bringing market power to centre stage. [55]

4.3 The position endorsed by the European Commission's Discussion Paper

While it is no mystery that the European Commission has largely relied on the economic suggestions contained in the EAGCP paper in the drafting of its Discussion

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[52] Obviously this is merely an assumption. Neoclassical economics assume that when firms set a price where their marginal revenues intersect their marginal costs such price will be optimal for consumers. Clearly, this depends on what class of consumers we are talking about.

[53] The more the market power detained by the firm, the more her marginal revenue curve will shift upright.

[54] Consumer surplus is defined as the difference between the maximum amount that a consumer is willing to pay for a good and the amount that the consumer actually pays. In this sense, *see* PINDYCK/RUBINFELD, note 46, 123 *et seq*.

[55] KRATTENMAKER/LANDE/SALOP, "Monopoly Power and Market Power in Antitrust Law", (1987) 76 Geo. L.J. 241, 246.

Paper (hereinafter "DP")[56], it is not clear the extent to which it has endorsed the innovative methodology contained in the effects-based approach.

At a first glance, the DP seems a comprehensive and systematic overview of the European case law of abuse of dominance. Constant reference is made to both old and recent decision of the Commission, Court of First Instance and European Court of Justice and the guideline style deliberately adopted by the Commission makes it hard to see where the changes have taken place and for what specific reason.

Generally speaking, the DP seems pervaded by a certain tension in the Commission between the intention to just confirming current approach to abuses of dominance and a desire to innovate and move towards more economic-based approach.[57] For example, with regard to the goal of Article 82 EC in exclusionary conduct cases, the Commission explains that the essential goal of antitrust law is "the protection of *competition on the market as a means* of *enhancing consumer welfare* and of ensuring an *efficient allocation of resources*" (italics added).[58] This is a very thoughtful and balanced definition because it confirms the principle that *competition on the market* and not consumers is the ultimate goal of Article 82 EC, but at the same time it explains that such goal has been elected in the belief that preserving a competitive and open market structure ultimately will safeguard consumers in terms of low prices, high quality products, wide selection of goods and services, and continuous innovation in general.[59]

Although one might point out that the preservation of *allocative efficiency* has rarely been pointed out so explicitly, from European bodies, as goal of competition policy, it should also be noted that the Commission places great emphasis on the protection of competition, instead of competitors. In doing this, the Commission explains that the purpose of Article 82 EC is not to protect competitors from dominant firm's genuine competition but "[…] to ensure that these competitors are also able to expand in or enter the market and compete therein on the merits, without facing competition conditions which are distorted or impaired by the dominant firm".[60]

Much in the same way, the Commission gives a cautious definition of exclusionary conduct intended as any behaviour that is able to cause an *actual* or *likely* anti-competitive effect in the market which *directly* or *indirectly* harms consumers.[61]

With regard to dominance, the Commission does not seem to accept EAGCP's suggestion of eliminating a preliminary and separate assessment of a dominant position. On the contrary, the DP seems to take a rather traditional approach. It firmly restates the principles set out in *Hoffmann-La Roche* about the role of market shares as significant indirect factor to assess dominance together with a profound inquiry on other market conditions such as rivals' market shares, rivals' ability to

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[56] EUROPEAN COMMISSION, "DG Competition discussion paper on the application of Article 82 EC of the Treaty to exclusionary abuses", (2005), available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

[57] MONTI, note 13, 31.

[58] EUROPEAN COMMISSION, note 56, para. 4 and paras 54, 17.

[59] EUROPEAN COMMISSION, note 56, para. 4 and paras 54, 17.

[60] EUROPEAN COMMISSION, note 56, para. 4 and paras 54, 17.

[61] EUROPEAN COMMISSION, note 56, paras 55, 18.

rapidly meet the demand etc.[62] It explains the importance of performing such an evaluation within the appropriate time-frame and, against to what economists suggest, it eventually concludes that, although highly unlikely, even a market share threshold of 25%, when coupled with the above market factors, might lead to a finding of dominance.[63]

However, while apparently preserving the status quo, the Commission silently introduces the concept of *substantial market power* as synonym for traditional concept of dominance.[64] The DP just presents the two concepts as equivalent, as if this were a consolidated point in the law.[65] However, the clear implications of such change are not clear. Some commentators argue that the Commission actually intends to move away from well settled case law and embracing the compelling economic concept of SMP.[66] While this could be true, it would contrast with the restatement of old principles and, especially, with the affirmation that even low market threshold may give rise to dominance.

5 Assessment of substantial market power in the new effects-based approach: How current assessment methodology may change

Both the supporters of the effects-based approach and the European Commission in the end seem to suggest the adoption of the more economic-oriented concept of substantial market power, mainly intended as economic power over prices. They further agree that such a definition should be broadened in such a way to comprehend the power to influence innovation pace and quality of products, and so on.[67] However, neither economists nor the Commission explain how these other variables should be taken into account in the measurement of market power (specifically, how would these variable fit with the economic assessment of market power quoted above)[68]. It is even more alarming to see that there is not consensus even with regard to what should be deemed *substantial* market power. In particular, it is not clear whether the term *substantial* refers to a time factor, as the Commission seems

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[62] EUROPEAN COMMISSION, note 56, paras 29 and 30, 11.

[63] EUROPEAN COMMISSION, note 56, paras 31, 11.

[64] EUROPEAN COMMISSION, note 56, paras 23, 9 and 28, 10.

[65] And indeed it has become really common - thanks to the increased recourse to economic analysis in antitrust law – to treat dominance and market power as synonyms.

[66] MONTI, note 13, 32 *et seq*. Monti notices that the Commission has already introduced the economic concept of SMP in the field of electronic communications (*cf.* Directive 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common framework for electronic communications networks and services, [2002] OJ L108/33, Article 14 (2).

[67] EUROPEAN COMMISSION, note 56, para. 24, 9. But also in this sense GERADIN/HOFER/LOUIS/PETIT/WALKER, note 13, 5 *et seq*.

[68] Recall from what explained *supra* para 4.1.1 that market power is a direct function of prices and costs. The other variable interconnected with market power are market shares and price elasticities of demand; other variables like product differentiation or innovation pace are not present. With regard to this latter point, *see infra* para. 7.1 and 7.2.

to suggest,[69] or rather is a matter of degree.[70] Probably it would be better to intend it as a mixture of both, although things are not very clear.

5.1 An inversion of route

Notwithstanding the uncertainties surrounding the concept of SMP, the latter is surely a crucial element for the successful implementation of the effects-based approach.

In the previous paragraphs, this study has focussed on the "conceptual" differences between dominance and market power. It has been shown that the notion of dominance has broader and more various contours than market power, who exhibits an exclusively economic connotation. Having said that, it must be further stressed that the choice between dominance and market power has significant implications also from a pure methodological point of view. In fact, the analysis of dominance, being conceptually separate from the abusive conduct, only concerns an exam of all the factors contributing to form a position of commercial and economic strength of the firm in a certain market; this regardless of what action the firm has taken. Conversely, measurement of market power stems directly from an evaluation of the price set by the company with regard to her marginal costs. In other words, measurement of market power directly comes from a direct evaluation of the *actual conduct* the firm has undertaken in the market.[71] Moreover, because measurement of market power gives direct account of consumer welfare diminution as result of the conduct, and because consumer welfare diminution represent the only meter to determine the anticompetitive character of the conduct, market power assessment directly responds the question of whether the conduct is or is not a violation of Article 82 EC.

At the end of the day, it seems that the adoption of the concept of substantial market power automatically calls for a reverse methodology in the assessment of abuse cases or simply a merger of the two steps into just one: proving the anticompetitive effect of the conduct.[72]

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[69] EUROPEAN COMMISSION, note 56, para. 24, where the Commission holds that "[…] An undertaking that is capable of substantially increasing prices above the competitive level for a *significant period of time* holds substantial market power and possesses the requisite ability to act to an appreciable extent independently of competitors, customers and consumers".

[70] As it would be reasonable to think, given the fact that many commentators blame the Commission to find dominance even when companies hold very low market shares thresholds.

[71] EAGPC-REPORT, note 2, 14 where they expressly acknowledge that "[…] in proposing to reduce the role of separate assessments of dominance and to integrate the substantive assessment of dominance with procedure for establishing competitive harm itself, we depart from the tradition of case law concerning Article 82 EC of the Treaty, but *not,* we believe, from the legal norm itself."

[72] This appears particularly worrisome because even if the DP has not endorsed the methodology proposed by supporters of the effects-based approach, its adoption of SMP might be intended as pathway to implement the new "more-economic" approach.

5.2 Substantial market power and effective competitive constraint

This clear inversion in the assessment of exclusionary conduct under Article 82 EC is not the end of the story. The proponents of the new effects-based approach, suggest a two-steps assessment: first, competition authorities should measure the degree of market power held by the undertaking intended, in its purely economic definition, as power over prices; secondly, once market power has been found they have to inquire further to see whether such market power can be persistent in time or it is likely to be quickly eroded by actual or potential rivals' future behaviors.[73] If this is the case, competition authorities must infer that the conduct is incapable of hurting consumers because the presence of *effective competitive constraints* refrain the dominant firm from keeping her price above marginal costs for a significant period of time.[74] Eventually, in the remote circumstances a firm might be found to have violated Article 82 EC (note that it would be improper at this point to use the words "abused its dominant position"), she would still have the opportunity to rebut such a finding by showing that her conduct benefits consumers through efficiencies.

It is interesting to note that the role played by so called *effective competitive constraints* seems by far more important than it appeared in the Commission Notice on the relevant market where it was held that the systematic identification of the competitive constraints faced by the firms was the precise scope of market definition.[75] Indeed, at a closer look, the presence of *effective competitive constraints* asserted by rivals here has the effect of countervailing the market power likely held by the firm with the result that there is no market power in the first place, hence there is no chance of anticompetitive harm to consumers.

But what I think is more worrisome is that the extra-focus on the *effective competitive constraints* might practically result in an inquiry on the efficiency levels of rivals to see how they would practically respond to the dominant firm's behavior and whether their strategies might be able to offset its effects on the market. If this were to be the case, three major consequences would follow. First, competition authorities' attention would be distracted from the behavior of the dominant firm towards the efficiency level of its competitors, and such a thing seems no longer justified after market definition has been performed and a position of dominance has been ascertained. Second, this means that the very same anticompetitive character of the practice would be practically determined according to how rivals would respond to the conduct of the dominant firm. Third, competition authorities' analysis would be overstrained with the burden of testing the efficiency level of each firm competing in that specific market; whatever efficiency might be intended to mean.[76] For example, according to the

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[73] EAGPC-REPORT, note 2, *passim.*

[74] Note that the DP also describes SMP as absence of *effective competitive constraints. Cf* EUROPEAN COMMISSION, note 56, paras 24-27, 9-10.

[75] Commission Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ C 372/5 expressly stated that: "[…] The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face", para. 2.

[76] This specific point will be analyzed more extensively, *infra* para. 6.2.

proposed framework if an undertaking is successful in restricting her output so that the resource she offers on the market becomes scarce and she can then raise the price for it, (supporters of the effects-based approach suggest that) competition authorities must look at how her rivals, if any, will respond and see whether they are *likely* to offset the effects of the (potential) anticompetitive manoeuvre. At this regard, economists explain that it is essential to look not just at barriers to entry but at barriers to expansion; in fact, if existing rivals face no barriers to expansion they can easily expand their output in response to the (dominant) undertaking restriction so that they will practically impede the latter to successfully raise its price.[77]

This clear shift of competition authorities' focus towards rivals' efficiencies rather than on the anticompetitive conduct adopted by the dominant firm is a central and radical change of the new effects-based approach, although it has not been publicized as it deserves. Indeed, while great emphasis has been put on the efficiency defense,[78] no one has really explained the role that efficiency should play already in Commission assessment of market power, consumer welfare and anticompetitive effects.

To give just an example of what I am referring to, I would like to quote some phrases of Commissioner Kroes at the Fordham Conference in 2005.

"certain forms of pricing conduct *may have different exclusionary effects depending on how efficient the rivals are*. It is clear to me that inefficient competitors should not be protected by competition policy from aggressive price-based actions of a dominant firm."[79]

These words perfectly reflect the policy rationale behind the reform of Article 82 EC. Clearly, Commissioner Kroes intends to get rid of the old criticism moved against European antitrust, protector of competitors rather than competition.[80] This sentiment is understandable and one can surely agree on the fact that a good set of antitrust laws must aim at promoting competition on the merits. However, one must be very careful because this assumption might lead us to practically favor bigger firms, who are easily found efficient, to the detriment of smaller ones, especially new comers who need time in order to stabilize on a certain market and become efficient.

Always with regard to exclusionary pricing conduct, Commissioner Kroes adds that:

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[77] Some economists argue that absence of barriers to expansion might even offset the presence of high barriers to entry and therefore even disprove an initial finding of market power. At this regard *see* GERADIN/HOFER/LOUIS/PETIT/WALKER, note 13, 16.

[78] At this regard, it is interesting noting that the DP has introduced a very narrow efficiency defense whereby the defendant has to prove that: a) the allegedly abusive conduct has realized or is likely to realize efficiencies; b) the conduct is *indispensable* to produce such efficiencies; c) the efficiencies benefit consumers; and that d) competition in a substantial part of the products concerned is not eliminated. EUROPEAN COMMISSION, note 56, paras 84-92.

[79] KROES, "Preliminary Thoughts on Policy Review of Article 82 EC", Speech at the Fordham Corporate Law Institute, New York, (2005), available at http://www.ec.europa.eu/comm/competition/antitrust/others/article_82_review.html.

[80] For the sake of preciseness, this criticism has not only been raised towards European antitrust. For a similar attack towards American competition law *see* BORK, "The Antitrust Paradox", 64-66 (1978).

> "[…] in my view, 'competition on the merits' takes place when an efficient competitor that does not have the benefits of a dominant position, is able to compete against the pricing conduct of the dominant company. […] One possible approach to pricing abuses could be based on the premise that only the exclusion of 'equally efficient' competitors is abusive."[81]

The theory of the "equally efficient competitor", of clear Posnerian derivation,[82] seems to call for a radical change in the philosophy of European antitrust treatment of abuses which finds its jus-political rationale in the German ordo-liberal school.[83]

6 Implications of the shift towards substantial market power

From what we have just seen it seems clear that the economic-based concept of substantial market power differs from the well known concept of dominance as intended and *assessed* in previous case law. The former is surely more in line with the mainstream economic thinking. In fact, the economic concept of market power is strictly linked to the concept of consumer welfare and therefore is better suited than the old concept of dominance to be part of an effects-based framework where the anticompetitive character of the conduct is directly inferred by recourse to consumer harm. Nonetheless, a likely implementation of the new concept of substantial market power-- as central part of the new effects-based approach – would bring a sensible departure from policy and economic rationales that underline European competition policy. Moreover, such a change of approach would carry significant procedural and practical drawbacks which risk to undermining the effectiveness of competition law enforcement system.

Please note that the considerations that follows in the subsequent paragraphs (5.1, 5.2, 5.3 and 5.4) directly relates to the situation which would be likely to arise were dominance discarded in favour of the substantial market power test. However, because, as emphasized several times, such a shift is an essential – if not the central – step of the so called effects-based approach, many of the following thoughts can be considered as if they were generally addressed to the effects-based approach directly.

6.1 Policy implications and economic shortcomings of the "welfarist" approach

The shift from traditional concept and assessment of dominance to SMP, as proposed by the new effects-based approach, signs a deep departure from traditional jus-political rationales and principles rooted into European competition law.

In order to better explain the magnitude of such departure, I would like to begin by quoting a sentence from AG Konott's opinion in the *British Airways v.*

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[81] KROES, note 79. In this sense *see* EAGPC-REPORT, note 2, 11, alleging that competition authorities ought to refrain from intervening against monopolistic pricing and instead should realize that such practice open up room for competition.

[82] POSNER, "Antitrust Law: An Economic Perspective", 194-195 (2nd ed. 2001).

[83] On this point see more extensively *infra* para. 6.1.

Commission case, which is representative of such values. According to AG Konott:

> "[…] Article 82 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market" (emphasis in the original).[84]

This short passage carries several hermeneutic keys to better understand the rationales of EU competition law.

First of all, the sentence underlines a persistent coherency between competition norms contained in the EC Treaty, as well as between the latter and the broad set of secondary legislations adopted by the EU.[85] Second, the sentence clarifies that the ultimate scope of Article 82 EC, and all competition law legislations in general, is not the protection of competitors' economic interests but neither of consumers'. Rather, the application of antitrust provisions should be intended as safeguarding the competitive structure of the market as value in itself. This basic proposition bears enormous importance for the understanding of competition law because it explains that although the protection of competition might be claimed to be an intermediate objective pursued in order to eventually obtain other goals (such as the protection of consumers, growth of industry, strengthening of the overall economy, achievement of market integration and so on), safeguarding a competitive structure of market remains the primary and direct aim of antitrust enforcement.[86]

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[84] Opinion of the AG Kokott in the Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para. 69.

[85] The words of AG Kokott express principles and ideas constituting the milestones of EC competition law. It is worth recalling the ECJ judgment in Continental Can where it clarified that Article 82 EC: "[…] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (F) of the Treaty". Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215, para. 26.

[86] At this regard, *see* DENOZZA/TOFFOLETTO, "Contro l'utilizzazione dell' "approccio economico" nell'interpretazione del diritto antitrust", (2006) 3 Mercato, Concorrenza e Regole 563, 565 *et seq*. Denozza and Toffoletto emphasize the need to distinguish between the overall value(s) and goal(s) that a set of norms aims at protecting from the precise end a single provision (within that normative framework) aims at pursuing. They explain that the overall spirit and goal of the normative framework (let's assume, competition laws) should surely help the interpreter in the application of the precise legal provision (let's assume, Article 82 EC) but the interpreter always remains bound by the parameters (i.e. the legal instruments) set by the provision to ascertain the illicit conduct and is not free to elude them and simply pursue the overall goal of the normative framework (in this example, the protection of consumers instead of the protection of competition). Similarly, EILMANSBERGER, note 6, 18, explaining that the goal of competition norms in the Treaty is to promote a system of undistorted competition in the Common market and that such goal is ultimately pursued for the benefit of consumers, which surely account as one of the foremost rationale of abuse control. Nonetheless, "[consumer welfare] it should not be considered *a direct requirement* of the types of abuse of interest here (anticompetitive abuses)" (emphasis added).

Conversely, the new effects-based approach, by stating that Article 82 EC is exclusively focussed on "improved consumer welfare", shakes the political and economic foundations of the abuse doctrine as well as its coherency with the rest of competition norms.

The new methodology introduced by the effects-based approach by eliminating the distinction between dominance and abuse, as restated by AG Konott in the passage quoted above, as well as the list of presumptively abusive circumstances, would practically deprive Article 82 EC normative structure of its original meaning and would sign a profound departure from the ordoliberal school vision of competition law as guarantor of undertakings' freedom of action in a scenario of open market structures governed by complete competition.[87] To give just one example, it is not difficult to comprehend that in an effects-based approach where the anticompetitive character of the conduct depends on the degree of market power which, in turn, is directly measured per reference to rivals' efficiency level on the market, there would be no room for concept of dominance as "special responsibility".[88]

But it is worth pointing out that the "consumer welfare" approach represents a departure even from mainstream economic theories as traditionally applied to competition law. In fact, the microeconomic theory of perfect competition, which for long time has formed the economic blueprint of competition law, postulates a scenario where firms are price takers, consumers buy the entire amount they wish at the price they are willing to pay and where, as a consequence, consumer surplus equates producer surplus. In the shift from perfect competition to a situation of monopoly, micro-economists teach us that not simply consumer surplus is reduced. This is only one consequence of monopoly but monopoly power carries several other drawbacks: indeed, producer surplus grows as it absorbs good part of what was previously consumer surplus, but there is also a sensible reduction of the quantity the company would supply in a competitive setting, even though she probably has capacity and economies of scale which would encourage her to do so.[89]

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[87] *See generally,* GERBER, "Law and Competition in Twentieth Century Europe", chapter VII (2001), and EUCKEN, "The Competitive Order and Its Implementation", (1949), English translation reprinted in (2006) 2 Competition Policy International 219.

[88] In fact, the whole policy rationale underlying the European abuse of dominance (if not the entire European antitrust law) reverts to the understanding that certain conduct whose intrinsic character is difficult to assess may be particularly detrimental if put into practice by a stronger firm or by two or more undertakings jointly. The rationale for this is the acknowledgment that if a certain conduct is adopted by a firm who holds a position of substantial economic and commercial strength on the market, such conduct risks disrupting competition because the effect it is able to produce in the market is directly proportioned to the strength of the undertaking. With specific regard to Article 82 EC, these ideas have led EU courts to determine the "special responsibility" doctrine which hinges on firms having a dominant position on the market. Pursuant to the "special responsibility" doctrine, a dominant firm has the duty "[…] not to allow its conduct to impair genuine undistorted competition on the common market". *Cf.* Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, para. 57. After that, the special responsibility principle was often confirmed: *see* Joint Cases C-395/96 and C-396/96 P *Compagnie Maritime Belge Transports SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365, para. 37.

[89] PINDYCK/RUBINFELD, note 46, 347 *et seq*.

According to microeconomic theory, the triangle given by the sum of the area representing the diminution of consumer surplus (given by the percentage of consumers which will no longer be able to afford the good), plus the area representing the percentage of quantity no longer supplied by the monopolist, together constitute the so called *deadweighloss* associated with monopoly power.

Evidently, the concept of deadweighloss is much broader than consumer welfare as it gives account of aggregate loss for society as a whole.[90] And indeed in promoting the blueprint of perfect competition, economists used to refer to *total aggregate welfare* (rather than simply consumer welfare).

The proof that antitrust is not a consumer protection law can be easily found in the fact that antitrust enforcers proudly avoid punishing certain conduct which immediately cause a diminution of consumer welfare.[91]

In any case, even assuming that all economists would agree that consumer welfare represents a better standard than total welfare, and that therefore it should supplant the latter as economic goal in competition law, an approach which describes antitrust norms only in a "welfarist" perspective is highly misleading. At this regard, it has been pointed out (by other economists) that antitrust policy does not examines only the *consequences* of conduct (i.e. the change in consumer or total welfare), but also the *process* that generates such consequences (i.e. the nature of conduct). More specifically, they clarify that while antitrust may prohibit practices harming consumers or reducing efficiencies, it does so only insofar as companies achieve such result through actions that are deemed *anticompetitive.*[92] Merging these two elements together or simply redefining the meaning of the word "anticompetitive" in light of a welfarist perspective only adds confusion to the debate.[93]

6.2 Practical implications. The effects-based approach and burden of proof: When do efficiencies matter?

Beyond the changes in the political and economic rationales underlying the abuse doctrine, the introduction of the new methodology supported by the effects- based approach would carry several practical shortcomings.

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[90] The deadweighloss caused by the monopolist gives a broader picture of the economic loss in that it takes into account the loss in quantity that would be offered in a competitive setting, which implicitly considers also a diminution in terms of work and capital that are no longer used; and, conversely, does not take into account the loss of consumer welfare which becomes monopolistic surplus, in the assumption that such new welfare is also passed on workers.

[91] FARRELL/KATZ, "The Economics of Welfare Standards in Antitrust" (2006) 2 Competition Policy International 3, 6 *et seq*. The authors refers to conduct like monopoly pricing which not only is lawful under U.S. antitrust laws, but it has been recently proclaimed by the Supreme Court as "an important element of the free-market system" (*See Verizon Communications Inc. v Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 407 (2004)). European Competition law, in theory, punishes excessive pricing as a form of exploitative abuse under Article 82 (a) EC; however, in practice such conduct has hardly been caught by competition authorities.

[92] FARRELL/KATZ, note 91, 6 *et seq*.

[93] FARRELL/KATZ, note 91, 8.

A first set of practical inconveniences that directly affects the enforcement of Article 82 EC stems from the discard of dominance as a concept and as separate test of the assessment, distinguished from the abusive conduct.

First of all, the assumption that dominance is automatically inferred whenever an anticompetitive harm on consumer is proved cannot be shared. At this regard, it has been rightfully pointed out that the anticompetitive harm could also be consequence of a cumulative effect of similar practices employed by the firm under investigation and its competitors;[94] or even more simply, the effect could well be produced from concerted action of firms in the market whose aggregate market share is well below the threshold usually needed to infer dominance. Moreover, beyond its political rationale, dominance also represents an important safe harbour because European legislators have purposefully decided to left out of Article 82 EC all conduct aimed at achieving and building a position of dominance, even when based on competition different than competition on the merits.[95]

In this regard, therefore, a preliminary assessment of dominance has an important screening function whose importance has been recognized also by famous economists.[96] And indeed, contrary to what EAGCP surely want to achieve with this reform, the elimination of a preliminary finding of dominance could increase, rather than decrease, competition authorities' intervention because (at least in theory) any practices able to concretely produce a significant anticompetitive harm should be object of scrutiny. This, however, hinges strongly on what we understand with the term "significant anticompetitive harm"; clearly, if the bar is set too high no abuses are likely to be found.

Besides all the negative effects outlined above, there is another one which often remains in the shadow and has seldom attracted attention by commentators. I am referring to the subtle element of the burden of proof.

Under the current enforcement regime, as amended by recent modernization package, the Commission has the power to challenge firms' behavior on its own initiative or acting on a complaint, whenever it fears that competition is at stake. While in doing so, the Commission has a broad set of investigative powers, the Commission has the burden of proving that an actual *infringement* of either Article 81 EC or Article 82 EC has been committed.[97] There is a first phase where the Commission opens the investigation during which it collects all the relevant information and

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[94] EILMANSBERGER, note 13, 24.

[95] In this sense, Article 82 EC is somewhat more lenient than other antitrust laws, like the American Sherman Act, that punishes also conduct aimed at obtaining a position of dominance in the market On the differences between European treatment of unilateral exclusionary conduct vis-à-vis American attempt to monopolize, *see* AREZZO, "Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared", (2006) 24 John Marshall Journal of Computer & Information Law 455.

[96] VICKERS, "Market Power in Competition Cases", (2006) 2 European Competition Journal, 12.

[97] Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1, Article 2.

forms an opinion regarding the character of the conduct (i.e. whether it is or not anticompetitive).

With regard to exclusionary conduct cases, the latter part (i.e. forming an opinion on whether the violation has occurred or not) is rather complex. Indeed, after the delineation of the relevant market and the assessment of the position the company holds therein, the Commission begins evaluating the conduct at issue. Here, contrary to what is argued by supporters of the effects-based approach, the verification *begins* from the form of the conduct to see whether it corresponds to one of the practices foreclosed by Article 82 EC and then it goes further to examine the peculiar circumstances of the case. Indeed, as it is well known, the mere correspondence of the company, for example, to a refusal to deal does not lead the Commission to declare straightforwardly that an abuse has been committed. On the contrary, the Commission will then turn to specific judicial doctrines which have been developed by European jurisprudence.[98] In the mentioned example, the Commission will further examine whether the dominant undertaking intends to reserve to itself an entire derivative market and through the refusal it aims at eliminating all competition coming from that rival.[99]

If the Commission eventually concludes that the conduct at issue has violated rules of competition, it issues a statement of objection which it must notify to the interested undertaking.[100] The latter then sends its written comments, usually alleging facts and circumstances aimed at disproving its violation of competition norms.[101] In these written submissions, undertakings may ask to be heard orally during the proceeding.[102]

It normally happens that notified companies ask to be heard before the Commission and strongly argue their case to convince the Commission to dismiss the proceeding. In an abuse case, accused companies usually claim that they do not hold a position of dominance in the relevant market or that the same relevant market has not been properly defined, and was indeed broader. In addition, they might claim that the conduct has not restricted competition or they could admit that the conduct was indeed anticompetitive but they might argue they had objective business justi-

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[98] It has been rigthly stressed that European courts have developed such doctrines along the years and they express the wisdom of a long judicial experience. Their codification is not result of accident, therefore the proponents of the effects-based approach cannot just suggest to simply thow them away. *See* DENOZZA/TOFFOLETTO, note 86, 568.

[99] Joint Cases 6 and 7/73 *Commercial Solvens v Commission* [1974] ECR 223, para. 25. Alternatively, if the case is examined under the *essential facility doctrine,* the Commission will verify whether competitors can duplicate the product, input or facility whose access has been denied; and it will further inquire on whether such product is essential to compete in the relevant market and so on. *Cf.* European Commission, Decision 94/19/EC *Sea Containers v Stena Sealink – Interim measure* [1994] OJ L 15/8, para. 66.

[100] Commission Regulation No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L 123/18, Article 10(1).

[101] Regulation 773/2004, Article 10 (3).

[102] Regulation 773/2004, Articles 11 and 12.

fication for pursuing it. [103] In pleading their case before the Commission, defendants often recur to complex economic theories, models, econometric data and the like.

Were the effects-based approach to pass, things would radically change in the assessment of abuse cases. Under the current approach, evidence of consumer welfare diminution is not requested; rather, consumer harm is often presumed to follow from the restriction of competition, which is the direct concern of the Commission. Conversely, proponents of the effects-based approach want competition authorities to go one step further and prove that consumers have been harmed (i.e. their surplus has been actually eroded). This is not all. Proof of consumer harm must be corroborated by strong economic evidences.

In addition to this, economists explain that the economic toolbox shall be used not simply to demonstrate that the company has substantial market power and, consequently, actual consumer harm is produced, but also to prove that such effect is persistent: i.e. that such SMP is stable and not likely to be quickly eroded by countervailing factors. In such case, indeed, there would be no market power and, consequently, no consumer harm in the first place.

As explained above, economists want competition authorities to pursue such task by examining how actual or potential competitors might respond to the presumptively dominant company abusive strategy; this in the assumption that *efficient companies* will be able to constrain the anticompetitive potential of the exclusionary conduct.

From the procedural perspective, this new methodology seems to over-burden competition authorities with elements they were not supposed to prove under current regime. Providing evidence of actual consumer harm is indeed hard to accomplish, especially if such thesis must be corroborated with economic tools. Moreover, the inquiry competition agencies would be supposed to perform on the efficiency levels of competitors seems way too excessive. Indeed, it is worth remembering that under the current regime all these elements are usually brought up by the defendants to plead their case. Asking the Commission to start an investigation and then find by itself the economic justifications to dump it seem meaningless and against all procedural rules.

The proponents of the new approach have purposefully convoluted the attention towards the so called *efficiency defence,* however, the real innovation of the proposal regards the other type of efficiency discussed above: namely, the ones the Commission has to deal with.

This new procedural mechanism would probably succeed in reducing the numbers of false positives, because in the end it would make it extremely difficult for the Commission to prove the abuse; however, this does not necessarily means that the Commission would have less work to do. On the contrary, these changes would

[103] Under current regime, differently from what happens in the case of Article 81(3) EC, firms which have allegedly abused a dominant position are not required to justify their conduct in terms of efficiencies brought about by their conduct. Regulation 1/2003, Article 2, expressly shift the burden of proving the four conditions contained at Article 81(3) EC on the undertaking or association of undertaking claiming the benefits connected therein.

probably increase the amount of investigations to be pursued and the workload for each single case.

7 Substantial market power, consumer welfare and significant competitive harm: Some flaws in the new effects-based approach

It appears from what we have seen until now that the new *effects-based* approach evolves around three main concepts: *significant market power*, *consumer welfare* and *anticompetitive harm.*

It is interesting to notice how these concepts are interrelated one another: substantial market power is found when the firm is able to raise prices and diminish quantity, hence damaging consumers that will either stop buying the good or will have to bear a higher price. At the same time consumer welfare, as measured per market power inference, will be the benchmark to determine when a certain conduct (which is deemed anticompetitive because the firm has been found to have substantial market power) can be said to cause a significant anticompetitive harm. In practice, it seems that both substantial market power and significant anticompetitive harm – which indeed would be evaluated at the same time – are measured and assessed with regard to consumer welfare. Thus, the concept of consumer welfare bears significant implication as it becomes the sole key to determine the magnitude of the anticompetitive harm. Therefore, at this point of this study we should question whether consumer welfare (and, indirectly, market power) amount to the appropriate benchmark for antitrust analysis in exclusionary unilateral conduct.

In previous parts of this study, I have examined the likely shortcomings that would arise if consumer welfare would be adopted as sole and exclusive goal of competition law (so called "welfarist approach"). I have also shown that case law experience confirms that consumer welfare is not the *sole* and *direct* objective of European antitrust. In the following paragraphs, I will argue that from a practical point of view consumer welfare is not appropriate to serve as benchmark to assess anticompetitive character of unilateral exclusionary conduct.

7.1 Consumer welfare and dynamic efficiency

The reference to consumer welfare as benchmark to assess the ultimate anticompetitive nature of the conduct and the related market power assessment, as necessary instrument to measure consumer welfare, present some flaws which are worth and interesting discussing.

First of all, as we have observed above when discussing the model of monopoly power in microeconomics, consumer welfare and market power analysis belong to a framework where the monopolist decides her strategy only throughout two variables: namely, prices and quantity. In fact, as we have seen already, market power is widely perceived by economists throughout the world as power over prices. The (widely accepted economic) reason for this is that firms maximize their profits when they can set a price which exceeds firm's marginal cost. In a competitive scenario, competing undertakings are price-takers in the sense that they normally

undergo the price formed according to consumers' willingness to pay, as every competitor by herself is not strong enough to stand up and set a supra-competitive price. Conversely, the power to set prices above competitive levels shows that the firm has indeed market power.

The problem with this model (and the monopolistic model as well) is that it is not suited to take into account other forms of competition beyond competition on prices and quantities. It simply assumes that consumer welfare is maximized when consumers get a lower price and everyone can access the good that is affordable at the price she is willing to pay (hence, there is enough of the product to satisfy the entire market demand). However, this paradigm does not tell us anything about product differentiation, product innovation, quality and so on. How do we take them into account? How can we know if consumers are likely to prefer low prices to higher innovative products or vice-versa?

The difficulty inherent unilateral practices lies in that they often require a balancing of short-run effects directly produced by the conduct against long-run effects that the conduct, if not stopped, is *likely* to cause. The complexity of such evaluation is further increased by the fact that often the short-run effects are far from harmful for consumers who often, as a result of the conduct, get lower prices (think for example about predatory pricing, bundling and other forms of rebates) and sometimes even better products (think for example to the American and European Microsoft tying cases where consumers would get at the same price a much more complete product). Conversely, the negative implications of the conduct, like the lessening of competition on the market, are often potential and not already occurred. Obviously, this depends on the moment the Commission begins investigating the practice. If, for example, Commission analysis of a predation case begins after the predation period has ended, rivals have been driven off the market and the dominant firm is recouping her losses incurred in the first period, the overall balancing analysis is relatively easy. However, because usually rivals who risks exiting the market try to catch the Commission's attention before it is too late for them, it is very likely that unilateral conduct will be assessed in a moment where the negative effects - likely to stem from such behavior - have not yet occurred.[104]

Even though commentators would like to think that consumer welfare – in the meaning of consumer surplus – would be better suited than total aggregate welfare for the purpose of Article 82 EC, other considerations suggest caution at this regard.

While reference to microeconomics is extremely useful lawyers do not have to forget that models are often quite far away from reality.

This is because every economic *model* – even the monopolistic model – is based on certain assumptions. The assumptions of this model are that the monopolist decides her strategy only through two variables, namely price and quantity. This model does not tell us that a monopolist may also decide to under-price her product in order to gain a wide installed based and than in a later moment be able to increase her prices. This is because the model not only does not consider other variables like competition on qualities and performances, product differentiation and so on; but

[104] KRATTENMAKER/LANDE/SALOP, note 55, 246. At this regard *see infra* para 7.3.

especially because this model is *static,* in the sense that it only works if the assumptions are met and only within a single time framework (i.e. it does not tell us how the monopolist would react in a later stage of the game when, for example, a new product might be launched on the market).

Clearly a static notion of consumer welfare would appear poorly suited to deal with determination of anticompetitive effects determined by exclusionary unilateral conduct whose eventual detrimental effects for consumers should be assessed in a dynamic framework.[105]

7.2 Consumer welfare and market power in information technologies markets

The criticism just outlined becomes even more compelling for today's economic leading sectors such as new information technologies markets where firms engage in strategic behaviors that go well beyond mere price competition.

To be more precise, companies active in such markets probably still compete on prices to some extent, but the core business strategies to maximize profits, to steel consumers away from rivals or to simply keep consumer loyal to the undertaking's products, they all evolve around other variables: namely, product variety, updates, superior quality, increased features the competing product does not have, compatibility with vast array of complementary products which increases the utility the consumer might get. To put it differently, and just with a simple word, competition is played through *innovation.* The tools to compete in this new scenario are IPRs in all their possible forms and strategic behaviors intended to capture and preserve the largest possible installed base of consumers.[106]

As I have explained elsewhere, the special feature of this new way of competing is that often firms play simultaneously in more than one market so that the assessment of the overall anticompetitive character of the business maneuver becomes more complex to assess.[107] Furthermore, often these sectors are characterized by high initial sunk costs in the form of R&D expenses and negligible marginal costs, usually due to economy of scales in production. In addition, because such markets are often characterized by strong network effects, often even big companies decide to price at fairly low levels or to give away a product for free because this will lead

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[105] The first debate on market power followed Posner's and Landes' paper mentioned *supra,* note 49. Criticisms against their model have been presented by several scholars. Schemalensee, in particular, attacked the model for being static and unable to take into account market dynamics. *See* SCHEMALENSEE, "Another Look at Market Power", (1982) 95 Harv. L.Rev. 1789.

[106] FARRELL/SALONER, "Standardization, Compatibility and Innovation", (1985) RAND Journal of Economics 70; PERITZ, "Dynamic Efficiency and US Antitrust Policy", in: CUCINOTTA/PARDOLESI/VAN DEN BERGH (eds), "Post-Chicago Developments in Antitrust Law", (2002); PITOFSKY, "Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy", (2001) Berkeley Tech. L. J. 535; PITOFSKY, "Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property", (2001) Antitrust Law Journal 913.

[107] GHIDINI/AREZZO, "On the Intersection of IPRs and Competition Law with regard to Information Technology Markets", forthcoming in: EHLERMAN/ATANASIU (eds), "The Relation Between Competition Law and Intellectual Property Law", (2006).

to the creation of a niche of consumers that will be later locked-in the product and will be probably unwilling to switch to a different item in the future.[108]

With these premises in mind, it is easy to understand that firms might not be interested in pricing a lot over marginal cost because even a small margin can yield them good profits when they are able to get the whole market for long time. At this regard, it is important to consider that (dominant) undertaking marginal costs might well be below rivals' therefore a price which is fairly above the firm's marginal costs might be right at rivals' marginal costs so that the dominant undertaking is able to set a price that allows it to be competitive on the market while earning profits. In such scenario, a focus on the price-effect of the conduct to see whether it reduces or increases consumer welfare could be misleading. Indeed, at this regard it is important to distinguish an analysis where competition authorities look at whether the conduct is (ultimately) aimed at strengthening or maintaining market power (intended as power over price), from an analysis where competition authorities look at the actual undertaking's power over price as sole and exclusive parameter to infer anticompetitiveness of the conduct.

7.3 Dominance as the ability to harm rivals in order to gain substantial market power

While the current debate on exclusionary abuses in Europe has mostly centred on whether to adopt the new *effects-based* approach or rather keep the current one, it is interesting to see that the same debate in the United States, which has surely influenced the European one, has much broader contours. In particular, for the purpose of our discussion, it is interesting to notice that not only some theories have been strongly debated, like the "profits-sacrifice-test",[109] which are completely new to

[108] Many studies have been dedicated to the economic analysis of network effects in new economy markets. In particular *see* KATZ/SHAPIRO, "Network Externalities, Competition, and Compatibility", (1985) 75 Am. Econ. Rev. 424; SHAPIRO/VARIAN, "Information Rules, a Strategic Guide to the Network Economy", (1999); KATZ/SHAPIRO, "Antitrust in Software Markets", in: EISENACH/LENARD (eds), "Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Market Place", (1999); LEMLEY/MCGOWAN, "Could Java Change Everything? The Competitive Propriety of a Proprietary Standard", (1998) 43 Antitrust Bull. 715; LEMLEY/MCGOWAN, "Legal Implication of Network Economic Effects", (1998) 86 Calif. L. Rev. 479; FARRELL/KATZ, "The Effects of Antitrust and Intellectual Property Law on Compatibility and Innovation", (1998) 43 Antitrust. Bull. 609.

[109] Just to mention some of the most relevant voices in the debate, s*ee* PATTERSON, "The Sacrifice of Profits in Non-Price Predation", (2003) 18 Antitrust 37; EHLAUGE, "Defining Better Monopolization Standards", (2003) 56 Stan. L.R. 256; HOVENKAMP, "Exclusion and the Sherman Act", (2005) 72 U. Chi. L. Rev. 147; EPSTEIN, "Monopoly Dominance or Level Playing Field? The New Antitrust Paradox", (2005) 72 U. Chi. L. Rev. 49; MELAMED, "Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice, and Refusal to Deal", (2005) 20 Berkeley Tech. L.J. 1247; FOX, "Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act", (2005) 73 Antitrust L.J. 153; WERDEN, "Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test", (2006) 73 Antitrust L.J. 413; SALOP, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard", (2006) 73 Antitrust L.J. 311.

European horizons, but also that even the views that at a first glance might seem close to the European *effects-based* approach are in practice quite distant. I am referring to a recent article of prof. Steven Salop where he sketches his personal theory of consumer welfare balancing test as methodology to investigate exclusionary conducts.[110]

Prof. Salop embraces the notion of antitrust as a consumer welfare prescription but he drafts it his own way. In particular, starting from the assumption that an antitrust evaluation involves an analysis centred on consumer welfare, hence market power, Salop explains that different conceptualizations of market power do exist although they have not received equal attention and respect from the economic literature.[111] In particular, he explains that often exclusion takes the form of raising rivals' costs. His point is that to be anticompetitive, an undertaking's conduct needs not be aimed at raising her own prices, but to raise her rivals' costs. Therefore, he explains that a consumer welfare analysis would evaluate whether the conduct harms competitors by raising their costs and whether those higher costs harm consumers and competition by allowing the defendant to achieve, maintain or enhance monopoly power.[112]

Without entering into the details of Salop's proposal, it is interesting to notice that although he also believes that consumer welfare should be the benchmark to evaluate the effects of an anticompetitive conduct, he draws a different economic methodology. In fact, he also intends to actually measure the ultimate effect the conduct will have on consumers, but within his framework market power is not assessed through an inquiry of overall rivals' efficiencies and their capability to offset the anticompetitive potentials inherent the behavior; rather, he intends to measure the effects the unilateral practice is going to directly assert towards rivals and see how this, in turn, affects the whole market, in terms of prices and quantities supplied. In fact, he argues that even though rivals might not be forced to immediately exit the market, they could be induced by the unilateral practice to compete less vigorously: for example, rivals may be forced to raise their price to reflect the internal increase in costs or, for the same reason, they could be forced to reduce the quantity produced and offered to the market, always to the benefit of the dominant firm. Salop argues that these are short-terms effects that directly damages consumers and must be taken into account in the overall balancing analysis.

Clearly, although an economist, Salop's position appears radically distant from mainstream economic thinking and from the European *effects-based* approach. For example, he emphasizes that the legal standard of proof of consumer harm placed on the plaintiff should not be excessive and that consumer harm might also be

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[110] SALOP, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard", (2006) 73 Antitrust L.J. 311.

[111] Salop distinguishes market power as power over price, which he calls Stiglerian market power, from a second form of market power, which he calls Bainian market power. This second form is present whenever a firm raises its price or prevents it from "falling to a lower competitive level by raising its rivals' costs and thereby causing them to restrain their output ('exclude competition')." KRATTENMAKER/LANDE/SALOP, note 55, 250.

[112] SALOP, note 110, 319.

threatened rather than actually realized.[113] This finds its rationale in the assumption that a conduct which foreseeably leads to consumers' benefits but it later turns out to harm consumers would not be punished in a merely *ex ante* perspective which only punishes a conduct if its actual and immediate effect is to damage consumers. He is one of the few to advocate that false negatives have a strong negative impact on competition because allowing anticompetitive exclusionary conduct to accomplish its goal means destroying the very same rivals who could innovate and, by asserting competitive pressure on the monopolist, could force the latter to keep ameliorating its product, hence competing on the merits rather than spending money in strategies only intended to preserve its position of strength.[114]

7.4 Consumer welfare and the exclusion paradox

A likely interpretation and assessment of market power as the power to harm rivals in order to obtain economic strength as a result would probably be more in line with the traditional definition of dominance whose special feature has been identified with the power to behave independently which, in turn, would vest the undertaking with the power to distort competitive equibrium in the market.

This concept would appear more apt to deal with the specific case of exclusionary conduct as it is seems more suited to make dynamic considerations and consider the foreclosure effects of the anticompetitive conduct in the long run.

The possibility that dominance takes indeed this specific form has been briefly acknowledged by some commentators in the current debate although the idea has not received particular consideration. Even the Commission Discussion Paper seems, at a certain point, to introduce a rather broad definition of foreclosure as the act of discouraging entry or expansion of rivals or encouraging their exit; and it clearly explains that foreclosure can also be found when rivals are not forced out of the market but they are simply disadvantaged and led to compete less aggressively.[115]

On the contrary, assessment of foreclosure under the *effects-based* approach would compel competition authorities to immediately look at the actual effect of the conduct: hence, to see first of all whether a competitor has actually been driven off the market because of the allegedly abusive conduct. Secondly, supporters of a more economics-based assessment of competition law explain that even though the practice may actually lead to exclusion of a competitor from the market, the anticompetitive nature of the conduct must be evaluated with focus on the competitor commercial strength and the position it holds on the market, not on the goals the allegedly dominant firm wants to achieve. Because the outmost blueprint is efficiency in order to better serve consumer welfare, competition on the merits needs not protect inefficient competitors from aggressive competition, even if it comes from a far

[113] SALOP, note 110, 350.
[114] SALOP, note 110, 351.
[115] EUROPEAN COMMISSION, note 56, 58.

stronger firm which holds substantial commercial and economic advantages on the market.

Although this reasoning seems to have its own logic, I am afraid that if stretched to the extreme might lead to circular reasoning. Indeed, if competitors are not driven off the market or they are efficient and (at least in theory) capable to constraint a likely exclusionary manoeuvre undertaken by the dominant firm, this is a proof that the firm does not hold a sufficient degree of market power (or – which should be the same – is not dominant) so the conduct cannot qualify for abuse; conversely, if competitors are not efficient and the firm is capable of asserting market power (hence, it can be said to be dominant), eventually causing one of them (or maybe even all of them) to leave the market, banning the likely abuse would equate protecting these inefficient firms from aggressive competition coming from an efficient partner (because the implicit assumption is that dominance is a synonym of efficiency).

8 Conclusions

As well known, the European Commission has engaged in a long and substantial reform of EC competition laws in light of a more economics-based assessment. This process has begun at the end of the nineties with the adoption of the Regulation on vertical agreements in restriction of competition and its related guidelines. Today the momentum has come for exclusionary practices ex Article 82 EC. The overall scenario, however, does not appear clear. The European Commission Discussion Paper is a very complex document whose style makes it incredibly hard to decipher the changes made to current practice nor does it explain the rationale behind such changes, if any. On the contrary, the apparent changes proposed by a group of very influential European economists (the Economic Advisory Group for Competition Policy) are crystal clear and very much worrying.

The approach they propose, the so called *effects-based* approach, evolves around three concepts all strictly related one another: consumer welfare, significant market power and significant anticompetitive harm. In fact, in the neoclassical economics, measurement of market power gives direct account of the degree of consumer welfare that is diminished as result of the conduct. Significant anticompetitive harm, in turn, is directly measured per inference to consumer welfare. This is because the effects-based approach calls for a balancing test whereby positive pro-consumers effects of the conduct are to be balanced against harms to consumer welfare, which is measured through market power.

This approach would sign a strong departure from the current assessment of abuse under Article 82 EC as it would completely eliminate the old definition of dominance and the list of presumptively abusive conduct listed at Article 82 EC, in order to adopt a test exclusively concerned about the final effect the conduct is likely to assert on consumers. Clearly, this approach would not have room for concepts well rooted in EU competition law, such as the protection of "competition as an institution" or dominance intended as "special responsibility".

However, while economists of the EAGCP present this the new effects-based approach as the *more economic approach* to the assessment of unilateral practices,

it is interesting to note that other economic considerations have not been taken into account which would probably suggest more caution in adopting such approach. In fact, it seems that the approach of the EAGCP instead of being simply in favor of more economics in general, it is more inclined to support the adoption of certain economic theories rather than others.

Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence

Pranvera Këllezi

1 Introduction

The traditional approach to defining dominance gives an important role to market shares and market delineation. In that respect, market shares constitute an intervention threshold that may lead competition authorities to neglect certain types of market power, although this traditional approach contributes to increasing the level of legal certainty for undertakings. A number of European countries have passed laws to intervene in cases falling short of dominance, such as abuse of economic dependence. Briefly defined, economic dependence arises when a supplier is economically dependent on a buyer or vice versa. The interest in economic dependence grew when the concentration of some industries rose substantially and the firms engaged in practices that harmed small businesses.

Under Regulation 1/2003,[1] unlike the national provisions related to the prohibition of agreements, Member States are not precluded from "adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

engaged in by undertakings".[2] Such an "exemption" relates to "provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings."[3] One might infer from the wording of Regulation 1/2003 that existing national provisions pertaining to the abuse of economic dependence are stricter than Article 82 EC. However, this is not necessarily the case, and this article aims to explore the issue in more depth.

The answer to this question is not only of interest for Member States that have already enacted special provisions on the abuse of economic dependence. Other member or non-member states' competition laws have borrowed the definition of the dominant position as defined by the European Court of Justice in *United Brands*.[4] Answering the question of whether this definition is intended to be interpreted widely so as to include the concept of economic dependence will be another task of this article.

The study of economic dependence also presents an interest in the framework of Article 82's modernisation process. Reflections about the interpretation of Article 82 EC include the discussion of points such as: What is a dominant position? What is its relation to market power and market shares? Can an undertaking with low market share be held dominant? What is abusive behaviour? What is the appropriate test to determine anticompetitive effect? The discussion of these points is relevant to both Article 82 EC and the interpretation of economic dependence.

Before beginning, some observations are in order. Antitrust commentators can have legitimate disputes about the appropriateness of the economic-dependence concept, or more broadly, about whether intervention is too strict or too lenient. The purpose of this article is not to enter directly into those debates, but rather to present the concept of economic dependence as it has developed in the case law of different national competition laws and to answer the question of whether it is consistent with the concept of dominant position as defined in European competition law as well as with the concept of market power.

The economic definition of market power is discussed in Section 2. The relation to market shares is also developed. Section 3 follows with the concept of economic dependence in some national competition laws, and the application of similar concepts in Switzerland. Section 4 examines the definition of dominant position under European competition law, focusing on the relevant case law. Abusive conduct and remedies are briefly examined in Section 5.

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2 Regulation 1/2003, Article 3(2).

3 Regulation 1/2003, recital 8.

4 Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207, para. 65.

2 Market power

2.1 Economic definition of market power

Market power is the key issue in industrial economics and competition law. In particular, antitrust law is used to minimise the social cost of the exercise of market power.[5] The competition authorities are concerned with the situation where one or more undertakings have the power to influence price[6] and output, as well as other parameters of competition such as the level of innovation. The Commission defines market power as "the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time."[7] The modern industrial organisation emphasizes the importance of strategic behaviour that aims at sustaining monopoly profits.[8] This is also known as the power to exclude exiting or potential competitors in the long run.[9]

Market power is defined by using two benchmarks: the marginal cost, or the level of price in a competitive market, and the monopoly price. As a matter of fact, the whole theory of industrial organisation is constructed around two market structures: competition and monopoly. Contrasting both situations usually illustrates the superiority of one outcome over the other in terms of social welfare.

In the state of perfect competition no firm has market power, or the power to determine price.[10] The market price equals the marginal cost. A firm with market power has the ability to profitably raise the price above marginal cost.[11] The benchmark of perfect competition, or the reference to the short-run marginal cost, is usually used to determine a firm's market power. According to this approach, an undertaking possesses market power even though it has the ability to impose only small increases in price. Since large fixed costs cannot be recouped without pricing above marginal cost,[12] this is a common situation in the market: It follows that a large number of firms are capable of having some market power.[13] As a consequence, a more sophisticated definition of antitrust market power refers to the ability to raise prices above long-run average cost.[14]

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5 The exercise of market power is one type of market failure.

6 The price is not the only parameter of competition. A firm has market power if it is able to influence quantity, quality, innovation or other commercial conditions.

7 EUROPEAN COMMISSION, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses", (2005), available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

8 CHURCH/WARE, "Industrial Organisation. A Strategic Approach", 603 (2000).

9 *See* BISHOP/WALKER, "The economics of the EC Competition Law", 73 (2002); CHURCH/WARE, note 8, 603.

10 CARLTON/PERLOFF, "Modern Industrial Organisation", 57 *et seq*. (3rd ed. 2000).

11 CHURCH/WARE, note 8, 29. Marginal cost equals the price in perfect competition.

12 MOTTA, "Competition Policy. Theory and Practice", 41 (2004).

13 BISHOP/WALKER, note 9, 42.

14 CHURCH/WARE, note 8, 603.

Monopolist behaviour approaches extreme levels of market power. A monopolist acts as a price maker since it is the only supplier of a product on a market. It can impose a price equal with what the consumers are willing and able to pay: a monopolist facing a low elasticity of demand has absolute power over its customers and consumers. Often monopoly power is used as a synonym for market power.[15] Indeed, market power indicates a deviation from the effective or perfect competition benchmark,[16] and monopoly power fulfils this condition:

> "Whenever a firm can influence the price it receives for its product, the firm is said to have *monopoly power* or *market power*. The terms *monopoly power* or *market power* typically are used interchangeably to mean the ability to profitably set price above competitive levels (marginal cost); that is, the Lerner Index is positive."[17]

Industrial organisation theory analyses a variety of intermediate market structures different from perfect competition and monopoly. One of them is the existence of a *dominant firm* together with a *competitive fringe*. The dominant firm "has some market power"[18] or "still possesses considerable market power"[19] in the sense that it is a price setter – it can practically ignore the other firms operating in the market. These latter fringe firms act as price takers. To clearly delineate the meaning, and distinguish it from monopoly, a dominant firm is said to have a relatively large market share in comparison with the firms composing the fringe.[20] It is this concept that corresponds most closely with the *dominant position* in the legal sense, for it refers to a firm having a paramount market position.

Another form of competition relates to differentiation and lies between monopoly and perfect competition: *monopolistic competition*.[21] The expression seems to be an oxymoron at first sight, but it becomes clear once branded goods are considered. It consists in a situation where there are many producers on the market, each producing imperfect substitute products, in that they are similar but slightly differentiated.[22] Establishing a strong brand image, in particular through advertising, increases the consumer preferences for that brand by decreasing the products' sub-

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[15] It should be underlined that, in the United States, monopoly power is one of the conditions for the application of Section 2 of the Sherman Act. American law generally distinguishes market power from monopoly power, although market power is used to explain monopoly power. Also, monopoly power under Section 2 of the Sherman Act requires "something greater than market power under Section 1" (*Eastman Kodak Co. v Image Tech. Servs.* 504 U.S. 451 (1992), para. 481). Monopoly power refers both to the ability to increase prices and the power to exclude competition (*United States v E.I. du Pont de Nemours & Co.* 351 U.S. 377 (1956), paras 391, 392). *See also* PRICE, "Market Power and Monopoly Power in Antitrust Analysis", (1989) 75 Cornell Law Review 190.

[16] BISHOP/WALKER, note 9, 50.

[17] CARLTON/PERLOFF, note 10, 92. The Lerner Index of market power is the difference between price and marginal cost as a fraction of price.

[18] CARLTON/PERLOFF, note 10, 107 *et seq*.

[19] CHURCH/WARE, note 8, 124.

[20] CARLTON/PERLOFF, note 10, 108.

[21] CHAMBERLAIN, "The Theory of Monopolistic Competition", (1933).

[22] CABRAL, "Introduction to Industrial Organization", 92 (2000).

stitutability and making their residual demand less elastic.[23] Each producer can influence its price and quantity without affecting the decisions taken by its rivals. Each of them therefore has market power:[24] its level increases the greater the degree of product differentiation.[25] Customers' dependence on specific brands relates to this situation.

Oligopoly is another intermediate market structure between perfect competition and monopoly, where firms have a certain degree of market power without having a paramount market position. Price under duopoly (or oligopoly) is generally above marginal cost; quantity is lower than under perfect competition but greater than under monopoly.[26] Oligopolistic firms have market power even in the absence of collusion (non-cooperative oligopoly), even though they have low market shares.

Market power may also arise in the presence of information gaps, search or switching costs,[27] or the necessity to use specific assets.[28] Information gaps and high switching costs create the so-called "lock-in effect". Substitution between products or services in long-standing business relationships depends on switching costs[29] that customers, consumers or manufacturers face. When switching from one supplier to another is costly or technically difficult, or when the information on switching possibilities is lacking, the customers are locked in to a particular supplier or buyer, consumers of aftermarket products being one example of this.[30]

Specialised investment makes a manufacturer that produces specifically for a big buyer dependent on that buyer, for the latter may engage in opportunistic behaviour. Transaction-cost economics has studied bilateral relations and opportunism in detail, though emphasising the efficiency rationale of restrictive contractual clauses.[31] According to transaction-cost theorists, interpretation of these restrictive practices can reveal efficiency as well as anticompetitive purposes, the former being nevertheless more credible for them.[32] The guidelines on vertical restraints adopt a

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[23] SCHERER/ROSS, "Industrial Market Structure and Economic Performance", 581 (3rd ed. 1990).

[24] That producer faces a downward-sloping demand curve. It ought to be emphasised that high prices reflect more or less the consumers' subjective preferences for the brand and diversity.

[25] CABRAL, note 22, 209 *et seq*.

[26] CARLTON/PERLOFF, note 10, 160 *et seq*.

[27] CABRAL, note 22, 217.

[28] *See* WILLIAMSON, "Economic Organisation: Firms, Markets and Policy Control", 143 (1986).

[29] Switching costs are "the real or perceived costs that are incurred when changing supplier but which are not incurred by remaining with the current supplier." *See* OFFICE OF FAIR TRADE, "Switching costs. Part one: Economic models and policy implications" 2003, para. 1.1, available at http://www.oft.gov.uk/NR/rdonlyres/CFD52220-7862-41A7-8F6F-53F3B4FE78FE/0/oft655.pdf.

[30] BISHOP/WALKER, note 9, 205 *et seq*.

[31] *See* WILLIAMSON, note 28.

[32] WILLIAMSON, "Credible Commitments: Using Hostages to Support Exchange", (1983) American Economic Review 519, 534 *et seq*. Williamson observes that "[m]onopoly explanations are commonly advanced when economists, lawyers, or other interested observers come across contractual practices that they do not understand." He nevertheless adds that "[t]o be sure, exchanges might simultaneously service efficiency and anticompetitive purposes. Here as elsewhere, where tradeoffs are posed, they need to be evaluated."

similar approach: Article 81(3) EC exempts vertical restraints if they are necessary to reduce the risk of opportunism (the so-called hold-up problem) that could arise after the conclusion of the contract (*ex post*).[33] The rationale is to avoid under-investment. The analysis is carried out *ex ante* and relies on three conditions: the investment must be specific to the relationship; it must concern a long-term investment that cannot be recouped in the short-run; and it must be asymmetric. The same conditions are valid to identify a potential hold-up situation *ex post*. The rationale of the rules on economic dependence is to prevent opportunistic behaviour or hold-up problems *ex post*.

2.2 Market power and market shares

Market or monopoly power is associated with high market shares. Competition lawyers extensively use market shares to show the level of market power a firm possesses: low market shares indicate a low level of market power; conversely, high market shares signal a high level of market power. Market shares serve therefore as a *threshold* for the finding of market power and of dominance. The reliance on market shares is the expression of the traditional confidence in the static Structure-Conduct-Performance paradigm[34] and of the static approach that relates to the perfect-competition model.

The Lerner Index of market power is positively related to the level of market shares:[35] the higher the market share a firm possesses, the higher the Lerner's Index. This relationship suggests that it does make a sense to refer to market shares in order to indicate a certain level of market power. Other factors, however, are important for its determination. On the one hand, low market shares do not exclude all market power: most firms have some market power, certainly those that produce differentiated products. The importance of potential competition, on the other hand, shows that high market shares do not necessarily confer market power and allows us to emphasise the importance of entry barriers as a criterion for the assessment of market power.

In competition law, market concentration, market shares and barriers to entry constitute central elements of the analysis, while product differentiation, asymmetric information and client-specific investments deserve attention only occasionally and in addition to the former. The latter are nonetheless sources of market power. Although the reliance on market shares as an indicator of market power is appropriate, the use of market shares as an intervention threshold begs the question of whether this threshold is able to capture all forms of welfare-reducing behaviour while minimising the level of intervention error. The concept of economic dependence in some national laws answers precisely some of these concerns.

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[33] European Commission, Guidelines on Vertical Restraints, [2000] OJ C 291/1, para. 116(4).

[34] *See* CABRAL, note 22, 156.

[35] $L = (p\text{-}Cm)/p = -s_i/\varepsilon$, where p is the price, Cm the marginal cost, s_i the market share of the firm i and ε the price elasticity of demand. *See* CARLTON/PERLOFF, note 10, 268.

3 Economic dependence

In this section we briefly present the specific rules and the case law in Germany, France, Switzerland and Italy. We then present the general criteria of a situation of economic dependence, and contrast them with the concept of market power.

3.1 Concept of economic dependence in Germany, France, Switzerland, and Italy

3.1.1 Germany

Germany was the first European country to adopt specific rules on the abuse of economic dependence. It was the main objective of the second modification of 1973 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, or GWB)[36]. The underlying rationale was to prevent big oil corporations from discriminating against small independent oil stations during the oil crisis; additionally, the rule aimed at protecting other retailers from dependence on strong brands and the dependence that resulted from long-standing business relations.[37]

Section 20(1) of the German Act against Restraints of Competition[38] proscribes any form of discrimination by dominant undertakings. Paragraph 2 extends this rule to other undertakings so far as they have contractual relationships with small and medium enterprises (SMEs):

> "Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers."[39]

This is called "relative dominance" (*relative Marktmacht*), or dominance of a particular degree not reaching that of the classical dominant position. Market power is assessed referring to the bilateral relation between suppliers and buyers.[40] The provision expressly determines its scope of protection (*Schutzbereich*) by naming only small and medium undertakings as its beneficiaries.

German jurisprudence distinguishes between several types of economic dependence.[41] First, there is dependence relating to the product range or to a strong brand

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[36] Version of 15 July 2005 (BGBl. I 2114), modified by the Law of 1 September 2005 (BGBl. I 2676).

[37] TAUBE, "Das Diskriminierungs- und Behinderungsverbot für 'relativ marktstarke' Unternehmen", 31 (2006), with references to the discussions in the Bundestag (German parliament).

[38] Available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB_7_e.pdf.

[39] § 20 (2) of the GWB.

[40] MARKERT, in: IMMENGA/MESTMÄCKER (eds), "GWB Kommentar zum Kartellgesetz", § 20, para. 39 (4th ed. 2007).

[41] *See* TAUBE, note 37, 37; GLOY/LOSCHELDER, "Handbuch des Wettbewerbsrechts", § 39 para. 17 (3rd ed. 2005); MARKERT, note 40, para. 61 *et seq*.

(*sortimentsbedingte Abhängigkeit*). Here a retailer is dependent on the producer of a branded or high-quality product, or on the producer of a range of products, because it cannot afford not to have and sell the items in its shops. The retailer can be dependent on a producer for one or a group of products. Second, there is business-related dependence (*unternehmensbedingte Abhängigkeit*), which is when two undertakings have long-standing relations and one of them does the larger part of its business with only the other business partner. Third, shortage dependence (*mangelbedingte Abhängigkeit*) is dependence related to the scarcity of a product. Fourth is buying dependence, that is, the dependence of a manufacturer on a buyer (*nachfragebedingte Abhängigkeit*). Lastly, there is technical dependence (*technisch bedingte Abhängigkeit*), or the dependence on specific technical products such as spare parts.

One of the first cases of dependence relating to branded products was *Rossignol*.[42] A leading specialised sport shop had long-standing business relations with the exclusive distributor of Rossignol skis in Germany. Rossignol skis represented (only) 3.3% of its turnover. In 1973, the distributor refused to deliver to the sport shop. The Federal Court assessed the case under the newly introduced provision on the abuse of economic dependence. It addressed the main criteria for identifying dependence, namely "insufficient and unacceptable means of switching to other undertakings."[43] The Court held that:

> "Sec. 26 II 2 GWB comes into play only insofar as an enterprise is exposed to considerable competition and does not hold a market-dominating position. The existence of considerable competition between suppliers is not the same as having sufficient possibilities to switch from an enterprise which discriminates between customers to another enterprise. The number of enterprises dealing in similar goods is likewise not decisive, at least not on its own. The overall decisive factor is the commercial value and market prestige of the goods in question. This factor determines whether or not sufficient possibilities exist to switch to other enterprises. Apart from their price, the actual value of particular goods is thus determined by their quality and the producer's advertising activities."[44]

The Federal Court clearly distinguishes between dominant position and economic dependence, observing that the latter does not preclude "considerable competition" in the market. The Court notes however that the existence of "considerable competition" in the market does not show that sufficient switching possibilities exist for the customers. Put in other terms, "considerable competition" – or using the terminology of the European Court of Justice: "lively competition"[45] – between the suppliers does not mean that the customers have *sufficient* switching possibilities and therefore are not dependent on the suppliers. Therefore, the Federal Court recog-

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[42] German Federal Court, *Rossignol* (1976) WuW/E 1391, 1393 *et seq*. Translation into English by the Institute of Global Law, available at http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bundes.shtml?20nov1975.

[43] German Federal Court, *Rossignol* (1976) WuW/E 1391, 1393 *et seq*, para. A.I.2.

[44] German Federal Court, *Rossignol* (1976) WuW/E 1391, 1393 *et seq*), para. A.I.2(b)(cc).

[45] *See* the text accompanying note 91.

nises that the mere existence of other competitors does not necessarily make them sufficient switching alternatives for the customers. There the Federal Court originates the concept of brand dependence, concluding that the market prestige of a product can, on its own, make a customer dependent on a supplier.

German law and practice reflect a wide interpretation of economic dependence. Brand dependence constitutes a large part of cases decided under the particular provisions on economic dependence, which recognise that market power from product differentiation is clearly a basis for antitrust intervention. Market or bargaining power resulting from the presence of asset specificity is also a matter of concern. In sum, both the German judiciary and the competition authority make use of the specific provisions and interpret them widely.

3.1.2 France

The origin of the French rule on economic dependence is to be found in the development and the concentration of retail distribution. In 1985, the Competition Commission itself requested the enactment of rules that would empower it to control the discriminatory behaviour of undertakings that constitute obligatory trading partners (*partenaires obligés*) for the manufacturers, even if they do not hold a dominant position in the market.[46]

The ordinance of 1986 extended the scope of the dominant position by introducing specific rules on economic dependence (*abus de dépendance économique*). It was modified successively in 2001 and 2005.[47] Article L 420-2 of the Commercial Code, which concerned the abuse of a dominant position, reads as follows:

> "Also prohibited, whenever it is susceptible to affect the functioning or structure of competition, is the abusive exploitation, by a company or group of companies, of the condition of economic dependence in which a customer company or supplier finds itself vis-à-vis such company. These abuses may consist of the refusal of sale, tied sales or the discriminatory practices mentioned in article L 442-6."

The reference to the impact on the functioning or the structure of competition[48] suggests that the abuse of economic dependence condemns anticompetitive practices as such:[49] the practice is abusive if it has a certain impact on the market. Nevertheless, this additional condition gives rise to difficulties in the application of the economic-dependence provisions on bilateral or vertical dependence relationships. In general, it has restricted the scope of application of Article L 420-2 of the Commercial Code.

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[46] POESY, "Ordre concurrentiel et abus de dépendance économique", in ULLRICH/RAINELLI/BOY (eds): "L'ordre concurrentiel. Mélanges en l'honneur d'Antoine Pirovano", 620 (2003).

[47] Law No. 2001-420 of 15 May, [2001] Journal Officiel No. 113 of 16 May, 7776, Article 66. Modified by the law No. 2005-882 of 2 August, [2005] Journal Officiel of 3 August, Article 40.

[48] Introduced in 2001 (*see* Law No. 2001-420 of 15 May, [2001] Journal Officiel No. 113 of 16 May, 7776, Article 66. Modified by the law No. 2005-882 of 2 August, [2005] OJ of 3 August), Article 40.

[49] POESY, note 46, 631. *See also* DECOCQ/DECOCQ, "Droit de la concurrence interne et communautaire", 383 (2nd ed. 2004).

The French Competition Council has put forward several cumulative conditions for finding economic dependence: Firstly, the popularity of the supplier's brand as well as the importance of its market shares; secondly, the importance of the supplier's share on the retailer's turnover, unless this share does not result from a deliberate choice of the customer; and lastly, the difficulty for the retailer to find other equivalent products from other suppliers.[50] The analysis of economic dependence focuses on the bilateral relationship between the two undertakings, and should not concern the whole profession or the market.[51]

The French Supreme Court, in clarifying the condition pertaining to switching possibilities, held that for a distributor, the state of economic dependence consists in a situation where an undertaking has no comparable substitute for its current supplier.[52] It adds that the mere fact that the distributor makes a large part of its turnover with a particular supplier is not sufficient to conclude that a state of economic dependence exists.

It is useful to present some French cases, in order to apprehend the situations covered by the notion of economic dependence. The French Competition Council has found a situation of economic dependence in the following cases:

– In *Reims Bio*, the Competition Council held that Reims Bio was economically dependent on GIPCA, an undertaking active in the market for blood products for non-therapeutic use. GIPCA was a quasi-monopoly in the market. About 90% of Reims Bio's supply came from GIPCA and 10% from another undertaking due to capacity constraints. There were in that market no other alternatives and therefore Reims Bio could not diversify its sources for some time. The Council also held that GIPCA abused the situation of economic dependence by refusing to supply, interrupting the supply to Reims Bio and discriminating against it. The Council also found that GIPCA held a dominant position and abused it.[53]
– In *Filmdis*, the Competition Council found that the film distributor Filmdis in Antille had a quasi-monopoly in the market and therefore the independent cinemas were economically dependent on it. The Competition Council emphasised the fact that independent cinemas did not have alternative solutions. Filmdis abused this economic dependence by imposing on independent cinemas clauses of non-competition, by supplying them films late and after every other

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[50] *See* French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*, para. 23, available at http://www.conseil-concurrence.fr/user/index.php.

[51] French Competition Council, Decision 03-D-42 of 18 August 2003 *Suzuki*: "Cette dépendance doit s'apprécier dans le cadre de relations bilatérales entre deux entreprises et doivent être évaluées, au cas par cas, et non pas globalement pour l'ensemble de la profession."

[52] Court of Cassation, Decision of 3 March 2004, *Société Concurrence*, cited in French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*, para. 24, available at http://www.conseil-concurrence.fr/user/index.php.

[53] French Competition Council, Decision 04-D-26 of 30 June 2004 *SARL Reims Bio*. Upheld by the Paris Court of Appeal, Decision of 25 January 2005, and the French Supreme Court, Decision of 28 February 2006.

cinema, therefore making their activity unprofitable.[54] The Competition Council observed that the same facts can be analysed under both dominant-position and economic-dependence provisions, even though for each of them the constitutive elements are distinct.[55] It found that Filmdis had also abused its dominant position.

– In *Cannes Palm Beach*, The Competition Council, without a detailed analysis, held, first, that the manager of a heliport was in a dominant position and, second, that the undertakings wishing to use this indispensable infrastructure are dependent on it. Nevertheless, it found no abuse.[56]

This brief overview of the recent decisions of the French Competition Council shows a strict application of the conditions related to economic dependence. In the three cases where the French Competition Council found a situation of economic dependence, the same market situation gave rise to a dominant position as well. The French Competition Council's analysis, however, makes a distinction between the two situations. Whereas for the finding of a dominant position it focuses on market shares of the defendant and those of its competitors, when analysing the situation of economic dependence it focuses on the existence of alternative solutions for the claimant and on the importance of the share of the claimant's turnover with the defendant. An analysis of the relevant market is not always present, although the Council never expressly held it unnecessary. The distinct approaches to the finding of a dominant position and of economic dependence resulted in an interesting case where the Council found no situation of economic dependence, but affirmed the existence of a dominant position.[57] In French competition law, therefore, a dominant position does not necessarily give rise to economically dependent customers.

3.1.3 Switzerland

The Swiss Competition Commission has recognised that specific circumstances can create a dependency relationship between two parties and that this may be of concern for competition law. Already in the seventies, the antecedent Swiss Cartel Commission carried out extensive research on the buyer power of retailers. It describes it as a "bilateral relation of dominance and dependence".[58] In fact, whereas the buyer can terminate the relationship without a loss, the termination amounts to substantial loss or economic damage for the manufacturer.

The Swiss Cartel Act of 1995, lacking a clear legal basis covering economic dependence, was modified in 2004 to cope with it. The new definition of the dominant position reads today as follows (the modifications are in italics):

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[54] French Competition Council, Decision 04-D-44 of 15 September 2004 *Filmdis-Ciné-Théatre du Lamentin. See also* Paris Court of Appeal, Decision of 29 March 2005.

[55] French Competition Council, Decision 04-D-44 of 15 September 2004 *Filmdis-Ciné-Théatre du Lamentin*, para. 79.

[56] French Competition Council, Decision 02-D-16 of 5 March 2002 *Hélistation Cannes Palm Beach.*

[57] French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*.

[58] Publications of the Swiss Commission on Cartels (Publ. CCSPr) [1976] 95.

> "The term "enterprises having a dominant position in the market" means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (*competitors, suppliers or customers*) in the market."[59]

It is to be noted that an undertaking possesses a dominant position in the market if it is able to behave independently of its suppliers *or* customers; in this latter hypothesis the assessment of the relationship with its rivals is not necessary. The modification is therefore meant to cover the *vertical economically dependent relationships* between a supplier and its customer, respectively between a buyer and its customers.

The Swiss Competition Commission took the opportunity to present the new concept of economic dependence in *CoopForte*.[60] The case concerns a "bonus" scheme put into effect by Coop, the second-largest supermarket chain in Switzerland. Coop required from its manufacturers a sum that amounts to 0.5% of the billing value. The manufacturers complained to the Swiss authorities, which opened an investigation.

In its decision, the Swiss Competition Commission clearly distinguishes between economic dependence and the dominant position in the classical sense:[61] an undertaking having a dominant position behaves independently of its rivals, whereas economic dependence relates to a situation in which an undertaking is independent of its customers. For the Swiss Competition Commission, a dominant position does not relate exclusively to an independent undertaking *vis-à-vis* its rivals: this is not a necessary condition. Alternatively, an undertaking is also said to have a dominant position when it is able to behave independently solely of its customers. The Commission emphasises the necessity of investigating these dependence relationships in the market.[62]

The assessment of the conditions of competition in the procurement market for daily consumer goods showed a sufficient level of competition. In general, manufacturers have a certain bargaining power over prices, which had increased by more than 0.5% in the years after the implementation of the bonus scheme.[63] Nevertheless, the investigation could not exclude that *particular* manufacturers were in a position of economic dependence vis-à-vis Coop.[64] It is precisely the economic dependence of a number manufacturers that is of concern for the Swiss Authorities. According to the Swiss Commission, a particular manufacturer is dependent on a distributor when two conditions are met:

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[59] Article 4 II Swiss Cartel Act (Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, Systematic Compilation of Federal Law (SR) 251), amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385, 1390; BBl 2002 2022).

[60] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146. *See also* BOVET, "Recent developments in Swiss competition law", [2006] 2 SZW/RSDA 138, 142.

[61] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 93.

[62] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 92.

[63] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, paras 64-91, in particular para. 91.

[64] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 94.

First, the manufacturer has no other comparable buyer and the marginal demand of other buyers does not allow it to cover its fixed costs. The first criterion is the share of the manufacturer's business with the buyer: a share of more than 30% indicates that the contract is essential for the manufacturer. Moreover, the manufacturer's alternatives to the buyer are of crucial importance: if the former can sell its products to other buyers or elsewhere, there is no dependence on the latter.

Second, the manufacturer is specialised in manufacturing the buyer's goods, so that it cannot switch to the production of other goods. The most important criterion is the estimation of the switching costs: the larger they are, the more dependent become the manufacturers on the buyer.

Two interrelated elements are of great importance in the assessment of the economic dependence of manufacturers: the existence of alternative sales channels as well as the magnitude of switching costs. The former is related to the substitutability of different sales channels: retail distribution, small local shops, *horeca*[65] market or export market. Other retail stores do not constitute real alternatives: Migros – the first retailer in Switzerland with 36% of the market share in the retail market – is vertically integrated in that it sells mainly its own products.[66] Although the other channels indicate possible markets for the manufacturers, they are only partial substitutes for Coop,[67] mainly due to the production-switching costs that manufacturers must incur to adapt the products to the requirements of these other markets.

The protection of particular manufacturers is not straightforward. The Swiss Competition Commission tries to delineate the boundaries of its intervention: the new dominant-position definition does not aim at protecting undertakings that are not able to survive in a competitive market.[68] Although not expressly mentioned in the decision, the Commission holds that the widening of the definition of dominant position cannot serve as a means to protect non efficient-undertakings, since that would be contrary to the objectives of competition law. In particular, concerning the specific investment requirement, the situation of a manufacturer's dependence on the retailer should not have been the result of its own behaviour: in a sense, the retailer must have been to some degree responsible for the specific investment or the supplementary costs borne by the manufacturer.[69]

Under the umbrella of the dominant-position concept, the Swiss Competition Commission announces in *CoopForte* strict conditions for the finding of a situation of economic dependence. A customer is economically dependent on a buyer only in

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[65] *Horeca* refers to Hotel – Restaurant – Café/Caterer/Canteen market.

[66] Because Migros is vertically integrated, the market shares in the retail market do not constitute relevant data for the procurement market. Coop has more than 30% in the procurement market, probably more than 50%. Indeed, a large part of the market share of Migros should not have been taken into account for the definition of the relevant market. Migros is simply not available for manufacturers as a business partner (Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 114). But a market share of more than 50% is tantamount to a "classical" dominant position, at least in European competition law.

[67] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 117.

[68] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 92.

[69] Swiss Competition Commission, Decision *CoopForte* [2005] RPW/DPC I 146, para. 99.

the presence of client-specific assets: in Switzerland, economic dependence therefore takes into account buyer power combined with market power derived from client-specific investment. Even though the Swiss authorities applied such a strict interpretation, the decision was criticised by the jurisprudence as over-intervening in the market.[70]

3.1.4 Italy

Italy has also introduced rules on the abuse of economic dependence (*abuso di dipendenza economica*), though not by the means of antitrust law.[71] Article 3 of the Italian Antitrust Act[72] prohibits the abuse of a dominant position in a language similar to Article 82 EC. A draft law of early 1995 on industrial subcontracting would have categorised as abuse of dominant position in the sense of Article 3 of the Italian Antitrust Act a range of practices undertaken by firms in a better position than the subcontractors, resulting in damage to the latter.

The Italian Antitrust Authority[73] opposed the extension of the scope of the dominant position by this special legislation. In an opinion of June 1995,[74] it held that the problems related to subcontracting cannot be resolved by "diluting in an unnatural way the notion of abuse of dominant position"; although the draft law certainly guaranteed the equity in the contractual relations, it did not constitute an element to be considered to assure an efficient market. On the other hand, the Italian Antitrust Authority emphasised that the concept of dominant position as provided for in the Italian Antitrust Act, first, encompasses the buyer power of retailers: the latter may be found to hold a dominant position in the procurement market even if it does not have a dominant position in the retail market; second, that the subcontracting relationships involving partners without alternative solutions can fall under the provision pertaining to abuse of dominant position through "an appropriate and contextualised delineation of the relevant market".

In a second opinion,[75] the Italian Antitrust Authority reiterated its position regarding the abuse of economic dependence, stating that the Italian law refers to Article 82 EC, which has no similar provision, and it would therefore be inappropriate to change it. It adds that the provision in the drafted law relating to abuse of economic dependence aims at disciplining the contractual relationships between the

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[70] *See* AMSTUTZ/REINERT, "Erfasst Art. 4 Abs. 2 KG auch die überragende Marktstellung und die relative Marktmacht?", (2005) sic! 537, 631 *et seq*.

[71] *See* FABBIO, "Der Missbrauch wirtschaftlicher Abhängigkeit nach italienischem Recht", (2001) 9 WuW 834.

[72] Italian Antitrust Act, Law No. 287 of 10 October 1990 (*Norme per la tutela della concorrenza e del mercato*) [1990] Official Gazette of 13 October, No. 240.

[73] Autorità Garante della Concorrenza e del Mercato (hereafter referred to as AGCM, http://www.agcm.it/).

[74] AGCM, Opinion of 20 June 1995 on Industrial Subcontracting (*Subfornitura Industriale*), available at http://www.agcm.it/agcm_ita/DSAP/SEGNALA.NSF/0/aca16f3c8d87effbc125645600527b55?OpenDocument.

[75] AGCM, Opinion of 10 February 1998 on Industrial Subcontracting (*Subfornitura Industriale*), available at http://www.agcm.it/agcm_ita/DSAP/SEGNALA.NSF/0/7b10628a45c2a97fc12565ae00552cc0?OpenDocument.

parties and should therefore find its place in the civil law legislation. It concludes that it would be inappropriate to introduce this provision to the antitrust law.

As a consequence, Article 9 of the Italian Law on Industrial Subcontracting[76] contains a provision relating to abuse of economic dependence. Nevertheless, there is no reference to the concept of dominant position, nor is the Antitrust Act changed. Economic dependence is defined mainly as a state of economic imbalance. The provision refers, however, to the lack of economic alternatives in the market, although it seems that this is not a necessary condition. Not surprisingly, the examples cited as abuse relate to refusal to deal, discrimination and exploitation.

The example of Italy shows that the concept of economic dependence is not absorbed without difficulties by national competition authorities. The position taken by the Italian Antitrust Authority reflects the risk of confusing the objectives of competition law – strictly speaking, relating to economic efficiency – with equity objectives related to the protection of the weaker party. Similarly to Swiss jurisprudence, the Italian Antitrust Authority raised objections in relation to European competition law: the extension of the dominant-position concept would deviate from that of Community law. On the other hand, in the opinion it is recognised that the retailers' buyer power falls under the concept of dominant position even if they possess market shares below the threshold of the classical dominance. More importantly, it is recognised that approaching the concept of dominant position in this way, with a careful and contextualised definition of the relevant market, can capture the lack of alternative solutions for the manufacturers.

3.2 General criteria

The main criterion for the finding of a situation of economic dependence consists in the absence, for the dependent undertaking, of alternative solutions to sell or to purchase its products in the market. The impossibility to find other sales outlets indicates that the undertaking is dependent on the buyer. The economic dependence in this case derives either from the high concentration of the market or from the special features of the bilateral relation between the undertaking and the buyer.

When the dependence results from a low level of competition on the market, the finding of a situation of economic dependence generally corresponds with the finding of a dominant position. It is consistent with the view that an undertaking being in a dominant position generally implies that its customers are dependent on it. Indeed, the other sales or buying possibilities are not sufficient to replace the current business relationships. For such an analysis, the relevant market delimitation and the finding of a significant market share is a prerequisite.

However, as showed by the French case *La Provence*,[77] it is possible that a dominant position does not necessarily result in a situation of economic dependence.

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[76] Law No. 192 of 18 July 1998 on Industrial Subcontracting (*Disciplina della subfornitura nelle attività produttive*) [1998] Official Gazette of 22 July, No. 143. Article 11 of the Law No. 57 of 5 March 2001 gives the competence to the Italian Competition Authority to apply the rules pertaining to abuse of economic dependence contained in the law on Industrial Subcontracting.

[77] French Competition Council, Decision 05-D-44 of 21 July 2005 *La Provence*.

Indeed, the crucial element for the latter is the absence of an alternative solution. But the existence of a dominant undertaking does not preclude other operators from being competitive and offering alternative solutions to the dominant undertaking's customers. In the absence of specific factors, be they contractual or technical, that impede the customer from switching, the former can replace the dominant firm as a business partner. It confirms the idea that economic dependence relates to a bilateral relationship between contractual parties.

Indeed, if the dependence results only from the specificities of the relationship between the contracting parties, its finding does not relate to the market structure, or to the level of competition within a relevant market. Other factors are responsible for the economic dependence, such as brand loyalty or the existence of specialised assets.

The condition of lessening of competition is present in French, and indirectly in Swiss, law. In classical antitrust law, it relates to the market structure and the horizontal market power, or the power of one undertaking to ignore the action of its direct competitors. Such a condition undermines the strength of economic dependence as a bilateral relationship, which is arguably the case in French law. But the competition can also be lessened in market stages different from where the undertaking under investigation operates. For instance, discrimination may distort competition in the market where the economically dependent undertakings are present.

Another important factor for assessing the absence of alternative solutions is the so-called *risk* or *threat rate*, meaning the proportion of the business with the dominant undertaking. In the case of buyer power, the risk rate constitutes the share of the supplier's turnover in the product categories accounted for by the new entity, above which there will be a threat to its existence. If this rate is high, the risk of being dependent and not having switching possibilities increases. It will be easier to replace a business partner that represents a small share of the business than one that represents a large one. First, the difficulty relates to the production capacity of other operators in the market. When there are capacity constraints, the latter cannot represent a source of supply. Second, the difficulty relates to the impossibility of a prompt replacement. New contractual relationships take time to concretise.

Although the risk rate is a new method that relates especially to the analysis of supermarket mergers or of economic dependence or more generally to bilateral relationships, there is a connection between the risk rate and the market share. Indeed, the importance of an undertaking in terms of market share is reflected in the part that the sales (purchase) of that undertaking will represent in the purchase (sales) of its customers. For instance, if an undertaking has 40% of the retail market, it purchases about 40% of the market production, and arguably it represents the same proportion of the sales of single producers. That is one method of calculating the market shares of supermarkets in the procurement market: the market share equals the average "threat rate" that one supermarket represents to manufacturers. Table 1 shows the market shares and the risk rates for a number of national cases on economic dependence.

Table 1 – Economic dependence, market shares and risk rate

Case	Market share in the relevant market	Part of the business with the dominant undertaking
Rossignol (DE)	8%	3%
ABG/Oil (EC)	26%	75%
CoopForte (CH)	40-50%	–
Rewe/Meinl (EC)	30-40%	22% (risk rate)
Carrefour/Promodes (EC)	25%	22% (risk rate)

In Germany, the beneficiaries of the special provision on economic dependence are the small and medium undertakings. It testifies to the regulatory nature of the German provision on economic dependence. Although the German jurisprudence denies a social role to Section 20(2) of the GWB,[78] similar to the labour or contract law, that provision clearly aims at protecting and favouring small undertakings. However, the rule has the advantage of precluding big undertakings from benefiting, which was one point of criticism toward the Robinson-Patman Act in the United States.

The absence, for the dependent undertaking, of alternative solutions to sell or to purchase its products in the market refers to market power that results from product differentiation or the existence of asset specificity. For instance, brand dependence or dependence on a range of products relates to market power of differentiated products. Business-related dependence and dependence on a buyer relate generally to asset specificity: in a long-standing relationship characterised by asymmetric investments the customer exposes itself to the buyer's opportunism.

Concerning enforcement, there is a trend for competition authorities not to (over)enforce particular provisions pertaining to economic dependence, except in cases related to supermarket buyer power, with Italian authorities resisting any statute change that includes provisions relating to economic dependence.

4 Dominant position under Article 82 EC

4.1 Legal definition of the dominant position

Under Article 82 EC, any abuse by one or more undertakings of a dominant position is prohibited. The Treaty gives no definition for the term dominant position. Since the 1978 case *United Brands*, the Court of Justice has defined it as follows:

> "The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[79]

[78] MARKERT, note 40, paras 41, 54.

[79] Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207, para. 65.

The Court of Justice added in *Hoffmann-LaRoche* that:

> "Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."[80]

Both passages from the seminal case law of the European judiciary deserve careful examination, not least because their interpretation defines the boundaries of intervention of European competition law. It will also help us answer the main question of this article, that is, whether the concept of economic dependence is covered by Article 82 EC.

The last part of the first sentence referred to in the case *United Brands* proved to be the central element: it served as the definition of the dominant position in European competition law, and was codified into law in a range of Member States and other European countries[81] less comfortable with the kind of common law developing at the European level. Through the whole of Europe, an undertaking in a dominant position is one that has the "power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".

Two equally important questions follow on. First, what is independent behaviour or an independent undertaking? Second, who are the others of which the dominant undertaking is independent? Its competitors *and* its customers? Its competitors *or* its customers?

The definition given by the Court of Justice holds that the undertaking should be able to act independently to an "appreciable extent" to be said to be in a dominant position. This expression supports the view that, in terms of market power, the undertaking should possess *significant* market power.[82] According to the Commission, "[a]n undertaking that is capable of substantially increasing prices above the competitive level for a significant period of time holds substantial market power and possesses the requisite ability to act to an appreciable extent independently of competitors, customers and consumers."[83] Similarly, directive 2002/21 on electronic communications[84] treats "significant market power" as the equivalent for dominance.

But distinguishing between significant and insignificant market power is not an easy task and will necessarily produce intervention errors.[85] If this view becomes

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[80] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 39.

[81] *See* competition laws of Albania, Bosnia & Herzegovina, Croatia, Iceland, Macedonia, Serbia, and Switzerland.

[82] O'DONOGHUE/PADILLA, "The Law and Economics of Article 82 EC", 108 (2006); BISHOP/WALKER, note 9, 184.

[83] EUROPEAN COMMISSION, note 7, para. 24.

[84] *See* Directive 2002/21/CE of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L 108/33, Article 14.

[85] BISHOP/WALKER, note 9, 42.

predominant, it precludes from the scope of Article 82 EC the cases involving possession of non-structural market power, as this could be the case in the presence of differentiated products, aftermarket products or asset specificity.

Moreover, the legal concept of dominance is often associated with *monopoly power* at its highest levels. For O'Donoghue & Padilla, "only a monopolist operating in a market protected by insurmountable barriers to entry and facing a completely inelastic demand would be able to behave independently of its competitors, customers, and consumers."[86] According to this approach, a dominant firm facing a competitive fringe cannot behave independently, although the dominant firm can be said to possess market power.[87] Also, the dominant position would not allow for any competition in the market. The authors express a view largely adopted by economists familiar with competition law.

Dominant position understood as monopoly power supports the view that the undertaking under investigation must behave independently both of its competitors *and* of its customers. Independent of its competitors means that the dominant undertaking is not constrained by the price and quantity decisions of its competitors, and behaves as if they do not exist. Independence *vis-à-vis* its competitors implies the ability also to act independently of its customers. As pointed out by the Court of Justice in *British Leyland*, it is the dominant position that "place[s] the dealers in a position of economic dependence which is characteristic of a dominant position."[88] The latter has no choice but to continue the contractual relationship with the dominant undertaking: it is in a position of economic dependence. As a matter of fact, the existence of an independent undertaking implies the existence of customers that are dependent on it: as pointed out by the Commission, "economic dependence […] is characteristic of the existence of a dominant position."[89]

But the definition in *United Brands* gives only a strict view of the dominant position. One year latter, and after careful consideration, the Court of Justice clarified the definition by tempering its exigencies.[90] Contrary to monopoly and quasi-monopoly, which eliminate competition altogether, a dominant position does not preclude some competition. As put forward by the Court of Justice in the same deci-

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[86] O'DONOGHUE/PADILLA, note 82, 108.

[87] O'DONOGHUE/PADILLA, note 82, 108.

[88] Case 226/84 *British Leyland Public Limited Company v Commission* [1986] ECR 3263.

[89] European Commission, Decision 89/205/EEC *Magill TV Guide/ITP, BBC and RTE* [1989] OJ L 78/43, para. 22. Upheld by the Court of First Instance in case T-69/89 *Radio Telefis Eireann v Commission* [1991] ECR II-485, para. 63: "[T]he applicant clearly held at that time a dominant position both on the market represented by its weekly listings and on the market for the magazines in which they were published in Ireland and Northern Ireland. Third parties such as Magill who wished to publish a general television magazine were *in a position of economic dependence* on the applicant, which was thus in a position to hinder the emergence of any effective competition on the market for information on its weekly programmes." [emphasis added]. *See also* case T-139/98 *Amministrazione Autonoma dei Monopoli di Stato (AAMS)* [2001] ECR II-3413, where the Commission underlined the extreme dependence of foreign cigarette distributors on AAMS (para. 16). The latter was a monopolist in the market for the distribution of cigarettes in Italy (para. 51).

[90] *See* Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461.

sion, "even the existence of lively competition on a particular market does not rule out the possibility that is a dominant position on this market".[91] A dominant position arises even though the undertaking may not be able to determine the key parameters of competition: an "appreciable influence" – that is to say a large enough influence to have an important effect on competition – is sufficient.

We have considered so far independence *vis-à-vis* the competitors of a dominant undertaking. The question we should answer is, however, whether the dominant position arises when an undertaking behaves independently of its customers, even though it cannot act independently of its rivals. A positive answer would allow economic dependence to be covered by the definition of a dominant position. In *ABG/Oil*,[92] the Commission accepted that the sole bilateral dependence of customers on suppliers sufficed to find a dominant position. The Commission's case involved a shortage dependence: the intervention was justified by the exceptional circumstances during the oil crisis of the beginning of the seventies. Although such a clear recognition of economic dependence is unique in European competition law, it nevertheless implies that there are situations where independence within the relationship with the customers shows a dominant position. As a consequence, under exceptional circumstances, un undertaking that behaves independently of its customers may be held to be in a dominant position.

4.2 Assessment of the dominant position

Legal analysis of the dominant position requires the examination of a number of factors,[93] whose careful consideration may imply that a dominant position exists. All these factors are also indicators of market power.

4.2.1 Market shares

In terms of market shares, a dominant position arises when one or more undertakings have a large share of the relevant market. In *Hoffmann-LaRoche*, the Court of Justice emphasised that the dominant position may derive from several factors among which very large market shares are "highly important".[94] The Court notes that the importance of market shares "varies from market to market",[95] suggesting that the economic context, the structure of the market and the specifics of the case count as much as market shares. The Court also, however, considers that the market specifics do not temper the importance of the existence of *large* market shares, holding them as evidence of dominance.[96] In *AKZO*, the Court of Justice quantified

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[91] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 70.

[92] European Commission, Decision 77/327/EEC *ABG/Oil companies operating in the Netherlands* [1977] OJ L 117/1.

[93] Even factors that are in themselves positive, like research and developing programs, are relevant. *See* Joint cases T-191/98 and T-212-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275, para. 981.

[94] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 39.

[95] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 40.

[96] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 41.

what was meant by large market shares by stating that an undertaking is deemed to be in a dominant position if its market share exceeds 50% of the relevant market.[97] This presumption is used as a threshold and plays an important role in the finding of a dominant position.[98]

An undertaking that has large market shares in comparison with its competitors is more often than not capable of behaving independently of them to a great extent. It explains the rationale of a second rule relating to the market shares: the shares of the competitors should be smaller than that of the undertaking under investigation. This confirms the idea of the dominant undertaking being a firm with a paramount market position and able to behave independently of its rivals.

Apart from the magnitude of the market share an undertaking possesses, the Court of Justice emphasises the fact that it is able to hold that share for some time, suggesting that large market shares are evidence of dominance only when they remain stable for a relatively long period.[99] As a matter of fact, the stability of market shares indicates that during that long period of time the competitors were not able to take customers from the principal undertaking in the market, be it because of lack of capacity or other factors, including strategic behaviour of the dominant undertaking. This, in turn, suggests that the customers and finally consumers do not have much choice: most of them will be supplied by the dominant undertaking simply because it is the one that offers the largest scale of production. Coupled with constraint capacities facing the rivals, high switching costs or the strategic behaviour of the dominant undertaking, a strong market position of one firm results in the foreclosure of the other undertakings.

Finally, the Court of Justice underlines one of the main factors that make the undertaking that has a large market share an *unavoidable trading partner*: the impossibility for those who would like to break away from it to change their trading partner, and that over a long period of time. It is precisely this lack of ability to switch that characterises the customers of aftermarket products or the relationship between specialised manufacturers and retailers. For this reason, the "unavoidable trading partner" approach is seen to some extent as the counterpart of that relating to economic dependence in some Member States.

While an undertaking possessing a market share of 50% is deemed to be dominant, there are cases where dominance was found below that threshold. Table 2 presents some of these cases.

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[97] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 60.
[98] *See also* MOTTA, note 12, 118.
[99] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461, para. 41.

Table 2 – Dominant position in the EC and market shares

Case (EC)	Market shares	Comments
*Hugin**[100]	13%	Market for cash registers in the UK. Hugin is the fourth-largest producer, the largest being the National Cash Register Company with about 40% market share. (*see also* below)
Carrefour/Promodes[101]	25-26%	In the French procurement market. Buyer power.
ABG/Oil Companies	26%	Shortage. Oil crisis.
Rewe/Meinl[102]	25-40%	In the Austrian procurement market. Buyer power.
Virgin/British Airways[103]	39.7 %	Upheld by the Court of First Instance.
Coca-Cola[104]	40%	If the next-largest competitor of Coca-Cola has half its shares.
United Brands[105]	40-45%	Other factors were important for the finding of a dominant position.
Hoffmann-LaRoche[106]	47%	In the market for vitamin A, the next-largest competitor having 27%. Other factors were important for the finding of a dominant position.
AKZO[107]	50%	Presumption of dominant position.
*Hugin**	100%	Market for "Hugin" spare parts (aftermarket case). (*see also* above)

* The case is reported in relation with the market shares in two different markets.

4.2.2 Barriers to entry, potential competition and countervailing buyer power

The other factors to be taken into account are barriers to entry, potential competition and countervailing buyer power. Barriers to entry indicate the absence of potential competition: new competitors do not have access to the market, which results in lower competition constraints for the undertakings present in the market. The over-reliance on market shares as a factor to find dominance emphasises the necessity to

[100] European Commission, Decision 78/68/EEC *Hugin/Liptons* [1978] OJ L 22/23.
[101] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5.
[102] European Commission, Decision 1999/674/EC *Rewe/Meinl* [1999] OJ L 274/1.
[103] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1. Upheld by the Court of First Instance, Case T-219/99 *British Airways v Commission* [2003] ECR II-5917.
[104] European Commission, Decision 2005/670/EC *Coca-Cola* [2005] OJ L 253/21.
[105] Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207.
[106] Case 85/76 *Hoffman-La Roche & Co. AG v Commission* [1979] ECR 461.
[107] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

consider barriers to entry together with potential competition. On the other hand, countervailing buyer power, or the market power of the customers, prevent the dominant undertaking from exercising its market power, since it would be countered by their own power.

4.2.3 Economic dependence

This section considers the importance of the concept of economic dependence in the case law. The Commission, upheld by the European judiciary, after presenting a clear case of economic dependence in *ABG/Oil*, firmly rejected it in *Metro*. In the other cases presented in this section economic dependence was taken into account as a complementary factor in the finding of dominance.

The *ABG/Oil* case is of particular significance because it provides an example of a genuine economic-dependence case in European competition law. In *ABG Oil*,[108] the Commission held that each oil company found itself in a dominant position relative to its customers during the oil crisis of the early seventies and that BP abused this position against its customer ABG.[109]

While referring to suppliers having a substantial share of the market, it concluded that BP, which had about 26% of the market, was in a dominant position relative to ABG. The economic circumstances of the case proved to be more important than market share in itself: It is the shortage of oil products that put the customers in a situation of economic dependence on suppliers, which, in turn, led the latter to a dominant position. Contrary to its previous decisions and to the practice of the European judiciary, the Commission qualified this dominant position by adding that the undertaking was in a dominant position *relative to its customers*. *ABG/Oil* therefore constitutes a clear case of economic dependence, where independence *vis-à-vis* the competitors is not necessary.

In *Metro,*[110] the Court of Justice rejected the claim that SABA, a manufacturer of electronic equipments that had a market share of 5-10%, enjoyed a dominant position. Metro, a German distributor using the so-called "cash and carry" system, contested the exemption by the Commission of the selective distribution system applied by SABA, and claimed that the latter had abused its dominant position by refusing to recognise Metro as one of its distributors in Germany. Metro put forward that SABA products, because of their high quality, were demanded by consumers, so that all distributors must include these equipments in the range of products offered by them.[111] We have seen that such a claim could have been successful in German competition law.

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[108] European Commission, Decision 77/327/EEC *ABG/Oil companies operating in the Netherlands* [1977] OJ L 117/1.

[109] The Court of Justice quashed the decision, concluding that BP had not abused its dominant position, without analysing the appropriateness of the Commission's approach regarding dominant position. *See* Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission* [1978] ECR 1513.

[110] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875.

[111] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para. 16.

In rejecting the claim made by Metro, the Court of Justice held, firstly, that SABA's market share was insignificant, secondly, that there was lively competition in the market and, lastly, that high quality on its own was not a factor permitting a conclusion of a dominant position under Article 82 EC.[112]

The Court of Justice firmly held that a market share of 10% cannot lead to a dominant position, although it recognised that *exceptional circumstances* can justify such a finding. Nevertheless, the Court of Justice ruled out the quality of the product being an exceptional circumstance, rejecting therefore the so-called brand or range dependence under German law being covered by Article 82 EC. While producers of branded products could possess market power, this is not sufficient for dominance to be found. In asserting its position, the Court of Justice observed that the factors that must be taken into account to assess a dominant position should enhance the undertaking's ability to behave independently of its competitors, casting doubts on the possibility of finding a dominant position when the customer is solely dependent upon its supplier because of the latter's reputation.

In *British Airways*,[113] the Court of First Instance upheld the Commission's finding of a dominant position. The Court of First Instance held that a market share of 39.7% must be considered as large enough for a dominant position. The other decisive point was the gap between British Airways' share and that of its rivals: the nearest rival held only marginal market shares (5-6%).[114] The large difference in market shares had as a result that even a decline in British Airways' market share was not sufficient to call into question the finding of a dominant position.[115]

The Court of First Instance added that other factors related to the dependence of the agent on British Airways were relevant for the finding of a dominant position. British Airways offered a larger choice of routes and more frequent flights, which generated a substantial part of the tickets sold by travel agents. As a result, the Court of First Instance held that travel agents "substantially depend on the income they receive from BA in consideration for their air travel agency services."[116] British Airways, therefore, could not deny being "an obligatory business partner of travel agents established in the United Kingdom".[117] Interestingly, the Court of First Instance also considered the share of British Airways tickets in the business of the main agencies in concluding that a modest size of such a share is not a factor capable of calling into question the dominant position of British Airways.[118] The Court

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[112] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para. 17.
[113] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1.
[114] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 210.
[115] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 223.
[116] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 216.
[117] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 217.
[118] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 219.

of First Instance concluded that "the great dependence of United Kingdom travel agents upon BA" could not be denied.[119]

The analysis of the Court of First Instance shows that the assessment of the dependence relationship between the undertaking in question and its customers is relevant for the finding of a dominant position in a classical sense. On the one side, it can be observed that, although relatively new in the analysis of the Commission and the Court of First Instance, the examination of factors related to economic dependence of travel agents upon British Airways occupies an important place in the overall assessment. On the other side, it must be underlined that these factors complement the classical dominant-position analysis, in particular the assessment of the position of British Airways in the market: even though a market share of 39.7% is relatively low, the important gap between British Airways and its next-largest competitor shows that Court of First Instance does not deviate substantially from a classical approach to dominance.

The economic dependence of customers *vis-à-vis* suppliers was a factor that the Commission and the Court of First Instance have taken into account to determine whether a dominant undertaking in one market may be found to abuse its dominant position based on its effects on another market. In *Aéroports de Paris*,[120] Aéroport de Paris (hereafter referred to as ADP) was found dominant in the market for the management of airports. ADP charged fees for the right to provide ground handling and catering services in the Orly and Roissy-CDG airports. Since the fees applied were discriminatory, the distorting effect on competition was produced in the market for the provision of ground handling and catering services. Referring to the judgment of the Court of Justice in *Tetra Pak*,[121] ADP contended that Article 82 EC was not applicable, because it was not even active on the market where competition was affected and therefore there were no exceptional circumstances that could justify the application of the above-mentioned case law.[122]

In rejecting the ADP's arguments, the Court of First Instance recognised that an abuse of a dominant position in one market may be censured because of effects it produces on another, non-dominated, market and held that:

> "[…] where the undertaking in receipt of the service is on a separate market from that on which the person supplying the service is present, the conditions for the applicability of [former] Article 86 are satisfied provided that, owing to the dominant position occupied by the supplier, the *recipient is in a situation of economic dependence vis-à-vis the supplier*, without their necessarily having to be present on the same market. *It is sufficient if the service offered by the supplier is necessary to the exercise by the recipient of its own activity.*"[123]

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[119] European Commission, Decision IV/D-2/34.780 *Virgin/British Airways* [2000] OJ L 30/1, para. 220.

[120] Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929.

[121] Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951.

[122] Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, para. 163. On the exceptional circumstances, *see also* Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, para. 27.

[123] Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, para. 165 (emphasis added).

The particular state of economic dependence is used here to justify the application of Article 82 EC to abuses that do not take place on the same market where the undertaking occupies a dominant position. Since ADP is not present in the downstream market for ground handling services offered by its customer, and vice versa, there is no risk of horizontal negative effects. The distortion effect occurs only within the downstream market. The necessary link between the upstream market where ADP is present and the downstream market for ground handling and catering services is constituted by the relationship of economic dependence between ADP and its customers. This dependence relationship is created, firstly, by the dominant position of ADP and, secondly, because the service offered by ADP is necessary for the exercise of an economic activity in the downstream market.[124]

The Commission and the European judiciary simultaneously use the concept of the unavoidable trading partner and that of economic dependence. But whereas in *Aéroport de Paris* and *Deutsche Bahn* the undertaking under investigation had a statutory monopoly in one market that as a consequence made it an unavoidable trading partner, in *Michelin* and *TACA* the reasoning was different. In *TACA*,[125] the Commission, after observing that the liner conference had a market share of 60-70% and that it engaged in discriminatory pricing, considered the switching possibilities of the customers as another element for the finding of a dominant position. It added that "[t]he final elements in demonstrating TACA's dominant position is the limited ability of its customers to switch to alternative suppliers, thereby making the TACA an unavoidable trading partner even for its disaffected customers."[126] The argument relating to the limited switching possibilities is one of the central elements of the concept of economic dependence. Interestingly, the absence of switching possibilities results in TACA being considered an unavoidable trading partner, a concept which refers to French law on economic dependence (*partenaire obligatoire*). Unlike the *Aéroport de Paris* and *Deutsche Bahn*, where the statutory monopoly put the undertakings in a position of unavoidable trading partner, in *TACA* it is the absence of switching alternatives that created an unavoidable trading partner and consequently a dominant position. Similarly, in *Michelin*, we find several elements of brand dependence.[127] The brand name and

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[124] *See also* Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689, para. 57: "Next, it is clear from the case-law that where, as in the present case, the services covered by the submarket are the subject of a statutory monopoly, placing those seeking the services in a position of economic dependence on the supplier, the existence of a dominant position on a distinct market cannot be denied, even if the services provided under a monopoly are linked to a product which is itself in competition with other products [references omitted]."

[125] European Commission, Decision 99/243/EC *Trans-Atlantic Conference Agreement (TACA)* [1999] OJ L 95/1. Upheld with respect to 81 EC and the existence of collective dominance, but annulled with respect to the abuse of a dominant position (Joint Cases T-191/98 and T-212-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275).

[126] European Commission, Decision 99/243/EC *Trans-Atlantic Conference Agreement (TACA)* [1999] OJ L 95/1, para. 538.

[127] European Commission, Decision 02/405/EC *Michelin* [2002] OJ L 143/1, paras 202 and 204, referring to Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461.

the reputation of Michelin's tyres put the specialised dealers in a position of economic dependence, and therefore made Michelin an unavoidable trading partner.[128] This suggests that, while brand and reputation alone cannot justify the finding of a dominant position, they can serve as additional elements to be taken into account.

The analysis of these cases shows that the absence of switching possibilities, the economic dependence of customers and the existence of an unavoidable trading partner are elements that *complete* the traditional analysis of the Commission. As pointed out by Ritter & Braun, the concept of the unavoidable trading partner is not used to extend the scope of Article 82 EC.[129] Originally, it was mentioned by the Court of Justice in relation to the importance of market shares. Nevertheless, the assessment of the switching possibilities and the economic dependence of customers shows that these elements can be taken into account and supplement the traditional analysis of dominance, especially where the undertaking under investigation has a small market share.

The situation of economic dependence is an important factor to be considered in merger control. The Commission has developed a consistent practice regarding concentrations in retailing distribution. One of the main factors for the finding of a dominant position in the procurement market has been the economic dependence of manufacturers *vis-à-vis* the retail distributors. In *Rewe/Meinl*[130] the Commission cleared the concentration only after substantial commitments by the parties. It undertook a full analysis of the economic relationship between retailers and manufacturers in the procurement market. In Carrefour/Promodes,[131] the Commission carried out an extensive analysis of the dependence relationships involved, due to the fact that the new entity would not exceed 25% of the procurement market.

The interest of the case resides precisely in the low level of market shares. The Commission referred to the merger between Promodes and Casino, observing that in that case, a market share of 25-26% did not give rise to competition concerns.[132] Nonetheless, the Commission qualified the finding in *Promodes/Casino* case[133] by adding that France was experiencing a concentration movement in the retail sector, which implies that the Commission would look carefully at the reinforcement of Carrefour's market position. It thus considered other factors capable of reinforcing the market power of the concerned undertakings.

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[128] Although the decision mentions market shares from 50% to 70%, Michelin held in the Community an overall market share of around 32%, and in the market for related tyres 47,2%.
[129] RITTER/BRAUN, "European Competition Law. A Practitioner's Guide" 404 (3rd ed. 2004).
[130] European Commission, Decision 1999/674/EC *Rewe/Meinl* [1999] OJ L 274/1.
[131] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5.
[132] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 51.
[133] European Commission, Case IV/M.991 *Promodes/Casino*.

One of these key factors was the so-called the risk or threat rate (*taux de "menace"*).[134] On average, the manufacturers gave a share of about 22%, which corresponds to what the Commission found in *Rewe/Meinl*. The Commission concluded that "a priori, it can be deduced that when a retailer exceeds such a share in the manufacturer's turnover, the latter finds itself de facto in a situation of economic dependence."[135] It then found that, first, the new entity would exceed significantly this risk rate and, second, that its competitors had not reached such a rate.[136] We find the same reasoning concerning market shares – namely the gap between the market shares of the incumbent and that of its rivals –, but here it concerns the risk or the threat rate. The Commission then completed the analysis with other factors giving an advantage to the new entity[137] before considering other classical factors such as the existence of barriers to entry and of potential competition.

As in *British Airways*,[138] the Commission did not limit its analysis to market shares, barriers to entry and potential competition. It considered instead additional factors capable of showing the overall economic strength of the new entity in relation to its competitors. But the central point was nevertheless the examination of the economic dependence of a number of suppliers, which affirms the importance of the analysis of the bilateral relationships between the new entity and its customers: in merger control, a dominant position can be found if the new entity will be capable of behaving independently of its customers, even if it cannot be held capable of ignoring its competitors but only enjoys a more comfortable position than they do. The Commission's approach, finally, shows that under "exceptional circumstances", – the most important of which is the presence of economically dependent customers – even (very) low market shares may indicate the existence of a dominant position.

4.3 Dominant position under EC competition law and economic dependence

From the analysis of the case law on Article 82 EC, we conclude that economic dependence of customers on the dominant undertaking constitutes one of the factors that can be taken into account for the assessment of the dominant position. In relation to market shares, economic dependence is a supplementary element that could complete the analysis of the dominant position. In the presence of low market

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[134] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 52.

[135] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 52.

[136] European Commission, Decision 1999/C359/10 *Carrefour/Promodes* [2000] OJ C 164/5, para. 54.

[137] Firstly, both parties were present in every type of retail distribution (hyper-, supermarket, discounter and small retailers). Secondly, the new entity would be the number one in hypermarket segments. Thirdly, the new entity would have a strong position in the fidelity cards offered to consumers. Fourthly, the new entity would be more integrated than its competitors. Finally, the new entity would already have a financial strength not comparable with its competitors.

[138] European Commission, Decision 2000/74/EG *Virgin/British Airways* [2000] OJ L 30/1.

shares, the interpretation of the Court of Justice allows for economic dependence to be included in the analysis under *exceptional circumstances*. That was the case in *ABG/Oil*, where the shortage of oil was an important factor for the finding of a dominant position.

Concerning the different forms of economic dependence, we conclude that Article 82 EC covers three types of economic dependence: first, the shortage dependence; second, the dependence of manufacturers on strong buyers; and third, the "technical" dependence related to aftermarket products. For the finding of a situation of economic dependence, asset specificity, lock-in effects and other exceptional market conditions may be taken into account. Brand dependence and dependence related to a range of products is not covered by the concept of dominant position. As a consequence, market power that results from product differentiation is not in itself a basis for intervention under Article 82 EC, although it can be taken into account as an additional factor for the finding of a dominant position. Nonetheless, it is not clear whether Article 82 EC covers the so-called business-related dependence. Asset specificity and the existence of a long-standing relationship are not sufficient in themselves for the finding of a dominant position, although they can be considered if the other classical conditions are met.

In general, Article 82 EC requires a relatively large market share for the finding of a dominant position. Except in special circumstances, the Commission does not seem very keen to intervene in a situation of low market shares. Indeed, the concept of economic dependence as used in some European countries is independent of the relationship with other competitors: only the vertical relationship between the supplier and the buyer is decisive. As a result, there is a tendency towards intervention against undertakings that are short of having a significant market share.

The problems identified within a bilateral relationship are instead covered by the law pertaining to vertical agreements. Similar to vertical restraints, the rules related to economic dependence aim at eliminating competition restraints that occur within or because of the relationship between undertakings active in two different stages of the market. For instance, the Commission has underlined the situation of economic dependence existing between a motor vehicle manufacturer and its dealers, even though the manufacturer (Volkswagen) had a market share of only about 10% in Europe.[139] In this case, the Commission considered the use of economic dependence as an aggravating factor against Volkswagen.[140] These cases show that economic dependence is found even in low levels of market shares or market power.

Nevertheless, in contrast to the abuse of economic dependence, which relates to unilateral behaviour, the law on vertical restraints necessarily involves an agree-

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[139] European Commission, Decision 98/273/EC *VW* [1998] OJ L 124/60, paras 7 and 220.

[140] European Commission, Decision 98/273/EC *VW* [1998] OJ L 124/60, para. 220. Case T-176/95 *Accinauto SA v Commission* [1999] ECR II-1635, para. 124, where the Court of First Instance upheld the Commission in considering the abuse of economic dependence of dealers as an aggravating circumstance.

ment between two undertakings, a term unfortunately strictly defined by the Court of Justice.[141]

However, another reason might explain the non-intervention of the Commission in situations of economic dependence: the lack of community interest. In *Sodima*,[142] a case involving vehicle distribution, the Commission rejected a complaint because of lack of Community interest. The complainants unsuccessfully invoked the dealer's economic dependence:[143] the Commission,[144] upheld by the Court of First Instance,[145] observed that the applicant could obtain satisfaction from national courts. Indeed, the Commission might be reluctant to use its resources to combat abuse of economic dependence under Articles 81 or 82 EC. Firstly, the abuse of economic dependence may not affect trade between Member States. More often than not, the conduct's effects are confined to the territory of a single Member State.[146] Secondly, the Commission may have no interest in dealing with relatively small undertakings. Lastly, in application of the subsidiarity principle, in an area where the Commission does not have exclusive jurisdiction, cases of economic dependence might better be treated by the national competition authorities or the national jurisdictions.

5 Abusive practices

5.1 Types of abuse of economic dependence

The main cases of abuse of economic dependence are discrimination, refusal to supply or to buy, excessive pricing and the imposition of unfair commercial terms. For

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[141] Joint cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23.

[142] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655.

[143] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655, para. 83.

[144] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655, para. 54.

[145] Case T-62/99 *Société de distribution de mécaniques et d'automobiles (Sodima) v Commission* [2001] ECR II-655, para. 90: "the applicant has not established that the Commission committed a manifest error of assessment in taking the view that a national court would be in a position to draw the legal conclusions from the fact that the economic dependency experienced by dealers is excessive and distorts the balance between manufacturers and dealers provided for in Regulation 123/85." *See also* Joint Cases T-185/96 and T-189-190/9 *Riviera Auto Service Etablissements Dalmasso SA, Garage des quatre vallées SA, Pierre Joseph Tosi, Palma SA (CIA – Groupe Palma), Christophe and Gérard Palma v Commission* [1999] ECR II-93.

[146] *See* Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869, para. 17. The Commission's decision was annulled because Hugin's conduct did not affect trade between Member States. The Commission may intervene, for instance, in cases that concern market integration: prohibition of parallel imports, cross-border trade discrimination or discriminatory refusals to deal with nationals of other countries. On the contrary, when the alleged abusive practices have negative effects only within a country, which is normally the case with abuse of economic dependence, the national authorities have a greater interest in dealing with them.

instance, brand or range dependence involves the refusal to deliver a branded product to a distributor. Buying dependence and business-related dependence may express themselves in the form of a refusal to buy or the imposition of a low price coupled or not with other unfair commercial conditions. The manufacturers are excluded from the market or otherwise exploited. Shortage dependence may result in partial refusal to supply coupled with high prices. When they apply to particular customers, it simultaneously involves discrimination. All these practices mainly concern existing customers and occur because these costumers have no switching alternatives.

Anticompetitive effect is the key element of the law on abusive behaviour. Abusive practices are prohibited mainly because they lead to foreclosure in a vertically related or adjacent market as well as to the exploitation of direct or indirect customers. Since generally neither the dependent undertaking (customer) nor the undertaking under investigation are vertically integrated, horizontal foreclosure[147] or vertical foreclosure as understood in the Commission's Discussion Paper[148] are not a matter of concern for the abuse of economic dependence. The latter relates, instead, to exploitative practices. Nevertheless, the structure of the market can be affected by the exclusion of small undertakings.

5.2 Anticompetitive effect

The intervention dilemma is better understood once the behaviour in question is tested under some of the proposed anticompetitive tests. It seems to us interesting to see what different tests tell us about the harm to competition of these practices and about the intervention's appropriateness. It must nevertheless be borne in mind that these tests were developed to define exclusionary conduct, and are therefore not suited to exploitative abusive conduct. For instance, it is not appropriate to test the conduct under the so-called profit-sacrifice test, since this is more suited to predatory behaviour. This exercise is, rather, an attempt to underline the inherent risk in intervening in cases of abuse of economic dependence.

We will concentrate on the equally-efficient-competitor test as well as on the consumer-welfare test. The first one is especially relevant because competition law aims at enhancing economic efficiency,[149] the second, because the application of competition law serves the interests of consumers in general. While acknowledging the right of an undertaking in a dominant position to protect its commercial interests, the Court of First Instance held that:

> "[T]he protection of the commercial position of an undertaking in a dominant position with the characteristics of that of the applicant at the time in question must, at the very least, in order to be lawful, be based on criteria of *economic efficiency* and consistent with the *interests of consumers*."[150]

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[147] In other terms, foreclosure of competitors in the upstream or downstream market.

[148] EUROPEAN COMMISSION, note 7, paras 69 *et seq*.

[149] The Commission has clearly announced that economic efficiency will be the basis of its intervention for exclusionary practices. *See* EUROPEAN COMMISSION, note 7, paras 63 *et seq*.

[150] Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, para. 189.

This double objective constitutes the foundation of European competition law and the competition law of other European countries.

The *equally efficient competitor test* tries to isolate exclusionary actions and qualify them as abusive only if they are capable of excluding an equally efficient (rival) undertaking. As explained by the Commission, "[t]he 'as efficient' competitor is a hypothetical competitor having the same costs as the dominant company. Foreclosure of an as efficient competitor can in general only result if the dominant company prices below its own costs."[151] Put in other words, the undertaking in a dominant position commits an abuse if, by its behaviour, it excludes from the market a competitor as efficient as it is.

Exclusion of inefficient firms does not have anticompetitive effects in a market and therefore does not amount to abuse. The rationale and the interest of the test lies in the importance it gives to economic efficiency: inefficient undertakings do not contribute to the enhancement of society's welfare and are not able to compete on the merits. In other terms, they are unimportant for the maintaining of the existent level of competition and unable to introduce more competition in the market. As a consequence, their disappearance does not result in an efficiency loss or otherwise in harm to competition.

In order to apply the test, the efficiency of the dominant firm is compared with the efficiency of the competitor that alleges competitive harm. But in situations of vertically related undertakings, which operate in different market stages, the efficiency of the seller cannot be compared with the efficiency of the buyer.

Although not suitable to the behaviour aimed toward direct customers, the test underlines an important basic rule of competition law: the overall effect of intervention must increase, rather than decrease, social welfare. Protecting inefficient producers or manufacturers could burden the undertaking in a dominant position and lead to an overall reduction of societal and consumer welfare. It amounts to a subsidy of small and inefficient undertakings by private ones (private aid).

The *consumer welfare test* focuses on consumer harm. It questions whether the relevant behaviour reduces consumer welfare: an abuse arises only if this is so. Conduct that produces harm to competitors, but not to consumers, would not lead to an abuse of dominant position. From this point of view, consumer harm is seen as a supplementary condition to competitor or customer harm. While emphasising the importance of consumer protection as a competition law objective, it strengthens the conditions for intervention.

The exclusion of a trader or a small manufacturer may not negatively affect consumers. For instance, the refusal of the producers of branded products to supply a trader does not affect consumers, in that they can purchase the item elsewhere. It is in the interest of the brand producer to broadly make available its products. By the same token, the refusal of a chain store to purchase from a small manufacturer may not negatively affect consumers if the chain proposes substitute products.

Both the equally-efficient-competitor and the consumer-welfare test aim at distinguishing between the protection of competition and the protection of competi-

[151] EUROPEAN COMMISSION, note 7, para. 63.

tors. Nevertheless, the majority of the abusive practices in the situation of economic dependence are directed towards vertically related customers, not competitors. Rather, the question is whether competition law aims at levelling the playing field for all undertakings in the market, by protecting *particular* undertakings, be they big or small. This is also linked with the risks related to the protection of inefficient undertakings and the inherent risk of over-regulating the market and inhibiting efficient behaviour and the growth of efficient firms.

5.3 Remedies available

The finding of an abuse of economic dependence requires the intervention of the authorities or judges not only to stop the abuse, but also to positively define what the undertaking under investigation should do. Whereas the finding of a dominant position increases the risk of over-intervention, there are additional risks inherent to the remedies themselves. Moreover, taking into account the type of abuse involved – refusal to supply, discrimination or excessive pricing – the risk of Type II errors increases because of the regulatory nature of remedies.

When the authorities issue an order to supply, the injunction should provide specific rules for the quantities supplied, for the price, the quality and the duration of the duty to supply. This remedy is highly regulatory in nature. When a new customer is given the right to be supplied with a product, the authority should also consider how many other undertakings might ask the same. Would it be wise to impose an unconditional duty to supply on the investigated undertaking?

Similarly, the prohibition of discrimination involves a price regulation. In fact, it is not a clear-cut task to determine equivalent transactions and require identical treatment. Moreover, the prohibition of discrimination may lead to the reduction of the quantity offered in the market. If the low prices were directed towards new customers, and the injunction order required applying the same prices to the newcomers, the quantity offered might fall and the price might rise.

The regulatory nature of remedies in cases of abuse of economic dependence must draw the attention of enforcers to the inherent risk of over-intervention in defining remedies. Therefore, while the use of market shares as a screening device highlights the risk of under-intervention, the definition of abusive practices and remedies emphasises the risk of over-intervention. Balancing both types of errors requires a rethinking of both the dominant position at the European level and the concept of abuse. While an extension of the concept of the dominant position would allow it to capture other types of market power short of the usual market-shares threshold, the careful definition of abusive behaviour would permit selective intervention in serious anticompetitive cases. As a consequence, this approach would result in the finding of more situations of dominance, which would be consistent with the concept of market power in economic literature, focusing meanwhile on inefficient behaviour that harms competition in a market.

6 Concluding remarks

The traditional definition of dominant position focuses on market shares and refers to a paramount market position. Unlike dominance, economic dependence relates to market power that does not result from a paramount market position. Other factors and forms of market power are responsible for the dependence of particular customers to their suppliers or buyers. Information gaps, searching costs and asset specificity are some of the sources of market power that can also cause a situation of economic dependence. Unfortunately, these aspects are currently underestimated. Another source of market power is product differentiation. The appropriateness of intervention in presence of this type of market power is controversial.

From the analysis of the case law on Article 82 EC, we conclude that economic dependence of customers on the dominant undertaking constitutes one of the factors that can be taken into account for the assessment of the dominant position. In relation to market shares, economic dependence is an additional element that could complete the analysis of the dominant position, in particular when the undertaking under investigation has low market shares. Indeed, the interpretation of the Court of Justice allows for economic dependence to be included in the analysis as an *exceptional circumstance*.

Concerning the different forms of economic dependence, we conclude that Article 82 EC covers three types of economic dependence: first, shortage dependence; second, the dependence of manufacturers on strong buyers; and third, the "technical" dependence related to aftermarket products. For the finding of a situation of economic dependence, asset specificity, lock-in effects and other exceptional market conditions may be taken into account. Brand dependence and dependence related to a range of products is not covered by the concept of dominant position. As a consequence, market power that results from product differentiation is not in itself a basis for intervention under Article 82 EC, although it can be taken into account as an additional factor for the finding of a dominant position. Nonetheless, it is not clear whether Article 82 EC covers so-called business-related dependence. Asset specificity and the existence of a long-standing relationship are not sufficient in themselves for the finding of a dominant position, but they can be considered if the other traditional conditions are met.

Abuse of economic dependence might not affect trade between Member States, which would suggest that the Commission has no jurisdiction or simply that there is no Community Interest in intervening in such cases. As a consequence, the application of national competition law is more appropriate. State intervention in these situations may nonetheless be a source of error. While the extension of the concept of the dominant position may allow for the covering of more types of market power and reducing in that way the importance of market shares, the wide interpretation of abuses and the regulatory nature of remedies increase the risk of over-intervention. The reduction of this latter risk requires a clear definition of the conditions as well as the methodology followed for the finding of anticompetitive effect through the exploitative abuse of a dominant position.

Efficiency Defence in Article 82 EC

Dimitris Riziotis

1 Introduction

In December of 2005 the European Commission published a Discussion Paper of the GD Competition on the application of Article 82 EC on exclusionary abuses.[1] In this Paper the Commission tries to give guidance on the principles and interpretation of Article 82 EC. But this Paper goes beyond summarizing and codifying the existing case-law of the community courts and the Commission itself; it proposes a new approach on several matters and applies a moderate "more economic approach" on the prohibition of abusive unilateral conduct.

One of the main problems of Article 82 EC is the distinction between abusive and lawful conduct of dominant undertakings. On the one hand even dominant undertakings should be able to compete, since the acquisition of a dominant position as such is not prohibited in EC competition law. On the other hand, competition law tries to ensure that powerful market participants will not exploit their power to the detriment of consumers. The distinction problem becomes acute, when the conduct under scrutiny restricts competition and simultaneously creates efficiency gains for society or for the consumer. The Discussion Paper expresses the willingness of the Commission to accept, in some cases, the so-called "efficiency defence" in favour of a dominant undertaking under strict conditions. Since the Community Courts had not done that up to the publication of the Paper, this is a major novelty,

[1] EUROPEAN COMMISSION, "DG Competition Discussion Paper on the application of Article 82 EC of the Treaty to exclusionary abuses", (2005), available at http://www.ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

but at the same time the recognition of such a defence is quite controversial. And even after a signal from the ECJ that under certain conditions it would accept such a defence[2], the policy considerations, the extent of such a defence and the specific conditions that would justify an otherwise abusive conduct still remain to be discussed.

2 Defining abusive conduct

The whole discussion on the necessity of an efficiency defence is part of a broader discussion on the definition of abuse of dominance. The goal of this discussion is to achieve clarity on what constitutes abusive conduct and what normal competition. One might think that, if a unanimously accepted definition of lawful competition were to be elaborated, the application of Article 82 EC would become easier for authorities and undertakings. But a practical and useful positive definition of normal competition has proven to be unachievable until now. From a methodological point of view, it would in fact be wrong to try and define it. The main (at least direct) purpose of competition law is maintaining freedom of competition. But defining free competition, in order to distinguish it from monopolistic or abusive conduct is an illusion. After all, once defined, free competition will be no longer free, since the definition is already a limitation in itself. For instance, it would be futile or even dangerous to try to positively define free speech, in the sense of defining a priori what one is allowed to say and what not; defining the content of free speech would be restricting all future expressions within a pre-defined border. It is far more reasonable to try to define the limitations than the content of freedom.

The ECJ has nevertheless made use of the term "competition on the merits" as a means of distinguishing permitted unilateral conduct from abusive behaviour. According to its definition abuse of dominance is the restriction of competition "through recourse to methods different from those governing normal competition in products or services on the basis of transactions of commercial operators"[3]. This phrase draws the line based on whether the means used belong to "performance" or not. The distinction in the *AKZO*-case was similar[4], whereas the CFI has stated in the *Tetra Pak II*-case that "article [82] of the Treaty prohibits an undertaking in a dominant position from eliminating a competitor by practising competition by means of price which does not come within the scope of competition on the basis of quality"[5].

This distinction seems to originate in or at least coincide with the German notion of performance-based competition *(Leistungswettbewerb).*[6] According to that notion, firms should compete with each other by using only four factors: price, qual-

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[2] Case C-95/04 P *British Airways v Commission and Virgin Atlantic* [2007] ECR I-2331, para. 86.

[3] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para. 91.

[4] Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para. 70.

[5] Case T-83/91 *Tetra Pak v Commission („Tetra Pak II")* [1994] ECR II-755, para. 147.

[6] *Cf.* on the origin and meaning of this concept GERBER, "Law and Competition in Twentieth Century Europe", 253 (1998).

ity, advertisement (marketing) and distribution.[7] All other means of competition should be deemed illegal. This notion is highly impractical, since even the use of those factors is in fact not without legal limits (e.g. predatory pricing with prices above average variable cost).[8] But it is also dangerous, because demanding from undertakings to compete "on the merits" or based on their "performance" or on "quality" can easily turn to market regulation. Courts and authorities may end up dictating market participants what their performance in the market should be instead of letting the market and the consumers dictate the rules of the game by means of shifting their demand towards the offers fulfilling their needs at most. There is a risk that innovative forms of pricing or distribution might be deemed to be illegal, just because courts and authorities are not yet familiar with them.

Due to these reasons, it is feasible to define only which conduct is abusive. The same problem exists also in U.S. law. Sec. 2 Sherman Act prohibits monopolisation, which takes place by means of exclusionary conduct.[9] On both sides of the Atlantic several tests have been proposed to distinguish legitimate from exclusionary conduct.

The first test is the profit sacrifice test. According to this test, a conduct is exclusionary if it results in the loss of short-term profits and this loss of profits would be irrational absent the purpose of excluding rivals.[10] The only rational explanation for the profit sacrifice would be the expectation of long-run monopoly profits after the exclusion of rivals.[11] This test is being used from the U.S. Department of Justice and from the Federal Trade Commission[12] and seems to have been adopted from the U.S. Supreme Court in some cases[13]. The drawback of this test is that the competition authority or the plaintiff must show the actual sacrifice of profits on behalf of the dominant undertaking in order to substantiate abusive conduct, whereas many forms of exclusionary conduct in fact do not require any such sacrifice. For this reason the test is prone to false negatives in all cases apart from price predation.[14] Many kinds of behaviour considered detrimental until now to competition such as

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[7] P. ULMER, "Der Begriff 'Leistungswettbewerb' und seine Bedeutung für die Anwendung von GWB und UWG-Tatbeständen", (1977) GRUR 565, 571; *cf.* MONTI, "Comments to the speech given by Hew Pate, Assistant Attorney General, US Department of Justice", 5 (2004), available at http://www.ec.europa.eu/comm/competition/speeches/text/sp2004_005_en.pdf (naming price and quality as the decisive factors).

[8] TEMPLE LANG/O'DONOGHUE, "The Concept of an Exclusionary Abuse under Article 82 EC", in: Geradin (ed.), "GCLC Research Papers on Article 82 EC", 38, 42 (2005), available at http://www.coleurope.eu/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf.

[9] *Verizon Communications Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); HOVENKAMP, "The Monopolization Offence", (2000) 61 Ohio St. L.J. 1035, 1036.

[10] OECD COMPETITION COMMISSION, "Competition on the Merits", Doc. Nr. DAF/COMP(2005)27, 24 (2006), available at http://www.oecd.org/dataoecd/7/13/35911017.pdf; TEMPLE LANG/O'DONOGHUE, note 8, 43.

[11] HOVENKAMP, "Exclusion and the Sherman Act", (2005) 72 U. Chi. L.Rev. 147, 155 *et seq.*

[12] ELHAUGE, "Defining Better Monopolization Standards", (2003) 56 Stan. L. Rev. 253, 270.

[13] *Verizon Communications Inc. v Law Offices of Curtis v Trinko, LLP*, 540 U.S. 398, 409 (2004); *Aspen Skiing v Aspen Highland Skiing*, 472 U.S. 585, 610-611 (1985).

[14] SALOP, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit Sacrifice Standard", (2006) 73 Antitrust L.J. 311, 315.

exclusive dealing and tying, do not require any profit sacrifice at all; on the contrary such practices may be profit-increasing from the very beginning and still have an exclusionary effect.[15] In addition, the profit sacrifice test fails to address the strategic behaviour of raising rivals' costs[16], whereas it risks sanctioning expenditures in welfare enhancing activities, such as investments in research and development[17].

An ameliorated broader version of the profit sacrifice test is the "no economic sense" (or "but for") test. This test is based on the same principle and seeks to sanction conduct, which only has the purpose to exclude rivals from the market. However, contrary to the previous test, it does not require the sacrifice of short-run profit and therefore can address more kinds of exclusionary practices.[18] Its criterion is the profitability of a specific conduct for the dominant undertaking without the exclusion of rivals.[19] The first flaw of this test is that it does not offer a clear-cut solution for behaviour which is profitable and exclusionary at the same time.[20] It presupposes a normative decision on which profits should be taken into account and which not. The exclusion of rivals is in itself profitable in the long run and every rational firm has the incentive to invest in enlarging its market share. On the other hand conduct that is profitable even without exclusion may be strategically used to exclude rivals. But the main drawback of this test is the requirement that courts and competition authorities rule on the economic sense of firm conduct. It is obvious that in many cases they will be ill-suited to make such a judgement, since firm decision making and strategic planning are very complex and cannot easily be judged ex ante. It is true that the "no economic sense" test does not make any inquiry into the intent or the motives of the undertakings[21], but it requires the use of objective criteria for assessing the rationality and expected profitability of a strategic decision. It is nevertheless obvious that any court or authority trying to develop such criteria would be moving on slippery ground. Also, it would be no surprise if its adoption would lead to criticism of false positives from its application and courts and authorities were asked to refrain from assessing strategic decisions of dominant firms in fear of over-deterrence and overregulation. In this case, the room left for application of competition law would be minimal.

Another test is the "equally efficient" or "as efficient competitor" test: a specific conduct of a monopolist constitutes an abuse, when it is capable of excluding a hypothetical "as efficient competitor" from the market.[22] This test goes back to a

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[15] HOVENKAMP, note 11, 158; *cf.* also ELHAUGE, note 12, 280 *et seq.*

[16] SALOP, note 14, 315 *et seq.*

[17] OECD COMPETITION COMMISSION, note 10, 26.

[18] WERDEN, "Identifying Exclusionary Conduct under Section 2: The 'No Economic Sense' Test", (2006) 73 Antitrust L.J. 413, 424; *cf.* also SALOP, note 14, 319.

[19] WERDEN, note 18, 415.

[20] OECD COMPETITION COMMISSION, note 10, 28.

[21] WERDEN, note 18, 426.

[22] GAVIL, "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance", (2004) 72 Antitrust L.J. 3, 58; OECD COMPETITION COMMISSION, note 10, 29 *et seq.*; TEMPLE LANG/O'DONOGHUE, note 8, 45; O'DONOGHUE/PADILLA, "The Law and Economics of Article 82 EC", 189 *et seq.* (2006).

proposal of *Posner*[23] and wishes to ensure that competition law will not be misused for the protection of individual competitors to the detriment of efficiency. Although this test seems reasonable, its drawback is that it fails to control conduct in case of increasing economies of scale. In such cases, especially in network markets, the dominant undertaking will always be in a position to produce more efficiently than its competitors. Then according to this test, it will have the right to foreclose all competitors from the market.[24] Less efficient competitors are also welcome in the market, because they can also exercise some kind of competitive pressure that leads to lower prices, even though they are less efficient than the monopolist[25]. This test "perversely inhibits the only competition that dominant firms are likely to face in many instances"[26].

A further proposal is the consumer welfare test. This test considers conduct as exclusionary, when it has a negative net impact on consumer welfare. The impact on consumer welfare is measured through the level of prices and output.[27] In case of ambiguous conduct with positive as well as negative effects on consumer welfare, a weigh off will take place and the conduct will be judged depending on the outcome. This test avoids the faults of the previous ones since it requires neither profit sacrifice nor evaluation of firms' decisions rationality. Article 81 (3) EC is in fact a refined version of it in the field of agreements between undertakings. The Commission opted for this test within Article 82 EC as well: the proposed efficiency defence is nothing else but a form of the consumer welfare test. There are two critical aspects of this test though, which require a closer look and which decide on its appropriateness for qualifying conduct as abusive: the first is the choice of the welfare standard and the other is the method of measuring the effects of conduct on welfare. In the U.S. there is a preference for the aggregate welfare standard. The effects of conduct are taken into account regardless of the probability that the efficiency gains will be passed on to the consumer. But European competition law has a strong tendency towards the consumer surplus standard, i.e. there must be a credible expectation that the gains will be passed on to the next market level in order for them to be taken into account. With regard to the measurement of efficiency gains, the question is if they will be measured on a case by case basis with highly complicated econometric models or if they will be assessed based on previous experience and with the respective approximation.

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[23] POSNER, "Antitrust Law", 194 *et seq.* (2nd ed. 2001); GAVIL, note 22, 58.

[24] BUNDESKARTELLAMT, "Written Statement on the DG Competition Discussion Paper", 9 (2006), available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/0703_Stellungnahme_DE_Art82_e.pdf.

[25] SALOP, note 14, 328 *et seq.*; BUNDESKARTELLAMT, note 24, 9; FJELL/SØRGARD, "How to Test for Abuse of Dominance?", (2006) 2 European Competition Journal, 69, 71; FLETCHER, "The Reform of Article 82 EC: Recommendations on Key Policy Objectives", 6 (2005), available at http://www.oft.gov.uk/shared_oft/speeches/spe0205.pdf.

[26] LAO, "Defining Exclusionary Conduct under Section 2: The Case for Non-Universal Standards", in: HAWK (ed.), "International Antitrust Law & Policy – 2006 Fordham Corporate Law Institute", 433, 446 (2007).

[27] SALOP, note 14, 329 *et seq.*

Apart from the efficiency defence in the narrow sense, which is a form of the consumer welfare test, the Commission in its Discussion Paper also applies in pricing practices in particular two other of the aforementioned tests. As a general rule it applies the "as efficient competitor" test as a measure for pricing conduct: "… for assessing alleged price based exclusionary conduct […] in general only conduct which would exclude a hypothetical 'as efficient' competitor is abusive" [28]. Apart from that in the specific area of predatory pricing practices the Commission also applies a variation of the "no economic sense"-test for conduct which involves prices above the average avoidable cost (AAC) but below the average total cost (ATC) of the dominant undertaking. As a general rule, prices above AAC do not constitute an abuse, unless they are below ATC and there is evidence of intent (predatory strategy). Intent can be indirectly induced, if there is no other reasonable explanation for the dominant undertaking's behaviour (no economic sense).[29]

3 The proposed efficiency defence

The Commission in its Discussion Paper from December of 2005 analyses the conditions, under which it would be possible for a dominant firm to invoke an efficiency defence. A conduct of a dominant undertaking which would prima facie qualify as an abuse could be exempted from the prohibition of Article 82 EC, if it fulfils four conditions.[30] These are the same ones that exempt an anticompetitive agreement from the prohibition of Article 81 (1) according to Article 81 (3) EC. First of all the conduct under scrutiny must contribute to technical or economic progress or to the improvement of production and distribution of goods. The conduct must be indispensable to the achievement of these efficiencies and these efficiencies must benefit consumers. The benefit of consumers is interpreted as a positive outcome in the weighing off of efficiency gains against the negative impact of the conduct on competition and is at the same time a requirement, that the efficiency gains be passed on to consumers. The final condition is that the conduct does not lead to elimination of competition.

These conditions signify that the Commission has opted for the consumer welfare test. More specifically the Commission has adopted a qualified version of the consumer welfare test, in which additionally the positive outcome of the welfare trade-off must be passed on to consumers and even a positive outcome of the trade-off cannot justify a complete elimination of competition in the relevant market.

But there is also another form of the efficiency defence in the Discussion Paper, namely the "as efficient competitor" test. The Commission wishes to apply this test to pricing abuses.[31] The core element of this defence is that the pricing behaviour of the dominant undertaking under scrutiny would not exclude a hypothetical "as efficient competitor" from the market. This test is also a form of efficiency defence,

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[28] EUROPEAN COMMISSION, note 1, para. 63.
[29] EUROPEAN COMMISSION, note 1, para. 115.
[30] EUROPEAN COMMISSION, note 1, paras 84 *et seq.*
[31] EUROPEAN COMMISSION, note 1, para. 63.

because it aims at distinguishing abusive from acceptable conduct based on efficiency considerations and it allows the worsening of the competitive structure, when the conduct leads to a more efficient outcome in the market.

4 Shift in competition policy

4.1 Rejection of Ordoliberalism

Accepting an efficiency defence in Article 82 EC signifies a turning away from the ordoliberal principles of competition policy, which influenced the European competition law from its very beginning.[32] According to the ordoliberal approach, competition law is a means of securing freedom of the market participants.[33] "Ordoliberalism treats individuals as ends in themselves and not as the means to another's welfare".[34] The Commission described in 1971 as an objective of competition law among others "stimulating economic activity by guaranteeing the widest possible freedom of action to all"[35]. Restriction of competition has been considered to be the same with restriction of other participants' freedom of action.[36] When considering unilateral conduct, freedom of participants is threatened from dominant undertakings; dominant undertakings do not underlie competitive pressure and are able to dictate their terms on consumers and to suppress their competitors, impeding their participation in the market and depriving them from their freedom. The prohibition of the abuse of market power has thus, according to this approach, the objective of limiting the activity of dominant undertakings in favour of freedom of consumers or remaining competitors. As a result of this approach, the EC competition law places substantial weight on the market structure.[37] The goal of competition law is to ensure that several competitors are present in the market and that they act independently from each other. The outcome (market performance) is thought to be optimal, only when optimal structure is safeguarded. In this context the ECJ has imposed a "special responsibility" on dominant firms not to impair the already weakened competition.[38]

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[32] On this influence *see* GERBER, "Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe", (1994) 42 Am. J. Comp. L. 25, 73.

[33] MÖSCHEL, "Competition Policy from an Ordo Point of View", in: PEACOCK/WILLGERODT (eds), "German Neo Liberals and the Social Market Economy", 142 (1989); COMPETITION LAW FORUM ARTICLE 82 EC REVIEW GROUP, "The Reform of Article 82 EC: Recommendation on Key Policy Objectives", (2005) 1 European Competition Journal 179, 180 *et seq.*

[34] MÖSCHEL, note 33, 149.

[35] EUROPEAN COMMISSION, "I Report on Competition Policy", 11 (1972).

[36] *Cf.* on Article 81 EC BRIGHT, "EU Competition Policy: Rules, Objectives and Deregulation", (1996) 16 OJLS 537; FAULL, "Working Paper", in: EHLERMANN/LAUDATI (eds), "European Competition Law Annual 1997: Objectives of Competition Policy", 503, 506 (1998).

[37] PERA/AURICCHIO, "Consumer Welfare, Standard of Proof and the Objectives of Competition Policy", (2005) 1 European Competition Journal 153, 159 *et seq.*

[38] "Irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market." Case 322/81 *Michelin v Commission* [1983] ECR 3461, para. 57.

This special responsibility concept attests the priority of structure over performance in European competition policy towards unilateral conduct.[39]

The efficiency defence would then mean a trade-off between economic efficiency and freedom of market participants: the dominant undertaking would be allowed to obstruct other participants in the market, as long as this practice would lead to efficiency gains. Thus European competition policy would definitely reject the ordoliberal approach in favour of an efficiency-enhancing one.[40]

The problem of the ordoliberal approach is that the interests of all market participants are not the same. In theory existence and freedom of the dominant undertaking's competitors is also important for consumers. However, in practice the protection of the competitors' freedom may have a substantial cost, which will be borne by the consumers. This is obvious on practices like rebates or tying, which are not always capable of completely excluding competitors, but will still have an adverse effect on them. Forbidding these practices for the sake of protecting the competitors' right to compete, i.e. to access consumers, would result in consumers having to pay higher prices. Especially in cases of price abuse, like predatory pricing or rebates, the court or competition authority has to decide whether the direct benefit to consumers through lower prices outweighs the negative impact of the foreclosure effect. The situation is similar to the protection of small and medium-sized enterprises in some cases involving conduct of powerful but not dominant firms, which by several national competition laws is labelled as abuse. In order to protect the less powerful market participants, the consumer is worse off at the end in that he has to pay higher prices and cannot benefit from economies of scale and scope. His interests are then sacrificed for the well-being of competitors. There can be, in fact, a discrepancy between competition and efficiency. Taking into account that allocative efficiency is one major interest of consumers, opting for the maintenance of a more rigorous competitive structure can lead to less allocative efficiency and to consumer harm.[41]

The proposal for an efficiency defence within Article 82 EC signifies thus a shift of competition policy objectives in favour of market performance. The importance of market structure is reduced and the first objective becomes performance in the sense of efficiency. Instead of the preservation of a competitive structure in the market the main focus of competition law will now be on avoiding direct consumer harm.[42] Direct consumer harm is associated with higher prices and less output. The lessening of competition, which was until now an indirect criterion for consumer harm, is bypassed and there is an attempt to measure consumer harm

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[39] *Cf.* MESTMÄCKER/SCHWEITZER, "Europäisches Wettbewerbsrecht", 389 *et seq.* (2nd ed. 2004).

[40] V. WEIZSÄCKER claims on the other hand that individual freedom and efficiency are very closely linked and there can be no freedom without efficiency, "Abuse of Dominant Position and Economic Efficiency", (2003) Zeitschrift für Wettbewerbsrecht, 58, 59.

[41] AHLBORN/GRAVE, "Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective", (2006) 2 Competition Policy International 197, 214.

[42] COLLINS, "The Reform of Article 82 EC", 3 (2006), available at http://www.oft.gov.uk/shared_oft/speeches/spe0206.pdf.

directly.[43] The association of competition law mainly or exclusively with output reduction and higher prices corresponds to the US approach of antitrust law and dates back to the Chicago School theories.[44] In the US there is a clear preference for this narrow understanding of consumer welfare[45] and the main goal of antitrust law is maximisation of efficiency instead of safeguarding competition in the market[46]. In the eyes of US antitrust scholars the European structure-oriented policy has always been interpreted as protecting competitors instead of competition.[47]

A conduct which leads to exclusion of competitors, for example through lower prices, such as a rebate policy[48], will according to the new approach no longer be automatically prohibited because of its exclusion effects, but instead the direct consumer gains achieved through lower prices will be taken into account and weighed against the exclusion of competitors. In the area of pricing abuses, in particular, the efficiency defence takes the additional form of the "as efficient competitor" test.[49] A pricing behaviour is only then an abuse, when it excludes equally or less efficient competitors from the market. At the same time the average total cost of the dominant firm is a safe harbour, when it comes to predatory pricing allegations. If competitors cannot match these prices, then, generally speaking, they are not efficient enough and as such they do not deserve to be protected.[50] Through this test efficiency gains prevail almost without exceptions over structure concerns. An increase in efficiency is always welcome even coming from a dominant firm and the other competitors should try to catch up, or else their elimination from the market is not a concern within competition law. The probable indirect consumer harm through loss of competition and eventual higher prices in the long run will be taken into account only under the strict condition, that an equally efficient competitor could not offer such low prices. But this defence is not without limits. No dominant firm is allowed to price below cost. Beyond this principle there are certain circumstances, under which the Commission accepts the existence of market imperfections, which give the protection of competition priority over the right of the dominant undertaking to

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[43] "The ultimate yardstick of competition policy is in the satisfaction of consumer needs", EAGCP-REPORT, "An Economic Approach to Article 82 EC", 2 (2005), available at http://www.ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf.

[44] "If a practice does not raise a question of output restriction, however, we must assume that its purpose and therefore its effect are either the creation of efficiency or some neutral goal. In that case the practice should be held lawful.", BORK, "The Antitrust Paradox", 122 (1978); critical to the limitation of the antitrust law goals in the U.S. only to efficiency LANDE, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", (1982) 34 Hastings L.J. 65, 68 *et seq.*

[45] FOX, "We protect competition, you protect competitors", (2003) 26 World Competition 149, 151 *et seq.*

[46] SUMMERS, "Competition Policy in the New Economy", (2001) 69 Antitrust L.J. 353, 358; *cf.* GERARD, "Merger Control Policy – How to Give Meaningful Consideration to Efficiency", (2003) 40 C.M.L.Rev., 1367, 1377.

[47] FOX, note 45, 149.

[48] But not predatory pricing; in cases of predatory pricing, no efficiency defence can be invoked. *See* EUROPEAN COMMISSION, note 1, para. 133.

[49] EUROPEAN COMMISSION, note 1, para. 63.

[50] EUROPEAN COMMISSION, note 1, para. 127.

be "efficient". Such circumstances are the existence of economies of scale and scope, of learn curve effects and of first mover advantages.[51] But even in those cases the wording of the Discussion Paper suggests that the Commission would expect competitors to improve their efficiency with time, so that such circumstances will exclude an efficiency defence in the form of the "as efficient competitor" test only for a limited period of time.[52]

4.2 Effects-based approach

An efficiency-oriented approach is intrinsically tied to an individual, economically-oriented and effects-based assessment. Weighing off the efficiencies against the structural deterioration caused by conduct under scrutiny makes sense only when this trade-off is based on the individual facts of the case. The benefits of such an approach cannot be neglected. First of all the thorough scrutiny of a conduct and its effects based on economic considerations will lead to better founded and more convincing decisions of courts and authorities. It should be noted though that many Commission decisions already include such a thorough analysis regardless of the existence of per se rules[53], so that a major change is not to be expected. The ECJ has also on several occasions in the past evaluated the specific impact of agreements on the market during the application of Article 81 (3) EC[54], so that a thorough analysis of a case on its merits should not be that big of a novelty. But still the need for keeping the legalistic approach at the minimum becomes obvious, when one recalls how the assessment of certain practices has changed over the years after thorough economic analysis.[55] Such an approach also minimises the risk of overdeterrence with regard to innovative strategies. As the futile effort to define competition on the merits has shown, not all sorts of economic activity can be divided into predefined categories. Especially innovative marketing strategies or introduction of new combinations of products and services are susceptible to false assessment with regard to their competition effects. Having to decide if and to what extent they fall under the prohibited conduct categories of the case law is no easy task and false positives can be detrimental for innovation and for the consumers. The second major benefit is the achievement of individual justice: every case is judged on its own merits. The

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[51] EUROPEAN COMMISSION, note 1, para. 67.

[52] "… competitors that are not (yet) as efficient …", EUROPEAN COMMISSION, note 1, para. 67.

[53] *Cf.* e.g. European Commission, Case COMP/38.233 *Wanadoo Interactive*, paras 332 *et seq.*, especially para. 338, where the Commission makes an extensive analysis of Wanadoo's recoupment chances, although at the same time it confirms that a showing of recoupment is not necessary for predatory pricing to be abusive. Also the Microsoft decision (European Commission, Case COMP/C-3.37.792 *Microsoft*) contains a rule of reason analysis of tying, paras 835 *et seq.*, especially para. 841, in spite of the existing *per se* rule in Article 82 EC against tying.

[54] PERA/AURICCHIO, note 37, 158.

[55] This change of approach due to new economic theories has taken place mainly within Article 81 EC, for instance with regard to vertical restraints; *cf.* O'DONOGHUE/PADILLA, note 22, 18, who criticise simultaneously the lack of impact of modern economics on the application of Article 82 EC.

primary criterion is the impact of the specific conduct on competition and not its general tendency to influence competition.

4.3 Benefits of efficiency consideration

The more extensive consideration of performance over structure can benefit consumers. This will be the case in situations, where size in the form of economies of scale plays an important role in achieving efficiency gains and where at the same time barriers to entry are not prohibitive for potential competition. Placing a burden on big firms in such cases "not to impair competition" may indeed collide with the interests of consumers, who would never achieve such gains under more rigorous competition but without large firms in the market. Additionally the dominant undertaking should be allowed, for example, to invest in its distribution chain (typical efficiency defence for rebates) or to integrate two until then separate products which are often used together (efficiency defence for tying), when these actions are to the benefit of consumer and do not eliminate all competition from the market. The positive aspects of this approach are also evident in the handling of pricing conduct. The "as efficient competitor" benchmark ensures that "business acumen"[56] shall not be as such penalised and the consumer will not fall prey to state protectionism of inefficient firms, for instance in the name of protection of small and medium-sized enterprises or of branch-specific established firms. Under this aspect the "as efficient competitor" criterion guarantees the openness of the market. A typical example is the growing penetration of super markets into new product markets, which allows the consumer to profit from lower prices in branches, such as electronics, which were traditionally dominated by specialised firms.

5 Limits to the competition policy reform

The aforementioned shift in competition policy cannot be very radical though. First of all focussing exclusively on direct consumer harm and thus market performance will not necessarily simplify the application of competition law or make it more effective. The reason is that efficiency has three forms: productive, allocative and dynamic. And these three aspects do not always harmonise with each other. There are several cases, in which static and dynamic efficiency collide and courts and authorities have to choose among them.[57] Some typical examples are cases of refusal to deal: in such cases the protection of innovation (dynamic efficiency) is promoted, at least in the short run, through the right of the dominant undertaking to refuse access to its facilities or intellectual property rights to competitors, but this refusal allows it to charge higher prices and decrease its output (loss of allocative efficiency). Another conflict situation exists in mergers: the new firm may be able

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[56] In the words of the U.S Supreme Court in its classical definition of lawful monopolisation: "… growth or development as a consequence of a superior product, business acumen, or historic accident", *US v Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

[57] BEHRENS, "Ökonomische Effizienz im Kontext des Wettbewerbsrechts der EG", in: BEHRENS/BRAUN/NOWAK (eds), "Europäisches Wettbewerbsrecht nach der Reform", 13, 21 (2006).

to benefit from economies of scale (productive efficiency), but the loss of competitive pressure may nevertheless lead to higher prices (loss in allocative efficiency).[58] Therefore, there is no clear-cut answer whether a certain form of behaviour leads to efficiency gains or losses.

Consumer's interests on the other side are served not only through low prices, but in the first place through a competitive and open market structure, which guarantees efficiency in the long run. The solution to this dilemma is achieved by giving priority to protecting competition as an institution, i.e. to protecting the competitive structure and not specific competitors. This does not mean that competitors will be left to fall prey to the dominant undertaking, but that they will be protected as long as it is necessary for the preservation of a competitive structure in the market. After all, there is no competition without competitors and, as the President of the ECJ stated in his order in the *IMS Health* case, the interests of competitors cannot be separated from the maintenance of an effective competition structure.[59] What is important in this context, is that this statement was not made as an obiter dictum, but the President of the ECJ was overruling a statement in the opposite direction from the President of the CFI, namely that the primary purpose of Article 82 EC is to prevent the distortion of competition, and especially to safeguard the interests of consumers, rather than to protect the position of particular competitors.[60] The position that direct consumer harm cannot be the sole purpose of EC competition law is in fact standard case-law of the Community courts.[61]

The broader scope of EC competition law may include the protection of competitors, but not as a purpose in itself. The possible scope of application of competition law is a line with two extremes: on the one end is the minimalistic approach which seeks an intervention only when output is restricted or prices are raised regardless of what happens to competitors, whereas on the other extreme lies the ordoliberal approach, which seeks to protect individual freedom of actual market participants. The EC competition policy should lie in the middle. Measuring consumer benefit only with regard to the reaction of price and output to a specific conduct is shortsighted, because it leaves out the crucial parameter of the future development of the market. But at the same time, actual competitors of the dominant undertaking are to be protected only to the extent that their existence and protection is necessary for the sake of the consumer. The competitive structure of the market, which should be protected, is not identical with the existing competitors, but relates much more to the openness of the market. When dealing with foreclosure of competitors, the first criterion should be the ease of entry and consequently the contestability of the market structure. Consumer harm will not only result from the exit of competing undertakings, but mainly from the non-entrance of new ones in the future. In markets with

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[58] BEHRENS, note 57, 21.

[59] Order of the President of the ECJ in the Case C-481/01 P (R), *NDC Health v IMS Health et al.* [2002] ECR I-3401, para. 84.

[60] Order of the President of the CFI in the Case T-184/01 R, *IMS Health v Commission* [2001] ECR II-3193, para. 145.

[61] Case T-201/04, *Microsoft v Commission* (not yet reported), para. 664; EILMANSBERGER, "How to Distinguish Good from Bad Competition", (2005) 42 C.M.L.Rev. 129, 132 *et seq.*

high barriers to entry, this means that the foreclosure of actual competitors is a greater concern than in other cases.

The Commission seems to bear this limitation in mind. It recognizes that the objective of Article 82 EC is in the first place the protection of competition, which in turn enhances consumer welfare.[62] The efficiency defence is therefore not without limits, but has to follow the strict scheme of Article 81 (3) EC. The two most crucial conditions of this scheme for the preservation of market structure, namely the non-elimination of competition and the passing-on requirement, are analysed further below. A further example of the caution, with which the Commission handles efficiency gains that result in foreclosure of competitors, is its proposed policy towards rebates, as it is explained in the Discussion Paper.[63] The difficulty of dealing with rebates is that their prohibition for fear of their foreclosure effect will lead to higher prices for the consumer. Therefore, the conflict between structure and performance is obvious.[64] The Commission develops a rather sophisticated model for conditional rebates, which seeks to ensure that their loyalty-enhancing effect is not such, as to exclude all other competitors from the market, but that the latter have the opportunity to cover a "commercially viable share" of the customers' demand.[65]

A third limit relates to the practicability as well as legal certainty requirement that in every legal order should be taken into consideration. The role of economics in competition law decision making should not be over-estimated. Economic analysis is based on models, which as such deviate from reality and whose outcome varies depending on how many and which variables one takes into account. It is not rare that economics can offer no clearer answer than general principles of competition law and disputes in that discipline as well are throughout the case.[66] Even in issues preliminary to calculation of efficiencies, such as the assessment of market power, there is often dispute, although precise econometric models have been developed for this purpose.[67] One will have to resort to proxies offered by general economic observations and assumptions, since precision in calculating efficiencies is highly unlikely. The risk of exchanging the sometimes unfair legalistic assumptions for equally arbitrary, but more sophisticated economic ones is obviously present and casts doubts on the practicability of the effects-based approach and of the welfare trade-off as a whole. It is feared that the more economic-based and effect-oriented the assessment, the less practical and efficient the competition law

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62 EUROPEAN COMMISSION, note 1, para. 54.

63 EUROPEAN COMMISSION, note 1, paras 152 *et seq.*

64 *Cf.* GYSELEN, "Rebates: Competition on the Merits or Exclusionary Practice?", 5, available at http://www.iue.it/RSCAS/Research/Competition/2003/200306COMP-Gyselen-sII.pdf.

65 It will be shown nevertheless below at 9.2 that even this elaborate model may need an additional limit.

66 INGO SCHMIDT, "More economic approach: ein wettbewerbspolitischer Fortschritt?" in: BRINKER/SCHEUING/STOCKMANN (eds), "Festschrift für Rainer Bechtold", 409, 413 (2006), expects the enforcement process to turn into an expert opinion war ("Gutachterkrieg").

67 LAO, note 26, 467.

enforcement will be.[68] A solution to these difficulties might be the balanced use of case-specific economic analysis and broader legal presumptions. Depending on the percentage of the ingredients in the mixture, a bigger or smaller change from the existing practice is to be expected.

6 Application of Article 81 (3) EC

The Commission's recourse to the criteria of Article 81 (3) EC for the establishment of an efficiency defence raises an old and not yet clarified issue: the relationship between those two articles. Article 81 (3) EC exempts from the prohibition of Article 81 (1) EC certain agreements under four conditions: that they contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit, whereas the imposed restrictions of competition must be indispensable to the attainment of these objectives and may not lead to the elimination of competition in respect of a substantial part of the products in question.

The application of Article 81 (3) EC by analogy on the abuse of dominant position is supported by the undisputed fact, that the same principles underlie both articles[69]; they both specify the general provision of Article 3 (g) of the EC-Treaty. Adopting the same reasons which exempt a competition distorting agreement from the relevant prohibition in order to exempt a competition distorting unilateral conduct from the abuse prohibition seems reasonable[70] and is in accordance with the underlying competition policy. Proposals have already been made to use the criteria of Article 81 (3) EC in order to define "competition on the merits" within Article 82 EC.[71]

The problem of this proposal is that Article 82 EC has never had such a para. 3; this means that formally there is no exemption possibility for abusive conduct.[72] The ECJ has made clear that "[…] no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty […]"[73]. Based on this case law the CFI has also noted that "This principle follows […] from the general scheme of Articles [81] and [82] which […] are independent and complementary provisions designed, in general, to regulate distinct situations by different rules. […] Article [82], […] by reason of its very sub-

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[68] DREHER/ADAM, "The More Economic Approach to Article 82 EC and the Legal Process", (2006) Zeitschrift für Wettbewerbsrecht 259, 268 *et seq.*

[69] LOWE (as discussant), "Monopolization versus Abuse of Dominant Position – Panel Discussion", in: HAWK (ed.), "International Antitrust Law & Policy – 2003 Fordham Corporate Law Institute", 341, 354 (2004).

[70] ENCHELMAIER, in: HAILBRONNER/WILMS (eds), "EU-Kommentar", Article 82 EC, para. 46; FAULL/NICKPAY, "EC Law of Competition", 407 (2nd ed. 2007).

[71] ENCHELMAIER, "Europäische Wettbewerbspolitik im Oligopol", 141 (1997).

[72] *Cf.* LOWE, "DG Competition's Review of the Policy on Abuse of Dominance", in: HAWK (ed.), note 69, 163, 171.

[73] Case 66/86 *Ahmed Saeed and Silver Line v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, para. 32.

ject-matter (abuse), precludes any possible exception to the prohibition it lays down."[74]. Until now the only possible defence for a dominant undertaking has been the objective justification and the right to pursue one's own interests. But the cases, in which the exemption of a conduct was brought up, involved agreements, which were exempted under the "old generation" block exemption regulations. These BERs exempted clauses from the prohibition of Article 81 (1) as such regardless of the market share of the parties.[75]

This policy changed under the more economic approach and beginning with the new BER for vertical agreements the new generation BERs are now applicable to undertakings with a market share of less than 30% (or even 20% jointly for horizontal agreements). Undertakings beyond this threshold had to seek an individual exemption until May 1st 2004 or after that date have to estimate individually the impact of their agreements on competition. Regarding individual exemptions the CFI had stated that they have to be taken under consideration: "in applying Article [82], the Commission must take account, unless the factual and legal circumstances have altered, of the earlier findings made when exemption was granted under Article [81] (3)"[76]. This is a reasonable statement, otherwise it would be irrational to accept that the same facts seen as an agreement are not detrimental to competition but seen as unilateral conduct they constitute an abuse of dominant position. The differentiation of the CFI between block and individual exemption confirms that the case law which distinguishes between Article 81 (3) and 82 EC applies mainly to the old generation BERs. The reason for this differentiation is the fact that for the grant of an individual exemption, the market situation has been taken into account. In contrast, the old BERs applied regardless of it. In view of the changes in European competition law the past years, the background of this differentiation has also changed. The BERs now take market power into account and individual exemptions are only to be granted in exceptional circumstances according to Regulation 1/2003. Under these conditions it would be contradictory to judge the same behaviour differently under the two major provisions of competition law. In a later decision the CFI based its finding of non-violation of Article 82 EC on the analysis under Article 81 (3) EC.[77]

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[74] Case T-51/89 *Tetra Pak Rausing v Commission („Tetra Pak I")* [1990] ECR II-309, para. 25.

[75] LOEWENTHAL, "The Defence of 'Objective Justification' in the Application of Article 82 EC", (2005) 28 World Competition 455, 461.

[76] Case T-51/89, *Tetra Pak Rausing v Commission („Tetra Pak I")* [1990] ECR II-309, para. 28.

[77] Case T-193/02 *Piau v Commission* [2005] ECR II-209, para. 119: "Consequently, although the Commission wrongly considered that FIFA did not hold a dominant position on the market for players' agents' services, the other findings contained in the contested decision, namely […] that the licence system could enjoy an exemption decision under Article 81(3) EC, would accordingly lead to the conclusion that there was no infringement under Article 82 EC".

7 The Reaction of the Community Courts

The reaction of the Community Courts to the introduction of an efficiency defence based on the conditions of Article 81 (3) EC cannot be safely predicted. On the one hand the ECJ in its recent decision in the *British Airways* case seemed to accept the efficiency defence. Referring to the allegedly exclusionary rebate system of BA, it stated: "It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer."[78] This statement of the Court seems to confirm the shift of the competition policy in favour of efficiency. But in the same paragraph the Court also gave the limits of such an efficiency defence: the efficiency gains must be related to the exclusionary effects and the conduct under scrutiny must not go beyond what is necessary in order to attain those advantages.

Parallel to that there is a clear tendency towards a more thorough economic analysis in competition law cases. This tendency became manifest in merger control, when the CFI quite recently stated that it anticipates from the Commission a more thorough analysis of the effects of the concentration on competition.[79] The ECJ confirmed this requirement[80] and the importance of its decision is arguably not limited only to merger control, but shows a general preference to thorough analysis of all facts of the cases in every field of competition law[81]. As a consequence, a legalistic approach without individual consideration and analysis would similarly not be accepted under Article 82 EC.

On the other hand the CFI in its even more recent Microsoft decision was somehow reluctant to assert an effects-based approach and sent mixed signals. Whereas it stated that "in principle, conduct will be regarded as abusive only if it is capable of restricting competition"[82] and that the effects-based approach of the Commission should not be interpreted as the adoption of a new legal theory[83], at the same time it did not deny to the Commission the right to assume, "as it normally does in cases of abusive tying, that the tying of a specific product and a dominant product has by its nature a foreclosure effect"[84]. This last phrase could be understood as a confirmation of the old "legalistic" approach with regard to tying arrangements, since the Court missed the opportunity to impose any burden on the Commission to weigh the positive and the negative effects of tying in every single case, as it did in its afore-

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[78] Case C-95/04 P *British Airways v Commission and Virgin Atlantic* [2007] ECR I-2331, para. 86.

[79] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, para. 63 ; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, para. 155.

[80] Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para. 40.

[81] BAY/CALZADO, "*Tetra Laval II*: The Coming of Age of the Judicial Review of Merger Decisions", (2005) 28 World Competition 433, 449 *et seq.*

[82] Case T-201/04, *Microsoft v Commission* (not yet reported), para. 867.

[83] Case T-201/04, *Microsoft v Commission* (not yet reported), para. 1035.

[84] Case T-201/04, *Microsoft v Commission* (not yet reported), para. 868.

mentioned merger decisions. On the contrary, it allows it to follow the old approach in the absence of extraordinary circumstances.

8 Passing-on requirement

8.1 The debate

The Commission in its Discussion Paper and the ECJ in its aforementioned *British Airways* decision, state as a condition for the acceptance of an efficiency defence explicit evidence, in accordance with Article 81 (3) EC, that the invoked efficiency gains will be passed on to the consumers. This means that for the welfare trade-off only gains to the consumer surplus can be taken into account. Several doubts have been expressed with regard to this passing-on requirement in competition law, especially within the context of merger control: a number of scholars think of it as being unnecessary and thus prefer using the total welfare standard as a criterion for efficiency defence.[85] According to them, it is sufficient if efficiency gains can be demonstrated regardless of their passing-on. The first line of the argument is that society as a whole will benefit from efficient firms even if it cannot be proven that the specific direct consumers will enjoy lower prices or innovation in the near future; requiring such proof can be over-restrictive. The second line comes from an economic model showing that, contrary to intuitive assessment, efficiency gains are more likely to be passed on to consumers in a monopoly situation than in a competitive structure.[86] Proof of this model is supposed to be the situation of perfect competition: in such a case the producers are unable to lower their prices and pass on their gains in form of lower prices, since they are price-takers, so only they themselves profit from productive efficiency gains.

The first line of argument in favour of the total welfare standard is that the distinction line between producer and consumer is quite blurred in reality. The producer in one market is the consumer in another one and vice versa[87], whereas the consumer of a particular market may participate in the producer's profits either directly as a shareholder or indirectly through pension funds etc.[88] This argument definitely reflects some truth, namely that efficient production and distribution benefit economy and its participants as a whole. The flaw of this position though is that it adopts a very optimistic and one-sided view of the market. Efficiency gains only in the area of productive efficiency are not enough as such to contribute to consumer welfare. There is a reason why competition law deals with specific product, geo-

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[85] *Cf.* on the debate AREEDA/HOVENKAMP, "Antitrust Law", Vol. IVA, 39 *et seq.* (2nd. ed. 2006) and ILZKOVITZ/MEIKLEJOHN, "European Merger Control: Do We Need an Efficiency Defence?", in: ILZKOVITZ/MEIKLEJOHN (eds), "European Merger Control: Do We Need an Efficiency Defence?", 43, 62 *et seq.* (2006).

[86] YDE/VITA, "Merger Efficiencies: Reconsidering the 'Passing-On' Requirement", (1996) 64 Antitrust L.J. 735, 741 *et seq.*; HOVENKAMP, "Federal Antitrust Policy", 508 (3rd ed. 2005).

[87] *Cf.* KOLASKY/DICK, "The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers", (2003) 71 Antitrust L.J. 207, 220.

[88] *Cf.* ILZKOVITZ/MEIKEJOHN, note 85, 64.

graphical and temporal markets, namely that only in such a narrowly defined framework one can examine the market conditions.

An old proposal to move away from this narrow framework towards a broader control of economic power[89] has been rejected with good reason: power can be adequately measured only with regard to a specific product or to a particular group of consumers. Every other effort would be too vague and arbitrary. It is only reasonable that the same be applied to efficiency gains, or else we would be facing the paradox that possible negative effects of a behaviour would be measured extremely narrowly, whereas positive ones vaguely and with regard to the whole economy. The natural tendency of a monopoly is to raise prices and lower output regardless of its own costs and there are numerous examples of monopolists who pass only cost increases but never decreases to consumers. Such a rise in efficiency, which remains only with the monopolist, leads to a greater dead weight loss for the society at the end, since, due to productive efficiency gains, the wealth transfer from consumers to the monopolist is even bigger. It is therefore only sound that European competition law requires undertakings to show that claimed efficiency gains will be passed on to the consumers.

With regard to the second analysis, it should be noted that the passing-on requirement is not based upon purely intuitive analysis. On the contrary, it is the same analysis that lies behind the concept of competition law as a whole; if we reject the assumption that rivalry in the market leads to lower prices, efficient allocation of resources and innovation, then the notion of a law stimulating competition (or at least sanctioning its stifling by firms) is no longer necessary. And it is more than intuition, which has lead many legal orders until now to adopt such laws. The basic fallacy of this argument is that it uses perfect competition as a model and then tries to apply its findings to real market conditions. Such a method makes one recall the over-simplifying static antitrust analysis of Chicago School: perfectly transparent markets without entry barriers, perfectly informed consumers and endless self-regulating ability of the markets. The fact that in perfect competition no passing-on can occur does not allow us to draw the conclusion that passing-on will occur under imperfect market conditions. The killer argument of this theory supporting the adoption of the total welfare standard in merger control is that, if the efficiency gains are not shared by all suppliers in the market, but benefit only the merged entity, in any event the latter will face less efficient competitors and therefore will not pass its efficiency gains on to consumers, the competitive structure of the market notwithstanding.[90] This argument ignores two crucial parameters: first, that even less efficient firms can exert pressure on dominant firms[91], and second, that rivalry solely on the base of prices is rather the exception, since it presupposes transparent markets with homogenous goods. One should also consider that, according to the ECJ definition of dominance, a dominant firm acts with a certain degree of independence from its competitors and from consumers in the first

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[89] EDWARDS, "Maintaining Competition – Requisites of a Governmental Policy", 102 (1949).
[90] AREEDA/HOVENKAMP, note 85, 40.
[91] *See* accompanying text to notes 25 and 26.

place.[92] This means that, if the total welfare standard is applied and if no specific benefits to consumers are required, Article 82 EC should allow a practice which makes it possible for a firm to become even more independent. Such a result would be based on the argument that a dominant company does not feel the competitive pressure anyway and on the assumption that the company would pass its gains on to consumers on its own initiative. But in reality, allowing a firm to strengthen its position and its independence in the market would be like giving the monopolist a carte blanche to exclude all remaining rivals under the pretence of efficiencies.

8.2 Passing-on and dynamic efficiency

The claimed passing-on of efficiency gains needs to be substantiated with credible evidence.[93] Vague claims are not taken into account. This principle applies also to Article 81 (3) EC as well as to mergers according to the respective guidelines.[94] The passing-on must also be timely, in the sense that it has to occur within reasonable time; the longer it takes for the gains to be passed on, the less these gains are taken into account.[95]

A point that should be elaborated in this context is the passing-on of dynamic efficiency gains. Efficiency as it is known is divided into three types: productive, allocative and dynamic. There is no distinction that the passing-on requirement should apply only to the first two kinds of efficiency (static efficiency). But its application on dynamic efficiency presents some degree of difficulty, at least at first sight. Dynamic efficiency refers to the rate of introduction of new products.[96] Such a rate is difficult to measure whereas, on the other hand, when new products are introduced, the benefit to the consumer is direct and most of the time there is no need for further passing-on.[97] Nevertheless, there is also the time element of passing-on, the condition namely that this passing-on occurs within reasonable time. This is the requirement that is often neglected when dealing with dynamic efficiency. The European Commission is prepared to accept such gains in merger control, but in the relevant Guidelines no specific scheme for their calculation is elaborated.[98] The majority of cases within Article 82 EC, in which dynamic efficiency is a defence, are refusal to deal and essential facility cases. The dominant undertaking

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[92] Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 65; *cf.* also EUROPEAN COMMISSION, note 1, paras 20 *et seq.*

[93] EUROPEAN COMMISSION, note 1, para. 85.

[94] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C 31/3, para. 86 ("efficiencies have to be verifiable"); European Commission, Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/8, para. 51.

[95] European Commission, Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/8, para. 87.

[96] MOTTA, "Competition Policy", 55 (2004).

[97] EVANS/PADILLA, "Demand – Side Efficiencies in Merger Control", (2003) 26 World Competition, 167, 168.

[98] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C 31/3, para. 81.

claims that its refusal to deal with or grant access to competitors is justified on dynamic efficiency grounds, since obliging the most successful undertaking to share its profits with its competitors would function as a counter-incentive for innovation. Especially when intellectual property rights are involved, the discussion is almost exclusively about dynamic efficiency. But according to the European competition law and its application by the Commission and the Courts, the expectation of efficiency gains on its own is not enough to justify exclusionary conduct; it must be shown that the efficiency gains will be not only passed on to consumers, but also within reasonable time.

Assessing the time aspect of dynamic efficiency is surely a difficult task. Trying to foresee when innovation will take place is more uncertain than trying to estimate future efficiency gains in productive and allocative efficiency.[99] Innovation is often due to coincidence and luck. But assessing its probability is not completely impossible. There are market situations where there is less reasonable expectation for innovation than others. Such situations are mostly standardisation cases, in which a standard has established itself in the market and there is no reasonable expectation that it will be replaced in the near future. In such cases denying access to the competitors in favour of dynamic efficiency violates the time aspect of the passing-on requirement. If there is no indication that innovation is expected in the relatively near future, possible efficiency gains from the access denial should not be taken into account. One may consider the example of port facilities. If the owner of these facilities denies access to competitors and tries to justify his behaviour claiming dynamic efficiency gains arising from exclusion, it cannot be overlooked that innovation in such a case is not expectable within reasonable time. Allowing the monopolisation of the transport markets with the argument that exclusion is an incentive for innovation is too formalistic and does not take the individual characteristics of the case into account. It is not very probable that a competitor will also invest in building a new port or in inventing a new shipping technology which makes the use of ports obsolete. A more realistic approach is that the exclusion will lead to supra-competitive prices and worse service for consumers; innovation in such a case would be the exception. It is not the incentive to innovate the ultimate goal of competition policy, but the innovation itself. Creating an incentive to innovate is similar to the expectation of efficiency gains in static efficiency. The expectation is not enough for the justification of otherwise restrictive practices, it is the gains themselves that will justify the restriction. Therefore, one must examine how realistic innovation in the specific market is under the individual circumstances.

The Commission fails to take this aspect into account in its Discussion Paper. In the chapter about refusal to deal it shows its concern about dynamic efficiency and suggests a trade-off based on the importance of the investment made on the necessary input: if the investment is significant, a broader exclusivity and thus exclusion of competitors should be allowed.[100] But in applying such a test the Commission tries to assess dynamic efficiency gains by looking at the past, whereas the Article

[99] GERARD, note 46, 1392.
[100] EUROPEAN COMMISSION, note 1, para. 235.

81 (3) EC test clearly looks at the future. It is undisputed that legal certainty for past investments encourages future investment. But this cannot be the only guide to assessing efficiency gains in refusal to deal cases for two main reasons. The first is that in reality it should be very difficult to distinguish which strategic monopoly situations are a result of investment and which are due to pure luck or coincidence. And when one considers the possibility of predatory pseudo-innovation aiming at exclusion of competitors, especially in new technology markets, the distinction between investment worth protecting and unworthy one becomes difficult. Additionally, the prospect of monopoly profits is not the only incentive to innovate; intense competition is also a reason for firms to invest in R&D. On the other hand exclusion and monopoly have negative effects on productive and allocative efficiency as well as on innovation in the long run. Absent competitive pressure the monopolist has no incentive to invest in R&D in order to reduce his costs or to invent new products.[101] Therefore, claims for dynamic efficiency gains should be assessed with care and the time factor must be taken into account. Our main concern, as dictated by Article 81 (3) EC, should be the future gains for the consumer. The past investments of the dominant undertaking should be taken into account, since the general probability of return of investment influences firm conduct and efficiency, but this cannot be declared to the only relevant criterion. More important is the prediction of future efficiency gains for the consumer in a specific market at a given place and time. Of course the time factor when assessing dynamic efficiency gains should be more generously calculated, because of the high uncertainty associated with future innovation, but such gains should not be taken into account when there is no reasonable expectation for innovation in the near future.

9 Elimination of competition and efficiency defence

9.1 Meaning of non-elimination within Article 81 (3) EC

An issue arising from the application of the conditions set in Article 81 (3) EC on the control of unilateral conduct relates to the fourth condition of Article 81 (3) EC, namely the non-elimination of competition. In order for Article 82 EC to be applicable, the questionable behaviour must come from a dominant undertaking in the first place. Dominance presupposes an already weakened competitive structure though. According to the standard definition of the ECJ, the dominant position "relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[102]. It is this situation of weakened competition that leads to the "special responsibility" of the dominant undertaking

[101] *Cf.* European Commission, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, [2004] OJ C 101/2, para. 7.

[102] Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 65; *cf.* WHISH, "Competition Law", 179 (5th ed. 2003).

for the maintenance of the remaining competition. It appears difficult to reconcile this special responsibility on the one hand with a behaviour detrimental for competition but beneficial to consumer welfare, which at the same time strengthens the dominant undertaking's market position but does not eliminate all competition. It seems that the fourth condition for the acceptance of an efficiency defence will almost never be met.

On the other hand the ECJ has made clear, that a finding of dominance in a market does not presuppose the elimination of all competition; an undertaking may have a dominant position in a relevant market with some remaining competition still present.[103] The Court of First Instance inversed this definition of dominance given by the ECJ and came to the conclusion that elimination of competition according to Article 81 (3) EC means something more than just acquiring a dominant position.[104] According to this statement it is possible for a dominant undertaking to further weaken remaining competition without automatically violating the last condition of Article 81 (3) EC, as long as competition is not *completely* eliminated. This allows the analogous application of Article 81 (3) within Article 82 EC.

From a policy point of view this approach has some non-negligible consequences. The furthest limit for allowing an efficiency-enhancing conduct of a dominant undertaking is moved in favour of the dominant undertakings. So far the dominant undertaking had a special responsibility for the maintenance of the remaining competition, now its responsibility applies only to the complete exclusion of competition in the market. This weakening of the requirements can be alarming, especially when one takes into account that in real markets there can be no exact distinction. The same conduct that leads today to the strengthening of a dominant position and brings efficiency gains to the consumers may lead to the complete elimination of competition in the future. Drawing the line between acceptable further weakening of the already weakened competition as a side-effect of a consumer-friendly conduct and forbidden elimination of all competition is often just a question of time. The burden falls on the authorities and courts to predict which of the two is the case in the facts before them. And because it is unrealistic to expect that the authorities will reconsider a particular case every couple of years, in order to assess the foreclosure potential of the dominant undertaking's behaviour, it is only reasonable to interpret this condition in such a way as to expect the assessing authority to substantiate its belief, that the conduct under scrutiny, although strengthening the dominant position of the undertaking, will indeed fall short of eliminating all competition in the future for some specific reason.

However, there are limits to the possibility of a dominant undertaking to further weaken competition. The Commission in its Discussion Paper recognizes that in the final analysis the competitive process has priority over efficiency gains and refuses to accept an efficiency defence, when the position of the dominant undertaking in

[103] Case 85/76 *Hoffmann-LaRoche v Commission* [1979] ECR 461, para. 39; Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 113.
[104] Case T-395/94 *Atlantic Container Line and others v Commission* [2002] ECR II-875, para. 939.

the market approaches that of a monopoly.[105] This will usually be the case at a market share of 75% and beyond, if additionally there is no substantial competition left in the market.[106] In this sense the non-elimination of competition condition poses an ultimate market structure guarantee, which cannot be bypassed for the sake of performance. This approach is consistent with that adopted in merger control. In its Horizontal Merger Guidelines of 2004, the Commission considers it to be highly unlikely for a merger leading to a market position approaching that of a monopoly to be declared compatible with the common market on based on efficiency gains.[107] Through these statements, the Commission makes it clear that competitive structure is not being completely replaced with direct efficiency gains as a criterion for the control of unilateral conduct. These restraints of the dominant undertaking not to completely eliminate remaining competition were recently confirmed by the CFI in its recent Microsoft, where it stated that the objective of Article 82 EC is to safeguard the competition that still exists in the relevant market and that for that reason, elimination of competition cannot be interpreted in the sense that Article 82 EC applies only from the time when there is no more, or practically no more, competition on the market.[108]

9.2 Non-elimination of competition and price abuses

According to the Discussion Paper, the Commission applies to price abuses, instead of the four element-efficiency defence, the "as efficient competitor" test.[109] It was shown earlier that this test is in fact a subcategory of the efficiency defence: foreclosure of competitors is allowed, because and as long as they are less efficient than the dominant undertaking. But the Commission does not qualify this test as efficiency defence and therefore does not apply the criteria of Article 81 (3) EC to it. This means that the condition of non-elimination of competition does not apply and that even a dominant undertaking with a market share of 99% can invoke this defence. This lack of limitation and of market structure guarantee poses the acute dilemma if less efficient competitors should be protected for the sake of competition or if monopolisation in the name of efficiency should be tolerated.[110] For pure pricing behaviour it seems reasonable to allow any price above the dominant undertaking's cost (although selecting a cost benchmark is already a difficult task) regardless of the impact on competitors. Selling at low prices but still above one's own costs should never constitute an abuse, unless there are additional elements (e.g. selective price cuts to specific customers) that clearly reveal a general foreclosure strategy.

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[105] EUROPEAN COMMISSION, note 1, para. 91.
[106] EUROPEAN COMMISSION, note 1, para. 92.
[107] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C 31/3, para. 84.
[108] Case T-201/04 *Microsoft v Commission* (not yet reported), para. 561.
[109] EUROPEAN COMMISSION, note 1, para. 63.
[110] For pleadings in favour of protecting even less efficient competitors *see* accompanying text to notes 25 and 26.

The problem arises when pricing conduct is more complex and has an additional foreclosure potential, as is the case with rebates or bundling. In such cases choosing the "as efficient competitor" standard without any limitations may lead to monopolisation of the market to the detriment of consumer. Both rebates and mixed bundling exhibit a high degree of foreclosure potential and, contrary to predatory pricing, the foreclosure mechanism is neither simple nor always predictable. Since the Commission has already given its answer to cases of significant foreclosure effect in favour of competition, it would only make sense to apply the non-elimination of competition limit to the "as efficient competitor" defence as well. The Commission does so indirectly to some extent. Even in predatory pricing, which is pure pricing conduct, the Discussion Paper does not exclude a finding of abuse at prices even above average total cost (which is the general safe harbour for pricing practices) under exceptional circumstances.[111] Such circumstances are, among others, the existence of non-replicable advantages on the part of the incumbent or the importance of economies of scale, which allow for entry only below the minimum efficient scale. In such cases, the benchmark is not the cost of the dominant incumbent, but that of the newcomer.[112] In the field of rebates, where the "as efficient competitor" benchmark is also applied, the Commission recognizes their foreclosure potential and wishes to set a limit for the dominant undertaking, but the measure remains the average total cost of the dominant undertaking.[113] The same applies to mixed bundling, i.e. the offer of two products at a lower price as a bundle. The Commission considers it to be abusive only when "as efficient competitors" cannot survive in the market and the measure is again the cost of the dominant undertaking.[114] Remarkably this approach is more liberal than the approach of the US Court of Appeals for the 3rd Circuit in the case *LePage v 3M*[115], which held that the own cost rule is not enough to address the foreclosure potential of bundling.[116] The Commission is prepared to apply stricter rules when the dominant undertaking enjoys non-replicable advantages, but this exception seems to be too narrow.

Because of their additional foreclosure potential "mixed" pricing practices should be treated with more caution than pure pricing conduct. Therefore, the criterion of the "as efficient competitor" is not enough without the restriction that not all competition in the market be eliminated. The overall approach of the Discussion Paper shows that performance does not have priority in the eyes of the Commission over market structure in the long run and that no efficiency gains can justify the perpetual exclusion of competitors, even if the latter are less efficient. Thus it would be safer for the consumer in the long run if the law protected a small degree of even less efficient remaining competition, after having taken into consideration the ease

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[111] EUROPEAN COMMISSION, note 1, paras 127 *et seq.*
[112] EUROPEAN COMMISSION, note 1, para. 129.
[113] EUROPEAN COMMISSION, note 1, para. 156.
[114] EUROPEAN COMMISSION, note 1, para. 189.
[115] *LePage v 3M*, 324 F.3d 141 (3rd Cir. 2003).
[116] On the contrary similar to the Commission's approach was the decision of another federal Court of Appeals in *Cascade Health Solutions v PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

of entry in the specific market, as a guarantee that the efficiency gains from price reduction will be long-term.

10 Comparison with merger control

In fact the efficiency defence in Article 82 EC has much in common with the efficiency defence in merger control. The reasoning that led to its adoption there, the fear namely that a too rigid application of competition law in favour of competitive structure could be detrimental to consumer welfare is also in abuse of dominance applicable. It would be contradictory to accept it in the first case, but deny it in the second case. One should bear in mind one difference between the two rules though: in merger control the emphasis is placed on structural considerations, whereas in abuse of dominance the object of the examination is the behaviour of the dominant undertaking. It is unclear to what extent behavioural considerations may apply in merger control and to what extent the Commission can base its merger prohibition decision on the likelihood of future abusive conduct of the merged entity. The CFI stated that the merger examination should take account "only of conduct which would, at least probably, not be illegal"[117], but the ECJ overruled this statement, because such a requirement would be too restrictive for the powers of the Commission[118]. But surely behavioural considerations have a limited role (if at all) in merger control. With other words whereas in merger control the question is whether the external growth of one or more undertakings will lead to an impediment of competition or to an increase in efficiencies, in abuse of dominance the respective foreclosure or efficiency gain will be the outcome of unilateral conduct.

The practical aspects of this difference are twofold. On the one hand the efficiencies under consideration in merger control will mainly relate to economies of scale and scope, to cost savings due to growth, to specialisation or to minimum efficient scale required for a market[119], whereas in abuse of dominance the efficiencies under consideration will be more diverse. They will relate to conduct (mainly pricing schemes and distribution) and they will not necessarily be a result of the size of the undertaking. The undertakings will be able to invoke more kinds of efficiency within behavioural than within structural control (minimisation of search cost for consumers, better supply, quality improvements will be some typical defences for suspect conduct). In addition the efficiencies invoked will be less vague in general, since the conduct will have already taken place and the courts and authorities will have a better view of the situation in the market. In addition, they will be able to establish the trade-off between gains and losses for the consumer more on actual facts than on speculations. Naturally many efficiency claims will concern the future and some degree of speculation is expected, but they will still have to be more concrete than in the merger control procedure.

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[117] Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, para. 162.

[118] Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paras 75 *et seq*.

[119] For the kinds of efficiencies invoked in mergers *cf.* RÖLLER/STENNECK/VERBOVEN, "Efficiency Gains from Mergers", in: ILZKOVITZ/MEIKLEJOHN (eds), note 85, 84, 86 *et seq*.

The second aspect of the difference between merger control and abuse of dominance is that, whereas in merger control the aim is to avoid the emergence, if possible, of a dominant position, Article 82 EC comes in at a further stage, when the dominant position already exists. Allowing efficiency considerations to outweigh deterioration of market structure within merger control would lead to the emergence of a dominant position in most cases, whereas in abuse of dominance to the strengthening of an already existing one. In that sense Article 82 EC is the last recourse of the authorities, competitors and consumers to react to an exclusionary conduct and to protect competition in the market. It should be kept in mind that an already weakened market structure is a prerequisite for the application of Article 82 EC. As a result, underdeterrence within Article 82 EC will have more serious consequences than within merger control, since false negatives in merger control can be mitigated to some degree through future application of Article 82 EC.

11 Conclusion

Drawing a final conclusion on efficiency defence is not an easy task. The above analysis has shown that a more economic scrutiny of firm conduct is to the benefit of consumers, as long as one keeps in mind that some proxies and generalisations will always be unavoidable. This is because economics is not in a better position than law to offer a clear-cut answer as to the benefits and drawbacks of all forms of conduct and because a minimum of legal certainty and predictability are necessary for firms and consumers. As a matter of fact, the last two elements have an economic value of their own and this should be also taken into account during the application of competition law.

It should be pointed out that the most important issue is not the introduction of economic analysis but its content and orientation. Declaring market performance to the sole purpose of competition law is neither wise nor in accordance with the existing case-law. Limiting the criteria of unilateral conduct control only to price and output is a static approach to consumer welfare. The openness of markets is a guarantee for consumer welfare in the long run. The need for openness of markets shows us the limits of any efficiency defence: no efficiency gains can justify the durable exclusion of competitors no matter how high the gains for the consumer, because in the long run it is only competition that will ensure the efficient allocation of resources.

The proposals of the Commission in its Discussion Paper are in accordance with these findings. The application of Article 81 (3) EC by analogy is the best way to distinguish abusive from legitimate conduct. Whereas Article 81 (3) EC allows courts and authorities certain degree of flexibility in favour of economic efficiency, it includes the openness of the market criterion (non-elimination of all competition) and it ensures that for the same reason mere productive efficiency cannot justify exclusion of competitors (passing-on requirement). At the same time it is a rule with which courts, authorities and market participants are experienced with in the context of Article 81 EC.

The most important question with regard to efficiency defence is what changes its application in practice will bring. In reality there are already some decisions, in which the Commission undertook a thorough economic analysis and the results are rather encouraging. *Wanadoo*[120], *Microsoft*[121], *British Airways*[122], *Clearstream*[123], *AstraZeneca*[124] are all examples of adequately founded decisions based on sound economic analysis. In all those cases the thorough analysis did not benefit the dominant undertakings, whereas the Commission did not hesitate to protect the competitive structure and the openness of the market without confusing the protection of competition with that of the specific competitors. A drastic change in policy is not very probable; even the application of Article 81 (3) EC to those cases would not have lead to a different outcome, due to the condition of non-elimination of competition and to the passing-on requirement.[125] Especially in the *Microsoft* decision the Commission could have used the *IMS Health* case-law, in order to justify Microsoft's refusal to reveal the Windows interfaces to its competitors, but instead it chose the risky path of distinguishing. And with regard to tying the use of a rule of reason approach, which would have favoured an efficiency defence, did not change the outcome for Microsoft compared to the traditional per se approach; it just granted the prohibition decision more credibility. So it is only fair to entrust the Commission with the application of the conditions of Article 81 (3) EC within Article 82 EC without fearing a mutation of EC Competition law into Chicago School antitrust.

The only point which needs further clarification is the "as efficient competitor" test applied at pricing practices. This test seems to escape the strict limits of Article 81 (3) EC and needs to be further elaborated, because it disregards the fact that not equally efficient competitors can also contribute to consumer welfare in some cases. This is mostly in cases where the alternative is complete market foreclosure by one single monopolist.

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[120] European Commission, Case COMP/38.233 *Wanadoo Interactive*.
[121] European Commission, Case COMP/C-3.37.792 *Microsoft*.
[122] European Commission, Decision 2000/74/EC *Virgin/British Airways* [2007] OJ L 30/1.
[123] European Commission, Case COMP/38.096 *Clearstream*.
[124] European Commission, Case COMP/A. 37.507/F3 *AstraZeneca*.
[125] Or, to put it in the sharp words of an opponent of the passing-on requirement: "In short, requiring a market structure that insures that the efficiencies be passed along to consumers is a way of preventing consideration of an efficiency defense in most cases where it would make a difference", PITOFSKY, "Proposals for Revised United States Merger Enforcement in a Global Economy", (1992) 81 Geo. L.J. 195, 208.

From *Courage v Crehan* to the White Paper – The Changing Landscape of European Private Enforcement and the Possible Implications for Article 82 EC Litigation

Ariel Ezrachi

1 Introduction

This paper explores the developments which have shaped European private enforcement of competition laws to date. In addition, it considers the interplay between the proposed reforms of private enforcement in Europe and the recent discussion on Article 82 EC.

The paper is divided into four sections. It first considers the value of private action and sheds light on its significance to competition enforcement. Following this, it reviews the development of private enforcement in Europe. This discussion serves as the basis for the following section, which considers the main challenges for, and obstacles to, private enforcement in Europe. In the last part, this state of affairs is assessed in light of the recent developments related to Article 82 EC, to present a picture of its application in national courts.

2 The public value of private action

The use of competition law in national courts may generate public value by supplementing the public enforcement of competition law and enhancing its deterrent effect. As such it has an important role in sustaining a competitive economy by harnessing the private parties' economic interests to ensure the full effectiveness of competition rules. The European Court of Justice (ECJ) commented on the contribution of private enforcement to the promotion of public policies in *Van Gend en*

Loos, stating that "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted to the diligence of the Commission and of the Member States."[1] The public value of this complementary role was echoed in *Courage v Crehan*, where the ECJ held that the right to sue in damages strengthens the working of the Community competition rules and discourages agreements or practices … which are able to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."[2]

In addition to its supplementary role to public enforcement, private enforcement promotes the individual rights of parties by providing a channel for corrective justice through compensation and injunctive relief.[3] In doing so it complements the public system and safeguards the rights of private individuals in their relations with one another.

Competition law may be used in courts in one of two ways, either as a shield or as a sword.[4] The former refers to the use of Articles 81 and 82 EC as part of a defence claim, most commonly through the application of the civil sanction of nullity in Article 81(2) EC against claims for breach of contract.[5] The use of competition law as a sword commonly involves "actions for injunctive relief" or "claims for damages" for loss suffered as a result of an infringement of Article 81 or 82 EC. This more "active" use of competition laws in court has the potential to generate greater value in enforcement terms and is the main subject of this paper.

Actions for injunctive relief provide an attainable temporary relief for undertakings and enable them to bring an anticompetitive activity to a halt. As such, they supplement the public-enforcer powers and enable private parties to detect and stop competition violations that in most cases have not been subjected to public investigation. Their private and public value may well be illustrated in the context of Article 82 EC, as often the wish to claim damages is secondary to the desire to stop the alleged abusive behaviour.

Actions for damages are commonly divided to two categories, each carrying a different public value. The first category includes "follow-on" damage actions. These originate from a public investigation and use the authorities' decision to support the claim for compensation in court. By doing so, private parties overcome part of the risk and costs associated with litigating a competition case as they rely on the public funds and investigation power to substantiate the claim. The ability to ride on the competition agencies' decision increases the popularity of these actions. In the

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1 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

2 Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297, para. 27.

3 The use of European law by private parties to protect their individual rights has been long recognised; *see* for example: Case 127/73 *BRT v SABAM* [1974] ECR 51, para. 16, discussing the direct effect of Articles 81 and 82 EC.

4 Competition law may also come in front of the national court when it acts as public enforcer or as a review court.

5 In the context of Article 82 EC, *see* for example Case 127/73 *BRT v SABAM* [1973] ECR 51.

US, for example, these claims comprise the majority of antitrust litigation.[6] The second category concerns "stand-alone" damage actions. These by their nature are more complex, as they require the claimant to prove not only causation and damage but also the violation of competition law. These actions are understandably less common due to the risk and cost they carry and the difficulty of obtaining adequate information to substantiate the claim.

In "public value" terms, both categories of damage claims provide compensation to the injured party and increase the deterrent effect of competition laws. However, stand-alone actions generate a significant additional value, as they may bring to an end violations of competition law which were not detected by the public authority. As such they represent private enforcement at its best, as they provide not only for compensation and deterrence but also detect and put a stop to anticompetitive activities.

Against the benefits of private enforcement, one should acknowledge its potential drawbacks. These may result from the distorting effect of economic behaviour. Generally, public enforcement policies aim to provide an optimal level of deterrence and only discourage those actions that reduce social welfare. Arguably, private enforcement can, in certain circumstances, diverge from this, albeit theoretical, optimal position. This disparity becomes evident when one considers one of the main drivers of private enforcement, which is the profit motive. The focus on financial gain and the risk and cost of litigation are only some of the variables which affect the choice of cases for, and the outcome of, litigation. The public value obtained from litigation is therefore a by-product of private choice that can be offset by excessive litigation, unmeritorious claims and undesirable settlements.[7] The "wrong" choice of cases may result in "qualitative inferiority", as it affects not only the individual claim but also the ability of courts to develop and improve competition policy.[8]

The opportunistic angle of private claims may also lead to the use (or abuse) of competition law in court as a strategic tool to prevent pro-competitive efficiency improvement by rival firms.[9] In the context of dominance and private enforcement, it has been suggested that in highly concentrated markets, private action by a non-dominant firm against the dominant firm is more likely to strategically abuse competition laws than actions by dominant firms against a non-dominant firm.[10]

Consideration of public value, deterrence and welfare gain or loss, highlights the complexity in designing an optimal system of private enforcement. In what follows

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6 BAKER, "Revisiting History – What Have We Learned about Private Antitrust Enforcement That We Would Recommend to Others?", (2004) 16 Loyola Consumer Law Review 379, 382.

7 *See* generally: WILS, "Should Private Antitrust Enforcement be Encouraged in Europe?", (2003) 26 World Competition 473, 482; contrast with JONES, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", (2004) 27 World Competition 13.

8 BORK, "The Antitrust Paradox – A Policy at war with itself", 439 (1993).

9 MCAFEE/MIALON/MIALON, "Private Antitrust Litigation: Procompetitive or Anticompetitive?", Working paper 5-24 (2005), available at http://www.economics.emory.edu/Working_Papers/wp/mialon_05_24_cover.htm.

10 MCAFEE/MIALON/MIALON, note 9.

we consider the development of private enforcement in Europe and the challenges ahead.

3 The (under) development of private enforcement in Europe

Traditionally in Europe, both Articles 81 and 82 EC have infrequently been used in national courts. Consequently, the promotion and protection of competition in Europe has been the domain of the European Commission in its role as public enforcer. This state of affairs stands in sharp contrast to the United States, where private litigation constitutes more then 90 percent of antitrust cases.[11] The dissimilar use of private enforcement in the two jurisdictions has stimulated calls for reform in Europe, aiming to widen the use of competition laws in the national courts.

Before considering the recent debate on reforming private enforcement in Europe, it is worthwhile to explore the main developments to date at the *court* and *regulatory* levels. One can portray these developments by cherry-picking a number of milestones in each of these areas.

The use of preliminary references under Article 234 EC enabled the ECJ to take part in the shaping of private enforcement in Europe.[12] The leading decision in the context of private enforcement of competition laws has been the landmark case of *Courage v Crehan,* which led to the establishment of a European-wide right for damages in competition cases.[13] The facts of this case are well known and a brief overview should suffice.[14] Mr Crehan, a tenant in two Inntrepreneur pubs, was contracted, as part of his lease agreement, to purchase most of his beer from the brewer Courage. Courage sued Crehan in the English High Court for unpaid debt. Crehan, as part of his defence, contested the lawfulness of beer-tie arrangements and claimed that they infringed Article 81 EC. In addition, Crehan launched a counterclaim for damages, arguing, in essence, that the failure of his business and his inability to pay the debts originated from the tie arrangements. The case reached the Court of Appeal, which in turn referred it to the ECJ, asking among other things whether a co-contractor has a right to damages. In its decision, the ECJ commented on the existence of a Community right to damages and held that:

> "The full effectiveness of Article 85 EC of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) EC would be put at risk if it were

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[11] UK DEPARTMENT OF TRADE AND INDUSTRY, "Productivity and the Enterprise – A World Class Competition Regime", Cm.5233 (2001).

[12] In recent times the ECJ have had limited opportunities to comment directly on private enforcement, due to either the low number of referrals in this point or lack of admissibility. A future surge in private litigation would undoubtedly lead to an increase in Article 234 EC references and allow the ECJ to take part in the fine tuning of private litigation.

[13] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297.

[14] For a more detailed account *see* for example: JONES/BEARD, "Co-contractors, Damages and Article 81 EC: The ECJ Finally Speaks", (2002) 23 E.C.L.R. 246; ANDREANGELI, "Courage v Crehan and the Enforcement of Article 81 EC Before National Courts", (2004) 25 E.C.L.R. 758.

> not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[15]

The Community right was subjected both to national rules of unjust enrichment and rules that bar an undertaking that bears significant responsibility for the distortion of competition from obtaining damages from the other contracting party.[16] Additionally, the ECJ acknowledged that the respective bargaining power and conduct of the two parties to the contract as well as the economic and legal context in which the parties find themselves should be considered by the national court. The judgment was praised, not only for the establishment of a clear Community right in damages, but chiefly for pushing forward the private litigation agenda and giving greater effectiveness to European competition law.[17]

It is interesting to note the latest and final development in the Crehan saga, which took place in the House of Lords. Following the ECJ judgment, the Crehan case was remitted to the English High Court for a full trial that was heard in 2003. The High Court considered the damage claim but found that in this case the beer-tie agreement did not make it difficult for competitors to enter the market and therefore did not infringe Article 81 EC. This finding was particularly interesting, as it departed from an earlier finding of the Commission that concerned similar beer-tie arrangements. The court distinguished between the case at issue and the other Commission decisions on the grounds that the cases involved different parties and different arrangements. Crehan appealed the decision to the Court of Appeal, arguing that the High Court was bound to accept the Commission's factual conclusions on similar beer-tie agreements. The case reached the House of Lords, which considered the extent to which the Commission's factual assessment of the UK beer market bound the national court.[18] The House of Lords clarified that the national court cannot depart from a Commission finding that concerns the same subject matter and the same parties. However, where the Commission decision concerns a different subject matter arising between different parties, it does not bind the national court. In such cases the decision serves as evidence and provides important and persuasive facts, but does not require the national court to follow it. Lord Hoffman referred to the jurisprudence of the ECJ, and stated that:

> "It is clear that the duty to avoid conflicting decisions, as stated by the Court of Justice in the two leading cases of *Delimitis* and *Masterfoods*, has no application to the present case. There is no possibility of conflict, in the sense discussed in those cases, between a decision of the Commission that the Whitbread agreements infringed Article 81 EC and a decision of the national court that the Inntrepreneur agreements did not …"[19]

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[15] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, para. 26.
[16] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, paras 29-32.
[17] JONES/BEARD, note 14; ANDREANGELI, note 14.
[18] *Inntrepreneur Pub Company (CPC) and others v Crehan* [2006] UKHL 38.
[19] *Inntrepreneur Pub Company (CPC) and others v Crehan* [2006] UKHL 38, para. 56.

He then continued, referring to Article 16 Regulation 1/2003,[20] and stated that:

> "this article makes it clear that a relevant conflict exists only when the 'agreements, decisions or practices' ruled on by the national court have been or are about to be the subject of a Commission decision. It does not apply to other agreements, decisions or practices in the same market."[21]

Some may argue that the House of Lords merely acknowledged the legal position as reflected in Regulation 1/2003. Others may see the judgment as cementing a new balancing point which requires less conformity between courts and the Commission. On a practical level, claimants who seek to rely on a Commission decision in comparable circumstances risk having the national court reject the Commission's analysis. Subsequently, parties may have to adduce evidence beyond the Commission's decision to support its finding. The limited reliance on the Commission's analysis might also lead to inconsistency in national courts' findings related to similar agreements in the same market. Such potential inconsistency may have an adverse effect on legal and business certainty and on the motivation to launch an "indirect" follow-on claim in the first place.

Returning to the ECJ level, it is interesting to note another derivative of the *Crehan* judgment. In the case of *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni*[22] the ECJ reaffirmed that the right in damages extends to third parties. In this case the Italian court referred to the ECJ questions on the interpretation of Article 81 EC that arose in connection with claims against insurance companies for the repayment of excessive premiums. The case at the national court followed a decision by the Italian competition authority which found the insurance companies to infringe competition laws by, among other things, exchanging information and coordinating prices. The ECJ reaffirmed that third parties who have a relevant legal interest may claim damages where there is a causal relationship between the prohibited agreement or practice and the harm suffered.[23] It thus echoed its earlier words in *Courage v Crehan*:

> "As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals."[24]

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[20] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

[21] Inntrepreneur Pub Company (CPC) and others v Crehan [2006] UKHL 38, para. 64.

[22] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

[23] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, paras 59-64.

[24] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, para. 25; also *see* opinion of AG Geelhoed, Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619, para. 56; Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, para. 89.

Another decision which is noteworthy in the context of this paper is the ECJ judgment in *GT-Link A/S v De Danske Statsbaner* (DSB).[25] In this case the ECJ clarified the duty of a dominant undertaking to compensate those who were abused by its practices. The case was referred to the ECJ from the Danish court, which asked, among other things, whether the state-owned railway company was liable to compensate a ferry operator which was arguably subjected to abusive charges. The ECJ reaffirmed that Article 82 EC has direct effect and confers on individuals rights which the national court must protect.[26] It further established that national procedural rules concerning the burden of proving the conditions of Article 82 EC should not "render virtually impossible or excessively difficult the exercise of rights conferred by community law".[27] The judgment focused on a public undertaking, yet it arguably establishes that a requirement of proof that would make it impossible or excessively difficult to prove a breach of Article 82 EC is incompatible with Community law.[28]

To these developments at the *court* level, one should add the major developments at the *regulatory* level in recent years. The introduction of Regulation 1/2003 (the Regulation) led to a turning point in the division of powers and responsibilities between the Commission, national courts and national competition authorities. The Regulation decentralised the enforcement of competition law in the Community while strengthening the Commission's investigation powers. Noteworthy in the context of private enforcement are the provisions in Article 1, which provide for the full and direct application of Articles 81 and 82 EC at national level, and the provisions in Article 3, which govern the relationship between national and EC competition laws. Also noteworthy are the provisions in Article 15, which refer to the cooperation between national courts and the Commission and those in Article 16, which ensure a uniform application of Community competition laws.[29]

As part of the modernisation package, the publication of Regulation 1/2003 coincided with the release of several notices. One of them, namely the notice on the cooperation between national courts and the Commission, is of particular importance for private enforcement.[30] The notice details the mechanism which governs the cooperation between Commission and courts and reiterates the relevant case law. Although not binding on the courts, it establishes the known framework for the

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[25] Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4349.

[26] Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4349, para. 57.

[27] Note that in the absence of Community rules governing a matter, it is for the domestic legal system to lay down the detailed procedural rules governing actions for safeguarding the rights that individuals derive from the direct effect of Community law. Accordingly, "such rules must not be less favourable than those governing similar domestic actions or render virtually impossible or excessively difficult the exercise of rights conferred by Community law". Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4349, para. 24.

[28] Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4349, paras 25, 26; *see* also the opinion of AG Jacobs Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4085, paras 175, 176.

[29] Regulation 1/2003, Article 16; also *see* regulation 1/2003, Article 6 and recital 7.

[30] European Commission, Notice on Cooperation between National Courts and the European commission in Applying Articles 81 and 82 of the EC Treaty, [1993] OJ C39/6.

application of Articles 81 and 82 EC. Another notice that is relevant for the discussion of private enforcement is that on the handling of complaints under Articles 81 and 82 of the EC Treaty.[31] This notice includes comments that further highlight the Commission's desire to promote private action under the new legislative framework. In it, the Commission states that it holds the view that "the new enforcement system established by Regulation 1/2003 strengthens the possibilities for complainants to seek and obtain effective relief before national courts".[32] The Commission further refers to the complementary role of private enforcement and states that "the fact that a complainant can secure the protection of his rights by an action before a national court, is an important element that the Commission may take into account in its examination of the Community interest for investigating a complaint."[33]

Regulation 1/2003 and its derivatives have contributed to stimulating private enforcement in Europe, yet at a much slower pace then some, including the Commission, had anticipated. Despite the removal of some of the obstacles to private enforcement, the modernisation package did not lead to a meaningful surge in competition litigation. As a result, the Commission has been unable to refocus its enforcement resources as it had hoped.

Three main publications shed light on the obstacles which allegedly hamper private enforcement in Europe. The Ashurst Study, which was published in August 2004, provided a detailed account of the state of private litigation in Europe and identified the main obstacles and possible ways to overcome them.[34] It portrayed a gloomy picture of the state of damage actions in Europe and described it as one of "astonishing diversity and total underdevelopment".[35] The study was widely accepted as an important step in the quest to stimulate private enforcement in Europe, although its conclusion of "total underdevelopment" was criticised by some as being overly pessimistic.[36] In December 2005, the Commission initiated a consultation process following the publication of a Green Paper[37] and a Staff Working Paper[38] on

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[31] European Commission, Notice on the Handling of Complaints under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65.

[32] European Commission, Notice on the Handling of Complaints under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65. para. 18.

[33] European Commission, Notice on the Handling of Complaints under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65, para. 17.

[34] WAELBROECK/SLATER/EVEN-SHOSHAN, "Study of the Conditions on Claims for Damages in case of Infringement of EC Competition Rules, Comparative Report", 1 (2004), available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf (hereafter referred to as the ASHURST STUDY).

[35] ASHURST STUDY, note 34, 1.

[36] *See* for example THE EUROPEAN COMPETITION LAW FORUM, "Comment on the Ashurst Report", (2004) (file with Author) which includes comments and moderate criticism on the ASHURST STUDY, note 34.

[37] EUROPEAN COMMISSION, "Green paper damages actions for breach of the EC antitrust rules", COM(2005) 672 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html;

[38] EUROPEAN COMMISSION, "Staff working paper – annex to the green paper damages action for the breach of EC antitrust rules", SEC(2005) 1732, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/sp_en.pdf.

antitrust damages actions. In the paper the Commission highlighted the significance it attributes to the development of private enforcement as a means to promote vigorous competition on an open market. The paper stimulated wide-ranging debate on the obstacles to, and future of, private enforcement. This consultation led to the publication, in April 2008, of the White Paper on Damages Actions for Breach of the EC Antitrust Rules.[39] The White Paper, accompanied by a Staff Working Paper and a detailed impact assessment study,[40] outlines the measures which the Commission suggests in order to stimulate a balanced private enforcement regime which would complement its public enforcement. These proposals and the obstacles they address are discussed below.

4 Obstacles, challenges and proposed reforms[41]

In the Green Paper on antitrust damages actions the Commission identified the main obstacles to a more efficient system of damages claims and invited comments from the various stakeholders. Issues identified included the access to evidence and documents, the calculation and quantification of damages, the availability of the passing-on defence, the cost of private action and the interplay between public and private enforcement.[42]

The Green Paper stimulated the already existing debate on the future role of private enforcement in Europe.[43] It proposed a range of measures, some far reaching, to stimulate private enforcement. By comparison, the recently published White Paper advances a more conservative package of reforms. This, although disappointing in some respects, is a reflection of the Commission's attempt to design a balanced reform package which would face less resistance at national level. The following discussion does not seek to summarise the debate and recommendations but to extract a few key features that highlight the range of difficulties and policy considerations relevant to the subject.

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[39] EUROPEAN COMMISSION, "White paper on damages actions for breach of the EC antitrust rules", COM(2008) 165 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf.

[40] EUROPEAN COMMISSION, "Commission staff working paper – accompanying the white paper on damages action for the breach of EC antitrust rules", SEC(2008) 404, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

[41] This chapter was written prior to the European Commission's publication of the White Paper on Antitrust Damages Actions. References to the White Paper were inserted prior to publication of the book and are therfore limited in nature.

[42] EUROPEAN COMMISSION, note 37; EUROPEAN COMMISSION, note 38.

[43] The comments on the Green Paper are available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html.

4.1 Unlevel playing field

Regulation 1/2003 promoted a consistent application of competition laws throughout Europe. This consistency, however, does not extend to the procedural aspects of litigation. These aspects, which govern the enforcement of competition law in courts, remain the preserve of the various member states and vary from one to another.[44] As one would expect, member states often have different philosophical approaches to litigation and compensation, a fact that is reflected in their procedural culture and provisions. This proliferation creates an unlevel playing field for private litigation, as the procedural differences affect the rules of discovery, use of evidence, burden of proof, class actions etc. These differences also affect legal and business certainty and increase the attractiveness of forum shopping in Europe.[45]

More generally, the range of philosophical approaches and the differences between common law and civil law jurisdictions make it harder to reach agreement on procedural reform. In the quest for more effective private enforcement, these difficulties shift part of the focus to less contentious areas, where European-wide reform *is* plausible.

4.2 Damages for breach

As highlighted above, the award of damages provides not only for corrective justice and motivation for private parties to make claims, but also increases the deterrent effect of competition laws and curtails anticompetitive activity. Subsequently, the level of damages, being single, double or treble, affects the incentive to launch a private claim as well as having the deterrent effect.[46] On the premise that a high level of damages would stimulate private enforcement, a possible shift from a compensatory to a punitive approach has been suggested. Such is the approach in the US, where a system of treble damages provides an effective, albeit controversial, engine for private enforcement.

On balance, it seems that many would agree that the US system, despite resulting in large volumes of claims, has generated limited public value. This conclusion stems from the premise that the punitive US approach resulted in excessive litigation and unmeritorious claims. It failed to stimulate a large number of stand-alone claims and mostly involved follow-on litigation.[47] It further introduced an imbal-

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[44] EUROPEAN COMMISSION, note 37, 4.

[45] See for example Roche Products Ltd v Provimi Ltd [2003] EWHC 961.

[46] The punitive approach may affect the effectiveness of public programmes of leniency. *See* the US approach, which supports the amnesty programme by making the successful applicant liable for single damages only: US 2004 Antitrust Criminal Penalty Enhancement and Refund Act & the US Standards Development Organization Advancement Act (HR 1086, 108th Cong. (2003)); *see* the European Commission proposal in the Green Paper which address issues of disclosure and conditional rebate, EUROPEAN COMMISSION, note 37, options 28-29.

[47] BAKER, "Revisiting History – What Have We Learned about Private Antitrust Enforcement That We Would Recommend to Others?", (2004) 16 Loyola Consumer Law Review 379, 381.

ance between claimants and defenders and fuelled the popularity of out-of-court settlements.

In Europe, there seems to be a consensus that punitive damages are only adequate in exceptional cases, if at all. Steering away from the pitfalls of the US system, the Green Paper, in one of the options it put forward, proposed a punitive element in the form of double damages in the case of horizontal cartels.[48] Such selective punishment, although controversial, may indeed be justified, especially when dealing with the most blatant violations of competition law. On the other hand, one might question the merit of such approach and its usefulness in increasing deterrence, compensation or the incentive to sue. If deterrence is the aim, then arguably the public enforcer could achieve this through fines without resorting to a punitive approach at the private level. Similarly, if compensation is the aim, then a compensatory base should suffice. As to the increased incentive to sue, one should note that in Europe the calculation of damages in national courts includes the award of interest on the principle sum.[49] The inclusion of pre-judgment interest generally results in a similar level of compensation as the US-style treble damages.[50] Accordingly, the lack of double or treble damages in Europe does not necessarily act as a disincentive to sue.

The Commission, being aware of the risk of creating an over incentive to claim and the limited likelihood of such reform being accepted, did not pursue a punitive system in the White Paper and left the measure of damages unchanged. To ensure full compensation of the loss suffered, the Commission proposed to codify the current legal position in a Community legislative instrument.

It is worthwhile noting that punitive damages were never considered in the context of Article 82 EC. It is indeed widely accepted that punitive damages are not appropriate in cases of abuse of dominance. The reason being that the application of Article 82 frequently involves complex economic analysis and uncertainty as to the existence of abuse or even dominance. Consequently, punitive damages would amplify existing uncertainty and risk chilling competition.

4.3 Passing-on defence

Linked to the issue of damages is the question of standing of claimants. In other words, who may sue in damages? This, in turn, is entwined with the use of the passing-on defence in competition cases. This defence excludes a claim for damages where goods and services have been re-sold by the claimant, passing on all or some

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[48] European Commission, note 37, option 16.

[49] For detailed discussion on the impact of pre-judgment interest *see*: JONES, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", (2004) 16 Loyola Consumer Law Review 409, 422.

[50] In the US, the Sherman Act does not provide for pre-judgment interest. PARKER, "Treble Damage Action: A Financial Deterrent to Antitrust Violations", (1971) 16 Antitrust Bull. 483; PARKER, "The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy", (1973) 3 N.M.L.Rev. 286; For detailed discussion on the impact of pre-judgment interest *see*: JONES, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", (2004) 16 Loyola Consumer Law Review 409, 422.

of the losses inflicted from the anticompetitive activity down the supply chain to indirect purchasers. In doing so, it follows the loss and seeks to compensate the injured party.

Accepting such defence in court prevents the claimant from recovering the full overcharge after having passed it down the distribution chain. Such approach, albeit justified in compensatory terms, generates complexity, as it fragments the claim and raises questions regarding causation and the distribution of damages along the supply chain. In addition, it dampens the incentive to launch a claim, as direct purchasers may face uncertainty as to the level of recovery. At the same time, indirect purchasers may lack incentive to sue when the cost of litigation outweighs the damage they have absorbed or in cases where causation is difficult to establish.

Conversely, prohibiting the defence stimulates private enforcement and simplifies the calculation of damages. The US stance, as evident in *Hanover Shoe*[51] and *Illinois Brick*,[52] prevents such defence claims[53] while depriving indirect purchasers of compensation in federal courts.[54] Such an approach, although effective in stimulating claims, is not easily justifiable in compensatory terms, as the party who passed on the loss benefits from the claim and the indirect purchasers are by and large impeded from obtaining compensation.[55] In addition, in the European context, the exclusion of indirect purchasers seems to stand in contrast to the ECJ approach in *Crehan*, which seeks to provide redress to all individuals who have suffered loss.[56]

The Green Paper put forward several options to tackle these difficulties, none of which is problem free.[57] In the White Paper the Commission refers to the ECJ ruling in *Manfredi*[58] and clarifies that all those who are harmed by an infringment of European Competition laws are entitled for full compensation. With respect to passing-on defence the White Paper proposes that defendants should be able to invoke the passing-on defence and that indirect purchasers should be able to rely on a rebuttable presumption that the overcharge passed to them in its entirety.[59]

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[51] *Hanover Shoe Inc v United Shoe Machinery Corp*, 392 US 481 (1968).

[52] *Illinois Brick Company v Illinois*, 431 US 720 (1977).

[53] *Hanover Shoe Inc v United Shoe Machinery Corp*, 392 US 481 (1968).

[54] Accordingly, only direct purchasers can bring a federal suit under Section 4 of the Clayton Act. The Court permitted the creation of State based causes for action for indirect purchasers in *California v ARC America Corp*, 490 US 93 (1989). This duality may result in double recovery at federal and state levels and lead to injustice and over-deterrence.

[55] *See* Case C-68/79 *Hans Just v Dutch Ministry of Fiscal Affairs* [1980] ECR 501, where the court referred to unjust enrichment of claimants.

[56] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297.

[57] *See* for example the comment by the International Bar Association which highlights the difficulties each option carries: IBA ANTITRUST COMMITTEE, "Submission Regarding the European Commission's Green Paper on Damages Actions for Breaches of EC Antitrust Rules", 18 (2006).

[58] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

[59] EUROPEAN COMMISSION, note 39, 8.

4.4 Cost-risk

The cost-risk associated with litigation acts as a significant gatekeeper to private action. In this respect it is interesting to note the policy considerations that may affect decisions to change the rules governing the award of costs in trial. On one hand, the award of high defendant costs against the unsuccessful claimants lowers the incentive to launch such claims and arguably holds back the litigation of novel or complex claims.[60] On the other hand, lower cost-risk may increase the incentive to litigate and facilitate opportunistic, unmeritorious claims. Aiming to strike a balance between incentive and disincentive, the Green Paper put forward a proposal under which the court should only award costs against the unsuccessful claimant in cases where the claimant acted in a manifestly unreasonable manner in bringing the case.[61] Indeed, such a rule could limit unmeritorious claims while increasing the incentive to bring private actions. Still, one may question the justification for such a rule that applies to competition cases but not to other areas of law. Would member states accept such an overriding principle? And if so, how likely is it to be consistently implemented in all jurisdictions? In the White Paper the Commission refrained from proposing a pan-European rule on the subject and limited itself to proposing that Member States reflect on their rules governing costs, with the view of facilitating damage claims.

It is worth noting that a change with respect to the award of costs in trial is likely to have a significant impact on future volume of litigation. It therefore cannot be considered in isolation and needs to be balanced against other reforms which may affect the incentive to litigate. For example, in the context of cost-risk assessment, it should be considered together with proposals for introduction of contingency fees. These fee arrangements entitle the lawyer to a share of the claimant's damages, if awarded, and may facilitate competition claims. The US experience with the effect of these fee arrangements has been somewhat negative. These fee schemes have often resulted in excessive litigation as lawyers promote unmeritorious clams as part of a "portfolio of cases" in hope of occasional profit. More limited schemes such as "no-win-no-fee" might be more appropriate in offering a balanced incentive, although they also risk encouraging litigation, rather than competition culture.[62]

High cost-risk serves as a major deterrent to unwarranted litigation, yet as highlighted above it may also result in the loss of meritorious claims. In the context of Article 82 EC, it is interesting to note that high cost-risk and losers-pay principles

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[60] It is interesting to note that the *Courage v Crehan* case has not been litigated under the common English "loser pays" rule, but supported by legal aid due to its significance. Arguably, it is this feature which allowed the case to be tried, since under "loser pays" rules the costs and uncertainty would have curtailed the incentive to sue. *See* BAKER, "The EU Green Paper on Private Damage Actions – An Ambitious Response to a Very Difficult Set of Practical and Philosophical Issues", (2005) Comp Law 1, 5.

[61] EUROPEAN COMMISSION, note 37, option 27.

[62] On the merit of conditional fees *see* for example DCA, "Conditional Fees: Sharing the Risks of Litigation", (1999) CP 7/99; Also *see* UK Courts and Legal Services Act 1990, Section 58(3).

may further tilt the balance in favour of the deep-pocketed dominant undertaking. When entwined with uncertainty as to the ability to substantiate a claim of abuse and with the overall cost of litigation, it may affect the volume and nature of claims and lead to a suboptimal position.

4.5 Group actions

Class or collective actions may alleviate some of the costs and obstacles mentioned above by providing wide access to courts. In addition, through their inclusiveness and aggregated nature they increase the deterrent effect. These actions do however raise several difficulties with respect to distribution and quantification of damages and, more generally, questions of standing and effectiveness.[63]

In the US, class actions attract criticism mainly due to their alleged opportunistic nature and ineffectiveness.[64] In many cases they involve transaction costs that outweigh their benefit. Similarly, it is questionable to what extent these actions benefit the class members, as agency problems may affect the real value of the compensation scheme. The combination of class actions, contingency fees and punitive damages is arguably one of the elements contributing to the excesses in the US system.[65] This excess arguably also results in weak claims being settled outside of court, as corporate defendants cannot risk the outcome of a large and well-publicised class action.[66]

Throughout Europe, different variants of class actions have been introduced as part of the quest to increase access to justice. Many member states have class-action-type mechanisms in the form of "group litigation" or "representative actions".[67] Recognising the controversy class actions may generate in Europe, the Commission has proposed in the Green Paper two paths for Europe-wide group action. The first concerns the creation of cause of action for consumer associations without depriving individual consumers of the ability to bring an action.[68] The second proposes the creation of special provisions for collective actions by groups of purchasers other than final customers.[69] The White Paper acknowledges the need to facilitate collective redress by aggregating individual claims. For this purpose it put forward two complementary mechanisms; representative actions brought by qualified entities and opt-in collective actions in which victims agree expressly to join a single action.

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[63] The customer interest is dealt with by CACHAFEIRO, "The Role of Consumer Associations in the Enforcement of Article 82 EC", published in this volume.

[64] Being driven by economic interests, these actions tend to promote litigation rather than competition, and often result in out-of-court settlements, as the defendants wish to limit their risk exposure.

[65] ASHURST STUDY, note 34, 5.

[66] WILLET, "US Style Class Actions in Europe – A Growing Threat?", Volume 9/6 National Legal Center, 5 (2005).

[67] WILLET, "US Style Class Actions in Europe – A Growing Threat?", Volume 9/6 National Legal Center, 5 (2005).

[68] EUROPEAN COMMISSION, note 37, option 15.

[69] EUROPEAN COMMISSION, note 37, option 26.

Reflecting on group actions in the context of Article 82 EC, it is interesting to note that in the US class actions have predominantly been used as follow-on actions. This, to some extent, shifts the focus to European competition agencies and the number of Article 82 EC decisions they reach. In other words, the public-enforcer focus on Article 82 cases is likely to affect the number of follow-on Article 82 group actions.

4.6 Access to, and use of, evidence

Restricted access to evidence may prevent a claimant from establishing a solid stand-alone competition case. It may also undermine the ability to establish causation and quantum in both stand-alone and follow-on claims. On the other hand, a too permissive discovery regime may encourage "fishing expeditions" and inflict unjustified burdens and excessive costs on the defending party.

Effective discovery rules are essential to substantiate a competition claim. The Green Paper proposed a set of options aimed at facilitating access to evidence.[70] The options differ in the threshold which prompts disclosure of documents and in the nature of evidence provided. The consultation in this area is interesting, as proposals to change the national status quo for disclosure are controversial. At the philosophical level, one may question whether disclosure in competition cases should differ from other national rules of procedure. At a more practical level, differences in approach to disclosure between common and civil law systems may be difficult to bridge.

Linked to the question of discovery of documentary evidence in civil procedure is the question of the access to documents held by the competition authority. Here as well, the Commission has considered the option of facilitating access to documents held by the competition authority. Permissible rules on access to evidence would facilitate follow-on claims. Such rules may especially be justifiable if the discovery regime in civil procedure is limited. On the other hand, such rules may undermine leniency procedures and would have a notable impact on the ratio between stand-alone and follow-on claims. In the White Paper the Commission proposes to facilitate access to evidence by establishing a minimum level of discovery which would apply in all Member States. Access to evidence, it is proposed, should be based on fact pleading and strict judicial control.

5 The interplay between private enforcement and Article 82 EC

The discussion so far has focused on the development of, and obstacles to, private enforcement and the public value it may generate. Changes in each of the areas mentioned above may tilt the balance of incentives and should be considered as part of an overall package of reforms and not in isolation. Indeed, the debate so far has been characterised by such careful consideration, aimed at avoiding future excessive litigation.

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[70] EUROPEAN COMMISSION, note 37, options 1-5.

It is interesting to continue this value examination while considering the interplay between Article 82 EC, an "effect-based approach" and private enforcement. To do so, the following discussion will briefly consider the contact points between private enforcement and Article 82 EC in damage claims, injunctive relief and out-of-court settlements.[71]

5.1 Damage claims

The volume and quality of Article 82 EC damage claims and the potential public value they may generate depend on three main variables: the jurisprudence dealing with Article 82 EC, the economic literacy of national courts and the reform of private enforcement.

First, the clarity of Article 82 EC jurisprudence is of paramount importance for its application in court. A move toward an economic-based approach in Article 82 EC analysis is welcome, as it strengthens the economic integrity of the analysis and avoids chilling competition through excessive intervention. Yet, such an approach potentially carries with it added complexity with respect to the establishment of dominance, abuse and consumer harm and the use of objective justification as a defence. As private enforcement exhibits a low tolerance for complex cases, much depends on the clarity of Article 82 EC jurisprudence and guidelines. The latter, although not binding on the national courts, serve as a valuable source of reference and are likely to impact on the scope of analysis in national courts. Of similar importance is the Commission's ability to develop consistent jurisprudence in its decision making.

A second variable which is linked to the substantive analysis is the national court's capacity to engage in economic analysis and the assessment of "consumer harm". The enlarged union comprises at present of national courts that substantially differ in their experience in the analysis of competition cases and the related economic investigation. The use of Article 234 EC references and the ability to appeal the court's decision only partially cure the risk of inadequate decisions. This dissonance may lead to divergent interpretations of, and rulings on, Article 82 EC cases which are based on the effect based approach. Such inadequacy may give rise to legal uncertainty, costs and risks and may trigger forum shopping, as claimants seek to bring their claims in a forum that they perceive as better suited for their purposes.[72]

Lastly, the outcome of the current private-enforcement consultation and proposals and their impact on costs and complexity of litigation will affect the incentive to launch Article 82 EC damage claims in court. Possible changes to rules

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[71] Several chapters in this collection deal in detail with the practical issues surrounding the application of Article 82 EC in court. The discussion in this chapter is therefore limited to more general themes.

[72] Such a decision may be based on cost, risk, disclosure provisions and other procedural and substantive provisions. It may also be affected by the type of abuse, the position of the dominant from and the injured party, transfer of wealth between jurisdictions and the risk of populist decisions.

concerning access to evidence, costs, burden of proof and group actions are only some of the elements that will shape the future landscape of European private enforcement. A reduction in cost and risk is likely to lead to a greater volume of litigation, a portion of which will in all likelihood involve Article 82 EC litigation. Such development may however be hampered by inadequacies with respect to the first and second variables.

Indeed, shortcomings in one or more of these variables are likely to tilt the balance of incentives against Article 82 EC stand-alone claims and in favour of follow-on claims.[73] This may be the case when claimants aim to neutralise shortcomings in one of these variables and reduce the complexity and costs of proving competitive harm in court by shifting most of the focus of litigation to the calculation and quantification of damages. In terms of public value, such a situation is suboptimal, because follow-on claims ride on the public authorities' decisions that have already established the abuse and brought it to a halt.

The attainment of this (albeit reduced) public value in follow-on claims depends to a large extent on the number of Article 82 EC public decisions on which the claimant may rely. Yet, the Commission has frequently stated that as part of the modernisation of enforcement it wishes to refocus its resources on fighting cartel activity in Europe. The leniency procedures have notably contributed to the success of this agenda. Similar agendas have also shaped the work of the national competition agencies. Naturally, a limited number of Article 82 EC decisions would yield relatively limited follow-on (Article 82 EC) litigation.

At the procedural level, one could increase the volume of such claims by facilitating follow-on claims across Europe. An extension of the rationale of Article 16 Regulation 2003 to decisions of national competition authorities could achieve this result. Such extended rule that provides for follow-on claims based on final decisions of competition authorities of all other member states of the European Community can already be found in the German regime.[74] Similar provisions have been considered in the Green Paper and proposed in the White Paper.[75] Such rule would facilitate follow-on claims, yet some member states may be reluctant to implement this broad model due to the limited public value it may generate in comparison to the negative effects it might have on the right of individuals to a fair trial.

5.2 Injunction

As mentioned earlier, although actions for injunctive relief were not the centre of recent public debate on private enforcement, they serve a valuable purpose in bring-

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[73] In addition, they may have an impact on the quality of claims, leading parties to focus on clear forms of abuse and avoid more complex and innovative claims.

[74] Section 33(4), German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB).

[75] *See* EUROPEAN COMMISSION, note 37, option 8; *also see* short comment by KROES, "Damages Actions for Breaches of EU Competition Rules: Realities and Potential", Paris, 17 October 2005, available at http://ec.europa.eu/commission_barroso/kroes/speeches_en.html.; Also see EUROPEAN COMMISSION, note 39, 6.

ing to an end alleged abusive behaviour, pending trial on the substantive issues. In the context of Article 82 EC, injunctive relief may be used, among other things, to contest limitations imposed by the dominant undertakings, including limitations on the use of intellectual property rights, and to provide access in cases of refusal to supply or deal.[76] The noticeable public value of such actions is in their ability to bring to a halt abusive behaviour that has not been the subject of a public investigation. Most interim injunction proceedings in Europe require a standard of proof that is lower than in proceedings on the merits. Relief is therefore more easily attainable in these cases then in claims for damages, as long as other conditions such as urgency or inadequacy of damages are fulfilled.[77] The lower standard of proof eases, to some extent, some of the difficulties mentioned above with respect to the three variables; Article 82 EC jurisprudence, the economic literacy of national courts and the reform of private enforcement.

5.3 Out-of-court settlements

The cost of litigation and the risk it carries affect the number of cases brought to trial and the use of out-of-court settlements. These settlements enable the *claiming party* to use the court proceedings as a starting point for the negotiation of a financial resolution, thus avoiding the cost and risk of litigation. The *defending party* may favour these settlements for similar reasons as well as for their confidential nature. In the United Kingdom, for example, despite the availability of damages in court, relatively few cases have actually reached the stage of trial and judgment.[78] A recent study that reviewed the tried cases in which competition-law issues have arisen in private litigation in the UK courts reported a notable limited use of Article 82 EC in court.[79] On the other hand, the use of Article 82 EC in out-of-court settlements has been more frequent. In the UK these settlements have reportedly been rather common and resulted in payment of significant damages.[80]

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[76] *See* generally: ROBERTSON, "Litigating Under the Competition Act 1998: The Early Case Law" (2002) Comp Law 335, 337.

[77] "The level and way of expressing the requisite standard of proof in injunction proceedings varies between Member States although many use terms such as probability (e.g. Cyprus (reasonable probability), Denmark, Germany, Greece, Luxembourg, Poland), *prima facie* case (e.g. Austria, Italy, Malta) or serious question to be tried (e.g. Ireland, UK) …", ASHURST STUDY, note 34, 55.

[78] COLLINS, "Public and private enforcement challenges and opportunities", speech, the Law Society's European Group, 6 June 2006, available at http://oft.gov.uk.

[79] RODGER, "Competition Law Litigation in the UK Courts: A Study of all cases to 2004", (2006) 27 E.C.L.R. 241, (2006) 27 E.C.L.R. 279, (2006) 27 E.C.L.R. 341; according to the study, during the 1980s and 90s, Article 82 EC has been used mainly as a Euro defence, for the most part unsuccessfully and mostly in cases involving intellectual property rights. From 2000 until the end of 2004 there have been no pure Article 82 EC cases successfully tried in the UK.

[80] *See* THE EUROPEAN COMPETITION LAW FORUM, note, 36. *Also see* ASHURST STUDY, note 34, 1; ROBERTSON, "Competition Litigation in the Courts – Recent Cases", (2006) Comp Law 5, 16; RODGER, "Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005", (2008) 29 E.C.L.R. 96.

Settlements, therefore, represent a significant part of private enforcement that is not completely processed through the official court, or agency, pipeline. Being mostly confidential, these agreements yield limited public value in terms of both result and impact. Still, their nature and outcome are directly derived from the procedural and substantive laws governing private enforcement. In other words, the alterative cost, namely the price and risk tags of court litigation, influence the economic and legal integrity of these settlements. Shortcomings in one or more of the three variables mentioned above would increase this alterative cost, allowing manipulations and opportunism, rather than competition law, to set the tone of out-of-court settlements.

6 Concluding remarks

The changing landscape of private enforcement in Europe is affected by developments at both member-state and European level. The recent debate and recommendations are expected to push forward the role national courts play in enforcing competition law and foster a competition culture throughout Europe. The extent of such developments and the benefits they may yield are uncertain. The public value depends on providing a balanced set of incentives that would facilitate the use of competition law while preventing excessive litigation and over-deterrence. It also depends on whether national courts would act as competition enforcers, through stand-alone actions and injunctive relief, or would focus on follow-on claims. The latter, although being less desirable in value terms, is more easily attainable and likely to dominate the scene.

In the context of Article 82 EC, this paper highlighted the possible interplay between new developments of Article 82 EC jurisprudence and possible changes to private enforcement. At the risk of stating the obvious, one ought to note that the interplay between the two is somewhat asymmetric. Developments at the private enforcement level provide the platform for litigation and set the spectrum of public value that may be attained. Changes to Article 82 EC jurisprudence may affect the fine tuning of value within this spectrum, positively or negatively. This tuning ability, however, exists within a given spectrum and is subject to its boundaries.

Private Enforcement – Is Article 82 EC special?

*Hedvig K. S. Schmidt**

1 Introduction

After *Courage*[1] there should be little doubt in our minds that damages can be awarded for breach of the European competition rules in private action cases. Moreover, with the publication of the Commission's Green Paper on "Damages actions for breach of the EC antitrust rules"[2] (hereafter the Green Paper) the Commission has taken a great step to increase the use of private enforcement. However, as this paper will demonstrate, the suggestions in the Green Paper will not sufficiently accommodate all the relevant issues that arise when promoting private enforcement.

Issues such as the standard of proof and how to establish causation are still left unresolved. Furthermore, although the Green Paper seeks to provide for private actions under both Article 81 and 82 EC, the paper seems in many ways to be more targeted towards Article 81 EC, leaving important aspects for private litigation under Article 82 EC untouched. This paper seeks to bring to light these aspects and highlights certain requirements that need to be fulfilled to obtain effective private enforcement of Article 82 EC, which to a certain degree has been neglected by the Commission in its Green Paper.

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* The author would like to thank Professor Gerrit Betlem and Dr. Renato Nazzini for their helpful comments on the draft of this paper. Any omissions are the full responsibility of the author. This paper was written prior to the publication of the European Commission "White Paper on damages actions for breach of the EC antitrust rules" and, therefore, mainly refers to the Green Paper and matching working paper.

1 Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297.

2 EUROPEAN COMMISSION, "Green paper damages actions for breach of the EC antitrust rules", COM (2005) 672 final, available at http://ec.europa.eu/comm/competition/antitrust/actions-damages/documents.html.

2 Private enforcement

Already as early as 1983 did the European Commission (hereafter the Commission) toy with the idea of private enforcement as a complementary tool to its own rigorous enforcement.[3] Yet private enforcement has remained almost non-existent, "totally undeveloped" and "astonishingly diverse",[4] a view also supported by the Commission.[5] The opportunity to really open the field up for private enforcement and make competition law more relevant to individuals came with the introduction of Regulation 1/2003,[6] which ended the exemption monopoly the Commission had had under Article 81(3) EC; hence national courts can now apply both Article 81 and 82 EC in their entirety.[7] Moreover, Regulation 1/2003 also adopted new possibilities for the national courts to seek advice from the Commission in competition law cases.[8] However, even with the adoption of Regulation 1/2003 the use of private enforcement seems to still be rather limited. The Ashurst Study identified a number of "key areas" where private parties could be activated in enforcement of the competition rules: 1) access to courts, 2) reducing risks, 3) facilitating proof, 4) reducing costs, 5) other incentives, 6) transparency and publicity, and 7) interaction between national and EC law.[9]

However, before dealing with some of these aspects in relation to an Article 82 EC infringement and claim for damages, it is important to illustrate why "private enforcement" should be encouraged, and why creating a balance between private and public enforcement is necessary. Although the Commission is aware of the need for a structured balance between public and private enforcement,[10] it seems to have devoted all its energy to protecting its leniency programme and not further assessed how the two could work together. The questions that need answering are: what are the true goals for this exercise? What type of enforcement structure do we want for the EU? What is the purpose we would want to achieve with "public enforcement"? And what are the aims of "private enforcement"?

Firstly, private enforcement has been defined by the Commission as "enforcement by means of legal action brought by the victim of anticompetitive behaviour

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3 EUROPEAN COMMISSION, "13th Report on Competition Policy", 135-136 (1983).

4 WAELBROECK/SLATER/EVEN-SHOSHAN, "Study of the Conditions on Claims for Damages in Case of Infringement of EC Competition Rules, Comparative Report", Ashurst, 31 August 2004, 1, available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf (hereafter referred to as the ASHURST STUDY).

5 EUROPEAN COMMISSION, note 2, 4.

6 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ *L 1/1-25.*

7 Regulation 1/2003, Article 6.

8 Regulation 1/2003, Article 15.

9 ASHURST STUDY, note 4, 9.

10 EUROPEAN COMMISSION, note 2, 9-10, and EUROPEAN COMMISSION, "Commission Staff Working Paper, Annex to the Green Paper on Damages actions for breach of the EC antitrust rules" SEC(2005) 1732, 63-66, available at http://ec.europa.eu/comm/competition/antitrust/actions-damages/sp_en.pdf.

before a [national] court".[11] Such enforcement can in principle entail several different actions, such as nullity of contracts and injunctive relief to stop anticompetitive behaviour either as an interim measure or final award, and, finally, award of damages to compensate for the harm suffered.[12] The latter award is what significantly distinguishes private from public enforcement.

Public enforcement has been relied upon to punish and deter anticompetitive conduct, whereas private enforcement has an additional element: that of compensating for the harm caused, and in many respects this is the driving force for private actions, rather than the more public policy of protecting the competitive process and enhancing consumer welfare. The challenge is to ensure that an equal (if not greater) amount of deterrence and punishment will continue, but that individuals harmed by infringements can additionally receive compensation.[13]

Undoubtedly, private enforcement can accomplish all three elements, but not necessarily equally well , as has been verified in the US where the award of treble damages have created unjust windfall effects[14] and demonstrated limited deterrence, as cartels and other forms of anticompetitive behaviour still take place. The former now have to be flushed out with the application of the leniency programme introduced in 1993.[15]

Clearly, the (almost) "pure public enforcement" structure applied in Europe no longer fulfils our requirements[16], but do we want a similar system to that in the US, where 90% of all cases are private actions?[17] Consider the following assessment:

> "[Private] parties must be provided with economic incentives to report, in the form of damages, restitution, bounties or any other form of monetary reward whatsoever. In theory the power to sue granted to purchasers would also induce them to reduce switching to substitutes when facing higher prices due to cartels or abusive monopolization, thereby lowering the deadweight loss caused by monopoly. Accordingly, even though the private incentive to bring suit remains 'fundamentally misaligned with the social optimal incentive to do so, and the deviation between them could be in either direction',[18] the enforcement pressure granted by the 'private attorney-general' is nevertheless needed. If one adds to these arguments considerations of corrective

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[11] EUROPEAN COMMISSION, note 10, 6.

[12] EUROPEAN COMMISSION, note 10, 9.

[13] *See* Competition DG's website: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html.

[14] *See for instance* BÖGE/OST, "Up and Running, or is it? Private Enforcement – the Situation in Germany and Policy Perspectives", (2006) 27 E.C.L.R., 198.

[15] *See* US DEPARTMENT OF JUSTICE, "Leniency Policy for Individuals", (1994), available at http://www.usdoj.gov/atr/public/guidelines/0092.htm and DEPARTMENT OF JUSTICE, "Corporate Leniency Policy", (1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm.

[16] Giudici identifies three reasons why a pure public-enforcement system is inefficient: 1) lack of access to certain information that is more readily available to private parties, 2) lack of adequate financial resources for efficient and sufficient investigations and 3) a public prosecutor can unfortunately be biased when faced with certain "agency costs". GIUDICI, "Private Antitrust Law Enforcement in Italy", (2004) 1 Competition Law Review, 65.

[17] SCHMIDT, "Civil Actions – Striking a balance between public and private enforcement", (2004) 25 CLI, 10.

[18] SHAVELL, "Foundations of Economic Analysis of Law", 391 (2004).

> justice, it is clear that the problem is not whether or not private actions should have a role in antitrust enforcement. *Rather, the problem is, in effect, that of reaching a balance of private and public enforcement* (the most criticized factor of imbalance in the US being state activism, both through state antitrust laws and through state enforcement of federal antitrust law). *In the end the real issue concerns the creation of formal or informal effective mechanisms for coordinating the roles of the two institutional frameworks (litigation and regulation), as is usual in fields where there is a cumulative effect of both.*"[19] (Emphasis added).

In order to create a good working balance between private and public enforcement, it should be acknowledged that the private claimants are likely to protect their own interests first. Therefore the main purpose of introducing or enhancing private enforcement should primarily be to compensate for the harm the anticompetitive behaviour has caused and not "punishment" and "deterrence", as these serve more "public policy goals", which one cannot expect individuals to also pursue.

> "Punishing competition law violations should not become the task of 'private attorneys-general' but should remain a domain of competition authorities. These have better facilities for fact finding and establishing proof which the constitutional system denies individuals. In addition, competition authorities are better suited than individuals to safeguard public interests, because the results achieved by individuals in their own interest are not necessarily also in the interest of competition protection … Private enforcement may therefore supplement and strengthen public enforcement, but it can never substitute it."[20]

Hence, we should focus on the elements that make private enforcement "special" in comparison to public enforcement, and that is precisely the compensatory element. This is also the route the Commission seems to have taken, wishing to make competition law more relevant for the citizens: "[direct] justice is what makes the competition rules instantly relevant for citizens",[21] direct justice being private enforcement, "which allows the victims of illegal anticompetitive behaviour to be compensated for the loss they have suffered".[22]

From a long-term perspective, private enforcement of competition can limit the pressure on competition authorities and act as an alternative for those cases that are of limited interest to the competition authority,[23] and this should equally be encouraged, as the Competition Commissioner acknowledges: "More private enforcement does not equal less public enforcement ... it is possible to design a system in which

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[19] GIUDICI, note 16, 65-66 (note 18 is part of the quote).

[20] BÖGE/OST, note 14, 197.

[21] KROES, "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials", Opening speech at the conference "La reparation du prejudice cause par une pratique anti-concurentielle en France et à l'étranger : bilan et perspectives", Cour de Cassation, Paris, 17 October 2005, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/613&format=HTML&aged=0&language=EN&guiLanguage=en.

[22] KROES, note 21. The White Paper primary aim appears to be compensation, EUROPEAN COMMISSION, "White Paper on damages actions for breach of the EC antitrust rules" COM (2008) 165 final, point 1 available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

[23] BÖGE/OST, note 14, 197.

the obligation to compensate the victims of an antitrust infringement has a stimulating, rather than a chilling effect, on the leniency programmes of the European competition authorities".[24] Moreover, Commissioner Kroes wishes to create a "competition culture" rather than a "litigation culture", which some fear increased private enforcement can bring.[25]

However, it is important to realise when encouraging private enforcement that this will only take place at national level. Only national courts are competent to hear such cases. Finally, pursuing a private-enforcement goal of compensation also requires that the litigation rules are equally adapted, allowing for achievable "standards of proof" and, for instance, aid to gain access to certain types of evidence. The Green Paper assesses some of these possibilities.

The opinion of Böge and Ost is consistent with the findings of this paper:

> "From a public interest perspective private and public antitrust enforcement are complementing parts of one system. While authorities have more far-reaching intelligence and investigative powers than individuals, the latter are able to become active in areas where competition authorities cannot intervene sufficiently due to their limited resources. Against this background private enforcement should by no means be reduced to damage claims following hard-core cartels alone. By doing so the importance of law suits which do not concern hard-core cartels (such as abuse proceedings or actions against vertical competition restraints) would be underestimated. Such cases, however, are of particular importance because they typically cover those areas of antitrust enforcement in which competition authorities are not primarily active."[26]

Troublingly, the reason for this paper is exactly that the Commission's Green Paper seems to focus mainly on private enforcement of hard-core cartels and does not offer specific concerns for other anticompetitive behaviour such as unilateral abuse.

The main reason for the cartel focus seems to be that cartels can be very damaging to competition and in many ways are less complicated to ascertain in comparison to unilateral behaviour. The predicament facing any enforcement under Article 82 EC is the risk of so-called false positive errors, i.e. where companies are found to abuse their dominant position without in reality having done so. False positive errors are more likely to occur under Article 82 EC, as certain elements of Article 82 EC are often difficult to prove satisfactorily. The fear is that providing disproportionate aid to private claimants, such as easier access to potentially confidential information or shifting the burden of proof to lighten the claimant's burden, will increase the number of false positives, as some will be tempted to claim damages simply to obtain confidential information on their rivals. The consequence would be over-enforcement of conduct rules, which in reality causes no harm to competition. In cartel cases, a similar situation is less likely.

Much of the debate relating to private enforcement has focused on the US application of treble damages for hard-core cartels and whether a similar system should be introduced in the EU, despite its known faults. Ex-Commissioner Mario Monti

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[24] KROES, note 21.
[25] KROES, note 21.
[26] BÖGE/OST, note 14, 198.

noted on this: "Overall … I believe that an extended system of private enforcement in Europe that does not fall into the excesses that we have seen in other legal systems would be in the interest of our economy and our consumers"[27] The problems with the treble damage system have also now been acknowledged by the US antitrust authorities. Even though it worked in the beginning of its antitrust enforcement history, when Congress feared that the governmental body was too timid to take action and therefore insisted on boosting private enforcement by introducing treble damages, the US antitrust authorities have recently acknowledged that the balance between private and public enforcement is uneven. After having received severe criticism, the antitrust enforcers have adapted their tough approach in two aspects. Firstly, there has been a move away from treble damages to the courts only awarding single damages, to improve the leniency programme and thus ensure that potential whistleblowers are not frightened off by fear of high damages claims against them.[28] Secondly, a new Act, the Antitrust Criminal Penalty Enhancement and Reform Act of 2003, has been introduced, which increases fines[29] and criminal penalties[30] for antitrust violations,[31] thereby placing greater emphasis on punishment in a clear public-enforcement manner. However, the full impact of the new legislation has yet to be seen, although it should be noted that the US leniency programme has proved very successful.[32] From this perspective, it is understandable that the Commission has chosen to protect its leniency programme by allowing leniency applicants certain forms of protection under its "access to evidence" section.[33]

Accepting that the primary objective of private enforcement should be compensation for caused harm, the next step is to asses how best to achieve this while at the same time ensuring that private enforcement can work as an alternative method to public enforcement in those situations where the competition authorities are stretched for resources.[34]

To fully assess the policy options suggested by the Green Paper, it is important to look at the different types of actions of private enforcement, as each requires different assistance to be prompted Three types of actions can be identified:

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[27] MONTI, "Private litigation as a key component to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation", IBA – 8th Annual Competition Conference, Fiesole, 17 September 2004, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/403&format=HTML&aged=0&language=EN&guiLanguage=en.

[28] *See* GRADY, "U.S. Private Enforcement of Competition Laws: An Overview", BIICL conference "Developments in Competition Litigation – A Comparative Perspective", London, 15 October 2004.

[29] For individuals, from $350,000 to $1 million, and for corporations, from $10 million to $100 million.

[30] The maximum prison sentence has been increased from three years to ten years.

[31] Antitrust Criminal Penalty Enhancement and Reform Act of 2003, Pub. L. No. 108-237, 118 Stat. 661 (signed 22 June 2004) (codified in scattered sections of 15 U.S.C.).

[32] GIUDICI, note 16, 62.

[33] EUROPEAN COMMISSION, note 2, option 6, and EUROPEAN COMMISSION, note 10, 23-24 and 29.

[34] *See* GIUDICI, note 16, for a list of arguments of the limits of public enforcement.

1) Follow-on cases: these are cases appearing after or alongside public enforcement cases revolving around the same conduct and abuses. The benefit of follow-on cases is that the private claimant can in principle rely on the outcome of the previous public enforcement case. Article 16 of Regulation 1/2003 ensures that national courts do not make judgments that run counter to a Commission decision taken on the same subject.[35] This provides an element of certainty to follow-on cases. A similar approach is allowed for under Section 5(a) of the Clayton Act in the US, where a final judgment obtained in either criminal or civil proceedings can be applied as 'prima facie' evidence against the defendant in other cases of a similar nature. A recent example of such cases is the *Microsoft* antitrust litigation.[36]
2) Independent cases: these are cases commenced independently of the competition authority or after the competition authority has declined to take the case because of limited resources or interest. These cases are probably the most complicated cases to encourage, because the plaintiff is acting entirely on his own, bearing the risk of legal costs and evidence gathering.[37] However, the independent cases are the most important ones for private enforcement to become a true complement to public enforcement. *Carter v. AT&T*[38] offers a good example of the importance of independent cases; although it was an independent case it created government attention and action. The case aided the opening of the telecommunication markets for competition in the US. Independent actions can therefore support and complement public enforcement where competition authorities lack resources, have no particular policy interest in a case, or simply have disregarded the significance of a case. Moreover, these cases are particularly important from an Article 82 EC enforcement perspective, as noted by Böge and Ost, as these no longer receive such intense attention from the Commission.[39] It is therefore vital that private action is strongly encouraged to ensure continued effective enforcement of Article 82 EC.
3) Class actions, or 'collective actions', as some refer to them,[40] are cases brought by one individual or a consumer group on behalf of others (a specified or unspecified group), who all have small individual claims, but who would not have made a claim alone due to the significant legal costs.[41] These can either be done as follow-on cases or as independent action, hence once class actions have been allowed for, what becomes important is the route of action – i.e. follow-on or independent action. Most Member States of the EU admit class actions, but these are often limited to trade or consumer organisations, as for instance is the

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[35] The White Paper suggests to also make National Competition Authorities' decisions binding upon later action for damages in national courts, EUROPEAN COMMISSION, note 22, point 2.3.
[36] *See for instance In re Microsoft Corporation Antitrust Litigation* 355 F.3d 322 (4th Cir. 2004).
[37] *See for instance* EUROPEAN COMMISSION, note 10, 18.
[38] *Carter v AT&T*, 365 F.2d 486 (5th Cir. 1966) cert. den'd, 385 U.S. (1967).
[39] BÖGE/OST, note 14, 198.
[40] WOODS/SINCLAIR/ASHTON, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead", (2004) 2 Competition Policy Newsletter, 34.
[41] WOODS/SINCLAIR/ASHTON, note 40, 34, and EUROPEAN COMMISSION, note 10, 52.

case in the UK and Germany.[42] The Commission has in its Green Paper considered the option of aiding access to consumer associations and collective actions of groups, which are not consumers.[43] Both must be said to be equally welcomed. In particular, the latter could prove beneficial for small companies indirectly affected by actions undertaken by dominant companies in another market.[44]

Each type of private action requires different forms of support from the procedural system and each accomplishes different levels of the three main elements of enforcement, punishment, deterrence and compensation. For instance, follow-on cases are dependent on the competition authorities to prove the competition violations. The follow-on private action's main purpose is compensation, and its secondary aim is deterrence, as companies may reconsider antitrust violations for fear that if caught they are not only going to be fined by the competition authorities but also potentially face several lawsuits from customers and competitors. Finally, as a third aim, these actions also work as punishment for bad behaviour. However, follow-on cases do not aid the stretched resources of public enforcement, as they rely on the findings of the competition authorities and their results to 'grasp' the damages awards. Follow-on cases may therefore be easy to encourage but also the least likely to aid public enforcement. To complement public enforcement properly, both independent cases and class actions need to be incited.

The following section will look in detail at the different obstacles to the compensatory element of private enforcement as identified by the Ashurst Study and the Commission's Green Paper on damages, and identify the specific issues that relate to Article 82 EC, which will perhaps require a different take on actions for damages.

3 Article 82 EC and action for damages

The greatest limit currently upon private enforcement is the burden of proof placed upon the plaintiff to show that anticompetitive behaviour has taken place and that that behaviour has had an adverse effect upon the plaintiff.[45] This latter limb is essential to establish causation and receive damages; showing anticompetitive behaviour is the essence of Article 82 EC. Article 2 of Regulation 1/2003 clarifies that the party who alleges the infringement has the burden of proving this. "This means that the claimant in all cases has to prove the infringement, the casual connection between infringement and damages, and the quantum of damages."[46]

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[42] Section 19 of the UK Enterprise Act 2002, Section 33 of the German Act against Restraints of Competition(Gesetz gegen Wettbewerbsbeschränkungen – GWB), and WOODS/SINCLAIR/ ASHTON, note 40, 34-5.

[43] EUROPEAN COMMISSION, note 2, options 25 and 26.

[44] The White Paper supports two forms of class action: collective redress (by consumer organisations or trade associations) and opt-in collective actions (by identifiable victims), EUROPEAN COMMISSION, note 22, point 2.1.

[45] Regulation 1/2003, Article 2.

[46] EUROPEAN COMMISSION, note 10, 25.

The Commission staff paper identifies 11 obstacles to actions for damages:

a) collective actions
b) fault
c) burden and standard of proof
d) collection and presentation of evidence
e) evidential value of national competition authorities' and national courts' decisions
f) quantification of damages
g) passing-on defences and indirect purchaser claims
h) amount of damages
i) time limitations
j) costs
k) applicable law.[47]

No detailed assessment of these obstacles will be made. However, they will act as important elements to illustrate the difficulties a private claimant faces in an Article 82 EC infringement action, which are more significant or simply different than those faced by private claimants under Article 81 EC.

3.1 Standing

The notion of standing has not caused much trouble in respect of actions for damages, equivalent to actions for compensation under national tort laws. *Courage* made it clear that

> "[the] full effectiveness of Article [81 EC] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1) EC] would be put at risk if it were not open *to any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[48]

In *Courage*, the claimant was himself party to the agreement. In *Manfredi*[49] the European Court of Justice (ECJ) clarified this position. It commenced by repeating and thereby confirming the principles laid down in *Courage*, then held: "Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm".[50] It leaves open the possibility for all individuals to attempt a claim for damages, whether there is a direct or indirect link with the defendant. However, it also places a significant burden upon the establishment of causation. Only by establishment of causation can a claim be met. The ECJ continued in *Manfredi*, stating that

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[47] EUROPEAN COMMISSION, note 10, 12-14.
[48] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, para. 26.
[49] Joint Cases C-295 and 298/04 *Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619.
[50] Joint Cases C-295 and 298/04 *Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619, para. 63.

> "[in] the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of "causal relationship", provided that the principles of equivalence and effectiveness are observed."[51]

The ECJ here clarifies that as long as there is no harmonisation of the rules on causation, each individual national law will give guidance on how this concept is understood. Nevertheless, the ECJ does not close the option of the Commission to introduce such guidelines and thus give a clearer picture as to how the causation condition is fulfilled. The door is thus open for private litigation by competitors, customers, and consumers.[52]

3.2 The substantive analysis of Article 82 EC

An Article 82 EC analysis consists in principle of three main steps; firstly, the market in which the alleged abuse took place must be identified. Secondly, it must be established whether the company in question held a dominant position in that market or a related market. Thirdly, it must be ascertained that an abuse in fact took place. A fourth and a fifth step, which are often seen as sub-categories of "abuse", are the assessments of anticompetitive effects and objective justification or efficiency defences.

Finally, in order for Article 82 EC to apply, there must be an effect on trade between Member States. The main purpose for this requirement is to ensure that the case dealt with has a Community dimension. The effect on trade has to be appreciable before the EC competition rules apply; hence normally more than one Member State's market must be affected by the conduct for the rules to apply. That said it is rare that a case will be dismissed on these grounds, when the company in question is dealing within the European market.[53] Moreover, as Article 81 and 82 EC now both have direct effect, national courts can automatically make use of them. This last requirement, an effect on trade between Member States, in principle merely refers to the jurisdictional scope of EC competition law, and it is therefore taken for granted in this paper and will not be dealt with further. If either of the above steps in an Article 82 EC case is not fulfilled the company in question cannot be found guilty of an Article 82 EC offence.

The definition of the relevant market and a finding of dominance are pre-conditions of the finding of abuse. Thus, much relies on both determinations. All Article 82 EC currently commences analyses with an assessment of the market in which the

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[51] Joint Cases C-295 and 298/04 *Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619, para. 64.

[52] This conclusion has been embraced by the White Paper, which proposes the use of "passing-on defence" to make claims by indirect customers easier, EUROPEAN COMMISSION, note 22, point 2.6.

[53] *See for instance* Case C-22/78 *Hugin v Commission* [1979] ECR 1869, the only case so far turned down by the ECJ due to insufficient effect on trade between Member States (para. 17); in comparison *see* European Commission, Case IV/M619 *Gencor/Lonrho*, that illustrates the extraterritorial reach of the EC competition law.

investigated company operates.[54] The market definition works as a framework for the establishment of whether the company possesses a dominant position, as a dominant position only exists in relation to a market.

> "The main purpose of market definition is to identify in a systematic way the immediate competitive constraints faced by an undertaking. The objective of defining a market in both its product and geographic dimension is to identify all actual competitors of the undertaking concerned that are capable of constraining its behaviour."[55]

Or, as the ECJ has stated:

> "The opportunities for competition under Article [82 EC] of the Treaty must be considered having regards to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed...for the effect of the economic power of the undertaking concerned to be evaluated."[56]

The market analysis requires the defining of the relevant product market and the relevant geographic market.[57] This exercise is similar to the one found under both Article 81 EC and the Merger Regulation. Therefore when identifying whether Article 82 EC requires "special treatment" to increase private enforcement, the relevant-market definition does not add any additional complications or burdens upon the private claimant in comparison to private enforcement of Article 81. That said, this does not mean that identifying the relevant market is an easy task. The claimant has to collect and presenting evidence, such as information about the allegedly dominant company's business plans in order to sufficiently identify in which markets it is active.

The Green Paper suggests different policy options that would make the national court able to provide some aid in the form of ordering the defendant or third party to disclose certain information.[58] Naturally, these policies are welcomed. However, two concerns should be highlighted. Firstly, depending on whether the case is an independent case or a follow-on case, different assistance for accessing evidence is required. Secondly, some form of buffer should be allowed for to ensure that companies do not file unfounded claims to gain access to competitors" business secrets.

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[54] Recent discussions of a modernisation of Article 82 EC have suggested downgrading the level of importance that the definition of the relevant market has by assessing Article 82 EC cases from an effect-based perspective. *See* for instance report prepared by the BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, COMPETITION LAW FORUM, "The Reform of Article 82: Recommendations on Key Policy Objectives" (2005), report by EAGCP, "An economic approach to Article 82" (2005), available at http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf, and GLYNN, "The Economic Basis for Possible Fines and Damages under Article 82", 1, available at http://www.eer.co.uk/download/2006%20ebpfda.pdf.

[55] EUROPEAN COMMISSION, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses", (2005), available at http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf, 6.

[56] Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 287.

[57] *See* Commission Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ C 372/5, paras 7 and 8.

[58] EUROPEAN COMMISSION, note 2, options 1-7. *See also* EUROPEAN COMMISSION, note 10, 20.

If it is a "follow-on" case, it may be possible to achieve access to documents regarding the information held by the Commission or national competition authorities under Article 255 EC.[59] However, such information will normally be stripped of any confidential or secret content.[60] This could for instance include the previous year's sale figures of the defendant or other important figures that could help define the relevant market and subsequently establish dominance. However, the Commission has suggested easing this hurdle, stating that

> "[a] prior infringement decision of a national competition authority, whether domestic or of another EU Member State, or of its review court, could be used to alleviate the claimant's burden of proving the infringement. A first option would be that such a prior decision shifts the burden of proving the absence of an infringement onto the defendant. A further option would be to make this infringement decision binding on the civil court."[61]

The next step for the claimant is to prove dominance. Dominance was defined in *Hoffmann-La Roche*: "the dominant position…relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."[62]

The definition is more legalistic than economic. An economic assessment of dominance would be based on the company's ability to limit output and raise prices above a competitive level on the market to extract greater profits. The above definition can be rather unsupportive and without real substance from the perspective of a small undertaking with low market shares, or an individual consumer, because it may appear to such a claimant that the alleged dominant company is behaving independently, this could partly be because of the market shares held by the alleged dominant company may also appear excessive in comparison to a small undertaking, if the latter holds just 1% and the alleged dominant company holds for instance 20% of the market share.[63]

The invisible line between dominance and non-dominance lies around the 40% market share; however, dominance is variable assessed on both the company's market share and legal and economic barriers to entry. Therefore, there can be little difference in the treatment towards an undertaking with a market share of 90% and an undertaking with a market share of 40%.

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[59] This suggestion has been dismissed by the Commission. *See* EUROPEAN COMMISSION, "Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules" (COM(2008) 165 final, para. 104. available at http://ec.europa.eu/comm/competition/antitrust/actionsdamagges/files_white_paper/working_paper.pdf.

[60] Article 287 EC and Regulation 1/2003, Article 28(2).

[61] EUROPEAN COMMISSION, note 10, 30.

[62] Case 85/76 *Hoffmann-La Roche & Co v Commission* [1979] ECR 461, para. 38.

[63] *Kenneth Frederick Cutsforth and Others, Trading AS for Amusement Only (Hull) v Mansfield Inns Ltd* [1986] 1 CMLR 1, para. 34.

In any case, the claimant must demonstrate not only the establishment the all important relevant market in respect of market shares, but also identify barriers to entry, such as legal restrictions including IP rights,[64] superior technology,[65] economies of scale and efficiency,[66] vertical integration,[67] access to financial resources,[68] access to key inputs,[69] overall size and product range,[70] unavoidable trading partner[71] and, "network effects".[72] There is a significant risk placed upon the claimant when commencing such a case to prove dominance, as he may not be able to provide sufficient evidence for the market share estimate and barrier to entry regardless of whether the defendant is dominant or not.[73] As the Commission Staff Working Paper highlights, Article 2 of Regulation 1/2003 only places the burden of proof, but is silent in respect of the standard of proof; thus this is regulated by national laws.[74]

> "The civil law jurisdictions tend to operate with a test such as the need for the claimant to 'win the conviction' of the judge. In the common law jurisdictions, on the other hand, the test tends to be a 'balance of probabilities' test for the establishment of the conditions of violation under Article 81 and 82 EC."[75]

However, the Commission does note that the outcome of either test may not significantly differ.[76] As noted above regarding the definition of the relevant market the claimant is faced with the difficulty of obtaining the evidence. Again, the level of difficulty in obtaining the information will depend on the type of case. In respect of follow-on cases, certain information should be relatively easily obtainable from the Commission or the relevant competition authorities, especially if Option 8 of the

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64 European Commission, Decision 92/213/EEC *British Midland/Aer Lingus* [1992] OJ L 96/34, – allocated airport slots, and, in respect of intellectual property rights, see Case C-53/92 P *Hilti AG v Commission* [1994] ECR I-666 and Case C-333/94 *Tetra Pak International SA v Commission* (*Tetra Pak II)* [1996] ECR I-5951.

65 Both Case C-53/92 P *Hilti AG v Commission* [1994] ECR I-666 and Case C-333/94 *Tetra Pak International SA v Commission* (*Tetra Pak II)* [1996] ECR I-5951 fall into this category as well.

66 Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 122.

67 Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 122.

68 Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 122 and Case 85/76 *Hoffmann-La Roche & Co v Commission* [1979] ECR 461, para. 49.

69 Joint Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v Commission* [1974] ECR 223.

70 Case 85/76 *Hoffmann-La Roche & Co v Commission* [1979] ECR 461, paras 45-47 and European Commission, Decision 92/163/EEC *Elopak Italia v Tetra Pak* [1992] OJ L 72/1, para. 101.

71 Case 85/76 *Hoffmann-La Roche & Co v Commission* [1979] ECR 461, para. 41, and Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para. 217.

72 In general *see* European Commission, Case COMP/C-3/37.792 *Microsoft*, paras 448-460: "network effects protect Microsoft's high market shares in the client PC operating system market from effective competition from a potential new entrant" (para. 459).

73 *Philips Electronics N.V. v Ingman Ltd and the Video Duplicating Company Ltd* [1999] FSR 112, where the defendant's pleading of the plaintiff holding a dominant position was struck down and EUROPEAN COMMISSION, note 59, para. 88.

74 EUROPEAN COMMISSION, note 10, 25.

75 EUROPEAN COMMISSION, note 10, 25.

76 EUROPEAN COMMISSION, note 10, 25.

Green Paper is to be adopted. However, in respect of individual cases and class actions the barrier to information may be significantly higher. Where asymmetric information exists, *i.e.* where (usually) the defendant has control over or access to more relevant evidence than the claimant, the Commission suggests alleviating the burden of proof upon the claimant and transferring this responsibility to the defendant once a sufficient level of evidence proving the infringement has been provided.[77] Certain Member States already provide for such situations,[78] and the ECJ has similarly opened up for such a possibility in *Aalborg Portland*,[79] where it held.

> "[although] according to [the principles of Article 2 of Regulation 1/2003] the legal burden of proof is borne either by the Commission or the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged."[80]

It should be noted that this was an Article 81 EC case. Nevertheless, the principles of the *Aalborg Portland* case are similar to the ones found in Article 82 EC cases. For instance, in respect of refusal to supply cases, where it is for the defendant to justify the refusal once the abusive conduct has been established.[81] There is therefore already accepted in Article 82 cases to shift the burden of proof to shift.[82]

Importantly, it is not an infringement of Article 82 EC to hold a dominant position, but an infringement to abuse such a position. Article 82 EC itself provides a list of four categories or examples of abuse. These are:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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[77] EUROPEAN COMMISSION, note 2, options 8-10, and EUROPEAN COMMISSION, note 10, 26, but note that the Commission has moved away from this suggestion in its White Paper in response to the comments received upon the Green Paper and the increased risk of false positives such an alleviation of the burden of proof could create, EUROPEAN COMMISSION, note 59, paras 74 and 91.

[78] For instance § 20(5) of the German Competition Law (Gesetz gegen Wettbewerbsbeschränkungen, GWB).

[79] Joint Cases C-204, 205/00, 211/00, 213/00, 217/00 and 219/00 *Aalborg Portland and others v Commission* [2004] ECR I-123.

[80] Joint Cases C-204, 205/00, 211/00, 213/00, 217/00 and 219/00 *Aalborg Portland and others v Commission* [2004] ECR I-123, para. 79.

[81] *See for instance* HANCHER, "Case C-7/97 *Oscar Bronner GmbH & Co. KG v Media Print Zeitungs und Zeitschriften GmbH & Co. KG*" (1999) 36 C.M.L.Rev 1303.

[82] See for instance WAHL, "The Application of Article 82 – how much regulation?" Speech at "Modernization of the Competition Rules for Dominant Firms in Europe", Policy symposium April 2006, Research Institute of Industrial Economics, Sweden, available at http://www.iui.se/article82/Article82wahl.pdf, 7.

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list has been interpreted as non-exhaustive and is therefore examples of what can be seen as abusive, rather than acting as a definition of abuse.[83] The concept of abuse has been divided into two categories: exploitative and exclusionary abuse.[84] Exploitative abuses are attempts by the dominant undertaking to exploit the strength of its power in the market, which directly harms consumers, such as excessive pricing and unfair trading, terms embraced under 82(a) EC.[85] These types of abuse have not received as much attention as exclusionary abuse, because it is assumed that the competitive forces within the market can readjust such abuses by itself. That said, the risk of exploitative abuse is ever-present when there is a dominant undertaking in a market, because dominant companies will always be inclined to increase prices or lower output in comparison to companies in competitive markets.[86] Exclusionary abuse on the other hand aims at the outset to cause harm to rivals by for instance predation or by refusing to supply. The result can be the exclusion of one or more competitors from the market, which will in the long-term also harm consumers as there is less choice on the market and increased risk of exploitative abuse.[87]

In case law, (exclusionary) abuse was defined in *Hoffman-La Roche*.

> "The concept of abuse is an *objective concept* relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those governing 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 growth of that competition."[88] (Emphasis added).

As highlighted, "abuse" is an objective concept – the establishment of abuse is based on facts and not upon whether the company intended to behave in an abusive manner.[89] In *Michelin I,* the ECJ held that abuse is practices that differ from those of

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[83] FAULL/NIKPAY, "The EC Law of Competition", 315 (2007).

[84] A third type of abusive behaviour has been identified – that of "reprisal" abuses, which are specifically targeted at one particular rival in response to this rival's conduct; TEMPLE LANG, "Monopolisation and the Definition of 'Abuse' of a Dominant Position under Article 86 EEC Treaty", (1979) 16 C.M.L.Rev, 363-64.

[85] DUNCAN, "Abuse of Dominance at a Crossroads – Potential Effect, Object and Appreciability under Article 82 EC", (2004) E.C.L.R. 491-501.

[86] FAULL/NIKPAY, note 83, 397.

[87] FAULL/NIKPAY, note 83, 348.

[88] Case 85/76 *Hoffmann-La Roche & Co v Commission* [1979] ECR 461, para. 91.

[89] FAULL/NIKPAY, note 83, 349; VICKERS, "Abuse of Market Power", Speech to the 31st conference of the European Association for Research in Industrial Economics, 3 September 2004, 5. However, note for instance the *AKZO*-case, where the concept of "intent" became necessary to prove the abuse: C-62/86 *AKZO-Chemie v Commission* [1991] ECR I-3359. But *see below* for a further discussion of "intent".

normal competition that are abusive.[90] However, in subsequent case law the ECJ moved away from that approach and have instead given more emphasis to the dominant position holding that certain forms of conduct can be performed by a company not in a dominant position, but once dominant the conduct is seen as abusive.[91] The reason being is that conduct becomes abusive when it has the effect of weakening the market structure further.[92] This interpretation could be classified as (almost) *per se* illegality, "almost", because of the requirement of establishing "dominance". The problem occurring from the private claimant perspective is that although it may be easier for a private claimant to identify the abuse, in comparison to a competition authority, it may be more difficult to prove whether a certain form of conduct is in fact abusive.[93]

As noted above, the "anticompetitive effects" test is a sub-category of "abuse". The basis for this conclusion is the definition of abuse made by the ECJ in *Hoffmann-La Roche* and repeated in the last paragraph of *Michelin I*, with the wording "through recourse to methods different from those governing normal competition…*have the effect of hindering the maintenance or development of the level of competition still existing on the market*"[94] (Emphasis added).

The claimant must therefore prove not only that certain conduct has taken place, but also that this conduct has actual or potential anticompetitive effects. This has proven to cause the most problems for private claimants. Notably, because the standard of proof for the anticompetitive effect is low as the anticompetitive effects need not be actual but merely potential or likely to occur in the near future.[95] So although that may be easy to demonstrate, the low standard makes it notoriously difficult to establish a link between the alleged abusive conduct and the harm caused to the claimant.

Therefore a claimant has to prove that there has indeed been harm to it due to anticompetitive behaviour; in other words, "causation", in comparison the Commission merely need to establish that there is a "likelihood (even of future) anticom-

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[90] Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission (Michelin I)* [1983] ECR 3461, para. 70.

[91] *See for instance* Case C-333/94 *Tetra Pak International SA v Commission* (*Tetra Pak II)* [1996] ECR I-5951, para. 37.

[92] AMATO/GIULIANO, "The Antitrust and the Bounds of Power, the Dilemma of Liberal Democracy in the History of the Market", 70 (1997); *see* cases such as Case T-65/89 *BPB Industries Ltd & British Gypsum Ltd v Commission* [1993] ECR II-389 and Case T-83/91 *Tetra Pak International v Commission* [1994] ECR II-755.

[93] The *Centre for European Policies Studies*, in association with *Erasmus University Rotterdam* and *Libera Università Internazionale degli Studi Sociali Guido Carli*, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios" Final Report, Done in Brussels, Rome and Rotterdam, 30 March 2008, 119-20, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf

[94] Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission (Michelin I)* [1983] ECR 3461, para. 70.

[95] *See* Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para. 293, and Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, para. 239.

petitive effects".[96] This was confirmed by the Court of First Instance (hereafter CFI) in *British Airways*,

> "[in] the first place, for the purpose of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or in other words, that the conduct is capable of having, *or likely to have such an effect*."[97] (Emphasis added).

Moreover, the DG Competition has recently reviewed Article 82 EC in order to adopt a more economic approach to competition and what is seen as anticompetitive behaviour.[98] The Commission notes that the ECJ's definition of abuse (i.e. para. 91 of *Hoffmann-La Roche)* implies, firstly, that the behaviour must by nature be able to eliminate competitors from the market and secondly, that the behaviour must be capable in respect of the specific market of foreclosing the market.[99] It defines foreclosure as a situation where

> "actual or potential competitors are completely or partially denied profitable access to a market. Foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively."[100]

In the *Microsoft* Commission Decision, the Commission found that Microsoft's tying had the *potential* to risk foreclosure in the future.[101] The case is interesting not only due to its high profile but also because the Commission almost uniquely provided a rather extensive analysis of anticompetitive effects and concluded by offering factual evidence for the risk of foreclosure. For instance, in paragraph 923 the Commission states:

> "Microsoft's prediction at the end of 2001 that "[although] several other media player vendors, including Microsoft, would like to overtake RealPlayer, there is no market evidence that RealPlayer's leading position will not persist," has proven wrong. Microsoft has now had to acknowledge that although "*until recently*, more consumers used RealNetworks's players than used WMP," this is no longer the case."[102]

However, for the purpose of this paper it proves the above-mentioned point: the likelihood or future risk of foreclosure is sufficient to establish anticompetitive effects,

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[96] In *Microsoft* the Commission took a different view, as it found that Microsoft's tying had the *potential* to risk foreclosure in the future. *See* European Commission, Case COMP/C-3/37.792 *Microsoft*, paras 842-954.
[97] Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para. 293.
[98] EUROPEAN COMMISSION, note 55.
[99] EUROPEAN COMMISSION, note 55, 18.
[100] EUROPEAN COMMISSION, note 55, 18.
[101] European Commission, Case COMP/C-3/37.792 *Microsoft*, paras 842-954.
[102] European Commission, Case COMP/C-3/37.792 *Microsoft*, para. 923.

and thereby that the conduct is abusive.[103] Although as noted above this is under the circumstances relatively easy to establish, it creates however, greater problems in establishing causation between the abuse and the alleged damages, as it is difficult to prove a genuine loss due to anticompetitive behaviour, which may occur in the future.

To ensure that competition remains efficient within a market, the low threshold of anticompetitive effects is sensible as it allows the competition authorities to react *ex-ante* of the conduct causing severe harm. This also ensures that competition within the market can more easily be restored or rebuild after the ceasing the abusive conduct.

From a private enforcement perspective follow-on cases may be the ones most affected by this low threshold of anticompetitive effects, because although they can rely on the findings of previous cases by competition authorities, which have established abuse, they may find it difficult to demonstrate causation between the abuse and the loss suffered by the claimant, as the loss may not have occurred.[104] Particularly demonstrating that the alleged loss was due to the alleged abusive behaviour and not other issues affecting the market, such as economic slow-down, change in the claimant's own business strategies or developments of the market.[105]

3.3 Causation

As noted in the Commission Staff Working Paper, the claimant must establish causation between the infringement and the damages sought to ensure that the defendant is only made liable for damages caused by his unlawful behaviour.[106]

Moreover, the Commission acknowledges that "[proof] of causation can be highly complex in antitrust cases…Proving a causal link might require complex economic analysis based on a large number of facts and economic data"[107]

The ECJ has so far left it for the national courts to assess causation in competition law cases. To look for a Community definition of causation, we must turn to Community liability under Article 235 and 288 of the EC Treaty and State liability (*Francovich*[108]*).*[109] *In Bergaderm*[110] the ECJ established certain conditions,

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[103] The Commission's findings were confirmed by the CFI in Case T-201/04 *Microsoft Corp. v Commission*, (not yet reported).

[104] As noted above the White Paper suggests that National Competition Authorities' decision should become binding upon later claims for damages, however, it stops short of providing any aid or guidance for establishing causation, EUROPEAN COMMISSION, note 22, point 2.3.

[105] *Arkin v Borchard Lines Ltd. et al.* [2003] All E.R. (D) 173, [2003] E.W.H.C. 687 (Comm. 10 Apr. 2003) and WOODS, "Private Enforcement of Antitrust Rules – Modernization of the EU Rules and the Road Ahead", (2004) 16 Loyola Consumer Law Review 456.

[106] EUROPEAN COMMISSION, note 10, 77.

[107] EUROPEAN COMMISSION, note 10, 77.

[108] Joint Cases C-6 and 9/90 *Francovich v Italy* [1991] ECR I-5357.

[109] REICH "The 'Courage' Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?", (2005) 42 C.M.L.Rev 35, 62.

[110] Case C-352/98 *P Bergaderm and Goupil v Commission* [2000] ECR I-5291.

which must be fulfilled for an action for damages to be successful. First, there must a sufficiently serious breach of a rule of law intended to confer rights on individuals. An infringement of Article 82 EC will fulfil this condition. Second, there must be a loss or damage, which must be sufficiently certain.[111] In *Manfredi* the ECJ held:

> "it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest."[112]

While *Manfredi* allows for a side range of damages,[113] it still leaves the question of future damages unanswered. This is an essential issue for action for damages under Article 82 EC. In *Kampffmeyer*[114] the ECJ held that compensation for future losses in Community liability cases would be permissible if the loss was sufficiently foreseeable. The ECJ defended this by holding that in certain circumstances it may be necessary to bring an action before the ECJ as soon as the damage is certain to prevent even greater harm.[115] If the ECJ would be willing to apply a similar approach to competition law cases it would mean that the low threshold of anticompetitive behaviour would cause less of a concern for private claimants. That said Kampffmeyer still requires the claimant to prove certainty that the damage will occur, and this may still remain a difficult task.

Third, *Bergaderm* sets out a condition for a "causal connection", requiring the claimant to demonstrate that the damages must be a direct consequence of the unlawful act, which includes ensuring that the claimant has taken reasonable care and caution to limit the harm caused.[116]

Arkin[117] highlights the problems faced by a private claimant in relation to proving causation in antitrust cases and consequences of a high threshold of the "causal connection". *Arkin* is the Article 82 EC UK equivalent to *Courage*, albeit the claimant was not successful in this case. The claimant successfully demonstrated that the

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[111] Joint Cases 19-20, 25 and 30/69 *Richez-Parise and Others v Commission* [1979] ECR 325, para. 31.

[112] Joint Cases C-295 and 298/04 *Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619, para. 100.

[113] In Joint Cases C-295 and 298/04 *Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619, para. 99, the ECJ, besides allowing for awarding damages relating to losses suffered, also suggests exemplary and punitive damages.

[114] Joint Cases 56-60/74 *Kampffmeyer and Others v Commission and Council* [1976] ECR 711, paras 6-8.

[115] Joint Cases 56-60/74 *Kampffmeyer and Others v Commission and Council* [1976] ECR 711, para. 6.

[116] LEANAERTS/ARTS/MASELIS, "Procedural Law of the European Union", 402 (2nd ed. 2006).

[117] *Arkin v Borchard Lines Ltd. et al.* [2003] All E.R. (D) 173, [2003] E.W.H.C. 687 (Comm. 10 Apr. 2003).

defendants were dominant;[118] but did not succeed in proving that the defendants had engaged in predatory pricing and thereby the claimant failed to demonstrate abuse.[119] Moreover, the Court noted that the claimant's loss was in fact not caused by abusive behaviour by the defendants, but the claimant's own action and business strategy of offering desperately low prices. This point is of significance at least for competition cases coming before UK Courts, as it demonstrates that a court will require a claimant to demonstrate that actions have been taken to limit the damages caused by the alleged abusive behaviour. In *Arkin*, the claimant had complained to the Commission in an attempt to stop the alleged abusive behaviour – an approach recommended in *Kampffmeyer* by the ECJ, which allowed for damages for future losses, but Arkin's mistake was to continue to operate in the market despite significant losses.

Arkin also offers a good example of the difficulties faced by the claimant in reaching the standard of proof in competition law cases.

The Commission explains:

> "[the] financial loss suffered by the victims of anticompetitive behaviour will often consist in the paying of a supra-competitive price. The claimant will therefore often have to show that a rise in price was the consequence of the actions of the defendant. The defendant might in turn argue that any rise in prices was in fact caused by something different, such as normal functioning of the market or by the actions of third parties."[120]

The Commission does not give any "policy options" to aid the establishment of causation, which is frustrating. Instead, it refers to its section on "access to evidence" and notes that "[given] the complex nature of the assessments to be made and given that case-law has played a very important role in all jurisdictions on this question, it could be considered that no further action is necessary in this field in order to facilitate damages claims."[121] The Commission also refers to *Courage* and the principles of equivalence and effectiveness. "These principles and particularly the latter can influence the notions of causations existing in national civil law. It should be considered whether a clarification of the legal requirement of causation is necessary in order to further facilitate damages actions".[122]

In view of the complications and complexities of Article 82 EC cases that the claimant stand in front of, in particular to prove causation in relation to such an action for damages it is unfortunate that the Commission has chosen not to address this point in any further detail.[123]

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[118] *Arkin v Borchard Lines Ltd. et al.* [2003] All E.R. (D) 173, [2003] E.W.H.C. 687 (Comm. 10 Apr. 2003), para. 51.

[119] *Arkin v Borchard Lines Ltd. et al.* [2003] All E.R. (D) 173, [2003] E.W.H.C. 687 (Comm. 10 Apr. 2003), para. 320, 339-341.

[120] EUROPEAN COMMISSION, note 10, 77.

[121] EUROPEAN COMMISSION, note 10, 77.

[122] EUROPEAN COMMISSION, note 10, 77.

[123] The Commission has been similarly silent on this point in the White Paper, although a passing-on defence for indirect customers is included in the White Paper, which includes a lightening of the burden of proof upon the claimant, by allowing her to rely on the rebuttable presumption that overcharges are carried through the entire purchase chain, EUROPEAN COMMISSION, note 22, point 2.6 and EUROPEAN COMMISSION, note 59, paras 212, 216, and 220.

In conclusion, if the *Arkin* case is anything to go by causation whether established *ex post* or *ex ante* will be the most difficult part of an Article 82 damages claim and therefore the one where most private claimants will fail. It therefore seems unfortunate that the Commission has not elaborated upon this point in its Green Paper (and White Paper), as there clearly is a need for greater guidance and support in private enforcement, which cannot be obtain via the other policy options suggested in the Green Paper such as granting easier access to evidence.

4 Should the leniency programme be extended to Article 82 EC?[124]

The purpose of the Commission's Leniency Notice[125] is to create a method of identifying and destroying cartels by granting immunity from fines to companies acting as whistleblowers. Cartels are seen as one of the most serious offences of the competition rules, as they are extremely harmful to competition and to consumers.[126] By granting immunity from fines or a reduction in fines to companies that help the Commission in unravelling a cartel, the Commission is giving an incentive to companies not wishing to participate in the cartel anymore to come forward without the fear of significant punishment.[127] The immunity or reduction of fine is based both on the quality or relevance of the information granted and the timing of the submission of the information to the Commission.[128] Currently the leniency programme only applies to cartels or horizontal agreements; vertical agreements under Article 81 EC and unilateral conduct under Article 82 EC are excluded from the scope of the programme.[129] The question is, could the leniency programme be extended to Article 82 EC?

Some key features should be considered: firstly, the leniency programme applies to a certain group of companies that by "kissing and telling" or whistle blowing on others avoids punishment or receives a diminished penalty. In comparison, Article 82 EC applies to unilateral conduct; hence, if a leniency notice were adopted for Article 82 EC, it would need to create an incentive that would make the dominant firm in principle "kiss and tell" on itself. Unless a company knows that it will be investigated and found guilty of an Article 82 EC offence and is facing significant fines, it is dubious whether such an incentive can be established by eliminating or limiting fines in return for "beyond normal cooperation". A "normal" leniency pro-

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[124] One of the questions that the Max Planck Forum on Competition Law asked me to consider in my talk was whether the absence of a leniency programme for breaches of Article 82 EC is justified. This is the basis of this section.

[125] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17.

[126] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17, para. 1.

[127] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17, paras 3-6.

[128] EUROPEAN COMMISSION, note 10, 63.

[129] EUROPEAN COMMISSION, note 10, 64.

gramme therefore does not seem to be effective or even plausible for Article 82 EC cases.

One option, however, could be to allow the "leniency" to commence after the Commission has begun its investigation. It could allow for a reduction of or immunity to fines if the investigated conduct ceases and the information provided by the dominant company is sufficient for some private claimants to be able to prove their losses are related to the dominant company's conduct. This is similar to the US system, where leniency applicants are forced to indemnify those who have suffered loss as a result of the applicants' behaviour.[130] Such leniency will clearly aid private enforcement, but it does not work well as an incentive for the dominant company to stop abusive behaviour. However, this is not leniency in the strict sense. It is rather conditions set for settlements. Hence, it would be more appropriate to refer to this suggestion as a form of "settlement promise" rather than leniency, as the latter is unrealistic under Article 82 EC. Moreover, the Commission seems adamant that its leniency programme should not be compromised and therefore suggests, in its Policy Option 28, to keep the leniency programme separate from national disclosure rules. This implies that it would not easily accept the above suggestion for a potential "settlement promise" under Article 82 EC.

The Commission's Policy Option 29 suggests awarding double damages to claimants for severe infringements (here horizontal cartelisation) and thus offer discounts of 50% of these in addition to the immunity from fines to the leniency applicant if he also aids the private claimants in obtaining damages. A similar approach could be applied for Article 82 EC offences achieving more or less the same result, as noted in the above settlement promise. In any case, any form of "leniency" like the ones suggested above has more in common with a settlement than with the leniency programme under Article 81 EC, and, as highlighted at the beginning, it will be hard to find a company willing to blow the whistle on itself.

Concluding a "leniency programme", or better, a "settlement promise" for Article 82 EC could be a support to promote private enforcement, in particular follow-on cases; however, it is rather more complicated, if not impossible, to make it act as an effective deterrent of anticompetitive behaviour and thereby work as an equivalent to the leniency programme under Article 81 EC. Moreover, there is a risk that it will run counter to public enforcement.

5 Costs as a disincentive to claim – or can they become an incentive?

All private actions will be faced with the risk of having to pay the costs for bringing an action. There is no indication that it may be more expensive to bring a claim for damages for an Article 82 EC offence than for an Article 81 EC offence. However, follow-on cases may be able to rely on evidence already submitted in a public litigation, and if this involved leniency immunity in Article 81 EC cases, there may

[130] *See* US DEPARTMENT OF JUSTICE, "Corporate Leniency Policy", available at http://www.usdoj.gov/atr/public/guidelines/0091.htm and EUROPEAN COMMISSION, note 10, 64.

be a reduction in legal costs to the claimant that would not be available to an Article 82 EC claimant. The general rule for cost recovery seems to be that the loser pays.[131] However, Article 6 of the European Convention on Human Rights has been interpreted to mean that everybody has a right to a fair trial and that this includes reasonable costs recovery. "Reasonable" should be assessed from the individual claimant's perspective. Consequently, the Commission suggests, in Policy Option 27, to establish a "cost protection order" system in cases where on the surface it is difficult to assess the outcome, to ensure that the risk of having to pay the legal costs does not become a disincentive for private claimants. In particular, the Commission notes that such a "cost protection order" should be applied to protect economically weak parties. This policy option should, from an Article 82 EC private-enforcement perspective, be encouraged, as the claimant will often be in a weaker economic position than the defendant, as it must be assumed that the latter has demonstrated a certain level of market power to trigger the private action in the first place.

6 Modernisation of Article 82 EC and the consequences for private enforcement

In 2005, the Commission commenced a review of Article 82 EC.[132] The review sought to outline the underlying theories and policies of Article 82 EC to generate a sound economic basis for the assessment of Article 82 EC cases. In other words, the review sought to adopt a more economic approach to Article 82 EC in line with the "modernisation" of the EC Competition rules and their enforcement: the adoption of Regulation 1/2003 on enforcement. With it follows a new set of guidelines on the cooperation between the Commission and national competition authorities, certain concepts within 81 and 82 EC and the application of 81(3) EC, which should help the national competition authorities and national courts in their newly acquired responsibility to enforce and apply the EC competition rules.[133] It has also reformed Article 81 EC with improved Block Exemption Regulations, all based on "a more economic and less regulatory competition policy".[134] Finally, the Merger Regulation[135] has been

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[131] EUROPEAN COMMISSION, note 10, 61.

[132] EUROPEAN COMMISSION, note 55.

[133] Commission Notice on cooperation within the Network of Competition Authorities, [2004] *OJ C 101/43,* Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] *OJ C 101/54,* Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] *OJ C 101/65,* Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), [2004] *OJ C 101/78,* Commission Notice – Guidelines on the effect-on-trade concept contained in Articles 81 and 82 of the Treaty, [2004] *OJ C 101/81, and* Communication from the Commission – Guidelines on the application of Article 81(3) of the Treaty, [2004] *OJ C 101/97.*

[134] EUROPEAN COMMISSION, Press Release IP/00/520, "Commission finalises new competition rules for distribution", 24 May 2000.

[135] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] *OJ L 24/1.*

updated, with "the underlying objective of the reform … to meet the challenges posed by global mergers, monetary union, market integration, enlargement and the need to cooperate with other jurisdictions"[136] as well as having moved towards a more economic-based approach in its application, with for instance the inclusion of the HHI measurements. It is therefore natural to expect an equal reform of Article 82 EC.[137]

Although the review of Article 82 EC is currently at a standstill it is worth considering the consequences of such a review upon private enforcement of the article.

The initial idea behind the review was to create a more economic based approach and thereby move away from the so-called "form-based" or "legalistic" approach, where the "conduct" is the focus of attention. Instead an "effect-based" approach has been suggested, where the focus is the effect of the conduct, irrespectively of its form.

The first concern to note is that any kind of reform of Article 82 EC will create some turmoil and uncertainty in relation to private enforcement if not hindering significant increases in private enforcement; because of the legal uncertainties such reform will bring to the substantive analysis of Article 82 EC. Therefore, to ensure effective private enforcement we must first ensure clarification and legal certainty of the substantive law. This includes ensuring that national courts and competition authorities are confident in applying the rules, a point which seems to have escaped the Commission.[138]

The EAGCP published in 2005 a report suggested an effect-based approach to Article 82.[139] This approach would require a shift in the focus from the conduct to the harm caused by the conduct and with this the standard of proof for anti-competitive effects would be raised, as the competition authorities would be required to demonstrate the competitive harm and the negative effects the behaviour has upon consumers through facts and empirical evidence.[140] On the other hand, the dominance assessment would be removed under the assumption that only companies holding market power would be able to create sufficiently harmful anti-competitive effects upon the market and surrounding markets. Such an approach would naturally also affect private enforcement. First, the introduction of a new approach to Article 82 would lead to lack clarity and legal certainty for both companies and consumers alike.[141] Despite the current competition rules not always being clear, case-law history establishes a certain amount of legal certainty. Moreover, the form-based approach draws a line between acceptable and unacceptable behaviour, albeit

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[136] EUROPEAN COMMISSION, Press Release IP/01/1795, "Commission launches wide-ranging discussion on reform of merger control regime", Brussels, 11 December 2001.

[137] Speech delivered by PHILIP LOWE, Director of Competition DG, at the Fordham Antitrust Conference ,Thirtieth annual conference on international antitrust law and policy, Fordham Corporate Law Institute, Washington, D.C., 23 October 2003, available at http://www.europa.eu.int/comm/competition/speeches/text/sp2003_040_en.pdf.

[138] EUROPEAN COMMISSION, note 10, 15.

[139] EAGCP, note 54.

[140] EAGCP, note 54, 3.

[141] *See* for instance BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, COMPETITION LAW FORUM, note 54 and WAHL, note 82, 3.

with limited consideration to the effect of the behaviour.[142] It will take time and resources to re-establish the legal certainty case law currently brings us, resources the Commission has not always been keen on allocating to Article 82.[143] Moreover, it will stagnate the introduction of independent action for damages: "the development of European Law towards the so-called 'more economic approach' seems to indicate, rather paradoxically, a weakening of this type of private enforcement".[144]

Another concern with an effect-based approach is restriction it will bring to *ex-ante* intervention, because "[if] applying an effect-based approach we will always have to wait and see what the actual or likely outcome of a particular behaviour is before we can conclude whether it is prohibited"[145] From a private action perspective and especially for follow-on cases an effect-based approach may be more convenient. Above it was demonstrated that private claimants are faced with severe difficulties when it comes to establishing causation. Even follow-on cases, which could in many ways rely on the findings of previous competition authority cases, would still fail in by not be able to establish causation due to the low standard of proof for anti-competitive effects, which permitted *ex-ante* action by the competition authorities. On the other hand, was an effect-based approach to be adopted the competition authorities would be required to apply a more rigorous analysis of the anti-competitive effects and certain times even an *ex post* assessment to sufficiently demonstrate abuse. [146] An increased standard of proof for anti-competitive effects would in effect lead to a lower barrier to reach for the private claimant to establish causation as the link between the harm caused to the claimant and the effects of the abuse will be easier to prove, if more attention is given to proving the anti-competitive effects. The result would be that follow-on cases would be greatly helped by introducing an effect-based approach to Article 82 EC. On the other hand, it would not aid independent cases and could in the worst case scenario exacerbate the standard of proof for the private claimant. If the purpose with the Green Paper (and White Paper) was to introduce private enforcement that would complement and support public enforcement, an effect-based approach to Article 82EC would most likely be of hindrance. Moreover, it could also risk limiting the preventative competition regulation by not allowing for sufficient *ex-ante* intervention.

The Commission Discussion Paper allows another reading of Article 82, which could in principle offer a solution to the standard of proof and causation problem occurring under private enforcements.[147] The Discussion Paper suggests an efficiency defence based on the four conditions under Article 81(3) EC allowing for a balancing test assessing the pros and cons of the alleged abusive behaviour. Under Article 81(3) EC, the burden of proof lies with the defendant to show that the conditions have been met. Introducing a similar reading of the anti-competitive effects

[142] Note however, as illustrated above, that the effect of certain behaviour does play a role when establishing an Article 82 EC offence; see also WAHL, note 82, 3.
[143] BÖGE/OST, note 14, 198.
[144] BÖGE/OST, note 14, 203.
[145] WAHL, note 82, 3
[146] EAGCP, note 54, 4 and WAHL, note 82, 6.
[147] EUROPEAN COMMISSION, note 55, paras 84-92.

under Article 82 EC would permit an alleviation of the burden of proof of the claimant. It therefore offers a good alternative to the current situation from a private enforcement perspective and to a certain degree also from a reform of Article 82 EC perspective, if a more economic approach should be sought. That said such a shift in the burden of proof risks straining the defendant's defence excessively and may increase the risk of over-enforcement and increased false positives and may therefore not be the way forward.

It is beyond the scope of this paper to discuss the reform of Article 82 EC, however, it should be highlighted that which ever shape such reform takes it will naturally affect the effectiveness of private enforcement. Many of the obstacles highlighted by both the Ashurst Study and the Commission's Green Paper in one way or another directly or indirectly relate to the substantive law. If a reform of Article 82 EC is going to take place, there will naturally be a period of uncertainty, until all parties have adapted to the new approach and this will undoubtedly affect private enforcement.

7 Conclusion

It should be recognised that private enforcement has it limits – private claimants ultimately work for their own benefits and not for a greater "public policy concern", private enforcement can therefore not be a substitute for public enforcement, but can work as an effective complement to public enforcement. The Green Paper reflects uncertainty as to which direction the Commission wishes to push private enforcement in.

The Green Paper does not disregard Article 82 EC offences, but equally they do not give them special consideration (the same can be said for the White Paper). This paper has demonstrated that the Green Paper does not sufficiently accommodate all the relevant issues for private claimants seeking damages for an alleged breach of Article 82 EC. Private claimants whether taking action in the form of a follow-on case or an independent claim, individually or as a group action are faced with obstacles which are not addressed adequately or in case of causation not addressed at all in the Green Paper.

There is no guidance or aid to private claimants as how to establish a causal link between the infringement and the harm caused. It has been shown that the current assessment of Article 82 EC by public enforcers and endorsed by the CFI can actually make it more difficult for private claimants to establish causation, as they will not be able to rely fully on the findings in the public litigation, because of the low threshold for anticompetitive effects which permits future "likely effects" to count towards the threshold.

Causation on the other hand requires a demonstration of actual loss, in other words a need for an *ex post* analysis or at least demonstration of certainty that the conduct will cause a foreseeable loss.

One suggestion to assist private enforcement is the introduction of a "settlement system" under Article 82 EC, mirroring to a certain extent the leniency programme available under Article 81 EC, but adjusted to mainly aid private litigations rather

than public enforcement. However, such introduction should be done with caution, as there is a risk that it will negatively affect public enforcement.

Another suggestion was to allow for a different reading of Article 82 EC in line with the proposed reform of the article. Although such an approach is similar to the suggestions made by the Commission in its Discussion Paper, it could bring forth increased risk of false positives. It is clear however, that there is room for interpretations which can support private enforcement and be in line with the 'more economic approach' sought by many.

Which ever route is taking, it is important that any form of assistance adopted to aid private claimants in their actions should be carefully assessed together with the Article 82 EC reform to ensure compatibility. Without clear guidance on the substantive assessment of Article 82 EC, it would be impossible to build a good working balance between public and private enforcement.

8 Post-script

Since the above paper was written the Commission has published a White Paper on action for damages referred to above in a few footnotes.[148] A few comments are here given in response to the conclusions made above and the position of the White Paper. First, the White Paper shows a guarded approach to private enforcement, although it can and probably will increase private enforcement, the White Paper makes it clear the Commission wishes public enforcement to remain in control of competition regulation. Second, the Commission's main aim of private enforcement has now become explicit compensation of injured parties. Third, the White Paper must be said to be equally less focused upon Article 82 EC offences and again causation has been left out despite the Commission again acknowledging in its White Staff Working Paper proving causation remains a significant obstacle to private claimants.[149] There may be some help to get for indirect claimants, i.e. claimants, who are not direct customers of the company engaged in the alleged abusive behaviour, under the passing-on defence, which the Commission wishes to introduce,[150] but again the claimant is left with a significant burden of proof in relation to causation. Fourth, given the little attention the White Paper has granted Article 82 EC, it is not surprising that nothing is said in relation to the reform of the Article. In conclusion, the White Paper has not given any special consideration to actions under Article 82 EC, although this is not unexpected, it is disappointing that not some efforts were made to give guidance or clarity on the issue on causation.

[148] EUROPEAN COMMISSION, note 22.
[149] EUROPEAN COMMISSION, note 59, 89
[150] EUROPEAN COMMISSION, note 59, 212-220.

Private Incentive, Optimal Deterrence and Damage Claims for Abuses of Dominant Positions – The Interaction between the Economic Review of the Prohibition of Abuses of Dominant Positions and Private Enforcement

Mark-Oliver Mackenrodt

1 Introduction

In 2008 the European Commission published a White paper[1] and a staff working paper[2] on damages actions for breach of the EC antitrust rules.[3] The White paper

[1] EUROPEAN COMMISSION, "White paper on damages actions for breach of the EC antitrust rules", COM(2008) 165 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf.

[2] EUROPEAN COMMISSION, "Commission staff working paper – accompanying the white paper on damages action for the breach of EC antitrust rules", SEC(2008) 404, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

[3] Further, the White Paper is accompanied by an impact assessment report: EUROPEAN COMMISSION, "Impact Assessment Report", SEC(2008) 405, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_report.pdf.

The report is accompanied by an executive summary: EUROPEAN COMMISSION, "Executive Summary of the Impact Assessment Report", SEC(2008) 406, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_summary_en.pdf.

was preceded by a Green Paper[4] and a staff working paper[5] on damage actions.[6] The European Commission seeks to enhance private actions for breaches of European competition law in order to have more private enforcement of competition law.[7] The intended reinforcement of private enforcement carries on the decentralisation of the application of European Competition law, a process that has been initiated by regulation 1/2003[8] which strengthened the role of the national competition authorities and of the courts of the Member States. With more private enforcement a higher number of competition law cases will be decided by the national courts instead of a competition authority. At the same time, competition authorities will be replaced by private parties when it comes to detecting possible infringements and selecting the cases that are brought to court.

In the same year in which the Green Paper on private damage actions was published the European Commission issued a discussion paper[9] on the application of Article 82 EC of the EC Treaty to exclusionary abuses.[10] The discussion paper on Article 82 EC further extends the more economic approach which has characterised the reform of Article 81 EC and the revision of the block exemption regulations to the field of abuses of market power. This means that the legality of unilateral competitive conduct is to be assessed with regard to its effect on competition. As compared to the traditional more formalistic approach, the more economic approach

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4 EUROPEAN COMMISSION, "Green paper damages actions for breach of the EC antitrust rules", COM(2005) 672 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html.

5 EUROPEAN COMMISSION, "Staff working paper – annex to the green paper damages action for the breach of EC antitrust rules", SEC(2005) 1732, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/sp_en.pdf.

6 The comments on the Green Paper which the European Commission has received during a public consultation are available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html. The comments by the Max Planck Institute for Intellectual Property, Competition and Tax law are reprinted at DREXL/CONDE GALLEGO/ENCHELMAIER/MACKENRODT/ENDTER, "Comments on the Green Paper by the Directorate-General for Competition of December 2005 on Damages Actions for Breach of the EC Antitrust Rules", (2006) 37 IIC 700.

7 For an overview of the Green Paper *see for example* DIENER, "The Green Paper on Damages Action for Breach of the EC Antitrust Rules", (2006) 27 E.C.L.R. 309.

8 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

9 EUROPEAN COMMISSION, "DG Competition discussion paper on the application of Article 82 EC to exclusionary abuses", (2005), available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

10 The comments of the public consultation on the discussion paper on the application of Article 82 EC to exclusionary abuses are available at http://ec.europa.eu/comm/competition/antitrust/art82/contributions.html. The comments by the Max Planck Institute for Intellectual Property, Competition and Tax law are reprinted at DREXL/CONDE/ENCHELMAIER/LEISTNER/MACKENRODT, "Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Directorate-General Competition Discussion Paper of December 2005 on the Application of Article 82 of the EC Treaty to Exclusionary Abuses", (2006) 37 IIC 558.

leaves market participants with a higher degree of uncertainty as to the legality of their conduct.[11]

The European Commission's Green Paper on private damage claims seeks to alleviate private enforcement[12] and has triggered a debate on a wide range of procedural and substantive issues.[13] However, private enforcement of competition law is mostly discussed with regards to cartel cases under Article 81 EC. This paper deals with the enforcement of Article 82 EC through private damage claims.

I am arguing that for private enforcement of Article 82 EC to be effective, there have to be private plaintiffs in place who are likely to be successful in court and who have an incentive to go exactly after that kind of behaviour which Article 82 EC seeks to prohibit. The first kind of shortcoming of private enforcement turns up in cases where harm to competition in the sense of Article 82 EC has occurred but where private parties are unlikely to be successful in court. This might be due to the fact that they have no legal standing or because they are not able to identify the infringer or because the harm is not attributable to an individual plaintiff. In these cases there is a danger of under-enforcement because private enforcers do not have an incentive to go to court. A second insufficiency of private enforcement occurs if private parties have an incentive to go to court even though there is no harm to competition in the sense of Article 82 EC. Law enforcement in the field of abuses of market power involves detecting and picking up cases for decision by a court or by a competition authority that are likely to violate Article 82 EC and to produce the kind of harm that Article 82 EC seeks to prevent. I am arguing that with regard to some potential private enforcers of Article 82 EC, there is a divergence between the motivation of a private party to bring a case to court and the motivation of a public enforcer. The paper discusses the consequences of this incentive divergence for reaching an optimal level of deterrence through private enforcement of Article 82 EC. I am concluding that there is an interaction between the new interpretation of Article 82 EC and the new enforcement mechanisms because a higher degree of uncertainty in a legal standard intensifies the concern for welfare losses through an over-deterrence. This concern is more pronounced with regards to Article 82 EC as compared to cartel cases.

After a short introduction of the notions of individual harm and harm to competition (2) and of the concept of legal standing (3) the relevance of incentives for reaching an optimal level of enforcement is analysed (4). Subsequently, the paper discusses the aptitude of several groups of individuals to serve as private enforcers of Article 82 EC (5).

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[11] The relationship of the more economic approach in the field of Article 81 EC and legal security is discussed by DREXL, "Die neue Gruppenfreistellungsverordnung über Technologietransfer-Vereinbarungen im Spannungsfeld von Ökonomisierung und Rechtssicherheit", (2004) GRUR Int. 716.

[12] EUROPEAN COMMISSION, note 2, para. 1.

[13] An overview of the various discussion points of the Green Paper is provided by DIENER, note 7; EILMANSBERGER, "The Green paper on Damages Action for the Breach of the EC Antitrust Rules and beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Actions", (2007) 44 C.M.L.Rev. 431.

2 The concepts of individual harm and harm to competition

Private enforcement of Article 82 EC through damage claims requires that there are individuals who have incurred individual harm. Individual harm is defined as the economic damage that can be attributed to an individual person.

It is important to distinguish the concept of individual harm from the notion of harm to competition: Article 82 EC seeks to protect competition on the market as a means to enhance consumer welfare and to ensure an efficient allocation of resources.[14] In particular, Article 82 EC seeks to prevent harm to the residual competition on a market where competition is already weakened by the presence of a dominant player.[15] The requirement to establish a detrimental effect on competition is part of the concept of abuse[16] which constitutes an element of the substantive offence of Article 82 EC. In the *Michelin* case the European Court of Justice has declared that the prohibition of abusive conduct covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking, competition has already been weakened and which through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market.[17] Under the more economic approach which the European Commission pursues in its discussion paper on the application of Article 82 EC to exclusionary abuses[18], the economic effects of the respective competitive strategy on the market constitute the most essential element in determining the unlawfulness of unilateral conduct.

This does not mean that Article 82 EC is exclusively concerned with public goods[19] or that Article 82 EC would not seek to protect individuals from harm under certain circumstances. To the contrary, Article 82 EC expressly seeks to protect purchasers from exploitative conduct as is exemplified by Article 82 (a) EC which interdicts the imposition of unfair prices.[20] Further, Article 82 EC prohibits exclusionary conduct.[21] European competition law does not intend to protect competitors from more efficient market players.[22] However, competitors can benefit from the application of Article 82 EC if the court finds that there has been harm to the com-

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[14] EUROPEAN COMMISSION, note 9.
[15] MÖSCHEL, in: IMMENGA/MESTMÄCKER (eds), "Wettbewerbsrecht EG/Teil 1", Article 82, para. 5 (4th ed. 2007).
[16] ENCHELMAIER, in: HAILBRONNER/WILMS (eds), "Kommentar zum Recht der Europäischen Union", Article 82, para. 43 (2005); Möschel, note 16, Article 82, para. 119.
[17] Case 322/81 *Michelin* [1983] ECR 3461, para. 70.
[18] *See also* DREXL/CONDE/ENCHELMAIER/LEISTNER/MACKENRODT, note 10.
[19] MÖSCHEL, note 16, Article 82, para. 5.
[20] ENCHELMAIER, note 17, Article 82, para. 8; MÖSCHEL, note 16, Article 82, para. 5.
[21] MÖSCHEL, note 16, Article 82, para. 5; ENCHELMAIER, note 17, Article 82, para. 8.
[22] EUROPEAN COMMISSION, note 9.

petitive process. There is a lively debate on the various goals of Article 82 EC.[23] For the purposes of the argument made in this paper it is, however, sufficient to note that in some instances there is an overlap or a correlation between individual harm and harm to competition but that they are not necessarily identical. On the one hand, there are cases where harm to competition occurs but where this harm is not attributable to an individual. On the other hand, Article 82 EC does not prohibit every kind of conduct that harms other individuals. Individual harm is not a substantive requirement for Article 82 EC to apply. To the contrary, there is a wide array of business practices which harm other individuals but do not constitute an infringement of Article 82 EC. For example, the introduction of a superior product in itself does not constitute an abuse of market power even though this might harm producers of an inferior product. In short, Article 82 EC seeks to prevent negative welfare effects that constitute harm to competition. Individual harm, by contrast, is a necessary but not a sufficient requirement which an individual plaintiff has to prove if he is seeking damages as a legal consequence.[24]

3 The concept of legal standing

The aptitude of an individual as private enforcer further depends on the eligibility of this person to bring a damage claim in court. Not all persons that have suffered some kind of harm due to abusive behaviour are entitled to sue for damages. It is important to distinguish between injury on the one hand, and legal standing in court on the other hand. Injury refers to the actual adverse effects of an antitrust infringement. Standing, by contrast, refers to the plaintiff's right to sue in court.[25] To be allowed standing, a showing of injury is necessary but not sufficient. Whether a particular group of plaintiffs should be allowed standing is often hotly debated and involves a policy question on who should be allowed to act as an efficient private antitrust enforcer. Relevant factors for granting standing to a party involve the directness of the harm, the potential for duplicative recovery and the existence of more direct plaintiffs. The concept of legal standing seeks to sort out plaintiffs who due to their remote relationship to the infringer have only little chances of actually succeeding in court. Even where these individuals are granted standing they might lose in court because they cannot prove the actual infringement or their actual damage. Granting standing involves a trade-off between the cost that are caused by proceedings which might eventually not be successful on the one hand, and the pros-

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[23] A comprehensive overview can be found at ICN, "Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies", (2007), available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf.

[24] In addition, private plaintiffs might sue for an injunction. This paper, however, deals with damage claims as a means of enforcing Article 82 EC.

[25] For a general overview with regards to legal standing *see* PAGE, "Proving Antitrust Damages", 14 (1996); GELLHORN/KOVACIC/CALKINS, "Antitrust Law and Economics", 548 (5th ed. 2004).

pect that the proceedings will actually lead to a compensation of the plaintiff and thereby contribute to the private enforcement of the competition laws on the other hand.

4 Incentives and the optimal level of enforcement

One of the main tasks of the enforcers of competition law consists in detecting possible infringements and bringing cases to court to be decided.[26] There are two scenarios in which enforcement would not be optimal: First, enforcement would be inefficient if the enforcer would fail to bring competitive conduct to court even though it has resulted in harm to competition in the sense of Article 82 EC. In such a case an under-deterrence would occur as actual infringements would remain unpunished. Second, an enforcement system would be insufficient if cases would be brought to court which completely lack merit or where there is only a small probability that the court will actually find an infringement. In this scenario three kinds of inefficiencies would arise: First, the court would waste resources which could otherwise be used to litigate and decide other cases that are more likely to have merit. Second, parties that have been drawn into meritless litigation would incur costs, and third and most importantly, they might be deterred from engaging in behaviour that is desirable and legal. The latter kind of inefficiency would be the result of an over-deterrence. To avoid the welfare losses of an over-deterrence, an enforcement system should, therefore, only bring cases to court that are likely to constitute an infringement of the law. In other words, enforcement of competition law is optimal if exactly the kind of conduct is detected and litigated that Article 82 EC seeks to prohibit.

The motivation of a public enforcer of Article 82 EC in selecting cases for decision is guided by the question whether the particular conduct has lead to harm to competition. For private plaintiffs, by contrast, it is the prospect of recovering damages that creates an incentive to bring cases to court. For a private party, going to trial involves an individual cost-benefit analysis which in economic literature has been interpreted as an investment decision.[27] Accordingly, with regards to the incentive to select cases for decision there is a divergence between the incentive of a private enforcer and that of a public enforcer. It is true that for the plaintiff to be ultimately successful, the court still has to find harm to competition. However, the plaintiff's decision to go to trial involves a wide range of factors other than whether

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[26] In the system of public enforcement on the European level it is the European Commission itself who takes the decision on a case. The party affected can then appeal the case in court. On the level of the Member States the national rules of public enforcement apply. Most Member States follow an administrative prosecution system similar to that on the European level. By contrast, in a court-oriented system of public enforcement the authority has to initiate proceedings in a court which then enters into a judgment. For the purpose of the argument made in this paper it does not make a difference whether the case is decided by a court or by an administrative authority.

[27] *See* for example CORNELL, "The Incentive to Sue: An Option-Pricing Approach", (1990) 19 Journal of Legal Studies 173-187.

there actually has been harm to competition.[28] Such factors include the probability of settling the case once a trial has been started, the costs of access to courts and the legal costs of litigation. Also, there may be plaintiffs who are motivated by intimidating the defendant, by causing him litigation costs or by extracting a settlement offer. Even if a case is ultimately rejected by a court an over-deterrence might occur if the defendant refrains from beneficial conduct for fear of litigation costs and of a loss of reputation. Accordingly, the court can have less reliance on the pre-selection of the cases lodged, if there is a private enforcer with a strong incentive divergence who selects the cases for litigation instead of a public enforcer. The different pre-selection of cases can affect the decision making of the courts. Courts which hear individual cases that are brought by private plaintiffs are presented a different overall picture of the market and of the market habits as compared to the scenario where the pre-selection of cases is performed by a public authority. Generally, courts are limited to the facts as they are presented by the parties. Further, courts are under an obligation to render a decision on every single case that is presented to him by private parties. A court is more concerned with deciding each particular case on its own merits than with generating a coherent policy approach. The situation is different if competition cases are decided by a public authority or if at least the cases are pre-selected by a public enforcer for decision by a court: A public authority can perform market investigations on its own initiative and is generally more familiar with the overall picture of the market conditions. A public enforcer enjoys discretion whether to bring a case to be decided by a court or an administrative body. In selecting the cases a public enforcer will have the general policy in an industry in mind. In sum, the pre-selection of cases by a private enforcer instead of by a public enforcer can influence the overall enforcement policy.

The concerns about an incentive divergence between a public and a private enforcer are smaller in cases where individual harm and harm to competition are identical or where there is a strong correlation between the two of them. Such a correlation would ensure that private parties have an incentive to go exactly after the kind of behaviour that Article 82 EC seeks to prevent. In such a scenario the incentive divergence would only be small, private enforcers would be more apt to replace public enforcers and private enforcement of Article 82 EC law through damage claims would be more likely to be optimal.

5 Potential private enforcers of Article 82 EC

This section identifies different groups of market participants that are potentially harmed by an abuse of a dominant position and that might potentially serve as private enforcers of competition law. The aptitude of these individuals as private enforcers is analysed by discussing whether they are likely to be successful as plain-

[28] A formal modelling for the plaintiff's incentive to sue is provided by RENDA/PEYSNER/RILEY/RODGER/VAN DEN BERGH/KESKE/PARDOLESI/CAMILLI/CAPRILE, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", 175 (2007). The formal modelling shows that the probability of winning at trial is only one out of several factors.

tiffs and whether the individual harm of these potential plaintiffs corresponds to a welfare loss that Article 82 EC seeks to prevent. There is a wide variety of different groups that might potentially be harmed. The kind of damage that a person has suffered from an abuse of a dominant position depends on his role in the market.

5.1 Direct purchasers

Direct purchasers are customers who buy the product directly from the defendant who has engaged in abusive conduct. An abuse of market power leads to a rise in prices and to a reduction in quantity because there is less competition in the market than absent the abusive behaviour. As a consequence, customers who purchase the relevant product directly from the defendant incur damages because they have to pay supra-competitive prices. Their economic loss corresponds to the overcharge.

In addition, direct purchasers might lose profits: Some direct purchasers are not the final customers, but rather use the product as an input for their own products. Due to the Article 82 EC infringement, their input costs rise. If the direct purchasers pass their higher costs on to their own customers, they lose profits if higher prices induce a reduction in sales. In this case direct customers may file a lost profit claim.[29]

Direct purchasers are generally granted standing in court.[30] Article 82 (a) EC explicitly seeks to protect direct purchasers from supra-competitive pricing. They do possess a particular aptitude to serve as private enforcers, because from their business relationship with the defendant they very often possess particular knowledge about the market.

In terms of welfare, a price increase leads to a wealth transfer from consumers to producers.[31] Under a consumer welfare standard[32] which is followed by European competition law[33] this wealth transfer constitutes harm which Article 82 EC seeks to prevent. As the overcharge and the wealth transfer are identical, there is a rather strong correlation between individual harm and harm to competition. The incentive of direct purchasers as private enforcers is, therefore, closely aligned with the incentive of a public enforcer.

If the direct purchaser is not the final customer the amount of damages which the direct purchaser is allowed to recover depends on whether the defendant is permitted to raise the so-called passing-on defence. A direct purchaser is not a final customer if he has either sold the defendant's product on to so-called indirect customers or if he has included the defendant's product as an input into his own products

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[29] For lost profit claims *see* for example PAGE, note 26, 183.

[30] EMMERICH in: IMMENGA/MESTMÄCKER (eds), "Wettbewerbsrecht GWB", § 33, para. 25 (4th ed. 2007).

[31] In addition, a deadweight loss occurs. Deadweight losses are discussed in section 5.4 of this paper.

[32] Various concepts of welfare are explained by MOTTA, "Competition Policy – Theory and Practice", 18-21 (2004).

[33] A strong argument for the theory that European competition law follows a consumer surplus standard can be found in Article 81 (3) EC which requires that efficiency gains are only admissible as a justification if they are passed on to consumers.

which he has sold to indirect customers. In selling the product, the direct customers might have passed the whole or part of the overcharge damage down the supply or production chain. If direct customers sue for damages, the question arises whether they are entitled to recover the whole amount of the overcharge or whether they are limited to recoup only that part of the overcharge which they have not passed on. In the latter case the defendant would be allowed to raise the passing-on defence and the damage award would be reduced by the passing-on rate. The admissibility of the passing-on defence is closely intertwined with the question whether indirect purchasers should have standing to sue.[34]

If the defendant is allowed to raise the passing-on defence, direct purchasers might have only a small incentive to serve as private enforcers of competition law. If, by contrast, the defendant is denied the passing-on defence, the direct purchasers might be enriched. This would increase their incentive to go after infringements of Article 82 EC. At the same time, a mere amplification of their incentive would, however, not compromise their aptitude as private enforcers because their incentive is still in alignment with that of a public enforcer. Under the federal antitrust law of the United States, direct customers are under certain conditions even entitled to treble damages in order to provide them with an additional incentive for detecting cartels.[35] Empirical studies have concluded that with regard to direct purchaser actions there is no concern of over-deterrence with regard to cartels even if there is a treble damage rule in place.[36] A similar reasoning would apply to direct customers as enforcers of Article 82 EC, because with regard to the incentive alignment it is irrelevant whether supra-competitive prices are due to an agreement or due to unilateral practice.

5.2 Indirect purchasers

A further group that is possibly harmed by an abuse of market power are indirect purchasers. Indirect purchasers are customers who do not have an immediate business relationship with the defendant, but who have bought a product from a direct purchaser and who are further down in the supply chain. The product which indirect purchasers have acquired is either identical with the one sold by the defendant, or it contains the defendant's product as an input.

Indirect purchasers are harmed, if they have to pay a higher price for the final product due to the supra-competitive pricing of the defendant. This is the case when the direct purchaser has passed on the price overcharge down the supply chain.

The individual overcharge damage of indirect customers corresponds to the welfare loss which Article 82 EC seeks to prevent. Therefore, the incentive of indirect

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[34] A discussion of the passing-on defence and legal standing of indirect customers will be provided in section 5.2 which deals with indirect customers.

[35] Section 4 (a) Clayton Act.

[36] Based on empirical studies, it has been concluded that in the field of cartels there is only little concern for an over-deterrence even when there is a treble damage rule in place. *See* LANDE, "Five myths about antitrust damages", (2006) U.S.F.L. Rev. 651, 666.

purchasers as private enforcers is quite closely aligned to the incentive of a public enforcer.

However, the aptitude of indirect purchasers as private enforcers is debated. As indirect purchasers do not have a direct business relationship with the defendant they often do not even know the defendant's identity and procedural complexities occur if the overcharge damage is dispersed over several stages of the production or distribution chain. Two controversial interrelated questions arise. First, it is discussed whether indirect purchasers should be allowed legal standing in court. Second, it is debated whether the defendant should be denied the passing-on defence, i.e. whether direct purchasers should be allowed to recover the complete overcharge even if a passing-on of the damage to indirect customers has occurred. The passing-on defence and legal standing for indirect customers are commonly discussed with regard to cartel cases. However, a similar reasoning applies with regard to unilateral conduct.

5.2.1 The passing-on defence and standing in US law and EU law

Under federal antitrust law in the United States, the passing-on defence is generally not allowed.[37] In *Hanover Shoe*[38] in the year 1968 the US Supreme Court awarded a plaintiff the full amount of the monopoly overcharge not admitting the defence that the damage of the direct purchaser had to be adjusted due to a passing-on of the supra-competitive prices to indirect purchasers. The decision was based on the belief that determining the pass-through rate is burdened with high difficulties. However, ever since the *Hanover Shoe* decision which dates back to 1968, considerable advances have been made in economic methods.[39] According to the Court in *Hanover Shoe,* the passing-on defence should only be allowed as a matter of exception if the overcharged buyer has a pre-existing cost-plus contract.[40] After the *Hanover Shoe* decision, defendants could be exposed to duplicative claims by direct purchasers on the one hand, and by indirect customers on the other hand. Therefore, it was discussed to deny standing to indirect customers to avoid duplicative damage claims.[41] In *Illinois Brick*[42] the US Supreme Court held that under federal antitrust law, only direct purchasers can recover damages and that there is no adjustment to be made for the passing-on of such overcharges. Accordingly, indirect purchasers are denied standing under federal antitrust law. However, after *Illinois Brick* about

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[37] *See for example* BLAIR/PIETTE, "Antitrust Injury and Standing in Foreclosure Cases", (2006) 31 Journal of Corporation Law 401; BULST, "Schadensersatzansprüche der Marktgegenseite im Kartellrecht", 35-98 (2006).

[38] *Hanover Shoe v United Shoe Machinery*, 392 US 476 (1964).

[39] An overview of economic methods for determining the pass-through rate is provided by KOSICKI/CAHILL, "Economics of Cost Pass Through and Damages in Indirect Purchaser Antitrust Cases", (2006) 51 Antitrust Bulletin 599-630.

[40] *Hanover Shoe v United Shoe Machinery*, 392 US 476 (1964), 481.

[41] For a more detailed discussion of the passing-on defence and of standing of indirect customers under US law *see* CAVANAGH, (2004) 17 Loyola Consumer Law Review 1-51; BAKER, "Federalism and Futility: Hitting the Potholes on the Illinois Brick Road", (2002) 17 Antitrust 14.

[42] *Illinois Brick v Illinois*, 431 US 720 (1977).

30 states have enacted state antitrust laws that allow indirect purchasers to sue for damages.

In the European Union there are no harmonized rules on the European level that govern the enforcement of private damage claims.[43] The admissibility of the passing-on defence and the question of standing of indirect purchasers are, therefore, to be determined according to the national procedural laws and the national tort laws.[44] Among the Member States the picture is most diverse with only little case law.[45] There are two main principles flowing from European law that define the requirements that the national laws have to fulfil for the assertion of claims under European competition law:[46] According to the *effet utile* principle, the Member States are under an obligation to ensure that European competition law is enforced efficiently. Secondly, the principle of equivalence requires that the conditions for asserting claims that are based on European law shall not be less favourable as compared to claims that are based on national law. In the *Courage*[47] decision, the European Court of Justice has spelt out that the practical effect of the European antitrust rules would be at risk if it were not open to any individual to claim damages for loss caused by an infringement of the competition rules. Carrying on this thought, the European Court of Justice held in the *Manfredi*[48] decision that the principle of full effectiveness requires that any individual can claim compensation if there is a causal relationship between the harm and the infringement of the competition rules. The Court added that community law does not prevent Member States from providing for legal mechanisms that prevent an unjust enrichment of the plaintiffs.[49]

In Germany, § 33 of the German Antitrust Law (Gesetz gegen Wettbewerbsbeschränkungen – GWB) was revised by the seventh amendment of the law. The revision substantially changed the system of damage claims. § 33 (3) (2) GWB[50] explicitly posits that a damage shall not be excluded simply because of a resale of the good. Under German law the defendant is as a rule denied the passing-on defence.[51] It is argued that it would be contrary to the objective of tort law to allow the defend-

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[43] Joint Cases C-295/04 – 298/04 *Manfredi* [2006] ECR I-6619, para. 62.

[44] A general analysis for German law is presented by BUNDESKARTELLAMT, "Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven", 10 (2005); BULST, note 38, 345; BULST, "Private Antitrust Enforcement at a Roundabout", (2006) 7 EBOR 725, 728.

[45] WAELBROECK/SLATER/EVEN-SHOSHAN, "Study of the Conditions on Claims for Damages in case of Infringement of EC Competition Rules, Comparative Report", (2004), available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf (hereafter referred to as the ASHURST STUDY).

[46] Joint Cases C-295/04 – 298/04 *Manfredi* [2006] ECR I-6619, para. 72.

[47] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

[48] Joint Cases C-295/04 – 298/04 *Manfredi* [2006] ECR I-6619, para. 61.

[49] Joint Cases C-295/04 – 298/04 *Manfredi* [2006] ECR I-6619, para. 99.

[50] § 33 (3) (2) GWB: "If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service."

[51] A more detailed analysis of German law is provided by DREXL, "Zur Schadensberechtigung unmittelbarer und mittelbarer Abnehmer im europäisierten Kartelldeliktsrecht", in: HELDRICH/PRÖLSS/KOLLER ET AL. (eds), "Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag", 1339–1365 (2007).

ant to profit from the fact that the direct purchaser managed to pass on part of the overcharge.[52] Also, there is no presumption under German law that a direct purchaser who is not the final customer was able to pass on the damage. The passing-on to be successful regularly requires particular efforts on part of the direct purchaser.[53] Therefore, the burden to proof that the overcharge has actually been passed on rests with the defendant who raises the passing-on defence. Indirect purchasers are granted standing under German law if they can establish a causal link between the infringement and the damage they have suffered.[54] In order to avoid a double payment of damages by the infringer, several different approaches are being discussed under German law.[55]

5.2.2 Compensation principle and deterrence

The discussion on the passing-on defence and on standing for indirect purchasers points to a conflict between the compensation principle that is inherent to many national tort laws on the one hand, and the principle of deterrence that the European Court of Justice has highlighted on the other hand. The conflict between the two principles provides an example how the enforcement of European law through national law can influence the character of the national law of the Member States.[56]

The principle of deterrence requires that damage awards have to be high enough to deter future infringements. With regards to private damage claims for infringements of European competition law, the European Court of Justice has spelled out in its *Manfredi* decision[57] that national courts have to respect the principle of effectiveness. This means that the enforcement of European competition law in order to be effective needs to achieve a deterring effect.[58] Liability for antitrust damages will only have a deterring effect, if damage awards are higher than the potential gains of the infringer from the anticompetitive behaviour. A potential infringer of the antitrust rules might count on the fact that not all antitrust infringements are detected and litigated successfully and that some individuals are harmed that do not have standing to collect damage compensation. For this reason, the principle of deterrence might require to allow an injured party to recover the complete illegal monopoly gain from the defendant even though the particular plaintiff might be enriched by this damages award. In addition, in some jurisdictions damage awards are multi-

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[52] EMMERICH, note 31, § 33, para. 58.

[53] DREXL, note 52, 1349.

[54] DREXL, note 52, 1354, 1355; EMMERICH, note 31, § 33, para. 57.

[55] An overview of the various approaches is provided by BUNDESKARTELLAMT, note 45; DREXL, note 51, 1354-1359; de lege late a two-step procedure is favoured by DREXL/CONDE GALLEGO/ENCHELMAIER/MACKENRODT/ENDTER, note 6, 717.

[56] There is some indication that the private enforcement of European competition law through national tort law might lead to a repositioning of national tort law and ultimately lead to the emergence of a Europeanized or even harmonized European tort law in the field of competition. *See* DREXL, note 52, 1359.

[57] Joint Cases C-295/04 – 298/04 *Manfredi* [2006] ECR I-6619, para. 72.

[58] It is, however, worth mentioning that the deterring effect stems at the same time from public enforcement and in particular from fines. In determining fines illegal gains are taken into account.

plied by a certain factor in order to enhance the deterring effect. However, this might result in an overcompensation of the plaintiff if the damage award is higher than the actual damage. Accordingly, a conflict between the compensation principle and the principle of deterrence arises.[59] Under the compensatory principle, the plaintiff is only entitled to be put in a situation in which he would have been absent the violation. In many national jurisdictions of the Member States' tort law is governed by the compensation principle in the sense that the plaintiff is not entitled to a damage award higher than its actual damage.

Applied to the debate about the passing-on defence and about standing of indirect purchasers the following picture arises. Denying the passing-on defence potentially over-compensates direct purchasers who receive the complete overcharge even though they have passed on their damage. This would be contrary to the compensation principle. But at the same time denying the passing-on defence makes it more likely that the defendant is deprived of his illegal gains. This would have a deterring effect for future infringers and lead to a more effective private enforcement of competition law. The windfall profit of the plaintiff could be interpreted as a reward for acting as a private enforcer of the laws. In sum, denying the passing-on defence would give priority to the objective of deterring infringers over the compensatory principle. The staff working paper accompanying the Green Paper of the European Commission cites both deterrence and compensation as principles for determining the amount of damages.[60] The White Paper[61] and the accompanying staff working paper[62] seem to give a slightly higher priority to the compensation principle as compared to the principle of deterrence.

5.2.3 Policy options in the Green Paper

As the law in the European Union regarding the passing-on defence and regarding standing for indirect purchasers is still largely unsettled, the European Commission presents and discusses four different options in its Green Paper on damages actions for breach of the EC antitrust rules[63] and in its working paper annexed to the Green Paper:[64]

The first option[65] allows the passing-on defence and gives standing for both direct and indirect purchasers. Under this option, direct purchasers will not succeed with their claims if there has been a passing-on of the damage. This ensures that direct purchasers are not being enriched. Indirect purchasers would remain as the main private enforcers of competition law. However, indirect purchasers are often only in a weak position to successfully pursue damage claims for three reasons:

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[59] Possible conflicts between the obligation to effectively enforce European competition law and principles of the national tort law regimes of the Member States are analyzed by DREXL, note 52, 1359.

[60] EUROPEAN COMMISSION, note 5, paras 4-6.

[61] EUROPEAN COMMISSION, note 1, 3.

[62] EUROPEAN COMMISSION, note 2, paras 12-15.

[63] EUROPEAN COMMISSION, note 4, 7.

[64] EUROPEAN COMMISSION, note 5, paras 159-180.

[65] EUROPEAN COMMISSION, note 4, option 21.

First, indirect purchasers suffer from an informational disadvantage with regards to suing the infringer. They do not have a direct relationship with the infringer and are not familiar with the market on which he sells his products. Very often, indirect purchasers are not even in a position to identify the infringer or to spot the violation of competition law. Second, the damage of indirect purchasers is often dispersed over a high number of individuals.[66] Indirect purchasers on their part are not necessarily the final customers and might have similarly passed on at least part of the damage. As a consequence, various members of the supply or production chain may end up bearing only small fractions of the overcharge damage. In these cases, the individual incentive to sue is only small even though the overall damage might be substantial. Third, indirect purchaser claims are burdened with a high degree of complexity: It is highly difficult to assess the extent to which higher input prices have been passed on to customers.[67] The complexities in determining the pass-on rate creates uncertainty as to the damage award. This uncertainty further decreases the incentive of indirect purchasers to sue. In sum, option one weakens the role of direct purchasers as private enforcers by allowing the passing-on defence. As indirect purchasers are only weak enforcers, infringers are likely to end up keeping their illegal gains. The first option should, therefore, be rejected.

The second option[68] of the European Commission's Green Paper excludes the passing-on defence and denies standing to indirect purchasers. This solution avoids the procedural complexities of allocating the damages between direct purchasers and indirect purchasers. However, indirect customers are denied compensation for their damage and direct purchasers might be unjustly enriched. Both contravenes the compensation principle. At the same time, this solution might not be satisfactory with regard to the principle of deterrence: Direct purchasers remain as the only enforcers of competition law. They might, however, be reluctant to sue their suppliers for fear of burdening their ongoing business relationship with litigation. This is particularly true in Article 82 EC cases where the infringer possesses market power which puts him in a better position to resort to retaliatory measures. If indirect purchasers are denied standing, infringers might even engage in collusion with direct purchasers not to bring an action. This would constitute a vertical cartel. In particular, in cases under Article 82 EC direct purchasers might be willing to enter into such a silent vertical agreement with the infringer for two reasons: As the direct purchaser is dependant upon the infringer who possesses market power he is particularly vulnerable to retaliatory measures. Second, the direct purchaser has not even suffered actual damage on his own if he has passed on the overcharge. His motivation to sue his business partner will therefore be lower. In sum, under the second option effective private enforcement is unlikely to occur and the infringer will in many cases be permitted to retain its illegal gains. Indirect purchasers for lack of standing are not in a position to take the infringer to court and direct pur-

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[66] DREXL, note 52, 1347.

[67] HOSEINIAN, "Passing-on Damages and Community Antitrust Policy – An Economic Background", (2005) 28 World Competition 3-21.

[68] EUROPEAN COMMISSION, note 4, option 22.

chasers are likely to be reluctant to do so. In addition, option two runs counter to the compensation principle and does not effectively deter from future infringements.

In the third option[69] cited by the Green Paper of the European Commission, the passing-on defence is excluded and both direct and indirect purchasers are permitted standing. This approach entails a stronger deterrence effect against future infringements. There is a higher probability that the infringer is stripped off his illegal gains because he might be sued by the direct purchaser as well as by the indirect purchaser. Indirect purchasers receive compensation for their losses. However, direct purchasers might receive windfall profits and infringers might be exposed to multiple damage claims. This would be contrary to the compensation principle, but would lead to an even higher deterrence. In sum, option three would be preferable to options one and two. The drawbacks of option three can be mitigated if a mechanism is put in place that allocates the overcharge between direct and indirect purchasers. The fourth option of the Green Paper[70] proposes a two-step procedure whereby in the first step the passing-on defence is excluded and indirect purchasers are granted standing. In the second step the overcharge is distributed between all parties that have suffered loss. This approach offers the advantage of better satisfying both, the compensation principle as well as the principle of deterrence. However, many national legal orders of the Member States do not provide for such an allocation mechanism. In particular, provisions for class actions are quite rare. Option four would therefore require that the Member States introduce mechanisms for collective damage claims.[71]

5.2.4 Discussion of the White Paper

In its White Paper the European Commission favours a solution that comes closest to options three and four of the Green Paper: With regard to standing the White Paper[72] of the European Commission and the accompanying staff working paper[73] favour granting legal standing to indirect purchasers. This is in accordance with the jurisprudence of the European Court of Justice who in its case *Manfredi*[74]stated that any individual can claim compensation, if there is a causal relationship between the infringement and the individual harm.

With regards to the passing-on of damages, the European Commission distinguishes between two scenarios in its White Paper[75] and the accompanying staff working paper[76]: In the first scenario an infringer is sued by a purchaser who is not

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[69] EUROPEAN COMMISSION, note 4, option 23.
[70] EUROPEAN COMMISSION, note 4, option 24.
[71] *See* DREXL/CONDE GALLEGO/ENCHELMAIER/MACKENRODT/ENDTER, note 6, 716, 717. *De lege ferenda* the authors propose a mechanism similar to that of a trustee in bankruptcy.
[72] EUROPEAN COMMISSION, note 1, 4.
[73] EUROPEAN COMMISSION, note 2, para. 37.
[74] Joint Cases C-295/04 – 298/04 *Manfredi* [2006] ECR I-6619, para. 61. The *Manfredi* decision has been issued after the publication of the Green Paper.
[75] EUROPEAN COMMISSION, note 1, 8.
[76] EUROPEAN COMMISSION, note 2, paras 207, 214, 220.

the final customer and who has passed on the overcharge. The Commission refers to this situation as "the passing-on shield against an action brought by a purchaser other than the final customer". In this scenario the European Commission seeks to prevent an unjust enrichment of the plaintiff by allowing the defendant to raise the passing-on defence.

It seems slightly imprecise if the European Commission argues that in this case the plaintiff has suffered no loss.[77] Rather, the plaintiff has suffered a loss at the moment when he paid the overcharge but this loss was later mitigated when he managed to pass the overcharge on to his own customers. Passing-on higher prices to one's customers usually requires particular efforts as to marketing and negotiating. Admitting the passing-on defence in such a case would mean to hold against the plaintiff that by virtue of his own genuine efforts he has managed to mitigate his damage. Even absent an infringement by the defendant, the plaintiff might have successfully engaged in such an effort. In this case, he would not be deprived off his additional income to the advantage of the infringer. It is, therefore, questionable whether enrichment as a consequence of a passing-on of the overcharge could in all cases be qualified as being unjust. However, in such a case a court might find that there is no causation between the infringement and the passing-on and reject the passing-on defence.[78] The European Commission, in any case, does not want to exclude the passing-on defence as a matter of principle. At the same time the European Commission seeks to make an unjust enrichment of the defendant less likely by placing the burden of proof for the passing-on defence on the defendant.[79] A defendant would be unjustly enriched if he could keep the illegal gains, because neither direct purchasers nor indirect purchasers are successful in court.

The second scenario identified by the European Commission is referred to "the passing-on sword in an action brought by a purchaser other than the direct purchaser".[80] In this situation an indirect purchaser claims that the harm has been passed on to him and sues the infringer. To be successful the indirect purchaser has to prove the antitrust infringement, the passing-on of the overcharge and the causal link between the infringement and the individual damage. The European Commission concedes that there is some risk that the infringer maintains his illegal gains, because the passing-on of the overcharge is difficult to prove. Therefore, the White Paper recommends that the indirect purchaser should be able to rely on a rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level.[81] Further, the White Paper and the accompanying staff working paper[82] propose procedural measures on a national level to avoid contradicting results in multiple proceedings by plaintiffs who are at different levels of the distribution chain.

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[77] EUROPEAN COMMISSION, note 1, 7.

[78] The European Commission, however, only requires that two facts be proven for invoking the passing-on defence (1) the fact that the overcharge has been passed on and (2) the extent to which the overcharge has been passed on. *See* EUROPEAN COMMISSION, note 2, para. 213.

[79] EUROPEAN COMMISSION, note 2, para. 213.

[80] EUROPEAN COMMISSION, note 2, para. 215.

[81] EUROPEAN COMMISSION, note 2, para. 220.

[82] EUROPEAN COMMISSION, note 2, paras 221-225.

5.2.5 Conclusion on legal standing and the passing-on defence

Summing up, direct customers as well as indirect customers incur individual harm if they have to pay an overcharge. Their individual harm is quite closely correlated with the harm to competition that Article 82 EC seeks to prevent. This basically makes them suitable as private enforcers. Their role as private enforcers of competition law is, however, complicated by the fact that the damage might have been passed down the supply chain.

Direct purchasers might be particularly effective as private enforcers due to their first-hand knowledge of the market conditions. Allowing the passing-on defence would reduce the incentive of direct purchasers to serve as private enforcers, because the prospect of success of their claims would be burdened with more insecurity. The solution in the White Paper to admit the passing-on defence, but to put the burden of proof on the defendant accounts for the compensation principle and at the same time seeks to reduce the procedural risks for direct purchasers.

Indirect purchasers should be granted standing to put them in a position to serve as private enforcers particularly in cases where the direct purchaser might collude with the infringer not to serve as private enforcers of competition law. As indirect purchasers are in a difficult position to prove the passing-on of the damage down to their level, it seems appropriate to establish a presumption in favour of the plaintiff. Otherwise, indirect purchasers would have only a smaller prospect of success and a smaller incentive to serve as private enforcers. This result is also supported by the compensation principle. Finally, procedural mechanisms should be instituted to allocate damage awards between direct purchasers and indirect purchasers if there are multiple proceedings.

5.3 Umbrella customers

A further group that is potentially hurt by abuses of market power are so-called umbrella customers. Umbrella customers are purchasers who buy the product or substitutes for the product not from the defendant himself, but from sellers other than the defendant. Monopolistic behaviour leads to a general increase of the price level in the relevant product market. This is due to a non-cooperative response in pricing behaviour in the market. This means that sellers other than the defendant who observe an increase in prices in the market very often raise their prices as well in order to earn a higher margin.

Umbrella customers incur individual damage if they have to pay higher prices than absent the abuse of market power by the defendant. The general price increase in the market leads to a wealth transfer from consumers to producers. Under a consumer welfare standard this is the kind of competitive harm that Article 82 EC seeks to prevent.

However, umbrella customers usually do not have standing in court to sue the infringer for damages. They are considered to be unsuitable as private enforcers of competition law because there is only a remote causal relationship between their damage and the infringement. Attributing the general welfare loss of umbrella customers to individual plaintiffs is burdened with high complexities. Also, umbrella

customers cannot recover damages under Article 81 EC from their direct sellers. If there has been an uncoordinated response in the market, the sellers have acted independently without colluding. In addition, the sellers are not liable to umbrella customers under Article 82 EC if they have on their own part not engaged in abusive behaviour.

The number of umbrella customers is, however, potentially smaller in Article 82 EC cases as compared to Article 81 EC cases. In cases under Article 81 EC the group of umbrella customers includes all consumers who buy the product from producers who did not participate in the cartel. The prohibition of a cartel does not require that a large number of players participate in the cartel. Accordingly, there is room for a large number of competing sellers from whom umbrella customers may buy the product. Article 82 EC, by contrast, requires that the defendant disposes of market power. Accordingly, there will only be a smaller number of competitors who sell the same product to umbrella customers. It bears mentioning that there might be indirect customers connected to umbrella customers to whom umbrella customers have passed on a price overcharge. They constitute a further group that incurs harm as a consequence of anti-competitive conduct. However, these individuals will regularly be too far removed to be granted standing.

5.4 Deadweight loss customers

Further, so called deadweight loss customers are harmed.[83] These are potential direct customers who due to the supra-competitive prices have completely abstained from buying the product. They incur harm because they are deprived of the utility which they would have derived from using the product. Their damage corresponds to the welfare loss in output which is referred to as deadweight loss.

However, deadweight loss customers play no role as private enforcers of competition law. They are generally denied standing in court because their damage is too difficult to prove and to quantify.

In the case of deadweight customers just like in the case of umbrella customers, the welfare loss of the abusive conduct might be substantial. However, the group that directly bears the economic loss which corresponds to a welfare loss in the sense of Article 82 EC is barred from acting as private enforcers.

5.5 Competitors

Further, an abuse of market power might inflict harm upon competitors. Antitrust law does not aim at protecting competitors in particular. Rather, antitrust law seeks to protect competition as a process. However, this does not exclude that competitors might be harmed by an abuse of market power.[84]

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[83] A detailed analysis with regard to deadweight loss customers is provided by LESLIE, "Antitrust Damages and Deadweight Loss", (2006) 51 Antitrust Bulletin 521-567.

[84] *See* section 2 of this paper for a discussion of the concept of individual harm and of the notion of harm to competition.

The harm to competitors through abuses of market power consists in a loss of market shares, in particular as a consequence of exclusionary conduct. For example, competitors who have illegally been cut off from their supply or who have been illegally denied access to an infrastructure might be harmed because they lose sales or because they have to exit the market.[85] Competitors who are suing for damages usually claim lost profits as damage. In the *Manfredi* case the European Court of Justice pointed out that the principle of effectiveness requires that plaintiffs can seek compensation not only for actual loss but also for lost profits.[86] Even though the *Manfredi* case related to Article 81 EC, lost profit claims are similarly admissible under Article 82 EC.

The role of competitors as private enforcers is more pronounced in cases under Article 82 EC as compared to cartel cases: In cases under Article 81 EC competitors are quite rare as plaintiffs because they are usually not harmed. If they are themselves members of the cartel, they generally profit from the illegal agreement. But also competitors who are not members of the cartel very often profit from the higher price level in the market as a consequence of the illegal agreement. Only in a few cases under Article 81 EC competitors might take harm, for example, if they have been forced to enter into a disadvantageous cartel agreement.[87] In this case Article 81 EC and Article 82 EC might apply simultaneously. Liability under Article 81 EC would generally not be excluded simply because the plaintiff himself was part of the cartel. In the *Courage* case[88] the European Court of Justice held that even a party which is member of a cartel might sue for damages under Article 81 EC under certain circumstances. The *Courage* case dealt with a vertical cartel. The plaintiff was, therefore, not a competitor but a direct purchaser. However, a similar reasoning would apply in a horizontal context. Accordingly, there are some cases where competitors might act as plaintiffs under Article 81 EC. Still, competitor plaintiffs are much more common in Article 82 EC cases because harm to competitors is quite common as a consequence of abuses of market power.

5.5.1 Distorted incentives of competitor plaintiffs

With competitor plaintiffs having a more prominent position as plaintiffs under Article 82 EC some cautioning is warranted as to their aptitude to serve as private enforcers. With regard to their particular incentive structure, competitors might be the wrong plaintiffs in order to achieve an optimal level of law enforcement.[89] Competitor plaintiffs are motivated to go to court by the prospect to recover damage payments from the defendant to whom they have lost market shares. There is, however, no strict correlation between the damage suffered by competitors on the one hand,

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[85] With regard to the future, a plaintiff who has been illegally denied access to an infrastructure will usually seek to be granted access. With regard to the past, however, plaintiffs will sue for damages.

[86] Joint Cases C-295/04 – 298/04 *Manfredi* [2006] ECR I-6619, para. 100.

[87] *See* MÖSCHEL, note 16, Article 82, para. 8.

[88] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, para. 36.

[89] SEGAL/WINSTON, "Public vs Private Enforcement of Antitrust Law: A Survey", (2007) 28 E.C.L.R. 306, 312.

and the public harm that Article 82 EC seeks to prevent other hand. This means that there are cases where competitors incur damages and, accordingly, have an incentive to bring the case to court, but where the damages are not the consequence of an infringement of Article 82 EC. In such a case an action of enforcement is not desirable. For example, lost market shares of competitors might likewise be the result of either, abusive conduct or healthy aggressive competition.[90] It is in the very nature of vigorous competition that it hurts competitors who are less efficient, for example, because they use an inferior technology. Enforcement of competition law by private plaintiffs is only desirable with regards to unlawful abusive behaviour, and not with regards to pro-competitive conduct that is considered as being lawful. Also, competitors should not be allowed to recover damages unless the damage is a consequence of unlawful behaviour.

It is true that in competitor suits it is the courts who have the last word in deciding whether there actually has been an infringement of the competition rules. However, as it has been discussed above[91] even cases that are ultimately rejected exert a deterring effect and can influence the overall enforcement policy. In any case, competitor plaintiffs do apply different criteria than a public enforcer in deciding what kind of cases to bring to court. This might influence the overall enforcement policy. A public enforcer will bring a case to court or decide himself on a case if he is convinced that a particular behaviour leads to harm to competition. By contrast, the motivation of competitors to sue for damages is guided by their own particular business interest and by the prospect of collecting damages.

This is not necessarily in accordance with the public policy considerations which would lead to an optimal level of enforcement.

5.5.2 The concern for over-deterrence in Article 82 EC cases

Competitor claims that are guided by the incentive to collect damages raise concerns about an over-deterrence in Article 82 EC cases. Over-deterrence means that individuals are discouraged from behaviour even though it is not disapproved of by the law. If law enforcement is above the optimal level even risk-neutral individuals are provided with an incentive to over-comply.[92] Over-deterrence entails negative welfare effects if parties refrain from conduct that is considered beneficial and desirable by the law. In cases of *per se* violations of the antitrust laws, there is little concern for an over-deterrence to occur, because it is quite improbable that there are offsetting efficiencies involved in the behaviour.[93]

Article 82 EC in most of the cases covers conduct that is ambiguous. Under Article 82 EC market participants are as a rule allowed to engage in competitive strategies of their choice. Only conduct by a dominant party that is abusive is prohibited. The burden of proof to prohibit a unilateral competitive strategy rests on the

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[90] HOVENKAMP, "Federal Antitrust Policy", § 17.6 (3rd ed. 2005).

[91] *See* section 4 of this paper.

[92] CRASWELL/CALFEE, "Deterrence and Uncertain Legal Standards", (1986) 2 Journal of Law, Economics & Organization 279, 280.

[93] HOVENKAMP, "Antitrust's Protected Classes", (1989) 88 Michigan Law Review 1, 12.

competition authority or on the private plaintiff. A market participant is not under a permanent obligation to prove that its market behaviour is legal. The legal technique used in Article 82 EC implies that rigorous competitive behaviour is considered as desirable and legal. If law enforcement is stronger than optimal, risk-averse market players who want to be sure not to violate Article 82 EC might be discouraged from efficient and aggressive competitive conduct that is considered beneficial. Accordingly, there is a concern of an over-deterrence.

The risk of an over-deterrence is intensified if competitor plaintiffs are present as private enforcers. With regards to public enforcers, market participants can rely on the fact that a public enforcer is guided by the motivation to prevent harm to competition. Market participants who are, in addition, exposed to private competitor claims, face a higher risk of being drawn into a costly litigation. As competitor plaintiffs are guided by the prospect to collect damages it is likely that a higher number of litigation occurs. It is true that an unfounded damage claim will ultimately be rejected if the court does not find a violation of Article 82 EC. However, even unfounded claims exert a deterrent effect because they involve a litigation risk, litigation costs and the risk to incur a reputational damage on the market. This might result in more deterrence than would be optimal.

Further, the concern of an over-deterrence is aggravated by the fact that the new approach to Article 82 EC creates a certain degree of uncertainty for the market participants as to the legality of their conduct. The Discussion Paper of the European Commission on the application of Article 82 EC[94] replaces the former formalistic approach by a more economic, effect-based approach. The economic effects of unilateral strategies are often ambiguous. Very often market participants have to take resort to complex economic models for assessing the legality of a competitive strategy. At least as long as there are no guidelines and only little case law, the new approach to Article 82 EC leaves market participants with more uncertainty. A higher degree of uncertainty of the legal standards, however, aggravates the risk of an over-deterrence.[95] Market participants who want to be sure not to violate the law have an incentive to be more cautious in applying innovative competitive strategies than the law would require.

There is some indication that the concern for over-deterrence is greater in cases under Article 82 EC than in cartel cases: Under Article 81 I EC restrictive agreements are generally forbidden. Only under the particular circumstances that are spelled out in Article 81 (3) EC restrictive agreements might be justified. The burden to show that a restrictive agreement is exempt from the prohibition rests with the parties. Accordingly, restrictive agreements are considered to be undesirable as a rule while the circumstances under which they can be justified are being limited. This legal technique might be interpreted as implying that the law is only little con-

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[94] For an assessment of the discussion paper *see* DREXL/CONDE/ENCHELMAIER/LEISTNER/MACKENRODT, note 10.

[95] CRASWELL/CALFEE, note 93, 299. The authors identify two opposing effects of uncertainty on the incentive to abide by the law. They conclude, however, that in the most common cases uncertainty in legal standards will result in too much deterrence.

cerned with an over-deterrence in cases of Article 81 EC. A market participant can make sure to not violate Article 81 EC simply by refraining from entering into a restrictive agreement.

However, with the more economic approach which is pursued by the European Commission there is a tendency to interpret Article 81 EC as a *rule of reason* by merging Article 81 (1) EC and Article 81 (3) EC.[96] In addition there is some indication that with regards to Article 82 EC an efficiency defence similar to that in Article 81 (3) EC is to be permitted.[97] Such an interpretation of Article 82 EC would align the structure of Article 82 EC with that of Article 81 EC. As a consequence of such an interpretation, the different legal technique used in Article 81 EC and Article 82 EC could not be cited any more to argue that the concern for an over-deterrence is smaller in Article 81 EC cases. Still, there is a range of cases under Article 81 EC where justifications of restrictive agreements are quite improbable, like for example cases with regards to the black clauses of the block exemption regulations. In these instances, an over-deterrence is unlikely. Also on an empirical basis it has been concluded that in cartel cases there is only a smaller concern of over-deterrence.[98]

5.6 Further groups harmed

There are further groups who might be harmed by an abuse of market power. A company that has been the victim of abusive conduct might lose value in the stock markets. In such a case, this can harm shareholders[99] as well as employees and officers who might lose their jobs due to the weaker performance of their company. Also, suppliers[100] of excluded firms might suffer losses. If the defendant's demand for inputs decreases, suppliers lose volume. In these scenarios individuals find themselves in a difficult situation to successfully show in court that their harm has been the actual cause of the infringement. For these reasons these groups often will be denied standing due to their only remote relationship to the infringer.

Further, producers of a complementary product might be harmed. Products are complementary if their demand is interrelated in a way that the quantity of one complementary product sold decreases when the price of the other product rises. If the price of a product rises due to an abuse of market power, the demand for complementary products decreases and producers of complementary products lose sales. In a recent case, a US court held that antitrust standing to bring private treble damage claims with regard to anti-competitive conduct is not limited only to consumers or

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[96] DREXL, note 12, 725.

[97] See RIZIOTIS, "Efficiency Defence in Article 82 EC", published in this volume. Further, it is argued to incorporate Article 81 (3) EC into the interpretation of Article 82 EC in order to define the notion of competition on the merits of Article 82 EC. *See* ENCHELMAIER, note 17, Article 82, para. 46; ENCHELMAIER, "Europäische Wettbewerbspolitik im Oligopol", 141 (1997).

[98] Based on empirical studies it has been concluded there is little concern for over-deterrence even when there is a treble damage rule in place. *See* LANDE, note 37, 666.

[99] For a more detailed analysis *see* PAGE, note 26, 25.

[100] For a more detailed analysis *see* PAGE, note 26, 24.

competitors in the same market. In the case at hand *Novell* the owner of the application software *WordPerfect* had filed a damage claim against the operating system programmer *Microsoft* claiming that *Microsoft* had targeted *WordPerfect*. Because *WordPerfect* was compatible to competing operating systems Microsoft allegedly feared that a business success of *WordPerfect* might erode Microsoft's position in the market of operating systems. Even though *Novell* did not compete with *Microsoft* on the operating system market, the Federal District Court granted standing to *Novell*.[101] The US Supreme Court rejected a petition for certiorari.[102] This example shows that legal standing is often hotly contested and that even plaintiffs who are only in a remote relationship to the infringer might be granted standing and serve as private enforcers. However, even if standing is granted to such plaintiffs, they very often face great difficulties in winning the case.

The examples in this section underline that the damages caused by an infringement of Article 82 EC are manifold. While some private plaintiffs in these groups might be successful in court, the complexity of the causal relationship will render many private suits unsuccessful.

6 Conclusions

This paper has identified it as a main objective of an enforcement system to detect and select cases for decision by a court or by an authority where there is a high probability that the conduct in question entails negative welfare effects. While public enforcers are motivated to prohibit business strategies because they cause harm to competition in the sense of Article 82 EC, private plaintiffs are motivated by the prospect of gaining damage awards. Accordingly, private enforcement of competition law through damage claims is most likely to be optimal if there is a strong correlation between individual damages and negative welfare effects in the sense of Article 82 EC. Such an alignment would ensure that private parties have an incentive to go exactly after the kind behaviour that is prohibited by the competition laws. An analysis of the groups who are harmed by abusive conduct has revealed that there are several scenarios where there is no strict correlation between individual harm and harm to competition. With regard to the incentives of private enforcers of Article 82 EC two potential shortcomings of private enforcement have been identified:

First, there are instances where there is no incentive at all for individuals to serve as private enforcers even though harm to competition in the sense of Article 82 EC has occurred. This includes cases where no individuals are in place who are likely to successfully sue in court and to serve as private enforcers. This scenario applies, for example, to umbrella customers, owners and employees of the targeted enterprises and like in some jurisdictions indirect customers. The reasons for the lack of prospect of private damage claims in these cases can be either that individuals are not granted legal standing or factual reasons. Private individuals who have

[101] *Novell v Microsoft*, 505 F.3d 302 (2007).
[102] Supreme Court of the United States, *Microsoft v Novell*, No. 07-924, 17 March 2008.

suffered individual harm often have only a remote relationship to the infringer which leads to high procedural complexities and makes it difficult to prove the infringement and to quantify the damage.

In other cases of this category, individuals are unsuited as private enforcers because it is practically impossible to attribute general welfare losses to individual plaintiffs. For example, abusive behaviour can lead to a decrease in innovation and accordingly a loss in dynamic efficiency. As a consequence, consumers are deprived of the higher utility of more innovative products. These products, however, have never reached the market. In this case, it is unworkable to identify the individuals harmed and their individual damage. Quite similarly, deadweight loss customers who have abstained from buying the products due to higher price are difficult to be identified.

In this category of cases there is a danger of under-deterrence. If there is no additional public enforcement in place, private enforcement alone is insufficient unless there are other private actors who have an incentive to act as an agent for the general welfare interests or for other individuals who have suffered loss but who are denied standing. However, every group of individuals has its own set of incentives to go to court. Also, different groups have suffered different kinds of individual damage. When deciding to go after an infringer or not, private plaintiffs do not take into account the damage that other individuals or the public have suffered. Rather, a plaintiff is guided by his own interests, which are defined by a wide range of factors. These factors include strategic business considerations and the personal inclination to enter into a legal conflict. As a consequence, there is no sufficient protection against harm to competition and for individuals who have suffered individual harm through an infringement of Article 82 EC, but who are not in a position to attain damage awards. For these cases, a concurrent public enforcement is desirable.

A second insufficiency of private enforcement which has been identified is due to a divergence of enforcement incentives between a public enforcer on the one hand, and a private enforcer on the other hand. While a public enforcer will only select cases for examination that have caused harm to competition, the incentive of competitor plaintiffs to go to court is primarily guided by the prospect of collecting damages. There are, however, cases where competitors incur individual losses even though there has not been a violation of Article 82 EC. Competitors take harm through unlawful abusive behaviour as well as through vigorous competition that is considered as being lawful.

It is true that in competitor suits there are still the courts who have the last word in deciding whether there actually has been an infringement of the competition rules. However, competitor plaintiffs do apply different criteria than a public enforcer in choosing what kind of cases to bring to court. This might influence the overall enforcement policy. In addition, even competitor claims which ultimately turn out to be unfounded lead to an over-deterrence if market participants refrain from applying rigorous competitive strategies even though these strategies are not prohibited. Over-deterrence results in a welfare loss, because rigorous competition is considered beneficial and the courts waste resources in reviewing claims that turn

out to be unfounded. These resources could otherwise be used to examine cases that are more likely to cause harm to competition.

The risk of an over-deterrence is intensified by the fact that the more economic approach to Article 82 EC leaves market participants with more uncertainty as to the legality of their conduct. Uncertain legal standards, however, aggravate the concern of an over-deterrence.[103] Accordingly, there is an interrelationship between the new interpretation of Article 82 EC as envisaged by the discussion paper of the European Commission on Article 82 EC on the one hand, and the intended enhancement of private enforcement that the Green Paper and the White paper of the European Commission seek to achieve.

The insufficiencies of private enforcement are more evident in Article 82 EC cases as compared to cartel cases because competitors are more common as plaintiffs in abuse cases than in Article 81 EC cases. Also, there is some indication that the concern of over-enforcement is more pronounced with regards to Article 82 EC. The case for private enforcement is, therefore, much weaker for cases under Article 82 EC than for cases under Article 81 EC.

However, it is not warranted to categorically exclude competitors as plaintiffs for damages. There are several cases where individual harm of competitors coincides with harm to competition that Article 82 EC seeks to prevent. If a competitive strategy has been qualified as illegal and if competitors are among those who have suffered harm they should not be barred from recovering damages. Also, competitors as private enforcers do play an important role in detecting abusive behaviour because they dispose of a first hand understanding of the particular markets. However, competitor claims should be treated with particular scrutiny by the courts. This runs down to asking the court to question the pre-selection of cases which it finds on its table. Screening and selecting the cases which are to be lodged would usually be part of the work which an enforcement authority would have to perform. Within the process of private enforcement the role of the court as a public authority would, therefore, be more pronounced.

In sum, it seems desirable to at least have a concurrent public enforcement in the field of Article 82 EC. If complaints of competitors would be directed to a public authority instead of being taken directly to court by a competitor plaintiff, the competition authority could profit from the market knowledge of competitors and at the same time closely scrutinise whether in the case at hand there is actually a detriment to the goods protected by Article 82 EC.

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[103] *See* section 5.5.2 of this paper for a discussion of the concept of over-deterrence.

The Role of Consumer Associations in the Enforcement of Article 82 EC

Fernando Garcia Cachafeiro

1 Introduction

The abuses of dominant undertakings may take several forms – discriminatory prices, exclusionary conduct – but in the end the result is always the same: competition is restrained in a market. The restriction of competition injures consumers because they have to pay more for worse products or services. Consumers have the right to be compensated for the damages caused by members of a cartel or dominant undertakings.[1]

To date, however, consumers and their associations have played a very limited role in the enforcement of EU competition law in general and in Article 82 EC of the Treaty in particular. Consumer associations may bring dominant companies before competition authorities – either national or European – seeking to stop their illegal behaviour (injunction) or to have fines imposed. In addition, consumer asso-

[1] Although there is no provision in the EC Treaty permitting recovery of damages caused by an infringement of EC competition law, the case-law of the Court of Justice has recognised the right of private parties to recover damages by bringing a claim before national courts under national procedure laws. As the Court stated in *Courage v Crehan* (Case C-453/99 [2001] ECR I-6297), "the full effectiveness of Article 81 of the Treaty (…) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition". The ECJ has reaffirmed this position in *Manfredi* (Joined Cases C-295/04 to C-298/04 [2006] ECR I-6619).

ciations may intervene in competition authorities' investigations to express the points of view of consumers in the market.[2]

The Commission has proposed to take this a step further: consumer associations are to be enabled to bring damages claims against dominant companies on behalf of their members who have suffered from market abuses. The Commission has introduced this proposal in its White Paper on damages actions for breach of the EC antitrust rules[3].[4] According to a Commission-sponsored study, damages actions are currently in a state of 'total underdevelopment' within the European Union.[5] The Commission has identified current obstacles to damages recovery and has proposed various measures for their removal, such as 1) allowing aggregation of the individual claims of victims (collective redress); 2) facilitating access to documents held by the infringer; 3) awarding binding effect to national competition authorities' final decisions; 4) removing fault requirements on the infringer; 5) recognising the right to perceive full compensation of the real value of the loss suffered, which includes the actual loss, the loss of profits and corresponding interests; 6) clarifying current uncertainty about passing-on defence and indirect purchaser's standing; 7) loosening the limitation periods; and 8) alleviating litigation costs for well-founded claims.

The purpose of this paper is to focus on the first of the measures addressed in the White Paper and, in particular, to consider one type of collective redress: representative claims brought by consumer associations.[6] According to the White Paper, there are two complementary mechanisms of collective redress: on the one hand, representative claims, where the claimant is a natural or legal person (*e. g.* a consumer association) who represents the interest of individuals who are not themselves party to the action, and who attempts to obtain damages for the individual harm caused to the interests of all those represented. On the other hand, collective actions in which victims decide to combine their individual claims for harm they suffered into one single action. Thus, representative claims differ from

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2 *See* the speech by Commissioner KROES, "Competition Policy and Consumers", at the General Assembly of the Bureau Européen des Unions de Consommateurs, Brussels, 16 November 2006, available at http://ec.europa.eu/commission_barroso/kroes/speeches_en.html.

3 EUROPEAN COMMISSION, "White paper on damages actions for breach of the EC antitrust rules", COM(2008)165final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

4 The White Paper was preceeded by the "Green paper on damages actions for breach of the EC antitrust rules", COM(2005) 672 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html.

5 *See* WAELBROECK/SLATER/EVEN-SHOSHAN, "Study of the Conditions on Claims for Damages in case of Infringement of EC Competition Rules, Comparative Report", 1 (2004), available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf (hereafter referred to as the ASHURST STUDY).

6 This proposal is part of the wider European Commission's iniciative expressed in it's Consumer Policy Strategy for 2007-2013, to strengthen collective redress mechanisms not specific to competition law, available at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

collective claims basically in the fact that the claimant himself has not suffered harm.[7]

The Commission considers that consumers are particularly reluctant to bring damages claims because the small loss suffered by them makes it uneconomical to sue the dominant undertaking. Generally, the amount involved in consumer deals is too small to bring an action against the antitrust infringer, with the result of thousands of consumers suffering small losses without remedy available.

Claims by associations can provide consumers with a tool to recover such individual small damages, whose aggregate value can be extraordinarily high. Consumers' litigation supports the main goals of private enforcement: compensation of victims and deterrence of infringers. On the one hand, consumer claims encourage compensation because consumers have a litigation tool to obtain a return for the damages caused by an abusive undertaking.[8] On the other, consumers' claims also promote the goal of deterrence since they contribute to detecting abusive behaviour and to punishing infringers. First, those claims contribute to the identification of wrongdoing in the market, since they may focus on conduct that is out of the scope of public authorities' investigations due to their limited resources. Second, consumers' claims provide additional punishment of infringers, who will have to pay not only substantial fines to antitrust authorities, but also compensation for the damages they have caused.[9]

In order to design the special procedure for claims by consumer associations, consideration should be given to a number of factors. In this paper the author will try to give an answer to the three following questions: *What* happens to individual claims if an association brings a claim? *Which* associations should have standing to sue? *Who* should be the beneficiary of the compensation?

To answer these questions the author considers it helpful to review the US experience with representative claims. Although substantial differences exist between the European and the American system of private enforcement, this is not an obstacle to considering the US experience a good starting point for the debate of the Commission proposals. Thus, in order to discuss the different options to implement a system for representative claims in the EU, the author will review some comments of American authors in this field.

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7 *See* EUROPEAN COMMISSION, note 3 and EUROPEAN COMMISSION, "Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust", COM (2008) 165 final, para. 49, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf.

8 *See* KROES, "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials", speech at the conference "La reparation du prejudice causé par une pratique anti-concurentielle en France et à l'étranger: bilan et perspectives", Paris, 17 October 2005, 2, available at http://ec.europa.eu/commission_barroso/kroes/speeches_en.html, stating that "the first advantage of private enforcement is direct justice, which allows the victims of illegal anticompetitive behaviour to be compensated for the loss they have suffered".

9 *See* KROES, note 8, 2, holding that "it is clear that the risk of having to pay damages for the harm caused by an infringement of the competition rules has a strong deterrent effect".

2 Representative action shall not remove individual right of action

2.1 Individual claims shall remain

The Commission holds that a cause of action for consumer associations should not deprive individual consumers of their right to bring a claim.[10] According to this view, representative claims shall not foreclose the rights of individuals who do not want to link their claims to the associations.

The preservation of individual claims is based on solid fairness considerations, because every person must have the right to request a court to take care of his legitimate interests as recognised both in article 6 of the European Convention on Human Rights and in the provisions of the constitutions of Member states.[11] Therefore, any provision withdrawing individual rights automatically after a representative claim is brought would be contrary to the due-process clause.[12]

The right of consumers to litigate their claims individually after an association has brought a claim is guaranteed either if the case is resolved by a judge or if it is settled by the parties. When a court issues a judgement on the association's claim, it is arguable that there is no *res judicata* effect on those who did not take part in the litigation. Although common law and civil law use different concepts of *res judicata*, both systems share the idea that it applies only to those who have participated in the litigation; the basic idea is that a party cannot use the same cause of action twice.[13] Consequently, individual consumers are not bound by the judgement on the associations' claim and they can pursue their claims individually.[14] Needless to say, however, the later individual claim will have little chance of obtaining a different result when the case has been litigated extensively by the association.

If the claim is settled by the association and the defendant, it is easier to conclude that the agreement binds only those who agreed to it. In this case, however,

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[10] *See* EUROPEAN COMMISSION, note 3, 5 and EUROPEAN COMMISSION, note 7, paras 21-22.

[11] Article 6 of ECHR declares that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[12] In the United States, the Supreme Court recognised that the possibility to opt out in class-action litigation is connected to the due-process clause (*Phillips Petroleum Co. v Shutts*, 472 U.S. 797, 812-14 (1985). *See* COTTREAU, "The Due Process Right to Opt Out of Class Actions", (1998) 73 N.Y.U.L. Rev. 480, 510, holding that due process concerns guarantee the right of all class members to opt out of some class actions, "certainly, individual control of litigation is an important value embodied in the Due Process Clause".

[13] *See* GIDI, "Class Actions in Brazil – A Model for Civil Law Countries", (2003) 51 Am. J. Comp. L. 311, 384-399.

[14] However, the *res judicata* issue is not settled among the authors. For a contrary opinion *see* the Comment on the Green Paper submitted by MULHERON, "Damages Actions for a Breach of the EC Antitrust Rules", 5 (2006). All comments on the Green Paper received by the European Commission are available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html.

the case has not been examined extensively and, thus, individual claims have greater possibilities to succeed.[15]

2.2 The relationship between representative and individual claims

In the Commission's view, representative claims and claims brought by injured consumers (either individually or collectively) constitute complementary means of obtaining compensation and, therefore, it is essential to guarantee a pacific coexistence between them. In order to facilitate this relationship, the Commission Staff Working Paper underscores the importance of imposing consumer associations a clear obligation to inform the victims they represent.[16]

There are two models to address this relationship, the so-called "opt-out" and "opt-in" systems. In the opt-out model, failure to respond to the notice of claim by the representatives is considered an acceptance of the claim. Absent victims are included in the case, receiving the indemnification agreed on by the parties or decided by the judge, and losing their right to bring their own claims. The opt-out system is widely used in United States class actions, where claimants have to fulfil several requirements in order to bring the claim.[17]

On the contrary, in the opt-in system only those consumers who manifest their intention to join the group litigation are included in the claim and, consequently, withdraw their individual rights. Representative actions are opt-in in Sweden, the Member State that has one of the most elaborated national legislations in this respect. In order to join the association claim, consumers have to reply to the notification sent by the court dealing with the claim. If the claimant settles with the infringer, the agreement binds only those who replied to the court's notification.[18]

The Commission has, however, refrained from issuing a clear rule on how representative and individual claims shall interact. Despite the White Paper assumes that collective claims (in which victims decide to pool their efforts into one single

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[15] *See* RUTHERGLEN, "Better Late than Never: Notice and Opt Out at the Settlement Stage of Class Actions", (1996) 71 N.Y.U.L. Rev. 258, 290, noting that non-party consumers may use previous settlements to found more ambitious claims against the infringer.

[16] *See* EUROPEAN COMMISSION, note 3, 5 and EUROPEAN COMMISSION, note 7, paras 21-22. In the United States, Rule 23 of Federal Civil Procedure provides for "individual notice to all members (of the class) who can be identified through reasonable effort". Notification might be due before or after the settlement/judgement, depending on the type of class action.

[17] According to the law, the class representatives are permitted to bring a claim if some requirements are met, such as 1) the class is so numerous as to render individual claims impracticable; 2) there are questions of law or fact common to the whole class; and 3) the representative fairly represents the interests of all of the class members. Judges play a role in preserving individual rights of class members; *e.g.* they have to approve any settlement prior to their verdict. *See* ABA, "Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules", 41 (2006).

[18] *See* ABYHAMMAR, "The Swedish Group Proceedings Act and Other Means for Collective Dispute Resolution", intervention at the Workshop on Alternative Dispute Resolution in Vienna, 4 (2006), available at http://ec.europa.eu/consumers/index_en.htm.

action) shall be opt-in, there is no equivalent rule as to representative claims. In this regard, the Commission merely affirms that "the basic principle should be that individual victims are not deprived of their right to bring an action for damages (either individually or through an opt-in collective action) if they so elect."[19]

The lack of concretion in the White paper reflects the extensive discussion among legal authors on which system should be adopted in order to enhance the efficiency of representative litigation.

2.3 Discussion

A group of commentators underscore the virtues of the opt-out system because it strengthens the position of the association in its litigation against the infringer. Representative claims are a unique tool for levelling the playing field between small consumers and strong corporations that violate competition law.[20] According to this view, opt-in systems have two negative effects that make them undesirable. First, they substantially impair the ability of the representative to settle the case, since exposition to later individual claims is a disincentive for settlements. Defendants are willing to accept better conditions from the claimant when they know the extrajudicial settlement will bring the litigation to an end. Conversely, they may not accept good settlements if they fear it may have the effect of "calling" new claims by individuals.[21]

A second failure of the opt-in system is that it permits individual consumers to free-ride on the association efforts to win the case. These consumers may opt to "sit on the bench" and await the favourable result of the representative claim before starting their own proceeding.[22] Such claims therefore do not contribute to detecting abusive conduct in the market.[23] Free-rider concerns are a big issue in jurisdictions such as in the United States, where lawyer fees might be extraordinarily high.[24]

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[19] *See* EUROPEAN COMMISSION, note 7, para. 61.

[20] *See* BRONSTEEN, "Class Action Settlements: An Opt-in Proposal", (2005) U. Ill. L. Rev. 903, 903, stating that "by pooling the claims of thousands or even millions of people, it evens the playing field between individuals and the corporations they accuse of wrongdoing".

[21] *See* PERINO, "Class Action Chaos? The Theory of the Core and an Analysis of the Opt-out Rights in Mass Tort Litigation", (1997) 46 Emory L.J. 85, 143-144.

[22] *See* BRUNET, "Class Action Objectors: Extortionist Free Riders or Fairness Guarantors", (2003) U. Chi. Legal F. 403, 427, noting that consumers may free-ride on the association effort "to settle the case, as well as on the original decision to select a defendant, identify a cause of action, and file suit".

[23] *See* the Comment on the Green Paper submitted by DECHERT, LLP, "Comment on EU Damages Green Paper" (2006).

[24] US courts developed the *common fund doctrine* that permits the first claimant to apply to the court for an award of attorneys "fees from the recovery by the later claimant. *See* NEWBERG, "Newberg on Class Actions", 546 (4th ed. 2002), holding that "who[ever] has created a benefit [through their particular efforts], for third parties [*e.g.*, absent class members] such as a common fund for the benefit of a class, [is entitled] to recover reasonable fees and expenses as awarded by the court from the common fund created".

On the other hand, other authors hold that the opt-in system should be implemented. First, it minimises the agency problem inherent in any representative action. The agency problem arises from the divergence between the interests of the representative and those of the victims. A typical example of this involves a settlement in which the representative trades a high fee award for a low recovery to the victims. Individual claims help to minimise the agency problem because they permit the victims to seek better compensation if the representative fails to look after the group.[25]

Second, even if consumers may free-ride on the association effort, individual claims strengthen the deterrence effect of representative litigation. Although some individual claims do not help to discover new infringements (because they merely follow the association claim), they have a deterrent effect because potential infringers would fear greater exposure to indemnification claims.[26]

Moreover, this sector of the doctrine argues that absence of response by consumers cannot be taken as a decision to join the association. It is not realistic to expect common people to spend time either in reading notices of representative claims or in replying them to avoid exclusion.[27] Thus, the opt-in system circumscribes participation in the claim to individuals who have real interest in the claim brought by the association.[28]

3 Association's standing

One of the issues that should be addressed when considering representative claims is whether certain degree of public control should be implemented in order to restrict standing to some types of entities. Public control over associations may take several forms. In a flexible model, associations must be registered in a public registry that guarantees transparency regarding its directors, members and objectives. In a stricter system, associations must obtain the authorisation of public authorities after having shown they have met certain criteria.

In the UK, the Competition Act of 1998 (as reformed in 2002) empowers certain 'specific bodies' to bring damages claims before the Competition Appeal Tribunal (CAT). In order to be designated as a 'specific body', an organisation must submit an application to the Department of Trade and Industry, which will issue a formal

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[25] *See* COTTREAU, note 12, 481, stating that "opt out rights (…) can assure that class members (…) will have an option of avoiding the agency problems frequently associated with class litigation".

[26] *See* CALKINS, "An Enforcement Official's Reflections on Antitrust Class Actions", (1997) 39 Ariz. L. Rev. 413, 445, arguing that class actions "seem to be playing an increasingly prominent role (…) in supplying the punishment to a company" after antitrust authorities' sanctions.

[27] *See* the empirical studies carried out by EISENBERG/MILLER, "The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues", (2004) 57 Vand. L. Rev. 1529, 1561, arguing that "apathy, not decision, is the basis for [consumers'] inaction".

[28] *See* BRKAN, "Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?", (2005) 28 World Competition 479, 501, stating that "allowing [opt out] class actions in Continental Europe would run contrary to the procedural law principle according to which an individual should have an interest in the suit he is filing".

designation if certain criteria are met.[29] In contrast, the Swedish Group Proceedings Act of 2003 establishes no prior authorisation for the organisation to be entitled to sue.[30]

3.1 Benefits of public control

The main advantage of public control over associations is that it minimises the agency problem in representative claims. Public supervision over consumer associations can be a useful tool to monitor representatives of the victims in antitrust cases.[31] Hence, public authorities may ensure that the representatives truly pursue the interests of the group rather than their own interests.[32]

Moreover, it has been argued that an authorisation procedure can be used to filter unmeritorious claims by representative bodies.[33] However, other commentators consider that existing rules on civil procedures in the Member States are sufficient to prevent ill-based claims.[34]

The White Paper has assumed these benefits of public control and therefore has opted for the stricter model which limits standing to consumer associations officially designated in advance by their Member States. Consequently, national laws should establish specific criteria to provide assurance that only legitimate consumer associations are entitled to bring damages claims. However, association having standing in one Member State should automatically be granted standing in all other Member States in order to make cross-borders claims more effective.[35]

3.2 Drawbacks of public control

Consumer associations may be generally oriented or may be focused on specific sectors (*e. g.* bank clients) or specific geographical areas (*e. g.* regional or local). But it is also possible that people who have suffered similar damages will create an association to bring a claim for compensation against the person who caused it. Registration or authorisation models have the disadvantage of making it more difficult to create an association for the sole purpose of bringing an antitrust damages claim.

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[29] *See* DEPARTMENT OF TRADE AND INDUSTRY, "Claims on Behalf of Consumers: Guidance for Prospective Specified Bodies", available at http://www.dti.gov.uk.

[30] *See* ABYHAMMAR, note 18, 3.

[31] *See* COFFEE, "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action", (1987) 54 U. Chi. L. Rev. 877, 883, describing the problems of the members of the class to monitor their representatives.

[32] *See* the comment on the Green Paper submitted by VAN DER BERGH/VAN BOOM/VAN DER WOUDE, "The EC Green Paper on Damages Actions in Antitrust Cases: An Academic Comment", (2006).

[33] *See* MULHERON, note 14, 5.

[34] *See* DREXL/CONDE GALLEGO/ENCHELMAIER/MACKENRODT/ENDTER, "Comments on the Green Paper by the Directorate-General for Competition of December 2005 on Damages Actions for Breach of the EC Antitrust Rules", (2006) 37 IIC 700, 718.

[35] *See* EUROPEAN COMMISSION, note 3, 4 and EUROPEAN COMMISSION, note 7, paras 19-20.

Some authors view *ad hoc* consumer associations with caution since they may be used as a means of implementing class-action-style litigation. In their opinion, a lawyer can promote the creation of an association by potential clients and, then, assume the legal representation of the association in order to bring a claim against an antitrust infringer.[36] Potential abuses arising from *ad hoc* associations, however, may not be used to deny them standing. The creation of an association by a group of injured people may serve the objectives of compensation and deterrence that any damages claim must fulfil.[37]

The White Paper has recognised this potential negative effect of authorisation models by granting standing to claim damages to entities certified on an *ad hoc* basis as well. Accordingly, Member States should implement procedures to permit entities to bring a representative claim in relation to a particular infringement, as long as those entities had among their objectives to protect the interest of their members.[38]

4 Distribution of compensation

The design of representative claims also requires to address the question of who should be the beneficiary of the compensation if the claimant prevails in the case: should damages go to the association itself or to its members?

The White Paper declares that damages should be awarded to the association who is the party bringing the claim. However, the association shall use the award to directly compensate the victims represented in the claim. Only in exceptional cases where direct compensation is not feasible, the Commission admits that the association may use the award for other purposes.[39]

4.1 Damages to consumers

As a general rule, the principle of compensation requires that damages shall be used to actually compensate those who suffered the anticompetive behaviour. When a consumer association brings a claim against an abusive undertaking, consumers should receive the compensation because they are the ones injured by the illegal conduct. The association acts as a mere representative of the victims and, consequently, the compensation must be distributed to compensate actual victims.[40]

Moreover, distribution of the compensation to consumers minimises the agency problem in representative claims. Since the association will not have any particular

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[36] *See* LLEWELLYN/SMITH, "EU Class Actions", in "The International Comparative Legal Guide to Product Liability", 21 (2006), available at http://www.iclg.co.uk.

[37] *See* DREXL/CONDE GALLEGO/ENCHELMAIER/MACKENRODT/ENDTER, note 34, 718.

[38] *See* EUROPEAN COMMISSION, note 3, 4 and EUROPEAN COMMISSION, note 7, paras 19-20.

[39] *See* EUROPEAN COMMISSION, note 7, para. 20.

[40] *See* DREXL/CONDE GALLEGO/ENCHELMAIER/MACKENRODT/ENDTER, note 34, 719, arguing that "as associations would (…) essentially be private plaintiffs who had been assigned, or authorised to enforce, other private parties' claims, damages should be awarded to them".

interest in the case, there will not be any potential conflict of interests between the association and its members.[41]

4.2 Problems

The Commission is aware that there are certain circumstances in consumer litigation that can make desirable distribution of the compensation to the victims not viable.

4.2.1 Identification of the victims

In order to distribute the compensation, the claimant has to identify all potential consumers injured by the illegal conduct.[42] Identification, however, may be a difficult task when the claim represents an extremely large group of people. One can review some classic American cases to analyse the problem. In *Rebney v Wells Fargo*, the claim included more than 1,500,000 current checking account clients and a large, undetermined number of former clients over a period of more than ten years. In *Rudolfi v Bank of America*, the claim represented every person who had commercial or consumer checking accounts between 1973 and 1988, which was estimated to be almost 9 million people. When the victims of an illegal conduct represent thousands or millions of people, the distribution of the compensation constitutes a special challenge.

Identification of the victims has improved nowadays as a result of the use of modern technologies. Most undertakings have electronic data bases that preserve information about clients for long periods of time. Moreover, the advent of the Internet permits the information contained in databases located in disperse geographical areas to be shared. As a result, it is possible today to determine what each individual has purchased at any location over long periods of time.[43]

Nevertheless, the use of modern technologies has not solved all the difficulties in identifying victims of anticompetitive behaviour. First, electronic data are not available in all industries. Second, identification is still a big issue when the product affected is an input in another product, which obliges one to follow the entire production chain in order to arrive at the victims of the conduct.[44] Finally, identification of victims can never be complete as it is impossible to take into account all potential

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[41] *See* VAN DER BERGH/VAN BOOM/VAN DER WOUDE, note 32, 17.

[42] Distribution of the award compels the association to engage in substantial paperwork. First, it has to identify all potential consumers injured by the illegal conduct. Second, it has to send all identified consumers claim forms. In some instances consumers may be required to give evidence of the damages suffered. Finally, the association has to collect all the information sent by consumers, calculate how much corresponds to each consumer and effect payment by bank transfer, check or other means.

[43] *See* RICHARDS, "What Makes an Antitrust Class Action Remedy Successful?, A Tale of Two Settlements", (2005) 80 Tul. L. Rev. 621, 638-39, holding that "multiple technological revolutions have occurred that now make effective compensation of consumer class members much more achievable".

[44] *See* WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?", (2003) 26 World Competition 473, 487.

purchasers of the product who have decided not to buy it because of the high prices caused by the illegal conduct. These people have also been injured by the conduct, but they are not reflected in any client data base.[45]

4.2.2 Small individual damages

Damages suffered by individual consumers are often very small, despite the fact that the damages caused to the market are huge. When the price of the product or service affected is low and it is hardly ever bought by consumers, the portion of the compensation that corresponds to each consumer is so little that it is not worth the effort of distributing benefits. American jurisprudence shows good examples of class actions with a large number of members and small individual compensations. For instance, in *State v Levi Strauss* the claim represented nearly seven million people with a maximum recovery of 2 dollars per pair of jeans purchased.[46]

4.3 Alternative means of compensation

When the number of consumers injured is big but their individual loss is small, distribution of the compensation may be unforeseeable because it costs more than what would be received by consumers.[47] In such circumstances, the Commission accepts, exceptionally, to consider alternative means of compensation.[48]

4.3.1 Coupons

One means of alternative compensation consist of offering coupon to consumers to acquire the products of the antitrust infringer at a reduced price. Coupons may take several forms: some coupons represent an absolute discount in euros, while others are structured as a percentage discount on the retail price. Furthermore, compensation to the victims can combine cash and coupons.[49]

Coupons have the advantage of reducing significantly the management costs of compensation. This is one of the reasons why they are often used in settlements in

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[45] *See* WILS, note 44, 487, stating that "determining who would have purchased the good or service if its price had been lower, is exceedingly difficult"; *see also* JONES, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", (2004) 27 World Competition 13, 23, arguing that unlike US law, EU law also permits compensation of consumers priced out of the market.

[46] *See* the list of cases mentioned by HILLEBRAND/TORRENCE, "Claims Procedures in Large Consumer Class actions and Equitable Distribution of Benefits", (1988) 28 Santa Clara L. Rev. 747, 759.

[47] *See* BARNETT, "Equitable Trusts: An Effective Remedy in Consumer Class Actions", (1987) 96 Yale L. J. 1591, 1594, holding that "the costs of locating class members, communicating with them, evaluating their proofs of claim, and distributing payments may be so large relative to the size of the individual claim as to result in a claim of little practical compensatory value".

[48] *See* EUROPEAN COMMISSION, note 7, para. 20.

[49] *See* LESLIE, "The Need to Study Coupon Settlements in Class Action Litigation", (2005) 18 Geo. J. Legal Ethics 1395, 1396.

the United States: they reduce the costs of the defendant while the claimant still obtains compensation to the victims.[50]

Nevertheless, coupons raise three major concerns. First, coupons may be used by the infringer as a promotional tool, since they guarantee new purchases of their products.[51] Second, it is uncertain whether coupons provide significant compensation to victims;[52] different studies undertaken in the United States estimate that coupons usually have redemption rates of below 5%.[53] Third, coupons may be used to increase lawyers' fees in jurisdictions that admit contingency fees: the fees are calculated as a percentage of the total value of the coupons regardless of their redemption rates.[54]

4.3.2 Distribution of the entire compensation among identified victims

When victims can be identified only in part, the entire compensation may be distributed among identified victims, including the benefits that were impossible to distribute to unidentified victims. In other words, the compensation is reallocated pro rata to identified victims.

This option has the advantage of making the infringer pay the compensation in full, regardless the number of victims who can be identified or who have submitted their claim forms. When the goal of full compensation cannot be attained, it is important to fulfil the second goal of representative claims: to deter future wrongdoings.[55] A second advantage of pro rata distribution is that it encourages consumers to become involved in the association claim, as they can expect higher compensations.[56]

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[50] *See* MILLER/SINGER, "Nonpecuniary Class Action Settlements", (1997) 60 Law & Contemp. Probs. 97, 112, stating that "the efficiencies of nonpecuniary settlements arise because of benefits such settlements can offer either to the plaintiff, the defendant, or both – benefits that can be shared between the parties, making everyone better off".

[51] *See* LESLIE, "A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation", (2002) 49 UCLA L. Rev. 991, 1007, noting that the consumer "can use the coupon for a purchase that she would not have made if she had not received the settlement coupon" and consequently "every Induced-Purchase Outcome increases the defendant's overall profits".

[52] *See* KLONOFF/HERRMANN, "The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements", (2006) 80 Tul. L. Rev. 1695, 1698-99, citing examples of unfair coupon settlements in the United States: the *Microsoft* cases, requiring consumers to engage in onerous procedures to receive a $5 to $10 discount coupon for future purchases of computer hardware or software; or the *Blockbuster* case, offering clients a $1 discount coupon for future video rentals, while class counsel fees amounted to $9.25 million.

[53] *See* THARIN/BLOCKOVICH, "Coupons and the Class Action Fairness Act", (2005) 18 Geo. J. Legal Ethics 1443, 1445, who state that the redemption rate of class action coupons ranges from 1 to 3%.

[54] The US Fairness Class Action Act of 2005 tried to impede this abuse by obliging lawyers to calculate their fees as a percentage of coupons actually redeemed. Moreover, the court must review the settlement and find it to be "fair, adequate and reasonable". *See* BLAIR/PIETTE, "Coupons and Settlements in Antitrust Class Actions", (2005) 20 Antitrust 32, 33, asserting that this kind of settlement actually means "cash for the lawyers and coupons for the class".

[55] *See* BARNETT, note 47, 1595.

[56] *See* the Comment on the Green Paper submitted by HAAK/MES/SCHRIJVERSHOF, "Damages Actions for the Breach of the EC Antitrust Rules (The Netherlands)", (2006).

The main disadvantage of this option is that it can be unfair, because the consumers who are paid take advantage of those who did not answer the claim because they were not aware of the actual possibility of getting compensation.[57]

4.3.3 Damages used for related purposes

The White Paper suggests that exceptionally the association may use the award for other purposes when it cannot be distributed to the victims. This solution significantly reduces management costs and guarantees that the compensation will benefit all the victims in the same manner, regardless of whether they have been identified or not. From this perspective, this option maximises the objectives of deterrence and compensation, since the entire amount of the compensation is paid by the infringer.

Nevertheless, allowing the association to dedicate the award for other purposes connected with the claim involve, at least, the two following problems. First, the association has to be supervised in order to assure that funds are used to promote the interests of the victims; this results in management costs. Second, it is impossible to guarantee that the association will benefit all consumers equally; equal compensation of all victims is not guaranteed.

A similar solution recognised by the Commission consists of granting the compensation to a different entity (*e. g.* a public agency). The advantage of this option is that it lowers management costs significantly. The problem is that it spreads the benefits of the litigation among all citizens and, thus, it does not truly pursue the goal of compensating the victims of the anticompetitive behaviour.[58] In Germany a proposal to allow consumer associations to claim the profits of antitrust infringers (which had to be transferred to the government) was debated during the Seventh Amendment of the German competition law, although it was not in the end passed by the parliament.[59]

5 Conclusion

There are many obstacles in establishing a framework for claims by consumer associations within the European Union. Among them are preserving consumers' right to pursue their claims individually; determining which associations should have standing to sue; and allocating damages among the victims.

There are no obvious answers as to how the Commission should proceed. The Commission must determine the appropriate balance between effective administration of representative claims and individual consumers' rights. While the experi-

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[57] *See* DEJARLAIS, "The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions", (1987) 38 Hastings L. J. 729, 756.

[58] *See* DEJARLAIS, note 57, 751 *et seq*.

[59] *See* WURMNEST, "A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition", (2005) 6 German L. J. 1173, 1187.

ence in the United States demonstrates the potential abuses of collective claims, paying attention to the practice across the Atlantic may bring some light to the debate initiated by the Commission.