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102 Trends in EU Competition

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SESSION 102:
TRENDS IN EU COMPETITION LAW

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ACC Europe 2006 Corporate Counsel University

February 12-14, Amsterdam
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AFTER THE “BIG BANG” OF MAY 1, 2004: WHERE DO WE STAND?

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THE BIGGEST BANG: EUROPE OF THE 25!

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MAY 1, 2004 WAS BOTH ENLARGEMENT DAY AND "COMPETITION DAY"!

EU COMPETITION COMMISSIONER MARIO MONTI:

"INDEED, MAY 1 WILL BE NOT ONLY 'ENLARGEMENT DAY' BUT ALSO, DARE I SAY, 'COMPETITION DAY', FOR IT WILL SEE A REVOLUTION IN THE WAY COMPETITION RULES ARE ENFORCED IN THE EUROPEAN UNION. A SMOOTH REVOLUTION, OF COURSE, AND ONE WHICH WE HAVE BEEN PREPARING FOR FIVE YEARS -- BUT A REVOLUTION NEVERTHELESS."

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NO CHANGE IN EU TREATY ARTICLE 81: A QUICK REFRESHER

ARTICLE 81(1)

"THE FOLLOWING SHALL BE PROHIBITED":

- **AGREEMENTS, DECISIONS, OR CONCERTED PRACTICES**
- **WHICH MAY AFFECT TRADE BETWEEN MEMBER STATES**
- **AND WHICH HAVE AS THEIR OBJECT OR EFFECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION**

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ARTICLE 81: THE TREATY'S MOST IMPORTANT EXAMPLES OF ILLEGAL RESTRICTIONS

"AND IN PARTICULAR THOSE WHICH:

- **DIRECTLY OR INDIRECTLY <u>FIX PURCHASE OR SELLING PRICES</u> OR ANY OTHER TRADING CONDITIONS;**
- **<u>LIMIT OR CONTROL</u> PRODUCTION, MARKETS, TECHNICAL DEVELOPMENT, OR INVESTMENT;**
- **<u>SHARE MARKETS</u> OR SOURCES OF SUPPLY"**

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ARTICLE 81(2)

ONE OF FOUR MAIN EU COMPETITION LAW SANCTIONS:

- **AN AGREEMENT OR DECISION PROHIBITED PURSUANT TO ARTICLE 81(1) WILL BE AUTOMATICALLY VOID**
  - CLASSIC DEFENSE TO ENFORCEMENT ACTION

[THE OTHER THREE SANCTIONS ARE:
THE COMMISSION'S AND NATIONAL AUTHORITIES' POWERS OF

- **TERMINATING INFRINGEMENTS AND**
- **IMPOSING FINES;**
- **JUDICIAL AWARDS OF DAMAGES]**

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ARTICLE 81(3)

BUT ART. 81(1) IS "INAPPLICABLE" -- i.e.,
THE AGREEMENT, DECISION OR PRACTICE IS EXEMPTED

IF it:

- **CONTRIBUTES TO IMPROVING THE PRODUCTION OR DISTRIBUTION OF GOODS, OR TO PROMOTING TECHNICAL OR ECONOMIC PROGRESS, and**
- **ALLOWS CONSUMERS FAIR SHARE OF THE BENEFIT, and**
- **THE RESTRICTIONS ARE INDISPENSABLE, and**
- **THEY CANNOT ELIMINATE COMPETITION**

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COMPETITION LAW BANG #1:

RADICAL CHANGE IN THE WAY ARTICLE 81 IS NOW APPLIED!

- THE COMMISSION LOST ITS FORMER MONOPOLY ON THE GRANTING OF EXEMPTIONS UNDER ARTICLE 81(3)
- ARTICLE 81(3) NOW, LIKE ARTICLES 81(1)-(2), HAS DIRECT EFFECT IN NATIONAL LAW
- BUT ARTICLE 81 STILL SPLIT AS TO BURDEN OF PROOF:
  - PLAINTIFF MUST PROVE ART. 81(1) IS INFRINGED
  - DEFENDANT MUST PROVE ART. 81(3) APPLIES

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EFFECTS?

AFTER 40 YEARS, THIS FORM BECAME HISTORY:

BYE-BYE,
“FORM A/B” →

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WHY "BYE-BYE FORM A/B"?

- IF DOUBTS ABOUT WHETHER THE AGREEMENT INFRINGES ARTICLE 81(1), NO LONGER A NEED TO ASK THE COMMISSION FOR AN EXEMPTION --

  IF AN INDIVIDUAL EXEMPTION IS DESERVED,
  IT ALREADY APPLIES AUTOMATICALLY!!!!!!!!

- GOOD EFFECTS: REDUCTION OF BURDENS -- EXPENSE, MANAGERS PREPARING DATA FOR THE FORM AND LONG WAITING TIME WITH LEGAL UNCERTAINTY

  vs.

- A BAD EFFECT: LOSS OF A FORMER LEGAL EFFECT OF NOTIFICATION -- IMMUNITY FROM FINES

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WHAT TRENDS ARE EMERGING?

- THE COMMISSION RETAINS THE POWER TO IMPOSE FINES
  - FINES ARE MOST LIKELY WHERE THE INFRINGEMENT IS "FLAGRANT"
  - MOST-PUNISHED CLAUSES UNDER ART. 81 ARE STILL BANS ON EXPORT!

    EXAMPLE: €90 MILLION FINE AGAINST VW UPHELD

- A NEW ERA OF "SELF-ASSESSMENT"
  - DO OUTSIDE COUNSEL HELP OR HINDER WHEN THE LAW IS UNCLEAR?

    THEY CAN NO LONGER GIVE JUST THE SAME OLD ANSWER, "LET US NOTIFY IT"

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COMPETITION LAW BANG #2:

"DECENTRALIZED" ENFORCEMENT OF ARTICLE 81 BY THE NATIONAL COMPETITION AUTHORITIES!

- WHEN THERE IS AN "EFFECT ON TRADE BETWEEN MEMBER STATES", THE NATIONAL AUTHORITIES MUST APPLY ARTICLE 81 - NOT NATIONAL COMPETITION LAW
- ALMOST ANYTHING "AFFECTS TRADE"
  - BUT THRESHOLDS APPLIED TO RELEVANT PRODUCTS :
    - LESS THAN 5% COMBINED EEA MARKET SHARE
    - LESS THAN €40 MILLION COMBINED EEA TURNOVER

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WHO TAKES THE CASE?

- ALL NATIONAL AUTHORITIES ARE COMPETENT TO APPLY ARTICLES 81 AND 82, BUT THEY MUST INFORM THE EU COMMISSION
- CASES ARE INITIALLY ALLOCATED BY COMPLAINANTS OR BY INDIVIDUAL AUTHORITIES ACTING ON THEIR OWN INITIATIVE
- CASES ARE REALLOCATED BY ONE NA ABSTAINING FROM ACTING WHILE ANOTHER ACTS
  - COOPERATION THROUGH A "NETWORK OF COMPETITION AUTHORITIES"
  - COMMISSION ELIMINATES NA COMPETENCE BY ACTING

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WHO TAKES THE CASE?(2)

- CASES SHOULD NORMALLY BE DEALT WITH BY A SINGLE AUTHORITY, BUT PARALLEL ACTION NOT EXCLUDED
- ALLOCATION CRITERIA:
  - LINK WITH ALLEGED INFRINGEMENT: EFFECTS ON COMPETITION, PLACE OF IMPLEMENTATION, ORIGIN OF AGREEMENT OR PRACTICE
  - ABILITY TO EFFECTIVELY BRING INFRINGEMENT TO AN END AND IMPOSE SANCTION COVERING ENTIRE SCOPE
  - ABILITY TO GATHER REQUIRED EVIDENCE

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WHO TAKES THE CASE?(3)

- RULES OF THUMB:
  - NAs ARE PARTICULARLY WELL PLACED TO ACT WHERE THE ALLEGED INFRINGEMENT COVERS A SINGLE MEMBER STATE
  - NAs <u>MAY</u> BE WELL PLACED TO ACT WHERE 2 OR 3 MEMBER STATES ARE AFFECTED
  - COMMISSION IS PARTICULARLY WELL PLACED TO ACT
    - WHERE MORE THAN 3 MEMBER STATES ARE AFFECTED,
    - WHERE NEED TO DEVELOP EU COMPETITION POLICY, OR
    - NEED TO ENSURE EFFECTIVE ENFORCEMENT
- AT END 2004, THERE WERE 33 CLOSED OR PENDING NA CASES APPLYING ARTICLES 81/82

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NEW COMMISSION POWERS OF DECISION

- THE POWER TO PROHIBIT AND TO IMPOSE "BEHAVIORAL" AND "STRUCTURAL" REMEDIES
  - REMEDIES MUST BE PROPORTIONATE TO THE INFRINGEMENT AND NECESSARY TO BRING IT EFFECTIVELY TO AN END
  - ONLY STRUCTURAL REMEDIES WHERE NO EQUALLY EFFECTIVE BEHAVIORAL REMEDY OR WHERE BEHAVIORAL REMEDY MORE BURDENSOME
  - BREAK-UP OF A COMPANY ONLY WHERE INFRINGEMENT DERIVES FROM THE VERY STRUCTURE OF THAT COMPANY (REG. 1, RECITAL 12)

NEW COMMISSION POWERS OF DECISION(2)

- COMMITMENT DECISIONS
  - COMMITMENTS OFFERED BY UNDERTAKINGS ARE MADE BINDING: VIOLATIONS OF COMMITMENTS ARE SUBJECT TO FINES AND PERIODIC PENALTY PAYMENTS
  - THE COMMISSION MUST SET OUT ITS PRELIMINARY ASSESSMENT AND CAN ONLY REOPEN THE CASE IN SPECIFIC CIRCUMSTANCES
  - COMMITMENT DECISIONS DO NOT MAKE A FINDING OF INFRINGEMENT OR NON-INFRINGEMENT
  - AT LEAST 2 SUCH DECISIONS PUBLISHED SO FAR, BOTH IN 2005: GERMAN FOOTBALL LEAGUE; COCA-COLA

NEW COMMISSION POWERS OF INVESTIGATION

- TO SEAL ANY BUSINESS PREMISES AND BOOKS OR RECORDS TO EXTENT NECESSARY FOR INSPECTION
- TO ASK ORAL QUESTIONS RELATING TO THE SUBJECT-MATTER AND PURPOSE OF THE INSPECTION
- TO CARRY OUT INSPECTIONS IN NON-BUSINESS PREMISES
  - HOMES AND CARS IF "REASONABLE SUSPICION"

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COMPETITION LAW BANG #3:

CHANGES IN THE EU "MERGER REGULATION"

- NEW TEST FOR DECIDING IF A NOTIFIED MERGER IS "COMPATIBLE WITH THE COMMON MARKET":
  - OLD TEST: MERGER BLOCKED IF WOULD "CREATE OR STRENGTHEN A DOMINANT POSITION"
  - NEW TEST: MERGER MAY NOT "SIGNIFICANTLY IMPEDE EFFECTIVE COMPETITION IN THE COMMON MARKET, IN PARTICULAR AS A RESULT OF THE CREATION OR STRENGTHENING OF A DOMINANT POSITION"

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HOW IS THE SIEC TEST DIFFERENT?

- AIMED AT CODIFYING THE RIGHT TO BAN MERGERS WHERE ANY SIGNIFICANT 1) "NON-COORDINATED EFFECTS" -- OR 2) "COORDINATED EFFECTS" -- e.g., OLIGOPOLIES
- SOP TO INDUSTRY? -- RECOGNITION OF "EFFICIENCIES"
- THE "SIEC" TEST FOCUSES ON HARM: WHETHER HORIZONTAL EFFECTS WILL ALLOW THE NEW ENTITY TO SIGNIFICANTLY RAISE PRICES POST MERGER

(IN THEORY EVEN IF NO "DOMINANCE"!)

- BUT THE COMMISSION HAS NOT YET IDENTIFIED ANY "GAP" CASE WHERE A MERGER WAS
  - QUESTIONED THOUGH DOMINANCE WAS NOT LIKELY, OR
  - APPROVED BASED ON EFFICIENCIES DEFENSE

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HORIZONTAL MERGER GUIDELINES ON "NON-COORDINATED (UNILATERAL) EFFECTS":

FACTORS TO BE CONSIDERED BESIDES MARKET SHARES

- THE PARTIES SUPPLY CUSTOMERS' FIRST AND SECOND CHOICES
- RIVAL PRODUCTS ARE LESS SUBSTITUTABLE
  - SO CLOSE LOOK AT INTERACTIONS IN BIDDING MARKETS – 2005 EXAMPLE: SIEMENS/VA TECH
- DIFFICULT FOR CUSTOMERS TO SWITCH SUPPLIERS
- COMPETITORS CAN'T INCREASE OUTPUT
- MERGED ENTITY HAS CONTROL OVER CRITICAL INPUTS, DISTRIBUTION CHANNELS OR IPR

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"COORDINATED EFFECTS"

- SUCCESSOR TO "COLLECTIVE DOMINANCE"
- FACTORS FROM "AIRTOURS" JUDGMENT:
  - ABILITY TO MONITOR CHEATERS
  - MEANS OF DETERRING CHEATERS
  - THIRD PARTIES NOT ABLE TO UNDERMINE

"CONGLOMERATE EFFECTS"

- BURIED BY GE/HONEYWELL JUDGMENT OF DEC. 14?
- NEED HIGH QUALITY PROOF LIKE INTERNAL DOCS
- WILL COMMISSION ASK FOR MORE DISCOVERY?

VERTICAL MERGERS – NEW GUIDELINES IN 2006?

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MERGER REMEDIES

- "STRUCTURAL" VS. "BEHAVIORAL"
  - MERGER REMEDY STUDY: ALTHOUGH DISFAVORED, BEHAVIORAL REMEDIES STILL ACCEPTED IN A RESPECTABLE NUMBER OF CASES DURING LATE 90's– ABOUT 24%
  - RECENT EXAMPLES:
    - ALCATEL/FINMECCANICA --ALCATEL ALENIA SPACE & TELESPAZIO, APRIL 28, 2005
      - IPR LICENSES TO CREATE COMPETITORS IN 2 MARKETS
      - AND ARBITRATION PROCEDURE IF PRICE INCREASE
    - PIAGGIO/APRILIA, NOV. 22, 2004 – COMMITMENT TO SUPPLY 50 cc SCOOTER ENGINE

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COMPETITION LAW BANG #4:

CHANGES IN IPR LICENSING POLICY: THE NEW "TECHNOLOGY TRANSFER" BLOCK EXEMPTION REGULATION

- NOW AVAILABILITY IS LIMITED BY MARKET SHARE CEILINGS
  - 30% IF LICENSE BETWEEN NON-COMPETITORS
  - 20% COMBINED IF LICENSE BETWEEN COMPETITORS
- DIFFERENT LISTS OF BANNED "HARDCORE" CLAUSES FOR NON-COMPETITORS AND COMPETITORS
- NO LONGER A "WHITE" LIST OF APPROVED CLAUSES -- WHAT IS NOT "HARDCORE" OR "EXCLUDED" IS EXEMPTED (IF UNDER MARKET SHARE CEILING)

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NEW "TECHNOLOGY TRANSFER" BLOCK EXEMPTION(2): EXAMPLES FROM NEW BLACK LISTS

Competitors	Non Competitors
• price fixing	• price fixing • except maximum sales price or recommended sales price
• limitation of production & sales • except for the output of licensee	
• allocation of markets or customers (exceptions) FORMERLY COULD HAVE CLOSED LICENSEE TERRITORY FOR FIVE YEARS -- NOW REDUCED TO ZERO YEARS IN NEW REG!	• restrictions on passive sales into a territory or to certain customers (exceptions) CLOSED LICENSEE TERRITORY REDUCED FROM FIVE -- TO TWO --YEARS IN NEW REG!
• Restriction on the licensee to exploit its own technology, restriction on either party on its own R&D	

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NEW “TECHNOLOGY TRANSFER” BLOCK EXEMPTION(3)

- A FEW POSITIVES:
  - FOR THE FIRST TIME, SOFTWARE LICENSES ARE COVERED
  - EXEMPTION FOR KNOW-HOW LICENSES NO LONGER ARBITRARILY LIMITED TO TEN YEARS:
    NOW FOR AS LONG AS REMAINS SECRET
  - THE NON-COMPETITOR LIST OF FORBIDDEN “HARDCORE” CLAUSES WILL STILL APPLY FOR THE LIFE OF THE LICENSE EVEN IF THE PARTIES BECOME COMPETITORS LATER
  - LICENSES SIGNED BEFORE MAY 1 BENEFIT FROM THE OLD REGULATION UNTIL MARCH 31, 2006

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SESSION 102
MAJOR DEVELOPMENTS AND POLICY ISSUES
ABUSE OF DOMINANCE

ROSALIND KELLAWAY
EVERSHEDS

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Introduction

- **Overview** – why competition law matters to you
- **Abuse of Dominance** – what you need to know about
  - The Law
  - Recent EC Cases
    - IMS Health
    - Microsoft
    - Syfait
    - Astrazeneca
- **Reform of Article 82**

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A Sea Change in the Law

- World class competition regime:
  - Competition Act 1998
  - Enterprise Act 2002
  - Modernisation 2004

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The EU Regime – Article 82 EC Treaty

PROHIBITS ABUSE OF A DOMINANT POSITION

- Any abuse by a business in a dominant position within the EU/UK
- Which affects trade between members states/in the UK
- There must be market power – starts at 40%
- No exemptions

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Market Definition

- Geographic market
- Product market
  - Fruit or bananas?
  - Cola, soft drinks or ‘share of throat’?
- SSNIP test

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What's an Abuse?

- Refusing to supply
- Unfairly low or high prices
- Forcing customers to buy whole range of products, not just single lines
- Loyalty rebates
- Margin squeeze

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IMS Health

- Refusal to licence copyright not in itself an abuse (*Magill, Volvo*)
- Exceptionally treated as abuse where product/service is indispensable to carrying on business and refusal
  - Prevents emergence of new product;
  - Unjustified; and
  - Excludes competition in downstream market

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Microsoft (1)

- Refusal to licence Windows interoperability information to competitors
- Commission not bound by *Magill* checklist of exceptional circumstances
- Interoperability found to be of "significant competitive importance" – but indispensable?

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Microsoft (2)

- Tying Windows with Windows Media Player
- Found to afford WMP "unmatched ubiquity" on PCs worldwide
- Efficiency arguments rejected
- Total fine €497m and Microsoft ordered to disclose interface information and unbundle WMP
- Interim measures application failed

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Syfait (1)

-
- GlaxoSmithKline imports and distributes three products into Greece; dominant in market for Lamictal
- November 2000, GSK limits supply to pharmaceutical wholesalers – claims that exports leading to shortages on Greek market
- Greek competition authority receives complaints – makes Article 234 reference

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Syfait (2)

- Whether dominant pharmaceutical undertaking must always be regarded as abusing dominant position simply because fails to meet orders in full with view to limiting customers' exports
- If not, which factors go to determine whether undertaking liable for refusal to supply

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Syfait (3)

-
- Advocate General – refusal to supply not abusive per se
  - Pure conditions of competition do not prevail in pharmaceutical market
  - Member States set prices – prices vary – scope for parallel trade
  - Legal and moral obligations on pharmaceutical companies – to make sure products are available
  - Doubtful of benefits to consumers of parallel trade

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Syfait (4)

- ECJ rules that the Greek competition authority not "court or tribunal" – no jurisdiction to rule on substantive issue
- Can sector take comfort from Advocate General's opinion?

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Astrazeneca (1)

- AZ manufactures Losec
- EU law provides for supplementary protection certificates
- AZ applies for SPC in various Member States – from date that prescription reimbursement agreed
- AZ also withdraws Losec from market in capsule form, replaced with pellets

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Astrazeneca (2)

- Commission carries out 6-year investigation, finds that AZ blocked or delayed market access for generic versions of Losec
  - Misleading national patent offices
  - Selectively deregistering market authorisations
- AZ fined €60m – fine lower because of "novelty charges"

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Reform of Article 82

- Report commissioned by DG Competition July 2005
- Currently being discussed with Member States
- Possible move towards US style "rule of reason" assessment of Article 82 infringements

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Why?

- Perceived lack of consistency
- Less emphasis on form and more on effect
- Focus on more serious cases

Key Changes

- Benchmark for assessing effect on competition – "consumer detriment"
- No need for a preliminary and separate assessment of dominance

Implications

- Need for complainants to identify consumer detriment linked to "abusive" behaviour
- Increased importance of economists!
- New defence of "efficiency"?

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FOR EXAMPLE… Discounts

- British Airways paid bonuses to travel agents retrospective to first ticket sold
- In the EU = abusive
- In the US- Virgin's market share grew during the period = no anti competitive effect and not abusive

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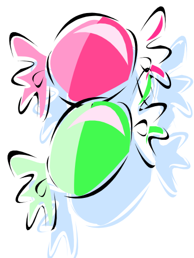
Next Steps

- Commission has produced
  - Updated guidance on Article 82
  - Discussion paper on exclusionary abusers
- Now in consultation period

CASE STUDY



USING COMPETITION LAW TO ACHIEVE YOUR COMMERCIAL GOALS

Welcome to "Sweetly Yours..."

As one of the most successful sweet companies in Europe ***"Sweetly Yours..."*** now employs around 350 people and generates turnover of £180 million. It sells market leading products such as Choca Rock and Jello Rock.

"Sweetly Yours…" has around 30% share of the sugared confectionary market in the UK and around 20% across the European sugared confectionary market.

Market conditions over the last couple of years have been tough. ***"Sweetly Yours …"*** is determined to meet the challenges posed by the anti-sugar crusaders.

"Sweetly Yours..."
key staff

Managing Director	Maxine Sugar
Chief Sales Director	Marcia Mallow
Regional Sales Executive	Rob Allsorts
Account Manager	Rich Sellar
In House Counsel	Cara Mell

"Sweetly Yours …."

- One of the most successful sweet companies in Europe
- Turnover last year of £180 million
- 350 employees
- 30% market share of sugared confectionary in the UK
- 20% market share of sugared confectionary in Europe

Case Study - Using Competition Law to Achieve Your Commercial Goals

The main sugar supplier to "*Sweetly Yours* ..." decides to cut off future supplies … what can they do to resolve this commercial crisis?

"Sweetly Yours…"

To: **Cara Mell**

From: **Marcia Mallow**

ADVICE REQUEST

Sucre Bleu, a French Company, have recently taken over our main sugar supplier, Union Jack Sugar. Sucre Bleu have written to us advising that they will no longer sell us sugar. (See attached letter)

We have offered to pay in advance and they have agreed to supply for a further 3 months.

Can they cut off supplies in this way? I suspect that what lies behind this is Sucre Bleu management switching to supply Bonbons, the sweet making division of Sucre Bleu – and one of our biggest rivals. I also know that Sucre Bleu had been under pressure from our biggest customer in Germany, Zuckersweet, not to supply us because we are undercutting their lollipops.

Do I have a credible argument? And what should I do about it?

MM

Sucre Bleu	**Tel**	**+33 1 46 24 24 00**
2 Rue de Nougat	**Fax**	**+33 1 46 24 24 11**
Nice	**Web**	**www.sucrebleu.com**
France		

"Sweetly Yours …"
Quality Street
Brighton
UK

Date	12 February 2006
Your Ref	QUALITY/001
Our Ref	LOLI/001
E-mail	henri.loli@sucre.com

Dear Sirs,

Following an acquisition by Sucre Bleu of Union Jack Sugar, we have undertaken a review of our customer portfolio.

Based on this review, I am writing to inform you that as of 1 March 2006 we will no longer be able to supply you with sugar and will not accept any future orders from your company, any such orders will be cancelled.

Can I take this opportunity to thank you for purchasing Union Jack's sugar for the last 20 years.

Merci.
Yours sincerely.

HENRI L'OLI
For Sucre Bleu

- **What is the commercial objective for "Sweetly Yours…"?**
- **What evidence is available to "Sweetly Yours…" and what you might need?**
- **What infringements might "Sweetly Yours…" allege?**
- **What action could "Sweetly Yours…" threaten or take?**
- **Pros and cons for each option?**
- **Which body/bodies likely to take jurisdiction? Why?**
- **What are the risks for *Sucre Bleu*?**
- **What could *Sucre Bleu* do to minimise the risks?**

ACC EUROPE 2006 - 12-14 FEBRUARY 2006

MAJOR DEVELOPMENTS AND POLICY ISSUES
ABUSE OF DOMINANCE

ROS KELLAWAY, EVERSHEDS

1. IMS Health

On 29 April 2004 the European Court of Justice ("ECJ") gave its judgement in the case of *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*[1]. The case addresses the circumstances when refusal to grant a licence to intellectual property rights ("IPR") will be held to be an abuse of a dominant position contrary to Article 82 EC Treaty ("Article 82").

1.1 Background

IMS provided data on regional sales of pharmaceuticals in Germany to supplier laboratories, formatted according to a "brick structure" with each brick corresponding to a designated geographic area in the country.

The former management of IMS created a rival business using a similar brick structure and IMS sought to restrain their use of the brick structure on the grounds of infringement of copyright. The application for injunction raised questions as to whether IMS was entitled under competition law to enforce its rights in this way and whether instead its competitor was entitled to be granted a licence of the copyright.

The procedural intricacies of the case (of which there are many) are of no real consequence in the context of the substance of the case which concerns the critical issue of compulsory licensing of IPR. Suffice it to say that ultimately the ECJ ruled on the issue in the context of a reference from the regional court in Frankfurt.

1.2 ECJ ruling

The ECJ held that the exclusive right of reproduction forms part of the copyright owner's rights, so that refusal to grant a licence - even if it is the act of an undertaking holding a dominant position - cannot in itself constitute an abuse of a dominant position. Nevertheless, exercise of an exclusive right by the owner may, in *exceptional circumstances*, involve abusive conduct.

The ECJ referred to *Magill*[2] where it had held that these exceptional circumstances were present. The exceptional circumstances were:

- the refusal related to a product (information on the weekly schedules of certain television channels), the supply of which was indispensable for carrying on the business in question (the publishing of a general weekly television guide);
- the refusal prevented the emergence of a new product (a composite weekly TV guide) for which there was consumer demand;
- the refusal was not capable of objective justification;

[1] (Case C - 418/01) (unreported) 29th April 2004 (IMS)

[2] Radio Telefis Eireann and Independent Television Publications Ltd v Commission, Case C-241/91: [1995] ECR 1-743; [1995] 4 CMLR 325

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10 February 2006 kellawr

- the refusal was likely to exclude all competition on a secondary market.

It was not clear from *Magill* whether these conditions were cumulative. The CFI had suggested they were not in its judgment in the *Tiercé Ladbroke*[3] case. The ECJ reached a different conclusion in IMS and made it clear that refusal by an undertaking which owns an IPR to give access to a product or service indispensable for carrying on a particular business will be treated as an abuse of dominance if three **cumulative** conditions are satisfied:

1. the refusal is preventing the emergence of a new product for which there is a potential customer demand,
2. it is unjustified; and
3. it would exclude any competition on any secondary market.

Emergence of a New Product

There will only be an abuse where the undertaking requesting the licence intends to produce new goods or services not currently offered by the IPR owner and for which there is a potential customer demand (as opposed to duplicating goods or services already offered by the IPR owner). However, it is not clear what the threshold of novelty will be between "duplicate" goods and "new" goods. For example, it is unclear whether "new" goods would include variations of the products offered by the dominant firm.

The ECJ did not adopt the Advocate General's formulation[4] that it is sufficient that the competitor proposes to offer products of a different nature which, although competing with those of the IPR owner, would answer specific customer requirements that are not met by the IPR owner's product. However, it may not be much more difficult for a competitor to demonstrate the existence of a "new" product than a "different" product.

In the *Magill* case, the product that the competitor wanted to publish was obviously 'new' (a composite television listings magazine). However, IMS appears to leave wide scope for argument about what will or will not be covered by 'duplicating'. This issue is also linked to the "secondary market" issue (see below). *Magill* had not made it clear whether the new product had to fulfil demand on a new market or whether it was sufficient for the new product to meet unfulfilled demand on the same market on which the copyright owner was operating.

The meaning of "potential customer demand" has also not been clarified. The ECJ did not explain whether this would include some pre-existing demand of customers, which the competitors products are designed to meet (but to which the IPR owner cannot or will not respond), or a new product which customers would be happy to have once the new competitor provides it (but are not currently demanding).

The ECJ did not actually decide whether this condition was fulfilled in the IMS case because it held that this was a matter for the German court.

[3] Case T-504/93 [1997] ECR - II 923, para 131

[4] Stated in Advocate General Tizzano's opinion delivered on 2 October 2003

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Objective Justification

The ECJ did not go into the specific factors to be taken into account when deciding whether any refusal to grant a licence will be objectively justified. This issue was again left for the German court to decide. The burden of proof appears to be on the party alleging that the refusal is unjustified, and it is unlikely that this will be a significant burden to discharge. It has been suggested that a refusal may be justified if the competitor requiring access was a bad debtor, or if there were safety issues involved. However, it is unclear what justifications could be offered which are specifically relevant to the licensing of IPR, unless the actual integrity and validity of the IPR were called into question.

Secondary Market

The ECJ confirmed the need for the existence of a secondary market on which competition was excluded as a result of a refusal to license indispensable (IPR) input, but made it clear that the existence of such a market could readily be made out.

A distinct market in the traditional sense need not exist. It was sufficient for two different stages of "production" to exist and for them to be interconnected. In the IMS situation the question was whether the brick structure constituted, upstream, an indispensable factor in downstream supply of the sales data.

The ECJ drew a comparison with the *Oscar Bronner* case[5], where the "market" for the supply of home delivery services for daily newspapers was separate to that for the supply of the daily newspapers themselves. It did not matter that the home delivery service was not marketed separately.

Indispensability

In *Oscar Bronner*, the ECJ set a high standard for indispensability in that it had to be determined whether there were products or services which constituted alternative solutions (even if they were less advantageous) and it had to be determined whether there were technical, legal, or economic obstacles making it impossible or at least unreasonably difficult for a company to create those alternative solutions. In order to accept the existence of economic obstacles it had to be established that the creation of those alternative solutions (even on a scale comparable to that of the incumbent) was not economically viable.

In IMS the ECJ acknowledged that the contribution made to the development of the brick structure by the pharmaceutical industry was potentially relevant in demonstrating indispensability because the investment that had been made by the industry would in principle amount to a switching cost that would need to be taken into account in determining the price at which a new operation on the market would have to offer sales data in order to be able to attract business (and would therefore go to the question of economic viability). This was a question of fact to be determined by the German court.

1.3 Implications

The ownership of IPR will not automatically result in an undertaking being in a dominant position in a market within the meaning of Article 82. However, in certain circumstances an IPR may result in or contribute to a dominant position. The issue would then be whether this IPR is used in such a way that it would constitute an abuse of a dominant position under Article 82.

[5] Bronner GmbH and Co KG v Mediaprint Zeitungs-Und Zeitschriftenverlag GmbH and Co KG Case C-7/97: [1998] ECR 1 7791; [1999] 4 CMLR 112

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A refusal to licence will only be held to be an abuse of a dominant position in exceptional circumstances. A refusal to licence an IPR is not normally considered to be contrary to Article 82. Holders of IPR are entitled to decide how they will exploit their exclusive rights. If access by competitors to a product protected by an IPR was permitted in less than exceptional circumstances, there would be no incentive for any undertaking to innovate and invest in the first place.

The IMS case has not significantly altered or clarified the law on compulsory licensing or when refusing a licence will constitute abuse of a dominant position. However, the ECJ has reaffirmed the 3 (cumulative) conditions from *Magill* as a prerequisite for there to be a competition concern in relation to a refusal to license.

The IMS case does not constitute a charter for companies to ransack their competitors' IPR portfolio.

Although it will not be difficult to construct a "secondary market" on which competition might be regarded as being reserved to the IPR owner by the refusal to license the key ingredients of indispensability and newness of product will be difficult for the would-be licensee to prove. The assessment of these ingredients turns entirely on the facts.

Ultimately the question needs to be addressed as to whether it is right to force an IPR owner to license his IPR to enable a company to compete on a downstream market. That contradicts the whole basis of IPR ownership which is to confer a monopoly on the owner as the reward for innovation.

In our view the IMS case represents a "high tide" mark in terms of the interference of competition law in IPR. The specific facts of IMS (in particular those relating to the contribution made to the development of the brick structure by the pharmaceutical industry) seemed on this occasion to militate in favour of the ECJ leaving room for the German court to require a licence of the brick structure to be granted by IMS. On that basis IMS is not properly to be regarded as the chill to innovation that has been widely claimed.

2. Microsoft

2.1 Key points

- This case represents the highest individual fine ever from the Commission.
- Microsoft found to abuse a dominant position on the market for PC operating systems by (1) refusing to licence interface information to competitors and (2) bundling its media player with Windows.
- Microsoft has appealed (but lost its application for interim relief from the orders made against it) and now faces a further fine for its failure to comply with the Commission's March 2004 decision.

2.2 History

In December 1998 Sun Microsystems ("Sun"), a US company supplying, among other things, computer hardware and server operating systems, complained that Microsoft had abused its dominant position in the client PC operating systems market by withholding technical information which was needed to enable Sun's operating system to interoperate with the Windows PC operating systems. Sun claimed that the information was necessary for it viably to compete.

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The Commission opened an investigation into Sun's complaint and in August 2000 issued a Statement of Objections relating to the refusal to supply interoperability information.

In February 2000 the Commission opened a separate investigation to study the effects of linking Microsoft's Windows PC operating system with the Windows Media Player ("WMP").

A second Statement of Objections was issued in August 2001 relating to both interoperability issues and the tying of Windows to WMP.

Finally, in August 2003, the Commission issued its third Statement of Objections, which supplemented and refined its arguments with regard to both the withholding of interoperability information and the tying of Windows to WMP.

In November 2003 the Commission conducted an oral hearing and its Decision was issued on 24 March 2004.

2.3 Relevant Market

The Commission found that the relevant markets for consideration in this case were:

(i) client PC operating systems (essentially, the software which controls the basic functions of a PC and acts as a platform for other software performing specific tasks, e.g. word processing);

(ii) work group server operating systems (software which runs powerful multi-user computers ("servers") in order to provide a small network of users with basic infrastructure services such as file sharing, printing and network administration services); and

(iii) streaming media players (software products which playback audio and video files simultaneously as they download).

2.4 Dominance

The Commission found that Microsoft was dominant in two markets. Firstly Microsoft was dominant in the Client PC operating systems market. Microsoft's market share, in respect of its Windows product, was found to have been consistently above 90% since 2000. Microsoft did not dispute this dominance finding. In addition the Commission found the market to be characterised by high barriers to entry caused by so-called "network effects", meaning that the more popular an operating system is, the more applications will be written for it, which in turn increases its popularity among users.

Secondly, the Commission found that Microsoft was dominant in the work group server operating systems market.

2.5 Abuses

First abuse: refusal to supply interoperability information

The refusal at issue was Microsoft's refusal to provide a full specification of the protocols used by Windows work group servers in order to provide the basic file, print and network administration services to Windows Client PCs. There was no question of Microsoft being compelled to licence its source code which would enable copying of Windows by third parties.

The ECJ had previously held in *Magill* that the refusal by a copyright holder to grant a licence, even where it holds a position of dominance, cannot in itself constitute abuse of that dominant position. However such a refusal may involve an abuse in exceptional circumstances. The Commission identified the following exceptional circumstances in the case of Microsoft's refusal :

Microsoft's refusal was found to put its competitors at a strong disadvantage in the workgroup server operating system market, to the extent that there is a risk of elimination of competition. The Commission considered in particular the growth in Microsoft's market share following the launch of Windows 2000, for which Microsoft had disclosed less interoperability information than for previous versions.

The Commission also found that as a result of Microsoft's refusal consumers (Windows users) are unable to benefit from new and innovative work group server operating system solutions which would otherwise be offered by Microsoft's competitors. This in turn discourages innovation and limits technical development.

Microsoft argued that the information requested by Sun was protected by intellectual property rights and that its refusal to supply was therefore objectively justified both to maintain the integrity of that protection and Microsoft's incentives to innovate in the future. In view of the exceptional circumstances referred to above, the Commission rejected the suggestion that the mere existence of IPRs constitutes a "self-evident" objective justification for the refusal. It also disagreed that the negative impact of an order to supply interoperability information on Microsoft's incentives to innovate would outweigh the positive impact of such an order on the level of innovation across the industry as a whole.

Second abuse: tying of Windows and WMP

The Commission set out a 'rule of reason' test for illegal tying within the meaning of Article 82(d), stating that the requirements for tying are that:

- the undertaking concerned is dominant in the tying product market
- the tying and tied products are two separate products
- the customer is not given a choice to obtain the tying product without the tied product
- tying forecloses competition.

It was also necessary to consider whether there is any objective justification for the tying.

Microsoft's dominance in the market for client PC operating systems had already been established.

The Commission concluded that there was a separate market for media players and a distinct consumer demand for those products, evidenced by the existence of vendors providing media players on a standalone basis. As products distinct from PC operating systems they are susceptible to be tied within the meaning of Article 82.

Microsoft does not offer a licence which would cover Windows without WMP. This was sufficient to satisfy the third condition, irrespective of the fact that users could install an alternative media player in addition to WMP.

Finally, the "unmatched ubiquity" of Windows was found to give WMP a significant competitive advantage by guaranteeing its presence, pre-installed, on PCs worldwide. This in turn makes WMP the platform of choice for providers of complementary software and content, thus reinforcing its popularity. It also gives rise to harmful spill over effects on competition on related products such as media encoding and client PC operating systems themselves.

Microsoft sought to justify tying on the grounds of efficiency. It argued that tying was necessary to maximise distribution efficiency and also that it was necessary for applications efficiency i.e. that integration of the two products improves technical performance. However, the Commission found that Microsoft had not submitted adequate evidence to show that there would be pro-competitive effects which would outweigh the distortion of competition caused by tying.

2.6 Remedies

The Commission imposed a fine of €497,196,304. The Commission's Decision was based on Microsoft's annual worldwide turnover being €30,700.336 million. The final fine represented 1.62% of this figure. The figure for the fine started at €165.732 million. This was multiplied by 2 (to €331.464 million) to ensure the fine represented a sufficient deterrent, reflecting the seriousness of the infringement in terms of actual impact of the market (where this could be measured), the nature of the infringement and the size of the relevant geographic market. This was increased by 50% to take into account the duration of the infringement of 5 years and 5 months. No aggravating or attenuating circumstances were considered relevant in this case.

In relation to the refusal to supply interoperability information, the Commission ordered Microsoft to:

- provide interoperability information within 120 days of the date of the Decision;
- allow use of interoperability information to enable development of work group server products;
- update any relevant interoperability information provided each time Microsoft brings a new product to the market;
- allow interested firms to inform themselves about the scope and terms of use of interoperability information.

The Commission also ordered Microsoft to offer PC systems without WMP within 90 days of the date of the Decision and to appoint an independent trustee to monitor compliance with the remedies.

2.7 The current position

Microsoft has appealed (but in December 2004 lost its application for interim relief from the orders made against it).

Following this, the Commission entered into discussions with Microsoft about its compliance, and carried out a market test of Microsoft's proposals on interoperability.

On 10 November 2005, the Commission issued a Decision warning that should Microsoft not comply by 15 December 2005 with its obligations to: (i) supply complete and

accurate interoperability information; and (ii) make that information available on reasonable terms, it would face a **fine of up to €2m a day**.

Since this Decision, Microsoft has revised the interoperability information that it is obliged to disclose, but the Commission is not satisfied that this is complete and accurate, and this view is supported by the Monitoring Trustee appointed by the Commission, Prof. Neil Barrett.

Therefore on 15 December 2005, the Commission issued a Statement of Objectives against Microsoft, to which Microsoft is required to respond within five weeks (15 February 2006).

On 25 January 2006, Microsoft issued a press release announcing that it had decided to license its Windows Server source code, and that this goes far beyond what is required of Microsoft under the March 2004 Decision.

Microsoft applied for an extension of time to file its response and this was rejected on 8 February 2006.

2.8 Implications

Refusal to supply - when should a court authorise the disclosure of information protected by intellectual property rights?

A line of ECJ authorities (e.g. *Magill*, *Oscar Bronner*) has established the following three key considerations in this regard: the need for licensee innovation; the absence of objective justification by the licensor for withholding the information; whether the refusal would be likely to eliminate all competition. The Commission took a different approach in Microsoft, looking at the broader circumstances surrounding Microsoft's case. It saw "no persuasiveness to an approach that would advocate the existence of an exhaustive list of exceptional circumstances".

It will be interesting to see how this issue is dealt with on appeal, particularly in light of the IMS decision.

Tying - this was essentially a case brought under Article 82(d): i.e. an abuse consisting in "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 subjects of such contracts". The Commission's approach was unusual in that it relied on its own "rule of reason" test for tying.

The decision is also notable for the emphasis placed throughout on the extraordinary features presented by Microsoft's dominance.

3. Syfait -v- GlaxoSmithKline plc

This case was a preliminary reference under Article 234 EC. The Advocate General gave an opinion relating to a refusal to supply in the pharmaceutical industry. However, the European Court of Justice has now ruled that it does not have jurisdiction to rule on a preliminary reference by the national competition authorities of a member state.

3.1 The case before the Greek competition authorities

GlaxoSmithKline plc and its Greek subsidiary (together "GSK") imported and distributed its products in Greece. The dispute before the national competition authority related to three products, Imigran, Lamictal and Serevent. Until November 2000, GSK had met the orders of the complainants and other pharmaceutical wholesalers in full, and a substantial proportion of those orders were then exported by the wholesalers to other EU Member States, where the prices were much higher than in Greece. However, from early November 2000, GSK stopped meeting orders from pharmaceutical wholesalers and stated instead that it would supply hospitals and pharmacies directly. It alleged that the export of the relevant products by wholesalers was leading to significant shortages on the Greek market. It subsequently reinstated supplies to wholesalers, but still refused to meet their orders in full.

The complainants complained to the Greek Competition Commission (the "Greek CC"), which adopted interim measures requiring GSK's Greek subsidiary to meet in full the orders it received. GSK also applied to the Greek CC for negative clearance in respect of its refusal to cover more than 125% of Greek demand. The Greek CC was satisfied that GSK held a dominant position at least in the market for Lamictal. However, it was unsure whether, by refusing to supply to the complainants, it was abusing this position. Therefore the Greek CC made a reference to the ECJ under Article 234 EC. It asked the ECJ whether a dominant pharmaceutical undertaking must always be regarded as abusing its dominant position within the meaning of Article 82 EC simply because it fails to meet in full all the orders placed with it with a view to limiting its customers' export activity. Secondly, and if not, which factors will go to determine whether or not an undertaking is liable for such conduct. (As paraphrased by the Advocate General).

3.2 The Advocate General's opinion

The Advocate General (the "AG") looked first at whether the Greek CC was a "court or tribunal of a Member State" for the purposes of Article 234. It decided that it was (see further below).

In relation to the substantive issue, the AG looked in some detail at the case law of the Court of First Instance and the ECJ, both in relation to failure to supply an existing customer, and failure to supply or licence a third party. He concluded that, first, it is evident that a dominant undertaking will on occasion have an obligation to supply its products or services, for example, where an interruption of supply would seriously disrupt competition between the undertaking and the customer on a downstream market or between the undertaking and its actual or potential competitors on the market of supply. Furthermore, there is a narrow range of circumstances in which a dominant undertaking will be obliged to open up its facilities or license its intellectual property rights to a third party for the first time, although in such cases, some exceptional harm to competition must be shown.

The AG said that secondly, however, it is also clear that a dominant undertaking's obligations to supply under Article 82 EC are in various respects circumscribed. In particular, a dominant undertaking is entitled to take such steps as are reasonable in order to defend its commercial interests (*United Brands*), and the courts have held that a dominant undertaking was able to defend a commercial policy which differentiated between customers in the allocation of scarce supplies (*BP*[6]). The courts have also consistently limited the obligation upon dominant undertakings by reference to the possibility of objective justification.

The AG noted that the factors that demonstrate whether or not an undertaking's conduct in refusing to supply is abusive are "*highly dependent on the specific economic and regulatory context in which the case arises*"[7]. Therefore the AG concluded that it must follow that "*a dominant pharmaceutical undertaking which restricts the supply of its products does not necessarily abuse its dominant position within the meaning of Article 82 EC merely because of its intention thereby to limit parallel trade*"[8].

The AG said that although GSK's intention to partition the market was assumed, that this was not its primary intent but was an inevitable consequence given the characteristics of the market. He said that the issue of intent should not detract from the essential question of whether the refusal to supply is justified, and in relation to this objective justification, the AG criticised the two step approach that is often taken to the questions of abuse and objective justification, which he said was somewhat artificial.

Member States' intervention

The AG noted that pure conditions of competition do not prevail in the European pharmaceutical market. First, he said that Member States intervene to limit the prices payable for medicinal products within their territories, and that prices vary between States, which in turn creates the opportunities for parallel trade. In fact, the European Commission had considered the possibility of adopting a centrally administered European pricing system for medicines and concluded that it was undesirable and currently impracticable. Additionally, the AG said that the pharmaceuticals industry is subject to a high degree of regulation, and that Member States are in fact required under European law to establish a system of authorisation for those engaged in activity as a wholesaler in medicinal products for human use and ensure appropriate and continued supplies of those medicinal products to pharmacies and persons authorised to supply them so that the needs of patients in the Member State in question are covered. Therefore, the AG said that "*When pharmaceutical undertakings attempt to block parallel trade, they are not thereby seeking to entrench price differentials of their own making, but rather to avoid the consequences which would follow if the very low prices imposed upon them in some Member States were generalised across the Community*"[9].

Additional obligations on pharmaceutical undertakings

The AG noted secondly that dominant pharmaceutical undertakings are under a legal and moral obligation that could prevent them being able to withdraw from a Member State where low prices were imposed on it.

National segregation

Thirdly, the AG said that the regulation of the distribution of pharmaceutical products in the EU is based around a nationally segregated system, aimed at ensuring that sufficient supplies are available within each national territory.

Benefit to consumers of parallel trade?

Finally, the AG doubted the notion that parallel trade would benefit consumers, given that Member States themselves are the purchasers and they set their own prices, and therefore he also doubted that parallel trade would necessarily result in increased competition.

Innovation -v- intervention?

The AG said that innovation is an important parameter of competition in the pharmaceuticals industry, and that the production of production of a pharmaceutical

6 Case 77/77 [1978] ECR 1513

7 Paragraph 68

8 Paragraph 69

9 Paragraph 84

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product is usually characterised by high fixed costs (to research and develop the product) and comparatively low variable costs (to manufacture the product once developed). He considered that too much intervention might discourage this innovation and would be an incentive for undertakings not to market products that might win them a dominant position in Member States where prices are fixed at a low level.

AG's conclusions

Therefore the AG concluded that a restriction of supply by a dominant pharmaceutical undertaking in order to limit parallel trade is capable of justification as a reasonable and proportionate measure in defence of that undertaking's commercial interests, and that such restriction does not protect that undertaking's own price disparities, nor directly impede trade, which is rather blocked by public service obligations imposed by the Member States. He said that to require the undertaking to supply all export orders placed with it would in many cases impose a disproportionate burden given the moral and legal obligations on it to maintain supplies in all Member States. Given the specific economic characteristics of the pharmaceutical industry, a requirement to supply would not necessarily promote either free movement or competition, and might harm the incentive for pharmaceutical undertakings to innovate. He said that, moreover, it cannot be assumed that parallel trade would in fact benefit either the ultimate consumers of pharmaceutical products or the Member States, as primary purchasers of such products.

The AG did caveat his opinion as applying only to the pharmaceutical industry, in its current condition, and he said that he thought it highly unlikely that any other sector would exhibit the characteristics that had led him to this conclusion.

3.3 The ECJ judgment

When the Article 234 reference went before the ECJ, the ECJ looked first at whether it had jurisdiction to determine the issued referred to it. It said that, in order to determine whether a body making a reference to it is a court or tribunal, it takes into account a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. Additionally, in order for a national court to refer a question to the ECJ, there must be a case pending before it, and it must have been called upon to give judgment in proceedings intended to result in a decision of a judicial nature.

The ECJ noted that the Greek CC was subject to the supervision of the Minister for Development, which the ECJ said implied that the Minister was empowered, within certain limits, to review the lawfulness of the decisions adopted by it. It said also that the members of the Greek CC enjoy no particular safeguards relating to their dismissal, and therefore there are no effective safeguards against intervention or pressure from the executive. The ECJ said further that insofar as there was an operational link between the Greek CC, a decision-making body, and its secretariat, a fact-finding body, the Greek CC was not a clearly distinct body from the State, which could itself be a party to competition proceedings. Finally, the ECJ said that the Greek CC had to work closely alongside the European Commission, and could be automatically relieved by it of its competence where the European Commission exercises its jurisdiction in relation to competition cases.

The ECJ concluded that the Greek CC was not a "court or tribunal" within the meaning of Article 234 EC.

Therefore the ECJ did not consider the refusal to supply question referred to it.

3.4 What next?

The Greek CC could have its decision appealed to the Greek courts, and the Greek courts could make an Article 234 reference to the ECJ. Alternatively, the Greek CC could refer the case to the European Commission.

4. AstraZeneca

On 15 June 2005, the European Commission fined the pharmaceuticals company AstraZeneca ("AZ") €60m for misusing the patent system and the procedures for marketing pharmaceuticals, in order to block or delay the entry on to the market of generic competitors to its ulcer drug, Losec.

4.1 Background

AZ manufactures a drug, Losec, for the treatment of stomach ulcers, and it applied for a patent in 1979.

Reforms to European legislation in the mid-1999 (which were intended to mirror initiatives in the United States and Japan) allowed pharmaceutical companies to seek "supplementary protection certificates" for up to five years, in order to compensate them for the lengthier period between initial patent filing and final marketing authorisation than exists in most other innovative industries.

AZ sought to take advantage of the SPC, by making such requests to European patent offices for Losec, and it interpreted the law as meaning it could seek a five-year extension from the date of approval from national health systems for *prescription reimbursement*, rather than the date on which the drug was first *approved* by the national regulators. There can often be as long as a two-year delay between approval and agreement of a pricing structure.

Additionally, at the time, generic products could only be marketed and parallel importers only obtain import licences if there was an existing reference market authorisation for the original corresponding product, i.e. Losec.

AZ withdraw Losec in capsule form from some market, replacing it with pellets, which it claimed were more easily absorbed by patients, thereby seeking to benefit from a further extension of exclusivity when a new formulation is protected by a more recent patent.

4.2 The Commission decision

The Commission carried out a six-year investigation, following which it found that, from 1993 to 2000, AZ infringed EU and EEA competition rules by blocking or delaying market access for generic versions of Losec and preventing parallel imports of Losec, by:

Giving misleading information to several national patent offices, resulting in AZ gaining extended patent protection through SPCs. The Commission found that AZ's conduct amounted to an abuse in Belgium, Denmark, Germany, the Netherlands, Norway and the United Kingdom.

Misusing rules and procedures applied by the national medicines agencies which issue market authorisations for medicines by selectively deregistering the market authorisations for Losec capsules in Denmark, Norway and Sweden with the intent of blocking or delaying entry by generic firms and parallel traders.
In relation to the SPC abuse, the Commission said that the patent offices relied on information supplied by AZ, as they were not obliged to consider whether the products were innovative.

In relation to the withdrawal abuse, the Commission said that the purpose of a market authorisation is the right to sell a medicine, and not to exclude competitors. It said that, unlike patents, SPCs and data exclusivity, market authorisations are not intended to reward innovation and the finding of an abuse cannot therefore affect incentives to innovate. (Subsequent changes to EU legislation have made it impossible to repeat this specific conduct).

The Commission fined AZ €60m, but conceded that its ruling broke new legal ground, and said that the novelty of the charges had resulted in a reduction of the fine (the maximum fine that AZ could have faced was €214m).

4.3 AstraZeneca's response

AZ brought an appeal on 25 August 2005. AZ claims that the Commission made an error in its definition of the relevant market. The Commission took the market to be proton pump inhibitors used for the treatment of gastrointestinal acid related diseases but mistakenly excluded histamine receptor antagonists from the market definition. This led to an error in the finding of dominance.

AZ also claims that the Commission erred in finding that there had been abuse as the making of misleading representations in the course of applications for intellectual property rights cannot amount to an abuse of a dominant position unless or until the dishonestly obtained rights are enforced or are capable of being enforced. Further, it claims that Article 82 does not impose on AZ an obligation to maintain a marketing authorisation for a product that is no longer marketed just to make it easier for generics and parallel traders to compete with it.

Finally, AZ claims that the Commission in relation to its findings of fact, failed to prove the alleged abuses to the appropriate legal standard. Further, it failed to demonstrate that there was a selective strategy to change from Losec capsules to tablets or to withdraw the marketing rights.

EUROPEAN COMMISSION'S DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES

In December 2005, the Commission produced a discussion paper on its application of Article 82 to exclusionary abuses. The Paper is open for consultation until 31 March 2006. It focuses on exclusionary abuses, rather than exploitative or discriminatory abuses (except insofar as they may have an exclusionary effect).

The Discussion Paper is the latest to emerge in the course of the Commission's reform programme, following on from guidelines relating to the application of Article 81 to both vertical and horizontal relationships; modernisation of the enforcement regime and reform of the Merger Regulation. As with the policy reforms that have gone before, the emphasis is on effects and economic analysis rather than conduct per se, and the introduction of an efficiency defence is entirely new so far as Article 82 is concerned. The Commission's hope is that this approach will lead to better and more consistent decision making, but the Paper itself cannot be relied on for guidance as to the Commission's enforcement policy. It is interesting that the Commission's thinking has clearly developed quickest in relation to exclusionary abuses, which is also where the weight of the existing case law lies. Until we start seeing decisions tested in the European Court against the existing precedents, it seems likely that there will remain considerable uncertainty in this area.

The first half of the Paper considers the framework for a finding of abuse, i.e. market dominance; abuse resulting in foreclosure of the market; and possible defences of objective justification and/or efficiencies. The second half of the Paper considers the application of this framework to specific abuses: predatory pricing; single branding and rebates; tying and bundling; and refusal to supply. Finally, the Paper briefly considers aftermarkets.

Market Definition

The paper does not contain anything new in this respect. The Commission Notice on definition of the relevant market remains the basis for market definition for the purposes of Article 82. However specific guidance is given in relation to the so-called "cellophane fallacy" - the assumption that a price charged by a dominant undertaking will almost inevitably have been raised above the competitive level, therefore the SSNIP test, which assumes that the prevailing price is a competitive price, could result in the market being defined too widely so as to include products or geographic areas that impose a competitive constraint only at this inflated price.

The paper suggests that it is necessary to use more than one test to verify the market definition arrived at using the SSNIP test and to avoid the cellophane fallacy. One alternative to using the prevailing price is to reconstruct the competitive price, but this is not always possible. Additionally, the characteristics and intended use of the products concerned can be assessed, and whether they are capable of satisfying an inelastic consumer need - regard must be had to the needs of marginal customers, who may even constitute a separate market. Also, it may be relevant to compare markets across various regions, so that where the company concerned supplies a product in several regions and charges higher prices in regions where it has a higher market share, this is an indication that the main competitive constraint comes from other suppliers of that type of product and not other types of product.

Dominance

The Paper uses the *United Brands* definition of dominance and it divides this into three elements: (a) there must be a position of economic strength on a market which (b) enables the undertakings in question to prevent effective competition being maintained on that market by (c) affording it the power to behave independently to an appreciable extent.

Market power is described 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. One indication of market power is higher than normal profits, but in general, the Paper considers that the way in which a firm acts in the market may in itself be indicative of substantial market power.

Market position of apparently dominant undertaking and its rivals

The starting point for the analysis of dominance is the market shares of the various participants in the market. If market shares have fluctuated significantly over time, this is an indication of effective competition (provided that these fluctuations have been caused by rivalry on the market rather than, for example, mergers). The Commission will usually look at current market share, but it may look at historic market share if market shares have been volatile. The Paper confirms that a market share of 50% or more is indicative of dominance; and dominance is more likely to be found in the market share range of 40% to 50% than below 40%; a market share of 25% of less is unlikely to constitute a single dominant position.

Of course, the Commission will not consider market share in isolation; it will also look at factors such as competitors' market shares, barriers to entry and buyer power.

Barriers to entry and expansion

If barriers to expansion and entry are low, the fact that one undertaking has a high market share may not be indicative of dominance, as any attempt to increase prices above the competitive level would attract expansion by competitors or new entry by potential competitors. The Paper notes that such expansion or entry to the market needs to be sufficiently immediate and persistent to prevent the exercise of the substantial

market power. Of course, the Commission will look carefully at the history of the industry when assessing barriers to expansion or entry, as well as taking into account how profitable that expansion or entry is likely to be (i.e. whether the market is growing or declining), and the likely strategic responses from the incumbents on the market.

Barriers to entry include legal barriers (e.g. licences), capacity constraints (e.g. large sunk costs), economies of scale and scope, absolute cost advantages (e.g. preferential access to essential facilities, natural resources, innovation and research and development, intellectual property rights etc), privileged access to supply (e.g. being vertically integrated), a highly developed distribution and sales network, the established position of the incumbent firms on the market and other strategic barriers to expansion or entry (e.g. where personnel have been trained to use the product, network effects, and the use of long term contracts).

Market position of buyers

The Commission will also take into consideration the market position of buyers, and in certain circumstances, it may be necessary to define separate markets for strong and weak buyers respectively.

Collective dominance

There are three main preconditions to a finding of collective dominance: first, each undertaking must be able to monitor whether or not the other undertakings are adhering to the common policy, i.e. there must be sufficient market transparency; secondly, the implementation of the common policy must be sustainable over time, i.e. there is an absence of sufficient deterrent mechanisms; and finally, competitive constraints must not jeopardise the implementation of the common strategy.

Abuse

Abuse, in the context of exclusionary conduct, is conduct by a dominant undertaking that weakens the existing competition or the growth of that competition.

The conduct must have the capability of foreclosing competitors from the market, and, in the specific market context, a likely distorting foreclosure effect must be established. However, foreclosure does not necessarily mean that rivals are forced to exit the market; it is sufficient that they are disadvantaged and consequently led to compete less aggressively. Indeed, it is suggested that in some circumstances the dominant undertaking may benefit from its competitors remaining in the market, albeit weakened. Where the exclusionary conduct is clearly not competition on the merits, in particular, conduct which clearly creates no efficiencies and which only raises obstacles to residual competition, such conduct is presumed to be an abuse, although that presumption may be rebutted by the dominant company.

Price v. non-price based exclusionary conduct

Exclusionary abuses may be both price-based and non price-based. The principles for assessing alleged price-based exclusionary conduct are based on the premise that, in general, only conduct which would exclude a hypothetical "as efficient" competitor is abusive.

The cost benchmarks used to apply the as efficient competitor test are as follows: (1) marginal cost, which is the cost of producing the last unit of output; (2) average variable cost; (3) average avoidable cost, which is the average of the costs that could have been avoided if the company had not produced the discrete amount of extra output (i.e. the amount allegedly subject to abusive conduct), which is usually the same as average variable cost unless there are specific fixed costs associated with that additional output; (4) long-run average incremental cost, which is the average of all fixed and variable costs incurred to produce a particular product; and (5) average total cost, which is the average of all fixed and variable costs.

For price-based alleged abuses, the question asked by the Commission is whether the dominant company itself would be able to survive the exclusionary conduct in the event that it were the target. In order to apply the as efficient competitor test, the Commission needs to have reliable information on the pricing conduct and costs of the dominant company. It may be necessary to look more widely than the relevant product market, in case the conduct negatively affects the company's revenues in other markets or of other products. If reliable information is not available in relation to the dominant company, the Commission may look at cost data of apparently efficient competitors. Further, even when no reliable cost data is available, the Commission may be able to built its case of abuse on other information. It may sometimes be necessary in consumers' interests to also protect competitors who are not yet as efficient as the dominant company, and in applying the as efficient competitor test, the Commission will take into account, for example, economies of scale and scope, learning curve effects or first mover advantages that later entrance to the market cannot expect to match.

Horizontal v. vertical foreclosure

Foreclosure may be horizontal as well as vertical; for example, vertical foreclosure may occur where the dominant company is vertically integrated and wishes to eliminate its competitors in the downstream market.

Defences: Objective Justifications and Efficiencies

There are types of objective justification: the objective necessity defence and the meeting competition defence. The objective necessity defence is construed strictly, and the Paper notes that it is not considered to be the task of a dominant company to take steps of its own initiative to eliminate products which it regards, rightly or wrongly, as dangerous or inferior to its own products. The meeting competition defence applies only to behaviour that otherwise would constitute a pricing abuse, and only to individual and not collective abuses. A proportionality test applies, and the dominant company must

first demonstrate that its chosen conduct is a suitable way of achieving the legitimate aim and that it is indispensable, i.e. that it cannot be achieved in a less anti-competitive way and that it is limited in time to the absolute minimum. The dominant company must also demonstrate that there are no other economically practicable and less anti-competitive alternatives to the approach taken.

The efficiency defence requires that: (1) efficiencies are realised or likely to be realised as a result of the conduct concerned; (2) the conduct is indispensable to realise those efficiencies; (3) the efficiencies benefit consumers; and (4) competition in respect of a substantial part of the products concerned is not eliminated. Again, the burden is on the dominant company to demonstrate that there are no other economically practicable and less anti-competitive alternatives to achieve the stated efficiencies. Also, the benefit of the efficiencies needs to outweigh the likely negative effects on competition. In general, the later the efficiencies are expected to materialise, the less the weight that will be assigned to them.

Predatory Pricing

In order to making a finding of predatory pricing, the Commission must be satisfied that the dominant company has an intention to eliminate or discipline rivals or prevent their entry to the market. Predatory pricing is only likely to succeed and be profitable if the dominant company already has substantial market power on the market in question; in a competitive market with many competitors, the exclusion of some is not likely to lead to sufficient weakening of competition so as to allow the predator to recoup its investment, and in a market with only a few strong competitors, such a strategy is also unlikely to succeed. Similarly, predatory pricing is unlikely to be effective for companies that are collectively dominant.

In general, predatory pricing will only be an abuse under Article 82 if the dominant company applies it to protect or strengthen its dominant position, although it may do so either in the market in which it is dominant or in another adjacent market. As an exception to this, predatory pricing may be an abuse in relation to a market in which the predator is not dominant, if it is protected by a legal monopoly in the market in which it is dominant.

Appropriate cost benchmark

The appropriate cost benchmark is the one that most accurately justifies the presumption that pricing below that benchmark can be expected to be predatory, i.e. does the company, by charging a lower price for its products, incurs losses that could have been avoided by not producing that part of its output? Therefore, the average avoidable cost is often an appropriate benchmark. (Although, as stated above, the average avoidable cost will frequently be the same as the average variable cost).

If the price charged by the dominant company is below average avoidable cost, there is a presumption of predatory pricing, although this may be rebutted in exceptional circumstances. Once the Commission has established pricing at below average avoidable cost, it does not need to further justify its decision with evidence of the actual or likely exclusion of the prey, the predatory intent of the dominant company, its possibility to recoup the losses in the future, etc. Of course, the dominant company may be able to proffer evidence of any of these elements to rebut the presumption of predation.

Where pricing is above average avoidable cost but below average total cost, in order to make a finding of abuse, the Commission will need to establish that the dominant company had predatory intent. It may have direct or indirect evidence of this. Indirect evidence includes, for example, that the pricing behaviour only makes commercial sense as part of a predatory strategy or that there are no other reasonable explanations for it; that there is an actual or likely exclusionary effect; that certain customers are selectively targeted; that there is concurrent application of other exclusionary abuses; that the dominant company has the possibility to recoup its losses in the foreseeable future, etc. If the pricing behaviour only makes commercial sense as part of a predatory strategy and there are no other reasonable explanations for it, this will normally suffice to show a strategy to predate, in which case it will not be necessary to show that a foreclosure effect is likely.

Pricing below long run average incremental cost is presumed to be predatory in cases where the activities are protected by legal monopoly, or in sectors that have recently been liberalised (or are under going liberalisation), such as the telecom sector. The Paper notes that the telecom sector is characterised by very high fixed costs and very low variable costs, therefore the use of an average variable cost or average avoidable cost benchmark would not be appropriate.

Pricing above average total cost is generally not considered to be predatory. An exception to this might be where there is collective dominance, or where a single dominant company operates in a market where it has certain non-replicable advantages or where economies of scale are very important and entrants will have to operate for an initial period at a significant cost disadvantage. However, in order for pricing at above ATC to be predatory, the Commission must show that the incumbent dominant company has a clear strategy to exclude, that the entrants will only be less efficient because of these non-replicable or scale advantages, and that entry is being prevented because of the disincentive to enter resulting from the specific price cuts.

Possible defences

For pricing below AVC/AAC, a defence of objective justification is highly unlikely to succeed. For pricing above this, the company may be able to show that its price cut is actually a short-term loss minimising response to change in market conditions, for example, a dramatic fall in demand leading to excess capacity, a need to sell of perishable inventory or obsolete products, or where the costs of storage have become prohibitive.

The meeting competition defence may also be available, although, again, this is unlikely to apply to pricing below AAC/AVC. It will only apply if it is shown that the response of lowering prices is suitable, indispensable and proportionate.

An efficiency defence cannot generally be applied to predatory pricing.

<u>Single Branding and Rebates</u>

Single branding obligations are those that require a buyer to concentrate its purchases of a product to a large extent with one supplier. An "English clause", which requires the buyer to report any better offer to the supplier and allows it to accept such an offer only where the supplier does not match it, can have the same affect as a single branding obligation. Rebates can be unconditional, where they are granted only to certain customers but for every purchase, irrespective of the customers' purchasing behaviour; or conditional, where they reward a certain purchasing behaviour.

The dominant position of the supplier means that, in general, even without loyalty enhancing measures, buyers will buy a large part or even most of their purchases from that supplier. Therefore, single branding obligations and loyalty rebates serve only to exacerbate this position.

Single branding

The higher the percentage of the buyer's exclusive purchasing obligations, the stronger the foreclosure potential, and where the dominant supplier applies the single branding obligation to a good part of its buyers, the Commission is likely to conclude that it has a market distorting foreclosure effect and constitutes an abuse of the supplier's dominant position. Where the supplier imposes the single branding obligation only selectively, its effect will depend upon whether those selected buyers are of particular importance to rivals or potential rivals. In relation to English clauses, the foreclosure effect maybe particularly strong where the buyer has to reveal who makes the better offer, as this may deter rivals from seeking to win over customers for fear that the dominant supplier will reciprocate.

Conditional rebates

Conditional rebates, i.e. rebates granted where the purchaser buys a certain quantity of the product, may be applied in respect of all purchases or only in respect of purchases above that threshold.

Conditional rebates on all purchases

These are likely to have a strong foreclosure effect, particularly where the supplier sets the threshold above the level that the buyer would usually purchase from it, and where it sets individualised volume targets (or a percentage of purchase requirements) rather than standardised volume targets. This will, of course, depend on specific market conditions.

In assessing the effect of conditional rebates on all purchases the Commission will calculate:

(1) a "commercially viable amount" that a competitor might expect to be able to supply to the dominant supplier's customers;

(2) the "effective price" of this commercially viable amount, i.e. the price paid for that last part of the supply, after applying the rebate;

(3) the "required share", being the share of the dominant supplier's customers' requirements its rivals would need to capture so that the effective price is at least as high as the dominant supplier's average total cost.

Where the required share is higher than the commercially viable amount, i.e. where the effective price is below average total cost, there is likely to be a market distorting foreclosure effect.

Conditional rebates on incremental purchases above the threshold

These are likely to constitute an abuse only where the resulting price for those incremental purchases is a predatory price, i.e. where it is below average total cost.

Conditional rebates in return for services

These are unlikely to be abusive.

Unconditional rebates

Unconditional rebates, i.e. those offered to selected customers, may have an exploitative as well as exclusionary effect. Whether they have exclusionary effects will depend on the customers to which they are offered.

Possible defences

A defence of objective justification may be available, for example, where economies of scale result in cost savings when buyers make larger volumes of purchases. However, this is unlikely to apply where the threshold above which the rebate applies is a percentage of buyers' requirements or an individualised volume target. The dominant supplier may also be able to claim that the rebate system is indispensable to allow it to make certain relationship-specific investments, but it would need to show that the investment is a significant long-term investment that is not recouped in the short term, and that it is asymmetric (i.e. the supplier invests more than the buyer).

The meeting competition defence is unlikely to apply.

Tying and Bundling

Tying occurs where the supplier makes the sale of one product (the tying product) conditional on the purchase of another distinct product (the tied product), and bundling occurs where a package of two or more goods is offered either together (pure bundling) or at a cheaper price than the sum of its individual components (mixed bundling).

For tying to be abusive, the supplier needs to be dominant in the tying market, but need not necessarily be dominant on the tied market. The products in question need to be distinct, although they need not belong to two separate product markets. Indirect evidence that the products are distinct might include, for example, that less powerful competitors tend not to tie together the two products, or that there are independent companies specialised in the manufacture of the tied product without the tying product. Commercial usage may also indicate whether or not the two products are distinct.

There will be foreclosure of the market if the discount for the tied or bundled product is so large that an efficient competitor offering only some but not all of the components cannot compete against the discounted bundle. The incremental price of each component of the bundle should therefore cover the long-run incremental costs of the dominant supplier of including this product in the bundle, i.e. in a bundle consisting of products A and B, the incremental price of B is the price of the bundle AB less the stand-alone price of product A. However, if competitors also sell similar bundles, it may be less relevant to consider the incremental cost, and in this situation, it should be assessed whether the price of the bundle as a whole is predatory.

In considering whether there may be foreclosure, the Commission will take into account the identity and number of tied customers, whether there are significant scale economies that could justify the tying/bundling, learning curve or network effects, barriers to entry in the tied market, customer preference, etc.

Possible defences

As a possible defence of objective justification, the supplier may be able to argue that it is necessary to tie the products for reason of quality and good usage, or to protect the health and safety of customers. Again, however, it is noted that it is not the task of a dominant supplier to take steps to eliminate products that it regards as dangerous or inferior to its own products.

An efficiency defence may be available, and this is more likely where the dominant supplier combines two independent products to form a new product, than in situations of contractual tying or bundling of existing products. However, in many cases, contractual tying may not be indispensable to achieve the stated efficiencies. Also, the price incentives in mixed bundling normally need to only reflect the effective cost efficiency that it realised.

Refusal to Supply

Refusal to supply is normally aimed at excluding not the buyer, but rather a competitor of the dominant supplier. Practices such as delaying tactics in supplying, imposing unfair trading conditions and charging excessive prices may also in reality amount to a refusal to supply. However, for a refusal to supply to be abusive, it must have a likely anticompetitive effect on the market that is detrimental to consumer welfare. Refusal to supply includes terminating an existing supply, refusal to start supplying, and refusal to licence IP rights.

Terminating an existing supply

This can include delaying tactics, imposing unfair trading conditions, or charging excessive prices, for example applying a margin squeeze.

A defence of objective justification may apply if the company can show that it is not able to provide appropriate commercial assurances that it will fulfil its obligation, or that it wants it integrate downstream and itself perform the downstream activities. However it would need to show that customers are better off with the supply relationship terminated.

Refusal to start supplying

In order to find an abuse, in addition to the requirements applying to termination of an existing supply, the Commission would also need to be satisfied that the input is indispensable in order to carry out normal economic activity in the downstream market. This will be the case only when duplication of the existing facility is impossible or extremely difficult, either because it is physically or legally impossible, or because it is not economically viable.

A defence of objective justification may apply, in the case of an essential facility, if that facility is capacity constrained or if granting access would lead to a substantial increase in cost that would jeopardise its economic viability, or if the customer is not technically able to use the facility properly.

The dominant supplier may have made substantial investment and endured insignificant risks, therefore in some situations, it should be allowed to exclude others for a certain period of time in order to ensure an adequate return on its investment, even where this results in effective competition being eliminated during this period. However, the Commission will take into account, for example, whether the investment would have been made even if the dominant company had known that it would have a duty to supply, or whether it was made primarily for reasons not related to the market in which the company seeking access intends to use it.

Refusal to licence IP rights

In addition to the requirements applying to a refusal to start supplying, in order for the refusal to be an abuse, the Commission must establish that it additionally prevents the

development of the market for which the licence is indispensable, to the detriment of consumers.

Aftermarkets

Aftermarkets, or secondary markets, include after sales services, spare parts for durable goods, consumables such as ink cartridges, upgrades etc. The application of the traditional SSNIP test to define an aftermarket may result in the definition of the market comprising only of the secondary product of the supplier of the primary product, i.e. to the supplier being a monopolist in the aftermarket. This does not take into account competitive constraints that the supplier may face on the primary market, which are considered at a later stage. The market definition exercise focuses on customers who have already purchased the primary product, and not prospective purchasers.

The secondary product may not form a market of itself where it is possible to switch to secondary products of other suppliers; or where it is possible to switch to an alternative primary product, which of course will require that the costs of switching (i.e. the price of the primary product and related investments such as training) are not too high. Where there is no separate aftermarket, the Commission will conduct its analysis on the overall “systems” market, and will need to establish dominance on this market.

If an aftermarket consists of only one brand of secondary products, a dominant position of that market can only be established after an analysis of the competition on both the aftermarket and the primary market. Relevant factors include the amount of information available to consumers, and the extent to which consumers make life cycle cost calculations when purchasing the primary product, and it may be that professional customers form a separate market from private customers.

Generally, the more competitive the primary market, and the weaker the position of the supplier on this market, the less likely it is to be considered to be dominant on the aftermarket. Once dominance on the aftermarket has been established, it is presumed to be abusive for the dominant supplier to reserve the aftermarket for itself by excluding competitors (e.g. by tying or refusal to deal).