Communication of the Commission Enforcement priorities in applying article 82 of the EC Treaty

II

(Information)

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COMMISSION

Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

(Text with EEA relevance)

(2009/C 45/02)

I. INTRODUCTION

1. Article 82 of the Treaty establishing the European Community ('Article 82') prohibits abuses of a dominant position. In accordance with the case-law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Article 82 is the legal basis for a crucial component of competition policy and its effective enforcement helps markets to work better for the benefit of businesses and consumers. This is particularly important in the context of the wider objective of achieving an integrated internal market.

II. PURPOSE OF THIS DOCUMENT

2. This document sets out the enforcement priorities that will guide the Commission's action in applying Article 82 to exclusionary conduct by dominant undertakings. Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article 82.

3. This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities. In addition, the general framework set out in this document applies without prejudice to the possibility for the Commission to reject a complaint when it considers that a case lacks priority on grounds of lack of Community interest.

4. Article 82 applies to undertakings which hold a dominant position on one or more relevant markets. Such a position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance). This document only relates to abuses committed by an undertaking holding a single dominant position.

5. In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.

6. The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.

7. Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured. For the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common.

8. In applying the general enforcement principles set out in this Communication, the Commission will take into account the specific facts and circumstances of each case. For example, in cases involving regulated markets, the Commission will take into account the specific regulatory environment in conducting its assessment ([1]). The Commission may therefore adapt the approach set out in this Communication to the extent that this would appear to be reasonable and appropriate in a given case.

III. GENERAL APPROACH TO EXCLUSIONARY CONDUCT

A. Market power

9. The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82. According to the case-law, holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case ([2]).

10. Dominance has been defined under Community law as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers ([3]). This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers. The Commission may consider that effective competitive constraints are absent even if some actual or potential competition remains ([4]). In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative ([5]).

11. The Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant ([6]). In this Communication, the expression 'increase prices' includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition — such as prices, output, innovation, the variety or quality of goods or services — can be influenced to the advantage of the dominant undertaking and to the detriment of consumers ([7]).

12. The assessment of dominance will take into account the competitive structure of the market, and in particular the following factors:

— constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors),

— constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry),

— constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).

(a) *Market position of the dominant undertaking and its competitors*

13. Market shares provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market ([8]). However, the Commission will interpret market shares in the light of the relevant market conditions, and

([1]) See for instance paragraph 82.

([2]) Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I)* v *Commission* [1983] ECR 3461, paragraph 57; Case T-83/91 *Tetra Pak* v *Commission (Tetra Pak II)* [1993] ECR II-755, paragraph 114; Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 139; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 112; and Case T-203/01 *Michelin* v *Commission (Michelin II)* [2003] ECR II-4071, paragraph 97.

([3]) See Case 27/76 *United Brands Company and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann-La Roche & Co.* v *Commission* [1979] ECR 461, paragraph 38.

([4]) See Case 27/76 *United Brands Company and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraphs 113 to 121; Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, paragraph 330.

([5]) Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraphs 65 and 66; Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraph 47; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 90.

([6]) What is a significant period of time will depend on the product and on the circumstances of the market in question, but normally a period of two years will be sufficient.

([7]) Accounting profitability may be a poor proxy for the exercise of market power. See to that effect Case 27/76 *United Brands Company and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 126.

([8]) Case 85/76 *Hoffmann-La Roche & Co.* v *Commission* [1979] ECR 461, paragraph 39-41; Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 90, 91 and 92; Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 100.

in particular of the dynamics of the market and of the extent to which products are differentiated. The trend or development of market shares over time may also be taken into account in volatile or bidding markets.

14. The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission.

15. Experience suggests that the higher the market share and the longer the period of time over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position and, in certain circumstances, of possible serious effects of abusive conduct, justifying an intervention by the Commission under Article 82 ([1]). However, as a general rule, the Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behaviour of the undertaking.

(b) *Expansion or entry*

16. Competition is a dynamic process and an assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation. The potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant. An undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient. For the Commission to consider expansion or entry likely it must be sufficiently profitable for the competitor or entrant, taking into account factors such as the barriers to expansion or entry, the likely reactions of the allegedly dominant undertaking and other competitors, and the risks and costs of failure. For expansion or entry to be considered timely, it must be sufficiently swift to deter or defeat the exercise of substantial market power. For expansion or entry to be considered sufficient, it cannot be simply small-scale entry, for example into some market niche, but must be of such a magnitude as to be able to deter any attempt to increase prices by the putatively dominant undertaking in the relevant market.

17. Barriers to expansion or entry can take various forms. They may be legal barriers, such as tariffs or quotas, or they may take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale and scope, privileged access to essential inputs or natural resources, important technologies ([2]) or an established distribution and sales network ([3]). They may also include costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier. The dominant undertaking's own conduct may also create barriers to entry, for example where it has made significant investments which entrants or competitors would have to match ([4]), or where it has concluded long-term contracts with its customers that have appreciable foreclosing effects. Persistently high market shares may be indicative of the existence of barriers to entry and expansion.

(c) *Countervailing buyer power*

18. Competitive constraints may be exerted not only by actual or potential competitors but also by customers. Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength ([5]). Such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices. Buyer power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.

B. **Foreclosure leading to consumer harm ('anti-competitive foreclosure')**

19. The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term

([1]) As to the relationship between the degree of dominance and the finding of abuse, see Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports, Compagnie Maritime Belge and Dafra-Lines* v *Commission* [2000] ECR I-1365, paragraph 119; Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 186.

([2]) Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 19.

([3]) Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 48.

([4]) Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 91.

([5]) See Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraphs 97 to 104, in which the Court of First Instance considered whether the alleged lack of independence of the undertaking *vis-à-vis* its customers should be seen as an exceptional circumstance preventing the finding of a dominant position in spite of the fact that the undertaking was responsible for a very large part of the sales recorded on the industrial sugar market in Ireland.

'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices ([1]) to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anti-competitive foreclosure either at the intermediate level or at the level of final consumers, or at both levels ([2]).

20. The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment:

— *the position of the dominant undertaking*: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure,

— *the conditions on the relevant market*: this includes the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking forecloses a significant part of the relevant market. Similarly, the conduct may allow the dominant undertaking to 'tip' a market characterised by network effects in its favour or to further entrench its position on such a market. Likewise, if entry barriers in the upstream and/or downstream market are significant, this means that it may be costly for competitors to overcome possible foreclosure through vertical integration,

— *the position of the dominant undertaking's competitors*: this includes the importance of competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. It may, for example, be the closest competitor to the dominant undertaking, be a particularly innovative competitor, or have the reputation of systematically cutting prices. In its assessment, the Commission may also consider in appropriate cases, on the basis of information available, whether there are realistic, effective and timely counterstrategies that competitors would be likely to deploy,

— *the position of the customers or input suppliers*: this may include consideration of the possible selectivity of the conduct in question. The dominant undertaking may apply the practice only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors, thereby enhancing the likelihood of anti-competitive foreclosure ([3]). In the case of customers, they may, for example, be the ones most likely to respond to offers from alternative suppliers, they may represent a particular means of distributing the product that would be suitable for a new entrant, they may be situated in a geographic area well suited to new entry or they may be likely to influence the behaviour of other customers. In the case of input suppliers, those with whom the dominant undertaking has concluded exclusive supply arrangements may be the ones most likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or may produce a grade of the product — or produce at a location — particularly suitable for a new entrant. Any strategies at the disposal of the customers or input suppliers which could help to counter the conduct of the dominant undertaking will also be considered,

— *the extent of the allegedly abusive conduct*: in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect,

— *possible evidence of actual foreclosure*: if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalised or may have exited, or potential competitors may have tried to enter and failed,

— *direct evidence of any exclusionary strategy*: this includes internal documents which contain direct evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.

([1]) For the meaning of the expression 'increase price' see paragraph 11.

([2]) The concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers. Where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.

([3]) Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 188.

21. When pursuing a case the Commission will develop the analysis of the general factors mentioned in paragraph 20, together with the more specific factors described in the sections dealing with certain types of exclusionary conduct, and any other factors which it may consider to be appropriate. This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices.

22. There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product.

C. **Price-based exclusionary conduct**

23. The considerations in paragraphs 23 to 27 apply to price-based exclusionary conduct. Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking ([1]).

24. However, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The Commission will take a dynamic view of that constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.

25. In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing. This will require that sufficiently reliable data be available. Where available, the Commission will use information on the costs of the dominant undertaking itself. If reliable information on those costs is not available, the Commission may decide to use the cost data of competitors or other comparable reliable data.

26. The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC) ([2]). Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market ([3]).

27. If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.

([1]) Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, paragraph 72: in relation to pricing below average total cost (ATC) the Court of Justice stated: '*Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them*'. See also Judgment of 10 April 2008 in Case T-271/03 *Deutsche Telekom* v *Commission* not yet reported, paragraph 194.

([2]) Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided. Long-run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.

([3]) In order to apply these cost benchmarks it may also be necessary to look at revenues and costs of the dominant company and its competitors in a wider context. It may not be sufficient to only assess whether the price or revenue covers the costs for the product in question, but it may be necessary to look at incremental revenues in case the dominant company's conduct in question negatively affects its revenues in other markets or of other products. Similarly, in the case of two sided markets it may be necessary to look at revenues and costs of both sides at the same time.

D. **Objective necessity and efficiencies**

28. In the enforcement of Article 82, the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified ([1]). A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

29. The question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking. Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product ([2]).

30. The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. In this context, the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled ([3]):

— the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution,

— the conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies,

— the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets,

— the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.

31. It is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm.

IV. **SPECIFIC FORMS OF ABUSE**

A. **Exclusive dealing**

32. A dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing ([4]). This section sets out the circumstances which are most likely to prompt an intervention by the Commission in respect of exclusive dealing arrangements entered into by dominant undertakings.

(a) *Exclusive purchasing*

33. An exclusive purchasing obligation requires a customer on a particular market to purchase exclusively or to a large

([1]) See Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 184; Case 311/84 *Centre Belge d'études de marché — Télémarketing (CBEM)* v *Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 3261, paragraph 27; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 102 to 119; Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, paragraphs 136 and 207; Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraphs 69 and 86.

([2]) See, for instance, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 118-119; Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, paragraphs 83 and 84 and 138.

([3]) See, in the different context of Article 81, the Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

([4]) The notion of exclusive dealing also includes exclusive supply obligations or incentives with the same effect, whereby the dominant undertaking tries to foreclose its competitors by hindering them from purchasing from suppliers. The Commission considers that such input foreclosure is in principle liable to result in anti-competitive foreclosure if the exclusive supply obligation or incentive ties most of the efficient input suppliers and customers competing with the dominant undertaking are unable to find alternative efficient sources of input supply.

extent only from the dominant undertaking. Certain other obligations, such as stocking requirements, which appear to fall short of requiring exclusive purchasing, may in practice lead to the same effect ([1]).

34. In order to convince customers to accept exclusive purchasing, the dominant undertaking may have to compensate them, in whole or in part, for the loss in competition resulting from the exclusivity. Where such compensation is given, it may be in the individual interest of a customer to enter into an exclusive purchasing obligation with the dominant undertaking. But it would be wrong to conclude automatically from this that all exclusive purchasing obligations, taken together, are beneficial for customers overall, including those currently not purchasing from the dominant undertaking, and the final consumers. The Commission will focus its attention on those cases where it is likely that consumers as a whole will not benefit. This will, in particular, be the case if there are many customers and the exclusive purchasing obligations of the dominant undertaking, taken together, have the effect of preventing the entry or expansion of competing undertakings.

35. In addition to the factors mentioned in paragraph 20, the following factors will generally be of particular relevance in determining whether the Commission will intervene in respect of exclusive purchasing arrangements.

36. The capacity for exclusive purchasing obligations to result in anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors who either are not yet present in the market at the time the obligations are concluded, or who are not in a position to compete for the full supply of the customers. Competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier ([2]). If competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation. In general, the longer the duration of the obligation, the greater the likely foreclosure effect. However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti-competitive foreclosure.

([1]) Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653. In this case the obligation to use coolers exclusively for the products of the dominant undertaking was considered to lead to outlet exclusivity.

([2]) Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraphs 104 and 156.

(b) *Conditional rebates*

37. Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates). Conditional rebates are not an uncommon practice. Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates — when granted by a dominant undertaking — can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking ([3]).

38. In addition to the factors already mentioned in paragraph 20, the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates is liable to result in anti-competitive foreclosure and, consequently, will be part of the Commission's enforcement priorities.

39. As with exclusive purchasing obligations, the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer. A conditional rebate granted by a dominant undertaking may enable it to use the 'non contestable' portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the 'contestable' portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes) ([4]).

40. In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates ([5]). The potential foreclosing effect of retroactive rebates is in principle strongest on the last purchased unit of the product before the threshold is exceeded. However, what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system

([3]) In this regard, the assessment of conditional rebates differs from that of predation, which always entails a sacrifice.

([4]) See Case T-203/01 *Michelin* v *Commission (Michelin II)* [2003] ECR II-4071, paragraphs 162 and 163. See also Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraphs 277 and 278.

([5]) Case 322/81 *Nederlandsche Banden Industrie Michelin* v *Commission (Michelin I)* [1983] ECR 3461, paragraphs 70 to 73.

on (actual or potential) competitors of the dominant supplier. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.

41. When applying the methodology explained in paragraphs 23 to 27, the Commission intends to investigate, to the extent that the data are available and reliable, whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers. In this context the Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ('the relevant range') away from the dominant undertaking. The effective price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time. The Commission will take into account the margin of error that may be caused by the uncertainties inherent in this kind of analysis.

42. The relevant range over which to calculate the effective price in a particular case depends on the specific facts of each case and on whether the rebate is incremental or retroactive. For incremental rebates, the relevant range is normally the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a competitor (the 'contestable share' or 'contestable portion'). If it is likely that customers would be willing and able to switch large amounts of demand to a (potential) competitor relatively quickly, the relevant range is likely to be relatively large. If, on the other hand, it is likely that customers would only be willing or able to switch small amounts incrementally, then the relevant range will be relatively small. For existing competitors their capacity to expand sales to customers and the fluctuations in those sales over time may also provide an indication of the relevant range. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible. It may be possible to take the historical growth pattern of new entrants in the same or in similar markets as an indication of a realistic market share of a new entrant ([1]).

43. The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect. However, as long as the effective price remains consistently above the LRAIC of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti-competitive way.

44. Where the effective price is below AAC, as a general rule the rebate scheme is capable of foreclosing even equally efficient competitors. Where the effective price is between AAC and LRAIC, the Commission will investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be affected. In this context, the Commission will investigate whether and to what extent competitors have realistic and effective counterstrategies at their disposal, for instance their capacity to also use a 'non contestable' portion of their buyers' demand as leverage to decrease the price for the relevant range. Where competitors do not have such counterstrategies at their disposal, the Commission will consider that the rebate scheme is capable of foreclosing equally efficient competitors.

45. As indicated in paragraph 27, this analysis will be integrated in the general assessment, taking into account other relevant quantitative or qualitative evidence. It is normally important to consider whether the rebate system is applied with an individualised or a standardised threshold. An individualised threshold — one based on a percentage of the total requirements of the customer or an individualised volume target — allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect ([2]). By contrast, a standardised volume threshold — where the threshold is the same for all or a group of customers — may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardised volume threshold approximates the requirements of an appreciable proportion of customers, the Commission is likely to consider that such a standardised system of rebates may produce anti-competitive foreclosure effects.

(c) *Efficiencies*

46. Provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by dominant undertakings that rebate systems achieve cost or other advantages which are passed on to customers ([3]). Transaction-related cost advantages are often more likely to be

([1]) The relevant range will be estimated on the basis of data which may have varying degrees of precision. The Commission will take this into account in drawing any conclusions regarding the dominant undertaking's ability to foreclose equally efficient competitors. It may also be useful to calculate how big a share of customers' requirements on average the entrant should capture as a minimum so that the effective price is at least as high as the LRAIC of the dominant company. In a number of cases the size of this share, when compared with the actual market shares of competitors and their shares of the customers' requirements, may make it clear whether the rebate scheme is capable to have an anti-competitive foreclosure effect.

([2]) See Case 85/76 *Hoffmann-La Roche & Co.* v *Commission* [1979] ECR 461, paragraphs 89 and 90; Case T-288/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 213; Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraphs 7 to 11 and 270 to 273.

([3]) For instance, for rebates see Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 86.

achieved with standardised volume targets than with individualised volume targets. Similarly, incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes ([1]). Under the same conditions, the Commission will consider evidence demonstrating that exclusive dealing arrangements result in advantages to particular customers if those arrangements are necessary for the dominant undertaking to make certain relationship-specific investments in order to be able to supply those customers.

B. **Tying and bundling**

47. A dominant undertaking may try to foreclose its competitors by tying or bundling. This section sets out the circumstances which are most likely to prompt an intervention by the Commission when assessing tying and bundling by dominant undertakings.

48. 'Tying' usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis ([2]). 'Bundling' usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.

49. Tying and bundling are common practices intended to provide customers with better products or offerings in more cost effective ways. However, an undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market.

50. The Commission will normally take action under Article 82 where an undertaking is dominant in the tying market ([3]) and where, in addition, the following conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anti-competitive foreclosure ([4]).

([1]) See, to that effect, Case T-203/01 *Michelin* v *Commission (Michelin II)* [2003] ECR II-4071, paragraphs 56 to 60, 74 and 75.

([2]) Technical tying occurs when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors). Contractual tying occurs when the customer who purchases the tying product undertakes also to purchase the tied product (and not the alternatives offered by competitors).

([3]) The undertaking should be dominant in the tying market, though not necessarily in the tied market. In bundling cases, the undertaking needs to be dominant in one of the bundled markets. In the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied after-market.

([4]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, in particular paragraphs 842, 859 to 862, 867 and 869.

(a) *Distinct products*

51. Whether the products will be considered by the Commission to be distinct depends on customer demand. Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product ([5]). Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product ([6]) or of each of the products bundled by the dominant undertaking, or evidence indicating that undertakings with little market power, particularly in competitive markets, tend not to tie or not to bundle such products.

(b) *Anti-competitive foreclosure in the tied and/or tying market*

52. Tying or bundling may lead to anti-competitive effects in the tied market, the tying market, or both at the same time. However, even when the aim of the tying or bundling is to protect the dominant undertaking's position in the tying market, this is done indirectly through foreclosing the tied market. In addition to the factors already mentioned in paragraph 20, the Commission considers that the following factors are generally of particular importance for identifying cases of likely or actual anti-competitive foreclosure.

53. The risk of anti-competitive foreclosure is expected to be greater where the dominant undertaking makes its tying or bundling strategy a lasting one, for example through technical tying which is costly to reverse. Technical tying also reduces the opportunities for resale of individual components.

54. In the case of bundling, the undertaking may have a dominant position for more than one of the products in the bundle. The greater the number of such products in the bundle, the stronger the likely anti-competitive foreclosure. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others.

55. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers who will buy the tied product alone to sustain competitors of the dominant undertaking in the tied market, the tying can lead to those customers facing higher prices.

([5]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 917, 921 and 922.

([6]) Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 67.

56. If the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the dominant undertaking may seek to avoid this substitution and as a result be able to raise its prices.

57. If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market.

58. If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.

(c) *Multi-product rebates*

59. A multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

60. In theory, it would be ideal if the effect of the rebate could be assessed by examining whether the incremental revenue covers the incremental costs for each product in the dominant undertaking's bundle. However, in practice assessing the incremental revenue is complex. Therefore, in its enforcement practice the Commission will in most situations use the incremental price as a good proxy. If the incremental price that customers pay for each of the dominant undertaking's products in the bundle remains above the LRAIC of the dominant undertaking from including that product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the incremental price is below the LRAIC, because in such a case even an equally efficient competitor may be prevented from expanding or entering ([1]).

61. If the evidence suggests that competitors of the dominant undertaking are selling identical bundles, or could do so in a timely way without being deterred by possible additional costs, the Commission will generally regard this as a bundle competing against a bundle, in which case the relevant question is not whether the incremental revenue covers the incremental costs for each product in the bundle, but rather whether the price of the bundle as a whole is predatory.

([1]) In principle, the LRAIC cost benchmark is relevant here as long as competitors are not able to also sell bundles (see paragraphs 23 to 27 and paragraph 61).

(d) *Efficiencies*

62. Provided that the conditions set out in Section III D are fulfilled, the Commission will look into claims by dominant undertakings that their tying and bundling practices may lead to savings in production or distribution that would benefit customers. The Commission may also consider whether such practices reduce transaction costs for customers, who would otherwise be forced to buy the components separately, and enable substantial savings on packaging and distribution costs for suppliers. It may also examine whether combining two independent products into a new, single product might enhance the ability to bring such a product to the market to the benefit of consumers. The Commission may also consider whether tying and bundling practices allow the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product.

C. **Predation**

63. In line with its enforcement priorities, the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm ([2]).

(a) *Sacrifice*

64. Conduct will be viewed by the Commission as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided. The Commission will take AAC as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided ([3]). Pricing below AAC will thus in most cases be

([2]) The Commission may also pursue predatory practices by dominant undertakings on secondary markets on which they are not yet dominant. In particular, the Commission will be more likely to find such an abuse in sectors where activities are protected by a legal monopoly. While the dominant undertaking does not need to engage in predatory conduct to protect its dominant position in the market protected by legal monopoly, it may use the profits gained in the monopoly market to cross-subsidize its activities in another market and thereby threaten to eliminate effective competition in that other market.

([3]) In most cases the average variable cost (AVC) and AAC will be the same, as often only variable costs can be avoided. However, in circumstances where AVC and AAC differ, the latter better reflects possible sacrifice: for example, if the dominant undertaking had to expand capacity in order to be able to predate, then the sunk costs of that extra capacity should be taken into account in looking at the dominant undertaking's losses. Those costs would be reflected in the AAC, but not the AVC.

viewed by the Commission as a clear indication of sacrifice ([1]).

65. However, the concept of sacrifice does not only include pricing below AAC ([2]). In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided ([3]). The Commission will not compare the actual conduct with hypothetical or theoretical alternatives that might have been more profitable. Only economically rational and practicable alternatives will be considered which, taking into account the market conditions and business realities facing the dominant undertaking, can realistically be expected to be more profitable.

66. In some cases it will be possible to rely upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy ([4]), such as a detailed plan to sacrifice in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action ([5]).

(b) *Anti-competitive foreclosure*

67. If sufficient reliable data are available, the Commission will apply the equally efficient competitor analysis, described in paragraphs 25 to 27, to determine whether the conduct is capable of harming consumers. Normally only pricing below LRAIC is capable of foreclosing as efficient competitors from the market.

68. In addition to the factors already mentioned in paragraph 20, the Commission will generally investigate whether and how the suspected conduct reduces the likelihood that competitors will compete. For instance, if the dominant undertaking is better informed about cost or other market conditions, or can distort market signals about profitability, it may engage in predatory conduct so as to influence the expectations of potential entrants and thereby deter entry. If the conduct and its likely effects are felt on multiple markets and/or in successive periods of possible entry, the dominant undertaking may be shown to be seeking a reputation for predatory conduct. If the targeted competitor is dependent on external financing, substantial price decreases or other predatory conduct by the dominant undertaking could adversely affect the competitor's performance so that its access to further financing may be seriously undermined.

69. The Commission does not consider that it is necessary to show that competitors have exited the market in order to show that there has been anti-competitive foreclosure. The possibility cannot be excluded that the dominant undertaking may prefer to prevent the competitor from competing vigorously and have it follow the dominant undertaking's pricing, rather than eliminate it from the market altogether. Such disciplining avoids the risk inherent in eliminating competitors, in particular the risk that the assets of the competitor are sold at a low price and stay in the market, creating a new low cost entrant.

70. Generally speaking, consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice.

71. This does not mean that the Commission will only intervene if the dominant undertaking would be likely to be able to increase its prices above the level persisting in the market before the conduct. It is sufficient, for instance, that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred. Identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers ([6]). In this context, the Commission will also consider possibilities of re-entry.

72. It may be easier for the dominant undertaking to engage in predatory conduct if it selectively targets specific customers with low prices, as this will limit the losses incurred by the dominant undertaking.

([1]) In Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, paragraph 71, the Court held, in relation to pricing below average variable cost (AVC), that: '*A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its price by taking advantage of its monopolistic position, since each sale generates a loss …*'.

([2]) If the estimate of cost is based on the direct cost of production (as registered in the undertaking's accounts), it may not adequately capture whether or not there has been a sacrifice.

([3]) However, undertakings should not be penalised for incurring *ex post* losses where the *ex ante* decision to engage in the conduct was taken in good faith, that is to say, if they can provide conclusive evidence that they could reasonably expect that the activity would be profitable.

([4]) See Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, paragraphs 151 and 171, and Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraphs 198 to 215.

([5]) In Case 62/86 *AKZO Chemie* v *Commission* [1991] ECR I-3359, the Court accepted that there was clear evidence of AKZO threatening ECS in two meetings with below cost pricing if it did not withdraw from the organic peroxides market. In addition there was a detailed plan, with figures, describing the measures that AKZO would put into effect if ECS would not withdraw from the market (see paragraphs 76 to 82, 115, and 131 to 140).

([6]) This was confirmed in Case T-83/91 *Tetra Pak International* v *Commission (Tetra Pak II)* [1994] ECR II-755, upheld on appeal in Case C-333/94 P *Tetra Pak International* v *Commission* [1996] ECR I-5951, where the Court of First Instance stated that proof of actual recoupment was not required (paragraph 150 in fine). More in general, as predation may turn out to be more difficult than expected at the start of the conduct, the total costs to the dominant undertaking of predating could outweigh its later profits and thus make actual recoupment impossible while it may still be rational to decide to continue with the predatory strategy that it started some time ago. See also COMP/38.233 *Wanadoo Interactive*, Commission Decision of 16 July 2003, paragraphs 332 to 367.

73. It is less likely that the dominant undertaking engages in predatory conduct if the conduct concerns a low price applied generally for a long period of time.

(c) *Efficiencies*

74. In general it is considered unlikely that predatory conduct will create efficiencies. However, provided that the conditions set out in Section III D are fulfilled, the Commission will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale or efficiencies related to expanding the market.

D. **Refusal to supply and margin squeeze**

75. When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. The Commission therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 82 would lead to the imposition of an obligation to supply on the dominant undertaking ([1]). The existence of such an obligation — even for a fair remuneration — may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.

76. Typically competition problems arise when the dominant undertaking competes on the 'downstream' market with the buyer whom it refuses to supply. The term 'downstream market' is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service. This section deals only with this type of refusal.

77. Other types of possibly unlawful refusal to supply, in which the supply is made conditional upon the purchaser accepting limitations on its conduct, are not dealt with in this section. For instance, halting supplies in order to punish customers for dealing with competitors or refusing to supply customers that do not agree to tying arrangements, will be examined by the Commission in line with the principles set out in the sections on exclusive dealing and tying and bundling. Similarly, refusals to supply aimed at preventing the purchaser from engaging in parallel trade ([2]) or from lowering its resale price are also not dealt with in this section.

78. The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers ([3]), refusal to license intellectual property rights ([4]), including when the licence is necessary to provide interface information ([5]), or refusal to grant access to an essential facility or a network ([6]).

79. The Commission does not regard it as necessary for the refused product to have been already traded: it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified ([7]). Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; 'constructive refusal' is sufficient. Constructive refusal could, for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply.

80. Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market ([8]), does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a so-called 'margin squeeze'). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking ([9]).

81. The Commission will consider these practices as an enforcement priority if all the following circumstances are present:

— the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,

([1]) Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP)* v *Commission (Magill)* [1995] ECR I-743, paragraph 50; Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 35; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 319, 330, 331, 332 and 336.

([2]) See Judgment of 16 September 2008 in Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* v *GlaxoSmithKline*, not yet reported.

([3]) Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223.

([4]) Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)* v *Commission (Magill)* [1995] ECR 743; Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039. Those judgments show that in exceptional circumstances a refusal to license intellectual property rights is abusive.

([5]) See Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601.

([6]) See Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers* v *Stena Sealink — Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland* v *Aer Lingus* — (OJ L 96, 10.4.1992, p. 34).

([7]) Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 44.

([8]) Including a situation in which an integrated undertaking that sells a 'system' of complementary products refuses to sell one of the complementary products on an unbundled basis to a competitor that produces the other complementary product.

([9]) In some cases, however, the LRAIC of a non-integrated competitor downstream might be used as the benchmark, for example when it is not possible to clearly allocate the dominant undertaking's costs to downstream and upstream operations.

— the refusal is likely to lead to the elimination of effective competition on the downstream market, and

— the refusal is likely to lead to consumer harm.

82. In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators' incentives to invest and innovate upstream, whether *ex ante* or *ex post*. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present.

(a) *Objective necessity of the input*

83. In examining whether a refusal to supply deserves its priority attention, the Commission will consider whether the supply of the refused input is objectively necessary for operators to be able to compete effectively on the market. This does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market ([1]). Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long-term — the negative consequences of the refusal ([2]). In this regard, the Commission will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future ([3]). The notion of duplication means the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market ([4]).

84. The criteria set out in paragraph 81 apply both to cases of disruption of previous supply, and to refusals to supply a good or service which the dominant company has not previously supplied to others (*de novo* refusals to supply). However, the termination of an existing supply arrangement is more likely to be found to be abusive than a *de novo* refusal to supply. For example, if the dominant undertaking had previously been supplying the requesting undertaking, and the latter had made relationship-specific investments in order to use the subsequently refused input, the Commission may be more likely to regard the input in question as indispensable. Similarly, the fact that the owner of the essential input in the past has found it in its interest to supply is an indication that supplying the input does not imply any risk that the owner receives inadequate compensation for the original investment. It would therefore be up to the dominant company to demonstrate why circumstances have actually changed in such a way that the continuation of its existing supply relationship would put in danger its adequate compensation.

(b) *Elimination of effective competition*

85. If the requirements set out in paragraphs 83 and 84 are fulfilled, the Commission considers that a dominant undertaking's refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market. The likelihood of effective competition being eliminated is generally greater the higher the market share of the dominant undertaking in the downstream market. The less capacity-constrained the dominant undertaking is relative to competitors in the downstream market, the closer the substitutability between the dominant undertaking's output and that of its competitors in the downstream market, the greater the proportion of competitors in the downstream market that are affected, and the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking.

(c) *Consumer harm*

86. In examining the likely impact of a refusal to supply on consumer welfare, the Commission will examine whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply. If they do, the Commission will normally pursue the case.

87. The Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled ([5]). This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already

([1]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 428 and 560 to 563.

([2]) Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications LTD (ITP)* v *Commission (Magill)* [1995] ECR 743, paragraphs 52 and 53; Case 7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791, paragraphs 44 and 45; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 421.

([3]) In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so-called 'single source' information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate.

([4]) Case 7/97 *Oscar Bronner* v *Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791, paragraph 46, Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 29.

([5]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 643, 647, 648, 649, 652, 653 and 656.

offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development ([1]).

88. The Commission also considers that a refusal to supply may lead to consumer harm where the price in the upstream input market is regulated, the price in the downstream market is not regulated and the dominant undertaking, by excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise do.

(d) *Efficiencies*

89. The Commission will consider claims by the dominant undertaking that a refusal to supply is necessary to allow the dominant undertaking to realise an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future, taking the risk of failed projects into account. The Commission will also consider claims by the dominant undertaking that its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about, including the development of follow-on innovation by competitors.

90. However, when considering such claims, the Commission will ensure that the conditions set out in Section III D are fulfilled. In particular, it falls on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation ([2]). If a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds.

([1]) Case C-418/01 *IMS Health* v *NDC Health* [2004] ECR I-5039, paragraph 49; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 658.

([2]) Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 659.