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The European Commission is presently reviewing the way in which it regulates the unilateral behavior of companies with market power under Article 82 of the EC Treaty and has published a discussion paper in this regard in December 2005 (Discussion Paper). In line with other areas of EC competition law, it is clear that the Commission is eager to adopt an economics-based approach to Article 82, with the focus being on consumer harm rather than the protection of particular competitors.

This paper reviews the position put forward by the Commission in relation to the concept of an exclusionary abuse, the meaning of dominance, and the use of an efficiency defense. In particular, the paper looks at refusal to supply cases involving IP rights and the impact the Article 82 review may have on such cases in the future. In general, the Discussion Paper does not indicate a change of policy with regard to first-time refusals to supply or license. However, the weight attached to existing commercial arrangements could result in behavior that previously would not have been considered as abusive, falling foul of Article 82. Although not considered in the Discussion Paper, in our view, the “no economic sense test” could be useful in determining whether a refusal to continue supplying an existing customer is objectively justified.

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I. Introduction

EC competition law has evolved considerably since the provisions on competition law in the Treaty Establishing the European Community (EC Treaty) came into force in 1957. A key theme of this evolution is the increased role played by economic analysis over the last decade that, in recent years, has resulted in a reform of legislation and enforcement practice known under the name of modernization.

Although the text of Article 81 of the EC Treaty, concerning agreements between companies that may restrict competition, has remained unchanged since 1957, the European Commission's enforcement policy and the implementing regulations have undergone considerable change, with a move away from legalistic form-based rules to a more economic effects-based approach. This shift in enforcement policy is demonstrated by the recent Commission guidelines on the effect of trade concept, the guidelines on the application of Article 81(3), as well as the guidelines in relation to horizontal and vertical agreements.¹ This change of the substantive approach was accompanied by procedural reform consisting of the modernization of the implementation legislation that came into force on May 1, 2004.²

Similarly, the amendments to the EC merger control regime that entered into force on May 1, 2004, and the accompanying horizontal merger guidelines are proof of a more economics-based approach to merger control.³ This reform established the new test for the prohibition of mergers (i.e., the test of significant impediment to effective competition, in which the old prohibition criterion of creating or strengthening a dominant position has been downgraded to the function of a mere example of the application of the new test). The new horizontal merger guidelines introduced the concepts of substantial market power as well as unilateral and coordinated effects, thereby bringing the interpretation and appli-

1 Commission Notice on Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C101/81) (Apr. 27, 2004); Commission Notice on Guidelines on the application of Article 81 (3) of the Treaty, 2004 O.J. (C101/97) (Apr. 27, 2004); Commission Notice on Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001 O.J. (C3/02) (Jan. 6, 2001); Commission Notice on Guidelines on Vertical Restraints, 2000 O.J. (C 291/1) (Oct., 10, 2000).

2 Council Regulation (EC) No. 1/2003 of Dec. 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1/1) (Jan. 4, 2003).

3 Council Regulation (EC) No. 139/2004 of Jan. 20, 2004 on the control of concentrations between undertakings, 2004 O.J. (L 24) (Jan. 29, 2004) and Council Notice on Guidelines on the assessment of horizontal mergers, 2004 O.J. (C 31/5) (Feb. 5, 2004). The Commission is also in the process of amending the rules with regard to the provision of state aid by the EC Member States in order to ensure that aid is permitted or prohibited on the basis of sound economic principles. See European Commission, State Aid Action Plan: Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009, at http://europa.eu.int/comm/competition/state_aid/others/action_plan/saap_en.pdf (last visited Feb. 8, 2006).

cation of the EC merger regime much closer to current economic thinking and the U.S. practice of merger control.

The importance placed by the Commission on economic analysis and the strengthened role it plays in the application of EC competition rules is also evidenced by the appointment of a Chief Competition Economist and the creation of the Chief Economist team that is currently made up of an additional ten specialized economists all of whom hold Ph.D.s in industrial organization.⁴

In contrast to merger control and the rules on anticompetitive agreements and concerted practices, the law relating to the unilateral behavior of companies with market power remains the one area of EC competition law that has not undergone some degree of modernization in order to reflect this shift in emphasis towards the economic effects of the activities of undertakings. Therefore, it was not surprising when, in 2003, the Commission announced that it would undertake a review of the way in which it regulates the unilateral behavior of companies with market power under Article 82 of the EC Treaty.⁵ Since the review of Article 82 was announced, it has become clear that the Commission is eager to adopt an economics-based approach to Article 82 and that a drive for consistency with other areas of competition law is one of the underlying reasons for the review.⁶

The review of Article 82 policy is overdue, given the criticism of cases decided by the Commission and the EC Courts and the considerable amount of uncertainty that exists on the degree of freedom that a company with market power may have and the type of behavior it can lawfully engage in. For example, the conclusion of the Commission and the EC Courts in *Michelin II*⁷ and *Virgin/British Airways*⁸ that the rebates in question were per se abusive on the basis of their form, and the authorities' failure to undertake an analysis of the actual effects of the behavior in question, does not sit well with the current

4 Speech by Lars-Hendrik Röller, *Using economic analysis to strengthen competition policy enforcement*, Modelling European Mergers: Theory, Competition Policy and Case Studies, European Commission, Sep. 1, 2005, available at http://europa.eu.int/comm/competition/speeches/index_2005.html.

5 Speech by Mario Monti (at the time, EC Competition Commissioner), *EU competition policy after May 2004*, Fordham Annual Conference on International Antitrust Law and Policy, New York, Oct. 24, 2003, available at http://europa.eu.int/comm/competition/speeches/index_2003.html.

6 Speech by Philip Lowe, *Enforcement Authorities Roundtable*, Fordham Annual Conference on International Antitrust Law and Policy, New York, Sep. 22, 2005.

7 Case T-203/01, *Manufacture Française des Pneumatiques Michelin v. Commission of the European Communities*, 2003 E.C.R. II-4071 (CFI) [hereinafter *Michelin II*].

8 Case T-219/99, *British Airways v. Commission*, 2003 E.C.R. II-5917 (CFI) [hereinafter *Virgin/British Airways*].

emphasis on economic effects in the application of Article 81 and EC merger control rules. There is also a difficulty in determining whether certain types of behavior, that have not been specifically considered in previous cases, will be considered abusive or not.

As part of the review of Article 82 policy, the Commission published a discussion paper on the application of Article 82 to exclusionary abuses on Dec. 19, 2005 (Discussion Paper).⁹ The Commission has indicated that a review of exploitative and discriminatory abuses will be undertaken in 2006 and so these abuses are not dealt with in the Discussion Paper. The publication of the Discussion Paper follows considerable consultation both within the Commission and with EU national competition authorities as well as other interested bodies and non-EU antitrust enforcers in relation to exclusionary abuses.¹⁰

The formal publication of the Discussion Paper marks the opening of an even wider consultation process with the Commission inviting comments on the Discussion Paper by Mar. 31, 2006. Current indications from the Commission are that this consultation process could lead to changes to Commission policy on Article 82 in relation to exclusionary practices that are not considered in the Discussion Paper.

There has been much debate as to whether the Commission's review should result in guidelines on the law concerning abuse of dominance or whether it would be preferable that the Commission adopts a more economic approach to its enforcement of Article 82 on a case-by-case basis. In particular, some voices within the Commission's Directorate-General for Competition (DG COMP) and among national competition authorities have pointed out the harm that may be caused by guidelines if the Commission is not able to articulate its policy in a transparent and meaningful manner. The same voices have also noted that harm may also be caused if the guidelines become too detailed and prescriptive, thus forcing the application of Article 82 into a straitjacket—

THERE HAS BEEN MUCH DEBATE AS TO WHETHER THE COMMISSION'S REVIEW SHOULD RESULT IN GUIDELINES ON THE LAW CONCERNING ABUSE OF DOMINANCE OR WHETHER IT WOULD BE PREFERABLE THAT THE COMMISSION ADOPTS A MORE ECONOMIC APPROACH TO ITS ENFORCEMENT OF ARTICLE 82 ON A CASE-BY-CASE BASIS.

9 EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005), available at <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf> [hereinafter Discussion Paper].

10 See Competition Law Forum Article 82 Review Group, *The reform of Article 82: Recommendations on Key Policy Objectives*, 1 EUR. COMPETITION REV. 179 (2005) and *An Economic Approach to Article 82*, Report by the Economic Advisory Group for competition policy commissioned by the Chief Economist of the Competition Directorate of the European Commission (originally published Jul. 2005), reprinted in this issue as J. Gual et al., *An Economic Approach to Article 82*, 2(1) COMPETITION POL'Y INT'L 111-154 (2006) [hereinafter EAGCP Report].

preventing a flexible adjustment of enforcement policy to changing business practices. On the other hand, guidelines on the Commission's policy in relation to Article 82 will not only be of importance to companies in assessing how the Commission will assess certain behavior, but will also provide guidance to national competition authorities and national courts in the 25 EU Member States, who must also apply Article 82, in a consistent manner, to behavior that significantly effects cross border trade within the European Union.¹¹

Although the final outcome of the Article 82 review, whether or not it takes the form of guidelines, cannot change EC law as set out in Article 82 or the previous case law of the European Court of Justice (ECJ) or the European Court of First Instance (CFI), it will provide valuable guidance on the way in which the Commission will apply Article 82 in the future and, in particular, its enforcement priorities. However, until it is clear that national competition authorities and national courts will follow the position put forward by the Commission following its review, or until the EC Courts have confirmed that the Commission's approach is correct, there is a risk that although the Commission may be unlikely to take enforcement action under Article 82 against particular behavior it considers acceptable, the behavior could still be found to be in breach of Article 82 by a national court or national competition authority.

Accordingly, until there is further clarity, the publication of the Commission's Discussion Paper does not provide companies with possible market dominance or national courts or national competition authorities with sufficient guidance on the application of Article 82.¹² In fact the publication of the Discussion Paper now places companies with market power, and their advisors, in an even greater quandary as to whether or not to follow the strict approach confirmed by the case law or to examine, based on a more economic analysis, whether the general principles, presumptions, and possible defenses set out in the Discussion Paper indicate that the behavior is acceptable under Article 82.¹³

While there are many aspects of the Article 82 review that give rise to debate, including market definition, the assessment of single or collective dominance, and abusive intent, this paper will focus on the policy objectives behind Article 82, the definition of an exclusionary abuse of a dominant position, and the application of an efficiency defense. The second part of this paper takes a closer look at decisions of the Commission and the EC Courts in relation to a refusal to license an IP right in order to assess if the eventual outcome of the Article 82

11 Article 3(2) of Regulation 1/2003 provides that EC Member States may apply national laws to unilateral conduct which is stricter than Article 82, however, to the extent that there is an effect on cross-border trade, national laws may not permit behavior which is prohibited by Article 82 (see *supra* note 2).

12 This is recognized by the Commission (see Discussion Paper, *supra* note 9, at para. 7).

13 In particular, the possibility that not all loyalty rebates offered by a dominant company will be considered abusive, indicates a shift away from the *per se* approach confirmed in *Michelin II*, *supra* note 7.

review may impact the way such cases are dealt with in the European Community in the future. As evidenced by the divergent views held in relation to the *Microsoft* decision, the distinction between exclusionary abusive behavior and non-abusive behavior is particularly controversial in relation to IP rights where the exclusion of others through the lawful exercise of an IP right can in certain circumstances be deemed unlawful under antitrust law.

II. Article 82 Policy Review

A. POLICY OBJECTIVES

The Commission has repeatedly stated that the objective of Article 82 is “the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.”¹⁴ In principle, this is the same objective that applies to other areas of competition law such as the law on anticompetitive agreements, mergers, and state aid, and should give a welcome coherence to EC competition policy.¹⁵ However, this approach still seems influenced by the traditional application of Article 82 that had the aim to protect the competitive process by preserving a competitive market structure, rather than by focusing directly on consumer harm. The Commission states in the Discussion Paper that “the Commission will adopt an approach which is based on the likely effects on the market.”¹⁶ It also explains that:

“the concern is to prevent exclusionary conduct of the dominant firm which is likely to limit the remaining competitive constraints on the dominant company, including entry of newcomers, so as to avoid that consumers are harmed. This means that it is competition, and not competitors as such that is to be protected.”¹⁷

14 With regard to exclusionary abuses, see Discussion Paper, *supra* note 9, at paras. 4 and 54; Philip Lowe, *supra* note 6; Speech by Neelie Kroes, *European Competition Policy – Delivering Better Markets and Better Choices*, European Consumer and Competition Day, London, Sep. 15, 2005; and Speech by Neelie Kroes, *Preliminary Thoughts on Policy Review of Article 82*, Fordham Corporate Law Institute, New York, Sep. 23, 2005, available at http://europa.eu.int/comm/competition/speeches/index_2005.html.

15 Philip Lowe, *supra* note 6.

16 Discussion Paper, *supra* note 9, at para. 4.

17 *Id.* at para. 54.

The above formulation of the objective and the effects-based application of Article 82, in practice, should mean that authorities only intervene under EC competition law to protect competition where a failure to do so would result in consumer harm. However, the ultimate outcome of the Article 82 review needs to further clarify the extent to which the focus will be on harm to consumers, rather than harm to the competitive process in the absence of consumer harm. The extent to which the Commission intends to focus on consumer harm, or to presume consumer harm where there are no actual or likely anticompetitive effects on the market, is not made clear in the Discussion Paper. In this regard, the Discussion Paper provides that “harm to intermediate buyers is generally presumed to create harm to final consumers.”¹⁸ EC Competition Commissioner Kroes, on the other hand, when announcing the preliminary results of the Article 82 review in a 2005 speech at Fordham Corporate Law Institute, stated that “ultimately the aim is to avoid consumer harm.”¹⁹ Commissioner Kroes went on to stress further the position of consumers by adding “I like aggressive competition – including by dominant companies – and I don’t care if it may hurt competitors – as long as it ultimately benefits consumers.” Commissioner Kroes, however, has indicated that it will be sufficient if there is “likely” to be harm to consumers in the medium or long term indicating that EC officials still intend to take a longer-term approach to consumer harm than their U.S. counterparts. Similarly, the Commission in the Discussion Paper refers to harm to consumers in a “direct or indirect way” and that “not only short term harm, but also medium and long term harm arising from foreclosure is taken into account.”²⁰

It is possible that the emphasis on the prevention of consumer harm that is “likely” to occur in the future may indicate that with regard to unilateral behavior of a company with market power, the Commission continues to focus on avoiding decisions which wrongly permit anticompetitive behavior (known as type I errors or false negatives).²¹ On the other hand, current economic thinking seems to suggest that, with respect to the regulation of the behavior of companies with substantial market power, the emphasis should be on the need to avoid decisions which wrongly condemn pro-competitive behavior (known as type II errors or false positives). However, the distinction between avoidance of type I or type II errors may ultimately be superfluous if, as pointed out in a report prepared by the Economic Advisory Group for Competition Policy (EAGCP Report), an economics effects-based approach, correctly applied, reduces the

18 *Id.* at para. 55.

19 Neelie Kroes (Sep. 23, 2005), *supra* note 14.

20 Discussion Paper, *supra* note 9, at para. 55.

21 Although it is recognized that it is not an offence to hold a dominant position, the tone of the Discussion Paper still indicates a certain mistrust of dominant companies.

likelihood of both condemning pro-competitive behavior and permitting anti-competitive behavior.²²

Traditionally, EC competition law has also been driven by other goals such as the achievement of the internal market within the European Community, the protection of small and medium sized enterprises, fairness, and successful market liberalization through the privatization of state run industries.²³ The Discussion Paper leaves the door open for these objectives to continue to play a role in EC competition law by explaining that, to give an example, the achievement of market integration will enhance consumer welfare “since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.”²⁴ The extent to which these objectives should play a role in Article 82 policy should be looked at closely and, if they are to continue to play a role, the manner in which they will influence enforcement policy, should be set out clearly and transparently, without risk of being perceived as a hidden agenda.²⁵

B. DOMINANCE

The classic definition of dominance in the case law of the EC courts²⁶ is that an undertaking enjoys a position of economic strength “which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.” In the Discussion Paper, the Commission uses this definition, and interprets the notion of independence contained in the definition to mean that the dominant undertaking must have substantial market power.²⁷ Similar to its approach in the horizontal merger guidelines, the Commission defines substantial market power as the power to influence prices,

22 See *supra* note 10.

23 Former EC Competition Commissioner, Mario Monti has stated that:

The liberalisation process that the Community has launched in recent years can only be successfully achieved if former monopolists, who usually retain powerful market positions, are prevented from engaging in exclusionary practices that delay or prevent effective competition in these markets

(Mario Monti, *supra* note 5).

24 Discussion Paper, *supra* note 9, at para. 4.

25 See Brian Sher, *The Last of the Steam-Powered Trains: Modernising Article 82*, 25(5) EUR. COMPETITION L. REV. 263-285 (2004).

26 Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207; Case 85/76, *Hoffmann-La Roche v. Commission*, 1979 E.C.R. 461 [hereinafter *Hoffman-La Roche*]; Case 322/81, *Michelin v. Commission*, 1983 E.C.R. 3461, at para. 30.

27 Discussion Paper, *supra* note 9, at para. 23.

output, innovation, the variety or quality of goods and services, or other parameters of competition in the market for a significant period of time.²⁸

Despite the acknowledgment in the Discussion Paper that in most cases the dominance analysis needs to be extended beyond market shares, encompassing an analysis of competitors, barriers to entry and expansion, and the market power of buyers, there is a concern that the Discussion Paper continues to rely heavily on a presumption of dominance based on market shares.²⁹ The Discussion Paper provides that “it is very likely that very high market shares, which have been held for some time, indicate a dominant position.”³⁰ This would be the case where a firm holds 50 percent or more of a market, but could also apply in the range of 40 percent to 50 percent. The Commission also indicates that undertakings with a market share below 40 percent³¹ also may be considered dominant, although dominance is not likely below 25 percent.

The Discussion Paper does not appear to take into account Commissioner Kroes’ remark at Fordham that high market shares are not on their own sufficient to conclude that a dominant position exists, and that a pure market focus risks failing to take proper account of the degree to which competitors can constrain the behavior of the allegedly dominant firm. Indeed economically, the most important factors for the determination of dominance or substantial market power are the existence or absence of barriers to expansion or entry. Even a firm with market shares well above the 50 percent level may not be able to charge supra-competitive prices if it is in constant fear of market entry or capacity expansion by its rivals. That being said, market share thresholds can play a useful role when they are used to define safe havens for firms that would allow them to determine, without a full economic analysis, that they are not subject to the special rules of Article 82.

C. CONCEPT OF EXCLUSIONARY ABUSE

Article 82 prohibits exclusionary, exploitative, and discriminatory abuses of a dominant position. As explained by Commissioner Kroes, the Commission has given priority to the review of exclusionary abuses on the basis that exclusion is often at the basis of later exploitation of customers.³² Exploitative and discrimi-

28 *Id.* at para. 24.

29 *Id.* at para. 31.

30 *Id.*

31 See *id.* at para. 31 (citing Case C-250/92, *Göttrup-Klim v. DLG*, 1994 E.C.R. I-5641, at para. 48, where the undertaking concerned held shares of 36 percent and 32 percent, and the ECJ stated that an undertaking holding market shares of that size may, depending on the strength and number of its competitors, be considered to be in a dominant position).

32 Neelie Kroes (Sep. 23, 2005), *supra* note 14.

natory abuses shall be looked at in the second round of the Article 82 policy review.³³ Another reason for the focus on exclusionary abuses could be the fact that the great majority of past decisions by the Commission and the EC Courts have concerned exclusionary as opposed to exploitative or purely discriminatory practices.

With regard to defining what is an exclusionary abuse, the Commission in the Discussion Paper continues to use the definition provided by the EC Court in *Hoffmann-La Roche*, namely:

“abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market . . . and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”³⁴

This has been interpreted by the Commission to mean:

- (1) the conduct must be capable of foreclosing rivals; and
- (2) in the specific market context, gives rise to a likely market distorting foreclosure effect.³⁵

The Discussion Paper goes on to explain that by market foreclosure it means that actual or potential competitors of the allegedly dominant firm are completely or partially denied profitable access to a market. In a move away from a form-based approach, the Commission states in the Discussion Paper that to establish foreclosure it, in general, would be necessary not only to consider the nature of the form of the conduct, but also its incidence, the degree of dominance, and other market characteristics including the existence of network effects and economies of scale.³⁶ Commissioner Kroes in her speech at Fordham also indicated that foreclosure of one or two competitors would not give rise to a foreclosure effect where sufficient residual competition remained.

33 *Id.*

34 *Hoffman-La Roche*, *supra* note 26.

35 Neelie Kroes (Sep. 23, 2005), *supra* note 14 and Discussion Paper, *supra* note 9, at para. 58 et seq.

36 Discussion Paper, *supra* note 9, at para. 59

The Commission has included a general presumption in the Discussion Paper that provides that where “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.”³⁷ However, one wonders whether this presumption adds any greater clarity than there is today about the type of behavior that is prohibited by Article 82—in particular given the uncertainty and lack of clarity concerning the meaning of the phrase “competition on the merits.”

With regard to pricing behavior, the Commission indicates in the Discussion Paper that the use of an “as efficient competitor test” may be helpful in establishing whether competition is “on the merits.”³⁸ There is a presumption that if a hypothetical competitor who is as efficient as the dominant company could compete against the price schedule or rebate system of the dominant company, the Commission normally will conclude that the pricing behavior constitutes competition on the merits and is not abusive. The “as efficient” competitor test, therefore, creates a kind of “safe harbor” for dominant companies in assessing the level of rebates that they are permitted to offer. On the other hand, if a hypothetical “as efficient” competitor could not compete as a result of the rebates offered by the dominant company, a closer examination of the impact of the behavior will be undertaken.

The Discussion Paper provides guidance on how, where cost information is available, the “as efficient” test is to be applied.³⁹ However, the difficulty in obtaining the necessary economic evidence on costs in some industries is recognized in the Discussion Paper as well as the fact that in some industries, economies of scale or a “first mover advantage” (particularly in newly liberalized industries) need to be taken into account and competitors cannot be expected to be “as efficient” as the incumbent operator, at least in the short run. Given the exceptions to the “as efficient” test and the need to apply the test in its specific market context, its value as a rule of thumb in determining that certain pricing behavior is acceptable may be limited. Other commentators, while recognizing the value of the “as efficient competitor test” have also highlighted the ambiguous consumer welfare effects of the test, where it can sometimes be in consumers’ interests to ensure there is vigorous competition between two firms, even if one of them is less efficient, than to allow the emergence of one monopolist.⁴⁰

37 *Id.* at para. 60.

38 *Id.* at para. 63.

39 *Id.* at paras. 64-68.

40 Speech by J. Vickers, *Abuse of Market Power*, European Association for Research in Industrial Economics, Berlin, Sep. 3, 2004, available at <http://www.offt.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf> and A. Fletcher, *The reform of Article 82: recommendations on key policy objectives*, Competition Law Forum, Mar. 15, 2005, available at <http://www.offt.gov.uk/NR/rdonlyres/41543043-1363-4CD5-B21E-87A9A3DFD160/0/spe0305.pdf>.

It is not yet clear if other tests that have been discussed in the literature will play a role in the enforcement of Article 82.⁴¹ For example, the “profit sacrifice” test (also referred to as the “no economic sense” or “but-for” test) looks at whether the behavior of the dominant company would be profitable or make economic sense in the absence of its tendency to eliminate or lessen competition. The value of the profit sacrifice test with regard to the identification of abusive behavior has been discounted by some commentators as it has been noted that not all exclusionary conduct involves a sacrifice of profit and the test does not help in determining which behavior would not make economic sense in the absence of the foreclosure effect.⁴² The EAGCP Report indicates, however, that with regard to certain abuses in the same market, the profit sacrifice test may be useful. In particular, this test may be useful in determining the intent of the company, although it should be noted that abusive intent is not a requirement under EC law. That being said, intent can be taken into account to strengthen an abuse finding,⁴³ and perhaps as put forward by Amelia Fletcher (2005), lack of intent could, in the absence of evidence of market foreclosure, indicate that the behavior is not abusive.⁴⁴ The possibility of using the profit sacrifice test (or more aptly named “no economic sense” test) to determine if a refusal to supply is objectively justified is raised in the second part of this paper.

Another candidate for a standard test is the “consumer harm test” or “consumer welfare test.” While this test would be in line with the objectives of EC competition policy it does not assist in identifying the behavior that may lead to consumer harm and leads to further questions as to the standard of proof and whether such harm needs to be actual or potential, or likely or possible.⁴⁵

It has also been suggested that behavior only should be found to be an exclusionary abuse where the conditions set out in Article 82(b) have been satisfied, namely that the behavior of the dominant company “[limits] production, markets or technical development to the prejudice of consumers.”⁴⁶ The limitation in production can refer to either its own production or that of third parties. The

41 See *id.* and J. Temple Lang & R. O’Donoghue, *The Concept of an Exclusionary Abuse under Article 82 EC*, GCLC RESEARCH PAPERS ON ARTICLE 82 EC (Jul. 2005).

42 Vickers, *supra* note 40.

43 In the past, the Commission and the EC Courts have looked at intent to support a finding of abuse (see Case C-62/86, *Akzo v. Commission*, 1991 E.C.R. I-3359).

44 Fletcher, *supra* note 40.

45 Vickers, *supra* note 40.

46 This test was first proposed by John Temple Lang. See John Temple Lang, *Anticompetitive Non-Pricing Abuses Under European and National Antitrust Law*, in *INTERNATIONAL ANTITRUST LAW & POLICY* (B. Hawk ed., Fordham Corporate Law Institute, 2003), at 235. The test is developed further in Temple Lang & O’Donoghue, *supra* note 41.

requirement that the behavior be detrimental to consumers would appear to be in line with the emphasis in Commissioner Kroes' speech at Fordham on the need for consumer harm. However, the proposition that a dominant company only should be prohibited from creating an obstacle or handicap that would not otherwise exist needs to be debated further.

It would be most welcome if a standard test could be developed in order to indicate with certainty whether behavior was exclusionary and accordingly prohibited under Article 82 while at the same time

THERE DOES NOT APPEAR TO BE ANY CLEAR CONSENSUS YET ON THE USE OF A STANDARD TEST TO DETERMINE WHAT BEHAVIOR IS EXCLUSIONARY. ALTHOUGH ONE STANDARD TEST WOULD BE WELCOMED, IN PRACTICE, IT MAY BE NECESSARY TO LOOK AT DIFFERENT TESTS FOR DIFFERENT TYPES OF EXCLUSIONARY CONDUCT.

taking into account the economic effects of the behavior in question. However, such a "one size fits all test" is likely to give rise to either too many type I or type II errors and so an appropriate balance must be sought between a practical transparent test that may give rise to errors and one that, although economically sound in principle, leads to uncertainty and a danger of an ad hoc approach to each case by competition authorities and national courts. There does not appear to be any clear consensus yet on the use of a standard test to determine what behavior is exclusionary. Although one standard test would

be welcomed, in practice, it may be necessary to look at different tests for different types of exclusionary conduct.

The application of any test will also need to take into account the appropriate standard of proof. For a number of years there has been much speculation in the European Community about the applicable standard of proof in Article 82 cases. Recent case law of the EC Courts⁴⁷ has indicated a rather low standard of proof referring to behavior as abusive where it was "capable of" having exclusionary effects or that "tends to" have exclusionary effects and has been much criticized. Commissioner Kroes on the other hand has referred to the need to show "actual or likely" restrictive effects. Similarly, the Discussion Paper refers to "actual or likely anticompetitive effects" and the fact that the Commission approach will be based on the "likely effects on the market."⁴⁸

Although it is not dealt with in the Discussion Paper or in Commissioner Kroes' speech, it is arguable that the economic evidence that the Commission will need to rely on in Article 82 cases will need to meet the standard of proof set out by the Court in relation to decisions made under the EC merger control rules. The Court recently clarified that where the Commission wishes to prohibit a merger under the EC merger control rules, the Commission's evidence must

47 *Michelin II*, *supra* note 7 and *Virgin/British Airways*, *supra* note 8.

48 Discussion Paper, *supra* note 9, at paras. 4 and 55.

be “factually accurate, reliable and consistent,” contain all the information necessary to assess a complex situation, and be capable of substantiating the Commission’s conclusions.⁴⁹ The Court added:

“42. A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.

43. Thus, the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.”

Where the Commission seeks to apply Article 82 to conduct that may have more or less likely harmful effects in the future, it will have to satisfy the standards established by the Court in *Tetra Laval*. There is no reason to assume that the standard for proving likely future effects in abuse of dominance cases should be any lower than in merger cases.

D. EFFICIENCY DEFENSE

The possibility of weighing the anticompetitive and the pro-competitive effects against each other in an Article 82 analysis has been the subject of much discussion and debate in the past. Previously, Commission officials and other commentators have noted that the text of Article 82 makes no provision for allowing abusive behavior—even if it is in the long-term interest of consumers.⁵⁰ However, Commissioner Kroes states, “we must find a way to include efficiencies in our analysis.”⁵¹ In the past, it has been open to dominant companies to explain that their behavior was “objectively justified” and accordingly not abusive. While it may be possible to bring an efficiency defense within this objective jus-

49 Case C-12/03P, *Commission v. Tetra Laval* (Feb. 15, 2005, not yet reported) [hereinafter *Tetra Laval*].

50 Speech by Philip Lowe, Fordham Annual Conference on International Antitrust Law and Policy, New York, Oct. 23, 2003, available at http://europa.eu.int/comm/competition/speeches/index_2003.html.

51 Neelie Kroes (Sep. 23, 2005), *supra* note 14.

tification test, some commentators have noted that this may be inadequate as the objective justification defense does not, on its face, allow a weighing up of the benefits and the anticompetitive effects.⁵² Similarly, the Discussion Paper distinguishes between an efficiency defense and the two objective justification defenses (i.e. the so-called “objective necessity defense” and the so-called “meeting the competition defense”).⁵³

The “efficiency defense,” outlined in the Discussion Paper, does not differ from the framework set out in relation to Article 81 on restrictive agreements and would require a dominant company whose behavior is being examined to demonstrate that conditions similar to those attached to Article 81(3) are satisfied. In summary, the particular behavior that is potentially abusive must meet the following conditions:

- (1) the conduct must give rise to specific efficiencies;
- (2) the conduct must be indispensable to the attainment of those efficiencies;
- (3) the benefits must outweigh the negative effects;
- (4) the benefits must be passed on to consumers (or at the very least consumers must not be worse off); and
- (5) all competition must not be eliminated.

The requirement that all competition must not be eliminated in order to satisfy an efficiency defense has led Commissioner Kroes to indicate that there might be a level of super dominance at which the efficiency defense will never be successful. The Discussion Paper confirms that it is “highly unlikely that abusive conduct of a dominant company with a market position approaching that of a monopoly, or with a similar level of market power could be justified on the ground of efficiency gains.”⁵⁴ It goes on to say that a company is considered to have a market position approaching that of a monopoly if its market share exceeds 75 percent and if there is almost no competition left from actual competitors in the market. Commissioner Kroes also notes that there are some types of abusive behavior for which there are no efficiencies at all, such as misuse of the patent system and the provision of misleading information to patent authorities as described in the recent Commission decision against AstraZeneca.⁵⁵

52 Fletcher, *supra* note 40. However, Fletcher also notes that the discussion of objective justification was wider in the *Microsoft* decision which is discussed further in Section III of this paper.

53 Discussion Paper, *supra* note 9, at para. 78 et seq.

54 *Id.* at para. 91.

55 Press Release, European Commission, IP/05/737 Competition: Commission fines AstraZeneca £60 million for misusing patent system to delay market entry of competing generic drugs (Jun. 15, 2005) and Neelie Kroes (Sep. 23, 2005), *supra* note 14.

It appears that the Commission envisages looking only at efficiencies raised by the company under investigation as a defense once an abuse has been established. Among other things, this has an effect on the burden of proof which is shifted from the Commission to the allegedly dominant company. However, it would seem to be more economically sound to take efficiencies into account when determining whether behavior is abusive. In our view, the efficiency analysis is most appropriately carried out as part of the determination of consumer harm. If certain conduct leads to significant efficiencies, it is unlikely that the Commission would find consumer harm and, therefore, this behavior should not be deemed abusive despite its potential foreclosure effects. Carrying out the efficiency analysis as part of the abuse analysis also would be more legally sound given that the possibility of taking efficiencies into account is absent from the text of Article 82.⁵⁶ An efficiency analysis, as opposed to an efficiency defense, may cause the Commission to take efficiencies into account at an early stage of its analysis rather than waiting until all the other elements of abuse have been established.

III. Compulsory Licensing of IP Rights

A. OVERVIEW

The interface between the exclusivity granted by IP rights and the obligation under competition law of the holder of an IP right to license it to third parties has been the subject of much debate following the Magill and IMS Health judgments of the ECJ and most recently the Microsoft decision of the Commission.⁵⁷ Because of the many remaining questions in this area, the business community and practitioners of competition law would welcome a clarification of the rules in the framework of the Article 82 review. In order to consider if the Article 82 review may bring about such a clarification of the rules with regard to the compulsory licensing of IP rights in the European Community, it is necessary to first look at the circumstances in which the Commission or EC Courts have considered compulsory licensing.

Traditionally, competition regulators have been reluctant to order the compulsory licensing of IP rights as the IP rights owner's freedom to refuse to grant a

⁵⁶ With regard to objective justifications, in *GlaxoSmithKline*, Advocate General Jacobs, while noting that Article 82 does not contain any explicit provision for the exemption of conduct otherwise falling within it, stated that in his view it was more accurate to say that certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all as a result of its objective justification. This would appear to apply equally to efficiencies (Case C-53/03, *Syfait v. GlaxoSmithKline*, 2005 E.C.R. I-4609 [hereinafter *GlaxoSmithKline*], at para. 72).

⁵⁷ Joined Cases C-241/91P and C-242/91P, *RTE and ITP v. Commission*, 1995 E.C.R. I-743 [hereinafter *Magill*]; Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, 2004 E.C.R. I-05039 [hereinafter *IMS Health*]; Commission Decision, Case COMP/IC-3/37.792, *Microsoft* (Mar. 24, 2004, not yet reported) [hereinafter *Microsoft*].

license is at the very heart of an IP right. Competition regulators seek to strike a balance between ensuring that antitrust policy does not stifle or chill innovation by reducing the value of an IP right through compulsory licensing, and ensuring that a holder of IP rights does not, through anticompetitive behavior, prevent competition in the marketplace (which will also stifle innovation in the long run). As indicated in the Discussion Paper, enforcement policy towards refusals to supply has to take into account both the effect of having more short-run competition and the possible long-run effects on investment incentives.⁵⁸ In light of the overall prominence given to consumer welfare, the Discussion Paper also makes it clear that for a refusal to supply to be abusive, it has to have a likely anticompetitive effect on the market which is detrimental to consumer welfare.⁵⁹

Generally, the refusal to license an IP right is regarded as a subset of the so-called “refusal to supply” or “obligation to deal” category of cases.⁶⁰ The obligation to deal has arisen on the basis of Article 82(b) of the EC Treaty that states that it is an abuse for a dominant company to “[limit] production, markets or technical development to the prejudice of consumers.” In relation to IP rights, the ECJ in *Volvo v. Veng*⁶¹ held that a refusal to supply a license allowing third parties to manufacture spare parts was not an abuse, in the absence of other abusive or exclusionary conduct, such as an arbitrary refusal to supply spare parts to independent repairers or the fixing of prices at an unfair level.⁶² However, in *Magill* and *IMS Health*, the Court found that a refusal to license can be prohibited, even in the absence of other exclusionary conduct, in certain “exceptional circumstances.”⁶³ Although it has been questioned whether the low quality of the IP rights—which are the subject matter of these decisions—had an impact on their outcome, they do set the framework within which cases involving a refusal to license an IP right must be examined. The impact that the nature of the IP rights can have on cases is also looked in more detail later in this paper.

The Commission decision requiring *Microsoft* to inter alia provide interoperability information necessary for competitors to be able to compete effectively in the workgroup server operating system market has been very controversial on

58 Discussion Paper, *supra* note 9, at para. 213.

59 *Id.* at para. 210.

60 *Id.* at para. 209.

61 Case 238/87, *AB Volvo v. Erik Veng (U.K.) Ltd.*, 1988 E.C.R. 6211 [hereinafter *Volvo v. Veng*].

62 The approach taken in Europe in *Volvo v. Veng* is perhaps closest to the position in U.S. law. It appears that it was the absence of a separate abuse by Verizon under the Sherman Act which led the Court in *Trinko* to conclude that the refusal to deal did not violate antitrust laws. *Verizon Communications Inc., Petitioner v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

63 See *supra* note 57.

both sides of the Atlantic and is currently under appeal in the EC Courts.⁶⁴ It is not clear yet which category of case this part of the *Microsoft* decision falls into. It may concern a simple refusal to supply information, a refusal to license IP rights, or exclusionary conduct that seeks to leverage dominance in one market into another market where the remedy is a compulsory license. This paper looks at the *Microsoft* decision as if it has been accepted that it concerns a refusal to license an IP right. Despite the controversy surrounding the *Microsoft* decision, there appears to be considerable overlap between the Commission's interoperability remedy and the U.S. consent decree.⁶⁵

B. EXCEPTIONAL CIRCUMSTANCES WARRANTING A COMPULSORY LICENSE

The ECJ has found that in "exceptional circumstances" it can be an abuse of dominance for a dominant company to refuse to deal because of the resulting limitation on production, markets, or technical development. The Court in *Magill* held that there were "exceptional circumstances" justifying a compulsory license where certain conditions were satisfied. These conditions were confirmed by the Court in *IMS Health* where it clarified that a refusal to give access to a product or service protected by an IP right can give rise to an abuse where the following cumulative conditions are satisfied:

- (1) access to the IP right is indispensable to carrying out that business;
- (2) the refusal to license the IP right is preventing the emergence of a new product for which there is a potential consumer demand;
- (3) the refusal cannot be objectively justified; and
- (4) the refusal would eliminate all competition in a secondary market.

On the other hand, the Commission decision in *Microsoft*, which was made just one month before the *IMS Health* judgment, found that the conditions in *Magill* were not exhaustive and that other conditions, such as the disruption of previous levels of supply, also could be relevant. Although the *Microsoft* decision leaves open the extent to which Microsoft's interface information contains information covered by IP rights, Commission commentators have said that the *Microsoft* decision, in any event, meets the *Magill/IMS Health* requirement of exceptional circumstances.⁶⁶

⁶⁴ *Microsoft*, *supra* note 57 and Pending Case T-201/04, *Microsoft v. Commission*.

⁶⁵ See Press Release, U.S. Department of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in its Microsoft Investigation (Mar. 24, 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm.

⁶⁶ Speech by Jürgen Mensching, *The Microsoft Decision – Promoting Innovation*, 4th Annual Competition Law Review Conference, Oct. 22, 2004, available at http://europa.eu.int/comm/competition/speeches/index_2004.html.

The Discussion Paper divides refusal to deal cases into four categories, namely, refusal to continue an existing supply relationship; refusal to start supplying; refusal to license an IP right; and refusal to supply information for interoperability. Although the section in the Discussion Paper on refusal to license an IP right formulates the *IMS Health* conditions slightly differently, the scope is effectively the same.⁶⁷ However, it is not clear on the face of the Discussion Paper whether a refusal to continue an IP license would be considered as a refusal to continue an existing supply relationship or as a refusal to license an IP right.

The Commission makes it clear in the Discussion Paper that it considers it much easier to show that a termination of an existing relationship is abusive as opposed to a refusal to license an IP right. The Discussion Paper provides that the termination of an existing relationship by a dominant company will be abusive where only the following two conditions are met:

- (1) the refusal is likely to have a negative effect on competition; and
- (2) the refusal is not justified objectively or by efficiencies.⁶⁸

If this category also covers existing IP licenses, then it would not be necessary, as set out in *IMS Health* and the Discussion Paper in relation to a first-time license of an IP right, to show:

- (1) that the supply is indispensable to normal economic activity in the downstream market; and
- (2) that the termination will prevent the development of the market to the detriment of consumers (although this would normally mean the prevention of the production of a new product, it could also refer to the prevention of the continued production of a product).

If this is the case, it would appear that the Commission considers it considerably easier to prove an abuse under Article 82 which involves the continuation of an existing IP license as opposed to the first-time license of an IP right.

Existing court jurisprudence does not provide direct guidance on the termination of an existing IP right and whether or not this should be treated in a similar manner to a first-time license. However, the reasons given in the Discussion

67 According to the Discussion Paper, five conditions have to be fulfilled in order for a refusal to start to supply to be abusive: (i) the behavior can be properly characterized as a refusal to supply; (ii) the refusing undertaking is dominant; (iii) the input is indispensable; (iv) the refusal is likely to have negative effects on competition; and (v) the refusal is not objectively justified. In the case of the refusal to license an IP right, an additional, sixth condition must be fulfilled, namely that the refusal to license the IP right prevents the development of a market for which the license is an indispensable input (in other words, the refusal prevents the development of a new product for which there is consumer demand). See Discussion Paper, *supra* note 9, at paras. 224 and 239.

68 *Id.* at para. 218.

Paper and the case law for treating IP rights with caution and only ordering compulsory licensing in exceptional circumstances would appear to apply equally to existing licenses and first-time licenses.⁶⁹ However, the fact that a license has been granted previously may make it more difficult to objectively justify a refusal to continue the license.

C. NEW PRODUCT

In essence, the limitation on production or technical development, that is considered an abuse under Article 82(b), arises in the case of IP rights (or arguably at the very least in the case of the license of an IP right that had not previously been licensed to the requesting party) where the refusal results in the prevention of the emergence of a “new product” for which there is potential customer demand. It was the prevention of the emergence of a “new product” in the market in *Magill* which distinguished that case from *Volvo v. Veng*, where a refusal to license was only an abuse in combination with other abusive conduct.⁷⁰

The requirement that the IP license is indispensable for the creation of a new product means that the incidences in which EC competition law regulators will require compulsory licensing will be very limited (or at the very least will be very limited in the absence of an existing commercial relationship). However, the extent to which regulators will resort to compulsory licensing will depend to a large degree on how the concept of “new product” is defined. Many had hoped that the Court in *IMS Health* would clarify what is meant by a “new product,” but the guidance provided by the Court is limited to the requirement that the company requesting the license must “not intend to limit itself essentially to duplicating the goods or services already offered.”⁷¹ However, it is not clear from the case law whether very slight improvements to a product will constitute a new product or whether the new product has to be so different that it actually would compete in a new product market (or indeed, as may be more likely, is somewhere in between).⁷²

The Discussion Paper interprets the “new product” requirement to mean that the refusal must not prevent the development of the market for which the license is an indispensable input, to the detriment of consumers. Although the Discussion states that this may only be the case, as indicated in *IMS Health*—where the undertaking requesting the license does not intend to limit itself to

69 *Id.* at para. 238 and *Volvo v. Veng*, *supra* note 61.

70 See Opinion of the Advocate General, *IMS Health*, *supra* note 57.

71 *Id.* at para. 49.

72 Damien Geradin, *Limiting the scope of Article 82 EC: What can the EU learn from the U.S. Supreme Court's judgment in Trinko in the wake of Microsoft, IMS and Deutsche Telekom?*, 41 COMMON MARKET L. REV. 1481-1518 (2004).

duplicating the goods or services already offered by the dominant company, but intends to produce new goods or services not offered by the owner of the right for which there is a potential consumer demand⁷³—arguably it also could cover a situation that would result in the prevention of the continued production of a product for which consumer demand would otherwise not be met. The Discussion Paper also indicates that it may be abusive to refuse to license an IP right where that IP right is indispensable for follow-on innovation.⁷⁴ However, the Discussion Paper appears to go further than existing case law by indicating that it is not necessary for the requesting party to have already identified the potential new product that it wishes to develop using the IP right. This could potentially increase the number of incidences an IP rights holder may be required to license an IP right, as in a number of areas it may be difficult to show that the IP right is not indispensable for the development of a product that has not yet been identified.

THE REQUIREMENT THAT THE IP RIGHT IS, AMONG OTHER THINGS, INDISPENSABLE TO THE CREATION OF A NEW PRODUCT ALSO DISTINGUISHES IP RIGHTS FROM OTHER TYPES OF PROPERTY WHERE THERE MAY BE AN OBLIGATION TO DEAL.

The requirement that the IP right is, among other things, indispensable to the creation of a new product also distinguishes IP rights from other types of property where there may be an obligation to deal. In *Bronner*,⁷⁵ the Court looked at the obligation to provide access to a distribution system and found that, other than the requirement that access be required to create a new product, the same conditions that applied in *Magill* needed to be satisfied before a refusal to deal on its own, in relation to physical property, could give rise to an obligation to deal.

The Commission did not deal specifically with the creation of a “new product” in the *Microsoft* decision. However, in its analysis of whether or not the refusal was objectively justified, the Commission did refer to the fact that Microsoft’s refusal to supply has resulted, and will continue to result, in blocking new functions of operating systems.⁷⁶ It is now up to the Court to decide whether or not the creation of new functions constitutes a “new product” under the conditions laid down in *IMS Health*, or whether the basis that Microsoft had refused to continue to supply information that it had supplied in the past means that the

73 Discussion Paper, *supra* note 9, at para. 239.

74 *Id.* at para. 240.

75 Case C-7/97, *Oscar Bronner v. Mediaprint*, 1998 E.C.R. I-7791 (ECJ) [hereinafter *Bronner*].

76 The Director within the Commission responsible for the decision has stated that the disclosure of the information in question would allow the development of new products. See Jürgen Mensching, *supra* note 66.

Commission is not required to show that the refusal resulted in the prevention of the creation of a new product.

D. OBJECTIVE JUSTIFICATION FOR THE REFUSAL: AN EFFICIENCY DEFENSE?

A dominant company may refuse to license an IP right or supply a good where the refusal can be objectively justified. For example, there is no obligation to supply companies that have a bad payment track record or where supply may damage reputation or goodwill. Similarly, capacity constraints may provide an objective justification for a refusal. The Discussion Paper does not indicate any change in the Commission's position that an objective justification can mean that behavior which would otherwise be considered an exclusionary abuse can be permitted.

Where there has been a previous history of dealing it may be harder for the dominant company to explain why there has been a change of circumstances that objectively justify a refusal to continue to supply. The emphasis put by the Commission in the *Microsoft* decision, and in the Discussion Paper, on the fact that there was a "disruption of previous level of supplies" may lead a dominant company to be more reluctant to license IP rights if it thinks that, in the future, it may wish to refuse to continue licensing the IP rights for its own (perhaps only subjectively justified) reasons.⁷⁷ Similarly, the U.S. courts regard a refusal to continue to deal as more objectionable than a refusal to commence dealing.⁷⁸ A refusal to continue to deal may make no economic sense but for the exclusionary effects. It is perhaps worth considering the value of the "no economic sense" test in determining whether a refusal to supply, or to continue to supply, can be objectively justified. If the refusal to supply makes economic sense even in the absence of exclusionary effects, it may indicate that the refusal is objectively justified. However, in the Discussion Paper, the Commission suggests that where a dominant company argues that it is terminating a supply relationship because it wants to integrate downstream, it must "show that consumers are better off with the supply relationship terminated."⁷⁹ Accordingly, the Commission currently does not appear to favor the "no economic sense" test in the case of a refusal to supply, but instead imposes a particularly high burden on dominant companies that even goes beyond showing that the status quo would be maintained following the termination of an existing supply arrangement.

77 Damien Geradin, *supra* note 72.

78 In the *Aspen Skiing* case, in which the courts prohibited a refusal to deal, there had been previous dealings between the parties. The refusal to supply ski passes even at retail prices was clearly intended to harm the competitor. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

79 Discussion Paper, *supra* note 9, at para. 224.

As noted above, Commissioner Kroes has also indicated that an efficiency defense will be considered in Article 82 cases in appropriate circumstances. The Discussion Paper⁸⁰ deals with efficiencies as part of the objective justification criterion and, therefore, as a constituent element of the finding of an abuse. In particular, according to the Discussion Paper, it may be possible to justify a refusal to license an IP right if exclusive use of the right is required in order to ensure that the company can recoup the investment it has made in creating that IP right. Consequently, within the framework of the efficiency defense, it is necessary to show that the refusal to deal with others was indispensable to the initial investment. Conversely, the Discussion Paper indicates that a refusal is more likely to be abusive if the investment that led to the indispensable input would have been made even if the investor had known that it would have a duty to supply.

It is hard to see how efficiency arguments could play a role—outside the considerations about the necessity to recoup the investment required to obtain the IP right. However, if there are exceptional cases where efficiencies would be important in a context other than to recoup the original investment, the IP right holder would have to satisfy all of the conditions that were identified by Commissioner Kroes in her speech at Fordham and that are identical to the conditions which must be satisfied under Article 81(3). In summary, the introduction of an efficiency defense in Article 82 enforcement is, in practice, unlikely to change the incidence of cases where the Commission orders the compulsory license of an IP right.

In the *Microsoft* decision, the necessity to withhold interoperability information from competitors for efficiency reasons played an important role. Microsoft claimed that the disclosure of the information in question would seriously damage incentives to innovate. In dismissing this as an objective justification, the Commission took into account the fact that the disclosure of the information would not allow others to free ride on Microsoft's investment by copying Microsoft, and only would give them sufficient information so that they could design products that could interoperate with Microsoft's products. The Commission also weighed the compulsory license's negative impact on Microsoft's incentives to innovate against its positive impact on the level of innovation across the whole industry in determining that the refusal was not objectively justified. In line with the *Microsoft* decision, the Discussion Paper suggests that for interoperability information "it may not be appropriate to apply to . . . refusals to supply [such] information the same high standards for intervention" as those applied to the obligation to license IP rights.⁸¹

80 *Id.* at paras. 224 and 235.

81 *Id.* at para. 242.

E. EXISTENCE OF A SECONDARY MARKET

With regard to either IP rights or physical property, there is no obligation on a dominant company to supply a product that a competitor simply wishes to resell. The obligation to deal can only arise in circumstances where access to the property or supply of the license or raw material is necessary to compete in a separate market and where it leads to a negative effect on competition in the downstream market.

The Court in *IMS Health* clarified that, in order for there to be an obligation to supply, two distinct markets must be involved—the one in which a dominant position is held (the upstream market) and the secondary market in which the company requesting access wishes to compete in (the downstream market). The Court confirmed that a dominant company is not obliged to supply a product to a competitor for that competitor to simply resell. However, the Court may have considerably reduced the hurdle of finding the existence of two distinct markets by stating that this could be a “potential market or even a hypothetical market.” In IP terms, this statement may be extremely broad as an IP right could potentially always constitute a “hypothetical market” and is nearly always used as an input in the creation of an output.⁸² Similarly, the interoperability information in question in the *Microsoft* decision may meet this very low test of a “hypothetical market” as there is clearly demand for the information.⁸³

The Discussion Paper recognizes the specificities of IP rights by acknowledging that there is no general obligation for the IP right holder to license the IP right. Even where the holder acquires a dominant position, there is no obligation because it is the very aim of the IP right to exclude others from using the IP right to produce and distribute products without the consent of the holder of the rights.⁸⁴ It also explains the distinction between the upstream market and the downstream market.⁸⁵ However, it does not provide further guidance on the interpretation of the term “potential market or even hypothetical market” used by the Court in *IMS Health*.

F. NATURE OF THE IP RIGHT

Against the background of past cases, the question has risen whether the standards to be applied by a competition authority in relation to compulsory licensing

82 Damien Geradin, *supra* note 72.

83 The Commission took care to point out that the information would not allow the recreation of Microsoft products but would merely allow the development of compatible products.

84 Discussion Paper, *supra* note 9, at para. 238.

85 *Id.* at para. 208.

will differ according to the importance of the relevant right. It cannot be excluded that the Court in *Magill* and *IMS Health* was motivated to use competition law to remedy a situation that it felt to be unsatisfactory under IP law. Accordingly, it is not clear if the questionable nature of the copyright in *Magill* and *IMS Health* and the degree to which such information was worthy of protection, influenced either the Commission or the EC Courts in finding that the holders of those rights were obliged to license to third parties in certain circumstances.⁸⁶

While one may question if it is not the task of IP law, rather than competition law, to ensure that only information worthy of protection is the subject of an IP right, the nature of the IP right may influence a competition law regulator's willingness to interfere with the IP right.⁸⁷ In a preliminary ruling on the *Microsoft* decision, the President of the CFI noted that the extent to which the information in question is known or secret is a relevant factor to be taken into account as well as the possible relevance of the value of the information concerned.⁸⁸

In the *Microsoft* decision, the extent to which the information concerned IP rights was left open by the Commission. However, the Commission made it clear in its decision that it was not requiring disclosure of Microsoft's source codes so that third parties could copy Windows, but of the interface specifications so that compatible products could be developed. The Commission explained that interface specifications describe "what" an implementation must achieve—not "how" it is achieved.

The use of competition law to remedy a situation that perhaps could be better dealt with by IP law is also illustrated by the recent *AstraZeneca* decision, which is currently under appeal to the EC Courts.⁸⁹ In that case, it was found that a misuse of the patent system was an abuse of *AstraZeneca's* dominant position under

86 *Magill* concerned the copyright in weekly television program listings in Ireland and the United Kingdom, which outside those jurisdictions were unlikely to have been protected by copyright laws on the grounds of lack of originality. Similarly, in *IMS Health*, the degree of creativity involved in the information protected by copyright is questionable and was granted as a result of EC-wide legislation on the protection of databases which provides a very low standard for the application of copyright protection. The *IMS Health* case concerned a refusal to license the right to use the "brick structure" developed by *IMS Health* for processing data received from pharmaceutical wholesalers, and which, according to the complainant, was indispensable for the provision of data on the sale of pharmaceutical products to pharmaceutical companies.

87 See Presentation by Carl Baudenbacher, *The protection of intellectual property in a system of free competition*, Studienvereinigung Kartellrecht, Brussels, Apr. 7, 2005 (on file with the author).

88 Order of the President of the Court of First Instance, Case T-201/04R, *Microsoft v. Commission*, Dec. 22, 2004.

89 Case T-321/05, *AstraZeneca v. Commission* [hereinafter *AstraZeneca*].

Article 82. One wonders, however, if it would be more appropriate to make provision within IP law for the punishment of companies that misuse the system or provide misleading information so that action can be taken against all companies, regardless of market power, who engage in such practices. Similarly, where an abuse is the result of a loophole in the patent law, then perhaps that loophole should simply be closed (as has now been done in relation to the loophole that had been used by AstraZeneca) rather than action be taken by competition regulators.

ONE WONDERS, HOWEVER, IF IT WOULD BE MORE APPROPRIATE TO MAKE PROVISION WITHIN IP LAW FOR THE PUNISHMENT OF COMPANIES THAT MISUSE THE SYSTEM OR PROVIDE MISLEADING INFORMATION SO THAT ACTION CAN BE TAKEN AGAINST ALL COMPANIES, REGARDLESS OF MARKET POWER, WHO ENGAGE IN SUCH PRACTICES.

IV. Conclusion on the Impact of the Article 82 Review on IP Rights

Indications so far are that the Article 82 review may not lead to any great change in the circumstances in which compulsory licensing will be considered. However, a deeper understanding of the underlying economic theories of competitive harm may assist competition regulators in distinguishing between pro-competitive licensing restrictions and anticompetitive licensing restrictions.⁹⁰

The reason why the Article 82 review may not impact refusal to license IP rights cases may be because such cases were already limited to “exceptional circumstances” rather than being a per se violation of Article 82 and because the ability to objectively justify a refusal that has anticompetitive effects may have already included an efficiency defense. Similarly, the requirement that the refusal will only be prohibited if it results in the elimination of competition indicates that, in refusal to supply or license cases, EC law takes into account the foreclosure effects of the refusal on the marketplace. This indicates that, in this regard, perhaps EC law already sought (in theory at least) to protect competition as opposed to particular competitors and that the Discussion Paper and the comments made by Commissioner Kroes in relation to the Article 82 review and a more economics effects-based approach, in general, do not indicate a change of policy with regard to first-time refusals to supply or license. However, the weight attached in the Discussion Paper to existing commercial arrangements should be treated with caution and could result in behavior that previously would not have been considered as abusive, falling foul of Article 82. Although not considered in the Discussion Paper, in our view, the “no economic sense test” could be use-

⁹⁰ In relation to the benefits of a deeper understanding of the underlying economic theories of competitive harm, see Speech by Mark Delrahim, *U.S. and EU Approaches to the Antitrust Analysis of Intellectual Property Licensing: Observations from the Enforcement Perspective*, American Bar Association’s Section of Antitrust Law, Washington, DC, Apr. 1, 2004.

ful in determining whether a refusal to continue supplying an existing customer is objectively justified. In addition, the statement in the Discussion Paper that in certain circumstances there may be an obligation to license an IP right where that right is indispensable for the development of a new product that has not yet been identified, should also be treated with concern as this could give rise to compulsory licenses in dubious cases. ▼