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This paper analyses the treatment of abuse of dominance in the EU antitrust system. It explains how a finding of dominance can be established and how the European Commission undertakes the assessment of abusive unilateral conducts by dominant undertakings.

1. Introduction

Abuse of dominance is one of the most complex anti-competitive practices that enforcers have to deal with in the ambit of Competition law. The present work seeks to present in a clear, concise and objective manner the main aspects taken into account in the EU antitrust system to establish a finding of dominance and coping with the assessment of abusive behaviors by dominant undertakings.

Under section 2 this paper examines the concept of dominance from a legal and economic standpoint. Section 3 discusses the various factors that -in the light of the relevant EU regulation, the case-law of the Community Courts, previous works of practitioners and scholars, and the "Guidance on the Commission´s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" (hereinafter the "Guidance Paper")- should be taken into account in order to establish the existence of a dominant position and how those factors are integrated in the general framework for the assessment of dominance. Section 4 deals with the approach endorsed by the European Commission in the Guidance Paper for the assessment of abusive exclusionary conduct. Finally, section 5 briefly reviews the specifics of the assessment of each one of them.

2. What is "dominance"? Legal and economical approach

Article 102 of the Treaty for the Functioning of the European Union (hereinafter the "TFEU") provides that:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States…"

Though it is the primary legal basis to regulate the abuse of dominance within the EU Competition law, Article 102 does not lay down the definition of "dominance", which joint with the concept of "effect on trade" is the essential element of the legal notion of "abuse of dominance." Thus, the concept of dominance, as well as the factors determinative of such condition have been developed by the case-law of the Community Courts, and more recently by the Guidance Paper.

The classical definition of dominance can be found in the jurisprudence of the European Court of Justice, particularly in the Hoffmann-La Roche and United Brands cases, where the Court defined dominance as:

> "a position of economic stretch enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[1]

This definition, however, has been criticized by some scholars, like Geradin, Hofer, Louis, Petit & Walker (2005), who consider that every firm´s conduct in the market place, even those that are held to be dominant, is influenced and affected to some extent by the behaviour of its competitors and customers.[2]

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[1] Judgments of the European Court of Justice, Case 85/76 Hoffmann-La Roche v. Commission, (1979) E.C.R. 461, paragraph 38, and Case 27/76 United Brands Company v. Commission (1978) E.C.R. 207, paragraph 65.

[2] "No firm can act to an appreciable extent independently, since every firm will be constrained by its respective demand curve. First, every firm is limited in its commercial behavior to some extent by competitors since the presence of these competitors affects the firm´s demand curve. Although this is true for firms operating in a competitive market, it is also true for a dominant firm. All firms, including those that are held to be dominant, will increase prices to the point at which further price increases would be unprofitable. In this

In legal terms, dominance can be said to result from the combination of two essential conditions: (a) the absence of sufficiently effective competitive constraints, and (b) the capacity to exert substantial market power. These two conditions afford the dominant undertaking the possibility "to prevent effective competition being maintained", as pointed out in the case law mentioned above. [3]

From the economic standpoint, on the other hand, dominance is considered as the condition resulting from the capacity to exert substantial and durable market power in a particular relevant market.[4]

The Guidance Paper itself relates the notion of independence with the capacity to exert "substantial market power."[5] Such capacity is given by the possibility of profitably "increasing prices above the competitive level for a significant period of time"[6], which in turn is an indicator that the undertaking in question "does not face sufficiently effective competitive constraints."[7]

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sense, competitors do constrain the behaviour of firms so that even a dominant firm does not act independently of its competitors. Second, an individual firm´s demand curve is equally affected by the behaviour and preferences of its customers. Firms typically face downward sloping demand curves, indicating that a higher price comes to the expense of fewer sales: it is not generally open to a firm to raise prices and sell the same quantity as before. Again, this is true of a dominant firm just as much as it is true of a non-dominant firm." (Geradin, et.al, 2005, p. 3).

[3] "Although from the economic point of view the notion of dominance is equated to market power, "defined as ability to (durably) reduce output and raise prices (…) from the legal standpoint, dominance does not necessarily require market power so great as to enable a firm to raise prices, but only a degree of market power giving the firm the ability to react to competition." (Rousseva, 2010, p. 66).

[4] "In economic terms, one would, hence, say that a dominant position is one in which the firm has a "reasonably large" degree of market power." (Van Damme, Larrouche, & Müller, 2006, p. 3).

[5] Guidance communication on the Commission´s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C/45, 24.2.2009, at para. 10.

[6] Idem, at para. 11

[7] Ibid

It should be underlined that the concept of market power encompasses not only an undertaking´s capacity to raise price, but also the ability to influence other parameters of competition on the relevant market, such as output, innovation, the variety or quality of goods and services, for a significant period of time[8], thereby affording unfair advantages to the dominant undertaking and causing harm to consumers.

It is appropriate now to spell out what should be understood as the "ability to raise prices above the *competitive level"*, which is the basic parameter given by the Guidance Paper to conduct the assessment of market power.

The concept of competitive price level can be understood as the price that results from the free interplay of supply and demand, in the absence of artificial distortions of competition; in other words, "the level that would prevail under competitive conditions" (D. Geradin et. al., 2005, p. 4). In this context, the notion of "competitive conditions" should be understood as the situation that prevails in the market when each firm is subject to the disciplinary constraint imposed by the existence of other competing rivals.

The Guidance Paper does not lay down what the competitive price level is or how it can be calculated, which is an essential part of the analysis that must be conducted in order to establish an undertaking´s capacity to exert substantial market power (main indicator of dominance). The Discussion Paper, however, sets out that an undertaking could price above the competitive level "by reducing its own output or by causing rivals to reduce their output."[9]

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[8] See DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (Dec. 2005), at para. 24 (hereinafter this document will be referred to as the "Discussion Paper").

[9] Ibid, at para. 24. This paragraph of the Discussion Paper further states that: "...An undertaking that is capable of substantially increasing prices above the competitive level for a significant period of time holds substantial market power and possesses the requisite ability to act to an appreciable extent independently of competitors, customers and consumers..."

This reduction of output, be it of its own output or its rivals’, is an effective mechanism to exert market power because it allows the undertaking concerned to raise prices by reducing the supply of its products -thereby causing a shortage of them in the market place- and still maintain the same volume of sales (income), due to the lack of capacity of its competitors to replenish the supply that has been taken away of the market (Geradin et.al, 2005, p. 6). In the same vein, if competitors are (artificially) forced to reduce their own output, this affords the dominant undertaking the possibility to raise prices and reduce input, to its own advantage and to the detriment of consumers.[10]

3. The assessment of dominance: steps to undertake and factors to be taken into account[11]

As shown above, an undertaking can be said to hold substantial market power, and therefore being in a dominant position, when it is free of competitive constraints or it is not subject to a sufficient degree of competitive pressure, neither from actual nor by potential competitors or buyers in the relevant market. This, in turn, affords the dominant undertaking the possibility to profitably maintain prices above the level that would prevail under competitive conditions or hold quality, variety, innovation, etc., below competitive levels in the long run (Majumdar, 2006, p. 163).

In this section will be analyzed the methodological framework to rely on when conducting the assessment of dominance. In this regard, the Guidance Paper lays down three

[10] In this regard, it is useful to recall that according to settled case law of the European Court of Justice, “an undertaking´s economic strength is not measured by its profitability; a reduced profit margin or even looses for a time are not incompatible with a dominant position, just as large profits may be compatible with a situation where there is effective competition. The fact that United Brands´ profitability is for a time moderate or non-existent must be considered in the light of the whole of its operations.” ECJ, Case 27/76 United Brands v Commission, n. 1 above (paras. 125-128)

[11] Van Bael & Vellis (2009, p.113) proposes a very complete and detailed list of factors that corroborate a finding of dominance.

main factors to be taken into account: (a) market position of the dominant undertaking and its competitors; (b) barriers to entry or expansion of actual or potential competitors (anti-competitive foreclosure), and (c) the existence or not of countervailing buyer power.[12] Each one of them will be discussed in detail in the following paragraphs. It should be borne in mind, however, that a finding of dominance is always subject to the verification of several factors, which are not determinative if analyzed individually.[13]

3.1 Definition of the relevant market. The first step for establishing a finding of dominance is the definition of the relevant market where the undertaking concerned is held to be dominant. Legal as well as economic reasons uphold the necessity to define the relevant market, as has been set out by the European Court of Justice.[14]

Defining the relevant market "consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers."[15] The concept of relevant market encompasses: (a) the relevant geographic market[16] and (b) the relevant product market[17]. The first one makes

[12] See Guidance Paper, at para. 12 and 19

[13] See idem, at para. 10

[14] Judgment of the Court of First Instance, Case T-62/98, Volkswagen AG v Commission (2000), ECR II-2707, paragraph 230: "…For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined…". In this regard, see also Judgment of the European Court of Justice, Case C-6/72, Europemballage Corporation and Continental Can Company Inc. v Commission, (1973), E.C.R. 215, paragraph 32.

[15] European Commission´s notice on the definition of relevant market for the purposes of Community competition law (Official Journal C 372, 09/12/1997), at para. 2 and 13.

[16] "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas". Idem, at para. 8

[17] "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use." Idem, at para. 7

reference to the geographic ambit where the allegedly dominant position has repercussion and the latter to the products and services which may constitute alternative sources of supply for the consumers.

As one commentator has put it (Majundar, 2006, p. 163), the purpose of defining both aspects of the relevant market is: (a) to identify rival products and competitors which may represent competitive constraints for the dominant undertaking; (b) to delimit the context within which the existence of barriers to entry/expansion must be analyzed, and (c) to ascertain the buyer´s power and how they could react towards the dominant undertaking´s behaviour.

3.1.1. Relevant product market. To define the relevant product market, the European Commission applies the Hypothetical Monopolist test or Small but Significant Non-transitory Increase in Price (SSNIP) test.[18] This test consists of assuming that the allegedly dominant undertaking is a monopolist in the supply of a certain product, and as such decides to implement a non-transitory increase of price in the range of 5%-10%.

The SSNIP test seeks to ascertain whether in response to this (hypothetical) price increase the reaction of a sufficient number of consumers would be to switch to alternative rival products (demand-side substitutability), thereby causing a loss of sales that would deter the dominant undertaking from implementing such price increase. If so, then additional substitute products are included in the relevant product market until one reaches to identify a group of products in respect to which the undertaking concerned, purportedly monopolist, could profitably implement the 5%-10% price increase (International Competition Network (ICN), 2011, at para. 24). Such group of products, once identified, sets the borderline which delimits the relevant product market.

[18] See Commission notice on the definition of relevant market for the purposes of Community competition law, above note 15, at para. 17.

Another parameter for the definition of the relevant product market through the SSNIP test is the supply-side substitutability, which ascertains whether in response to a hypothetical price increase by the dominant undertaking, competing rivals would have the capacity, "in the short term without incurring significant additional costs or risks"[19], to switch production of a different product to the production of the same product of the dominant firm or a substitute of it (ICN, 2011, at para. 29).

3.1.2 *Relevant geographic market.* The test applied by the Commission in order to define the relevant geographic market seeks to ascertain "whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost."[20] For such purpose, the Commission has to analyze a series of qualitative as wells as quantitative factors[21], with the view to "identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area."[22] This exercise allows the Commission to appraise "the precise degree of market interpenetration at national, European or global level."[23]

[19] Commission notice on the definition of relevant market for the purposes of Community competition law, above note 15, at para. 20.
[20] Ibid, at para. 29
[21] According to the Commission notice on the definition of relevant market for the purposes of Community competition law, at paragraphs 28-30, the factors to be taking into account are as follows: i. the distribution of market shares between the parties and their competitors; ii. analysis of pricing and price differences at national and Community or EEA level; iii. the configuration of prices and market shares; iv. demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, etc.) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers; v. requirements for a local presence in order to sell in that area; vi. the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc.
[22] Idem, at para. 30
[23] Ibid

It is opportune to recall, however, that the SSNIP test is not the only tool available to Competition Authorities for the definition of the relevant market in dominance cases and that it has some pitfalls, namely the Cellophane fallacy, owing to the difficulties in identifying the precise benchmark for the so-called competitive price level. In this regard, the ICN (2011, at. para. 26) has pointed out that: "Competition authorities should therefore use the hypothetical monopolist test in unilateral conduct cases with care and recognition of its limitations."

3.2 ***Market share*****.** The role of market share analysis in the assessment of dominance is to yield a preliminary indicator of the degree of market power of the purportedly dominant firm. It provides a general perspective of the undertaking´s market position, the position of its competitors and the competition degree existing on the market.[24] Market share can be calculated using production or sales volume, whether by monetary or physical units (ICN, 2011, at para. 54).

Within the EU Competition law, although the Guidance Paper suggests that rather than conclusive evidence of the existence of dominance, market share must be considered in the light of other relevant factors, such as market conditions, the dynamics of the market, product differentiation, etc.[25], the Community Courts have traditionally hold the criterion that "very large market shares are in themselves and save in exceptional circumstances, evidence of the existence of a dominant position."[26]

In this regard, Van Bael & Bellis (2009, p. 110) has noted that the position held by the Court of Justice in the AKZO case, where it considered a market share of 50% as evidence of dominance[27], gives rise to the existence of a "rebuttable presumption of dominance"

[24] See Discussion Paper, at para. 29
[25] See Guidance Paper, at para. 13
[26] Judgment of the Court of First Instance, Case T-139/98, Amministrazione Autonoma dei Monopoli di Stato (AAMS) v. Commission (2001), E.C.R. II-3413, paragraph 51.
[27] Judgment of the European Court of Justice, Case C-62/86, AKZO Chemie v. Commission (1991), E.C.R. I-3359, paragraph 60. The same criterion was held in the Judgment of the

whenever the market share of the undertaking concerned is 50% or more. This standpoint is also reinforced by the decision of the Court of First Instance in the TACA case, where it confirmed the Commission´s view that "the fact that the TACA parties held a market share of 60% on the trade in question gave rise to a strong presumption of a dominant position."[28]

3.3 Likelihood of entry or expansion. Once the relevant market has been identified, in both its geographic and product dimensions, and the market shares have been verified, the next step in the assessment of dominance is to examine the likelihood of entry or expansion, since they are two of the main circumstances which can constraint the exercise of market power by a dominant undertaking. The higher the likelihood of entry of new competitors or expansion by those already active in the market, the more unlikely the existence of a dominant position and *vice-versa*.

The analysis of the likelihood of barriers to entry or expansion seeks to answer the question of whether they "will pose a credible competitive constraint on the incumbent" (ICN, 2011, at para. 70). In the light of the Guidance Paper, at paragraph 16, this would be the case when entry or expansion is: (a) *likely* (profitable for the entrant or existing competitor); (b) *timely* (swift enough as to avoid the exercise of substantial market power by the dominant undertaking), and (c) *sufficient* (of such dimension as to have a deterring effect over any price increase that the dominant firm may attempt to apply). The idea is that when these requisites are met "an undertaking can be deterred from increasing prices"[29], or implementing any other strategy which affords it the possibility to exercise substantial market power.

Court of First Instance, Case T-30/89, Hilti v. Commission (1991), E.C.R. II-1439, paragraph 89, and Judgment of the Court of First Instance, Case T-83/91, Tetra Pak v. Commission (1994), E.C.R. II-755, paragraph 109.

[28] Judgment of the Court of First Instance, Joined Cases T-191/98, T-212/98 to T-214/98, Atlantic Container Line AB and Others v. Commission (2003), E.C.R. II-03275, paragraph 908.

[29] Guidance Paper, at para. 16

The Guidance Paper, at paragraph 17, identifies as barriers to entry or expansion: *i. Legal barriers*, such as tariffs or quotas (intellectual property rights and administrative regulations, such as those requiring a license to operate in a specific industry, can also be considered as legal barriers). *ii. Advantages*, such as: economies of scale[30] and scope[31], privilege access to essential inputs, natural resources, important technologies or an established distribution and sales network; *iii. Sunk costs*[32], such as those derived from network effects[33]; *iv. Behavioral* barriers, which are those resulting from the dominant undertaking´s own conduct (such as huge investments in advertising campaigns and other capital investments that competitors or entrants would have to match); the conclusion of long term (supply or distribution) contracts with customers when they "have appreciable foreclosing effects" (ICN, 2011, para. 76).[34]

3.3.1 ***The condition of unavoidable trading or business partner.*** Whilst doing the analysis of barriers to entry and expansion, another aspect that should be examined is whether the undertaking concerned posses the condition of an "unavoidable trading or business partner". This concept was coined by the first time by the Community Courts in the decision of the Hoffmann-La Roche case in 1979[35] and has been thereafter repeatedly used in subsequent judgments. It encompasses all those factors and circumstances, apart from market share,

[30] Economies of scale are "the reduction in long-run average costs that come from operation at a larger scale, i.e. at a greater level of input." (ICN, 2011, at para. 74)
[31] Economies of scope are "the reduction in lung-run average costs as a result of producing or distributing multiple distinct products." Idem, at para. 75
[32] "Sunk costs are outlays associated with investments necessary for entry or expansion that cannot be recovered by reversing the entry or expansion decision." Idem, at para. 73
[33] "Network effects occur when a good or service increases in value to potential customers as the number of existing customers increases." Idem, at para. 76
[34] For further reference on barriers to entry or expansion and its impact in the assessment of dominance in the EU, see Judgment of the European Court of Justice, Case 27/76, United Brands Company v. Commission, n. 1 above, at para. 122.
[35] ECJ, Case C-85/76, Hoffmann-La Roche v. Commission, n. 1 above, at para. 41: "An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for (…) is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position."

which may put costumers in a situation of dependence in respect to the dominant undertaking, such as the control of essential facilities, scarcity of products, must stock brand, etc.[36]

3.4 ***Countervailing buyer power*****.** This is a third aspect that according to the Guidance Paper must be taken into account in the assessment of dominance. The concept refers to the bargaining capacity of purchasers as a means to constrain the exercise of market power by the dominant undertaking (ICN, 2011, at paras. 99-100). In other words, it is "the ability of a buyer to influence the terms and conditions on which it purchases goods."[37] The role that it plays in the assessment of dominance is to ascertain whether the customers of the allegedly dominant firm, owing to their size or commercial significance for this latter, "may deter or defeat an attempt by the undertaking to profitably increase prices."[38] This could happen because they have the ability to easily and quickly switch to competing firms, encourage entry, vertically integrate, or there exist a credible threat that they can do so.[39]

4 The assessment of abuse of dominance in the scope of the EU Competition law

4.1 Forbidden practices.- The concept of abuse of dominance has not been defined by the TFEU, which just set out in Article 102 the following non-exhaustive list of practices that may constitute abuse of dominance:

> "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the

[36] See Judgment of the Court of First Instance, Case C-95/04 P, British Airways PLC v. Commission (2007), paragraph 75; Judgment of the General Court, Case T-57/01, Solvay v. Commission (2009), E.C.R. II-4621, paragraph 277; Judgment of the General Court, Case T-155/06, Tomra Systems and others v. Commission (2010), not yet reported, paragraph 269; and Commission Decision of 20 June 2001, Michelin, O.J. L143/1 (2002), at paragraphs 173, 200, 202 and 204.

[37] Organization for Economic Co-operation and Development (OECD), Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy (1998). *Buying Power of Multiproduct Retailer* (DAFFE/CLP(99)21), p. 8. Retrieved October 21, 2011, from http://www.oecd.org/dataoecd/1/18/2379299.pdf

[38] Guidance Paper, at para. 18

[39] See ibid

prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[40]

4.2 Definition of abuse of dominance.- The Community Courts, however, have broadly developed the notion of abuse of dominance, as shows the definition given by the Court of First Instance in the Michelin (II) case, cited below:

"…according to a consistent line of decisions, an abuse is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[41]

***4.3 Constituent elements of abuse of dominance*.-** Dominance is the essential condition for an undertaking to be able to engage in abusive practices. This is why establishing the existence of a dominant position in the relevant market must be the first step in the assessment

[40] "…according to the common practice of the Community Courts: Article 82(a) pertaining to unfair commercial practices is used as legal basis for prohibiting practices which exploits consumers directly (exploitative abuses); Article 82(b), which prohibits limitation of production, markets or technical development is the general basis for practices that harm consumers by excluding competitors; Article 82(c) is relied on to condemn discrimination by way of exclusion of competitors and exploitation; and Article 82(d) is traditionally used in case of tying practices." (Rousseva, 2010, p. 21)

[41] Judgment of the Court of First Instance, Case T-203/01, Manufacture Française des Pneumatiques Michelin v. Commission (Michelin II) (2003), E.C.R. II-4071, paragraph 54.

of abuse of dominance cases under Article 102 TFEU.[42] Rousseva (2010, p. 67) has identified two other constituent elements of abuse of dominance: "(i) the undertaking´s behaviour should go beyond ´normal competition´, and (ii) as a result of that behaviour, particular effects on competition should be produced that either (a) hinder the existing degree of competition or (b) prevent the growth of it." Hindering the existing degree of competition may derive from the implementation of strategies aimed to eliminate competitors from the market, whilst preventing the growth of competition could be foreclosure of new entrants or expansion of other competitors already active in the market.

4.4 Special responsibility of dominant undertakings.- This notion was introduced in the EU Competition law in 1983 with the decision of the Court of First Instance in the case Michelin (I), where the Court held that:

> "…a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."[43]

This criterion of the Court which has been thereafter repeatedly endorsed by subsequent decisions of the Community Courts[44], imposes on dominant firms the obligation to refrain from certain conducts, which are, nevertheless, permitted to non-dominant undertakings.[45]

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[42] See Judgment of the Court of First Instance, Case T-62/98 Volkswagen AG v Commission (2000), E.C.R. II-2707, paragraph 230.

[43] Case 322/81, Nederlandsche Baden-Industrie Michelin v. Commission (Michelin I) (1983), E.C.R. 3461, paragraph 57

[44] See: (a) Judgment of the Court of Justice, Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB (2011), not yet reported, paragraphs 24, 53 and 84; (b) Judgment of the General Court, Case T-155-06, Tomra Systems ASA and others v. Commission (2010), paragraph 207; (c) Judgment of the European Court of Justice, Case 280/08 P, Deutsche AG v. Commission (2010), not yet reported, paragraph 83.

[45] "…under Article 82 EC, firms are not forbidden from having market power, however, firms with significant market power are banned from using certain business strategies that other, non-dominant, firms are free to use. Presumably, the idea is that welfare and consumer

The underlying reasoning in the notion of "special responsibility" of dominant undertakings is that the existence of a dominant firm in a given market is indicative that the degree of competition in that market is already weakened due to the very presence of it. Furthermore, the market power wielded by the dominant firm bestows on it the capacity to exert an influence of such magnitude on the market conditions, that it can seriously distort or eliminate (the already weakened) remaining competition (Rousseva, 2010, p. 72).[46]

4.5 Objective justification and efficiency gains.- The fact that a firm holds a dominant position is not punished or prohibited in the EU Competition laws. Though they are subject to a special responsibility, dominant firms still maintain the right to legitimately compete on the merits with their rivals in the market. In fact, it has been held that:

> "...the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked (…) such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests…"[47]

The term "objective justification" has it grounds in the decision of the Court of First Instance in the Atlantic Container Line case[48], where the Court spelled out that certain

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surplus can be hurt if dominant firms would be allowed to engage in such (anti-competitive) practices." (Van Damme et. al., 2006, p. 5).

[46] In this regard, see: a) Mcmahon, K. (2009). A Reformed Approach to Article 82 and the Special Responsibility not to Distort Competition. In A. Ezrachi (Ed.), *Article 82 EC: Reflections on its Recent Evolution* (pp. 122). Oxford: Hart Publishing; b) Judgment of the Court of First Instance, Case T-111/96, ITT Promedia v. Commission (1998), E.C.R. II-2937, paragraph 139.

[47] CFI, Case T-203/01, Michelin v. Commission (2003), n. 41 above, paragraph 55. In British Airways v. Commission (2003), the CFI held that: "However, the protection of the competitive position of an undertaking which, like BA, occupies a dominant position must, at the very least, in order to be lawful, be based on criteria of economic efficiency." Case T-219/99, E.C.R. II-5917, paragraph 280.

[48] Judgment of the Court of First Instance, Joined Cases T-191/98, T-212/98 to T-214/98, Atlantic Container Line AB and Others v. Commission (2003), E.C.R. II-3275, paragraphs 1112-1114.

courses of conduct by dominant firms may be deemed to protect their commercial interests, rather than abusing their dominant position.[49]

The Commission itself has explicitly embraced this criterion in the Guidance Paper, paragraphs 28-31, asserting that a dominant undertaking may demonstrate that its conduct is justified by demonstrating that it is "objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers."[50] However, the conduct in question must be indispensable and proportionate[51], and comply with the cumulative conditions set out in paragraph 30 of the Guidance Paper.

4.6 Methodological framework for the assessment of abuse of dominance under the Guidance Paper.-

Competition policy is aimed to protect the competitive process (competition itself), with the view to guarantee consumer welfare. Thus, when enforcers undertake the assessment of abusive unilateral conducts, the substantive principle that should guide them is whether or not the conduct in question harms consumers, hinders or eliminates competition. This, in turn, allows then to dismiss prosecuting those practices that constitute "competition on the merits"[52], which means those practices that dominant undertakings can lawfully engage in.

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[49] In the same judgment the Court held that: "…a dominant undertaking may seek to rely on grounds to justify the practices it adopts (…) The sole purpose of those grounds of justification is to enable a dominant undertaking to show not that the practices in question should be permitted because they confer certain advantages, but only that the purpose of those practices is reasonably to protect its commercial interests in the face of action taken by certain third parties and that they do not therefore in fact constitute an abuse."

[50] Guidance Paper, at para. 28

[51] See Ibid

[52] "Generally, the expression "competition on the merits" implies that a dominant enterprise can lawfully engage in conduct that falls within the area circumscribed by that phrase, even if the consequence of that conduct is that rivals are forced to exit the market or their entry or expansion is discouraged." OECD, Policy Brief (2006, June), *What is Competition on the Merits?*, p. 2, retrieved October 5, 2011, from http://www.oecd.org/dataoecd/10/27/37082099.pdf

The assessment referred to above, may be conducted following a form-based approach or an effects-based approach. In the European Union antitrust system, both the Commission and the Community Courts have traditionally maintained a form-based approach in the assessment of abusive unilateral conduct cases under Article 102 TFEU.[53] However, with the adoption of the Guidance Paper (on 3 December 2009), the Commission has endorsed an effects-based approach[54] or, as the EAGCP has put it, an economics-based approach.[55]

The effects-based approach endorsed by the Commission seeks to verify whether the practice under scrutiny allows the dominant firm to foreclose competitors in any anti-competitive way that has the effect of causing harm to consumers.[56] Under this approach, the

[53] Following this approach, "to reach findings of unlawful abuses, the Commission would not scrutinize whether the impugned course of conduct generates actual, or probable, anti-competitive effects on the relevant market. Rather, following a cursory examination of the practice´s formal features (as opposed to an analysis of is market impact), the Commission would infer that the dominant firm´s conduct has, by its very nature, the ability to cause anti-competitive effects on the market." (Petit, 2009, pp. 485-486). As to the decisional practice of the Community Courts in this regard, see the Judgments of the Court of First Instance in the following cases: (a) Case T-201/04, Microsoft Corp. v. Commission (2007), E.C.R. II-3601, paragraph 867; (b) Case T-203/1, Michelin v. Commission (2003), E.C.R. II-4071, paragraph 239; (c) Case T-340/03, France Télécom SA v. Commission (2007), E.C.R. II-107, paragraph 195.

[54] "The Commission then sets out principles for assessing exclusionary abuses that indeed open the door to a more effects-based approach." (Kavanagh, J., Marshall, N. & Niels, G., 2009, p. 8).

[55] "An economics-based approach to the application of article 82 (…) will be based on the assessment of the anti-competitive effects generated by business behaviour. This implies that competition authorities will need to identify a competitive harm, and assess the extent to which such a negative effect on consumers is potentially outweighed by efficiency gains. The identification of competitive harm requires spelling out a consistent business behaviour based on sound economics and supported by facts and empirical evidence...." Report by the Economic Advisory Group for Competition Policy (EAGCP) (July 2005), *An Economic Approach to Article 82*, p. 3, retrieved October 30, 2011, from http://ec.europa.eu/dgs/competition/economist /eagcp_ july_21_05.pdf

[56] "In the case of Article 82, the question becomes: is competition impeded as a result of the practice relative to the counterfactual? Are consumers worse off as a result of the practice relative to the counterfactual? (…) the test for assessing the anticompetitive effects would aim at comparing the exercise of market power with the practice (taking into account the likely efficiencies and expected harm predicted by the theory –if backed up by the facts) with the exercise of market power without the practice…" (Papandropoulos, 2008, p. 2). See also

notions of "anti-competitive foreclosure" and "consumer harm" are the key elements of the assessment of abusive behaviour.

The Guidance Paper defines "anti-competitive foreclosure" as follows:

> "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 to the detriment of consumers."[57]

Hence, from the wording of this paragraph, it is inferred that "consumer harm" is the situation resulting of the likelihood of the dominant undertaking being "in a position to profitably increase prices to the detriment of consumers"[58], "limiting quantity or reducing consumer choice"[59], after rivals have been foreclosed.

Accordingly, when confronted with a case of abusive exclusionary conduct, the Commission has to undertake the following assessment:

a) To identify the relevant facts of the case (what is the specific conduct in play);

b) To explain how is (or is likely to be) competition distorted as a consequence of the practice (articulate a theory of harm[60]): are competitors foreclosed in any anti-competitive way? If so, is there an actual or likely adverse impact on consumer

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G. Bruzzone & M. Boccaccio (2009). Impact-based assessment and use of legal presumptions in EC competition law: the search for the proper mix. *World Competition: Law and Economics Review* 32(4), p. 479

[57] Guidance Paper, at. para. 19

[58] Ibid

[59] Ibid

[60] This theory "aims to establish a relationship of causality between the specific practice and potential consumer detriment." (Llanos, 2009, p. 44).

welfare? Is there cogent and convincing evidence of these circumstances? Does the theory of harm "fits the facts of the case"?[61]

c) To spell out what would happen if the practice under scrutiny had not been in play in the relevant market (counterfactual[62]).

d) To evaluate objective necessities or efficiencies that may justify the practice because they outweigh the "anti-competitive effects on consumers."[63]

The Guidance Paper (under paragraph 20-22) sets out in more detail the factors that the Commission has to take into account in the assessment of the anti-competitive nature of any given conduct. They are as follows:

i. *The position of the dominant undertaking* (what is the degree of dominance?);
ii. *The conditions on the relevant market* (are there any circumstances that make barriers to entry or expansion particularly likely or difficult, such as economies of scales/scope, network effects?);
iii. *The position of the dominant undertaking´s competitors* (are there any particularly innovator competitors in the market? Have they the reputation of cutting prices? Are they in a position of deploying realistic, effective and timely counterstrategies?);
iv. *The position of the customers or input suppliers* (are they in a position that somehow enhances the likelihood of anti-competitive foreclosure of new entrants or expansion of competitors already active in the market? Do they have at their disposal any strategies that could help then to counter the conduct of the dominant undertaking?);
v. *The extent of the allegedly abusive conduct* (its duration, regularity, percentage of sale in the relevant market);
vi. *Possible evidence of actual foreclosure* (has there been any increase in the market share of the dominant undertaking due to the allegedly abusive behavior? Have actual

[61] In this part of the assessment the Commission "checks whether there is a credible "theory of foreclosure" that fits the facts of the case". (Petit, 2009, p. 496).
[62] See Guidance Paper, at para. 21
[63] Ibid, at para. 28

competitors exited or potential competitors failed to enter the market for any reasons attributable to such behavior?);

vii. *Direct evidence of any exclusionary strategy* (is there any concrete evidence of exclusionary action, such as internal documents revealing a plan to exclude competitors, prevent entry or pre-empt the emergence of a market?)

The list of factors mentioned above is not exhaustive and the Commission may include in its assessment other factors that it may deem appropriate, depending on the specific practice in play. The Guidance Paper in paragraph 21 explicitly lays down that:

> "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[64], such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices."

5 The assessment of some specific forms of abuse provided in the Guidance Paper

Under this section will be briefly explained the specific forms of abusive exclusionary conduct provided by the Guidance Paper and the relevant factors that, in addition to those laid down in paragraph 20 of the Guidance Paper (already analyzed under section 4.6 of this paper), must be taken into account for the assessment of such abusive behaviors.

[64] According to Petit (2009, p. 498), in the case where the Commission undertakes the assessment of a practice that is likely to lead to anti-competitive foreclosure, rather than actual foreclosure, "…the Commission must (1) examine –pursuant to a counterfactual analysis- what competitive situation would have *likely* prevailed on the market absent the practice; and (2) establish that the dominant´s firm conduct led to a less favorable competitive outcome "than would have otherwise prevailed". He further remarks that, in this case, the counterfactual is intended "to demonstrate that the anticipated "anti-competitive foreclosure" arises "as a result of the conduct of the dominant undertaking" and cannot be ascribe to alternative, equally convincing, explanations." Ibid, p. 496

The Guidance Paper identifies the following abusive practices[65]: (a) exclusive dealing, (b) tying and bundling, (c) predation, (d) refusal to supply and margin squeeze. Each one will be examined individually in the next paragraphs.

5.1 Exclusive dealing**:** encompasses those practices engaged in by a dominant undertaking with the purpose of hindering competitors from selling to its customers. It may present itself in the form of exclusive purchasing, conditional rebates, non-compete clauses and single branding obligations. The Guidance Paper tackles exclusive purchasing and conditional rebates.[66]

5.1.1 Exclusive purchasing[67]**:** presents itself when the seller (in a dominant position) imposes on its customers the obligation "to purchase exclusively or to a large extent"[68] from it. The assessment of the likelihood of this kind of practice to lead to anti-competitive foreclosure, in addition to the factors mentioned under paragraph 20 of the Guidance Paper (see paragraph 4.6 of this paper), also takes into account whether without the exclusive purchasing obligation

> "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."[69]

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[65] Van Bael & Bellis (2009, p. 806-807) identifies a number of other (less common) unilateral abusive conducts, such as: discrimination, imposing unfair terms and conditions, single branding, abusive use of public procedures and regulations, restrictions on sales, abusive licensing; limiting production, markets or technical development; market-sharing agreement, etc.

[66] See Guidance Paper, at para. 32

[67] For further reference as to the treatment of exclusive dealing in the EU antitrust system see: Judgment of the Court of First Instance, Case T-65/98, Van den Bergh Foods Ltd. v. Commission (2003), E.C.R. II-4653; Commission´s Decision of May 13, 2009 (COMP/C-3/37.990-Intel) D(2009) 3726final.

[68] Guidance Paper, at para. 33

[69] Idem, at para. 36

According to the Guidance Paper, this is likely to be the case when the dominant undertaking wield an unavoidable trading partner condition, i.e. when "its brand is a "must stock item"[70], or "the capacity constraints on the other suppliers are such that a part of the demand can only be provided for by the dominant supplier."[71]

5.1.2 Conditional rebates: are those given by a seller to its customers to reward their purchasing behavior when it meets certain conditions (Guidance Paper, para. 37).[72] In the light of the Guidance Paper, what is more relevant in the Commission´s assessment of a given rebate scheme is whether it has the effect of foreclosing equally efficient competitors.[73] The likely foreclosure effect, therefore, depends on the "contestable" portion of demand (the amount for which the buyer may prefer and be able to find substitutes).[74]

Foreclosure is to be considered unlikely: (a) if rivals of the dominant undertaking can compete on equal terms to supply the entire demand of each individual customer;[75] and also (b) when the threshold that a customer has to achieve to receive the rebate is fixed at the amount that that customer would buy in any event from the dominant undertaking, since in such circumstances the rebate does not have a loyalty enhancing effect.[76]

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[70] Ibid
[71] Ibid
[72] For further reference see also: a) Case 322/81, Nederlandsche Baden-Industrie Michelin v. Commission (Michelin I) (1983), E.C.R. 3461; b) Judgment of the Court of First Instance, Case T-203/01, Manufacture Française des Pneumatiques Michelin v. Commission (Michelin II) (2003), E.C.R. II-4071; c) Judgment of the Court of First Instance, Case T-219/99, British Airways v. Commission (2003), E.C.R. II-5917; d) Judgment of the Court of First Instance, Case T-228/97, Irish Sugar v. Commission (1999), E.C.R. II-2969, para. 203-225; e) Judgment of the General Court, Case T-155/06, Tomra Systems and others v. Commission (2010), para. 208-230; f) Temple Lang, J. (2010) Rebates, price discrimination and refusal to contract – the Commission´s guidance paper on Article 82. *Europattslig Tidskrift* 3(1), 47-54; g) Kjolbye, L. (2010). Rebates under Article 82 EC: navigating uncertain waters. *European Competition Law Review* 31(2), 66-80.
[73] See Guidance Paper, at para. 23 and 41
[74] See Guidance Paper, at para. 39 and Discussion Paper, at para. 153
[75] See ibid
[76] See Guidance Paper, at para. 40 and Discussion Paper, at para. 152

Nevertheless, if the threshold is set above this quantity, it may entice the customer to buy more than he would otherwise do, thereby diverting purchases from other competing suppliers to the dominant undertaking (Discussion Paper, para. 152). This in turn, enables the dominant undertaking to use the 'non contestable' (inelastic) portion of demand of each buyer as leverage to reduce the price for the 'contestable' (elastic) portion of demand (the amount for which the buyer may prefer and be able to find substitutes).[77]

The likelihood of a given rebate scheme lo lead to anti-competitive foreclosure has to be tested taking into account whether it hampers or is likely to hinder entry or expansion of equally efficient competitors, "by making it more difficult for them to supply part of the requirements of individual customers" (Guidance Paper, para. 41).

In order to assess the likelihood of exclusionary effects of a rebate scheme on equally efficient competitors the Commission has to take into account: (a) "the relevant range" (this is the estimation of how much of customer´s requirements can realistically be switched to competitors) and the effective price that results of spreading the rebate over such volume[78]; (b) a predation test based on the dominant undertaking´s costs and the "avoidable average cost" (AAC) and "long-run average incremental cost" (LRAIC) benchmarks[79]; (c) Kjolbye (2010, p.69) suggests that the third factor to be taken into account is evidence of actual foreclosure or relevant facts indicating the absence thereof.

Put simply, a rebate scheme is likely to lead to anti-competitive foreclosure if the price a competitor would have to offer to compensate the buyer´s loss of the rebate in question is below the average avoidable cost[80] (Wessely & Horsstkotte, 2011, p. 76).

It is opportune to point out that recent case-law of the European General Court in the ambit of conditional rebates strays away from the (effects-base) approach embedded in the

[77] See Discussion Paper, at para. 153 and Guidance Paper, at para. 39
[78] See Guidance Paper, at paras. 41-42
[79] See idem, at paras. 43-44 and 23-26
[80] The average avoidable cost (AAC) is the cost that could be avoided if a certain course of conduct or activity is suspended.

assessment of conditional rebates as laid down in the Guidance Paper, and rather maintains its traditional form-based approach to them.[81]

5.2 Tying and bundling[82]: tying consists in "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[83] In other words, tying is a strategy that requires customers that purchase one product (the tying product) also to purchase another product (the tied product) from the dominant undertaking, be it by contractual or technical means (Guidance Paper, para. 84).

Bundling, on the other hand, consists in offering several products together, as one combined product. It is denominated "pure bundling" when the products are sold together and in fix proportions, and "mixed bundling" or "multi-product rebate" when the products are also available to be purchased separately, in which case the sum of the prices of each individual product is higher than the bundled price (Guidance Paper, para. 84).

The anti-competitive nature of tying and bundling lays in their likelihood to cause consumers harm by foreclosing the market for the other products that are part of the tie or bundle ("the tied market" or "bundled market") and, indirectly, the tying market (Guidance Paper, para. 49). According to Rousseva (2010, p. 398), this is particularly the case when

[81] As one commentator has put it: "According to the General Court´s approach, it is therefore not necessary to establish whether the average effective price that an efficient rival would need to offer in order to match a dominant firm is above or below cost. This stands in sharp contrast with the methodology endorsed by the Commission in the Guidance Paper and applied in detail in the *Intel* case." (Federico, 2011, p. 140)

[82] Some important decisions of the Community Courts in this area are as follows: (a) Judgment of the Court of First Instance, Case T-201/04, Microsoft v. Commission (2007), E.C.R. II-3601, para. 842-869; (b) Judgment of the European Court of Justice, Case C-333/94, Tetra Pak International SA v Commission (1996), E.C.R. I-5951; (c) Judgment of the Court of First Instance, Case T-83/91, Tetra Pak International SA v. Commission (1994), E.C.R. II-755. See also Ahlborn, C. & Evans, D.S. (2008). The Microsoft Judgment and its implications for competition policy towards dominant firms in Europe. *Antitrust Law Journal 2009, 75(3)*, available at SSRN: http://ssrn.com/abstract=1115867.

[83] Article 102(d) of the TFEU.

products are complementary, since under such circumstances tying and bundling may lead to the strengthening of a dominant position on the tying market.

Other anticompetitive effects that bundling and tying may have, according to the Guidance Paper (paras. 55 and 58) are: fewer supply of the tied product could make entry into the tying market more difficult if it is necessary to enter both markets to compete; less competition (fewer options) for buyers of the tied product; higher prices, etc.

The assessment of tying and bundling takes into account, in addition to the factors outlined in paragraph 20 of the Guidance Paper, the following aspects: (a) the undertaking concerned should be dominant in the tying market (in bundling cases it should be dominant in one of the bundled markets); (b) verification of evidence that the tying and tied products are distinct products, which requires that in the absence of the tying or bundling strategy a substantial number of customers would be willing to buy or would have bought the tying product without also purchasing the tied one from the same supplier, thereby allowing a stand-alone production for both products[84]; and (c) the likelihood of anti-competitive foreclosure.[85]

The anti-competitive foreclosure effect of tying and bundling is more likely to arise when: (1) the strategy has been set/in play on a long-lasting basis; (2) the undertaking concerned holds a dominant position in respect to more than one of the bundled products; (3) the bundle is difficult to be replicated by other competitors.

Finally, in the case of mixed bundling or multi-product rebates, the Commission´s assessment prone to ascertain whether the discount offered by the dominant undertaking is so large that even an equally efficient competitor who only competes in respect to one of the bundled products wouldn´t be able to compete effectively in the market (Rousseva, 2010, p. 01). To this end, the Commission verifies whether the incremental price that customers pay

[84] See Guidance Paper, at paras. 50-51
[85] See idem, at paras. 50 and 52

to the dominant undertaking for each of the products offered in the bundle is below the LRAIC of the dominant firm. The rationale is that under such circumstances "even an equally efficient competitor may be prevented from expanding or entering" (Guidance Paper, para. 60).

5.3 Predation[86]: also denominated "predatory pricing", is a strategy whereby a dominant undertaking deliberately incurs losses or foregoes profits in the short term (sacrifice), with the purpose of foreclosing or be likely to foreclose actual or potential competitors and strengthening or maintaining its market power, thereby causing consumer harm (Guidance Paper, para. 63).

The Guidance Paper (paragraph 64) lays down a presumption of predation where the dominant undertaking charges prices that are below average avoidable costs (AAC), because this is considered as a clear indicator that the dominant firm is incurring or has incurred avoidable losses. Likewise, other strategies leading to losses that could have been avoided by implementing a reasonable alternative conduct may be considered as indicator that a predatory conduct is in play.

In order to assess the likelihood of anti-competitive foreclosure and consumers harm[87] in predatory pricing the Commission relies on the as efficient competitor test (Guidance Paper,

[86] Relevant case-law on predation in the EU may be found in the following decisions: a) Judgment of the European Court of Justice, Case C-202/07 P, France Télécom SA v Commission (2009), E.C.R. I-2369; b) Judgment of the European Court of Justice, Case 62/86, Akzo Chemie v Commission (1991), E.C.R. I-3359; c) Judgment of the Court of First Instance, Case T-83/91, Tetra Pak v. Commission (1994), E.C.R. II-755. See also: Alemanno, A. & Ramondino, M. (2009, June). The ECJ France Télécom/Wanadoo Judgment. To recoup or not to recoup? That "was" the question for a predatory price finding under Article 82 EC. *European Law Reporter, n. 6,* 202-210.

[87] "…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." Guidance Paper, at para. 70

para. 67). As Rousseva has pointed out (2010, p. 406), when the dominant undertaking is pricing above the AAC and below the LRAIC, the combined reading of paragraphs 25 and 67 of the Guidance Paper suggests that under such scenario the dominant undertaking is not recovering all its fixed costs, and that even an equally efficient competitor could be foreclosed from the market.

In this case, the Commission has to undertake the assessment laid down in paragraph 20 of the Guidance Paper, also taking into account other relevant factors the dominant undertaking may have at its disposal "to influence the expectations of potential entrants and thereby deter entry"[88], such as its degree of knowledge about costs and market conditions (is it better informed than its rivals?); its ability to distort market signals about profitability; possible interest in forging a reputation of predator, etc.

5.4 Refusal to supply and margin squeeze.-

5.4.1 Refusal to supply[89] "may constitute an abuse where a dominant company acts arbitrarily, disproportionately or in the pursuit of anti-competitive aims…" (Wessely et. al, 2011, p. 77). According to the Guidance Paper (paragraph 78), it may consists in particular in: a) refusal to supply products to existing or new customers; b) refusal to license intellectual property rights, or c) refusal to grant access to an essential facility or a network.

The Guidance Paper, under paragraph 79, makes clear that actual refusal is not an imperative condition for the refusal to supply to lead to anti-competitive foreclosure;

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[88] Ibid, at para. 68

[89] For further references on refusal to supply see: a) Lidgard, H. H. (2009). Application of Article 82 EC to abusive exclusionary conduct: refusal to supply or to license. *Europarättslig Tidskrift 12(4,)* 701-702; b) Judgment of the European Court of Justice, Joined Cases C-68/06 to C-478/06, Sót. Lelos kai Sia and others v. GlaxoSmithKline (2008), E.C.R. I-7139; c) Judgment of the European Court of Justice, Case C-418/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG (2004), E.C.R. p. I-5039; d) Judgment of the CFI, Case T-201/04, Microsoft Corp. v. Commission (2007), E.C.R. II-3601; e) Judgment of the Court of First Instance, Joined Cases 6/73 and 7/73 Istituto Chemioterapico Italiano and Commercial Solvents v. Commission (1974), E.C.R. 223.

"constructive refusal" (i.e., to unduly delay or otherwise degrading the supply of a product, or imposing unreasonable conditions in return for the supply), could lead to competitive harm as well.

The assessment of refusal to deal is built on the verification of three conditions laid down in the Guidance Paper (para. 81). If these conditions are all met, the Commission considers refusal to deal cases as an enforcement priority. The assessment should be applied as follows:

i. *The refusal must relate to a product or service that is objectively necessary for competitors to be able to compete effectively on a downstream market*: is the input under control of/produced by the dominant undertaking indispensable for other rivals to be able to compete in the downstream market? Could competitors effectively duplicate the input produced by the dominant undertaking in the foreseeable future?[90]

ii. *The refusal should be likely to lead to the elimination of effective competition on a downstream market*: if the input is indispensable[91] and the dominant undertaking has previously supplied it, the "refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market" (Guidance Paper, para. 85).

iii. *The refusal should be likely to lead to consumer harm*: do the likely negative consequences of the refusal to supply outweigh over time the negative consequences of imposing an obligation to supply on the dominant undertaking? Are competitors foreclosed by the dominant undertaking prevented from bringing innovative goods or services to market, or is innovation stifled? (Guidance Paper, para. 87).

[90] See Guidance Paper, at para. 83

[91] "…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 the least in the long-term- the negative consequences of the refusal." Guidance Paper, at para. 83

5.4.2. Price squeeze or margin squeeze[92], according to Grout (2003, p. 71), is "a situation where a vertically integrated company sets a high price for its upstream supply to downstream competitors while setting its own retail price so low as to exclude or significantly chill the downstream competition."

According to the Guidance Paper (paragraph 80), the Commission should apply the "as efficient-competitor test" for the assessment of margin-squeeze cases. In brief, the Commission has to ascertain whether the prices charged by the dominant undertaking in the upstream and downstream markets preclude even an equally efficient competitor from trading the same product in the downstream market on a lasting basis.

[92] For further reference on margin squeeze see: a) Hou, L. (2011). Some aspects of price squeeze within the European Union: A case law analysis. *European Competition Law Review 32(5)*, 250-257; b) Bjorgan, P.A. (2008, September). Margin squeeze as an abuse under Article 82 EC ("Deutsche Telekom AG v Commission of the European Communities", CFI of 10 April 2008, T-271/03). *European Law Reporter n. 9*, 289-295; c) Judgment of the European Court of Justice, Case C-543/09, Deutsche Télékom v Bundesrepublik Deutschland (2011), not yet reported; d) Commission Decision 88/518 of 18 July 1988 in case IV/30.178 Napier Brown v. British Sugar (OJ L 284, 19.10.1988, p. 41–59); d) Commission Decision of July 2007 in case COMP/38.784 Wanadoo España v. Telefónica (OJ C 83, 2.4.2008, p. 6–9).

REFERENCE LIST

DG Competition Discussion Paper on the application of Article 82 of the TFEU to exclusionary abuses (Dec. 2005). Retrieved on October 11, 2011, from http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf

European Commission (1997). Commission notice on the definition of relevant market for the purposes of Community competition law. Official Journal C 372, 09/12/1997).

European Commission (Dec. 2009). 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. OJ C/45, 24.2.2009.

Federico, G. (2011). Tomra v Commission of the European Communities: Reversing progress on rebates? *European Competition Law Review*, 32(3), 139-141.

Geradin, D., Petit, N., Walker, M., Hofer, P. & Louis, F. (2005, July). *The Concept of Dominance in EC Competition Law*. Global Competition Law Center. Retrieved September 11, 2011, from http://ssrn.com/abstract=770144

Grout, Paul A. (2003). Defining a Price Squeeze in Competition Law. In Swedish Competition Authority (Ed.), *The Pros and Cons of Low Prices*. Retrieved Nov. 8, 2011 http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/Pros&Cons/rap_pros_and_cons_low_prices.pdf

International Competition Center (ICN) (2011, May). *Unilateral Conduct Workbook Chapter 3: Assessment of Dominance*. The Hague, Netherlands. Retrieved Sep. 9, 2011 from http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf

Kavanagh, J., Marshall, N. & Niels, G. (2009). Reform of Article 82 EC-can the law and the economics be reconciled? In A. Ezrachi (Ed.), *Article 82 EC: Reflections on its Recent Evolution* (pp. 1-17). Portland, Oregon: Hart Publishing.

Kjolbye, L. (2010). Rebates under Article 82 EC: Navigating uncertain waters. *European Competition Law Review, 31(2)*, 66-80.

Llanos, I. (2009). Categorical thinking in Competition law and the effects-based approach in Article 82 EC. In A. Ezrachi (Ed.), *Article 82 EC: Reflections on its recent evolution* (pp. 19-49). Portland, Oregon: Hart Publishing.

Majumdar, A. (2006). Whither dominance? *European Competition Law Review, 27(4)*,161-165.

Organization for Economic Co-operation and Development (OECD). Policy Brief (June 2006). *What is Competition on the Merits?* Retrieved October 5, 2011, from http://www.oecd.org/dataoecd/10/27/37082099.pdf

OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy (1998). *Buying power of multiproduct retailer* (DAFFE/CLP(99)21). Retrieved October 6, 2011, from http://www.oecd.org/dataoecd/1/18/2379299.pdf

Papandropoulos, P. (2008). Implementing an effects-based approach under Article 82. *Concurrences n. 1-2008*, 1-10.

Petit, N. (2009). From formalism to effects? The Commission´s communication on enforcement priorities in applying Article 82 EC. *World Competition 32(4)*, 485-503.

Report by the Economic Advisory Group for Competition Policy (EAGCP) (2005, July). *An Economic Approach to Article 82.* Retrieved October 30, 2011, from http://ec.europa.eu/dgs/competition/economist /eagcp_ july_21_05.pdf

Rousseva, E. (2010). *Rethinking exclusionary abuses in EU competition law*. Oxford: Hart Publishing.

Van Damme, E., Larrouche, P. & Müller, W. (2006, August). *Abuse of a dominant position: cases and experiments* (discussion paper 2006-020). Tilburg Law and Economic Center, Tilburg University. Retrieved September 1, 2011, from http://ssrn.com/abstract=925626

Van Bael & Vellis (2009). *Competition Law of the European Community*. The Hague: Kluwer Law International.

Wessely, T. & Horstkotte, C. (2011). European Union. In *Global Competition Review*, 7th. Edc., Dominance – The Regulation of Dominant Firm Conduct in 35 Jurisdictions Worldwide. Law Business Research Ltd, London, p. 72-80.

CASE-LAW

Judgment of the European Court of Justice, Case 85/76, Hoffmann-La Roche v. Commission, (1979) E.C.R. 461.

Judgment of the European Court of Justice, Case 27/76, United Brands Company v. Commission (1978) E.C.R. 207.

Judgment of the Court of First Instance, Case T-62/98, Volkswagen AG v Commission (2000) ECR II-2707.

Judgment of the European Court of Justice, Case C-6/72, Europemballage Corporation and Continental Can Company Inc. v Commission, (1973), E.C.R. 215.

Judgment of the Court of First Instance, Case T-139/98, Amministrazione Autonoma dei Monopoli di Stato (AAMS) v. Commission (2001), E.C.R. II-3413.

Judgment of the European Court of Justice, Case C-62/86, AKZO Chemie v. Commission (1991), E.C.R. I-3359, paragraph 60.

Judgment of the Court of First Instance, Case T-30/89 Hilti v. Commission (1991), E.C.R. II-1439.

Judgment of the Court of First Instance, Case T-83/91, Tetra Pak v. Commission (1994), E.C.R. II-755.

Judgment of the Court of First Instance, Joined Cases T-191/98, T-212/98 to T-214/98, Atlantic Container Line AB and Others v. Commission (2003), E.C.R. II-3275.

Judgment of the Court of First Instance, Case C-95/04 P, British Airways PLC v. Commission (2007), E.C.R. II-5917.

Judgment of the General Court, Case T-57/01, Solvay v. Commission (2009), E.C.R. 4621.

Judgment of the General Court, Case T-155/06, Tomra Systems and others v. Commission (2010), not yet reported.

Commission Decision of 20 June 2001, Michelin (II), O.J. L143/1 (2002).

Judgment of the Court of First Instance, Case T-203/01, Manufacture Française des Pneumatiques Michelin v. Commission (2003), E.C.R. II-4071.

Judgment of the Court of First Instance, Case T-62/98 Volkswagen AG v Commission (2000), E.C.R. II-2707.

Judgment of the Court of First Instance, Case 322/81, Nederlandsche Baden-Industrie Michelin v. Commission (Michelin I) (1983), E.C.R. 3461.

Judgment of the Court of Justice, Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB (2011), not yet reported.

Judgment of the European Court of Justice, Case 280/08 P, Deutsche Telekom AG v. Commission (2010), not yet reported.

Judgment of the Court of First Instance, Case T-111/96, ITT Promedia v. Commission (1998), E.C.R. II-2937.

Judgment of the Court of First Instance, Case T-201/04, Microsoft Corp. v. Commission (2007), E.C.R. II-3601.

Judgment of the Court of First Instance, Case T-340/03, France Télécom SA v. Commission (2007), E.C.R. II-107.

Judgment of the Court of First Instance, Case T-228/97, Irish Sugar v. Commission (1999), E.C.R. II-2969.

Judgment of the European Court of Justice, Case C-333/94, Tetra Pak International SA v Commission (1996), E.C.R. I-5951.

Judgment of the European Court of Justice, Case C-543/09, Deutsche Télékom v Bundesrepublik Deutschland (2011), not yet reported.