*Common Market Law Review* **42:** 129–177, 2005.


# HOW TO DISTINGUISH GOOD FROM BAD COMPETITION UNDER ARTICLE 82 EC: IN SEARCH OF CLEARER AND MORE COHERENT STANDARDS FOR ANTI-COMPETITIVE ABUSES

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## 1. Introduction

EC competition law has changed dramatically over the last ten years. Under the aegis of outgoing commissioner Mario Monti and his predecessor Karel van Miert, major reforms[1] regarding enforcement of Article 81 EC and merger control were initiated and ultimately completed.[2] In striking contrast, Article 82 EC has so far largely escaped the revisionary zeal of DG Competition.[3] As the attention of the antitrust community was focused on Article 81 EC and merger control reforms, this fact did not, until recently, provoke much interest, let alone criticism. When those projects were completed, the attention of competition law practitioners and academics returned to abuse control, in particular to anti-competitive abuses.[4] While this debate has not

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1. These reforms comprise a comprehensive policy review in the field of Art. 81 EC, leading to the adoption of new guidelines, notices and group exemption regulations in the areas of vertical restraints, horizontal restraints and technology transfer agreements. In addition, the new procedural Regulation 1/2003, O.J. 2003, L 1/1, along with a number of Commission notices brought about very significant changes of the antitrust enforcement regime, featuring first and foremost a much discussed directly applicable exemption system.

2. See Wils, "Community Report", in FIDE, *The Modernization of EU Competition Law in the EU – FIDE 2004 National Reports* (Cambridge, 2004), 661. In addition, a new Merger Control Regulation, accompanied by a number of new guidelines was adopted, introducing a new substantive test and crucial procedural and jurisdictional changes.

3. Regulation 1/2003, replaces Regulation 17/62 also with regard to Art. 82 EC but did not bring about any significant changes as to that provision, neither as regards procedure (the elimination of the notification system is irrelevant for abuse control) nor substance (in particular, the new supremacy rule in Art. 3 does not apply to abuse control as far as unilateral conduct is concerned).

4. The discussion on whether and to what extent the interpretation and application of Art. 82 EC was also in need of some kind of modernization seems to have been launched by the 8th EU Competition law and policy workshop in Florence, was continued at the 2003 Fordham Proceedings and has since then been subject of various others seminars and symposiums. At

yet produced a discernible reaction from the European Courts, it is likely to influence the Commission's policy and thinking on this topic. Both Commissioner Monti and Director General Lowe recently confirmed that DG Competition has started an internal review on the policy on abuses of dominant positions which might eventually lead to the publication of guidelines.[5]

Along with a number of recent Commission decisions and judgments dealing with fundamental issues of abuse control,[6] these announcements further stimulated the academic debate on the interpretation and application of Article 82 EC. While this was the declared intention of DG Competition, it probably received more radical reform suggestions than bargained for. According to the overwhelming majority of recent contributions, a radical overhaul of abuse control with regard to anti-competitive abuses is just as imperative as was the modernization of Article 81 EC and the merger control regime.[7] Some authors even bring what many regard as the most serious charge to be raised against an interpretation of a competition provision nowadays: it is supposedly not sufficiently effects-based and in general not founded on sound economics, but is instead still influenced by those old-fashioned formalistic and legalistic principles attributed to the ordo-liberal Freiburger Schule.[8]

the time of writing the proceedings of the Florence workshop were not yet published, most manuscripts are however available at www.iue.it/RSCAS/Research/Competition/2003 (papers).shtml. With permission of the editors these papers will be cited here as follows: Author in Ehlermann and Atanasiu (Eds.), *2003 European Competition Law Annual – What Is an Abuse of a Dominant Position?* Hart Publishing, Oxford and Portland, Oregon (forthcoming). Note that page numbers and paragraphs quoted are those of these manuscripts, not those of the forthcoming book.

5. See e.g. Lowe, "DG Competition's Review of the Policy on Abuse of Dominance", (2004) Fordham Competition Law Institute (hereafter: F.C.L.I.) 2003, 163; Slot, "A view from the mountain: 40 years of developments in EC competition law", 41 CML Rev. (2004), 443, 462.

6. E.g. Commission Decision of 24 March 2004 in Case COMP/C-3/37.792 – *Microsoft* (web publication of non-confidential version available under europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf); Case T-203/01, *Michelin* v. *Commission ("Michelin II")*, judgment of 30 Sept. 2003, nyr; Case T-219/99, *British Airways* v. *Commission*, judgment of 17 Dec. 2003, nyr; C-418/01, *IMS Health* v. *NDC Health*, judgment of 29 April 2004, nyr; Commission Decision 2003/741/EC, *NDC Health/IMS Health*, O.J. 2003, L 268/69.

7. In a recent workshop on the modernization of Art. 82 EC, Ehlermann thus called the modernization of the interpretation and application of Art. 82 the "last frontier" in the pursuit of modernization of European competition law. Paradigmatic for most recent publications on this topic is the title of Sher's contribution in ECLR, calling Art. 82 "the last of the steam-powered trains": Sher, "The Last of the Steam-Powered Trains: Modernizing Article 82", (2004) ECLR, 243.

8. Kallaugher and Sher, "Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82", (2004) ECLR, 263, 268; see also Gerber, *Law and Competition in*

This essay does not fully support the theory that case law and decisional practice do not, or even should in all respects, reflect modern economic thinking. While identifying important types of potentially abusive conduct, which should indeed be evaluated under a more facts-based approach, this analysis will only rarely find fault with the outcome of Court and Commission decisions under Article 82 EC. Nonetheless, this author fully embraces the second important criticism expressed in most recent articles on the subject, namely that the decisions concerning anti-competitive abuses lack a clear and coherent conceptual basis.[9] The rather harsh critique recently levelled at the monopolization doctrine under Section 2 Sherman Act, calling fundamental standards formulated under this doctrine not just vague but vacuous,[10] to a certain extent also applies to some of the guiding principles intended to identify anti-competitive abuses.[11]

This paper thus seeks to develop a comprehensive and systematic approach for the evaluation of anti-competitive abuses of dominant positions. Its ambition is not to provide comprehensive and precise rules for the assessment of specific business practices. Instead, it attempts to establish guiding principles and an analytical framework for distinguishing aggressive, but justified and even desirable competition from conduct ultimately harming the competitive process.

*Twentieth Century Europe – Protecting Prometheus* (Oxford, 1998); Möschel, "Competition Policy from an Ordo Point of View", in Peacock and Willgerodt, *German Neo-Liberals and the Social Market Economy* (London, 1989), at p. 142.

9. See Sher, op. cit. *supra* note 7, 243.

10. Elhauge, "Defining better monopolization standards", (2003) *Standford Law Rev.*, 254, 255.

11. See e.g. Case 27/76, *United Brands* v. *Commission*, [1978] ECR 207, para 189: "Whilst the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and [whilst] such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it"; Case 322/81, *Nederlandsche Banden Industrie Michelin* v. *Commission ("Michelin I")*, [1983] ECR 3461, para 57: "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"; Case 6/72, *Europemballage and Continental Can* v. *Commission*, [1973] ECR 215, para 26: "Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition"; Case T-83/91, *Tetra Pak* v. *Commission*, [1994] ECR II-755, para 147: "Although Community competition law recognizes that an undertaking in a dominant position has the right to take reasonable steps to protect its commercial interests, it does not countenance acts whose actual purpose is to strengthen that dominant position and abuse it ".

The structure and basic findings of this paper are as follows. The analysis is premised on the assumption that decisive contours of the concept of anti-competitive abuse can be derived already from the basic objective of Article 82 EC, as clearly set out in the Treaty: the protection of competition against distortions arising from significant market power. This objective underlines the significance and, even more importantly, determines the content of the causation requirement. Interpreted correctly in the light of the fundamental purpose of abuse control, this element of Article 82 EC holds the key to identifying of two basic types of anti-competitive abuses. The first category comprises business conduct characterized by the instrumental use of market power to achieve certain commercial goals (most importantly the transfer or extension of market power to a connected market). The second category includes normal business conduct, practisable and practised also by non-dominant firms, which however brings about an undesired result, namely an alteration of the market structure and an interference with the dynamics of competition, either on the supply side (through the elimination of competitive restraints) or on the demand side (through the manipulation of demand patterns). This structural effect is a necessary element of this type of abuse, and must therefore be established by a prosecutor or plaintiff; it is, however, not sufficient to trigger the prohibition in Article 82 EC. *Prima facie* normal business conduct which impacts the market mechanism (or has the potential to do so) should be considered abusive only if it can be shown that this was at least one of the objectives pursued by the practice.

## 2. Objectives of Article 82 EC

### 2.1. *Protection of undistorted competition*

Article 82 EC is a central provision of the competition regime established by the EC Treaty. It is one of the pillars of the "system ensuring that competition in the internal market is not distorted", set down in Article 3(1)(g) EC.[12] This is generally understood as a system in which superior business performance should be the decisive factor for the success of an undertaking (prin-

12. In *Continental Can* the Court underscored the importance of Art. 3(1)(g) for the interpretation of Art. 82. It rejected the applicant's argument that this provision merely contained a general programme devoid of legal effect, referring to the fact that Art. 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Communities' task (para 23). In another passage (para 25) the Court declared that the obligation to observe the basic objectives of the Treaty, in particular that of Art. 3(1)(g) resulted from the obligatory force of these objectives.

ciple of competition on the merits; *Leistungswettbewerb*). In such a system, efforts of business to anticipate and satisfy consumers' needs in the best possible fashion are stimulated and rewarded, thus also assuring the most efficient use of scarce resources. As was already explained in *Continental Can*, Articles 81 and 82 EC safeguard this objective at different levels. While Article 81 EC concerns various forms of coordination of conduct between undertakings, Article 82 EC concerns unilateral activities potentially disturbing the goal of maintaining effective and undistorted competition.[13] In this spirit, in *Michelin I* the Court emphasized that a dominant firm "has a special responsibility not to allow its conduct to impair undistorted competition on the common market".[14]

This objective defines the basic function of Article 82 EC, namely to shield competition from possible distortions associated with single firm market power. Article 82 EC thus is not primarily, or at least not exclusively, concerned with ensuring that dominant firms compete on the merits.[15] Its purpose is also to ensure that the exercise of market power does not *impair competitors' possibilities* to succeed or prevail on the market on the basis of superior business performance.[16]

### 2.2. *Significance of consumer harm and efficiencies*

It is safe to assume that the main goal of Article 82 EC is to protect the competitive process,[17] and to this extent also the opportunities of competitors to compete on the merits. This objective, and the efficiencies presumed to be associated with such a system of undistorted competition, are however not a goal in themselves but are ultimately pursued for the benefit of the consumer.[18] It is largely undisputed that consumer protection in the context of

13. *Continental Can*, cit. *supra* note 11, para 25.

14. *Michelin I*, cit. *supra* note 11, para 57; see also the Commission in Decision 97/624/EC, *Irish Sugar plc*, O.J. 1997, L 258/1, para 134: "The maintenance of a system of effective competition does, however, require that competition from undertakings ... be protected against behaviour by the dominant undertaking designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power".

15. Although a correct application of Art. 82 EC would prohibit most types of non-performance related practices.

16. See also Lowe, op. cit. *supra* note 5, 169.

17. See Gyselen, "Rebates: Competition on the merits or exclusionary practice?", in Ehlermann and Atanasiu, op. cit. *supra* note 4, para 10; Fox, "Abuse of dominance and monopolization: How to protect competition without protecting competitors", in ibid.; Fox, "We protect Competition, You Protect Competitors", (2003) World Comp., 149, 155.

18. See Gyselen, op. cit. *supra* note 17, para 8; Fox, "Monopolization and dominance in the US and the EC: Efficiency, opportunity, and fairness", (1986) *Notre Dame Law Rev.*, 1004;

EC competition law is not to be equated with consumer welfare in the Chicago sense (i.e. the "total wealth of the nation"[19]), but is concerned with the consumer in the literal sense.[20] What is not yet settled, however, is whether direct consumer harm should be considered to be a requirement for finding an abuse, and, correspondingly, the absence of it a valid defence against an abuse charge.[21] For anti-competitive abuses, the answer must be negative.

As has been repeatedly confirmed by the Court, Article 82 EC applies not only to practices directly damaging consumers, but also to conduct which is detrimental to them through their impact on an effective competition structure as laid down in Article 3(1)(g) EC.[22] This clearly indicates that (potential) consumer harm is a constitutive element only for practices directly hurting consumers, i.e. for the prohibition of exploitative abuses where Article 82 EC substitutes the insufficient constraints of Adam Smith's invisible hand of competition by the rather more visible hand of public intervention.[23]

Peeperkorn, "IP licences and competition rules: Striking the right balance", (2003) World Comp., 527, 528; see e.g. the speeches by Commissioner Monti, "Competition for Consumers' Benefit", European Competition Day, Amsterdam, 22 Oct. 2004; "Proactive Competition Policy and the Role of the Consumer", European Competition Day, Dublin, 29 April 2004; "Competition Enforcement and the Interests of Consumers – a stable link in times of change", European Competition Day, Athens, 14 Feb. 2003; "Competition in a Social Market economy", Conference of the European Parliament and the European Commission on Reform of European Competition law, Freiburg, 9/10 Nov. 2000, 3; all available at www.europa.eu.int/comm/competition/speeches/index_speeches_by_monti.html; see also Jones and Sufrin, *EC Competition Law* (Oxford, 2004), at p. 15; Goyder, *EC Competition Law* (Oxford, 2003), at p. 9.

19. See Bork, *The Antitrust Paradox – A Policy at War With Itself* (New York, 1978), p. 90–91.

20. Jones and Sufrin, op. cit. *supra* note 18, pp. 39 et seq.

21. In favour e.g. Temple Lang, "Anticompetitive Abuses under Article 82 Involving Intellectual Property Rights", in Ehlermann and Atanasiu, op. cit. *supra* note 4, at p. 38; cf. also Vickers, "Abuse of Market Power", Speech to the 31st conference of the European Association for Research in Industrial Economics, Berlin, 3 Sept. 2004, p. 21, available at www.oft.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5–B0FA-B25214DE6199/0/spe0304.pdf

22. Cf. *Continental Can*, cit. *supra* note 11, para 26; Case 85/76, *Hoffmann-La Roche* v. *Commission*, [1979] ECR 461, paras. 89 et seq and 125; *British Airways*, cit. *supra* note 6, para 244; Joined Cases 40–48/73, 50/73, 54–56/73, 111/73, 113 & 114/73, *Suiker Unie and Others* v. *Commission*, [1975] ECR 1663, para 518; *Michelin I*, cit. *supra* note 11, para 71; Case T-65/89, *BPB Industries and British Gypsum* v. *Commission*, [1993] ECR II-389, para 120; Case T-54/99, *max.mobil Telekommunikation* v. *Commission*, [2002] ECR II-313, para 52; Case T-228/97, *Irish Sugar* v. *Commission*, [1999] ECR II-2969, para 232; also *IMS Health*, cit. *supra* note 6, para 48; Drexl suggests explaining such consumer emphasis with the concept of dynamic efficiency, "Intellectual property and antitrust law – IMS Health and Trinko – Antitrust placebo for consumers instead of sound economics in refusal-to-deal cases", (2004) *International Review of Intellectual Property and Competition Law* (IIC), 788, 802, 804 et seq.

23. Ruppelt, "Abuse control: Objectives, restrictive practices and institutions", in Ehlermann and Atanasiu, op. cit. *supra* note 4.

The very notion of exploitation presupposes actual or potential damage inflicted on the consumer.

For anti-competitive abuses, on the other hand, consumer protection or the prevention of consumer harm is clearly an important – if not the decisive – *rationale* of abuse control.[24] However, it is not a necessary component of this type of abuse.[25] The protection of the competitive process is motivated by the idea that consumers are best served if firms are forced to compete, and are at the same time protected in their efforts to compete on the merits.[26] The reason for prohibiting distortions of the competitive process by the use of market power as such, i.e. without requiring proof of actual consumer harm, is, as was recently observed by Fox,[27] none other than the reason why competition regimes have been instituted in more than 100 countries to date in the first place: it is the assumption that competition is the best way to get quality goods at the lowest prices, and the best way to stimulate business to behave responsively.[28]

The underlying logic may of course be questioned, but there is no doubt that in the EU this is the approach dictated by the law, or, to be more precise, by a combined reading of Articles 82 and 3(1)(g) EC.[29] This conclusion is not contradicted by the explicit mention of consumer harm in Article 82(b) EC.[30] While it is true that this provision is now used as a legal basis also for condemning conduct that hinders the production of competitors,[31] the refer-

24. *Continental Can*, cit. *supra* note 11, para 26; *Suiker Unie*, cit. *supra* note 22, paras. 526 et seq.; *Irish Sugar*, cit. *supra* note 22, para 111.

25. Cf. Sinclair, "Abuse of dominance at a crossroads: Potential effect, object and appreciability under Article 82 EC", (2004) ECLR, 491, 494.

26. See also Lowe, op. cit. *supra* note 5, 169; Gyselen, op. cit. *supra* note 17, para 10; Sinclair, op. cit. *supra* note 25, 494.

27. Fox in Ehlermann, op. cit. *supra* note 17, 4.

28. See also Monti, "European Competition policy for the 21st century", (2001) F.C.L.I. 2000, 257: "Since its adoption more than forty years ago, the Treaty acknowledges the fundamental role of the market and of competition in guaranteeing consumer welfare, encouraging the optimal allocation of resources and granting to economic agents the appropriate incentives to pursue productive efficiency, quality and innovation".

29. Cf. also Gerard, "Merger control policy: How to give meaningful consideration to efficiency claims?", 40 CML Rev. (2003), 1367–1412, at 1380.

30. See however Temple Lang, op. cit. *supra* note 21, 38.

31. Joined Cases 6 & 7/73, *Commercial Solvents* v. *Commission*, [1974] ECR 223, para 25; Case 53/87, *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar* v. *Régie nationale des usines Renault*, [1988] ECR 6039, para 16; Case 238/87, *Volvo* v. *Veng*, [1988] ECR 6211, para 9; Cases C-241/91 P & C-242/91 P, *RTE and ITP* v. *Commission ("Magill")*, [1995] ECR I-743, para 54; Commission Decision 89/113/EEC, *Decca Navigator System*, O.J. 1989, L 43/27, paras. 97 et seq.; Commission Decision 92/213/EEC, *British Midland* v. *Aer Lingus*, O.J. 1992, L 96/34, para 25; Commission Decision *Irish Sugar*, cit. *supra* note 14, paras. 120 et seq.

ence to consumer harm is to be explained by the particular nature of this abuse in its core meaning, which is the reduction of the own output of the dominant firm. In this context the consumer harm requirement is a sensible, and indeed necessary, qualification preventing the prohibition to be applied to all limitations of the firm's own output. It cannot be assumed that the mention of consumer harm in this particular example of a market power abuse is meant to alter the basic concept of abuse control in the sense that proof of immediate consumer harm, in addition to proof of the relevant conduct being distortive of competition, should be a general prerequisite for anti-competitive abuses.[32]

The argument made above with regard to consumer harm *mutatis mutandis* also applies to efficiencies, which many commentators would also like to see playing a more important role in the analysis of anti-competitive conduct.[33] It is corroborated by the fact that, contrary to the consumer protection goal, it is doubtful whether efficiency gains as such, i.e. irrespective of the ultimate beneficiary, can be considered an objective of Article 82 EC, or for that matter of the EC competition regime, in the first place.[34] The prohibition of exploitative abuses in Article 82 EC, and the fact that Article 81(3) EC makes exemptions subject to the passing on of efficiency gains to the consumer, both point to the contrary. As a result, such efficiency gains, or evidence of the practice increasing output, cannot be considered a redeeming virtue *per se*. However, efficiencies are relevant in the evaluation of potentially abusive conduct. One of the central arguments developed in this essay is that for certain anti-competitive abuses, i.e. abuses concerning the market structure, a crucial, and indeed constitutive, element is the intent of the firm, or the aim of the business practice. In this particular context, a credible claim that the conduct was intended to increase own efficiencies[35]

32. To disregard immediate consumer harm as constitutive element of anti-competitive abuses, by the way, cuts both ways. Certain business practices, e.g. a refusal to deal, may clearly harm consumers in the short run as they prevent short-term competition from arising. The decisive question, however, must remain whether the practice distorts competition through an abuse of market power. This is ultimately also what will determine whether the consumer would benefit in the long run, in which lower prices brought about by the opening up of monopolies or dominant positions through interventions based on Art. 82 may be outweighed by disadvantages such us discouragement of investment.

33. E.g. Sher, op. cit. *supra* note 7, 243; Kallaugher and Sher, op. cit. *supra* note 8, 281; Temple Lang, op. cit. *supra* note 21, 29.

34. See Fox, op. cit. *supra* note 18, 985.

35. For a detailed analysis of efficiency claims in the context of merger control see Gerard, op. cit. *supra* note 29, 1367.

or to improve the profitability of a certain product, should be of decisive importance.[36]

### 2.3. *Role of economic analysis*

At this point it is opportune to consider the role of economic doctrine in defining the concept of abuse, and more specifically in the analysis of business conduct under Article 82 EC. As was mentioned before, most recent contributions on the reform of abuse control propose that the decisional practice in this area be based more on sound economics.[37] It is submitted that this argument is only well-founded as far as micro-economic insights are concerned.[38] Economic analysis, in particular macro-economic doctrine, is correctly denied any decisive influence regarding the determination of the normative content of the prohibition laid down in Article 82 EC. The decision of the founding fathers to proscribe behaviour which distorts competition is, in other words, not subject to the proviso that this conduct is also economically inefficient or welfare reducing. As this is a legal concept, economic theory should not even be taken into consideration in determining what a distortion of competition is. This would not only be wrong in principle, but also exceedingly difficult in practice. As was emphasized recently by Pitkofski, there are limits as to what enforcement officials, judges (and competition counsel) can, as a practical matter, deal with in terms of economic complexity.[39] If business conduct were in each case to be evaluated in accordance with, and the outcome of an abuse case were to be determined by, the macro-economic consequences of the conduct in terms of allocative, productive and dynamic efficiencies, the ensuing legal uncertainty would be substantial.

There is, however, still ample scope for an increased role of economic analysis in the application of Article 82 EC. First, as is the case with competition rules generally, this provision regulates business conduct. Article 82 EC is to be applied to facts which are economic in nature. A correct application of the law therefore requires a sound understanding of these acts. Second, as will be explained in more detail below,[40] abuse control should also

36. See *infra* 7.2.
37. E.g. Kallaugher and Sher, op. cit. *supra* note 8, 272.
38. Cf. also Hutchings, "The competition between law and economics", (2004) ECLR, 531; for a more general view, see Fox, "The 1982 Merger Guidelines: When Economists are Kings?", 71 Cal. Law Rev. (1983), 281.
39. Pitofski, "Policy objectives of competition law and enforcement", in Ehlermann and Atanasiu, op. cit. *supra* note 4, 5.
40. See *infra* 7.

relate to "normal" behaviour (i.e. behaviour not considered problematic under other standards) if it produces a certain effect, namely an alteration of the structure of the market and the dynamics of competition. A prognosis of such effects must indeed be based on sound economics. Third, with regard to that type of anti-competitive abuse, this study will attempt to demonstrate that intent is a decisive element.[41] The plausibility of a certain business justification brought forward to deny anti-competitive intent will often be impossible to verify by even a trained competition lawyer's common economic sense alone. Frequently, therefore, more sophisticated micro-economic expertise may be necessary to judge alleged non-predatory or non-exclusionary business explanations for suspicious conduct, and will thus critically influence the legal analysis under Article 82 EC.

### 2.4. *Other objectives*

Whether Article 82 EC has further objectives is unclear. It is largely undisputed, however, that the protection of competitors is, in itself, not an objective. The ECJ and the Commission are occasionally charged with pursuing this goal, at least as a hidden agenda,[42] and this point is usually made by reference to cases like *Hugin* and *Commercial Solvents*. Apart from being somewhat dated, these cases are not conclusive in this respect. While the immediate effect of these cases (and other essential facility type cases dealt with below[43]) undoubtedly was to protect competitors from exclusion, it cannot be simply assumed that this, and not the safeguard of the competitive process, was the underlying rationale of these decisions. A similar, but ultimately different, issue is whether Article 82 EC, like Section 19 GWB (*Gesetz gegen Wettbewerbsbeschränkungen*),[44] the corresponding German provision, also aims at protecting trading partners of the dominant firm who are dependent on its supplies or purchases. This would appear be in line with the definition of dominance used more and more frequently in recent years, namely the reference to the characteristic of the dominant firm as an obligatory trading partner. It is, however, not evident whether this conduct, which neither constitutes an exploitation of consumers nor a hindrance of competi-

41. See *infra* 7.2.

42. See e.g. Sher, op. cit. *supra* note 7, 244; Goyder, op. cit. *supra* note 18, 9; Korah, *EC Competition Law and Practice* (Oxford, 2000), at p. 11; Jones and Sufrin, op. cit. *supra* note 18, p. 17; Bellamy and Child, *European Community Law of Competition* (London, 2001), at p. 42; Slot, op. cit. *supra* note 5, 462.

43. See *infra* 6.2.

44. BGBl I 1998, 2521, as amended, English version available at www.bundeskartellamt.de/wDeutsch/download/pdf/02_GWB_e.PDF

tors, would really fit in the general scheme of abuse control under Article 82 EC.

As regards non-competition related EC objectives which were occasionally considered under Article 81(3) EC,[45] direct conflicts between abuse control and the relevant Treaty goals may, at first sight, not be readily apparent. Closer analysis however shows that, as is the case under Article 81(3) EC, certain of these objectives, especially environmental and safety concerns, may either justify otherwise abusive conduct, or may provide an alternative explanation for certain practices and thus disprove intent.

### 2.5. *Scope of the prohibition to discriminate*

With regard to the objectives and basic content of Article 82 EC, a last clarification is required. Certain judgments[46] suggest that dominant firms are under a general duty to treat all their business partners in an equal and non-discriminatory fashion.[47] It is submitted that this is incorrect. Given the central objective to prevent distortions of competition connected with market power, Article 82(c) EC unsurprisingly expressly prohibits the application of dissimilar conditions to equivalent transactions with their trading partners to the extent that this distorts secondary line competition (i.e. competition between these customers).[48] In view of that goal, it must furthermore be considered abusive if the dominant firm, e.g. with regard to access pricing[49] (and with a view to applying a price-squeeze), discriminates between its own subsidiaries (branches or divisions) and its competitors on the downstream market.[50] The application of different prices for different categories of cus-

45. For a representation of these cases see e.g. Jones and Sufrin, op. cit. *supra* note 18, pp. 232 et seq.; or Whish, *Competition Law* (London, 2003), at pp. 126 et seq.

46. E.g. *United Brands*, cit. *supra* note 11, paras. 227 et seq.

47. In this sense also Kleinmann, "Rabattgestaltung durch marktbeherrschende Unternehmen", (2002) *Europäisches Wirtschafts- und Steuerrecht* (EWS), 466.

48. E.g. *Suiker Unie*, cit. *supra* note 22, para 523; *Michelin I*, cit. *supra* note 11, para 87; *Irish Sugar*, cit. *supra* note 22, paras. 140 and 218; *British Airways*, cit. *supra* note 6, paras. 233 et seq.; a more recent application of this rule can be found in Case C-82/01 P, *Aeroports de Paris* v. *Commission*, [2002] ECR I-9297.

49. However regarding access to essential facilities only. Here, "[a]n undertaking in a dominant position may not discriminate in favour of its own activities in a related market", Commission Decision 94/19/EC, *Sea Containers* v. *Stena Sealink*, O.J. 1994, L 15/8, para 66 and the case law cited there.

50. See e.g. Notice on the application of the competition rules to access agreements in the telecommunications sector, O.J. 1998, C 265/2, para 86; Nihoul and Rodford, *EU Electronic Communications Law* (Oxford, 2004), pp. 374 et seq.

tomers might also be indicative of an exploitation of customers paying the higher price.[51]

The objectives of Article 82 however neither mandate nor justify obliging dominant firms to avoid every single unequal treatment in their dealings with customers beyond those three situations where unequal treatment may influence the competitive process.[52] As a result, different prices or conditions displaying none of those distortive effects run counter to the prohibition in Article 82 EC only if they are to be considered abusive under other abuse standards.[53] Conduct considered legitimate (if not desired) competition on the merits should therefore not be prohibited under Article 82 EC merely because it may somehow be discriminatory.[54] Selective price cuts or price discrimination, for example, which do not distort competition between customers or between the dominant firm and downstream competitors, or which do not indicate exploitation, should be deemed abusive only if they are also anti-competitive under the standards discussed below.[55]

## 3. The nexus between dominance and abuse: The issue of causation

### 3.1. *Is there a causation requirement in Article 82 EC?*

Causation seems to be a settled issue these days. There is virtually no discussion in current legal writing on this topic any more,[56] and even in more ex-

51. See Jones and Sufrin, op. cit. *supra* note 18, p. 409; Commission Decision 88/138 EEC, *Eurofix-Bauro* v. *Hilti*, O.J. 1988, L 65/19, e.g. para 81. In *United Brands*, cit. *supra* note 11, para 260 et seq., however, the Court clarified that even significant price discrimination is proof of excessive prices only if it is shown that lower prices were also profitable.

52. See also Schröter in Schröter, Jakob and Mederer, *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), Art. 82, para 230.

53. And, of course, if they discriminate according to nationality; see e.g. Case 7/82, *GVL* v. *Commission*, [1983] ECR 483, para 56; *Tetra Pak*, cit. *supra* note 11, para. 173. There are, however, limits to the duty of equal treatment of nationals of different Member States: Case T-504/93, *Ladbroke* v. *Commission*, [1997] ECR II-923, para 124 (for a critical comment see Korah, "The Ladbroke Saga", (1998) ECLR, 169, 171).

54. See also O'Donoghue, "Over-regulating lower prices: Time for a rethink on pricing abuses under Article 82 EC", in Ehlermann and Atanasiu, op. cit. *supra* note 4, pp. 6 et seq.

55. Cf. Temple Lang, "Anticompetitive non-pricing abuses under European and national Antitrust law", (2004) F.C.L.I 2003, 235, 246, 250; Temple Lang, op. cit. *supra* note 21, 37 et seq.; Ridyard, "Exclusionary pricing and price discrimination abuses under Article 82: An economic analysis", (2002) ECLR, 286, 296; O'Donoghue, op. cit. *supra* note 54, p. 7. In this sense also Commission Decision 89/22/EEC, *BPB Industries plc*, O.J. 1989, L 10/50, at para 133.

56. The most detailed and thoughtful analysis was published in this review a while ago:

tensive commentaries usually only short chapters are dedicated to this question. There seems to be near unanimous agreement in the antitrust community that a causation requirement does not exist, notwithstanding the language of Article 82 EC, which prohibits abuses of dominant positions and not abusive behaviour by dominant firms.[57] The underlying concern appears to be that the introduction of this element would lead to a severe limitation of the scope of abuse control, potentially excluding most if not all types of anti-competitive conduct. These qualms would of course not justify the rejection of a causation requirement. Scholars advocating this position however also rely on two ECJ judgments which indeed seem to categorically rebut causation. In *Continental Can* the Court considered the question of the link of causality raised by the applicants as irrelevant, arguing that the strengthening of a dominant position may be an abuse regardless of the means and procedures by which this is achieved. In *Hoffman-LaRoche* the Court seemed to be even clearer in this respect. It reasoned that "the interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted".[58] In *AKZO* the Commission endorsed this position.[59]

A closer reading of *Continental Can* and *Hoffmann-La Roche*, however, reveals that these judgments by no means reject the causation requirement as such. They only dismiss a rather narrow variant of it, namely a strictly causal nexus between dominance and abuse where the economic power associated with the dominant position constitutes the instrument for the perpetration of the abuse.[60] The rejection of such a narrow causation concept is of little surprise, as this would indeed exclude most, though not all, important anti-competitive abuses from the scope of abuse control.[61] The economic power

Vogelenzang, "Abuse of a dominant position in Article 86: The problem of causality and some applications", 13 CML Rev. (1976), 62.

57. Compare Ritter, Braun and Rawlinson, *European Competition Law: A Practitioners's Guide* (The Hague, 2000), p. 354; Bellamy and Child, op. cit. *supra* note 42, at p. 719; Jones and Sufrin, op. cit. *supra* note 18, p. 278.

58. *Hoffmann-La Roche*, cit. *supra* note 22, para 91.

59. In Commission Decision 85/609/EEC, *ECS/AKZO*, O.J. 1985, L 374/1, para 41, the Commission stated that "contrary to the literal sense of Article 86 of the EEC Treaty, there need not be any relationship of cause and effect between the dominant position and its abusive exploitation. In particular, Article 86 does not require that the dominant undertaking in the market should have used its economic power to bring about the abuse."

60. See also Vogelenzang, op. cit. *supra* note 56, 69; Stoll, *Drittmarktbehinderungen im deutschen und europäischen Kartellrecht* (Köln, 2002), at p. 263.

61. Tellingly, in both cases practices falling under the category of anti-competitive abuse were at issue.

connected with dominance and abusive behaviour can, however, be linked in a variety of other ways. In more recent cases, both the European Courts and the Commission concluded that some kind of nexus between dominance and abuse is indeed required. In *Tetra Pak*[62] the ECJ stated flatly that "application of Article [82] presupposes a link between the dominant position and the alleged abusive conduct". This is repeated almost verbatim by the Commission in its introductory remarks to abuse control in the notice regarding access agreements in the telecommunications sector.[63] In *Irish Sugar*[64] the Court of First Instance, albeit in the rather specific context of possible abuses of a collective dominant position, observed that the abuse "has to be capable of being identified as one of the manifestations of such a joint dominant position".

These statements are wholly convincing. It was already pointed out that the wording of Article 82 EC makes clear that the prohibition does not concern abusive behaviour by dominant firms in general, but explicitly (and specifically) relates to abuses of a dominant position.[65] Furthermore, strong teleological reasons support a causation requirement. As discussed above, the central objective of Article 82 EC is to safeguard the competitive process from disturbances stemming from, or associated with, market power. This strongly suggests that market dominance should be a constitutive, or at least a formative, element of the concept of abuse. The contention that abuse and dominance must somehow be connected finds additional support in the definition of dominance used by the Court. According to *Hoffmann-La Roche*, "the dominant position ... relates to a position of economic strength enjoyed by an undertaking *which enables it* to prevent effective competition being maintained on the relevant market *by affording it*[66] the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers".[67]

These arguments suggest a causal connection either in form of an instrumental causality or, if the abuse is about the manipulation of the market structure, a link between this effect and the dominant position of the firm engaging in the relevant act,[68] may be required.

62. Case C-333/94 P, *Tetra Pak International* v. *Commission*, [1996] ECR I-5951, para 27.

63. Notice on the application of the competition rules to access agreements in the telecommunications sector, O.J. 1998, C 265/2, para 81.

64. *Irish Sugar*, cit. *supra* note 22, para 66.

65. In this sense also A.G. Lenz in C-62/86, *AKZO* v. *Commission*, [1991] ECR I-3359, para 41; see also Vogelenzang, op. cit. *supra* note 56, 66.

66. Both times my emphasis.

67. *Hoffmann-La Roche*, cit. *supra* note 22, para 138.

68. See also Möschel in Immenga and Mestmäcker, *EG-Wettbewerbsrecht – Kommentar*

### 3.2. *Causation and categories of anti-competitive abuses*

In order to identify the links which would satisfy the causation requirement, it is important to distinguish between two basic types of abusive behaviour:[69] business practices which are *in themselves* abusive, and business practices which are abusive because of their *effects*. The first category comprises conduct which itself distorts competition through, or (with regard to exploitative abuses) constitutes an improper use of, market power. With this behaviour, the dominant firm is trying to achieve an otherwise unobjectionable commercial goal by unacceptable means. The second category includes business practices, which under other standards would generally be considered as normal and unobjectionable competition, and are thus also employed by non-dominant firms, but which may take on an abusive dimension by their undesired effects on the market.[70] This conduct is thus characterized by the use of an unobjectionable means to achieve a problematic goal.

With regard to the first category, i.e. practices which are abusive as such, the causation requirement would only be satisfied if the conduct is tainted by the instrumental use of the market power. With regard to the second category of abuses, which focuses on effects, causation need not be that strict. This condition would be fulfilled if the dominant position played a decisive role in the practice bringing about the relevant effect, either because dominance was a *conditio sine qua non* for that effect to arise, or because it was a sufficient condition, i.e. the effect could also be caused by a normal firm taking such action but in the case of a dominant firm the effect would inevitably arise (e.g. acquisition of key technology of a competitor).

The presumption of a link between dominance and abuse thus defines the concept of abuse under Article 82 EC, both with regard to conduct-based and effects-based exclusionary abuses.

Anti-competitive conduct which should be judged abusive as such would have to be conduct using market power, instead of superior business performance, to accomplish the (in itself unobjectionable) goal of winning customers or capturing markets. The two most important variants of such market power leveraging are tying on the one hand, and refusal to supply necessary input for a downstream market on the other. Characteristically, both practices

(München, 1997), Art. 86, para 124; Stoll, op. cit. *supra* note 60, p. 270.

69. A.G. Reischl in his Opinion in *Hoffmann-La Roche,* p. 583, also suggested that the causation requirement might depend on the nature of the abuse in question.

70. See also Vogelenzang, op. cit. *supra* note 56, 67 et seq.; in that respect, these business practices resemble restrictive arrangements under Art. 81 EC which are prohibited because of their effects on the market only.

are strictly reserved to dominant firms. In the case of tying, some degree of market power is required for the implementation of the practice. In the case of refusals to deal, the desired leveraging effect can only be achieved if the firm dominates the input market.

With regard to conduct considered abusive and anti-competitive because of its effects, the causation requirement adds one important clarification in particular. This category of abuse causes particular problems as it concerns business practices which are, by definition, indistinguishable from ordinary commercial conduct. The conventional approach to this category of abuse is first to establish a (negative) impact on a competitor's business, i.e. some kind of hindrance of its productive or marketing efforts, and then to judge whether this effect was caused by "normal" competition (competition on the merits) or not. As one is dealing with normal behaviour in the first place, the latter assessment is exceedingly difficult, so that it may be tempting to somehow rely again on the particular effect of the conduct. This would however not only come rather close to circular reasoning, but would provide little guidance, as the effect of a hindrance of competitors is all too easy to establish.

The causation requirement suggested here partially resolves this dilemma by defining more precisely the kind of effect required to trigger Article 82 EC. It excludes all effects which do not require market power, but would at most be somewhat magnified by the dominant position of the firm.[71] Thus, the mere hindrance of competitors, or the seizure of a smaller or larger market share from them, should be considered an irrelevant effect under Article 82 EC. The only type of effect requiring dominance, or for which dominance is at least a sufficient condition, is the alteration, or to put it more bluntly, the *manipulation* of the *structure* of the market, and the resulting interference with the market mechanism and the conditions under which competition unfolds.[72]

This is not a novel concept. In a passage quoted above, the ECJ already in *Continental Can* defined the basic concept of an anti-competitive abuse by reference to the impact of the behaviour "on an effective competition structure".[73] The significance of the structural dimension of a business practice is also emphasized in the landmark definition of abuse in *Hoffmann-La Roche*:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the

71. See however Vogelenzang, op. cit. *supra* note 56, 72.
72. Cf. Sinclair, op. cit. *supra* note 25, 493.
73. *Continental Can*, cit. *supra* note 11, para 26.

> structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on basis of the transaction 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".[74]

For the purpose of a more detailed analysis of these effects and their relevance under abuse control, it is convenient to distinguish between interferences concerning the supply side and the demand side of the market structure. Relevant supply-side effects would be the elimination, exit-inducing intimidation or entry-deterring discouragement of (potential) competitors and the resulting reduction of horizontal competitive restraints. All of these effects either require market power, as is the case with predation or deterrence through aggressive pricing, or are bound to arise in connection with dominant firms (market power as sufficient condition), as is the case with horizontal collaborations, mergers and acquisitions, or the acquisition of competing technologies. Pertinent demand-side structural effects are mainly persistent changes of demand patterns of consumers. This effect, which goes beyond the hindrance effects inherent in any sales transaction, can be brought about, for example, by practices influencing or determining the future purchasing behaviour of customers on a given market, usually by rebate systems or long-term purchasing or supply arrangements. The causal nexus between market power and demand-side market structure effects would be that the former is a necessary condition for the practice to cause this undesired result.

The causation requirement not only shapes the concept of abuse in a positive (inclusive), but also in a negative (exclusive) way. Most importantly, this principle excludes the bulk of unfair marketing and selling techniques from the scope of Article 82 EC. Unfair selling practices, e.g. misleading advertising, clearly do distort competition and are very obviously not performance related. This distortion of competition however does not depend on the firm having a dominant position on the market. Such conduct thus does not constitute an abuse of a dominant position, and was rightly not prosecuted as such under Article 82 EC thus far.

In conclusion, the causation requirement provides important contours for the concept of abuse under Article 82 EC. It requires, and permits, the identification of distortions of competition specifically connected to dominant

74. *Hoffmann-La Roche*, cit. *supra* note 22, para 91.

market positions. The causation requirement is thus primarily responsible for the dissociation of the concept of normal or performance based competition under Article 82 EC, and the concept of competition on the merits under other standards, especially the standards of unfair competition laws. What may be clearly performance based under those external standards, may qualify as abuse under Article 82 EC due to the dominance-induced effects on the structure of the market.[75] Inversely, conduct which clearly constitutes an unfair business practice may fall outside Article 82 EC if this unfairness is not in any way determined by the market position of the firm.

## 4. The relevance of effect and intent

### 4.1. *General remarks*

In contrast to Article 81 EC, the wording of Article 82 EC does not contain an express reference to the effect or intent of the practice. This seems to suggest that neither of the two is required for the establishment of an abuse. By calling the concept of abuse an "objective concept" in the passage in *Hoffmann-La Roche* quoted above,[76] the Court seems to give support to this interpretation. Given the specific context of this statement,[77] its significance is not entirely clear. Nevertheless, there is a tendency in the literature to take this declaration at face value, i.e. as indicating or confirming that intent is an irrelevant element in the concept of abuse.[78] However, the only conclusion which can safely be derived from this passage is that there is no fault requirement under Article 82 EC.[79] The issue of fault, which basically involves

75. See also *Michelin II*, cit. *supra* note 6, para 112 (it is immaterial that the practice had allegedly been approved by the Directorate-General for Competition, Consumer Affairs and Fraud Prevention and was compatible with French law).

76. *Hoffmann-La Roche*, cit. *supra* note 22, para 91.

77. With this statement, the Court rejects the argument of the applicant that Art. 82 presupposes a causal link between dominance and abuse.

78. E.g. Ahlborn and Allan, "The Napp Case: A study of predation?", (2003) World Comp., 233, 241 (even in the context of predation); Korah, op. cit. *supra* note 42, 107; Bellamy and Child, op. cit. *supra* note 42, p. 218; Ritter, Braun and Rawlinson, op. cit. *supra* note 57, p. 355; Faull and Nikpay, *The EC Law of Competition* (Oxford, 1999), p. 146; Gyselen, op. cit. *supra* note 17, para 17; Sinclair, op. cit. *supra* note 25, 499; Schröter, op. cit. *supra* note 52, Art 82 para 162. For relevance of intent Kleinmann, op. cit. *supra* note 48, 470.

79. In this sense e.g. Commission Decision 2001/354/EG, *Deutsche Post AG*, O.J. 2001, L 125/27, para 40. This is, however, rather obvious and did not require any clarification (the decisional practice already before *Hoffmann-La Roche* did not rely on fault except for the de-

the firm's awareness of the illegality of its conduct, must be distinguished from the question of whether the illegality of a given practice should turn on its underlying intent.[80] It is highly questionable whether, by calling the concept of abuse an objective concept, the Court indeed intended to discard the significance of intent in the latter meaning. It must be borne in mind that already in *United Brands*, a judgment handed down shortly before *Hoffmann-La Roche*, the ECJ did stress the relevance of the aim of the practice at issue.[81]

In what certainly represents the most comprehensive discussion of the significance of effect and intent under Article 82 EC thus far, the CFI in *Michelin II* recently concluded that intent is relevant. However, this judgment also reasons that as the conduct of a dominant firm pursuing the objective of limiting competition will usually also be liable to have such an effect, "establishing the anti-competitive object and the anti-competitive effect are one and the same thing".[82] This conclusion is, in principle, persuasive. It does not answer all relevant questions, though. It is correct that effect and intent will usually be closely connected,[83] but precisely by emphasizing this connection the Court leaves unexplained what the respective relevance of effect and intent are in the context of abuse control, and how the anti-competitive intention – if this is a necessary requirement – is to be established.

The following analysis will attempt to demonstrate that the CFI in *Michelin II* should be understood to mean that for certain anti-competitive abuses both a certain anti-competitive effect as well as an intention to bring about this effect are required. While it is correct that in this context effect and intent are closely connected in the way suggested by the CFI, in order to avoid circular reasoning, at least one of two elements must be established independently from the other.

### 4.2. *Why, and for which abuses, are effect and intent necessary elements?*

At this point, it is again convenient to recall the fundamental distinction between conduct which is abusive as such, because of its improper use of mar-

termination of the sanction; see e.g. Commission Decision 71/224/CEE, *GEMA I*, O.J. 1971, L 134/15, 26).

80. Posner, *Antitrust Law* (Chicago, 2001), p. 214.

81. *United Brands*, cit. *supra* note 11, para 189 (referring to the "purpose" of the conduct); similarly *BPB Industries*, cit. *supra* note 22, para 69; Case T-24–26/93 & T-28/93, *Compagnie Maritime Belge* v. *Commission*, [1996] ECR II-1201, para 107; *Irish Sugar*, cit. *supra* note 22, para 112; most recently *British Airways*, cit. *supra* note 6, para 243.

82. *Michelin II*, cit. *supra* note 6, para 241.

83. See also Fox, op. cit. *supra* note 18, 1001.

ket power to achieve a certain commercial goal, and conduct which may become abusive if it brings about undesired effects on the market. No detailed analysis is required to realize that with regard to the first category, effect and intent should be irrelevant. While it may ultimately be the likely or typical effect on competition which underlies the prohibition of such practices, it is the instrumental use of the dominant position on one market to achieve commercial success on another market which in itself must trigger Article 82 EC. The actual intention of the firm employing such practices (e.g. a tie-in) is and should be completely irrelevant, and the same applies to the actual effects of such a practice. In this respect, conduct which must be qualified as abusive *per se* (essentially market power leveraging abuses) very much resembles *per se* prohibited naked restraints under Article 81 EC.

The analysis is radically different with regard to anti-competitive abuses in the form of market-structure abuses. The basic normative structure of these abuses is very similar to the way in which Article 81 EC is applied to other than hard-core restrictions. In this variant, both Article 81 EC and Article 82 EC prohibit the combination of a normal practice (an agreement under Art. 81 EC, and a normal unilateral commercial practice such as a price cut under Art. 82 EC), and an undesired result (under Art. 81 EC a restriction of competition, and under Art. 82 EC an interference with the market structure or market mechanism). It is thus not only possible, but evidently also necessary, to determine how conduct and effect must be connected, in particular whether the (potential or likely) generation of the effect and the associated intent are, respectively, necessary or sufficient conditions.

Under Article 81 EC, effect and intent are alternatives, i.e. the effect on competition and the intention to produce that effect would each be a sufficient condition for the cartel prohibition to apply. What would clearly be inadequate is mere evidence of purely subjective intent, without any accompanying agreement or coordination of conduct. The latter also applies to Article 82 EC. Proof of an anti-competitive intention only, without evidence of relevant conduct, would clearly not make an abuse case yet.[84] This is, however, where the analogy between Article 82 EC and Article 81 EC ends. For the reasons set out below, both effect and intent are required for the establishment of a market-structure abuse. It is the particular effect which brings *prima facie* normal business conduct within the scope of application of Article 82 EC; the decisive and formative abuse element, however, is the desire and determination to bring about this effect.

84. Cf. Gyselen, op. cit. *supra* note 17, at p. 9.

### 4.3. *The relevance of intent in market structure abuses*

Before giving more detailed reasons for the proposition that intent is an essential, defining, element of market-structure abuses, it is necessary to stress once more the correct point of reference for the assessment of both effect and intent. The determinative value of intent in this analysis is often viewed sceptically because of its seemingly wide reach. It is said to catch almost any competitive behaviour as it is very difficult if not impossible to dissociate the unobjectionable desire to increase turnover and market share from the animus to defeat competitors.[85] This argument, however, is based on the faulty assumption that intent should be established with regard to the hindering of competitors, e.g. resulting from the further strengthening of the dominant firm's market position. Such weakening of competitors is, however, not the correct reference point. The relevant effect to be taken into account for judging intent is the alteration of the mechanism of demand and supply on the market.

The most convenient starting point for a consideration of the significance of intent is, yet again, the definition of anti-competitive abuses in *Hoffmann-La Roche*, already quoted several times. According to that passage, the concept of abuse relates to the behaviour of a dominant undertaking which influences the structure of a market "through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators".[86] The statement quoted here is important because it clarifies that the generation of a certain effect is in itself not abusive, but must be accepted if it is the consequence of normal competition. This, of course, makes immediate sense. Even a clear

85. Andrews, "Is meeting competition a defence to predatory pricing? The Irish Sugar Decision suggests a new approach", (1998) ECLR, 49, 55; Ridyard, op. cit. *supra* note 55, 300; O'Donoghue, op. cit. *supra* note 54, 34.

86. Equally e.g. *AKZO*, cit. *supra* note 65, para 69; *Michelin I*, cit. *supra* note 11, para 70; Case 31/80, *NV L'Oreal and SA L'Oreal* v. *PVBA De Nieuwe Amck*, [1980] ECR 3775, para 27; *British Airways*, cit. *supra* note 6, para 241; Case T-65/98, *Van den Bergh Foods* v. *Commission*, judgment of 23 Oct. 2003, nyr, para 157 ("recourse to means other than those based on competition on the merits"); *Michelin II*, cit. *supra* note 6, para 54 ("recourse to methods different from those governing normal competition") and 97 ("recourse to means other than those within the scope of competition on the merits"); *Irish Sugar*, cit. *supra* note 22, para 111; Case T-111/96, *ITT Promedia* v. *Commission*, [1998] ECR II-2937, para 138; *BPB Industries*, cit. *supra* note 22, paras. 94 ("recourse to means other than those falling within competition based on merits") and 118; Case T-51/89, *Tetra Pak Rausing SA* v. *Commission*, [1990] ECR II-309, para 23; *Tetra Pak*, cit. *supra* note 11, paras. 218 and 241 ("retaining customers to maintain artificially or to strengthen Tetra Pak's dominant position on markets where competition was already limited").

deterioration of the market structure, such as the elimination of a competitor from the market or from a certain segment thereof, must be accepted if this is the mere result of a form of competition which the antitrust regime wants to foster. A prohibition of such conduct would not contribute to the safeguard of a system based on competition on the merits. Instead, it would stifle competition, offer competitors a sort of safe haven against competition on the merits from dominant firms, giving them at the same time an opportunity to prevail on the basis of inferior business performance, and would lead to the absurd outcome that business practices which may have helped the company to achieve its dominant position become illegal once the dominance threshold has been surpassed.[87] Relying solely on the effect on the market or the market structure would ultimately also mean that dominance as such is punished and competitors are protected for their own sake, and not merely as a consequence of the protection of the competitive process.

The reference of the Court to the admissibility of normal competition also seems to pose a difficult conceptual challenge, namely to distinguish normal from illegitimate and abusive competition. However, this task is actually much easier than it appears. As has already been pointed out, for the purpose of abuse control under Article 82 EC, the concepts of normal competition or competition on the merits are to be defined under an autonomous standard. The distinguishing mark of a market structure abuse is that it involves normal business behaviour which brings about a change in the basic parameters of the market mechanism. Examples of such practices which are generally considered manifestations of competition on the merits, but may cause such effects, are price cuts or long-term bilateral business transactions serving the interest of both parties. With regard to these practices, the argument made above that conduct should not be prohibited merely because of the effects it may produce, evidently applies.

It is suggested that it is in particular one factor which causes normal commercial conduct to lose its innocent character and metamorphose into non-performance related and improper behaviour. This is if, with regard to the alteration of the market structure, cause and effect were turned around. It should be considered an abuse of a dominant position if the firm were intentionally to use such practices to change the market mechanism to its advantage, either with a view to reducing the competitive pressure exerted by other firms, or by making it more difficult for them to win customers on the basis of superior performance. It is thus the *intention to alter*, or to use the ECJ's

87. Such an outcome has been cautioned against already by Supreme Court Justice Learned Hand in Alcoa 148 F.2d 416 (2d Cir.1945): "The successful competitor, having been urged to compete, must not be turned upon when he wins".

words in *Hoffmann-La Roche,* the attempt "to influence", the structure of the market by means of normal business practices which constitutes the specific non-performance competition caught by Article 82 EC.

The proposition that the intent of the firm or, in other words, the objective or aim of the business practice in question, is the decisive element for market structure abuses not only appears to be at the heart of, or is at least indirectly recognized by, a number of modern approaches to identify abusive practices, such as the sacrifice test[88] or the objective justification test.[89] More importantly, this contention also finds support in the case law of the courts. As mentioned above, already in *United Brands* the Court referred to the aim of the conduct holding that "such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it".[90] In *AKZO* the Court makes very clear that it is the intention to eliminate a competitor which makes a price cut abusive. The abusive character of prices below average variable cost is explained by the fact that "a dominant undertaking has no interest in applying such prices except that of eliminating competitors", and prices above average total cost are regarded as abusive only "if they are determined as part of a plan for eliminating a competitor".[91] Also in rebate cases, the analysis regularly focuses on the aim of the practice. The abusiveness of loyalty rebates is often motivated by the courts with reference to the fact that "such a rebate is designed through the grant of financial advantage, to prevent customers from obtaining their supplies from competing produc-

88. According to this principle, which was developed to identify exclusionary conduct under Section II of the Sherman Act, dominant firm behaviour is unlawfully "exclusionary" or "predatory" if the conduct does not make economic sense but for its elimination or softening of competition. It seems to have been first advanced by Ordover and Willig, "An economic definition of predation: pricing and product innovation", 91 *Yale Law Journal* (1981), 8, where they posit that "predatory behavior is a response to a rival that sacrifices part of the profit that could be earned under competitive circumstances, where the rival to remain viable, in order to induce exit and gain consequent additional monopoly profits"); the sacrifice test was prominently argued by the US Government in *Trinko* (Brief of the United States and the Federal Trade Commission as Amici Curiae in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko*, No. 02-682, p. 9; available at www.ftc.gov/ogc/briefs/02-682.pdf) and its use is now also advocated under Art. 82 (see Vickers, op. cit. *supra* note 21, p. 13 et seq.).

89. This criterion is regularly used by the Commission to identify exclusionary abuses; recently e.g. in Commission Decision 2004/33/EC, *GVG/FS*, O.J. 2004, L 11/17, para 145. See also Faull and Nikpay, op. cit. *supra* note 78, paras. 3.156 et seq.

90. *United Brands*, cit. *supra* note 11, para 189.

91. *AKZO*, cit. *supra* note 65, paras. 71 et seq. See also Commission Decision 2003/707/EC, *Deutsche Telekom AG*, O.J. 2003, L 263/9, para 179; Commission Decision 92/163/EEC, *Tetra Pak II*, O.J. 1992, L 72/1, paras. 104 et seq.; Commission Decision 88/518/EEC, *Napier Brown – British Sugar*, O.J. 1988, L 284/41, para 66.

ers".[92] In *Michelin I* the Court explained the condemnation of the discount system at issue pointing out that "such a situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage".[93]

## 5. Interim conclusion

In the above analysis it is suggested that two categories of anti-competitive conduct should be distinguished, namely conduct which is abusive as such and conduct which is abusive by virtue of the alteration of the market structure it brings about.

Conduct is abusive as such if it is characterized by an instrumental use of the economic power bestowed by the dominant position to gain commercial advantages, usually on adjacent markets. Abuses in this category can also be referred to as market power leveraging abuses. The two most important variants are tying and refusals to grant access to a necessary input for downstream activities. The central abusive element here is the use of market power instead of superior business performance to achieve success on a market. The leveraging of market-power clearly is a dominance-specific distortion of competition and should be prohibited *per se* under Article 82 EC. While it is theoretically conceivable to apply some kind of appreciability threshold with regard to these practices, this not only seems to make little practical sense in the presence of dominant firms, but also appears to be questionable as a matter of principle with regard to such clearly abusive behaviour.

Market-structure abuses are characterized by a combination of normal, in itself unobjectionable and even desirable business conduct on the one hand, and an undesirable result, namely the alteration of the market structure, on the other. However, the production of such an impact on the market, or its potential in this regard under the given circumstances, does not make the conduct abusive. Dominant firms should not be prevented from employing normal commercial techniques merely because they might lead to the exit of one or all competitors, or hinder competitors in their efforts to increase their

92. *Suiker Unie*, cit. *supra* note 22, para 518; *Hoffmann-La Roche*, cit. *supra* note 22, paras. 89 and 90; *Michelin I*, cit. *supra* note 11, para 71; and *BPB Industries*, cit. *supra* note 22, para 120; *Michelin II*, cit. *supra* note 6, para 56.

93. *Michelin I*, cit. *supra* note 11, para 85.

market share. Dominant firms should also be able to fight and even to win.[94] They must, however, be prevented from seeking business success through the manipulation of the market dynamics and the resulting obstacles which could prevent competitors from succeeding on the merits. The establishment of a market structure abuse thus requires proof of both effect and intent.

In the following sections, this analytical framework will be applied to these two types of abuse.

## 6. Market power leveraging abuses

### 6.1. *Tying and bundling*

Tying involves an open use of market power to win business on a separate market. It is, on a conceptual level, a relatively straightforward, if not the prototypical variant of an anti-competitive abuse.[95] It is thus not surprising that Article 82(2) EC specifically lists tying as an example for abusive behaviour. Besides the justification contained in this provision (connection between the tying and the tied product by their nature or commercial usage), the only acceptable vindication for tying is safety considerations.[96] These are, however, rarely accepted.[97]

A difficult conceptual issue with regard to tying however is its relation to bundling. Bundling is here understood to mean the inclusion or addition of one or more components in a given product or service to increase the appeal of the latter, irrespective of whether this leads to a higher price or not.[98] Bun-

94. Sceptical in this respect Furse, "On a darkling plain: The confused alarms of Article 82 EC", (2004) ECLR, 317.

95. Cf. Whish, op. cit. *supra* note 45, pp. 657 et seq.; see however Temple Lang, op. cit. *supra* note 55, 313.

96. Cf. Evans, Padilla and Polo, "Tying in platform software: Reasons for a rule-of-reason standard in European Competition Law", (2002) World Comp., 509.

97. Cf. Case T-30/89, *Hilti* v. *Commission*, [1991] ECR II-1439, paras. 33 et seq.; confirmed by C-53/92 P, *Hilti* v. *Commission*, [1994] ECR I-667; *Tetra Pak II*, cit. *supra* note 91, paras. 118 et seq.; *Novo Nordisk*, cited in XXVI Competition Report 1996 – Part II, pages 142 et seq.; *Industrial Gas*, cited in XIX Competition Report 1989, para 62; cf. also Report on the evaluation of Reg. (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, COM(2000)743 final, paras. 226 et seq.; Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. 2004, C 101/2, paras. 194 et seq.

98. The pricing issue may, however, be relevant in the analysis of the bundling under Art. 82 EC.

dling is, of course, an extremely common phenomenon in the market, not least because it does not require any kind of market power and can, and indeed is, also done by non-dominant firms. This observation alone should already caution against assessing bundling under the same standard as tying. This is, however, what the Commission seems to have done in Microsoft.[99] It concluded that "inasmuch as tying risks foreclosing competitors, it is immaterial that consumers are not forced to purchase or use WMP. As long as consumers automatically obtain WMP – even if for free – alternative suppliers are at a competitive disadvantage."[100]

Nonetheless, the Commission was right to condemn the bundling together of the windows operation system and the Media Player;[101] it was only wrong to do so by using the tying standard.[102] Tying and bundling are only superficially similar in that both techniques seek to achieve the same result, namely to coerce the customer into acquiring two separate products or services. There is however one crucial difference: tying is used to conquer a second, separately exploitable market, and the dominant position on an adjacent market is used as a lever in this respect. Bundling, on the other hand, can also, and will in most cases, be a means to increase the appeal of the product the second product is bundled with (e.g. the addition of a sports section to a newspaper). This should, in itself, be considered competition on the merits also under Article 82 EC, even if it has the effect or potential of squeezing out companies marketing the bundled product on a stand-alone basis.[103]

However, under certain conditions bundling may also have a leveraging quality, and may furthermore, like other normal business practices, be intentionally used to change the way the market functions. Bundling can, in other words, also be treated as market-structure abuse and consequently be considered unlawful if parallel effect and intent can be established. Thus, there appear to be three variants of potentially abusive bundling, only the first of which has a leveraging dimension. The first category of abusive bundling comprises the addition or inclusion of products so as to obtain a head start

99. See Dolmans and Graf, "Analysis of tying under Article 82 EC: The European Commission's Microsoft Decision in perspective", (2004) World Comp., 225.

100. *Microsoft*, cit. *supra* note 6, para 833.

101. See below at note 104.

102. See also Evans and Padilla, "Tying under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf", (2005) World Comp. (forthcoming, available on the Social Sciences Research Network at papers.ssrn.com/sol3/papers.cfm?abstract_id=596663#Paper Download).

103. Cf. Evans, Padilla and Polo, op. cit. *supra* note 96, 511; and Evans, Padilla and Salinger, "A pragmatic approach to identifying and analysing legitimate tying cases", in Ehlermann and Atanasiu, op. cit. *supra* note 4.

on markets for secondary products, i.e. markets developing around the bundled product or service. This type of abusive bundling appears to have been effected by Microsoft with the Media Player software:[104] the windows operating system is used as a sort of launch vehicle to disseminate the Media Player so widely that Microsoft would receive an immediate advantage, and would be likely to become the dominant player, on markets for software written for such audio and video software.[105] The second category would be predatory bundling. This occurs when, by adding another component to the main product, the price no longer covers costs.[106] The third type would be bundling intended to eliminate firms posing a competitive threat on certain markets which, however, rely heavily on income from the market of the bundled product.[107]

### 6.2. *Market power leveraging qua refusal to deal*

#### 6.2.1. *State of the law after Bronner and IMS Health*

The second type of business practice permitting a transfer of market power is the refusal to grant access to a product or service which is a necessary input for activities on a downstream market. This leveraging variant is considerably more complex than tying. Whether such a refusal to deal does in fact enable the owner of an input to transfer a possible dominant position with regard to that input to another market, and whether the capture of this market by means of a denial of access to this input can be considered abusive exclusion, depends on a number of factors, and considerations that have not yet been sufficiently clarified.[108] Although the doctrine of abusive leveraging has long been established under Article 82 EC,[109] and has since been applied in a fair number of cases involving all sorts of material and immaterial facili-

104. See also Dolmans and Graf, op. cit. *supra* note 99, 240.

105. See paras. 843 et seq. of the Commission Decision (cit. *supra* note 6).

106. Note, however, that a stricter standard was applied by the Commission in the Digital Undertaking (Commission Press Release IP/97/868 of 10 Oct. 1997) where it considered the package price for hardware and software services abusive "due to the prices of the software services being considerably more attractive ... than when sold on a stand-alone basis". For a detailed comment on the case see Andrews, "Aftermarket power in the computer services market: The digital undertaking", (1998) ECLR, 176 et seq. If the price for the bundle, on the other hand, does cover costs, the practice could be found to exploit customers if they are denied the opportunity to purchase either of the two products at a lower price separately; cf. Dolmans and Graf, op. cit. *supra* note 99, 231.

107. *Microsoft* was accused of this type of bundling in *United States* v. *Microsoft Corp.*, 87 F. Supp. 2d 30, (D.D.C. 2000).

108. See also Temple Lang, op. cit. *supra* note 55, 303.

109. *Commercial Solvents*, cit. *supra* note 31, para 25.

ties,[110] the precise conditions under which a refusal to deal with (and thus to assist) competitors on a downstream market may be abusive are still unclear in important respects.[111]

The two leading cases, at any rate, now appear to be *Bronner*, for material facilities,[112] and *IMS Health*, for immaterial, intellectual property facilities.[113] In *Bronner*, the Court confirmed the relevance of a criterion which had already emerged in previous Commission practice, namely the indispensability of the input for a competitor's capability to enter (or remain active) on a downstream market. The judgment, however, clarified that this is to be assessed under a strict standard. Moreover, the Court indicated that indispensability must be examined in two respects.[114] This may not be immediately clear from the relevant passage,[115] which some commentators found to

110. In particular *IMS Health*, cit. *supra* note 6, para 49; Case C-7/97, *Bronner* v. *Mediaprint*, [1998] ECR I-7791, paras. 41 et seq.; Joined Cases T-374/94, T-375/94, T-384 & 388/94, *European Night Services and Others* v. *Commission*, [1998] ECR II-3141; *Ladbroke*, cit. *supra* note 53, paras. 128 et seq.; *Magill*, cit. *supra* note 31, paras. 66 et seq.; Case T-69/89, *Radio Telefis Eireann* v. *Commission*, [1991] ECR II-485, paras. 66 et seq.; *Hilti*, cit. *supra* note 97, paras. 99 et seq.; *Volvo*, cit. *supra* note 31, para 14 et seq.; *Maxicar*, cit. *supra* note 31, paras. 16 et seq.; Case 311/84, *Télémarketing (CBEM)* v. *SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, [1985] ECR 3261, paras. 25 et seq.; Case 22/78, *Hugin* v *Commission*, [1979] ECR 1869, para 9; *Commercial Solvents*, cit. *supra* note 31, para 25; Commission Decision 98/190/EC, *Flughafen Frankfurt/Main AG*, O.J. 1998, L 72/30, paras. 70 et seq.; Commission Decision 97/745/EC, *Port of Genoa*, O.J. 1997, L 301/27, paras. 10 et seq.; Commission Decision 94/119/EC, *Port of Rødby*, O.J. 1994, L 55/52, paras. 12 et seq.; *Sea Containers*, cit. *supra* note 47, paras. 66 et seq.; *Decca Navigator System*, cit. *supra* note 31, paras. 98 et seq.; Commission Decision 88/589/EEC, *London European/ Sabena*, O.J. 1988, L 317/47, paras. 29 et seq.; Commission Decision *Napier Brown/British Sugar*, cit. *supra* note 91, para 71; Commission Decision 87/500/EEC, *BBI/Boosey & Hawkes*, O.J. 1987, L 286/36, paras. 19 et seq. For an analysis of these cases see Stoll, op. cit. *supra* note 60, at p. 244 et seq.

111. It may illustrate the ambiguity of the issue that in the pending *Microsoft* case before the CFI, after the ECJ judgment in *IMS-Health*, both the Commission and Microsoft Corporation purportedly claimed that it supported their respective legal positions, see Wilmer Cutler Pickering, Competition Law Update. Interesting times for IP holders in Europe: The implications of Microsoft and DMS Health, May 12 2004, available at www.wilmerhale.com/ publications.aspx

112. *Bronner*, cit. *supra* note 110.

113. *IMS Health,* cit. *supra* note 6. Although this case concerned only copy-rights, and the statements of the ECJ only referred to this type of IP, it must be assumed that the principles formulated in this judgment also apply to other forms of intellectual property.

114. See also Doherty, "Just what are essential facilities?", 38 CML Rev. (2001), 397–436, 418 et seq.

115. *Bronner*, para 41: " ... for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of the Treaty in a situation such as that which forms the subject-matter of the first question, not only that the refusal of the

be slightly confusing and repetitive,[116] but is demonstrated by the way the Court judged the indispensability of the facility at hand. First, it examined whether the type of service, i.e. a home delivery scheme, is necessary for the downstream activity in question, i.e. the sale of daily newspapers. Although the facility already failed this test, the Court also looked at the second aspect of indispensability, namely whether the concrete facility at issue, i.e. the delivery scheme of Mediaprint, would be indispensable in the sense that it cannot be duplicated. In this respect, the Court employed an objective standard which relies on the relevant capabilities and capacities not of the applicant but of those of an equally efficient competitor. As a consequence, apart from facilities which cannot be replicated for technical or legal reasons, only natural monopoly facilities would appear to pass that test.[117]

The single most important legal obstacle to the duplication of a potential essential facility certainly is the protection afforded by intellectual property rights.[118] Legally protected IP rights, therefore, appear to be particularly vulnerable under the *Bronner* test.[119] Arguably, this also explains why the Court in the recent preliminary ruling in the enduring *IMS* saga[120] considerably tightened the standard for the abusiveness of a refusal to grant access to intellectual input. It did so by holding that the three conditions set down in

service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme".

116. See e.g. Stothers, "Refusal to supply as abuse of a dominant position: Essential facilities in the European Union", (2001) ECLR, 256, 258; Fleischer and Weyer, "Neues zur 'essential facilities'-Doktrin im Europäischen Wettbewerbsrecht", (1999) WuW, 350, 358; Doherty, op. cit. *supra* note 114, 426; Beckmerhagen, *Die essential facilities-Doktrin im US-amerikanischen und europäischen Kartellrecht* (Baden-Baden, 2002), at p. 262.

117. Bergman, "The Bronner Case: A turning point for the essential facilities doctrine?", (2000) ECLR, 59, 61; more cautious Doherty, op. cit. *supra* note 114, 424.

118. For a general discussion of the interface of competition law and intellectual property rights protection see Forrester, "EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there Reason to Panic?", in Ehlermann and Atanasiu, op. cit. *supra* note 4; Aitman and Jones, "Competition law and copyright: Has the copyright owner lost the ability to control his copyright?", (2004) E.I.P.R., 137; Derclaye, "Abuses of a dominant position and intellectual property rights: A suggestion to reconcile the Community Courts Case Law", (2003) World Comp., 685; Stothers, "IMS Health and its implications for compulsory licensing in Europe", (2004) E.I.P.R., 467; Peeperkorn, op. cit. *supra* note 18, 527; Drexl, op. cit. *supra* note 22, 788.

119. See also Stothers, op. cit. *supra* note 118, 470.

120. *IMS Health*, cit. *supra* note 6, para 38; for a comment on this judgment see Aitman and Jones, op. cit. *supra* note 118, 139.

*Magill*[121] must be satisfied cumulatively.[122] Thus, the exclusion of competition on a secondary market in itself will not make a refusal to license abusive. In addition, it must be proven that this conduct will also lead to the prevention of the emergence of a new product for which there is likely consumer demand. This is a very important development. It signifies, in effect, that the doctrine of monopoly power leveraging is severely curtailed, if not altogether rescinded, with regard to essential facilities in the form of intellectual property.

6.2.2. *Critique of the indispensability and the new product criteria*

It is submitted that the indispensability criterion and the condition relating to the prevention of a new product are not, in themselves, individually or in combination, adequate indicators of abusive leveraging. The indispensability criterion does not take sufficiently into account that the erection of an essential facility may in itself be an expression of superior business performance, and thus a manifestation of competition on the merits. As a result, an obligation to share the facility with competitors on a downstream market might have the effect of introducing rather than eliminating a distortion of competition, and of ultimately merely aiding competitors and not the competitive process. This applies also, and maybe even with greater force, to essential facilities in the form of intellectual property. In the rather rare event that a certain technology acquires a gatekeeper quality with regard to a downstream market, most commentators would probably agree that the forcing of a compulsory licence under Article 82 EC would not stimulate but would chill competition. Furthermore, if the company had developed the technology with a view to succeeding on a downstream market, a refusal to license it to potential competitors on this market hardly has the flavour of leveraging.

These concerns have now been addressed in *IMS.* The Court clarified that, in order to be abusive, the refusal to license must also prevent the *emergence of a new product* demanded by consumers. This condition can be understood as meaning two different things.[123] First, that the refusal to license must con-

121. *Magill*, cit. *supra* note 31, paras. 54–56. For a detailed analysis of these criteria see Temple Lang, op. cit. *supra* note 55, 291. Briefly they are: the exclusion of competition on a secondary market, the prevention of the emergence of a new product for which there is likely consumer demand, and lack of justification.

122. It remained uncertain after *Magill*, whether the conditions established by the Court need to be satisfied cumulatively, see e.g. Derclaye, op. cit. *supra* note 118, 695; Temple Lang, "Compulsory licensing of intellectual property in European Community Antitrust Law", paper for Department of Justice/FTC Hearings, Washington DC, May 2002, p. 21, available at www.ftc.gov/opp/intellect/020522langdoc.pdf., Temple Lang, op. cit. *supra* note 21, 7.

123. See also Stothers, op. cit. *supra* note 118, 470.

cern an input which is sufficiently removed from the downstream market that compulsory licensing would create an opportunity for value-added competition, i.e. competition on the basis of product quality and not only price.[124] Second, that the refusal to license would, as was the case in *Magill* (where the criterion originates), prevent the emergence of a product which, while competing with the downstream product of the owner of the IP right, has new features and properties compared to those products.

It appears that both the Court and its Advocate General, based on the special value of IP rights, lean towards the latter reading.[125] However, if interpreted strictly as relating to products with hitherto not offered qualities, e.g. a new comprehensive TV-guide, this condition in my view overshoots the mark.[126] It effectively denies the possibility of an abusive leveraging of market power based on IP rights. This privileged position of IP facilities *vis-à-vis* material facilities by reference to its special character is, however, not justified.[127] Both types of facilities may require significant investment. Furthermore, the consideration that the risk associated with the development of the facility was taken with a view to succeeding on a downstream market could apply in equal measure to material and intellectual facilities. It would also be erroneous to assume that IP rights have a superior value in comparison to other property rights. That most legal systems offer special legal protection is not proof of its higher value but merely of its particular vulnerability, i.e. that it is not sufficiently protected from intrusions by civil and penal law.[128]

124. See also Temple Lang, "The principle of Essential Facilities in European Community Competition Law: The position since Bronner", (2000) *Journal of Network Industries*, 375, 379; Temple Lang, op. cit. *supra* note 21, 21 et seq.

125. See also Casper, "Die wettbewerbsrechtliche Begründung von Zwangslizenzen", (2002) *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (ZHR), 686, 695; Subiotto, "The right to deal with whom one pleases under EEC Competition law: A small contribution to a necessary debate", (1992) ECLR, 234, 237; Derclaye, op. cit. *supra* note 118, 700.

126. Also critical, albeit for a different reason, Aitman and Jones, op. cit. *supra* note 118, 142.

127. In this sense also Doherty, op. cit. *supra* note 114, 429; Ridyard, "Essential facilities and the obligation to supply competitors under UK and EC competition law", (1996) ECLR, 438, 445; Eilmansberger, "Abschlusszwang und Essential Facility Doktrin nach Art. 82 EG", (2003) EWS, 12, 15; Heinemann, *Immaterialgüterschutz in der Wettbewerbsordnung* (Tübingen, 2002), at p. 494; Baumol, *The Free-Market Innovation Machine* (Princeton 2002), at p. 80; affording a higher value to intellectual property, Davis, "A European Constitution for IPRS? Competition, trade marks and culturally significant signs", 41 CML Rev. (2004), 1005–1026, 1024.

128. Cf. Drexl, op. cit. *supra* note 22, 805.

6.2.3. *Prevention of the emergence of a new product as an abuse in its own right*

This is not to say that the criterion of prevention of the emergence of a new product should be discarded. On the contrary, if interpreted narrowly in the above sense, the suppression of a new product should constitute an abuse in its own right, namely an abuse under Article 82(2)(b) EC. While such conduct will usually also entail the stifling of competition on the downstream market (this is usually the primary objective of suppressing a new and potentially superior product), such an effect should not be regarded as a necessary element of this type of abuse.

However, a refusal to deal or license would only cause the prevention of the emergence of a new product, if one important condition (present for example in *Magill*) is fulfilled: the development and production of this new product must require the pooling of the inputs of various firms so that neither of them, not even the firm with the most significant input, could make the new product *on its own*. In such a constellation, it is indeed precisely the denial of access to the input which prevents the new product and thus constitutes the infringement. The only adequate remedy, therefore, is to order compulsory dealing or licensing. If the owner of the input has the capacity to develop the new product itself, but refuses to do so (as it is content with the profits earned on the latest generation of the product), and leaves a potential consumer demand unsatisfied, this would still have to be considered abusive under Article 82(2)(b) EC. The refusal to let competitors use the input to step in and satisfy demand for the new product, however, only accentuates this abuse. It does not cause it. Compulsory licensing or dealing may thus be the most appropriate *remedy*, but is not the only cure to the problem.[129]

6.2.4. *Conditions for abusive leveraging of a dominant position*

Just as the elimination of competition on the downstream market should not be considered a *conditio sine qua non* for the finding of an abuse under Article 82(b) EC, the suppression of a new product, inversely, should not be regarded a necessary requirement for the abusiveness of the elimination of competition. This applies to both IP and material facilities. The use of market power with regard to crucial IP input to block access to a secondary market is just as apt to produce the sort of distortion of competition Article 82 EC is designed to prevent as the leveraging of market power connected to physical facilities.

129. Thus, in Cases *Volvo*, cit. *supra* note 31, para 11, and *Maxicar*, cit. *supra* note 31, para 18, compulsory licences was a remedy for the abuse in the form of a reduction of production.

In view of the basic objectives of Article 82 EC, however, a refusal to deal or to license can only be considered a distortion of competition on the merits, and thus qualify as abusive leveraging, if the following conditions are met: first, two sufficiently distinct markets must be present for leveraging to be feasible at all; second, the input on the upstream market must be indispensable for access to the downstream market in at least three respects; and third, the refusal must lack not only a technical justification (such as insufficient capacities), but also a performance-related justification. These three conditions are, of course, not entirely novel. In particular, the first two conditions are well established. There are, however, still some uncertainties as to their interpretation and application.

6.2.4.1. *The two market requirement*. The very concept of abusive market power leveraging through a refusal to deal or license presupposes that a separate market to which the market power can be transferred exists.[130] It is therefore a bit surprising that the relevance of this condition was only recently conclusively confirmed in *IMS Health*.[131] The judgment brought another welcome clarification in this context. The Court affirmed (what could already be inferred from *Bronner*) that the identification of a separate upstream market is not precluded by the fact that the product or service in question was not intended to be marketed separately.[132] This is an important conceptual clarification because it confirms that the doctrine of abusive leveraging not only applies to a duplication of market power, i.e. the capture of a new "empire",[133] which can be exploited independently and in addition to the dominated input market,[134] but also to the more frequent case of a transfer of market power in the sense of its advance to a further production stage, i.e. an expansion of the existing "empire" to a more profitable market.[135]

130. Temple Lang, op. cit. *supra* note 21, 16 et seq.; for a different view see Fine, "NDC/IMS: A logical application of essential facilities doctrine", (2002) ECLR, 457.

131. IMS Health, cit. *supra* note 6, para 45.

132. Para 43 seq, see also Drexl, op. cit. *supra* note 22, 798, 799.

133. This is the expression used by the US Supreme Court in the famous Kodak-case *Eastman Kodak Co.* v. *Image Technical Services, Inc.,* 504 U.S. 451 (1992), at 480 n. 29: "[We have] held many times that power gained through some natural advantage such as a patent, copyright or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next".

134. Cf. Doherty, op. cit. *supra* note 114, 413 et seq.

135. Normally, the owner of an essential input will have to choose whether he wants to exploit its dominance on the input market or on the output market. Only in two constellations is a duplication of market power in the above sense possible. First, it may be that the facility in question has multiple uses, i.e. is not only a necessary input for one particular downstream product, but is needed for the manufacture of other products as well, or is sold as such to certain

*IMS Health* is however not entirely clear as to whether and to what extent the two markets must be distinct from one another. The statement that the abusiveness of the refusal to license also turns on whether this leads to the prevention of the emergence of new product for which there is a potential consumer demand, regardless of how it is to be interpreted, confirms for IP input that the markets must not be to close. If this requirement is to be understood as relating to new products in the sense of products with properties and features not yet offered, it is, as was argued above, too restrictive. If this condition would have to be understood as a mere accentuation of the two-market requirement, it would make perfect sense both for IP input and physical facilities. If the input largely determines the quality and/or market success of the output product, a denial of access to the input can hardly by characterized as a *transfer* or expansion of market power. As far as intellectual property is concerned, the relevant question should be whether and to what extent the downstream output market exceeds the scope of the corresponding IP right,[136] and whether and to which extent the IP component determines and shapes the product, and its success on the market.[137]

If the two-market condition is not fulfilled, a substitute justification for ordering access to the facility under Article 82 EC, such as the exploitation of the market concerned, is required. Compulsory licensing or dealing, would then, again, only be a remedy for another abuse.[138] Alternatively, this regulatory intervention would have to be based on sector-specific rules as was the case in the telecom industry.[139]

end-users also. Second, with regard to auxiliary (secondary) products or services (to be used in connection with a main product or service), a firm may be able to transfer its dominant position from the primary to the secondary market, and exploit power on both markets, if the production of the primary product yields an input necessary (i.e. an essential facility) for the secondary product or service (e.g. interface information; product information necessary for user guides etc.).

136. See also Forrester, op. cit. *supra* note 118, p. 13; Marquardt and Leddy, "The essential facilities doctrine and intellectual property rights: a response to Pitofsky, Patterson and Hooks", 70 *Antitrust Law Journal* (2003), 847, 873.

137. In the case of sailboards, for example, this would apply to the IP component regarding the link between board and rig. However, also in the *IMS Health* case this appears to have been met. The crucial quality feature of the database was not its content, but the copyrighted brick structure used for the geographical arrangement of the data.

138. As was the case in *Volvo*, cit. *supra* note 31, para 9. With regard to the concept of compulsory licences as a remedy see Temple Lang, op. cit. *supra* note 55, 298, 300.

139. Under the old regulatory framework at least incumbents had to grant access to their facilities even though, as was the case with regard to the fixed line network as a whole, the facility in question was not merely an input but basically identical with the output service.

6.2.4.2. *Connection between the two markets*. A transfer or expansion of market power to a downstream market further presupposes that (potential) competitors depend on the input to successfully compete on this market. Thus, in *IMS Health*, the Court referred to the necessity of an interconnection between the two stages of production in the sense that the upstream product is indispensable for the supply of the downstream product. It is submitted that the indispensability of an input essentially depends on two factors, namely whether the input as such is necessary not merely for manufacturing a certain downstream product but for entering the relevant downstream market, and whether the input at issue can be duplicated.

As regards the first condition, an input can only be assumed to constitute a necessary component of a certain downstream product if it forms an essential element thereof in the first place,[140] and, if so, if it cannot be substituted by another component or, in the case of IP, be circumvented by another technology.[141] The necessity of an input, however, also depends crucially, and this is not always sufficiently recognized, on the definition of the relevant downstream market. If this market comprises products which do not rely on the particular input, a refusal to grant access to the input is not capable of procuring exploitable market power. At this point at the latest, most IP rights lose their essential facility quality. While one may conceive of many products for which a certain IP element is a necessary input, these products are only rarely immune from competition from products using other technology inputs.[142] The definition of the output market is particularly relevant with regard to *secondary products*. Producers of a certain primary product frequently also hold the key to aftermarkets (spare parts, consumables, accessories, etc.) by controlling an input connected to or derived from the manufacture of the primary product, such as interface information, copyrighted design rights for must-match or must-fit spare parts etc. Whether a denial of access to such input may amount to an abusive leveraging of market power does not necessarily, or solely, depend on the market position on the primary market. The decisive question rather is whether the secondary product forms a relevant market of its own.[143] It is respectfully submitted

140. This, for example, was rejected in *Ladbroke,* cit. *supra* note 53, paras. 123 et seq. The CFI held that the refusal of the dominant undertaking to grant licences to sound and pictures of horse races did not impede the entry of the applicant into the betting market.

141. In this respect *IMS Health*, cit. *supra* note 6, paras. 28 et seq. brought the important clarification that it may crucially depend on consumer preferences whether a certain input is substitutable by alternative products or services.

142. In this sense also Stothers, op. cit. *supra* note 118, 470.

143. Relevant criteria can be found in Commission cases *Info-Lab/Ricoh* and *Pelikan*

that this issue was not always given sufficient consideration in Commission decisions regarding essential facilities for secondary products and services.[144]

Duplicability of the specific facility at issue, the second condition, only becomes relevant if indispensability in the above sense is proven (or *vice versa*). In this respect, the Commission and the courts have consistently adopted a strict approach. In *European Night Services*, the CFI referred to the prohibitive cost of and/or time reasonably required for the reproduction of the facility. Similarly, the Commission in its access notice[145] relies on whether the erection of an alternative infrastructure is "commercially feasible". In *Bronner*, as mentioned above, the ECJ further tightened the test clarifying that duplicability must be excluded because of technical, legal or economic obstacles, and must not be evaluated from the point of view of the applicant but of an equally efficient competitor.[146] This strict approach is persuasive. Under the theory advocated here, the abusiveness of a refusal to grant access to a certain facility should not depend on its impact on the competitiveness of certain rivals but on its effect on the downstream market, i.e. on whether dominance can successfully be leveraged.

6.2.4.3. *Business performance justification*. Contrary to the case law and decisional practice analysed above, a refusal to grant access to a facility constituting a bottleneck input meeting both tests of indispensability and non-duplicability does not necessarily constitute abusive market power leveraging.

That a facility cannot be replicated for economic, technical or, as may be the case with IP rights, legal reasons does not exclude the possibility that this

*Kyocera*, Competition Policy Newsletter 1/1999, 35 et seq.; cf. also Temple Lang, op. cit. *supra* note 21, 50 et seq.

144. E.g. in its decision in *Hugin* (cit. *supra* note 110) the Commission considered the question whether the secondary product (maintenance and repair of cash registers) formed a separate market only from the point of view of the competitors on that (secondary) service market. The latter however could only depend on the dominant undertaking's spare parts if the servicing of Hugin products is in itself a distinct market. In *Microsoft* the Commission confined itself to the finding of a general market for work group server operating systems (presumably because the firm was also dominant on the primary market).

145. Notice on the application of the competition rules to access agreements in the telecommunications sector, O.J. 1998, C 265/02, point 88.

146. Cf. *Bronner*, cit. *supra* note 110, para 46. It should be noted, however, that this standard was initially not all that strict. In *Commercial Solvents*, cit. *supra* note 31, para 26, the Court flatly stated that the question whether the applicant undertaking still disposed of a sufficient quantity of the dominant undertaking's components was irrelevant to assess the abusive character of its conduct. Cf. also Doherty, op. cit. *supra* note 114, 433; Beckmerhagen, op. cit. *supra* note 116, at p. 219; and Eilmansberger, op. cit. *supra* note 127, 12.

facility may be a manifestation of superior business performance of its owner, and its erection and exclusive use thus a means of competition on the merits. To open access to the facility for competitors may therefore create, rather than eliminate, a distortion of competition on the merits. Especially with regard to IP rights, this approach may have a chilling effect on competition. It is suggested that also with regard to IP rights, there is a better way to protect investment in crucial input than the introduction of the criterion relating to the prevention of a new product for which there is potential consumer demand. This is to accept that a refusal to grant access to an input may not only be justified by technical reasons and insufficient capacity, but also on the grounds that the facility in question represents an effort to compete on the merits.[147]

This justification, however, has persuasive force only if the owner of the facility is able to show that the business effort underlying the creation of the input was indeed *directed* at a downstream market. This condition, for example, was not fulfilled in important essential facility cases such as *Commercial Solvents*,[148] where the raw material was originally marketed separately, or *Airport Frankfurt*, where the facility at issue was created primarily for serving another downstream market.[149] This justification should further be denied if the facility or input is not the result of superior business acumen or, indeed, any business effort at all, but is simply the by-product of the development and manufacture of another product. Typically, this is the case with regard to essential input in the form of interface information,[150] or copy-righted forms or appearances[151] necessary to enable the interoperability of a primary product or service with a secondary, accessory product or service. And even if some effort was actually invested in developing and establishing the interface, this may not be a good enough justification if the interface is a very narrow bottleneck, i.e. constitutes only a minor part of the

147. See also Bergman, op. cit. *supra* note 117, 63; Müller, "Die 'Essential Facilities' – Doktrin im Europäischen Kartellrecht", (1998) EuZW, 232, 235.

148. *Commercial Solvents*, cit. *supra* note 31, para 25; similar in this respect also *Télémarketing*, cit. *supra* note 110, para 27.

149. Commission Decision, *Flughafen Frankfurt*, cit. *supra* note 110, paras. 72 et seq. The justification must generally be denied in cases in which a facility is a necessary input also for the consumers of the primary product (or service) offered with the aid of this facility (e.g. auxiliary services for airlines using an airport which require access to the airfield).

150. As appears to have been the case in *Microsoft* (cit. *supra* note 6).

151. It is thus persuasive that Art. 8 of Regulation (EC) No 6/2002 of 12 Dec. 2001 on Community designs, O.J. 2002, L 3/1, excludes protection of features which must necessarily be reproduced in their exact form and dimensions to permit the product to be mechanically connected to another product to perform its function.

know-how required to develop and make the secondary product.[152]

Another example for essential input not being based on business endeavour worthy of protection is information regarding the content of a primary service or product or its users, the collection of which is not particularly burdensome as this information simply accrues in the normal course of producing or supplying the product or service.[153] If such information is indispensable, e.g. for publishing user guides or user directories, the denial of access should be considered abusive.[154] A third important category of essential input, the gatekeeper qualities of which are not based on superior business acumen, and where this defence should be denied, are facilities, typically network infrastructures, originally erected by the State (possibly because of its assumed natural monopoly quality), and later transferred to their present owner in the course of privatization.[155]

Legal intervention is also a factor here. It may not necessarily make the business performance justification inapplicable, but may considerably weaken its force. For example, if the indispensability of a certain input mainly results from a legal exclusion of an alternative input, it is questionable whether the obtainment of a dominant position on the strength of this input can be considered a result of superior business performance only. The same applies if the law comes to the aid of the owner of an input by prohibiting downstream products relying on an alternative input. Legal intervention of this kind should be a relevant consideration in particular in cases of heavy leveraging where, in terms of total value, the input is of relatively minor importance.

152. For an analysis of interfaces and essential facilities see also Temple Lang, op. cit. *supra* note 55, 315.

153. See also Schwarze, "Der Schutz des geistigen Eigentums im europäischen Wettbewerbsrecht – Anmerkungen zur jüngsten Entscheidungspraxis", (2002) EuZW, 75, 80.

154. Thus, in *Magill*, cit. *supra* note 31, the denial of a licence to the copyrighted information would have been abusive even though Magill TV Guide had only included the program information of only one of the broadcasting companies. In as much as it was prevented from publishing a comprehensive TV-Guide the refusal to license was doubly abusive (it prevented the emergence of a new product not yet offered by the owners of the facility and it eliminated competition on the downstream market).

155. A.G. in *Bronner*, op. cit. *supra* note 110, para 66; Bergman, op. cit. *supra* note 117, 63; Schnelle, "Die Öffnung von leistungsnotwendigen Einrichtungen für Dritte und der Schutz des Eigentums", (1994) EuZW, 556, 558; Venit and Kallaugher, "Essential acilities: A comparative law approach", (1995) F.C.L.I. 1994, 315, 321; Stollhoff, *Der Ausschluss von Marktrisiken durch Essential Facilities unter Art. 82 EGV* (Baden-Baden, 2000) 240.

## 7. Market structure abuses

Market structure abuses are considerably more important in practice than market power leveraging abuses. As discussed, the characteristic element of a market structure abuse is the strategic alteration of the market structure, i.e. its manipulation to the advantage of the dominant firm.[156] The centre of gravity of this abuse is not the particular conduct, which under other standards may be considered perfectly normal or even desired business behaviour, but its potential effects and underlying intentions. The establishment of such an abuse thus requires proof of these effects, or of the potential to bring them about, as well as proof of intent.

### 7.1. *Proof of effect*

With regard to market effects, case law and decisional practice are criticized on two main grounds. The first is that such effects are generally not sufficiently taken into account.[157] The second is that where effects are considered at all, this is done in an inconsistent manner requiring in certain cases only a hindrance of competitors, in other cases the rather more drastic effect of their potential elimination.[158]

The first criticism clearly carries some weight. It is, in general, regrettable that there are still no clear and conclusive statements as to the general significance of actual or potential market consequences. Furthermore, while the contention that under Article 82 EC effects are largely ignored by the courts and the Commission is probably exaggerated, it is correct that those effects, or potential effects of the same kind, are at times assumed too readily by merely pointing out that the conduct has such a tendency.[159] Both with regard to supply-side and demand-side alterations of the market structure, a

156. See e.g. *Hugin*, cit. *supra* note 110, para 17; *Commercial Solvents*, cit. *supra* note 31, para 32; *Hoffmann-La Roche*, cit. *supra* note 22, para 125; *United Brands*, cit. *supra* note 11, para 201; T-70/89, *British Broadcasting Corporation and BBC Enterprises Ltd* v. *Commission*, [1991] ECR II-535, para 64; *Radio Telefis Eireann* v. *Commission*, cit. *supra* note 110, para 76.

157. See Sher, op. cit. *supra* note 7, 243; Kallaugher and Sher, op. cit. *supra* note 8, 280; Ridyard, op. cit. *supra* note 55, 297 et seq.; Sinclair, op. cit. *supra* note 25, 497.

158. O'Donoghue, op. cit. *supra* note 54, 36; cf. also Kallaugher and Sher, op. cit. *supra* note 8, 279 et seq.; Sher, op. cit. *supra* note 7, 243; Sinclair, op. cit. *supra* note 25, 499.

159. See e.g. *British Airways*, cit. *supra* note 6, para 293: "... for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect"; a similar approach can be found in *Michelin II*, cit. *supra* note 6, para 239.

merely abstract potential for the business practice to impact the market structure should not be sufficient. Proof of an actual impact on the market structure is evidently not necessary,[160] but a plaintiff in an abuse case should be required to prove that, *under the concrete market circumstances*, the practice at issue is capable of generating such an effect.[161] If there is a strong presumption of exclusionary intent, it is however persuasive[162] to conclude that the conduct is at least capable of achieving this result.[163] The second charge regarding inconsistency is in this author's view largely unfounded. It is true that different judgments and decisions rely on different kinds of effects. This is, however, justified as the changes in the structure of the market triggering Article 82 EC are of a different nature depending on whether they concern the demand side or supply side of the market structure.

With regard to the supply side, the relevant effect (or its potential in this regard under the given circumstances) of a practice to be proven is the reduction of competitive constraints posed by other operators on this market, either by influencing their market strategies or by eliminating (or intimidating) them. The former effect is likely to be achieved by collusive practices and the acquisition of minority shareholdings.[164] The latter effect is certain to be brought about by the acquisition of competitors or their key competition assets,[165] and may be brought about by price cuts,[166] or by bundling practices

160. *British Airways,* cit. *supra* note 6, para 297 ("the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse of a dominant position within the meaning of Article 82 EC"); see also *Compagnie Maritime Belge*, cit. *supra* note 81, para 149.

161. See also Gyselen, op. cit. *supra* note 17, para 20; Ridyard, "Article 82 price abuses: Towards a more economic approach", in Ehlermann and Atanasiu, op. cit. *supra* note 4; Lowe, op. cit. *supra* note 5, 170.

162. Only, however, if intent is not inferred from the abstract quality of the conduct to produce such effects (otherwise the reasoning would be somewhat circular).

163. *Michelin II*, cit. *supra* note 6, para 241; *Compagnie Maritime Belge*, cit. *supra* note 81, para 149.

164. Cf. Joined Cases 142 & 156/84, *British American Tobacco Company Ltd and R.J. Reynolds Industries Inc.* v. *Commission*, [1987] ECR 4487, para 65; Commission Decision 93/252/EEC, *Warner-Lambert/Gillette and Others and BIC/Gillette and Others*, O.J. 1993, L 116/21, paras. 25 et seq.

165. *Continental Can*, cit. *supra* note 11, para 29; *Tetra Pak*, cit. *supra* note 86, para 23 (acquisition of an exclusive patent licence).

166. Which may have the effect of eliminating competitors from the market or of discouraging entry. With regard to customers, an alternative method of deterring market entry is the imposition of sanctions such as the discontinuation of business relations: e.g. cf. Commission Decision *BBI/Boosey & Hawkes*, cit. *supra* note 110, para 19, where the dominant undertaking withdrew supplies from its customers as part of a plan to exclude them from the market: "A dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat. ... There is no obligation placed on a

squeezing profits needed to compete on other markets. For aggressive pricing strategies to be caught by Article 82 EC, it is thus a necessary requirement that they are effectively capable of eliminating or deterring competition.[167] Price reductions designed to meet aggressive competition by a rival, but which neither threaten the viability of this rival nor can realistically be expected to cause its exit from the market, should not be considered abusive. As was argued above, the mere fact that such price cuts are selective in terms of customers or geography should, in itself, be irrelevant.[168] There is no general obligation on dominant firms to apply equal prices.[169]

As far as the demand side is concerned, the relevant effect to be proven is foreclosure, i.e. the restriction of business opportunities for competitors through an influence on future purchasing (or, in case of dominant buyers, supply) patterns of the buyers (or suppliers). Practices capable of deploying such effects, for example, are sanctions imposed on trading partners for dealing in or purchasing competing products,[170] exclusive purchasing arrangements,[171] and rebate schemes with purchasing targets and/or longer reference periods.[172]

If these practices are employed by dominant firms, there is a certain degree of likelihood that they will in fact erect barriers to entry or hinder the expansion of market shares by competitors.[173] This may be the explanation why a more thorough analysis of such effects was omitted, or was carried out

dominant producer to subsidize competition to itself. In the case where a customer transfers its central activity to the promotion of a competing brand it may be that even a dominant producer is entitled to review its commercial relations with that customer and on giving adequate notice terminate any special relationship. However, the refusal of all supplies ... would appear in the circumstances of the present case to go beyond the legitimate defence of ... commercial interests."

167. *Irish Sugar*, cit. *supra* note 22, para 111; *AKZO*, cit. *supra* note 65, paras. 70 et seq.; *Compagnie Maritime Belge*, cit. *supra* note 81, paras. 147 et seq.; *Continental Can*, cit. *supra* note 11, para 29; A.G. Lenz in *AKZO*, para 146.

168. In this sense also Andrews, op. cit. *supra* note 85, 55.

169. See *supra* 2.5.

170. A case in point is *United Brands*, cit. *supra* note 11, para 192: "In fact UBC could not be unaware of that fact that by acting in this way it would discourage its other ripener/distributors from supporting the advertising of other brand names and that the deterrent effect of the sanction imposed upon one of them would make its position of strength on the relevant market that much more effective".

171. *BPB Industries*, cit. *supra* note 22, paras. 54 and 65 et seq.; *Hoffmann-La Roche*, cit. *supra* note 22, para 89.

172. See recently *Michelin II*, cit. *supra* note 6, para 54 et seq.

173. The actual development of market shares may be indicative of a foreclosure effect, but is in itself not conclusive as an increase could be even more marked in the absence of the practice; see *British Airways*, cit. *supra* note 6, para 298.

in a relatively cursory fashion[174] in many if not most relevant cases. While this is legitimate in clear-cut constellations, a more thorough examination is required with regard to practices only used sporadically, or which possess a modest foreclosure potential only.[175] This may apply to short-term or low-volume agreements, and to rebate schemes with low suction effect (creating only insignificant switching costs for the customer)[176] due to short computation periods, or applied to a limited number of buyers only.[177] The methodology to be used in this respect should be the same as under Article 81 EC.[178]

### 7.2. *Proof of intent*

For the establishment of a market structure abuse, evidence of relevant effects is necessary but not sufficient. A business practice with the potential to bring about such a structural change should only be considered abusive if it also aimed at this result. A competition authority, or a plaintiff in a civil case, thus needs to provide evidence that, rather than being the mere consequence of the practice, the suspect change of the market structure was one of the goals pursued, or inversely, that the practice was not completely motivated by objectives other than the manipulation of the market mechanism. In this context, it is important to bear in mind that market structure abuses are *prima*

174. E.g. in *BPB Industries*, cit. *supra* note 22, para 69, the CFI simply held that condemning an exclusive purchasing obligation is "justified by the fact the where, as in the present case, an economic operator holds a strong position in the market, the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market". In *Van den Bergh Foods*, cit. *supra* note 86, para 160, the analysis was only slightly more elaborate: "The fact that an undertaking in a dominant position on a market ties de facto – even at their own request – 40% of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty. The exclusivity clause has the effect of preventing the retailers concerned from selling other brands of ice cream (or of reducing the opportunity for them to do so), even though there is a demand for such brands, and of preventing competing manufacturers from gaining access to the relevant market". See also Commission notice – Guidelines on Vertical Restraints, O.J. 2000, C 291/1, para 148, "For a dominant company, even a modest tied market share may already lead to significant anti-competitive effects. The stronger its dominance, the higher the risk of foreclosure of other competitors".

175. See also Kallaugher and Sher, op. cit. *supra* note 8, 280; Ridyard, op. cit. *supra* note 55, 297 et seq.; Sinclair, op. cit. *supra* note 25, 497; O'Donoghue, op. cit. *supra* note 54, p. 20.

176. For an analysis of this effect see e.g. Kallaugher and Sher, op. cit. *supra* note 8, 266; O'Donoghue, op. cit. *supra* note 54, p. 22.

177. Cf. O'Donoghue, op. cit. *supra* note 54, p. 20, 22.

178. The leading cases, as is well known, are Case C-234/89, *Stergios Delimitis* v. *Henninger Bräu AG*; [1991] ECR I-935; and more recently Case C-214/99, *Neste Markkinointi Oy* v. *Yötuuli Ky and Others*, [2000] ECR I-11121.

*facie* normal business practices for which firms, almost by definition, will almost always be able to put forward a commercial justification. Under the test suggested here, however, this would be insufficient to disprove intent. An alternative commercial motive for the choice of a certain course of action on the market would not only have to be plausible, but would also have to be capable of *fully and exhaustively* explaining the conduct. That the particular market structure effect was a possibility, or a foreseeable or even desired side-effect, should, on the other hand, be irrelevant in this context. While being helpful, it is therefore not necessary to prove that the conduct was, or could have been, profitable also without hurting competitors (e.g. by tapping new customer resources).[179]

Evidence of intent can be direct or indirect and circumstantial. Direct proof of the dominant firm's objectives is usually difficult, in particular as internal business documents displaying an aggressive attitude towards competitors in many cases will have only a limited evidential value.[180] In many cases proof of intent will thus have to be indirect. The plaintiff (the public prosecutor or the private claimant in a civil case) has to establish that the practice was not exclusively motivated by normal commercial considerations including, but not restricted to, the aspiration to increase profits or market shares. It needs to rebut the claim that the practice made economic sense for the firm, irrespective of the deterioration of the market structure it was likely or certain to cause.

Also with regard to indirect evidence the burden of proof lies principally with the plaintiff. For the following two reasons, cooperation of the accused firm is, or may be, appropriate. First, it is the very nature of negative proof that it can never be wholly conclusive. Second, the evidence with regard to the legitimate motivation of a business practice is controlled by the accused firm; for the firm to introduce evidence that will exonerate it should not be an unreasonable burden. Nonetheless, it remains the plaintiff's obligation to make a solid *prima facie* case. After that, it would be the accused firm's responsibility to demonstrate on the basis of information, usually available only to itself, that contrary to the plaintiff's allegation there was in fact such

179. See however Ridyard, op. cit. *supra* note 55, 293.

180. Cf. Posner, op. cit. *supra* note 80, p. 214; O'Donoghue, op. cit. *supra* note 54, p. 34. In a number of cases the Commission could, however, rely on internal documents showing exclusionary intent, e.g. Commission Decision 91/299/EEC, *Soda ash – Solvay*, O.J. 1991, L 152/21, paras. 19 and 52 et seq., and Commission Decision 91/300/EEC, *Soda ash – ICI*, O.J. 1991, L 152/40, paras. 24 and 55 et seq.; Commission Decision 2003/6/EC, *Soda ash – Solvay*, O.J. 2003, L 10/10, paras. 68 and 154 et seq.; Commission Decision *Hilti*, cit. *supra* note 51; *AKZO*, cit. *supra* note 65, paras. 123 et seq.; Commission Decision *Irish Sugar*, cit. *supra* note 14, para 69; Commission Decision *BPB Industries*, cit. *supra* note 55, paras. 96 et seq.

a motive.[181] The alternative explanation for the conduct must however satisfy the following requirements: the conduct must be objectively capable of achieving the professed goal (taking into account both objective market circumstances and the subjective situation of the firm), credible with regard to past conduct, and legitimate under other standards. That Article 82 EC does not provide for an exemption corresponding to Article 81(3) EC[182] does not in any way restrict a dominant firm's possibility to justify, or rather explain, its business practices.[183] The point of this exercise is not to obtain some sort of approval for otherwise prohibited behaviour, but to demonstrate that the conduct should not be considered abusive in the first place.

*Prima facie* evidence of intent can be produced in various ways. First, some practices may in themselves reveal exclusionary intent. This applies e.g. to fidelity rebates which are basically granted in return for not dealing with competitors, to terminations of business relationships which circumstances indicate to be of a punitive character, or to predatory selling aimed at customers of purchasers which have become unfaithful and switched suppliers.[184] A second way is to show that the practice does not make business sense but for the change of the market structure, i.e. depends in its profitability on this effect (sacrifice-test or variations of it). Third, intent might be clearly indicated by the particular circumstances bringing about the impairment of the market structure. Fourth, with regard to practices which in themselves appear to make economic sense, evidence of intent can be found in the fact that the firm did not choose a practice which would have achieved the professed commercial goal just as efficiently but with distinctly less

181. Recently, in *Michelin II*, cit. *supra* note 6, para 107, the CFI held the accused firm accountable for proving that a quantity rebate system was based on objective economic reasons.

182. The significance of this was long unclear. *Tetra Pak*, cit. *supra* note 86, para 27, and *BPB Industries*, cit. *supra* note 22, para 75 clarified that abusive behaviour cannot benefit from block exemption regulations. However, in *Hoffmann-La Roche*, cit. *supra* note 22, para 120, the Court suggested that exclusive purchasing agreements might benefit from individual exemptions under Art. 81(3) EC. In Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH* v. *Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989] ECR 803, para 32, the Court already took a more restrictive approach. In Case C-395/96 P & C-396/96 P, *Compagnie maritime belge transports SA and Others* v. *Commission,* [2000] ECR I-1365, at para 135, the issue was finally settled; the Court unequivocally stated that "no exemption of any kind may be granted in respect of an abuse of a dominant position".

183. In this sense also Commission notice, Guidelines on Vertical Restraints, O.J. 2000, C 291/1, para 141; Gyselen, op. cit. *supra* note 17, para 12; more sceptical however Lowe, op. cit. *supra* note 5, 171.

184. For an analysis of such practices in the German electricity and gas market see Markert, "Treuerabatte und 'predatory selling' in der Strom- und Gasversorgung aus kartellrechtlicher Sicht", (2003) *Wettbewerb in Recht und Praxis* (WRP), 1320, 1325 et seq.

harmful consequences for the market structure, i.e. what might be termed "disproportionate".

The sacrifice-test, or similar tests, are useful tools for assessing intent in particular with regard to conduct capable of eliminating or deterring competitors.[185] Pricing or bundling strategies which are not in themselves profitable and thus make economic sense only if they cause rivals to leave the market (or renounce plans to enter the market), can be presumed to at least also aim at this result. Thus, in *AKZO* the ECJ concluded that prices below average variable cost must be regarded as abusive since "a dominant firm has no interest in applying such prices except that of eliminating competitors so as to be able to subsequently raise prices by taking advantage of its monopolistic position, since each sale is bound to generate a loss".[186] The presumption of exclusionary intent created by short-run losses caused by the pricing strategy in question should, however, be rebuttable.[187] It is in this (but only this) context that the issue of recoupment may become relevant as it may boost the plausibility of an alternative business rationale (i.e. to clear storage space) offered by the firm.[188] Prices above average variable cost but

185. See e.g. *amici curiae* in *Trinko*, cit. *supra* note 88, p. 15; Ahlborn and Allan, op. cit. *supra* note 78, 238.

186. *AKZO*, cit. *supra* note 65, par. 71; *Irish Sugar*, cit. *supra* note 22, para 111. An alternative test to identify prices which are bound to generate losses, and thus predatory intent, is to rely on average avoidable cost (AAC) instead of average variable (or marginal) cost. The AAC test also appears to have been developed by Ordover and Willig, op. cit. *supra* note 88, 17–18; its use to assess predation also under Art. 82 EC was recently suggested by Ridyard, op. cit. *supra* note 55, 295. The appeal of this standard is that it identifies loss-making prices also in multi-product situations involving cross-subsidies. If the dominant firm uses production or distribution facilities to manufacture and market a second product, the latter will be sold profitably only if its price covers at least the incremental cost of producing and selling the products. These incremental costs, which may be both fixed and variable (consist of one-off investments in relation to which the timeframe or quantities over which these may be spread need to determined) thus reliably indicate sinister motives. It should be noted that the standard for assessing cross-subsidies is thus more lenient under Art. 82 EC than under Art. 87 EC; cf. in this respect Commission Decision *Deutsche Post*, cit. *supra* note 79, para 35 et seq.; and Joined Cases C-83/01 P, C-93/01 P & C-94/01 P, *Chronopost SA, La Poste and French Republic* v. *Union française de l'express (Ufex), DHL International, Federal express international (France) and CRIE*, [2003] ECR I-6993, paras. 74 et seq).

187. See also Ridyard, op. cit. *supra* note 55, 296.

188. In *Tetra Pak,* cit. *supra* note 62, at para 44 the ECJ stated that proof of a realistic chance to recoup losses incurred through below cost prices is not required. In the *Wanadoo* predatory pricing case, however, the Commission apparently did in fact investigate the possibility of recoupment, Commission Decision of 16 July 2003, *Wanadoo*, Case No. COMP 38.233, Commission Press Release IP/03/1025, see Lowe, "Monopolization versus abuse of dominant position", panel discussion statement, (2004) F.C.L.I. 2003, 355; the decision was appealed to the CFI, T-340/03 (pending).

below average total cost can as such be profitable and are thus ambivalent under the sacrifice-test. As was also observed by the Court in *AKZO*, such prices are capable of eliminating even efficient competitors, but are not necessarily unprofitable. They are therefore not as such indicative of exclusionary intent, and can be regarded as abusive only if additional proof of intent can be found.[189]

Such additional proof may well be found in the specific attendant circumstances of the market structure change under investigation. The potential of a price cut to eliminate an actual or potential competitor might, for example, result from the fact that this practice is tailored specifically to reach those customers the competitor depends on in order to achieve necessary economies of scale, scope or density in order to either stay in business or get it off the ground.[190] Such price cuts, which are selective not merely in the sense that they meet competition, but in that they are aimed at crucial customers, may be a strong indicator of exclusionary intent.[191] Intent to eliminate a rival may also be revealed by the circumstances of the conduct itself, i.e. by fact that the price cut is imbedded in a whole range of exclusionary practices.[192] Such cumulative evidence of an exclusionary strategy appears to have played a decisive role in *Hilti* and *Tetra Pak*.[193]

The scope of the sacrifice or no-economic-sense test is, however, limited even for market structure abuses.[194] This applies in particular to conduct in-

189. *AKZO*, cit. *supra* note 65, para 72.

190. An example would be the practice known as fighting ships (where freight rates are lowered in order to offer rates the same as or less than those of the principal independent competitor for vessels sailing on the same date or neighbouring dates) condemned by the ECJ in *Compagnie maritime belge*, cit. *supra* note 182, para 117 et seq. Price cuts designed to eliminate a specific competitor from certain air routes were prohibited by the German Bundeskartellamt in the *Lufthansa* case by order of 18 Feb. 2002, B9–144/01; for a detailed comment on this case see Ewald, "Predatory Pricing als Problem der Missbrauchsaufsicht – Entscheidungspraxis USA und Deutschland im Luftverkehrssektor", (2003) WuW, 1165 et seq.

191. Thus, in its decision in *Deutsche Post*, cit. *supra* note 79, at para 37 it pointed out that "by granting fidelity rebates to its biggest partners, DPAG has deliberately prevented competitors from reaching the 'critical mass' of some 100 million in annual turnover". Similarly in *Hilti*, cit. *supra* note 51, para 81, the Commission stated that "the abuse in this case ... depends on the fact that, because of its dominance, Hilti was able to offer special discriminatory prices to its competitors' customers with a view to damaging their business, whilst maintaining higher prices to its own equivalent customers".

192. See also O'Donoghue, op. cit. *supra* note 54, p. 32.

193. Commission Decision *Tetra Pak II*, cit. *supra* note 91; and *Hilti*, cit. *supra* note 51; confirmed on appeal by the CFI *Tetra Pak*, cit. *supra* note 11; and *Hilti*, cit. *supra* note 97.

194. It is obviously generally irrelevant for anti-competitive abuses for which intent in general is not relevant (abusive practices as such like tying or refusal to deal). Note in this context

fluencing demand patterns, i.e. practices altering the demand-side structure of the market. Exclusive purchasing (or supply) agreements, non-compete obligations, and generally all other practices fostering customer retention (e.g. rebate schemes) do as a rule make immediate commercial sense and do not necessitate a profit sacrifice in exchange for the modification of the market structure. The only avenue for establishing a *prima facie* case of intent here is to show that the practice is *disproportionate* to the professed goal.[195] It therefore need not be proven that these practices have no convincing business justification at all. It is sufficient to demonstrate that this commercial goal[196] could have been reached by practices which do not distort competition and hinder rivals in competing on the merits, or do so to a lesser extent.[197] However, in the interest of legal certainty, a practice should fail this test only if the alternative conduct is clearly equivalent.

For certain types of conduct, proportionality with regard to a given commercial objective can be judged in an abstract manner. A *per se* approach is thus possible. For example, *prima facie* credible commercial justifications for rebate schemes capable of foreclosing business opportunities for competitors may be to increase sales, to improve planning and organization of production and distribution, or to achieve (and pass on) cost savings through better economies of scale.[198] If a firm attempts to reach this goal with rebate

that the academics credited with the development of the sacrifice-test recently in their *amici curiae* brief in *Trinko* also argued that the sacrifice-test should not be applied to the essential facilities case at hand.

195. See also Gyselen, op. cit. *supra* note 17, 20.

196. These goals, however, must obviously be legitimate. Strengthening customer loyalty, for instance, is not an acceptable commercial justification because it aims directly at influencing demand patterns.

197. See also Commission Decision 81/969/EEC, *Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin*, O.J. 1981, L 353/33, at para. 50; Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty, O.J. 2004, C 101/97, para 82.

198. Note however that in the context of rebate cases, only the latter business motive is regularly accepted by the Courts; for a representation of the relevant case law see O'Donoghue, op. cit. *supra* note 54, p. 36 (and sometimes considered credible only if applied to purchases exceeding the relevant threshold, i.e. not to all purchases made during the reference period in question; see e.g. *British Airways*, cit. *supra* note 6, para 281). In *Michelin I*, cit. *supra* note 11, para 85, the other two justifications were dismissed, but this may have been due to the restrictive nature of the rebate scheme. It is submitted that better production planning and increasing sales are also perfectly legitimate business motives capable of disproving intent, potentially relevant e.g. with regard to target rebates (provided they are not progress bonuses granted for increases of sales; cf. O'Donoghue, at p. 21). A general rejection of all other justifications than the achievement (and the passing on) of cost savings through improved economies of scale is problematic, also because of the obvious difficulties of determining such efficiency gains; see

schemes, quantity and loyalty rebates (including rebates linked to individualized volume targets) are, as a rule, equally effective. The former is possibly even more advantageous as it allows a more reliable prognosis as to the quantities to be purchased. The use of a loyalty rebate therefore normally indicates a dual purpose: besides the facilitation of better planning of production and distribution, also the restriction of business opportunities to competitors. The Commission and the courts' *per se* prohibition of loyalty rebates,[199] along with all other rebates targeted at specific customer groups, is therefore persuasive.

These considerations support a *per se* approach also for exclusivity arrangements binding customers even more tightly to the dominant firm than loyalty rebates schemes, in particular exclusive purchasing and non-compete obligations. This may explain the strict approach adopted by the Court already in *Hoffmann-La Roche*.[200] Even dominant firms, however, may be able to demonstrate a legitimate need to reliably predict future (increases of) demand for their products, for example because production requires significant investment and storage capacities are limited.[201] In such situations, long-term exclusive arrangements may be considered non-abusive.

If none of the above circumstances positively indicating intent can be established, the plaintiff needs to make its *prima facie* case by looking into and repudiating the most obvious alternative business justifications open to

also Ratliff, "Abuse of dominant position and pricing practices: A practioner's viewpoint", in Ehlermann and Atanasiu, op. cit. *supra* note 4, p. 4; Kleinmann, op. cit. *supra* note 48, 470.

199. *Michelin I*, cit. *supra* note 11, para 71; *British Airways*, cit. *supra* note 6, para 244; *BPB Industries*, cit. *supra* note 22, para 120; *Irish Sugar*, cit. *supra* note 22, para 197 et seq.; *Suiker Unie*, cit. *supra* note 22, paras. 517 et seq.; *Hoffmann-La Roche*, cit. *supra* note 22, paras. 89 et seq.; Commission Decision *Soda ash – Solvay* (1991), cit. *supra* note 180, paras. 52 et seq.; *Soda ash – Solvay* (2003), cit. *supra* note 180, para 180; *Deutsche Post*, cit. *supra* note 79, paras. 34 et seq.

200. *Hoffmann-La Roche*, cit. *supra* note 22, para 89: "An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate." Cf. also *BPB Industries*, cit. *supra* note 22, para 68; *AKZO*, cit. *supra* note 65, para 149; in *Van den Bergh Foods*, cit. *supra* note 86, para 160.

201. Cf. *Hoffmann-La Roche*, cit. *supra* note 22, para 90. For a dominant undertaking to successfully rely on the argument of a need to predict demand, the respective clauses must of course constitute the least restrictive means for business planning, cf. the examples given in the context of Art. 81 in the Communication cited *supra* note 197, para 82. Furthermore, the factor of predictability of business developments can also be used against the dominant undertaking; e.g. Commission Decision *Soda ash – Solvay* (2003), cit. *supra* note 180, para 176; *Soda ash – Solvay* (1991), cit. *supra* note 180, para 59.

dominant firms to rebut a finding of intent. The most relevant commercial justifications for conduct affecting the market structure appear to be the following three. First, the practice can be shown to have actually been initiated, forced and determined by an accordingly powerful customer,[202] rather than being simply in his interest (which would not be a good enough rationale[203]). Long-term exclusive purchasing (supply) agreements concluded as a result of bidding procedures should thus, as a rule, be considered non-abusive even though altering the market structure.[204] The same applies to price cuts or other forms of favourite treatment demanded by powerful buyers, or generally by buyers offering a long-term commitment in exchange for better prices. Second, the practice can be shown to be as such profitable because it increases productive efficiency. Selective price cuts for products with high-fixed costs may increase profits by attracting customers who would not have purchased the product at a higher price.[205] Third, there may be a non-commercial justification sufficient to dissipate the suspicion of a wilful interference with market structures, such as safety concerns.[206]

In a small proportion of cases, the above analysis may remain inconclusive. If there is a significant impact on the market structure, an intervention under Article 82 EC may appear advisable even though there is a perfectly plausible alternative business explanation. One possibility would be to apply Article 82 EC without allegation of fault, and accordingly without the imposition of fines. This, however, would be incompatible with the concept of abuse. The only solution in those cases would be to apply Article 81 EC to the extent that these are bilateral practices.

202. In this sense also Ratliff, op. cit. *supra* note 198, p. 2.

203. In *Hoffmann-La Roche*, cit. *supra* note 22, para 89, the Court made it clear that the tying of purchasers was impermissible "even ... at their request". Cf. also *BPB Industries*, cit. *supra* note 22, para 68 *AKZO*, cit. *supra* note 65, para 149; *Deutsche Post*, cit. *supra* note 79, para 41; *Microsoft*, cit. *supra* note 6, para 832.

204. See also Ratliff, op. cit. *supra* note 198, p. 7; Commission in OECD Roundtable on Loyalty and Fidelity Discounts and Rebates, DAFFE/COMP(2002)21, p. 197; O'Donoghue, op. cit. *supra* note 54, p. 21.

205. For a detailed analysis of the cost-justification of price discrimination aimed at fixed-cost recovery see Ridyard, op. cit. *supra* note 55, 286; O'Donoghue, op. cit. *supra* note 54, p. 41. However, this can justify only price discrimination, not loyalty rebates or exclusive purchasing agreements.

206. See above 2.4.