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Serving American Business as U.S. Affiliate of:

International Chamber of Commerce (ICC)  
International Organisation of Employers (IOE)  
Business and Industry Advisory Committee (BIAC) to the OECD  
ATA Carnet System

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**RE: Directorate-General Competition discussion paper on the application of Article 82 of  
the Treaty to exclusionary abuses**

Dear Sir or Madam:

The attached statement is in response to the DG Competition notice of December 2005, soliciting comments on its discussion paper on the application of Article 82 of the Treaty to exclusionary abuses. The United States Council for International Business (USCIB) is pleased to offer its comments on this important subject. USCIB represents over 300 U.S. corporations, professional firms, and business associations, many with substantial trade and investment interests in the European Union.

USCIB appreciates this opportunity to express its views on Article 82. We stand ready to meet with European agencies to discuss our recommendations and concerns at greater length.

Yours truly,

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Peter M. Robinson  
President  
United States Council for International Business



STATEMENT  
of the  
UNITED STATES COUNCIL  
FOR INTERNATIONAL BUSINESS

**Submission to the Directorate-General for Competition on the  
application of Article 82 of the Treaty to exclusionary abuses**

March 30 , 2006

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**COMMENTS ON THE REFORM OF THE  
APPLICATION OF ARTICLE 82 OF THE EC TREATY**

The United States Counsel for International Business (USCIB) welcomes this opportunity to submit comments on the Reform of the Application of Article 82 of the EC Treaty. USCIB works to advance the global interests of business both at home and abroad. It is the American affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organization of Employers (IOE).

As a globally-oriented business organization, USCIB has a particular interest in how Article 82 is applied in the context of international business, and is able to draw on a rich and varied range of perspectives from different sectors on these issues. It is the belief of USCIB that there are significant efficiencies to be gained, both in Europe and throughout the global economy, through the application of sound economic principals to issues of competition regulation. While necessarily general in nature, it is hoped that the following comments will assist in the identification of priority areas for further advances in competition policy by the Directorate-General for Competition.

**I. Framework for Analysis**

**A. Forms and Rules v. Economic Principles.**

There are few, if any, unilateral practices that can be condemned as anticompetitive without consideration of their actual impacts on the market in which they operate. Cases involving single firm conduct are necessarily about both the dynamics of the firm engaging in the conduct in question and the dynamics of an entire market. Most will involve vigorous competition, which competition laws should be designed to encourage. Consumer welfare is harmed when pro-competitive conduct is chilled or condemned. A full understanding of the overall economic impact of a given business activity is necessary to avoid mistakes in enforcement that ultimately have a negative impact on consumers, businesses and the market.

Adhering to sound economic rationales for enforcement results in more uniform enforcement and more predictable decision making.

Enforcement should continue to push in the direction of increased objectivity, transparency and administrability.<sup>1</sup> Regardless of the type of conduct at issue – whether tying, rebates, or refusals to deal – the question of whether a business has engaged in anti-competitive conduct can only be answered by an analysis of the conduct’s impact on the undertaking, on efficiency, and most significantly, on consumer welfare. While concepts such as market share and market power provide useful starting points in the analysis of market dynamics, standing alone they cannot answer whether unilateral conduct violates Article 82.

Keeping in step with advances in economic thinking, competition enforcement has moved away from a focus on the “form” of challenged conduct in favor of a more flexible and context specific economic analysis of competing interests.<sup>2</sup> USCIB applauds this development. Form-based regulatory regimes in which certain types of lawful behavior become unlawful once a firm passes over some threshold of market share are difficult to justify and even more difficult for businesses to comply with.

For example, a rule that creates a presumption of market power above certain levels of market share deters pro-competitive conduct simply because of the risk it imposes on dominant firms to take any action at all. While *per se* rules may reduce enforcement costs, this purported benefit in fact imposes a much greater cost on society as a whole. This is because such inflexible rules are necessarily over-inclusive and thus have the effect of deterring efficient conduct that would otherwise increase overall consumer welfare. The challenge in exclusion cases is to determine how the law should treat conduct that can have both efficiency benefits and

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<sup>1</sup> International Chamber of Commerce, *ICC Comments on the Reform of the Application of Article 82 of the EC Treaty*, Doc. No. 225/623 (12 Dec. 2005) at 3-4, 16.

<sup>2</sup> See John Vickers, *Abuse of Market Power*, 115 *Economics Journal* F244, F245-47 (2005); John Vickers, *Competition and Economics Policy*, October 3, 2002 at 3-6.

exclusionary harms. As a result of the difficulty of distinguishing when the line between aggressive pro-competitive conduct and conduct that is harmful to competition is crossed, standards governing such conduct need to be sufficiently flexible and adaptive to be able to incorporate continuing advances in our understanding of economics.

The act of competition enforcement should be a fact-intensive inquiry that requires consideration of sophisticated economic evidence. There are basic economic principles that should be applied in a uniform manner to cases involving single firm conduct. For example, a competition law that seeks to maximize consumer welfare should take as its underlying principle that government intervention should be modest and undertaken only when the rules are clear and understandable so that uncertainty about the rules does not inhibit competitive and entrepreneurial forces that competition regulation is intended to encourage. The rules adopted should give clear notice to affected parties so that they will know what is required of them. Additionally, enforcement decisions should turn on tractable factual issues, and like cases should be treated alike.

The criterion by which competition rules should be judged is how well the rules deter welfare-reducing conduct without reducing welfare-enhancing conduct. This is a very fact-intensive consideration. Closer adherence to the general principle that enforcement exists to foster competition, not competitors, combined with a greater effort to publicize the economic rationale behind enforcement decisions (including enforcement actions not taken) will result in more uniform and economically accurate decision-making, as well as greater transparency to the business community. In sum, these core principles help make the law and its enforcement more

predictable, thereby furthering robust conduct by economic actors, and thus in turn promoting competition objectives.<sup>3</sup>

## **B. Enforcement Should Focus on Consumer Welfare and Not Harm to Competitors.**

### **1. Focus on Consumer Welfare**

USCIB welcomes the discussion paper's statement in paragraph 4 that "[w]ith regard to exclusionary abuses the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources." Competition law should prohibit conduct only where the net impact on competition, taking into account any benefits of efficiency gains and consumer benefits, is nonetheless negative. Under Article 82, harm to competitors is not a sufficient condition for enforcement.<sup>4</sup> If the efficiencies generated by a dominant firm's conduct outweigh their negative effects on competition such that the net effect advances consumer welfare, the conduct should not be considered abusive.<sup>5</sup>

How efficiencies and negative impacts are to be identified, measured and balanced is a matter of some debate. In addressing these questions, however, it is important that policy makers be mindful as to how the adopted approach can be fashioned onto a set of rules and regulations that can be efficiently administered. In addition, the rules and regulations must not impose such high costs of compliance that they destroy the incentives to create the efficiencies they are intended to foster and protect. USCIB believes that a sound and administrable policy begins with adoption of the proposition that a dominant firm's conduct should be viewed as abusive

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<sup>3</sup> International Chamber of Commerce, *ICC Comments on Selected Issues for Study by the U.S. Antitrust Modernization Commission*, Doc. No. 225/621 (1 Sep. 2005) at ¶ 6.5

<sup>4</sup> European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (Dec. 2000) ("DG Discussion Paper") at ¶¶ 57, 58, 60, 94, 134.

<sup>5</sup> *Id.* at ¶¶ 54-60, 67, 91, 92.

only when its net effect is to harm consumer welfare. As Judge Learned Hand<sup>6</sup> once admonished: “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”<sup>7</sup> When a dominant firm wins business from a customer that was formerly served by a competitor, the competitor is excluded from that transaction, yet such competition is entirely beneficial. We believe that the means of reducing the risk that consumer welfare might be harmed though over-enforcement requires close adherence to the general principle that enforcement exists to foster competition, not competitors. It is often difficult to distinguish between firms that achieve and maintain their dominant position as a result of being aggressive, innovative competitors that benefit consumers, from those who engage in conduct that retards competition. Pro-competitive conduct that benefits consumers and the business engaging in it may hinder the efforts and prosperity of that business’ competitors.<sup>8</sup>

## 2. Exclusionary Abuses

Paragraph 1 of the discussion paper defines exclusionary abuses as “behaviors by dominant firms which are likely to have a foreclosure effect on the market, *i.e.*, which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers.” Because enforcement is appropriate only in instances where consumer welfare is harmed, the definition of exclusionary abuses must necessarily be limited to where the extent of the foreclosure is sufficient in the context of the relevant market to harm competition and where that harm is brought about by illegitimate means. The objective of any business enterprise is to expand its position in the marketplace to the

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<sup>6</sup> Billings Learned Hand (1872-1961), a senior judge of the U.S. Circuit Court of Appeals for the Second Judicial Circuit, was responsible for several landmark decisions in the early development of competition law. His decisions, particularly those involving the charge of monopoly, set judicial precedence in the United States for decades.

<sup>7</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2nd Cir. 1945).

<sup>8</sup> DG Discussion Paper at ¶¶ 58, 82, 83, 96.

maximum amount possible. It is in this manner that a company maximizes the return on investment of its stakeholders. To accomplish this goal, businesses are compelled to out-perform their competitors through superior efficiency, innovation and price. Far from being a threat to competition, companies that are most successful in one or more of these pro-competitive behaviors are by definition the most likely to become dominant firms. Such firms necessarily engage in aggressive competitive practices, practices that should be encouraged regardless of who wins or loses as long as the outcome is not the impairment of competition itself.

When a dominant firm wins the business from a customer formerly served by a competitor, the competitor is excluded from that transaction, yet such competition is entirely beneficial. Therefore, it is often difficult to distinguish between firms that achieve and maintain their dominant position as a result of being aggressive, innovative competitors and those who engage in conduct that retards competition. This task is made even more difficult by the fact that conduct that benefits both the business engaging in it and, ultimately, the consumers served by it may also act to hinder the efforts and prosperity of competitors.<sup>9</sup> For these reasons, it is critical that it be made clear that the mere fact that competitors may be harmed is insufficient to establish liability. There must be harm to consumers that was predictable at the time the conduct occurred.

### **3. Efficiencies**

Efficiencies, recognized but only briefly in the discussion paper,<sup>10</sup> should be a central consideration in determining whether conduct is abusive. Efficiencies occur where unilateral conduct results in positive effects that benefit consumers, such as improved quality or reduced prices. These efficiencies may be of either a qualitative or quantitative nature. For example, where a firm is able to realize economies of scale or to introduce more efficient methods of

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<sup>9</sup> *ICC Comments on Selected Issues for Study by the U.S. Antitrust Modernization Commission* at ¶¶ 4.4, 6.1.

production or distribution, it can reduce costs and hence prices. Efficiencies are also created as a result of greater research and innovation. All of these things are beneficial to consumer welfare, and, thus, conduct that results in efficiencies should not be deemed abusive. A failure to recognize the consumer benefits from the creation of efficiencies would result in over-enforcement, which in turn would result in innovation-detering uncertainty as to when otherwise pro-competitive conduct becomes abusive.<sup>11</sup>

## **II. Determining When Conduct is Exclusionary**

Standards for exclusionary conduct should continue to be determined by taking into account sound economic theory, with particular focus on developing an administrable test that is intelligible enough to provide guidance to businesses seeking to compete aggressively while conforming their conduct to the law. Indeterminacy in competition laws creates uncertainty for businesses. Uncertainty for businesses creates a risk that they will not undertake pro-competitive, pro-consumer activities for fear of becoming embroiled in costly, lengthy litigation. A workable definition of exclusionary conduct under Article 82 must not be over-inclusive and must also be readily administrable.

Exclusionary conduct is behavior that excludes competitors on some basis other than efficiency, to the detriment of consumers. Mere market exclusion or serious harm to competitors should not be enough to establish liability, absent a further showing of abnormal methods of competition or competition not on the merits. Stated another way, conduct is unlawful if it would be unprofitable for the acting firm but for both the exclusion of rivals from a market and the resulting market power that would enable the dominant firm to recoup its prior period losses. Conversely, conduct is not exclusionary if the conduct would be profitable for the acting firm

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<sup>10</sup> DG Discussion Paper at ¶¶ 130-134; *see also* ¶ 206.

<sup>11</sup> DG Discussion Paper at ¶¶ 87, 88, 91, 92.

and would make good business sense even if it did not exclude rivals and thereby create or preserve market power for the acting firm.

A standard for whether behavior is appropriate must consider the economic reality confronting the acting firm at the time the decision to take a given course of action is taken. Moreover, that standard must be the same at the time the challenged conduct is undertaken as it is when the conduct is scrutinized, possibly years later. An efficient standard provides for adequate deterrence while reducing the risk of false positives. Ideally, the standard and the means of its implementation will achieve the following goals. First, the standard must condemn only conduct that clearly could be anticipated to generate incremental costs for the acting firm that exceed the incremental revenues or cost savings that the conduct creates for the firm. It should condemn only conduct that, viewed *ex ante*, reduces welfare on the basis of the short-term, non-transitory consequences of the conduct. As the European courts have noted in the analogous context of conglomerate mergers, the Commission should be required to show that the conduct of the dominant firm would be likely to result in harm to competition “in the relatively near future.” It should not condemn conduct on the ground that it might lead to future increases in market power and a resulting welfare reduction. Such a standard would present a greatly reduced risk of false positives. To the extent that the Commission wishes to consider long-term effects on the market, the Commission should adhere to a higher evidentiary standard, given that showing long-term effects are often “dimly discernable, uncertain and difficult to establish.”<sup>12</sup> Therefore, the Commission should be required to show clear and convincing evidence that the long-term effects will likely result from the behavior in question.

Second, an efficient standard directs attention to the nature of the defendant’s conduct, not just to market-wide effects, many of which are unanticipated and beyond a defendant’s

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<sup>12</sup> See *Commission v Tetra Laval*, Judgment of 15 Feb. 2005, Case C-12/03. (ECJ 2005), at ¶ 44.

control. In this manner, an efficient standard ensures that firms are entitled to reap the fruits of their “skill, foresight and industry,” even if those fruits include market power, and condemns only conduct that is not competition on the merits.

Third, an efficient standard ensures that the competition laws condemn only conduct from which an anticompetitive intent can unambiguously be inferred. One way it can accomplish this is by condemning only conduct that makes no sense apart from exclusion of competitors and resulting market power. It should not condemn conduct that makes good sense from the firm’s perspective, regardless of the resulting market power simply on the ground that the conduct may have the effect of creating market power.

Finally, the efficient test is administrable by enforcement agencies and courts, and provides simple and meaningful guidance to firms to enable them to know how to avoid liability without steering clear of procompetitive conduct. Firms would be able to comply with the law simply by determining whether their contemplated conduct would make good business sense even if the conduct did not increase their market power.

### **III. The Role of Dominance**

#### **A. Market Share is Only a Starting Point for Analysis.**

The Discussion Paper takes an important step towards a more economic approach to Article 82 by defining dominance as having “substantial market power.”<sup>13</sup> As the Discussion Paper explains<sup>14</sup>, an undertaking has substantial market power “only if it is capable of substantially increasing prices above competitive levels for a significant period of time.” Market share alone is never a sufficient indicator of dominance since it is necessary in each case to examine the “link between the position of economic strengths held by the undertaking and the

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<sup>13</sup> DG Discussion Paper at ¶ 23.

<sup>14</sup> DG Discussion Paper at ¶ 24.

competition process” in the context of the relevant market.<sup>15</sup> Standards that, either overtly or covertly, run contrary to these fundamental principles should be suspect, as more often than not they result in discouraging leading firms from engaging in conduct that benefits consumers at the expense of a competitor’s market share. Placing undue reliance upon market share in determining dominance and making enforcement decisions deters firms from engaging in aggressive competition. Why should a firm engage in activities that are beneficial to consumers, such as rebates and discounts, when the increased market share potentially gained by being more efficient serves only to attract the punitive attention of competition enforcers? Additionally, given the tremendous variation that exists between and among markets, reliance on market share thresholds to evaluate abuse risks being substantially over-inclusive to the detriment of consumer welfare. This is especially true in dynamic markets, where competition is generally “winner-takes-most.” In these markets, market shares are a particularly poor proxy for market power since even incumbents with very high market shares are almost always constrained by a permanent threat of entry, mandating innovation.

**B. High Market Share is Not an Accurate Indicator of Dominance.**

There is no economic basis for discounting a firm’s pro-competitive, welfare-enhancing, efficient behavior simply because it holds a particular percentage of the relevant market. The fact that a firm has a large portion of the relevant market simply does not translate *ipso facto* to the possession of dominance in the market by that firm.<sup>16</sup> As the DG Discussion Paper recognizes,<sup>17</sup> to avoid being over-inclusive at the expense of consumer welfare, a great number of market factors must be considered before it can be concluded that a firm possesses market power. Factors such as low barriers to entry, changes in technology, or unusually strong power

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<sup>15</sup> DG Discussion Paper at ¶ 23.

<sup>16</sup> *ICC Comments on the Reform of the Application of Article 82 of the EC Treaty* at 5-6.

<sup>17</sup> DG Discussion Paper at ¶¶ 28-29.

in the possession of buyers restrict the behavior of even dominant firms. However, where market share thresholds trigger presumptions of market power, the risk of false positives is extraordinarily high to the detriment of consumers, as even an above-cost price cut can result in liability, even though any exclusionary effect either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.

What is of significance in assessing dominance, as the DG Discussion Paper recognizes,<sup>18</sup> is an analysis of a firm's exercise of market power over time. Obviously, where a firm is required to modify its behavior in a relevant market as the result of the activities of its competitors, it cannot truly be said to possess market power.<sup>19</sup> This is because the firm in such circumstances cannot act without regard to whether the conduct is efficient or harms consumer welfare over an extended period of time. Similarly, as noted in the portion of the Discussion Paper dealing with rebates, evidence that other firms are able to compete for all or most of the demand in the relevant market is inconsistent with a finding of dominance even if the leading firm has a very high market share.<sup>20</sup> In addition, evidence that competitors are expanding or are able to expand their operations, or that new firms are entering or are able to enter a market, is inconsistent with a finding of market power, and hence market dominance.<sup>21</sup>

The Discussion Paper suggests that in certain cases, market share alone can lead to a presumption of dominance.<sup>22</sup> Given the emphasis on economic analysis suggested throughout the Discussion Paper, these sections should be modified to acknowledge that market shares may,

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<sup>18</sup> DG Discussion Paper at ¶ 30.

<sup>19</sup> DG Discussion Paper at ¶ 27.

<sup>20</sup> DG Discussion Paper at ¶ 146 & fn. 92.

<sup>21</sup> DG Discussion Paper at ¶ 40.

<sup>22</sup> *See, e.g.*, Paras. 29-31.

in certain circumstances, be *indicative* of market power, but insufficient to establish a *per se* presumption.

While high market shares are not presumptively indicative of market power, it is nonetheless appropriate to establish a safe harbor based on market shares.<sup>23</sup> For example, in *United States v. Aluminum Company of America*,<sup>24</sup> approved and adopted by the U.S. Supreme Court in *American Tobacco Co. v. United States*,<sup>25</sup> Judge Learned Hand created the widely accepted rule of thumb that to find monopolization, "it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not."<sup>26</sup> Supreme Court cases have suggested that absent special circumstances, a defendant must have a market share of at least fifty percent before he or she can be guilty of monopolization.<sup>27</sup> Thus, as a matter of law, absent other relevant factors, U.S. courts have found that a 55 percent market share will not prove the existence of monopoly power.<sup>28</sup> For market shares above that level,<sup>29</sup> a full-scale economic analysis of the economic justifications from the firm's perspective and of the effects of the firm's behavior on consumers, not competitors, is called for. By adopting a market share "safe harbor," businesses can be spared the enormous expense of being forced to defend single firm conduct when there is virtually no likelihood that such conduct could have harmed consumers.

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<sup>23</sup> *ICC Comments on the Reform of the Application of Article 82 of the EC Treaty* at 5-6.

<sup>24</sup> *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir.1945).

<sup>25</sup> *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

<sup>26</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2nd Cir. 1945).

<sup>27</sup> Illustrative Supreme Court cases include *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (91% market share); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (87%); *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959) (81%); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (86%); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (90%); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (75%); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (70%); *United States v. Pullman Co.*, 50 F. Supp. 123 (E.D. Pa.1943), *aff'd per curiam*, 330 U.S. 806 (1947) (100%).

<sup>28</sup> *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 201 (3d Cir. 1992).

<sup>29</sup> *ICC Comments on the Reform of the Application of Article 82 of the EC Treaty* at 5.

### **C. Market Definition.**

As the DG Discussion Paper points out,<sup>30</sup> to establish whether a business possesses market power, it is necessary to define the relevant market in which said power allegedly operates. Additionally, competitors selling reasonable substitutes for the product or products at issue must be accurately identified and, since what constitutes a reasonable substitute is a question of demand, the relevant customers must also be accurately identified. Thus, for example, it would be inappropriate to define a relevant market by reference to a single firm's intellectual property rights (IPRs), whether patents, copyrights, or unpatented trade secret technology. Indeed, the United States Supreme Court in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, recently recognized that “Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”<sup>31</sup> The development of economic methods for accurately addressing these questions is a process that is rapidly developing and rules and regulations must be flexible enough to accommodate newer methodologies as they become economically feasible to apply. Therefore, mechanical application of any test must be avoided. In particular, the Commission should not rely solely on methods that focus exclusively on product characteristics, which may lead to overly narrow market definitions, and concomitantly erroneous findings of dominance.

## **IV. Burdens and Levels of Proof**

### **A. Burden of Production.**

No matter how well designed or empirically based a standard for determining whether conduct is exclusionary, the benefits of such a standard can be dissipated or even eliminated by

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<sup>30</sup> DG Discussion Paper at ¶ 12.

the procedures through which it is applied. For example, placing on dominant firms the burden and risk of being able to prove that the efficiency gains of their conduct outweigh any negative effects on competition, rather than requiring the party seeking enforcement to rebut any *prima facie* efficiency claims as an essential part of plaintiff's case, will discourage dominant firms from engaging in efficiency enhancing conduct, regardless of the standard selected.<sup>32</sup> There is no sound reason why enforcement agencies should not carry the burden of evaluating business justifications when attempting to assess the overall positive and negative effects on the marketplace of the behavior in question. It should be the burden of the authority investigating the alleged infringement of Article 82 to support any finding of abuse by empirical economic evidence that the conduct can credibly be shown to cause substantial harm to consumer welfare, and only then should the firm have a burden of coming forward with justifiable efficiencies that can be balanced against the demonstrable harm.

#### **B. Issues Involving the Standard of Proof.**

Standards that are unjustifiably high, such as requiring that a firm demonstrate that the conduct in question was “indispensable” in order to realize the claimed efficiencies, or that there are no other economically practicable and less anticompetitive alternatives to achieve the same efficiencies, should be avoided.<sup>33</sup> While a business may consider multiple courses of action, it is unrealistic to expect firms to expend the resources necessary to perform studies to eliminate the possibility that there might be alternative courses of action that might have less impact on competitors. Imposing such a burden on businesses institutionalizes the very inefficiencies this process is trying to avoid, and places the protection of competitors above creating efficiencies in

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<sup>31</sup> *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281, 1293 (2006).

<sup>32</sup> DG Discussion Paper at ¶¶ 77, 79, 84, 86, 91.

<sup>33</sup> *Id.* at ¶¶ 84, 86.

the market. Indeed, imposing such costs eliminates the incentives for firms to undertake innovative measures to increase efficiencies or reduce prices in the first instance.

In addition to the criteria of indispensability, the criteria regarding the elimination of competition in respect of a substantial portion of the products concerned seems to be an unjustifiably high standard. At least if this criteria is interpreted as in Article 81(3) it will be hardly possible for a dominant company to demonstrate that “competition in respect of a substantial portion of the products concerned is not eliminated.” Finally, the presumption that above a market share of 75% efficiencies will no longer justify otherwise abusive behavior is at odds with an economics-based approach. It will make it impossible for a number of companies to engage in efficiency-enhancing pro-competitive behavior.

**1. Standards Should Remain Constant and Not Shift in Response to Market Share.**

As previously noted, market share is not a substitute for an empirical understanding of the market. It is only a starting point for analysis. As such, there is little if any justification for applying different standards to the same conduct when engaged in by firms having differing market shares.<sup>34</sup> Where firms with high market shares generate efficiencies that benefit consumers, their conduct is no different than that of any other actor in the market and their conduct must be permitted, even if it means the elimination of less efficient competitors.<sup>35</sup> While it could be argued that in the context of predatory pricing, a larger market share provides an incentive for preclusive conduct, the instances where recoupment may successfully be had are extraordinarily rare and thus do not provide a justification for standards to shift in response to the degree of market share.

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<sup>34</sup> *Id.* at ¶¶ 91, 92.

<sup>35</sup> *ICC Comments on the Reform of the Application of Article 82 of the EC Treaty* at 18-19.

## **V. Collective Dominance**

The Discussion Paper notes that Article 82 is also applicable where two or more undertakings together hold a dominant position.<sup>36</sup> Applying Article 82 to situations where two or more undertakings function in the market as a single firm because of “ownership interests or other links in law”<sup>37</sup> is unlikely to pose problems for undertakings. Indeed, as the Discussion Paper confirms, to date Article 82 has only been applied “with respect to exclusionary abuse of a collective dominant position” in “situations where there were strong structural links between the undertakings holding the dominant position.”<sup>38</sup>

USCIB questions the proposal in the Discussion Paper to expand the application of Article 82 to reach oligopolistic markets in which there are no structural or legal links among the undertakings.<sup>39</sup> It would be extremely difficult to advise firms as to how to avoid Article 82 violations when their economic self-interest may lead each firm in an oligopolistic market to pursue similar independent actions. In addition, it is unclear what remedial steps would be appropriate to address ongoing independent behavior involving “conscious parallelism” taken by firms in an oligopolistic market. The failure of the attempts by U.S. antitrust agencies in the 1970s and 1980s to deal with “shared monopolies” suggests that the Commission should avoid expanding the concept of collective dominance beyond the reach of the current case law.

## **VI. Predatory Pricing**

As the Discussion Paper notes, the “lowering of prices, the directly visible part of predation, is also an essential element of competition. By lowering its price and/or improving the quality of its products a company competes in the market. This is competition that benefits

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<sup>36</sup> DG Discussion Paper at ¶ 43.

<sup>37</sup> DG Discussion Paper at ¶ 45.

<sup>38</sup> DG Discussion Paper at ¶ 76.

<sup>39</sup> DG Discussion Paper at ¶ 46. Any anti-competitive agreements between undertakings can be addressed under Article 81.

its consumers and that a competition authority wants to defend and protect.”<sup>40</sup> Two important aspects of the Discussion Paper’s approach to predatory pricing should be revised because they threaten to chill pricing initiatives that will benefit consumers.

First, pricing at or above average total cost (ATC) should not provide a basis for a claim of predatory pricing. The Discussion Paper correctly observes that prices that are above a firm’s ATC “are in general not considered to be predatory because such pricing can usually only exclude less efficient competitors.”<sup>41</sup> Rather than create uncertainty that might chill pricing behavior by successful firms that will benefit consumers in order to make it possible to address the rare “exceptional situation,”<sup>42</sup> the Commission should encourage lower prices by making pricing at or above ATC a safe harbor that will not expose firms to Article 82 scrutiny.

Second, the Discussion Paper fails to focus appropriately on recoupment. Recoupment should be a critical element of any predatory pricing claim, since consumers will benefit overall from lower prices unless the firm engaging in below cost pricing is able to recoup all of its losses on a net present value basis. It is therefore not sufficient to presume a “likelihood of recoupment” from the fact that a firm holds a dominant position and, consequently, that there are likely to be barriers to entry into the relevant market.<sup>43</sup> The existence of barriers to entry is necessary for the dominant firm to recoup its losses but is not sufficient to establish that recoupment would occur. The recoupment assessment should take into account the magnitude of the likely losses, the level of increased prices following foreclosure and the period of time during which those prices would need to be charged, the time value of money, and the prospects for

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<sup>40</sup> DG Discussion Paper at ¶ 94.

<sup>41</sup> DG Discussion Paper at ¶ 127.

<sup>42</sup> DG Discussion Paper at ¶ 128.

<sup>43</sup> DG Discussion Paper at ¶ 122.

innovation affecting the ability to recoup as well as the prospects for entry prior to recoupment of the losses on a NPV basis.

## **VII. Bundling and Tying**

### **A. Tying and Bundling are Competitive Strategies Designed to be Pro-consumer, and Should be Considered Non-abusive Unless Proven Otherwise.**

Bundling and tying are ubiquitous to the marketplace and are now considered to provide significant benefits to both producers and consumers. Thus, a *per se* approach is not appropriate and results in over-enforcement and a reduction reduces activities that would result in increases in consumer welfare. It is now a well-accepted economic principle that, more often than not, bundling and tying results in lower production, transaction and distribution costs, lower prices, and greater convenience and utility for consumers.

Distinguishing instances of anticompetitive tying or bundling from instances of procompetitive tying or bundling is especially difficult.<sup>44</sup> “[T]here are decent theoretical reasons for concern that vertical restraints can have anticompetitive consequences,” yet that outcome will occur “probably in only a small minority of cases in which they are employed. Yet even in suspicious cases there invariably are multiple possible reasons for a challenged practice – no responsible student of competition policy is about to suggest that bundling, discounting, exclusive dealing, volume discounts, consumer rebates, or even tying should be presumptively unlawful – and sorting out the reasons in particular cases will often be very difficult. It is easier to conjecture anticompetitive [reasons] for such practices than it is to determine the practices’ actual or even (in contrast to cartel cases) likely economic consequences.”<sup>45</sup>

Market-leading companies should be able to continue producing innovative combinations of products benefiting consumers without running afoul of the prohibitions on tying unless the

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<sup>44</sup> *Id.* at ¶¶ 183- 206.

<sup>45</sup> Richard Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 2229, 240-41 (2005).

competition authority can rebut the innovating firm's *prima facie* case of efficiency gains.<sup>46</sup> When companies combine formerly separate products, consumer welfare is usually increased as firms realize the efficiencies involved. These efficiencies may be the result of greater product functionality or the elimination of double marginalization, or simple convenience. Such tying or bundling may also lead to system-based competition, which may create an even more innovative and competitive market than component-based systems, as the markets for computer systems, home theaters, and cell phones aptly demonstrate. As a result, any rule that did not create broad safe harbors would run a substantial risk of deterring pro-competitive conduct to the detriment of the consumer.

One such safe harbor is suggested in the Discussion Paper in the context of bundling. The Paper offers a safe harbor based upon analysis of whether “the incremental price that customers pay for each of the dominant company’s products in the bundle [covers] the long-run incremental costs of the dominant company of including th[e] product in the bundle.”<sup>47</sup> Assuming that this safe harbor is sufficient, then for mixed-bundle discounts or rebates that fall outside the safe harbor, the Commission should then continue the analysis by demonstrating (1) a likelihood of recoupment and (2) a likelihood of the creation of substantial market power in the relevant market for the “bundled” product in order to show that discounting through mixed bundling constitutes an abuse of dominance. Absent such a showing, mere exclusion of a competitor should not be found sufficient to establish a finding of anticompetitive bundling. Moreover, as discussed in Section B following, a somewhat broader safe harbor may further serve to limit false positives.

As is the case in other areas of single firm conduct, it can be difficult to distinguish between vigorous competition and anticompetitive acts, especially where the alleged act results

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<sup>46</sup> ICC Comments on Selected Issues for Study by the U.S. Antitrust Modernization Commission at ¶ 8.0.

in the lowering of prices to consumers. It is therefore essential that the regulation of bundling and tying practices focus not on their effects on competitors, but on the welfare of customers in the market. This can only be determined through an extensive analysis of the market, the conditions of entry and the constraints the threat of entry places on market participants. Evidence of harm to competitors is ambiguous at best with regards to the positive or negative impact of the conduct on the market. Because erroneous enforcement may discourage pro-competitive practices that provide benefits to the market, entities challenging such conduct must be required to demonstrate anticompetitive consequences directly resulting from the alleged conduct.

**B. An Economics-Based Test of Tying and Bundling Would Incorporate These Elements.**

An analysis of bundling should not proceed unless a defendant's price discount brings the firm's price below its cost.<sup>48</sup> Even when a company engages in below-cost pricing, the firm still should not be found liable without substantial proof that the firm can and will recover its discounts because of a reduction in competition.<sup>49</sup> Indeed, in markets where businesses can move in and out, the short-term benefits to consumers in the form of lower prices may more than offset the remote risk that the seller will ultimately succeed in driving all rivals from the market.

Because the harm over-enforcement can cause to consumer welfare is significant in this area, the ideal test is one that greatly reduces the risk of enforcement by being administrable by competition authorities while being easily and predictably applied by businesses. It would create a safe harbor for which a business can qualify using its own readily available data, thus not diminishing the effects of efficient conduct as a result of compliance costs. It must be designed

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<sup>47</sup> D.G. Discussion Paper at ¶ 190.

<sup>48</sup> *Brook Group, LTD v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 222-23 (1993).

<sup>49</sup> *Id.* at 224-26. Any recoupment analysis should also take into account the impact of the time value of money, that is, that the amount of recoupment has to be larger in absolute terms than the loss from pricing below cost, since the recoupment will by definition occur in a later period.

so that it condemns only conduct that generates incremental costs for the defendant that exceed the incremental revenues or cost savings that the conduct creates for the defendant, and thus condemns only conduct that is not “competition on the merits,” while allowing firms to reap the fruits of their skill, foresight and industry. The adoption of economically sound, administrable and predictable standards provides straight-forward and meaningful guidance to firms to enable them to know how to avoid competition liability with data readily available to them at the planning stage. An efficient standard should move business behavior in a pro-competitive direction without imposing excessive decision-making costs or chilling aggressive competition.

## **VIII. Refusals To Deal**

### **A. Consumer Welfare Requires an Approach Grounded in Economics.**

Similarly, an empirical, economically based test for exclusionary conduct would be particularly beneficial for application to cases involving refusals to deal. It is well established that firms, even dominant firms, generally have the right to decide whom to supply, including whether to supply at all.<sup>50</sup> It is also widely recognized that forcing dominant firms to grant access to their inputs can deter innovation, both by discouraging dominant firms from investing in innovation in the first instance, and by encouraging smaller rivals not to innovate but instead to “free ride” on the innovations of others.<sup>51</sup> The United States Supreme Court, echoing these principles, recently observed that compelling firms who have established an advantage “to share the source of their advantage is in some tension with the underlying purpose of competition law, since it may lessen the incentive for the monopolist, the rival, or both to invest” in ways that promote consumer surplus.<sup>52</sup>

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<sup>50</sup> *Id.* at ¶¶ 207, 213, 218.

<sup>51</sup> Brief for the United States, et al, as Amici Curiae Supporting Petitioner, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No 02-682), 2003 WL 21269559 at \*13-20.

<sup>52</sup> *Verizon Communs., Inc.*, 540 U.S. at 407.

A firm's dealings with third parties and its prior dealings with rivals provide a baseline for evaluating its challenged conduct. Where a firm is willing to deal with its retail customers on certain terms (such as a certain price), claiming that its refusal to deal with a rival on those terms constitutes anticompetitive conduct makes no economic sense. However, absent discriminatory dealing or departures from prior profitable courses of dealing, decisions by either courts or regulatory agencies to enforce sharing distorts the incentives to innovate and should therefore be avoided.<sup>53</sup>

The Discussion Paper appears to make the troubling suggestion that there is no need to identify an actual downstream market, and would deem the existence of a potential or hypothetical market sufficient for a showing of anticompetitive effect.<sup>54</sup> Read literally, the effect could be to require dominant firms to share every technological advance made to improve production processes, even absent the existence of an existing market for such technology, even without the presence of any effort at leveraging. This would be particularly troubling in an innovation market, where technological advances are the primary competitive advantage.

As in bundling and tying cases, reducing the occurrence of over-enforcement in cases involving refusals to deal while being efficient and administrable requires the consistent application of sound economics. In order not to suppress conduct that would be beneficial to consumers, appropriate standards must be adopted that condemn only conduct that is not “competition on the merits,” while allowing firms to reap the fruits of their skill, foresight and industry by being able to predict the likely consequences of their actions. Meaningful guidance must be provided to firms to enable them to know how to avoid liability using data that is readily available to them at the planning stage, and that the conduct, if challenged, will be evaluated

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<sup>53</sup> DG Discussion Paper at ¶ 210.

under the same efficient standard that applied at the time the company decided to engage in the conduct.

## **B. Intellectual Property Rights**

It is a well established principle that the rights of intellectual property holders are to be respected in all but most exceptional circumstances.<sup>55</sup> In fact, there is no economic reason why cases involving intellectual property rights should be treated any differently than any other case involving a refusal to deal.<sup>56</sup> The purpose of intellectual property law in the first instance is to provide businesses an incentive to invest in research and development activities aimed at generating new products and services. Thus, intellectual property rights are of vital importance to promoting consumer welfare. The adoption of rules and standards that create uncertainty as to when a company may be required to license its intellectual property will have a chilling effect on investment in research and development, to everyone's detriment.<sup>57</sup> This is particularly true in markets that are already subject to governmental regulation. Such regulation tends to significantly reduce the likelihood of major antitrust harm. The additional benefit to competition of adding another layer of legal process will tend to be small, whereas the risk of false positives is high.<sup>58</sup>

Moreover, the Discussion Paper does not provide clear guidance with regard to refusals to license IPRs, and runs the very real risk of over-deterrence. For example, while rightly acknowledging that the refusal to license an IPR should only be considered an abuse in "exceptional circumstances,"<sup>59</sup> the Paper goes on to state that such circumstances may be present where the potential licensee "intends to produce new goods or services not offered by the owner

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<sup>54</sup> D.G. Discussion Paper at ¶ 227.

<sup>55</sup> D.G. Discussion Paper at ¶ 239; *but see* ¶ 240.

<sup>56</sup> *Illinois Tool Works*, 126 S.Ct. at 1293.

<sup>57</sup> *ICC Comments on the Reform of the Application of Article 82 of the EC Treaty* at 19.

<sup>58</sup> *Trinko*, 540 U.S. at 407-408, 411-15.

of the right and for which there is a potential demand.” However, there is no definition of precisely what constitutes “new goods or services” for the purpose of application to Article 82. This leaves open the possibility of an overly broad definition, and hence, potential over-enforcement. The Commission could utilize this opportunity to clarify the definition of “new goods or services,” a standard developed in the *IMS Health* licensing case a few years ago, but still without substantive content.<sup>60</sup>

Similarly, there is no justification in law or economics for the proposition that trade secrets should be entitled to less protection under Article 82 than other forms of intellectual property. If trade secrets are provided less protection than other forms of intellectual property, the net effect will be less innovation and competition in the market, not more. This is simply because the protection of trade secrets enables firms to recover the investments they make in the research and development that are necessary for the firm to be able to meet the competitive pressures of its rivals, who are themselves investing in research and development for the same reason. Thus, as is the case with other forms of intellectual property, uncertainty as to the ability to recover the costs of the research and development necessary to create innovative trade secrets acts as a disincentive, to the detriment of consumer welfare. From the other perspective, there is little incentive for risking the loss of your own investment in research and development that may fail to yield the desired results when you have the option of free-riding off of the efforts of a rival. For these reasons, sound economics requires that trade secrets be protected the same as

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<sup>59</sup> D.G. Discussion Paper at ¶ 239.

<sup>60</sup> Also troubling is the suggestion in Paragraph 240 that dominant firms could be forced to supply a license to their rivals for IPR technology that is indispensable for follow-on innovation even if the technology is not sought for direct incorporation in a product or service. The anomalous result would be that the dominant firm’s rivals could pick and choose its technologies on the notion that such technologies could be useful at some indeterminate later date to develop a follow-on innovation, thereby eliminating any incentives for innovators in order to protect “free-riding” rivals engaged in exploitation of the technological innovator. This paragraph should be deleted from the Paper.

any other form of intellectual property, and that the rules and regulations impacting intellectual property rights not create ambiguity with regards to the extent of their protection.

### **VIII. Aftermarkets**

As the Discussion Paper notes, it is common for the supplier of capital equipment to have “a very strong position” in the sale of “secondary” products and services used with its own brand of equipment.<sup>61</sup> As a result, there is a risk that undertakings with quite modest positions in the primary market would be viewed as dominant in the aftermarket if the assessment were to be focused only on an aftermarket consisting of products and services for their individual brand of equipment.

The Discussion Paper is correct in emphasizing that the “secondary markets” should not be viewed in isolation since “the actual degree of market power of the supplier [in the aftermarket] . . . may be constrained by competition in the primary market.”<sup>62</sup> As the Discussion Paper explains, “competition in the primary market may make price increases in the aftermarket unprofitable due to its impact on sales in the primary market, unless prices in the primary market are lowered to offset the higher aftermarket prices.”<sup>63</sup> This fundamental insight regarding the key relationship between the primary market and any related aftermarkets means that a separate examination of a single-brand aftermarket under Article 82 is rarely, if ever, appropriate.

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<sup>61</sup> DG Discussion Paper at ¶ 253.

<sup>62</sup> DG Discussion Paper at ¶ 246.

<sup>63</sup> *Id.*