

Unclassified

DAF/COMP(2005)27



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

30-Mar-2006

English/French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 22 December 2005

COMPETITION ON THE MERITS

JT03206706

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

**DAF/COMP(2005)27
Unclassified**

English/French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition on the Merits which was held by the Competition Committee in June 2005.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la concurrence aux mérites, qui s'est tenue en juin 2005 dans le cadre du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "les tables rondes sur la politique de la concurrence".

Visit our Internet Site – Consultez notre site Internet

<http://www.oecd.org/competition>

OTHER TITLES**SERIES ROUNDTABLES ON COMPETITION POLICY**

1.	Competition Policy and Environment	OCDE/GD(96)22
2.	Failing Firm Defence	OCDE/GD(96)23
3.	Competition Policy and Film Distribution	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements	OCDE/GD(96)65
5.	The Essential Facilities Concept	OCDE/GD(96)113
6.	Competition in Telecommunications	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11.	Competition Issues related to Sports	OCDE/GD(97)128
12.	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13.	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14.	Resale Price Maintenance	OCDE/GD(97)229
15.	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16.	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19.	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21.	Regulation and Competition Issues in Broadcasting in the light of Convergence	DAFFE/CLP(99)1

22.	Relationship between Regulators and Competition Authorities	DAFFE/CLP(99)8
23.	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24.	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25.	Oligopoly	DAFFE/CLP(99)25
26.	Airline Mergers and Alliances	DAFFE/CLP(2000)1
27.	Competition in Professional Services	DAFFE/CLP(2000)2
28.	Competition in Local Services	DAFFE/CLP(2000)13
29.	Mergers in Financial Services	DAFFE/CLP(2000)17
30.	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31.	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32.	Competition and Regulation Issues in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33.	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34.	Competition Issues in Road Transport	DAFFE/CLP(2001)10
35.	Price Transparency	DAFFE/CLP(2001)22
36.	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37.	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38.	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39.	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40.	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41.	Communication by Competition Authorities	DAFFE/COMP(2003)4
42.	Substantive Criteria used for the Assessment of Mergers	DAFFE/COMP(2003)5
43.	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44.	Media Mergers	DAFFE/COMP(2003)16
45.	Non Commercial Services Obligations and Liberalisation	DAFFE/COMP(2004)19
46.	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47.	Regulating Market Activities by Public Sector	DAFFE/COMP(2004)36

48.	Merger Remedies	DAF/COMP(2004)21
49.	Cartels: Sanctions against Individuals	DAF/COMP(2004)39
50.	Intellectual Property Rights	DAF/COMP(2004)24
51.	Predatory Foreclosure	DAF/COMP(2005)14
52.	Competition and Regulation in Agriculture : Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53.	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54.	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55.	Structural Reform in the Rail Industry	DAF/COMP(2005)46

TABLE OF CONTENTS

EXECUTIVE SUMMARY	9
SYNTHÈSE.....	13
BACKGROUND NOTE.....	17
NOTE DE RÉFÉRENCE.....	57
NATIONAL CONTRIBUTIONS	
France.....	101
Germany.....	133
Ireland	149
Japan	155
Korea.....	161
Mexico	165
New Zealand.....	173
Norway.....	189
Turkey.....	191
United Kingdom	199
United States	215
European Commission.....	221
Brazil.....	231
Lithuania	239
Israel	245
OTHER	
Professor Barry E. Hawk	251
BIAC.....	265
SUMMARY OF THE DISCUSSION	273
COMPTE RENDU DE LA DISCUSSION	287

EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegates' written submissions and the Secretariat's background paper, several key points emerge:

- (1) *"Competition on the merits" is a popular but vague term. The principles underlying it and any standards that are based on it need to be clarified.*

The concept of "competition on the merits" is supposed to be a helpful point of reference for distinguishing unilateral conduct that is harmful to competition from unilateral conduct that enhances competition. Lawyers, judges and competition law enforcement officials have been using this phrase for many years to explain and justify their arguments and decisions, but there is no consensus on what the term means. The same may be said of terms such as "unreasonable," "improper," and "level playing field." The continued use of these terms despite the absence of precise, generally accepted definitions for them has led to inconsistent interpretations, and therefore to unpredictable results. Consequently, these phrases have not helped to promote a better understanding of the law and policy on abuse of dominance. There is a need for a more principled and consistent basis for determining liability in unilateral conduct cases.

- (2) *There is substantial agreement among jurisdictions on the broad goals and methods of enforcing competition laws against abuse of dominance, particularly with respect to studying harm to competition, not competitors, through the use of economics. There is some disagreement, however, over what variables to consider and whether to use a form-based approach or an effects-based approach.*

It is widely agreed that the purpose of competition policy is to protect competition, not competitors, but there is less agreement on how to go about doing that. Agencies in many countries use an effects-based approach, focusing on the economic impact that conduct has on consumers and competition. Agencies in a number of other countries, such as Germany and Korea, use a more form-based approach that focuses on how conduct can be categorised. Economic analysis still plays an important role in those jurisdictions, and the form-based approach may provide greater legal certainty and faster resolutions than effects-based methods. Some commentators believe, however, that a critical problem with form-based approaches is that the same type of conduct can be either "normal competition" or "abusive competition," depending on the circumstances. That would mean that there is no obvious form-based way to assess whether behaviour constitutes competition on the merits, and that attempts to assess potentially abusive conduct in that manner are prone to both false positives and false negatives. Focusing on the conduct's economic effect, they argue, is essential to making an accurate determination of its true nature, and thus it is worthwhile even if it requires more time than a form-based approach. Otherwise, competition law enforcement might not be consistently aligned with competition policy's economic purpose.

There is an inherent tension between fostering legal certainty, ease of administration, and accuracy. Form-based systems may provide more certainty and are relatively easy to administer, but also may generate results that are inappropriate, given what the actual market effects are. Case-by-case or effects-based approaches may yield results that are more appropriate given a practice's actual effects, but having to uncover every detail in every case would be slow, unworkable, and unenforceable. Either approach, driven to excess, produces unattractive results.

- (3) *Dissatisfaction with both the ambiguity of some jurisdictions' competition statutes and the lack of clear definitions for terms like competition on the merits has prompted a number of specific tests that aim to detect abusive conduct.*

Over the years, scholars searching for more principled ways to sort out pro-competitive conduct from anti-competitive conduct have proposed a number of tests that agencies and courts can apply in abuse of dominance and monopolisation cases. These include the profit sacrifice test, the no economic sense test, the equally efficient firm test, and various consumer welfare balancing tests. There is general agreement that no single test is suitable for every type of case, but there is also some variation with respect to the test that different delegates tend to favour. Each of the four major types of tests has been used by courts and agencies. Other tests, such as the one recently devised by Professor Elhauge, have been proposed from time to time as scholars continue trying to pinpoint what competition on the merits is. Each of the tests has certain strengths and weaknesses.

- (4) *The profit sacrifice test states that conduct should be considered unlawful when it involves a profit sacrifice that would be irrational if the conduct did not have a tendency to eliminate or reduce competition.*

One form of this test is useful for capturing predatory pricing conduct, but it does not appear to be a good test in other types of cases because it is both over-inclusive and under-inclusive. It is over-inclusive because it can capture certain types of behaviour that increase consumer welfare even though they also exclude competitors. For example, research and development costs for a new drug may be so high that an investment in developing the drug can be profitable only if the drug is so effective that it excludes competitors and gives the innovating firm market power. But is it sound policy to discourage such investments? On the other hand, some conduct may entail no short run profit sacrifice at all yet still be harmful to competition. In addition, the profit sacrifice test is not well-suited to difficult cases in which the conduct at issue can be both beneficial and harmful.

- (5) *The no economic sense test states that conduct should be unlawful if it would make no economic sense without a tendency to eliminate or lessen competition.*

This test avoids under-inclusiveness because it does not require profit sacrifice. The test can be used offensively, *i.e.*, to argue that conduct was exclusionary because it made no economic sense, and defensively, *i.e.*, to demonstrate that conduct should not be condemned because it did make economic sense. It seems, however, that over-inclusiveness and an inability to deal well with conduct that has mixed effects are characteristic of this test, too.

- (6) *The equally efficient firm test states that conduct should be unlawful if it would be likely to exclude a rival that is at least as efficient as the dominant firm is.*

The equally efficient firm test (which is also known as the as efficient competitor test) is geared toward distinguishing harm to competition from harm to competitors, and it relies on the fact that

without “bad” conduct by a dominant firm, equally efficient rivals cannot be eliminated. The test may be too lenient, though, if it is interpreted as allowing the elimination of new firms that are currently less efficient but that would eventually become equally or more efficient than the incumbent if they are able to survive long enough. Furthermore, an equally efficient firm might be able to enter a market and survive, but that does not always mean it would be able to exert competitive pressure. The mere fact that it could survive, therefore, is not necessarily enough to preserve competition.

- (7) *Consumer welfare balancing tests determine whether conduct should be unlawful by requiring decision-makers to weigh the positive and negative effects that the conduct has on consumer welfare.*

There are several varieties of consumer welfare tests. They all have a certain amount of appeal because they attempt to use consumer welfare effects themselves, rather than indirect factors such as profit sacrifice, as the gauge of dominant firm conduct. Unfortunately, although it may be possible to determine whether conduct enhances or reduces consumer welfare in some cases, it can be quite challenging, if not impossible, to measure the magnitude of those changes. Yet when conduct has both positive and negative effects on consumer welfare, a balancing step is necessary to determine which effect is stronger. It is therefore difficult to have confidence that balancing tests can be applied accurately, objectively, and consistently. Furthermore, it is not clear what the appropriate time horizon should be when applying this test, but that choice has very important implications for dynamic strategies such as predatory pricing.

- (8) *It is desirable to make the reasoning in competition agencies’ decisions more transparent because doing so will clarify how competition laws are being interpreted and enforced.*

Although it is useful to discuss and apply specific tests, the overall method that courts and agencies ultimately use to identify abusive conduct is going to be based on the precedents set by reasoned decisions. There are opportunities to draw lessons both from matters in which proceedings were not brought and from those in which action was taken. Some agencies, however, do not routinely issue written statements of their reasoning in no-action cases. It could be quite helpful to themselves and to the public if they would start doing so because it would lead to a greater understanding of how any similar matters that arise in the future are likely to be analysed. Furthermore, making the reasoning in all agency decisions transparent can spark debate and lead to refinements in both the competition laws and the enforcement of those laws. . Ireland’s competition authority, for example, publishes its no-action decisions with an accompanying analysis, and the U.S. Federal Trade Commission aims to explain its no-action decisions, as well.

Several delegates expressed the view that decisions regarding unilateral conduct should offer both legal certainty and clear, structured analysis of market facts in an economic effects-oriented way. More key facts can be brought into play in decisions to take action, even if form-based approaches might not require it. No-action decisions need to be very clear in explaining why conduct that might appear to be superficially unlawful is actually competition on the merits when looked at soberly in the light of market facts.

SYNTHÈSE

par le Secrétariat

A la lumière des débats de la table ronde, des contributions écrites des délégués et du document de référence du Secrétariat, les principaux points suivants se dégagent :

- (1) *La « concurrence par le mérite » est une expression souvent utilisée, mais vague. Il faut clarifier les principes sur lesquels elle repose et les normes qui en découlent.*

La notion de « concurrence par le mérite » est censée offrir un repère utile pour distinguer entre les comportements unilatéraux nocifs pour la concurrence et les comportements unilatéraux qui l'améliorent. Les juristes, les juges et les responsables chargés de l'application du droit de la concurrence utilisent cette expression depuis de nombreuses années pour expliciter et justifier leurs arguments et leurs décisions, mais il n'y a aucun consensus quant à sa signification. Il en est de même, d'ailleurs, pour les termes comme « déraisonnable », « indu » et « égalisation des chances ». A défaut de définition précise et universellement acceptée, cette terminologie donne lieu à des interprétations contradictoires et aboutit donc à des résultats imprévisibles. Par conséquent, elle n'a pas contribué à une meilleure compréhension du droit et de la politique de la concurrence dans le domaine de l'abus de position dominante. Pour se prononcer sur la responsabilité du fait d'un comportement unilatéral, il faut une approche qui s'articule davantage autour de principes et qui soit plus cohérente.

- (2) *Les pays sont largement d'accord sur les grands objectifs et les principales méthodes pour l'application de la réglementation de la concurrence à l'abus de position dominante, tout particulièrement en ce qui concerne l'examen du préjudice causé à la concurrence – et pas aux concurrents – dans une optique économique. Mais on constate certaines divergences sur deux plans : les variables à prendre en compte et l'utilisation d'une approche fondée sur la forme ou fondée sur les effets.*

Il est largement admis que la politique de la concurrence a pour objet de protéger la concurrence, et pas les concurrents, mais la démarche à suivre est controversée. Dans de nombreux pays, les autorités de la concurrence mettent en œuvre une approche fondée sur les effets, en s'attachant à l'impact économique de la pratique sur les consommateurs et sur la concurrence. Dans un certain nombre d'autres pays, notamment l'Allemagne et la Corée, elles utilisent une approche davantage fondée sur la forme, qui vise essentiellement à catégoriser les diverses pratiques. Néanmoins, l'analyse économique conserve un grand rôle dans ces pays, et l'approche de type formaliste assure sans doute une plus grande sécurité juridique et un règlement plus rapide du contentieux que les méthodes qui reposent sur les effets. Toutefois, certains observateurs font valoir que le problème fondamental avec les approches fondées sur la forme est qu'un même type de comportement peut, selon les circonstances, constituer une « concurrence normale » ou une « concurrence abusive ». Autrement dit, il n'y a pas de façon évidente, avec l'approche formaliste, d'évaluer si un comportement relève ou non de la concurrence par le mérite, et lorsqu'on veut évaluer de cette manière des comportements potentiellement abusifs on peut facilement porter un jugement erroné, positif ou négatif. Pour ces commentateurs, il est indispensable de s'attacher à l'impact économique du comportement pour déterminer exactement sa véritable nature, et cela est extrêmement utile, même si l'approche fondée sur les effets prend

plus de temps que celle fondée sur la forme. Sinon, l'application du droit de la concurrence risque de ne pas être en phase avec la finalité économique de la politique de la concurrence.

Il y a intrinsèquement contradiction entre le souci de sécurité juridique, le souci de commodité d'administration et le souci d'exactitude. Les systèmes fondés sur la forme sont sans doute garants d'une plus grande certitude et sont assez faciles à appliquer, mais ils peuvent aussi donner des résultats inadéquats au regard de l'impact effectif sur le marché. L'approche au cas par cas ou l'approche fondée sur les effets peuvent aboutir à des résultats plus adéquats au regard de l'impact effectif d'une pratique, mais devoir mettre à jour tous les détails dans chaque affaire exigerait beaucoup de temps et ne serait pas réalisable concrètement. Aucune des deux approches, poussée à l'extrême, ne donne des résultats satisfaisants.

- (3) *Face à l'ambiguïté des lois sur la concurrence de certains pays, et en l'absence de définition claire d'expressions comme « concurrence par le mérite », plusieurs critères précis ont été proposés pour mieux détecter les pratiques abusives.*

Au fil des années, les spécialistes à la recherche de méthodes plus structurées pour distinguer les pratiques proconcurrentielles des pratiques anticoncurrentielles ont proposé plusieurs critères que les autorités de la concurrence et les tribunaux peuvent appliquer dans les affaires d'abus de position dominante et de monopolisation. Il s'agit du critère du sacrifice de bénéfices, du critère d'absence de justification économique, du critère de l'entreprise aussi efficiente et de divers critères faisant intervenir le bien-être des consommateurs. On admet généralement qu'aucun de ces critères n'est adapté à tous les types de situation, mais les positions varient parmi les délégués quant au critère qu'ils ont tendance à privilégier. Chacune des quatre grandes catégories de critères a été utilisée par les tribunaux et les autorités de la concurrence. D'autres, comme celui que le Professeur Elhauge a mis au point récemment, sont proposés au fur et à mesure que les chercheurs s'efforcent de mieux cerner la notion de concurrence par le mérite. Chacun de ces critères a ses points forts et ses points faibles.

- (4) *Selon le critère du sacrifice de bénéfices, une pratique doit être considérée comme illicite lorsqu'elle implique un sacrifice de bénéfices qui serait irrationnel si la pratique n'avait pas tendance à éliminer ou à restreindre la concurrence.*

Sous une de ces formes, ce critère est utile pour bien appréhender les prix prédateurs, mais il ne paraît pas satisfaisant dans d'autres types d'affaires parce qu'il est à la fois trop large et trop étroit. Il est trop large parce qu'il peut viser certains comportements qui accroissent le bien-être des consommateurs bien qu'ils excluent également les concurrents. Par exemple, les coûts de recherche-développement d'un nouveau médicament peuvent être si élevés qu'un investissement dans le développement du médicament ne pourra être rentable que si le médicament est suffisamment efficace pour exclure les concurrents et donner à l'entreprise innovante un pouvoir de marché. Mais est-il judicieux de décourager ces investissements ? En revanche, certaines pratiques peuvent ne nécessiter aucun sacrifice de bénéfices à court terme tout en étant nocives pour la concurrence. De plus, le critère du sacrifice de bénéfices ne convient pas dans les affaires complexes où la pratique en cause peut être à la fois bénéfique et nocive.

- (5) *Selon le critère de l'absence de justification économique, une pratique ne doit être considérée comme illicite que si seule sa tendance à éliminer ou restreindre la concurrence lui donne un sens économique.*

Ce critère évite le reproche de l'étroitesse, parce qu'il n'exige pas le sacrifice de bénéfices. Il peut être utilisé de façon offensive, c'est-à-dire en faisant valoir que la pratique avait un effet

d'exclusion parce qu'elle n'avait aucune justification économique, et de façon défensive, c'est-à-dire pour démontrer que la pratique n'est pas condamnable parce qu'elle a effectivement une justification économique. Mais il semble bien que ce critère, lui aussi, soit trop large et ne soit pas adapté aux pratiques dont les effets sont mixtes.

- (6) *Selon le critère de l'entreprise aussi efficiente, une pratique ne doit être considérée comme illicite que si elle est appelée à exclure un concurrent qui est au moins aussi efficient que l'entreprise dominante.*

Le critère de l'entreprise aussi efficiente (connu également sous le nom de « critère du concurrent efficient ») vise surtout à distinguer les conséquences préjudiciables pour la concurrence des conséquences préjudiciables pour les concurrents et il s'appuie sur le fait que sans la pratique « répréhensible » de l'entreprise dominante, les concurrents tout aussi efficaces ne peuvent être éliminés. Mais ce critère peut lui aussi être trop lâche s'il est interprété de façon à permettre l'élimination de nouvelles entreprises qui sont actuellement moins efficaces, mais qui seraient en définitive tout aussi efficaces, voire plus efficaces que l'entreprise en place si elles pouvaient survivre assez longtemps. De plus, une entreprise aussi efficiente pourra entrer sur un marché et survivre, mais cela ne veut pas toujours dire qu'elle pourra exercer une pression concurrentielle. La simple possibilité de survie ne suffit donc pas pour préserver la concurrence.

- (7) *Avec les critères fondés sur le bien-être des consommateurs, on se prononce sur la licéité ou l'illicéité d'une pratique en évaluant les effets positifs et négatifs que cette pratique exerce sur le bien-être des consommateurs.*

Le critère du bien-être des consommateurs se présente sous plusieurs formes. Toutes ont un certain attrait parce qu'elles s'appuient sur les effets mêmes en termes de bien-être des consommateurs, et pas sur des facteurs indirects comme le sacrifice de bénéfices, pour évaluer le comportement de l'entreprise dominante. Malheureusement, bien qu'il soit possible de déterminer dans certains cas si une pratique est bénéfique ou nocive pour le bien-être des consommateurs, il peut être très difficile, voire impossible, de mesurer l'amplitude de ces changements. Lorsque la pratique a des effets à la fois positifs et négatifs sur le bien-être des consommateurs, une mise en balance est nécessaire pour déterminer quels sont les effets qui l'emportent. On ne peut donc être véritablement assuré que cette mise en balance soit exacte, objective et cohérente. De plus, on ne sait pas très bien quel est l'horizon temporel à retenir pour cette mise en balance. Or, ce choix est très important lorsqu'il s'agit de se prononcer sur des stratégies dynamiques comme les prix de prédation.

- (8) *Il est souhaitable de rendre plus transparents les motifs des décisions des autorités de la concurrence, de façon à clarifier l'interprétation et l'application du droit de la concurrence.*

L'examen de certains critères et leur application sont certes utiles, mais en définitive, pour déterminer si une pratique est abusive, les tribunaux et les autorités de la concurrence s'appuieront sur les précédents découlant de décisions motivées. On peut tirer des enseignements aussi bien des affaires dans lesquelles des poursuites n'ont pas été engagées que de celles qui ont donné lieu à poursuites. Néanmoins, certaines autorités de la concurrence lorsqu'elles décident de ne pas poursuivre, ne rendent pas publics leurs motifs par écrit. Pour ces autorités, et aussi pour le public, il serait très utile de faire connaître les motifs d'une décision de non poursuite, car on saurait mieux aussi comment des affaires similaires sont susceptibles d'être analysées à l'avenir. De plus, la transparence des motivations de toutes les décisions des autorités de la concurrence peut ouvrir des débats et permettre ainsi d'affiner le droit de la concurrence et son application. L'autorité irlandaise de la concurrence, par exemple, rend publique son analyse en

cas de décision de non poursuite et aux États-Unis la Federal Trade Commission a également l'intention de commenter ses décisions dans ce cas.

Plusieurs délégués considèrent que les décisions en matière de pratiques unilatérales devraient à la fois offrir plus de sécurité juridique et comporter une analyse claire et structurée des éléments factuels du marché dans une optique économique axée sur les effets. Davantage de faits importants peuvent être pris en compte dans les décisions de poursuite, même si les approches fondées sur la forme ne l'exigent pas. Il faut que les décisions de non poursuite expliquent très clairement pourquoi une pratique qui pourrait paraître à première vue illicite relève en fait de la concurrence par le mérite lorsqu'on l'examine posément à la lumière des faits du marché.

BACKGROUND NOTE

1. Introduction

In July 1993, Virgin Atlantic Airways filed a complaint with the European Commission that was directed against a system of rebates for travel agents implemented by its competitor British Airways. Three months later, Virgin filed a complaint in a federal court in New York, alleging that British Airways had violated the Sherman Act by implementing the same system of rebates. The American case ended when a Court of Appeals upheld a ruling in favour of British Airways, finding that Virgin had failed to show that the rebates had harmed consumers. About two years later, under Article 82, the European Court of First Instance considered exactly the same rebate system during the same relevant period. It concluded that British Airways had abused a dominant position because its rebates were discriminatory and they could have an exclusionary effect on competitors in the air transport services market. Why were the outcomes in these two decisions so different? Is the conflict in results attributable solely to differences in the competition statutes in Europe and the United States? Or, if there is general agreement on the purpose of competition laws, did the conflict arise because different courts have different ideas about how to evaluate the same conduct?

Although there are some important differences in statutory language regarding unilateral conduct, there is more concurrence than conflict. Especially significant from a policy standpoint is that there is broad agreement among competition agencies from OECD countries that the purpose of competition policy is to protect competition, not competitors.¹ In pursuing that objective, however, agencies and courts have repeatedly referred to the phrase “competition on the merits” to explain and justify their views on how to discern conduct that harms competition from conduct that advances it. Yet that phrase has never been satisfactorily defined. Like Shakespeare, who observed that “it is excellent to have a giant’s strength; but it is tyrannous to use it like a giant,” the competition community has long been somewhat imprecise when providing guidelines to dominant entities.² Its loose guidance has led to a discordant body of case law that uses varying analytical methods. That, in turn, has produced divergent outcomes even when the facts are virtually identical and the courts involved are both striving to protect consumers, as in the *British Airways* example.

Typically, use of the expression “competition on the merits” implies that when a dominant enterprise is confronted with rivals or the prospect of their entry, it cannot lawfully counter the competitive challenge with conduct that falls outside an area circumscribed by that phrase.³ Despite many years of competition law enforcement across OECD countries, both the perimeter of that area and the underlying principles that ought to define it remain unclear. Thus, although it may be easy to agree that certain types of conduct by a dominant firm are outside of the acceptable area, it is not always easy to agree on why they are, and for other types of conduct it has proven difficult even to reach agreement on whether to locate them in or out of the acceptable area in the first place.

Nevertheless, when courts and practitioners have referred to “competition on the merits” in their efforts to delineate which behaviour is lawful, which is not, and why, they have tended to do so in a manner that presumes a common understanding of what the phrase means. In other words, it has served too often as a shortcut that glosses over the difficult work of defining clear principles and standards that embody sound competition policy. This has led to inconsistent interpretations of what competition on the

merits is (both within and between jurisdictions), and therefore to unpredictable results, which has undermined the term's legitimacy along with policies that purport to be based on it.

Understandably, dominant businesses have become apprehensive about the likelihood of receiving arbitrary treatment from competition authorities who criticise their conduct while relying on the official-sounding, but in fact untethered, term "competition on the merits" to justify their enforcement actions. It can be quite a difficult task for firms to show that they are competing on the merits when there is no firmly accepted definition of what it means to do so. Consequently, the question of the abusive character of practices such as refusals to deal and fidelity rebates that are examined in various court decisions has generated a lively controversy and a consensus, at least in several jurisdictions, that the standards for evaluating dominant firm conduct under the competition laws should be re-examined and clarified.

For example, over the last five to ten years, the law and policy toward anticompetitive agreements in Europe has shifted from form-based approaches to more economics-based approaches, but a parallel evolution has not occurred with respect to dominant firm conduct. The European Commission is now reviewing the area of abuse of dominance and again one of the fundamental questions is the extent to which the Commission's approach should be form-based or economics-based. Many commentators believe that the underlying principles and standards should be clearer, too.⁴ A similar movement is afoot in the United States.⁵ In light of the trend toward deregulation and privatisation, such re-examinations are especially timely.⁶

If competition on the merits is to be a helpful concept, it must facilitate the task of sorting out harmful, exclusionary conduct from healthy, competitive conduct in a principled manner. In other words, the objective should be to make that distinction while using terms that are more precise than "unfair" or "exclusionary," yet more general than a lengthy inventory of specific acts that have been judged to be anti-competitive (or not). Many scholars have commented on the importance of this issue recently.

This paper begins by briefly addressing various principles that are considered to describe the purpose of competition policy. It then reviews a number of tests that have been put forward as widely applicable, transparent, and consistent means of using those principles to determine whether a dominant firm's conduct should be considered competition on the merits or not. Next, it discusses a selection of recent court decisions related to dominant firm conduct, examining them not only in the context of the analyses used by the courts, but in light of the tests introduced earlier in the paper, as well.

The key points of this paper are:

- Courts and competition enforcement agencies have been using the term "competition on the merits" in single-firm conduct cases for years, but there is no general agreement on what that term means. Therefore it has not been helpful in promoting a better understanding of how to distinguish conduct that is harmful to competition from conduct that enhances competition. There is a need to find a more principled and consistent basis for determining liability in abuse of dominance and monopolisation cases.
- The first step in finding a better approach is to clarify what the objectives of competition policy toward unilateral conduct are. It is widely agreed that the purpose of competition policy is to protect competition, not competitors, but there has been less agreement concerning how to go about doing that. It is suggested here that a focus on competition should be just that, rather than a separate focus on the competitive process. The factors that drive competition policy, therefore, should include consumer welfare and productive efficiency.

- The ideal test for unlawful unilateral conduct would be easy to understand and apply, as well as highly accurate in its ability to identify harm to consumer welfare. The test also needs to be objective, to lead to consistent outcomes, and to be applicable to a wide variety of conduct. While the perfect test probably does not exist, some seem to have more strengths than others.
- The profit sacrifice test states that conduct should be considered unlawful when it involves a profit sacrifice that would be irrational if the conduct did not have a tendency to eliminate or reduce competition. One form of this test is useful for capturing predatory pricing conduct, but it does not appear to be a good test in other types of cases because it is both over-inclusive and under-inclusive. It also is not well-suited to cases in which the conduct at issue can be both beneficial and harmful.
- The no economic sense test states that conduct should be unlawful if it would make no economic sense without a tendency to eliminate or lessen competition. This test avoids under-inclusiveness because it does not require profit sacrifice. It seems, however, that over-inclusiveness and an inability to deal well with conduct that has mixed effects are characteristic of this test, too.
- The equally efficient firm test states that conduct should be unlawful if it would be likely to exclude a rival that is at least as efficient as the dominant firm is. This test is geared toward distinguishing harm to competition from harm to competitors, and it relies on the fact that without “bad” conduct by a dominant firm, equally efficient rivals cannot be eliminated. The test may be too lenient, though, because it seems to permit the elimination of new firms that would eventually become equally or more efficient than the incumbent if they were allowed to survive long enough as less efficient firms.
- There are several varieties of consumer welfare tests. They all have a certain amount of appeal because they attempt to use consumer welfare effects themselves, rather than indirect factors such as profit sacrifice, as the gauge of dominant firm conduct. Unfortunately, it is one thing to be able to tell whether conduct enhances or reduces consumer welfare, and quite another to try to measure the magnitude of those changes. The latter can be extremely difficult, if not impossible. Yet when conduct has both positive and negative effects on consumer welfare, a balancing step is necessary to determine which effect is stronger. It is difficult to have confidence that balancing can be done accurately, objectively, and consistently.
- Finally, Professor Einer Elhauge has devised a test for analysing unilateral, dominant firm conduct. His test is quite difficult conceptually, but once it is understood it is relatively easy to apply. Essentially, his test asks whether rivals are being excluded because the dominant firm is improving its own efficiency, or because it is impairing the efficiency of its rivals. If the conduct causes both of those effects, then it is still permissible as long as at least some of the exclusionary effect is caused by the improvement in the dominant firm’s efficiency. Elhauge’s test appears not to suffer from many of the drawbacks that affect the other tests, but it is relatively new and untested in both the courts and the literature.
- A sampling of court decisions highlights the need for a more principled approach to abuse of dominance and monopolisation cases. In many cases, courts are still relying on vague slogans that do not provide useful guidance to dominant firms who wish to ensure that their conduct will not run afoul of the competition laws. It is an interesting and worthwhile exercise to apply the tests above to these cases to see what outcomes they would point toward and whether they would provide better, more predictable guidance.

2. Objectives of competition policy toward single-firm conduct

Before discussing the strengths and weaknesses of various tests that can be used to distinguish conduct that enhances competition from conduct that harms it, we must begin with what the mission of competition policy toward unilateral conduct is in the first place. Stated another way, the tests can be evaluated properly only if it is clear what their objectives should be. There was wide agreement at the Committee's previous roundtable that the purpose of competition policy is to protect competition, not competitors.⁷ But what does it mean to protect competition, and what purposes does it serve? Some possible answers to both questions are:

- deterring conduct that reduces consumer welfare
- deterring conduct that reduces productive efficiency
- deterring conduct that produces a net decrease in overall welfare when both consumer welfare and productive efficiency are considered
- deterring conduct that interferes with the openness of markets, or distorts the "competitive process"
- deterring conduct that eliminates smaller, weaker firms

Even choosing among these basic objectives has generated some controversy.⁸ Fox believes that the concept of protecting competition may be considered in terms that go beyond output reduction and higher prices, which are ordinarily considered when measuring welfare effects. In her view, harm to competition could legitimately include harm to the competitive process, and whether it should is "largely a matter of context and political economy perspective."⁹ According to that viewpoint, even if consumers do not suffer any ill effects from a dominant firm's conduct, the conduct could be unlawful if it disrupts the ability of some firms to enter and compete in a market.

Fox appears to have mistaken means for an end. The competitive process is a means, not an end. Competition is worth protecting not because there is inherent value in the process itself, but because competition leads to greater social welfare. As Sir John Vickers has stated, "the idea that there could be harms to the competitive process, justifying competition policy intervention, that are not even capable of harming consumers is unattractive. Competition to serve the needs of the general public of consumers – not some abstract notion of competition for its own sake – is the point of competition policy."¹⁰ The reason intervention is unattractive in that situation is that the point where a government begins to protect an ideal of a fair competitive *process* beyond the extent to which *competition* and social welfare are harmed is also where the government begins to protect competitors for their own sake. Who else would benefit?

Interestingly, that point is revealed in an article by Gavil, who shares Fox's opinion that the competitive process should be protected. Gavil is disturbed by what he sees as a growing overemphasis on avoiding false positives, at least in American antitrust jurisprudence and academic literature on single-firm conduct: "A legitimate question remains . . . whether this quest to avoid false positives and over-deterrence has led to false negatives and under-deterrence of pricing strategies that unreasonably and unnecessarily exclude rivals."¹¹ Competition policy's role is not to fret about the unreasonable or unnecessary exclusion of rivals in every case, though. Instead, it is to protect competition. Gavil also states, however, that "the mantra that 'the antitrust laws are designed to protect competition, not competitors' is an empty slogan. There can be no competition without competitors."¹² Of course it is true that competition depends on competitors. But it does not depend on *every* competitor. Furthermore, if a

dominant firm's "bad" conduct really creates a risk of leaving a market without competitors, then it should be no problem for plaintiffs to show that the conduct is likely to harm competition.

Moreover, Fox's formulation of a standard based on the competitive process principle has, as Hawk puts it, both "a theoretical and an operational weakness." Fox's standard is that "[t]he analyst looks at the market structure and dynamics, and asks whether the practice interferes with and degrades the market mechanism. Freedom of trade (and competition and innovation) without artificial market obstruction is presumed to be in the public interest, especially the public's economic interest. Barriers must be justified. By this metric, significant unjustified exclusionary practices are anticompetitive and should be prohibited."¹³ Hawk notes that, at a theoretical level, there is a risk that Fox's test would be used more to protect individual competitors, including less efficient ones, than to focus on efficiencies. Furthermore, at an operational level, it is doubtful whether concentrating on the competitive process can yield criteria capable of distinguishing desirable from undesirable conduct. This problem shows up in Fox's test in the form of the ambiguous terms "artificial" and "unjustified."¹⁴

While Fox points out that American antitrust law until the 1980s could be characterised as protecting the competitive process, she also concedes that the law since then has shifted substantially toward protecting consumer welfare and productive efficiency.¹⁵ The fact that the former view once held sway may have been largely a matter of context and perspective, but that does not mean it reflected good policy. Fox also notes that European competition policy right up to the present could fairly be described as protecting the competitive process. A number of recent Article 82 decisions have met with substantial criticism, however, and the Commission has responded by undertaking a project to consider reforms to its approach in this area.¹⁶ Some commentators are calling for an approach that is based more on economics and less on the form of or intent behind the conduct, which suggests a shift away from protecting the competitive process for its own sake.¹⁷ Furthermore, in light of the Committee's roundtable on predatory foreclosure, it appears that the concept of requiring evidence showing that unilateral conduct will likely harm consumer welfare is gaining momentum in other OECD countries, too, as evidenced by growing support for the recoupment test in predatory pricing analysis.¹⁸

Finally, the leading tests that have been proposed for identifying competition on the merits work within the framework of one or more of the first three bullets above. The fourth bullet could be compatible with that group, but only insofar as interfering with the competitive process affects consumer welfare and/or productive efficiency. As for the objective in the last bullet, even Fox states that it unabashedly protects competitors rather than competition.¹⁹ Therefore, this Note focuses on tests that are designed to further one of the objectives in the first three bullets.

3. Competition on the merits in principle

3.1 *The Problem*

A logical place to begin looking for tests that define competition on the merits is the competition statutes themselves, but few legislatures have ventured past broad generalities or lists of examples that leave conflicting impressions about the objective being pursued. Section 2 of the Sherman Act,²⁰ for instance, if taken literally, would simply prohibit all monopolisations and attempts to monopolise, regardless of the methods used. It provides no guidance whatsoever on how to implement a more prudent approach that would separate "bad" monopolising from the result of superior, legitimate competition. Article 82 of the EC Treaty²¹ goes further in trying to clarify the conduct it is intended to capture, but still leaves fundamental questions unanswered, such as what "unfair" prices and trading conditions are. Furthermore, subsection (b) is based on a consumer welfare objective, whereas (c) seems to be concerned with the welfare of competitors.

Therefore, it was largely left to the courts to forge practical, sensible interpretations of abuse of dominance and monopolisation statutes. This proved to be difficult and often led courts to resort to vague generalities themselves, including the concept that conduct undertaken by dominant firms is lawful when it is competition on the merits, and suspect when it is not. For a long time, this circular logic escaped widespread criticism.²² Possibly bolstered by the fact that they were getting by without having to pin down what the term meant, courts began to use it more and more as if everyone else already understood its meaning.

“An undertaking in a dominant position cannot have recourse to means other than those within the scope of competition on the merits.”²³ “A monopolist wilfully acquires or maintains monopoly power when it competes on some basis other than the merits.”²⁴ One court compounded the problem by using “competition on the merits” to define another vague term in this passage: “Thus ‘exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”²⁵

Resorting to other, similar terms has not helped. Consider this often-quoted passage from the European Court of Justice’s judgment in *Hoffman-La Roche*, which defines an Article 82 abuse as

an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking, the degree of competition is weakened and which, through recourse to methods different from those which condition *normal competition* on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.²⁶

We can probably assume that “normal competition” is the same thing as “competition on the merits,” but of course that does not get us very far because both normal competition and “abnormal” competition can have the effect of excluding or weakening competitors. The most frequently cited definition of actual monopolisation in U.S. case law does not do much better, defining it as the possession of monopoly power and

the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.²⁷

The terms “superior product” and “business acumen” are not very helpful because they mean different things to different, reasonable people.²⁸

There is an occasional, admirable rebellion by a court now and then, as in this passage from a decision of New Zealand’s High Court: “As an aside, because the phrase has reached the status of a slogan or catchword in common parlance, we note with some satisfaction that someone of Professor Baxter’s eminence and experience described the phrase, ‘level playing field,’ as ‘insidious.’”²⁹ On the whole, though, such terms survived and replicated over the years.

Now, however, it appears that the days in which courts will be able to use such slogans without drawing criticism are dwindling. Scholars troubled by inconsistent, unpredictable results in unilateral conduct cases have recently put a spotlight on the widespread use of labels like “competition on the merits,” “normal competition,” “business acumen,” and “level playing field.” Their disapproval has been severe. Elhauge, for example, states with respect to U.S. antitrust jurisprudence that “for decades monopolization doctrine has been governed by standards that are not just vague but vacuous.”³⁰ Continuing in the same vein, he addresses European jurisprudence, as well, declaring that the standards “utter vacuity . . . is neatly illustrated by the fact that the same conduct – using above-cost price cuts to

drive out rivals – has been labeled ‘competition on the merits’ in the United States but not ‘normal competition’ in Europe. Something is driving these conclusions, but it is not the determinate meaning of terms like ‘exclusionary,’ ‘competition,’ ‘merits,’ or ‘normal.’³¹ Fox agrees, noting that “[a] number of contemporary cases on exclusionary practices tend to be noncommittal if not obfuscatory in their usage of ‘anticompetitive.’”³² Consequently, it is no longer a secret that terms like “competition on the merits” have barely advanced anyone’s understanding of what is lawful and what is not because no one really knows what they mean.

It may be said in defence of the courts that it is not surprising that they have created a portfolio of blurry clichés and fact-specific examples rather than a set of clear, universal principles. Apart from the problem that the relevant statutes tend to provide minimal assistance, there is no escaping the fact that it is difficult to distinguish unilateral behaviour that harms competition from unilateral behaviour that furthers competition because the two can bear a strong resemblance to one another. Furthermore, defining what is unlawful is a delicate task because there is a legitimate concern that intervention may inadvertently damage consumer welfare, firms’ efficiency, and their incentives to compete and innovate. Accordingly, courts have used a cautious, case by case, rule of reason approach.

This is not to say, as Vickers has noted, that the case law on dominant firm conduct has not developed any standards at all.³³ On the contrary, the problem is that there are many standards, they do not collectively produce consistent outcomes, they are sometimes difficult to apply, and it is not always clear what the principles behind them are or that they accurately reflect sound competition policy. All of those factors add up to a system that puts businesses in a position of having to do a great deal of guesswork about how their conduct is likely to be judged at some point several years in the future. It is quite possible that competitive behaviour that would have increased consumer welfare is being discouraged as a result of the risks inherent in our legal systems.³⁴ Fortunately, commentators have not only exposed and lamented the present situation, but have made efforts to suggest and evaluate tests for determining the legality of dominant firm conduct.

3.2 *Potential Solutions*

Before reviewing the tests themselves, it is useful to list the characteristics that the ideal test would have:

- Accuracy – the test should be based on widely accepted economic principles and yield minimal false positives as well as minimal false negatives
- Administrability – the test should be relatively easy to apply
- Applicability – the wider the scope of unilateral conduct the test can cover well, the better
- Consistency – the test should yield predictable results
- Objectivity – the test should leave no room for subjective input from the decision-maker
- Transparency – the test and its objectives should be understandable

The following tests vary in their conformity to these characteristics, each one having its own strengths and weaknesses. While none of them are perfect, some may be less imperfect than others.

3.2.1 *The Profit Sacrifice Test*

The profit sacrifice (“PS”) test, sometimes called the “but for” test, holds that when a dominant firm engages in conduct requiring it to forego short run profit, the conduct should be deemed unlawful if it would be irrational absent its tendency to eliminate or reduce competition in the longer run. The test has at least superficial appeal because it seems to distinguish deliberately exclusionary conduct from healthy responses to competition.

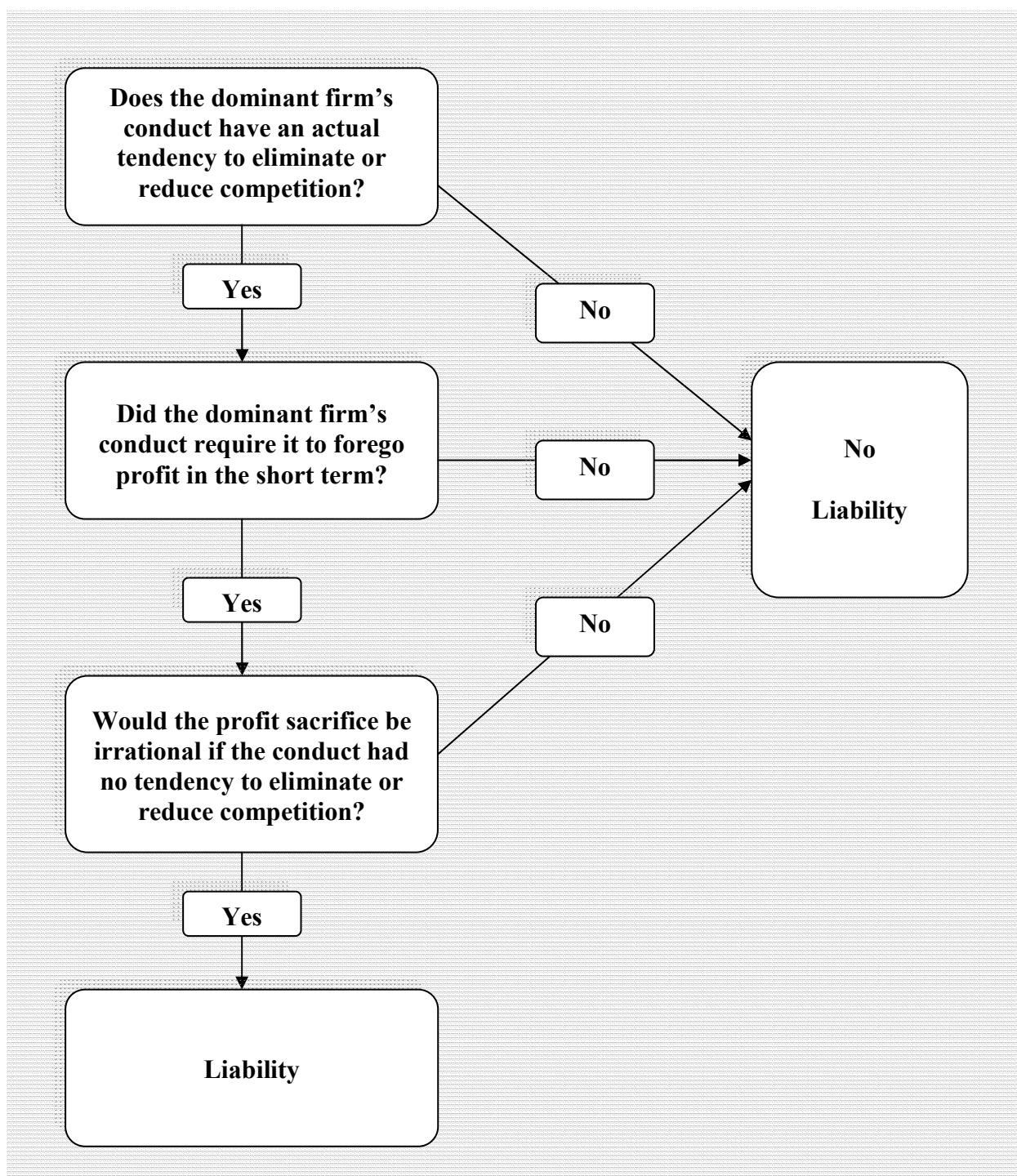
For a very simple illustration of how the PS test works, suppose that a dominant firm is making a profit of \$1000 per week. If it engages in certain conduct that requires a one-time expenditure of \$600, though, it can permanently exclude its rivals from the market. Thereafter, it will earn a profit of \$1200 per week. It is rational for the firm to spend the \$600, but it would not have been rational without the exclusionary effect. The PS test captures this kind of conduct whenever there is no other rational reason for engaging in the conduct that excluded the rivals.³⁵

Most jurisdictions currently use a relaxed form of the PS test to assess predatory pricing. The PS test captures predatory pricing because the strategy involves absorbing short-run losses in anticipation of eliminating or disciplining rivals, thereby making it possible to earn higher profits and recoup the short-term losses.³⁶ Discounts that leave price above cost, on the other hand, pass the test because they do not rely on eventual profits from greater market power for their profitability. The ability of the PS concept to deal with predatory pricing cases encouraged a move to apply it in all types of unilateral conduct cases.³⁷ As will be discussed, however, the PS test does not seem to be well-suited for evaluating exclusionary conduct that does not involve below-cost pricing.

In fact, one of the primary criticisms of the PS test is that it is under-inclusive. Some conduct may entail no short run profit sacrifice yet still be exclusionary and harmful to competition. “Cheap exclusion” falls into this category, as does raising rivals’ costs.³⁸ Suppose, for example, that a monopolist lies to potential customers about the quality of a new entrant’s product. This is essentially costless behaviour (in fact it may even be profitable in the short run if it works quickly enough), yet it still has the potential to be exclusionary if the incumbent manages to manoeuvre the entrant into a position where it must either exit without a fight or make expenditures that it cannot afford to counter the negative publicity. The PS test would be no better at capturing a scheme to kidnap a rival’s leading scientist, which could pay immediate dividends and thus be profitable, or at least not unprofitable, in the short run. Thus, courts may reach the wrong result in some cases if they use the PS test.

Admittedly, kidnapping is an extreme example, so one might argue that no one would be so foolish as to use the PS test in a case like that. Elhauge, who is critical of this test, responds:

But then one has to ask what precisely are the normative criteria that determine when the profit-sacrifice test would apply and when it wouldn’t. If we have nothing to go on other than ‘we know it when we see it,’ then the resulting test is no better than a conclusory standard[.] If we would use implicit normative criteria for determining what sorts of conduct that exclude[s] rivals is desirable even when it sacrifices profits, then those implicit criteria are what really does the work, and we should focus on defining them explicitly rather than hiding normative judgments in ad hoc decisions about when to apply the profit-sacrifice test.³⁹

Diagram 1. The Profit Sacrifice Test

Although he makes a valid point there, Elhauge is perhaps a bit too aggressive in another part of his criticism of the PS test when he describes a number of scenarios involving special discounts and concludes that they would enable a monopolist to reduce competition without sacrificing any profit in the short run. He therefore reasons that the PS test cannot capture even non-tortious conduct. “To the contrary, in all these scenarios the side payments and special discounts are funded out of the additional supracompetitive profits that the exclusionary scheme creates. Thus, they can be expected to involve an *increase* in short-

term profits as well as long-term profits.”⁴⁰ It does not matter whether profits that the exclusionary scheme creates come in the short term or the long term, however, because taking them into account at all is a conceptual error if one follows the spirit, rather than the letter, of the PS test. Profits that arise from the elimination or reduction of competition are not to be counted.⁴¹

The real problem is that not all conduct that eliminates or reduces competition is undesirable. Therefore, the PS test begs the question of which profits should be counted when determining whether there has been a profit sacrifice. Again, this seems to require implicit normative criteria, and those are what a good test would bring out into the open.

Before expanding on that point, though, one other argument that the PS test is too lenient should be covered. The argument is that the PS test is overly permissive because defendants will not fail it unless the sole purpose of their conduct was to exclude competition. What this criticism should be taken to mean is not that defendants having multiple purposes for their conduct never fail the test, but that defendants having multiple purposes will not fail the test so long as at least one of their motives (other than eliminating competition) is sufficient to make the conduct profitable. A drawback of the PS test, therefore, is that all defendants with a reasonable story to tell about why their conduct was likely to achieve some legitimate, profitable purpose will never fail it. Defendants will thus be able to cover any anti-competitive objective with a discreet fig leaf if they can think of a plausible, justifiable purpose.

That criticism is only partially persuasive. First, the test is not driven by purpose or intent. It is based on rationality – a more objective criterion. Second, a legitimate result is legitimate, after all, and if the conduct is likely to achieve one, it is not clear that competition law should automatically condemn it just because the conduct may also bring about an illegitimate objective. Of course, it is not clear that competition law should automatically disregard the conduct in that situation, either. Therefore, the “fig leaf” problem is real. How, then, should conduct that is likely to produce both beneficial and harmful results be treated? This is the core of the challenge facing all unilateral conduct tests, but the PS test sidesteps the issue. Salop suggests a balancing test, but that introduces its own set of problems (discussed below in Part III.B.4.).

The other major criticism is that the PS test is over-inclusive. It breaks down when it is applied to certain types of behaviour that increase consumer welfare even though they also exclude competitors. For example, suppose a firm invests in research and development to develop a drug that will be profitable only if it is so effective that it excludes competitors and gives the firm market power. Is it sound policy to discourage such investments? If it were, governments would not facilitate the exclusionary effect by awarding patents for some types of innovation. In doing so, governments recognise that innovation improves society’s welfare by creating better or cheaper products. Yet the PS test censures this highly desirable kind of investment. Thus it appears that the PS test is both over-inclusive and under-inclusive. In other words, failing it is neither a necessary nor a sufficient condition for conduct that harms competition.

Finally, it is not always easy to apply the PS test, as the Committee’s previous roundtable showed with respect to predatory pricing. A decision has to be made about how to identify “sacrifice.” In predatory pricing cases, one would need to decide whether prices should be compared with average total cost, for example, or with some other measure of cost. In the strict form of the test, though, the inquiry is not whether there are accounting losses, but whether any profit has been given up. Thus the benchmark is not a cost at all, but a price. Specifically, it is the price that the dominant firm would have charged in a hypothetical, “but-for” world where it engaged in the allegedly unlawful conduct, but that conduct did not have the effect of excluding or disciplining rivals. Even that formulation has to be further tuned because some of the effect on rivals may be legitimate. That means decision makers have to separate “competitive” revenues from “anti-competitive” ones, which places us directly back where we began in the overall

problem of sorting out good conduct from bad conduct. Because the PS test does not provide guidance for making the decision on how to choose the correct benchmark, the determination will be, as Salop contends, “extremely subjective” and thus “prone to error.”⁴²

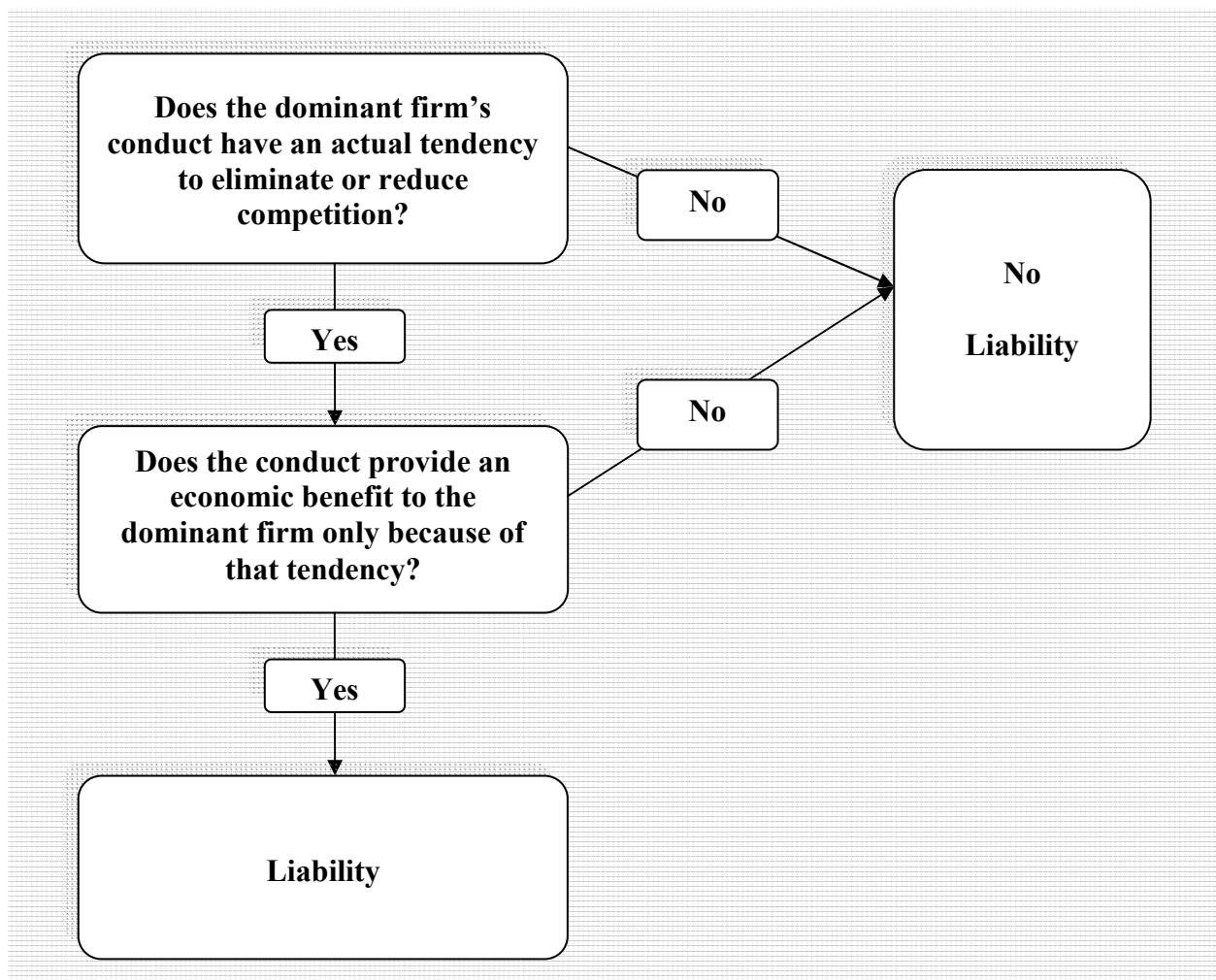
At last, even after a benchmark is chosen, there may still be difficult accounting issues involved in assessing whether a firm’s prices dipped below the mark. That problem was also made clear in the previous roundtable.⁴³

In view of the foregoing criticisms and problems, it seems that while profit sacrifice may be a useful test for predatory pricing, it is not promising in terms of providing a general foundation for determining what constitutes unlawful exclusionary behaviour.

3.2.2 *The No Economic Sense Test*

The no economic sense (“NES”) test holds that conduct should be unlawful if it makes no economic sense absent its tendency to eliminate or lessen competition. This may sound like the PS test, but its advocates argue that it is quite different because profit sacrifice is neither a necessary nor a sufficient condition for failing the NES test. It therefore avoids the two major criticisms directed at the PS test. Werden, for instance, points out that if there is a profit sacrifice, then the NES test inquires why the defendant would find it desirable to make that sacrifice. If there is no sacrifice, there may still be harm to competition and the NES test asks why the conduct is profitable.⁴⁴ The NES test has won the respect of the U.S. Department of Justice, which supported it in several cases brought under section 2 of the Sherman Act over the last few years.⁴⁵

Werden is careful to spell out that the NES test is really only part of the definition of exclusionary conduct. The NES test should signify unlawful behaviour only if there is also a showing that the conduct in question has caused, or has an actual tendency to cause, the elimination or lessening of competition.⁴⁶ This makes perfect sense and is true of the PS test, as well. This additional step shows up in predatory pricing cases, for example, in the form of the recoupment test. Price-cost tests may show that a firm’s conduct is irrational, but the recoupment test is still necessary to show that the conduct is likely to harm competition.

Diagram 2. The No Economic Sense Test

Therefore, another way to formulate the NES test is to say that it prohibits conduct that has an actual tendency to eliminate competition when that conduct provides an economic benefit to the defendant only because of that tendency, regardless of whether the conduct is costless. This helps to clarify that the NES test is not under-inclusive like the PS test, because it can capture cheap exclusion cases. It does not seem so clear, though, that the NES test avoids the over-inclusiveness problem that plagues the PS test. The welfare-enhancing conduct in the IP example described in the previous section, for instance, would also be caught by the NES test. It is not a very satisfactory defence of the NES test simply to assert that it asks why such conduct is rational and that it would therefore never be applied in certain situations. If all the test does is ask why, without giving any guidance about what to do with the answer, then it leaves us in a kind of shadowy place that is on the road to a definite standard but not quite there yet.

A related point is that, like the PS test, the NES test essentially ignores the difficult issue of how to deal with conduct that is likely to produce both beneficial and harmful effects or, in the language of the NES test, conduct that makes economic sense because it reduces competition *and* increases the defendant's efficiency. Taken literally, the test seems to allow conduct that is known to be harmful whenever it also has a beneficial effect that is, by itself, strong enough to yield a positive payoff to the defendant. That would avoid any need to engage in a balancing step, but it also invites the "fig leaf" problem described earlier. Furthermore, an agency or court would still have to estimate and sort out the reasonably expected gains to the firm that are due to the elimination of competition from the reasonably expected gains that are

due to any proffered efficiency justification, net of the costs of the conduct. As Werden observes, it is doubtful that the NES test is well-suited to conduct that is profitable both because it tends to eliminate competition and because it generates other effects, as well.⁴⁷

Finally, the NES test would seemingly require a dominant firm that owns a valuable property right to sell or license its property to any rival who needs it to survive and offers a profitable fee for it – even if the dominant firm has never sold or licensed it to anyone. That could damage the incentives to develop or acquire the property right in the first place.

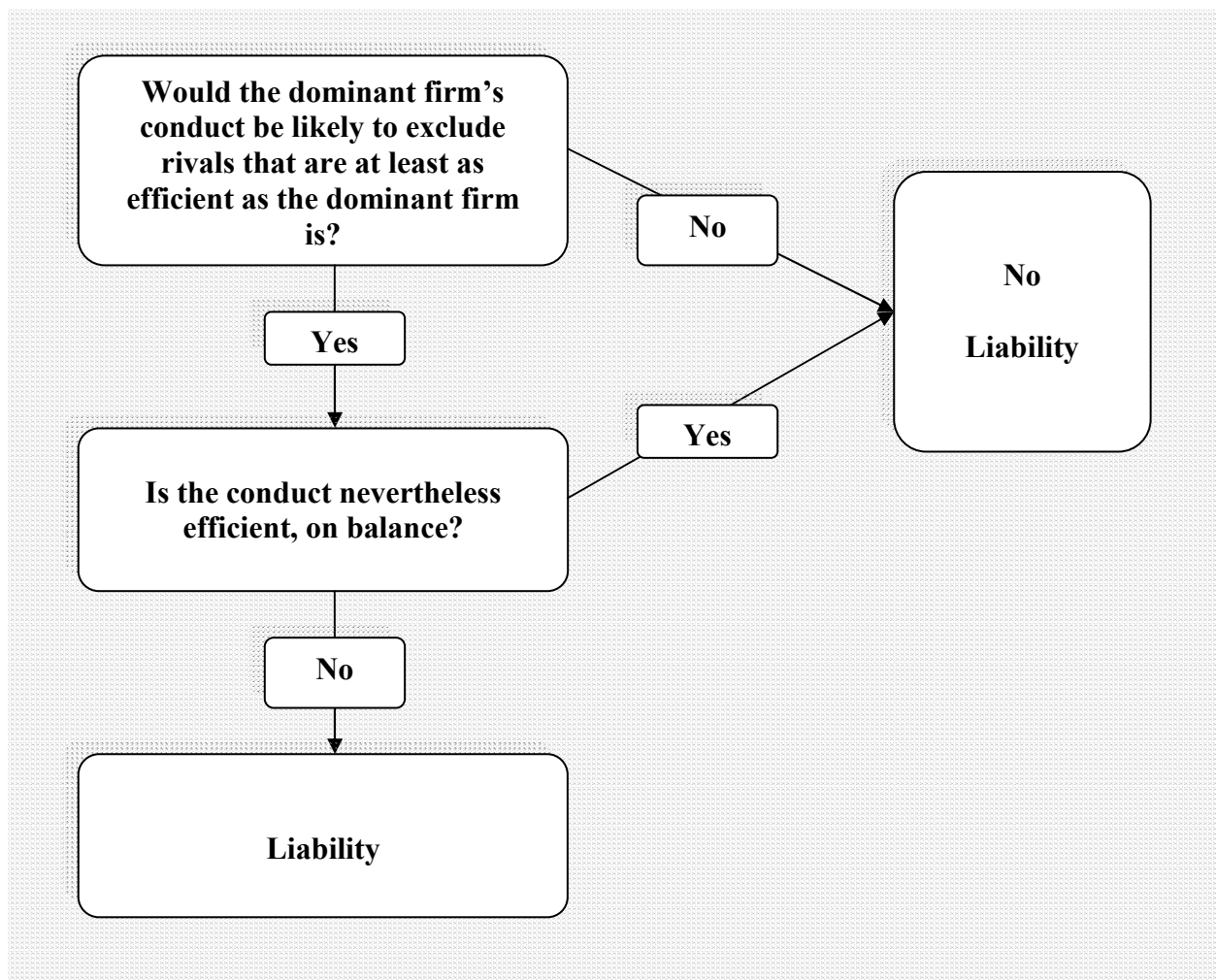
3.2.3 *The Equally Efficient Firm Test*

The equally efficient firm (“EEF”) test aims to identify dominant firm conduct that harms competition by asking whether the conduct would be likely to exclude rivals that are at least as efficient as the dominant firm is. If the answer is that EEFs would probably be excluded, then the conduct is considered harmful to competition. Otherwise, the conduct is considered lawful. This test has substantial merit, too. It guards against the danger of protecting competitors rather than competition because, under competitive conditions, a market will be served only by the most efficient firms. Therefore, it is not considered harmful for less efficient firms to be driven out.

Like the PS test, the EEF test also has a bearing on some of the cost benchmarks used in the case law on predatory pricing. The logic behind the average variable cost test, for example, is that it is an approximation of a marginal cost test, and a firm could not exclude an equally efficient competitor by pricing at or above marginal cost.

Most of the criticisms that have been levelled against the EEF test contend that it treats dominant firms too leniently. Critics have pointed out, for example, that even when an entrant is less-efficient than the incumbent firm, it may still improve social welfare by forcing the market price downward (and quantity upward). If the allocative efficiency gain from lower pricing/higher quantity outweighs the reduction in productive efficiency due to the presence of the higher-cost entrant, these critics note, then it is better to use a stricter test to protect that entrant.

Other commentators have replied that it is too difficult to predict which way the scales in such balancing tests would tilt and whether entrants would eventually become more efficient.⁴⁸ Furthermore, they reason, it is wiser not to adopt a policy that encourages inefficient entry and guarantees that prices will be higher in the short run than those that would prevail if the incumbent were not forced to allow inferior rivals to survive.⁴⁹ Another problem with trying to help less efficient competitors is that doing so may improve social welfare in the short run at the expense of the longer run. Specifically, it ignores the damage that could be done to innovation and competition by taking away dominant firms’ ability to defend themselves by eliminating rivals through their own superior efficiency. If dominant firms are forced to make room even for inferior competitors, then all firms – not just the dominant ones – may begin to wonder why they should strive to win a dominant position in the first place. Consequently, the incentives to compete and innovate, which are crucial to the long term performance of the market system, could suffer.⁵⁰

Diagram 3. The Equally Efficient Firm Test

Another argument aimed at the EEF test is made by Gavil, who writes that “it is difficult to imagine how a plaintiff would, at the pleading stage, possess the information necessary to allege that it was at least ‘equally efficient’ as the defendant.”⁵¹ It is not clear, however, that a plaintiff would need to make that allegation. Instead, it should be sufficient to allege that the dominant firm’s conduct would exclude *any* equally efficient firm, regardless of whether the plaintiff happens to be one. The EEF, therefore, could be purely hypothetical. At least, that is the way the test has been applied in predatory pricing cases, where prices are compared with the defendant’s own costs, not with the plaintiff’s, and the plaintiff need not show that its costs are at least as low as the defendant’s.

Nevertheless, there is a difficult question to be answered regarding the scale of operation at which one should assess the hypothetical EEF’s efficiency. This question matters greatly because new entrants tend to enter at a relatively small scale and therefore have not worked their way down the marginal cost curve yet. Consequently, they may be less efficient than the dominant firm in the short run, but if they were able to survive long enough they might become equally or even more efficient. It could be the case, then, that the EEF test would say conduct should be permitted because a hypothetical EEF could withstand it, yet in the real world no entrant would ever have a chance to become an EEF because the defendant’s conduct would eliminate it before it reached that point. This tendency to give false negatives appears to be a serious drawback to the EEF test.

Even so, the EEF test has some well-known proponents, including Judge Richard Posner. His formulation would allow a defendant to rebut a showing that its conduct would exclude an EEF with evidence that the conduct is “on balance, efficient.”⁵² In other words, in cases that raise the core difficulty of what to do with conduct that is both pro- and anti-competitive, Posner recommends balancing, which leads to the next type of test.

3.2.4 *Consumer Welfare Tests*

The consumer welfare test in its most general form holds that conduct is not unlawful unless there is a tendency for it to reduce consumer welfare (“CW”) by raising prices and lowering output. The test has intuitive appeal because, unlike tests that rely on other factors such as profit sacrifice to predict welfare effects, the CW test is directly connected to promoting consumer welfare. When a dominant firm’s conduct reduces welfare without contributing to any increase in the firm’s efficiency, this test is relatively easy to apply. The harder case, of course, is when the firm’s conduct has the potential both to reduce CW and to enhance the defendant’s efficiency. In that situation, there seem to be four possibilities:

1. always condemn conduct if it is likely to have any negative effect on CW, regardless of any efficiencies;
2. always allow conduct if it is likely to have any positive effect on efficiency, regardless of harm to CW;
3. balance the two effects against each other to determine which one is likely to be stronger, and prohibit the conduct if likely harm to CW outweighs likely improvements in performance; or
4. balance the two effects and consider conduct unlawful only if it is likely to produce harm to CW that is disproportionate to the improvement in efficiency.

Possibilities c) or d) may sound like attractive solutions, and they have received some support in court decisions, government briefs, and journal articles.⁵³ Their disadvantage is that welfare balancing is hard to do well. It is doubtful that either competition agencies or courts could reliably, consistently quantify the anticipated long run effects of conduct that both enhances efficiency and reduces consumer welfare. Even Salop, a proponent of balancing, concedes that “[c]ourts would be unlikely to know these exact numbers but instead would engage in a rough balancing of effects, using the evidence before them.”⁵⁴ To acknowledge that is to give up a great deal of ground, however. If courts will not *know* the numbers and their balancing will be *rough*, then the process will be prone to subjective impressions and reasoning, which will make it less predictable. Gavil adds that comparing changes in CW (allocative efficiency) with changes in firms’ production efficiency is to compare apples with oranges. It is not clear, he argues, that there is a one-to-one tradeoff between the two.⁵⁵

Furthermore, even if advanced econometrics could come to the rescue by estimating the relative sizes of various welfare triangles accurately, and even if courts could comprehend such information and use it wisely, the business community may find the process incomprehensible and therefore unpredictable. If most of the benefit of competition law enforcement comes not from its effect on the companies who are involved in each particular case, but rather from the behavioural influence that those cases have on thousands of other companies, then sacrificing predictability is unwise. Without it, competition policy may unintentionally deter healthy competitive behaviour.

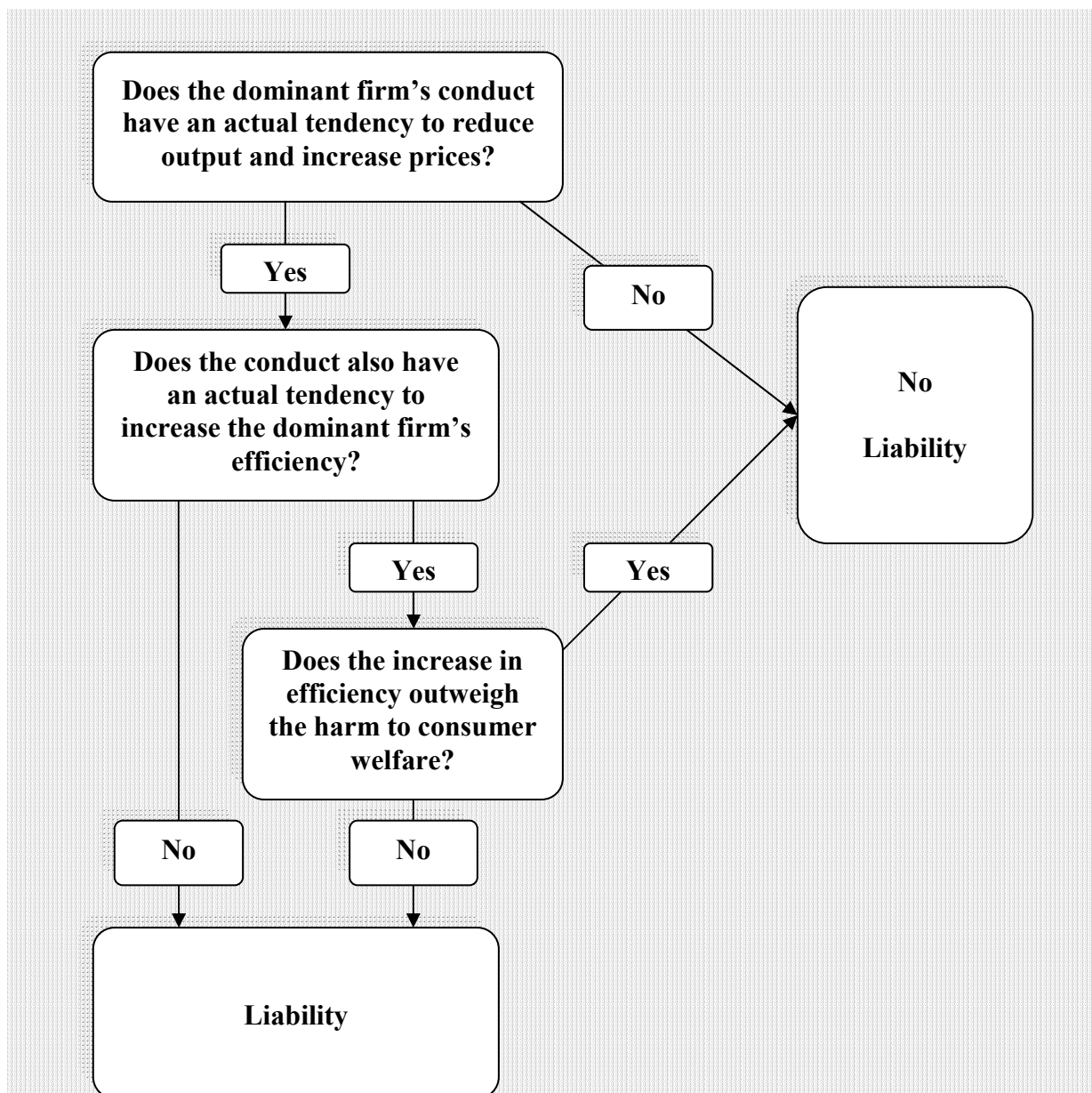
Another disadvantage is that, in countries with jury systems, relying on a balancing test may invite false positives (*i.e.*, condemning conduct that should not have been condemned), which would also chill healthy competitive behaviour. Rule d) seems preferable in this regard, since it requires the harmful effect

to significantly outweigh the benefits before conduct can be deemed unlawful. But “disproportionate” and “significantly” are subjective terms that do not provide fixed guidance.

Balancing tests of all varieties irritate Elhauge, who writes that “[s]uch an open-ended balancing inquiry by antitrust judges and juries would often be inaccurate, hard to predict years in advance when the business decision must be made, and too costly to litigate. Thus the risk posed by such an inquiry, coupled with the risk of [fines or] damages, would greatly deter desirable innovation and investments in improving products or the methods of making them.”⁵⁶

Moreover, courts do not seem to be eager to engage in balancing exercises in unilateral conduct cases.⁵⁷ Although they have sometimes indicated that their decisions are driven by balancing, it turns out that the courts are not actually engaging in balancing after all.⁵⁸

Diagram 4. Consumer Welfare Balancing Test



Rules a) and b), on the other hand, are simpler to understand and apply, though they will not always arrive at the optimal result in individual cases. Yet they retain the characteristics of predictability and consistency that are so important to effective competition law enforcement. It may be more prudent to have bright-line rules that do not achieve perfect welfare distribution in the individual cases that happen to go before agencies and courts, for the greater good of achieving better economy-wide results because predictable rules are better than ad hoc, incomprehensible ones. This view has additional appeal if one is willing to admit that the complex cases will always be hard to decide correctly, no matter what rule is used. If so, it is reasonable to focus on making sure that the easy cases, at least, are decided correctly.

One other difficulty faced by all of the tests can be mentioned here. A decision must be made about how likely the harm to competition (or consumer welfare) has to be before the test is failed. Should there be actual harm, a dangerous probability of harm, a likelihood of harm, or a mere possibility of harm? The same questions apply regarding the likelihood of any claimed efficiencies. These are not questions that can be answered in this Note. Each jurisdiction has to make a choice, depending on where it wants to locate itself along the spectrum ranging from strong avoidance of false negatives to strong avoidance of false positives.

3.2.5 *Elhauge Efficiency Test*

Professor Elhauge has devised a test that is more difficult to understand than the others, but it could prove to be the most useful one to date. His test turns on

whether the alleged exclusionary conduct succeeds in furthering monopoly power (1) only if the monopolist has improved its own efficiency or (2) by impairing rival efficiency whether or not it enhances monopolist efficiency. Under this standard, which would permit the former conduct and prohibit the latter, a defendant that has increased its own efficiency by investing in its intellectual or physical property should not have a duty to share that property with rivals, but has no privilege to discriminate by offering worse terms to rivals or those who deal with rivals.⁵⁹

There are several ideas packed into that concise statement, so it is best to begin by breaking it down into smaller parts. To apply Elhauge's test, one must answer the following questions:

1. Does the defendant's conduct discriminate against its rivals in some manner? (This question is asked only in cases involving refusals to deal, exclusive dealing, or conditional dealing.)
2. Does the conduct enhance or maintain the firm's dominance, or is it likely to do so?
3. If so, then does the effect on dominance occur only if there is an improvement in the defendant's efficiency?
4. If not, then is the effect on dominance caused by the conduct's impact on rivals' efficiency, regardless of whether the conduct also enhances the defendant's efficiency?

For a defendant's conduct to be found unlawful, the answers to these questions must be yes (if applicable), yes, no, and yes, respectively. Any deviation from that sequence of answers results in a finding in favour of the defendant.

Because Elhauge's test still seems a bit daunting, even in a broken-down format, it may also be helpful to describe it in ordinary text. The test requires, as a threshold matter, that the defendant's conduct somehow discriminate against its rivals if the conduct involves a refusal to deal or dealing only under certain conditions, such as exclusivity. It also requires that the conduct increase or maintain (or be likely to increase or maintain) the defendant's dominance. It then asks whether a dominant position is being

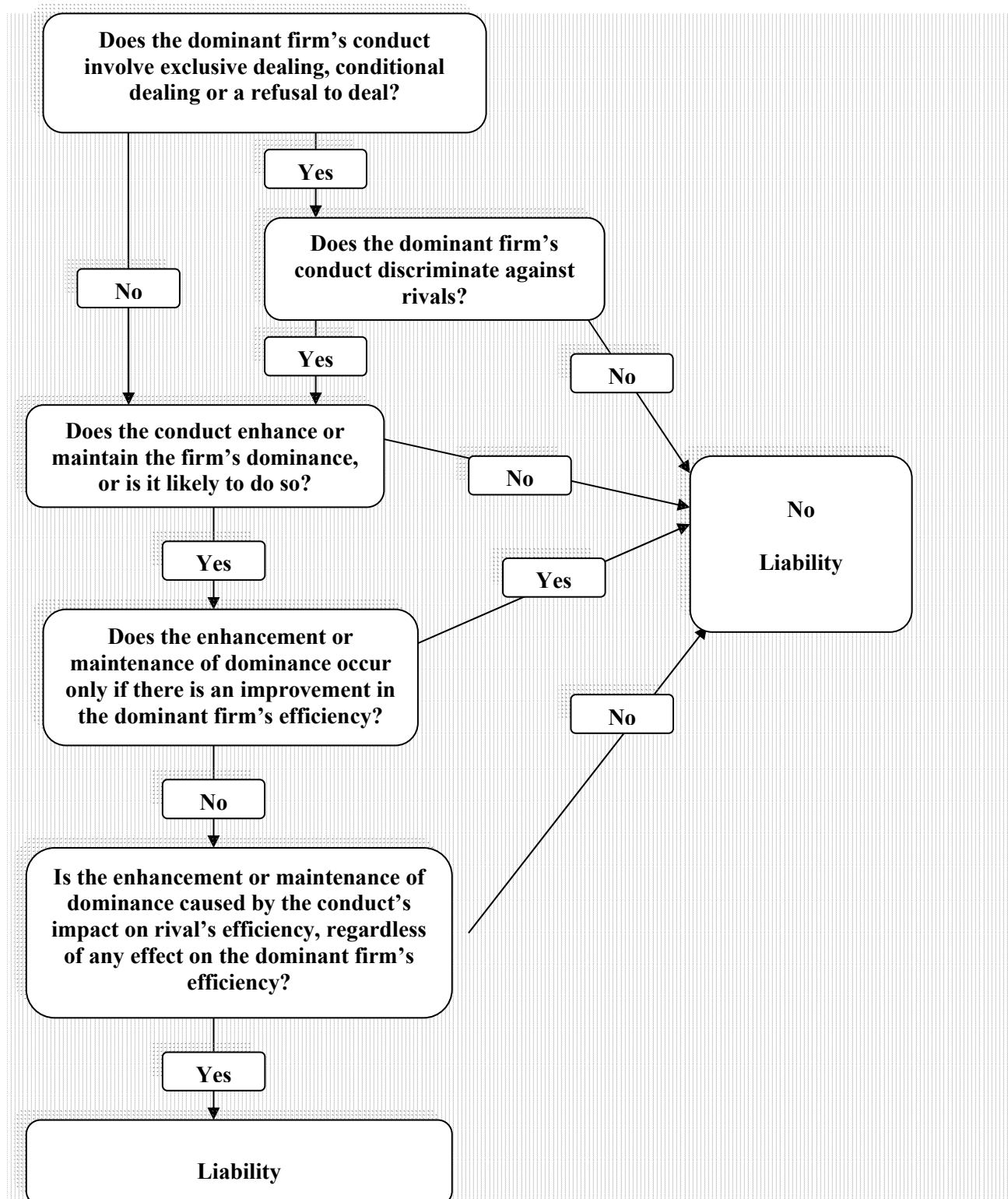
enhanced or maintained because the defendant is improving its own efficiency (lawful), or because the defendant is impairing the rival's efficiency (unlawful). If both firms' efficiencies are affected by the defendant's conduct, then the defendant is not liable so long as the effect on its dominance takes place only if the conduct has a positive impact on the defendant's efficiency. If, on the other hand, the effect on dominance is attributable entirely to the conduct's damage to the rival's efficiency, then the conduct is unlawful even if the defendant can come up with some kind of an efficiency-enhancing story to tell. This latter situation could occur, for example, in cases where the defendant did not use the least restrictive means available to improve its own efficiency.⁶⁰ "The key factor that distinguishes the sort of exclusionary conduct that merits condemnation is that it can successfully increase or maintain the monopolist's market power even if the monopolist has not increased its efficiency in any way."⁶¹

It is immediately apparent that Elhauge's test, though it takes efficiencies into account, does not require any balancing. It therefore avoids a major administrative difficulty. It also permits behaviour such as investing in research and development to make a better or cheaper product, whereas the PS test can capture that behaviour. Furthermore, the innovating firm is allowed to sell its new or improved product at any above-cost price (absent discrimination against rivals), even if doing so takes market share away from its rivals to such an extent that they become less efficient. The key factor is that permissible conduct reduces rivals' efficiency only as an unavoidable side effect of the improvement in the defendant's own efficiency.

The Elhauge test helps to solve the mystery of competition on the merits because it connects conduct to efficiency – a concrete concept – rather than to subjective notions of "fair," "normal," or "non-exclusionary" competition. In other words, the test offers a solution by saying that efficiency is "the merits" in the phrase "competition on the merits." Of course, we still face the task of separating what counts as efficiency-enhancing conduct from efficiency-reducing conduct.

In designing his test, Elhauge paid careful attention to the treatment of refusals to deal. He wanted to avoid a rule that would force defendants to make their property available to competitors even if the defendants were not selling or leasing it to anyone else. On the other hand, he wanted a rule that would condemn a firm for discriminating against its competitors when they wished to procure the same goods or property that the firm was voluntarily selling or leasing to others. In focusing on those characteristics, Elhauge was trying to fix one of the problems with the PS test, which is that it labels all unconditional refusals to deal as profit sacrifices. (There is money to be made by selling to competitors, so refusing to sell to them is the same as giving up profits.) In Elhauge's opinion, the PS test generates faulty results because it evaluates refusals to deal only in hindsight, meaning that it simply takes as a given the fact that the defendant has already made an investment in developing or acquiring whatever it is that its competitors want to buy. It therefore fails to account for the fact that being able to exclude rivals and acquire or maintain market power is what provides much of the incentive for making investments in acquiring or developing desirable property in the first place.⁶²

Diagram 5. The Elhauge Test



A better test would not damage that incentive, and Elhauge's does not because it condemns defendants for refusing to deal with rivals in only one situation, namely when they are already dealing with others. In that case, defendants should already be charging a price that reaps whatever profit can be

obtained from any market power their property conveys, so selling to competitors on the same terms would not be a burden or disadvantage. Conveniently, the Elhauge test imposes a relatively small administrative task on courts because it does not require them to determine what a “fair” price would be. The court simply needs to determine whether defendants are dealing with competitors on the same terms they deal with others.⁶³

4. Competition on the merits in practice

This section examines competition on the merits from an applied standpoint, comparing how courts in various jurisdictions approach certain types of abuse of dominance and monopolisation cases. The results make it difficult to conclude that any particular test has been used consistently, which contributes to the sense of unpredictability and even incoherence in policy that scholars have highlighted recently. While this Note does not by any means cover every kind of abusive conduct, it does attempt to illustrate both the current problems caused by the lack of adequate standards and the performance of proposed tests by focusing on a few different types of behaviour. In particular, the discussion will include cases on loyalty rebates and discounts, bundled rebates, tying, and refusals to deal.⁶⁴

4.1 Loyalty Rebates/Discounts and Bundled Rebates

4.1.1 *British Airways (U.S.)*

In 2001, the U.S. Court of Appeals for the Second Circuit decided that British Airways (“BA”) had not violated Section 2 of the Sherman Act by implementing a system of financial incentives for travel agents.⁶⁵ Even after drawing all inferences of fact in the light most favourable to plaintiff Virgin Atlantic, the court concluded that the evidence failed to show that BA’s rebates harmed consumers. It therefore affirmed a lower court’s grant of summary judgment to BA.

The incentives in question were paid to agents whose sales of BA tickets met certain thresholds. There were no mandatory minimums. The incentives were calculated as a percentage of the agent’s BA sales for the entire year and then paid in the form of a rebate. Virgin Atlantic argued that these incentives were part of a predatory pricing scheme by BA that was designed for the purpose of acquiring and sustaining a monopoly on airlines service to five U.S. cities from Heathrow Airport. In particular, Virgin argued that, but for BA’s below-cost pricing, Virgin would have entered the markets for serving those five cities earlier than it did.

Virgin’s decision to bring its case under a predatory pricing theory triggered a special form of the PS test that is used in U.S. courts for predatory pricing cases. The plaintiff must prove that the defendant’s prices “are below an appropriate measure” of the defendant’s costs, and that the defendant has a dangerous probability of recouping its predatory losses.⁶⁶ As will be shown, however, some of the most important evidence and reasoning that the court used in reaching its decision would be equally relevant in a more general application of the PS test and is therefore not specific to predatory pricing claims.

The court began its analysis by noting that even if a defendant has monopoly power and excludes competitors, it is still considered to be acting lawfully if it is “simply exploiting competitive advantages legitimately available to it.”⁶⁷ It then embarked on a critical examination of the plaintiff’s argument that its evidence established below-cost pricing. The particulars of that argument and the court’s critique of it are somewhat intricate and not especially relevant to our subject. What matters is that the court’s inquiry followed the steps of a well-known standard.

Even more importantly, the court directly addressed the key question that the general PS test asks: Would the defendant have engaged in the allegedly unlawful conduct in a world where that conduct did not eliminate competition? Despite the problems with the PS test noted earlier, this is one case where it

worked well because it was possible to *know* the answer to that question. In other words, the real world and the hypothetical, but-for world were one and the same because Virgin entered and remained in all five of the relevant markets despite BA's allegedly unlawful conduct, and that conduct nevertheless continued for years afterward. The court therefore concluded that BA's rebates system was rational even without an exclusionary effect, so there was no basis to find it unlawful. "Business practices presumptively should not be viewed as an attempt to monopolize when 'the practices have been ongoing for several years and rivals have managed to profit, new entry has occurred, and their aggregate market shares are stable.'"⁶⁸ In this case, Virgin's share in three of those markets had actually grown to roughly the same size as BA's.

Although the outcome of this case turned on a clear standard, there is still room for improvement in the decision. Specifically, the court did not give any guidance regarding what qualifies as a "competitive advantage" or what "legitimately available" means. It simply mentioned those phrases and moved on. Furthermore, U.S. courts still have not resolved the issue of which cost to use in predatory pricing cases.

4.1.2 *British Airways (E.U.)*

Roughly two years after the American court's *British Airways* decision, the European Court of First Instance determined that the same conduct at issue in that case had violated Article 82.⁶⁹ Interestingly, although the European case also arose from a complaint made by Virgin Atlantic – a competitor in the airlines industry – the court based its decision on a finding that BA occupied a dominant, monopsonistic position in the market for travel agent services in the United Kingdom. The court found that BA had violated Article 82 not only because its rebates discriminated against some travel agents, but because the rebates could also have an exclusionary effect on competitors in the air transport services market.

The rebates were found to be discriminatory because they could disadvantage some travel agents by awarding them discounts that were different from those received by other agents who had sold a similar number of BA tickets. This effect was possible because the rebates depended on the growth rate of each agent's BA ticket sales from year to year, rather than on the absolute magnitude of the agent's BA sales. Therefore, the court reasoned, the "ability of agents to compete in supplying air travel agency services to travellers and to stimulate the demand of airlines for such services was naturally affected."⁷⁰

As a basis for competition law liability, the logic behind the finding of discrimination appears to be suspect. No evidence showing that these discounts had harmed competition among travel agents was discussed by the court. Furthermore, it would make no sense for BA to reduce competition in that downstream market because doing so would decrease demand for its (upstream) product. On the contrary, a rational objective for offering target discounts would have been to motivate agents to use their best efforts to make more sales, which is exactly what they should be doing in a competitive travel agent market.⁷¹ Consequently, the fact that BA could be said to have discriminated against some travel agents does not, without more, appear to be a sound basis for finding that it abused its dominant position as a purchaser in the market for travel agent services.

With respect to the exclusionary effect of BA's incentives, the court recited precedent from *Hoffman-La Roche* to the effect that an abuse occurs when a dominant firm influences market structure by using methods other than "normal competition."⁷² The court then noted that a company in a dominant position cannot engage in behaviour "if its purpose is to strengthen that dominant position and thereby abuse it."⁷³ Relying on that framework, the court found that BA's rebates induced fidelity among travel agents because rivals did not have a comparable revenue base with which to build their own competitive rebate program. In addition, because the rebate levels did not increase continuously with higher sales, but rather were tiered, the court found that it would take a disproportionate financial incentive to persuade any agent who happened to be near the next highest tier to divert sales to a rival airline. Furthermore, the court determined that BA's program had no economic justification because the rebates were paid on all BA

tickets sold by the agents, not just the incremental ones. Therefore, BA “can have had no interest in applying its reward schemes other than ousting rival airlines.”⁷⁴

The court’s methodology for finding potential exclusionary effects on competing airlines is problematic. After referring to the vague concept of normal competition, the decision mentions an intent-based test that seems to be presented as a sufficient condition for finding abuse of dominance. But the court also gives the impression that it is applying the PS or NES test, or perhaps the EEF test, when it states that the rebates lacked an economic justification and that BA could not have had any interest other than eliminating rivals. Therefore, it is not clear what the basis is for determining what is normal competition and what is not.

As for the substance of those tests, it does not seem prudent to rely on the intent test because holding dominant firms liable merely for intending to strengthen their dominance would encompass beneficial investment and innovation aimed at improving efficiency. It would also capture welfare-increasing attempts to exclude rivals by discounting.⁷⁵ It would be a strange form of competition indeed if dominant firms intended *not* to strengthen their positions by any means whatsoever.

Regarding the PS and NES tests, a showing of actual or likely harm to competition is a prerequisite for both of them, as discussed earlier. Notably, however, the decision does not consider whether BA’s discounts to travel agents would likely have, or did actually have, any effect on competition among airlines. Several factors could have been, but were not, considered for this purpose:

- Whether the rebates ultimately affected travellers’ decisions regarding which airline to fly, particularly if cheaper flights were available on other airlines. Persuading customers to ignore cheaper flights would seem to be difficult unless travel agents were the only source of information about flight prices, but such considerations are not mentioned in the decision.
- Whether competing airlines could match BA’s discounts profitably. Rather than requiring proof that they could not do so, the court simply assumed that they could not.
- Whether BA faced substantial competition in the airlines industry at the level of individual routes rather than across all of its routes.
- Whether BA was able to charge higher fares as a result of the rebate program’s effect on competitors than it otherwise would have been able to charge.

All of this is not to say that the court erred by holding that BA’s conduct *could* have harmed competition, but only that if the court had required evidence regarding what was actually happening in the market, there could be more confidence that its decision promoted competition and protected consumer welfare.

Ironically, the only evidence on actual effects that is mentioned in the decision suggests that competition in air transport services had not been harmed. The complainant Virgin Atlantic was not only able to enter the relevant market profitably, but other airlines entered, too, and their market shares grew during the relevant period. The court paid scant attention to that evidence, however, ruling that no showing of actual effects was necessary because it was adequate to demonstrate that BA’s program “tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.”⁷⁶ While merely being capable of restricting competition sounds like an exceedingly strict standard, it should be noted that in the court’s view there was concrete evidence of a tendency to harm competition: 85 percent of airplane tickets sold in the U.K. were sold by travel agents. That finding led the court to conclude that BA’s rebates “cannot fail to have had the effect of excluding competing airlines.”⁷⁷

We will return to the CFI's *British Airways* decision shortly to discuss it in the context of other tests reviewed earlier.

4.1.3 *Michelin II*

The Court of First Instance's *Michelin II* decision⁷⁸ was issued just a few months before its *British Airways* ruling, cited much of the same precedent, and applied essentially the same analysis. The court found that Michelin had abused its dominant position in the market for replacement tyres for heavy vehicles in France by using a complex system of bonuses and rebates paid to tyre dealers. The court ruled that even rebates that are based solely on the volume that a customer buys can be considered fidelity rebates, and therefore abusive, under certain circumstances. The fidelity-inducing effect in this case was found to stem from a) the abrupt variation of the rebate rates between quantity levels, together with the fact that the rates applied to total purchases rather than only to the incremental purchases above each threshold, b) the reference period of one year's worth of purchases, and c) the fact that the rebates were also based on the entirety of a customer's tyre business with Michelin, rather than being calculated product by product.⁷⁹

Another rebate that Michelin gave to dealers in exchange for the performance of certain services was also held to be abusive. The Court stressed that this rebate was "unfair" to the dealers, noting that subjective and unclear criteria were used to evaluate the dealers' services.⁸⁰ Yet another program held to be unlawful offered marketing and financial support to dealers based on the tacit condition that they achieve a certain percentage of Michelin sales in their turnover, as well as several other conditions regarding spontaneous customer demand and an obligation to provide information on sales and strategies to Michelin.

Finally, Michelin's quantity rebates were found to discriminate against dealers (and were thus abusive for this reason, as well), again because of the fact that they did not progress in a smooth, linear fashion as the quantities bought by a dealer increased. The court explained that where, as a result of the thresholds of the various discounts bands and the levels of discount offered, discounts are enjoyed by only some trading parties, giving them an economic advantage which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors, a system of quantity discounts leads to the application of dissimilar conditions to equivalent transactions.

This made it clear that under Article 82, quantity rebates must not only be non-discriminatory, but must also be economically justifiable, *i.e.*, based on a countervailing advantage, such as economies of scale. In this case, the court found that Michelin had failed to show that its rebates were justifiable. The company's references to economies of scale in production and distribution costs were found to be too general.⁸¹ The discounts must be shown to represent genuinely and specifically lower costs for the seller.

It is somewhat incongruous that the court insisted that Michelin have specific proof of its claimed efficiencies, for the court rejected Michelin's argument that a finding of abuse required a specific showing of foreclosure effects. The court was content to base its judgment of liability on a theoretical finding that Michelin's conduct should, according to logic, have harmful effects on competition. As it did in its *British Airways* decision, the CFI emphasises that abuse is an objective concept and that it is sufficient to establish that the quantity rebates are merely capable of having a loyalty-inducing effect.

Furthermore, the judgment holds that "for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing[.] If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect."⁸² This holding was crucial in this case because it would have been difficult to prove actual or likely foreclosure, given that Michelin was losing market share to both established competitors and new entrants while its rebate system was in effect. In fact, Michelin

actually started to regain market share when it ended the rebate program. In essence, then, the court followed an intent-based, per se approach to fidelity rebates by refusing to consider actual or likely effects on competition or consumer welfare.

It appears that the CFI was concerned that by dramatically cutting marginal prices around the threshold of each discount band, the discounts had changed the competitive *process* among manufacturers in the replacement tyre market from a constant battle for each unit of sales to a periodic battle for all, or much, of a dealer's demand. Without an evaluation of the market and the other competitors in it, however, it cannot be known whether that change in the process was likely to harm *competition* by increasing or maintaining Michelin's market power.

Heimler has noted that if all firms compete for and are able to supply the total demand of a customer in cases like *Michelin II*, then competition simply happens to take place at the beginning of each period and discounts cannot harm competition so long as they leave revenues greater than costs. It is when the rivals are not large enough, do not supply the same range of products, or do not yet have a strong enough reputation to allow them to meet all of the customer's demand that the discounts might harm competition.⁸³ But in *Michelin II*, the court did not thoroughly consider the actual ability of competitors to profitably match Michelin's discounts.

Heimler further concludes that "sound economic analysis is largely missing" in the European cases involving discounts, which has led to weaker standards.⁸⁴ At the same time, he finds that the emphasis on actual exclusionary effects in American cases is probably too rigid. His recommendation for both jurisdictions is to use the EEF test in discounting cases, which would hold that a dominant firm's pricing conduct is lawful unless it would exclude an equally efficient competitor.⁸⁵ Heimler proposes mathematical formulas, based on the EEF test, for detecting exclusionary discounts and rebates under certain conditions. His approach takes into account the competitors' ability to profitably match the dominant firm's discounts, essentially asking whether an EEF, though smaller than the incumbent, could match the latter's magnitude of discounts and still manage to keep its price above costs. Although Heimler finds that target discounts may indeed have a substantial exclusionary effect under some conditions, there simply is not enough information given (such as price-cost margins) in *Michelin II* to assess whether Michelin's discounts could have excluded an EEF.⁸⁶ He finds that there is, however, just enough information to cast doubt on the court's analysis and conclusion. Most notable is the fact that Michelin lost market share during the relevant period.

Sher, too, is critical of the CFI's analyses in *Michelin II* and *British Airways* because they are based substantially on the objectives of a) promoting fairness to the dealers and travel agents and b) maintaining existing market structures. Sher argues that even if one considers those goals to be valid, it is still the case that dominant firms in the tyre and airlines industries are becoming increasingly vertically integrated as a consequence of these decisions, thereby taking the business away from distributors altogether. The goals of "fairness" and preserving market structures are therefore being thwarted.⁸⁷

From the perspective of a consumer welfare balancing test, the CFI's analyses in *British Airways* and *Michelin II* look like one-sided approaches. They considered only that the defendants' conduct was capable of enhancing or maintaining their dominant positions by impairing rivals' opportunities. The "other side," namely whether the conduct was also capable of creating any efficiencies, was not rigorously addressed. For example, the decisions did not consider any pro-efficiency effects that the discounts might have had, such as the extra sales effort they might stimulate among the dealers and agents. Most importantly, the court did not consider the fact that consumer welfare would be improved by the rebates if dealers and agents were passing some or all of them through to retail customers.

As for the application of the PS test, we have already seen its outcome in the American *British Airways*. Given the available facts, it would appear that an application of that test in the European cases would have led to the same result. In both of the CFI cases, the real world and the PS test's hypothetical world coincided and showed that the defendant continued its system of rebates for many years, despite entry and despite loss of its own market share. Therefore, the conduct would have been deemed rational and lawful under the PS test.

Finally, if a court were to apply Elhauge's test to these cases, it does not appear that any of them would get past step 2, which asks whether the conduct enhances or maintains the firm's dominance, or is likely to do so. There simply was no proof along those lines, and the proof that did exist relating to that question pointed in the other direction. The cases would have been more difficult if the courts had been called upon to make a decision when the rebates had first been implemented, or if there had been proof of a discernible (or at least likely) effect on competition, such as a persistent lack of entry, exiting rivals, and/or steady or growing market share for the defendant. The cases would have been even more complex if the defendants had then responded with plausible arguments about why their rebates were efficiency-enhancing.

Nevertheless, it is worthwhile to consider hypothetically how step 2 of Elhauge's test might have been satisfied, and how the rest of his test would have been applied in *British Airways* and *Michelin II*. It would have first been shown that the conduct discriminated against rivals because discounts and rebates were given to buyers in exchange for buying a high percentage of their purchases from the defendants. Then it would have to be shown that rivals were foreclosed from such a substantial part of the market that the residual demand left to them was insufficient to achieve the minimum efficient scale. If so, that would impair their efficiency and force them to charge higher prices to cover their costs. Consequently, the rivals' ability to restrain the dominant firm's pricing would be weakened, so dominance would be enhanced or maintained. Then, unless the defendant could make a persuasive argument that its conduct increased its own efficiency, and that the effect on dominance would not have occurred without that increase in efficiency, Elhauge's test would condemn the discounts or rebates.

4.1.4 *LePage's*

The 2003 decision *LePage's v. 3M*, issued by the U.S. Court of Appeals for the Third Circuit, involved a claim that 3M had monopolised the market for transparent tape in the U.S. by using a system of bundled rebates.⁸⁸ LePage's argued that 3M's rebates induced de facto exclusive dealing among major customers. LePage's also claimed that it was foreclosed from selling tape because it could not cover its costs and still compensate customers for the rebates lost on other products in 3M's discount program when customers bought LePage's tape instead of 3M's. The court found in LePage's favour, holding that 3M "used its monopoly power over transparent tape, backed by its considerable catalog of products, to entrench its monopoly to the detriment of LePage's, its only serious competitor[.]"⁸⁹

3M's rebates were calculated based on the customer's level of purchases from six of 3M's product lines, ranging from health care products to retail automobile products. Customers were given targeted growth rates in each line, and the more targets the customer met, the larger were its rebates across all of the product lines. 3M conceded that it had a monopoly in the transparent tape market, with a market share of 90 percent. It contended that the proper method of analysis was to treat the case like a predatory pricing claim. In particular, 3M argued that its pricing was above its costs regardless of how its costs are calculated, and that LePage's did not contest that assertion. 3M therefore reasoned that the bundled discounts could not be anti-competitive. This can be viewed as an argument in favour of either the PS test or the EEF test.

The court rejected a predatory pricing analysis, however, stressing that this was an exclusive dealing case, not a below-cost pricing case. It then proceeded with its analysis, guided by the principle that “a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.”⁹⁰

Without specifically endorsing the EEF test, the court did allude to it in its description of the potential harm of bundled rebates. That harm, the court explained, occurs when a customer buys the defendant’s product B rather than plaintiff’s B not because defendant’s B is better or cheaper, but because doing so will enable the customer to receive a larger discount on A, which the plaintiff does not produce. Thus the plaintiff can compete in the market for B only by lowering its price enough to compensate for the customer’s forfeited discount on A. Depending on how many other products like A the defendant wraps in to the bundled discounts, and on how much the customer buys, “even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce.”⁹¹

The court then listed the total annual amounts of rebates received under 3M’s program by some large customers, noting that in some cases they amounted to half of LePage’s total tape sales to a given customer. The court also described how LePage’s market share, profitability, and manufacturing efficiency all declined as a result of 3M’s rebate program. Because 3M faced no other rivals in the relevant market, the court essentially concluded that harm to LePage’s was equivalent to harm to competition, noting that 3M would be able to earn more profit without LePage’s in the market.

Finally, the court returned to the concept of a “valid business justification.” It defined that term as being related to the enhancement of consumer welfare, which could be achieved by means such as greater efficiency or quality control. The court then pointed out that 3M had cited no evidence to support the argument that 3M realised efficiencies when customers bought products in several of its products lines at once. The court also observed that “[i]t is highly unlikely that 3M shipped transparent tape along with retail auto products or home improvement products to customers such as Staples or that, if it did, the savings stemming from the joint shipment approaches the millions of dollars 3M returned to customers in bundles rebates.”⁹²

The court did not expressly use any particular test to determine whether 3M’s conduct was unlawful. For the most part, it dwelled on the effects that the conduct had on LePage’s. Consequently, as the United States later observed in an amicus brief, “[t]he court of appeals was unclear as to what aspect of bundled rebates constituted exclusionary conduct, and neither it nor other courts have definitely resolved what legal principles and economic analyses should control.”⁹³ Its decision therefore leaves much room for uncertainty regarding how future bundled rebate cases will be resolved, and uncertainty is one of the main evils that good competition policy strives to eliminate because it can chill competitive conduct.⁹⁴

Heimler justifiably criticises this decision because it emphasises the magnitude of 3M’s rebates to certain big customers but makes no analysis of their ability to foreclose rivals. Persuaded that evidence of a competitor’s losses was sufficient, the court essentially waved its hand and concluded that 3M’s bundled rebates *could* foreclose portions of the market to equally efficient competitors who do not manufacture an equally diverse line of products.⁹⁵ There was no examination of whether 3M’s rebates *would* have forced an EEF to price below cost, though. As the dissenting opinion stated, the court simply presumed that the defendant had acted unlawfully because LePage’s had suffered. In other words, the dissent accused the majority of protecting a competitor and not necessarily protecting competition.

Actually, using the EEF test in bundled rebate cases is problematic because multiple product markets are involved and it is therefore unclear how one should conceptualise an EEF. “Equally efficient” could mean that the hypothetical firm manufactures all of the same product lines that the defendant does, and is equally efficient with respect to each one. But this definition, in effect, requires a real world rival to enter

a number of other product markets beyond the one it actually wants to enter, just so that it can have a chance to match the defendant's bundled rebate strategy. In other words, it allows defendants to raise entry barriers by forcing rivals to enter more than one market at a time. Alternatively, "equally efficient" could mean that the hypothetical firm manufactures and is equally efficient at producing only the one product in the relevant market. This definition, however, deprives the defendant of any ability to take advantage of efficiencies that may exist precisely because it operates across several product lines. In other words, it takes away the defendant's right to pass along to customers any savings that may arise because they are buying a range of products at once.

A variant of predatory pricing analysis may seem like an intuitively appealing solution to this problem, at least for purposes of exculpating defendants. If price remains above cost even after applying all of the bundled rebates to the product for which the defendant faces competition, then even an EEF who operated only in that market would not be excluded and it would seem that the conduct should not be deemed unlawful. If the resulting net price turns out to be below cost, on the other hand, then the problem of not taking defendants' multiple-product efficiencies into account remains, which is why the test seems to have value only for exculpating defendants, but not for inculcating them.

Greenlee, Reitman and Sibley, however, conclude that this kind of analysis is unlikely to be useful in any bundled rebate cases, provided that the policy objective is to promote consumer welfare. Their theoretical work shows that bundled rebates can either raise or lower consumer welfare, and that EEFs can be foreclosed in either situation. Furthermore, EEFs can be foreclosed by bundled rebates even when there is no short run profit sacrifice.⁹⁶ Therefore, their work can be taken as a recommendation against using either the PS test or the EEF test in bundled rebate cases.

In any event, there is not enough information in the opinion to apply the PS test properly, as the court did not examine whether 3M's discounts would have stimulated demand enough to make the discounts profitable even if LePage's had matched them. There is also not nearly enough information to perform a welfare balancing test.

Moreover, Werden acknowledges that it is "doubtful that the 'no economic sense' test would have been well suited to the bundled rebates at issue in *LePage's*. Such rebates implement a form of price discrimination, which can make them profitable even apart from any tendency to eliminate competition, and it may be infeasible to separate the profits from discrimination from the profits from eliminating competition."⁹⁷

As for the Elhauge test, it does not appear that it would be difficult to satisfy steps 1 and 2 in this case. The rebates discriminate against rivals by taking discounts away from customers who do not buy all of the products that 3M sells from 3M, and there was evidence that the rebates solidified 3M's monopoly in the tape market. The court ruled out the presence of any efficiencies associated with selling multiple types of products to individual customers, so the answer in step 3 appears to be that the effect on dominance does not occur only if there is an improvement in 3M's efficiency. Finally, if the rebates raised entry barriers by forcing rivals to have a comparable range of products with which to combat the bundling, and given that the court found that LePage's efficiency was damaged by the rebates, it would seem that step 4 is satisfied, as well. Therefore an argument can be made that LePage's would have won under the Elhauge test.

Still, some readers may have a nagging feeling that 3M's main argument seems to be compelling, namely that it did not price below cost, it was simply moving its prices closer to marginal cost, and that shows that 3M was merely improving its efficiency. Given that the court ruled out multi-product efficiencies, however, if the only argument 3M has is that it enhanced its efficiency by bringing its prices closer to marginal costs without going below them, then it is still possible to find in LePage's favour under Elhauge's test. This depends on there being a least restrictive means component to his test, though.

One would argue that, by making its discounts interdependent with customers' purchases in other product lines where its only rival in the tape market did not compete, 3M used an unnecessarily restrictive means of improving its efficiency. After all, it could have offered the same discounts on a non-bundled basis without losing any efficiency.⁹⁸

4.2 *Tying in Irish League of Credit Unions*

In a recent abuse of dominance cases heard by Ireland's High Court, a credit union association was recently found to have implemented an unlawful tying arrangement.⁹⁹ The Competition Authority argued that the Irish League of Credit Unions ("ILCU") abused its dominant position in the market for credit union representation services by enforcing an arrangement that tied ILCU membership to both a highly sought after Savings Protection Scheme ("SPS") and an insurance product. The Authority also argued that this arrangement deterred the entry and growth of rival credit union associations. The Court fully agreed, finding not only that the arrangement was an anti-competitive tie-in but that it had no countervailing business justification. ILCU was therefore held to be in violation of section 5 of the Competition Act, 2002, which is equivalent to Article 82 of the EC Treaty.

The SPS was established by ILCU as a stabilisation fund for its member credit unions. They were required to make monetary contributions to it, and in return it enabled discretionary financial assistance to be given to members who ran into difficulties, as well as payments to individual savers upon the failure of their credit union. The SPS was the only program of its kind in Ireland, and credit unions considered participation in it to be very desirable because of the consumer confidence it created for them. ILCU's rules specified that participation in the SPS program was available only to credit unions that belonged to ILCU.

Another ILCU rule required that all members purchase life protection and life savings insurance through ILCU's wholly-owned subsidiary, ECCU. When a number of credit unions sought to obtain alternative insurance coverage because they believed ECCU's rates were too high, ILCU responded by moving to disaffiliate them. That, in turn, would have cut off their access to the SPS. What is more, ILCU's rules provided that if a credit union ceased to be a member for any reason, it would forfeit all of the contributions it had made to the SPS.

There was one other credit union association in Ireland, CUDA, which was formed in 2001. It had a market share of roughly five percent, but many of its members chose to remain in ILCU, as well. The Court considered the vital question of whether CUDA or anyone else could create a service comparable to ILCU's SPS, and the evidence showed that they could not, unless they were able to recruit enough members to reach the critical mass necessary for adequate, stable funding. The Court found, however, that ILCU's rules regarding the SPS were discouraging defections from its own ranks.

It came to that conclusion when examining the issue of whether ILCU's rules were unlawful tying arrangements. The guidance it received from Article 82(2)(d), which sets out an example of what qualifies as an abuse, is not especially helpful: "Making the conclusion of contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the nature of such contracts." There is ambiguity concerning what qualifies as a "connection." Is a buying a hat connected to buying a scarf, for example? Are automobile purchases connected to global positioning system device purchases? The Court solved this problem by consulting the European Commission's *Guidelines on Vertical Restraints* and determined that two products are distinct when buyers would purchase them in two separate markets in the absence of tying.¹⁰⁰

The Court then concluded that ILCU had, in fact, used a "double-tie" to maintain and profit from its dominant position.¹⁰¹ ILCU membership was tied to the SPS, and ECCU insurance was tied to ILCU

membership. Credit unions might not want to belong to ILCU, or might simply want to buy lower cost, non-ECCU insurance. If they did either of those things, though, they would lose access to the SPS and sacrifice all of the equity they had invested in it. That raised their switching costs, thereby helping to weaken competition in the market for credit union representation services.

Next, the Court turned to the issue of whether ILCU had an objective justification for its tie-in arrangement. It began by describing what sounds approximately like the disproportionality version of the consumer welfare balancing test, stating that “the court must further enquire as to whether or not there is any objective justification for ILCU’s assertion that its rules and practices are proportionate to legitimate co-operative aims[.]” Then, without finding that the conduct had any legitimate aims, the Court held that “the sanction imposed on any credit union disaffiliating from ILCU is disproportionate.”¹⁰² The use of the word “disproportionate” is regrettable, since it gives the impression that the Court engaged in a subjective weighing process. Actually, the Court considered only the negative aspects of ILCU’s conduct because the evidence did not support any positive inferences whatsoever. (ILCU was actually impairing itself by refusing to accept non-members in the SPS because they would have added greater financial strength and stability to that scheme.) Therefore, there was nothing to balance in the first place, as the evidence was entirely one-sided.

Furthermore, although lawyers involved in the case had apparently tried to keep the Court from indulging in concepts of “fair play” and “equitable considerations,” the Court could not resist the temptation, noting that “they are nonetheless concepts which must have some importance, at least where arguments on objective justifications are concerned.”¹⁰³ This played directly into the hands of balancing’s critics, who argue that it is an unavoidably subjective process, because there is no objective definition of fair play. Judgments that depend on such notions will therefore be more unpredictable than judgments that do not.

Even though the outcome in *ILCU* was probably correct from a policy standpoint, the way in which that outcome was reached is equally important, if not more so, given the decision’s precedential impact. Direct, express application of one of the other tests discussed earlier might have resulted in a more transparent, predictable process. The EEF test, for example, would appear to go against ILCU because its conduct would have tended to exclude even a hypothetically more efficient credit union association by keeping credit unions to itself through the SPS tie-in. Even if an EEF were defined as a more efficient credit union association with an equally good SPS, ILCU’s conduct would be able to exclude that EEF because of the provision requiring credit unions that left ILCU to forfeit the assets they had in ILCU’s SPS.

Elhauge’s test would point in the same direction. ILCU discriminated against rivals by refusing to deal with any credit union that was not its own customer. Its conduct helped to maintain its dominance in the credit union association market. The conduct caused no improvement at all in ILCU’s efficiency and, in fact, weakened the solvency of its SPS. Finally, ILCU’s conduct impaired rivals’ efficiency by frustrating their expansion and preventing them from reaching the critical mass necessary to form their own SPS.

4.3. Duty to Assist Rivals in *Trinko*

In *Verizon Communications, Inc. v. Trinko*, the U.S. Supreme Court clarified the law on a monopolist’s duty to assist its rivals, but applied a mixture of standards that left considerable uncertainty intact with respect to monopolisation law in general.¹⁰⁴ The case arose because the Telecommunications Act of 1996 aimed to inject competition into local telephone service markets by requiring incumbent local exchange carriers (ILECs) to share their networks with competitors. A certain ILEC (which later became part of Verizon) therefore signed interconnection agreements with its rivals, making the operations support system that processed customer orders available to them. Complaints that the ILEC nevertheless failed to

fill rivals' orders on an equal basis were addressed by a consent decree under the Telecommunications Act. One day after that decree was entered, Trinko – a customer of one of the rivals – filed an antitrust complaint. It alleged that the same conduct that led to the consent decree also breached section 2 of the Sherman Act by discouraging customers from using competitors' services and thereby obstructing the rivals' ability to enter and compete.¹⁰⁵

The Court explained that the Sherman Act does not impose a general duty on monopolists to share the source of their advantage with rivals because doing so would conflict with the underlying purpose of antitrust law. In particular, it could reduce the incentive for the monopolist, the rival, or both to invest in the economically beneficial facilities in the first place. Furthermore, enforcing such a duty would require courts “to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited.”¹⁰⁶

Nevertheless, the Court acknowledged that certain exceptions to this general rule were made in the past, notably in *Aspen Skiing*, which held that Section 2 required a certain company to resume a severed business arrangement with its rival.¹⁰⁷ Explaining the rationale behind *Aspen*, the Court first pointed out that there was a prior history of dealing between the two companies in that case. Next, the Court noted that the defendant in *Aspen* refused to deal with the plaintiff even on the same terms it used with retail customers. Both of those facts supported a conclusion that the defendant had “a willingness to forsake short-term profits to achieve an anticompetitive end.”¹⁰⁸ Finally, the Court noted that the *Aspen* defendant had refused to provide services to its rival that it willingly provided to the public.

The Court then noted that none of those factors was applicable in *Trinko*. There was no history of dealing between Verizon and its rivals. It could not be inferred that Verizon was giving up profits by not fully cooperating because the price it would have received was not a price it set itself, but rather a regulation-imposed, cost-based price. Last, the relevant service in *Trinko* was not available to the public. In fact, the only reason Verizon made it available to rivals at all was that the Telecommunications Act forced it to do so. Therefore, because the circumstances did not fit within the exception carved out by *Aspen*, the Court confirmed the dismissal of Trinko's complaint because it failed to state a cognizable claim under the Sherman Act. That means that even if everything that Trinko had alleged in the complaint was assumed to be true, it would still be insufficient to support a finding that Verizon had unlawfully monopolised the relevant market. In other words, Trinko did not even come close to having a winning case.

There are several standards at work in *Trinko*, especially in the Court's description of *Aspen*. The first (concerning the prior course of dealing between the defendant and its rival) is the very same one that Elhauge has criticised because it will discourage monopolists from ever dealing with rivals, so as to avoid being forced to deal with them perpetually.¹⁰⁹ The Court gave stature to that standard anyway, though, by using it to distinguish the facts of *Trinko*.

The second rationale for *Aspen* sounds like the first part of Elhauge's test (discriminating against rivals) until it veers off into language that seems to endorse the PS test. One of the usual problems with the PS test remains unresolved, though, which is that the Court gives no useful guidance regarding the meaning of the term “an anticompetitive end.” Damaging a rival cannot always be considered “an anticompetitive end” even if it does require profit sacrifice because, as has already been pointed out, such conduct sometimes increases social welfare. The third rationale is clearly the same as the first part of Elhauge's test, but the commonality ends there.

Significantly, the decision also states that *Aspen* is “at or near the outer boundary” of cases in which a refusal to cooperate with rivals can constitute a violation of Section 2.¹¹⁰ Thus, the Court used two problematic standards and part of a possibly meritorious third one, then cast doubt on them all by saying

that the case is an outlier. In doing so, it left a hazy impression of how to identify the cases that are within the boundary of Section 2 liability.

Had the court applied the Elhauge test, its inquiry would have ended at step 1 because the conduct cannot be considered to have discriminated against Verizon's rivals (because Verizon was not dealing with non-rivals, either). The result of no discrimination means there is no violation under that test, so Elhauge's test would have yielded the same result that the Court reached, but the analysis would have been easier and more predictable. In fact, there probably never would have been a decision to make in the first place if a test like Elhauge's had been previously endorsed by the Court, because the plaintiff would have known in advance that its complaint would have no chance of success.

It is not possible to determine how the PS or NES tests would have fared in *Trinko* based on the facts in the decision because the plaintiff's complaint was dismissed before any evidence was taken. We cannot determine, for example, whether the interconnection fees Verizon received were above its costs. Therefore we cannot determine whether Verizon sacrificed profit by delaying or refusing the fulfillment of its rivals' customer orders. The lack of evidence in the case presents similar problems for applying the consumer welfare balancing test.

Surprisingly, it is possible that Verizon would have failed the EEF test, provided that an EEF is defined to mean a firm that is just as efficient as Verizon in every respect except that it lacks an operations support system and a local network. Then it would also have had to be shown that Verizon's conduct tended to exclude the EEF. It does seem a bit unreasonable to expect competitors to build their own, duplicative local telephone networks in order not to be dependent on an interconnection agreement with a firm that has a natural monopoly. That was probably one of the reasons that Congress passed the Telecommunications Act, though. In any event, *Trinko* is not a very helpful path toward a clearer general standard for unilateral conduct.

5. Conclusion

Competition policy would be strengthened if courts and agencies were to abandon the use of empty phrases like "competition on the merits." At the same time, they should redouble their efforts to identify clear criteria to be used in abuse of dominance/monopolisation cases. With more transparent, predictable standards in place, compliance with the laws would likely improve because companies would be better able to police themselves.

Nevertheless, it must be acknowledged that a single, perfect test probably does not exist. Elhauge, for example, admits that his test is not flawless.¹¹¹ Werden, too, concedes that the NES test's utility is likely to vary, depending on how difficult it is to determine whether conduct would make no economic sense but for its tendency to eliminate competition.¹¹²

Still, it may be conceded that any test will lead to erroneous determinations in a portion of the cases without suggesting that the search for better criteria is futile. The cost of the errors may be far outweighed by the benefits of a predictable, understandable, streamlined process that arrives at the correct result most of the time in hard cases and all of the time in easy cases. That view is supported by Gavil, who believes that "most cases will be weeded out before trial for weaknesses related to the plaintiff's assertions with respect to monopoly power or effects [on competition]. To the extent a small number of cases proceed any further, most will be decided based on lopsided evidence – lots of harm and little or no efficiency, or little harm and substantial efficiency."¹¹³ If he is right, only a small fraction of cases present the tough issue of what to do about conduct that yields both significant efficiencies and significant inefficiencies anyway. Furthermore, the only alternative appears to be difficult, expensive, and unpredictable rules that aim for perfection in every case but do not always achieve it.

It is too early to say that there is a best test available at this point. The debate is still very active, and scholars are continuing to come up with excellent ideas and criticisms. Agencies should do their part to contribute to this exchange of ideas.

NOTES

1. OECD (2005), Predatory Foreclosure, see at <http://www.oecd.org/competition>, Executive Summary at 7.
2. William Shakespeare, *Measure for Measure*, Act II, Scene 2.
3. “Dominant” is used here as a shorthand description that is intended to encompass the variety of thresholds used in statutes that govern unilateral conduct in OECD member countries. Thus, the term should be understood, for purposes of this Note, to include not only the dominance standard, but also the market power threshold, for example, as well as other benchmarks presently in use. Defining dominance, market power, etc., is a separate issue that will not be addressed here. Instead, this Note deals with the subject of how to determine whether the conduct of a firm that has already been found to be dominant should be deemed harmful to competition.
4. E.g., John Vickers, “Abuse of Market Power,” Speech to the 31st conference of the European Association for Research in Industrial Economics, Berlin (3 September 2004), available at www.offt.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf; Brian Sher, “The Last of the Steam-Powered Trains: Modernising Article 82,” 25 European Competition Law Review 243, 243 (2004) (arguing that “Art. 82 is the last unmodernised piece of European competition law,” that there is “no internal consistency of application,” and that “there is no longer any coherent policy basis for applying Art. 82”); Sven Völcker, “Developments in EC Competition Law in 2003: An Overview,” 41 Common Market Law Review 1027, 1048 (2004) (contending that the law on Article 82 “currently lacks a coherent overall approach and remains largely untouched by the increasing focus on economic analysis that has characterized the development of the law and practice under Article 81”).
5. E.g., Einer Elhauge, “Defining Better Monopolization Standards,” 56 Stanford Law Review 253 (2003); Andrew Gavil, “Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance,” 72 Antitrust Law Journal 3 (2004); Steven Salop, “Section 2 Paradigms and the Flawed Profit-Sacrifice Standard,” __ Antitrust Law Journal __ (forthcoming 2005).
6. See, e.g., Akinori Uesugi, “Recent Developments in Japanese Competition Policy: Prospect and Reality,” speech before the American Bar Association (24 January 2005) (discussing amendments to Japan’s Anti-Monopoly Act and noting that, in order to encourage entry into newly deregulated sectors, the JFTC is increasing its enforcement against the abuse of dominant positions).
7. OECD (2005), Predatory Foreclosure, see at <http://www.oecd.org/competition>.
8. E.g., Eleanor Fox, “We Protect Competition, You Protect Competitors,” 26 World Competition 149 (2003); Gavil, *supra* n.5.
9. Fox, *supra* n.8 at 150.
10. Vickers, *supra* n.4 at 23.
11. Gavil, *supra* n.5 at 17.
12. *Id.* at 81.
13. Eleanor Fox, “What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect,” 70 Antitrust Law Journal 371, 372 (2002) (footnote omitted).
14. Barry Hawk, Speech to La Cour de Cassation, Paris (24 February 2005), at 9, on file with the Competition Division.
15. Fox, *supra* n.8 at 151-155; Fox, *supra* n.13 at 382.

16. Philip Lowe, Speech to the 30th Annual Conference on International Antitrust Law and Policy (23 October 2003), at 6-7.
17. Vickers, *supra* n.4; Alberto Heimler, “Pricing Below Cost and Loyalty Discounts: Are they restrictive and if so when?,” monograph (2004), available at <http://ssrn.com/abstract=634723>; Sher, *supra* n.4 at 245 (expressly urging an approach to Article 82 that is “consistent with modern economic thinking and with the fundamental goal of protecting consumer welfare”).
18. OECD (2005), Predatory Foreclosure, see at <http://www.oecd.org/competition>.
19. Fox, *supra* n.8 at 149; Fox, *supra* n.13 at 372.
20. Section 2 reads: “ Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]”
21. The text of Article 82 is: “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”
22. The first appearance of the term “competition on the merits” in case law seems to have been in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958).
23. Case T-228/97, *Irish Sugar v Commission*, [1999] ECR II-2969, para. 111.
24. *LePage’s Inc. v. 3M*, 324 F.3d 141, 147 (3d Cir. 2003).
25. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (quoting 3 Phillip Areeda & Donald F. Turner, Antitrust Law 78 (1978)).
26. Case 85/76 *Hoffman-La Roche & Co. v. Commission*, 1979 E.C.R. 461, [1979] 3 C.M.L.R. 211, para. 91 (emphasis added).
27. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (emphasis added).
28. See Elhauge, *supra* n.5 at 263 (“Why isn’t it just good ‘business acumen’ to refuse to share one’s superior product with rivals in order to drive [them] out of the market?”). The same type of question could be asked with respect to fidelity rebates, for example.
29. *Fisher & Paykel Ltd v Commerce Commission*, [1990] 2 NZLR 731.
30. Elhauge, *supra* n.5 at 255.
31. *Id.* at 264-65 (citations omitted).
32. Fox, *supra* n.13 at 383; see also Hawk, *supra* n.14 (criticising U.S. and E.U. courts for using conclusory labels that offer no firm guidance in difficult abuse of dominance and monopolisation cases that involve competitively ambiguous conduct).
33. Vickers, *supra* n.4 at 6.
34. Elhauge, *supra* n.5 at 266.
35. For several more elaborate hypotheticals applying the PS test, see Salop, *supra* n.5.

36. A strict form of the PS test would condemn not only below-cost prices, but all prices below the short run maximising level, whether they resulted in some amount of profit or not. For a discussion covering the drawbacks of requiring short run profit maximisation in predation cases, see OECD (2005), Predatory Foreclosure, DAF/COMP(2005)14, Background Note at 24.
37. *See, e.g.*, Janusz Ordover & Robert Willig, "An Economic Definition of Predation: Pricing and Product Innovation," 91 Yale Law Journal 8, 9-10 (1981); Robert Bork, The Antitrust Paradox 144 (1978).
38. For more on cheap exclusion, see Susan Creighton, Speech to Charles River Associates 9th Annual Conference (Washington, D.C.) (8 February 2005), available at www.ftc.gov/speeches/creighton/050425cheapexclusion.pdf
39. Elhauge, *supra* n.5 at 278-79.
40. *Id.* at 292 (emphasis in original).
41. Elhauge later acknowledges this point and rightly concludes that, even so, the PS test is still both over-inclusive and under-inclusive. *See id.* at 293. Salop makes the same type of argument and acknowledgement that Elhauge does. Salop, *supra* n.5.
42. Salop, *supra* n.5.
43. OECD (2005), Predatory Foreclosure, DAF/COMP(2005)14.
44. Gregory Werden, "The 'No Economic Sense' Test for Exclusionary Conduct," ____ Journal of Corporation Law ____ (forthcoming 2005).
45. *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Verizon Communications Inc. v. Trinko*, 540 U.S. 398 (2004), available at www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf; Brief of the Appellees United States and the States Plaintiffs at 48, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), available at www.usdoj.gov/atr/cases/f7200/7230.htm; Brief for the United States at 26 (redacted version), *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005), available at www.usdoj.gov/atr/cases/f202100/202141.htm. *See also* R. Hewitt Pate, "The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct," speech to the 30th Annual Conference on International Antitrust Law and Policy, New York (23 October 2003), at 5, available at www.usdoj.gov/atr/public/speeches/202724.htm (noting that the Division has found the NES test "useful" in many contexts, though it does not necessarily encompass every type of conduct that may violate Section 2 of the Sherman Act).
46. Werden, *supra* n.44.
47. *Id.*
48. *See, e.g.*, Damien Geradin, "Limiting the Scope of Article 82 EC," 41 Common Market Law Review 1519, 1542 (2004) (calling balancing tests "inherently unreliable and unpredictable," at least in mandatory access cases).
49. This is the essence of the debate between Professors Edlin and Elhauge that was described in the Background Note for the previous roundtable on Predatory Foreclosure. *See* OECD (2005), Predatory Foreclosure, see at <http://www.oecd.org/competition>; Aaron Edlin, "Stopping Above-Cost Predatory Pricing," 111 Yale Law Journal 941 (2002); Einer Elhauge, "Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory," 112 Yale Law Journal 681 (2003). Gavil takes Edlin's side of the argument in the context of the EEF test. Gavil, *supra* n.5 at 59.
50. *See* Opinion of A.G. Jacobs in Case C-7/97, *Oscar Bronner v. Mediaprint*, [1998] ECR I-7791, para. 57 (discussing tradeoff between increasing competition in the short run and reducing it in the long run by allowing competitors to share a dominant firm's facilities too easily); *but see* Gavil, *supra* n.5 at 43 (noting that the lure of monopoly profit is by no means always necessary to stimulate innovation; there are many examples of industries in which firms innovate without any expectation of acquiring a monopoly).
51. Gavil, *supra* n.5 at 60.

52. Richard Posner, *Antitrust Law* (2d ed. 2001), pp. 194-195.
53. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); Salop, *supra* n.5; Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of the Petition for a Writ of Certiorari, at 14, in *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), available at www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf; Phillip Areeda & Herbert Hovenkamp, 3 *Antitrust Law* para. 651(a) (2d ed. 2002).
54. Salop, *supra* n.5 at n.15.
55. Gavil, *supra* n.5 at 71-72.
56. Elhauge, *supra* n.5 at 317.
57. See Gavil, *supra* n.5 at 72 (“despite nearly a century of devotion to the ‘balancing’ concept, in fact there is a remarkable dearth of examples of courts engaging in any kind of balancing”).
58. See, e.g., Elhauge, *supra* n.5 at 318-19 (discussing the court’s failure to apply a balancing analysis even though it stated that was the applicable test in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)); Gavil, *supra* n.5 at 21-22.
59. Elhauge, *supra* n.5 at 253.
60. Note that this solves the “fig leaf” problem that exists with other tests, such as the PS test, because Elhauge requires a causal connection between the claimed efficiency and the harmful effect on rivals. It is not enough, in other words, for defendants merely to identify some efficiency attributable to their conduct. To be exculpatory under Elhauge’s test, the claimed efficiency must itself contribute at least partially to the competition-eliminating effect.
61. *Id.* at 323.
62. Gavil is skeptical of this position. In a recent article, he asks rhetorically, “[I]s it really true that the hope of monopoly profits is the principal engine that drives innovation and economic progress? If it is, most business leaders are delusional dreamers, and the incentives to sharpen their business acumen are weak – because monopoly thankfully remains the exception, not the rule, in most industries. . . . Profits, not monopoly profits, are the principal spur to innovation that ‘attracts business acumen.’ One need only observe the rapid pace of innovation in highly competitive and dynamic markets – where no real hope of monopoly exists – to know that something less than the hope of monopoly appears quite adequate to drive firms to create. Protecting monopoly because it is necessary to spur innovation, therefore, is a dubious across-the-board proposition upon which to build the law of monopolization[.]” Gavil, *supra* n.5 at 43 (emphasis in original). While Gavil’s point seems sound, it is still hard to question the proposition that incentives to innovate would be reduced, even in highly competitive markets, if the would-be innovators knew they were going to be forced to share their innovations with rivals.
63. It should be noted that Elhauge was trying not only to develop a sensible, administrable, and predictable test, but one that would also be consistent with existing U.S. case law. He was therefore constrained by cases such as *Aspen Skiing*, which rejected the idea that monopolists never have to deal with rivals. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). That precedent does not limit the inquiry here, though. In fact, even the U.S. Supreme Court recently backed away from *Aspen Skiing* to a large extent, calling it “at or near the outer boundary of § 2 liability.” *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398, 409 (2004). (*Trinko* is discussed further below.) In any event, it is fair to ask whether there are any valid reasons for discriminating against rivals by refusing to deal with them on the same terms on which one deals with others. One obvious possibility is to avoid doing anything that might assist a rival in developing into a threat to the dominant firm’s market power. The possibility of that happening would damage the ex ante incentive to innovate and invest that Elhauge was trying to protect. Therefore, if the law allows rivals to force dominant firms to make their property available to everyone if they choose to make it available to anyone, then the logical choice in some cases may be to not deal with anyone. Elhauge first argues that “that sort of behaviour is implausible and self-detering, for if a monopolist does not sell to *someone*, it cannot make any profit or recoup its investments.” Elhauge, *supra* n. 5 at 314. That may be correct, but the likely outcome in that case is not that a firm would invest in

acquiring or developing desirable property and then simply hold onto it. Instead, the logical thing to do would be to decide not to invest in the property in the first place, which would be just as much of a loss to society. Furthermore, Elhauge's argument proves too much, because if not selling to anyone is implausible, then monopolists will always sell their property to someone. Thus, under his rule, they would *always* have a duty to deal with their rivals, and to do so on equal terms (unless doing so creates certain ex post inefficiencies that he describes elsewhere and that do not seem very common; *see id.* at 311).

64. Predatory pricing is not discussed here for two reasons. First, substantial progress in moving away from conclusory labels has already been made in that area, as most courts have begun to use fairly well-defined (though different) tests in those cases. Second, predatory pricing was discussed thoroughly in the Committee's previous roundtable. *See* OECD (2005), Predatory Foreclosure, *see* at <http://www.oecd.org/competition>.
65. *Virgin Atlantic Airways Ltd v. British Airways*, 257 F.3d 256 (2d Cir. 2001). The complaint was also brought under Section 1 of the Sherman Act, but that count failed because the plaintiff had no factual support for the proposition that British Airways' rebates were part of a concerted action.
66. *Virgin Atlantic Airways Ltd v. British Airways*, 257 F.3d at 266 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993)).
67. *Id.*
68. *Id.* at 269 (quoting 3A Phillip Areeda & Herbert Hovenkamp, Antitrust Law para. 807f (1996)).
69. Case T-219/99 *British Airways v Commission*, (17 December 2003). This decision has been appealed to the European Court of Justice (pending case C-95/04).
70. *Id.* at para. 238.
71. Heimler, *supra* n.17 at 6.
72. *British Airways v Commission*, para. 241 (quoting *Hoffman-La Roche* at para. 91).
73. *Id.* at para. 243.
74. *Id.* at para. 288.
75. First, even if the conduct did drive rivals out, those rivals would be less efficient in at least some cases, meaning that the certain gains from lower pricing in the short term and in productive efficiency in the long term might outweigh a possible long term increase in prices due to having fewer firms in the market; second, some of those attempts might not succeed at driving the rival(s) out of the market, in which case consumers would receive lower prices but suffer no loss of competition.
76. *British Airways v Commission*, para. 293.
77. *Id.* at para. 297. It remains puzzling to juxtapose that reasoning with the fact that BA's competitors gained share. The CFI was certainly correct, however, when it noted that despite the rivals' growth, it is possible that they might have grown more substantially but for BA's rebates. *Id.* at para. 298.
78. Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission* (30 September 2003) ("*Michelin IP*"). Paragraphs 241-247 of *British Airways* correspond to paragraphs 54-59 of *Michelin II*.
79. *Michelin II*, para. 95.
80. *Id.* at paras. 136-141.
81. *Id.* at para. 109.
82. *Id.* at para. 241.
83. Heimler, *supra* n.17 at 5.
84. *Id.* at 1.
85. *Id.*

86. *Id.* at 11-12.
87. Sher, *supra* n.4 at 245.
88. *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).
89. *Id.* at 169.
90. *Id.* at 152.
91. *Id.* at 155 (quoting Phillip Areeda & Herbert Hovenkamp, Antitrust Law, para. 794 at 83 (Supp. 2002)).
92. *Id.* at 164.
93. Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 8, No. 02-1865 (May 2004), *3M v. LePage's Inc.*, available at www.usdoj.gov/atr/cases/f203900/203900.htm.
94. In fact, one large corporation's Chief Antitrust Counsel has remarked that the unequivocal message of *LePage's* to firms is to bundle at your own risk. "If you are a multi-product firm with a significant position in one or more products, and engage in bundled rebates, you face treble damages if your smaller rival can't keep up – period. . . . Consumers [therefore] will not receive the benefit of lower prices through these programs." Gary P. Zanfagna, "*LePage's v. 3M*: A Reality Check," The Antitrust Source (November 2004), available at www.abanet.org/antitrust/source/11-04/Nov04-Zanfagna1129.pdf. Thus, even if the Third Circuit would have been correct under more rigorous standards to find in *LePage's* favour, the fact that its decision was written in a manner that created a great deal of uncertainty may leave consumers much worse off overall.
95. Heimler, *supra* n.17 at 14.
96. Patrick Greenlee, David Reitman, & David S. Sibley, "An Antitrust Analysis of Bundled Loyalty Discounts," U.S. Department of Justice Economic Analysis Group Working Paper 04-13 (October 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600799.
97. Werden, *supra* n.44.
98. For a great deal more information on fidelity rebates, see OECD(2002), Loyalty and Fidelity Discounts and Rebates, see at <http://www.oecd.org/competition>.
99. *Competition Authority v Irish League of Credit Unions*, [2003 No. 8608P] (22 October 2004).
100. *Id.* at 154.
101. *Id.* at 153.
102. *Id.* at 156.
103. *Id.* at 158.
104. 540 U.S. 682 (2004).
105. The Act provides that "nothing in this Act . . . shall be construed to modify, impair, or supercede the applicability of . . . the antitrust laws." *Trinko*, 540 U.S. at 406 (quoting § 601(b)(1) of the Telecommunications Act).
106. *Trinko*, 540 U.S. at 407-08.
107. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
108. *Trinko*, 540 U.S. at 409
109. Elhauge, *supra* n.5 at 314. Geradin argues that it does not make sense to allow dominant suppliers to cut off downstream firms when the supplier does not (yet) compete in that downstream market. Geradin, *supra* n.48 at 1535-36. In both *Aspen* and *Trinko*, however, the dominant upstream firm already competed in the downstream market.
110. *Trinko*, 540 U.S. at 409.

- 111. Elhauge, *supra* n.5 at 330.
- 112. Werden, *supra* n.44.
- 113. Gavil, *supra* n.5 at 77.

NOTE DE RÉFÉRENCE

1. Introduction

En juillet 1993, Virgin Atlantic Airways a déposé une plainte auprès de la Commission européenne qui visait le système de rabais appliqué aux agents de voyage par son concurrent British Airways. Trois mois plus tard, Virgin a déposé une plainte devant un tribunal fédéral de New York, accusant British Airways d'enfreindre la Loi Sherman en appliquant ce même système de rabais. Aux Etats-Unis l'affaire a abouti à la confirmation par une Cour d'appel d'une décision en faveur de British Airways, stipulant que Virgin n'était pas parvenu à démontrer que les rabais accordés avaient porté préjudice aux consommateurs. Deux ans plus tard environ, c'est le Tribunal européen de première instance qui, en vertu de l'article 82, a examiné précisément ce même système de rabais sur la même période considérée. Il a conclu qu'il s'agissait d'un abus de position dominante de la part de British Airways parce que les rabais étaient discriminatoires et pouvaient provoqué un effet d'éviction des concurrents sur le marché des services de transport aérien. Pourquoi le résultat a-t-il été aussi différent dans ces deux décisions ? La divergence des conclusions n'est-elle imputable qu'à des différences relatives au droit de la concurrence en Europe et aux Etats-Unis ? Ou bien s'il y a convergence de vues sur la finalité du droit de la concurrence, le conflit provient-il du fait que des tribunaux différents avaient des idées différentes sur la façon d'évaluer les mêmes pratiques ?

Il existe dans la formulation des textes réglementaires sur les pratiques unilatérales des différences importantes mais la concurrence prédomine sur les points de divergence. Un élément notoire concernant les politiques à poursuivre est que les organismes de la concurrence des pays de l'OCDE s'accordent à reconnaître que la finalité des politiques de la concurrence est de protéger la concurrence et pas les concurrents.¹ Toutefois dans la poursuite de cet objectif, les organismes et les tribunaux ne cessent de se référer à l'expression « concurrence par les mérites » pour expliquer et justifier leurs vues sur la façon de distinguer des pratiques qui portent atteinte à la concurrence de celles qui la favorisent. Cette expression n'a pourtant jamais été définie de façon satisfaisante. A la manière de Shakespeare qui observait que « c'est excellent d'avoir la force d'un géant mais c'est être tyrannique que de l'utiliser comme un géant, » les autorités chargées de la concurrence ont longtemps été imprécises d'une certaine manière dans les orientations qu'elles fournissaient aux entités dominantes.² Ces orientations peu rigoureuses ont conduit à une jurisprudence dissonante qui applique des méthodes d'analyse diverses. Il s'en est suivi des divergences dans les résultats même lorsque les faits étaient quasiment identiques et que les deux tribunaux concernés s'attachaient à protéger les consommateurs comme dans l'exemple *British Airways*.

De manière générale, l'utilisation de l'expression « concurrence par les mérites » implique que si l'entreprise dominante est confrontée à des concurrents ou à la perspective de leur entrée sur le marché elle ne peut pas s'opposer légalement à la concurrence par des pratiques qui sortiraient du champ délimité par cette expression.³ En dépit des nombreuses années d'application du droit de la concurrence dans les pays de l'OCDE, le périmètre de ce champ et les principes sous-jacents qui sont censés le définir restent imprécis. Par conséquent, même s'il est certainement aisé de convenir que certains comportements d'une entreprise dominante sortent du champ des pratiques acceptables, il n'est pas toujours commode de s'entendre sur les raisons qui le justifient et concernant d'autres pratiques ? Il s'est avéré difficile de se mettre d'accord pour savoir si elles entraient ou non en premier lieu dans le périmètre des pratiques acceptables.

Néanmoins, les tribunaux et les praticiens font état de la « concurrence par les mérites » lorsqu'ils s'efforcent de distinguer les pratiques réputées licites de celles qui ne le sont pas et d'en donner les raisons, souvent ils le font d'une façon qui laisse entendre qu'il existe une compréhension commune de la signification de cette expression. En d'autres termes, elle a trop souvent servi de raccourci et contourné la difficulté de définir des principes et des normes précis pour donner corps à des politiques de la concurrence solides. Il s'en est suivi des interprétations incohérentes de ce qu'est la concurrence par les mérites (à l'intérieur des juridictions et entre les juridictions) ce qui explique les résultats imprévisibles qui ont affaibli la légitimité de l'expression ainsi que des politiques qui sont censées être fondées sur elle.

Le souci des entreprises dominantes d'être susceptibles de faire l'objet d'un traitement arbitraire de la part d'autorités de la concurrence est compréhensible si celles-ci venaient à réprimer leurs pratiques en s'appuyant sur la notion de « concurrence par les mérites » à consonance officielle, mais trop vague pour justifier leurs mesures d'application. Il est relativement difficile pour les entreprises de démontrer qu'elles affrontent la concurrence « par les mérites » en l'absence d'une définition solidement établie de ce que recouvre une telle pratique. Pour cette raison, la question du caractère abusif des pratiques telles que les refus de vente ou les remises de fidélité examinées dans plusieurs décisions de justice a suscité de vives controverses et une convergence de vues, dans plusieurs juridictions au moins, sur la nécessité de réexaminer et clarifier les normes servant à évaluer les pratiques de l'entreprise dominante en vertu du droit de la concurrence.

Par exemple, au cours des cinq à dix dernières années, le droit et les politiques publiques concernant les accords anticoncurrentiels en Europe ont évolué et se fondent désormais davantage sur des critères économiques que sur des critères de forme mais il n'y a pas eu d'évolution similaire concernant le comportement de l'entreprise dominante. La Commission européenne réexamine actuellement le problème de l'abus de position dominante et, là encore, une des questions fondamentales qui se pose est de savoir dans quelle mesure l'approche de la Commission doit reposer sur des critères de forme ou des critères économiques. Bien des commentateurs estiment que les principes et normes sous-jacents doivent aussi être plus clairs.⁴ Un mouvement comparable est en cours aux Etats-Unis.⁵ Compte tenu de l'évolution vers la dérégulation et la privatisation, ces réexamens sont particulièrement opportuns.⁶

Pour que la concurrence par les mérites soit une notion utile, elle doit faciliter la distinction à faire de manière principielle entre les pratiques d'exclusion préjudiciables et les pratiques concurrentielles saines. En d'autres termes, le but doit être de les distinguer en utilisant des termes plus précis que « déloyal » « d'exclusion », mais plus généraux qu'un long inventaire des différentes pratiques jugées anticoncurrentielles (ou concurrentielles). De nombreux universitaires se sont exprimés récemment sur l'importance que revêt cette question.

La présente note commence par une présentation rapide de différents principes qui contribuent à la définition de la finalité des politiques de la concurrence. Elle se penche ensuite sur différents tests qui sont présentés comme un moyen relativement universel, transparent et cohérent d'appliquer ces principes pour déterminer si les pratiques d'une entreprise dominante peuvent être ou non jugées comme relevant de la concurrence par les mérites. Ensuite, elle examine une sélection de décisions de justice récentes relatives aux pratiques de l'entreprise dominante, les étudient non seulement sous l'angle des analyses présentées par les tribunaux mais aussi à la lumière des tests présentés plus avant dans la présente note.

Les points essentiels de la présente note sont les suivants :

- Les tribunaux et les organismes chargés de faire respecter la concurrence utilisent le terme « concurrence par les mérites » depuis des années dans des affaires relatives à des pratiques d'entreprises isolées mais ce qu'on entend par cette expression ne fait l'objet d'aucun accord commun. C'est pour cette raison qu'il ne sert à rien d'encourager une meilleure compréhension

de la façon de distinguer les pratiques préjudiciables à la concurrence des pratiques qui renforcent la concurrence. Il est indispensable de trouver une base plus principielle et cohérente pour déterminer la responsabilité dans l'abus de position dominante et les affaires de création de monopoles.

- La première étape pour parvenir à une meilleure approche est de clarifier quels sont les objectifs des politiques de la concurrence en matière de pratiques unilatérales. On s'accorde à reconnaître que la finalité des politiques de la concurrence est de protéger la concurrence et pas les concurrents, mais la convergence de vues est beaucoup moins marquée en ce qui concerne les moyens pour y parvenir. L'idée serait qu'il faut se contenter de mettre l'accent sur la concurrence plutôt que de se concentrer plus particulièrement sur le processus compétitif. C'est pourquoi les facteurs qui stimulent les politiques de la concurrence doivent englober le bien-être des consommateurs et l'efficacité productive.
- Le test idéal pour les pratiques unilatérales illicites doit être facile à comprendre et appliquer et d'une grande précision dans sa capacité à déceler les effets préjudiciables sur le bien-être des consommateurs. Il faut également que le test soit objectif pour conduire à des résultats cohérents et être applicable à une grande diversité de comportements. Il n'existe pas de test parfait mais certains semblent plus performants que d'autres.
- Le test de renoncement aux bénéfices stipule que des pratiques doivent être considérées comme illicites lorsqu'elles impliquent un sacrifice qui ne serait pas rationnel si ces pratiques ne tendaient pas à éliminer ou restreindre la concurrence. Dans une de ses formes, le test peut servir à détecter les pratiques de prix d'éviction mais il ne semble pas satisfaisant dans le cas d'autres affaires car il est à la fois trop large et trop étroit. Il n'est pas bien adapté non plus pour les affaires où le comportement en question risque d'être à la fois bénéfique et préjudiciable.
- Le test d'absence de justification économique stipule que des pratiques doivent être considérées comme illicites si elles n'ont pas de justification économique sans une tendance à éliminer ou atténuer la concurrence. Ce test n'est pas trop étroit dans la mesure où il ne requiert pas le renoncement aux bénéfices. Néanmoins il semble se caractériser également par le fait qu'il est trop large et incapable de traiter correctement des pratiques qui présentent des effets mitigés.
- Le test de l'entreprise aussi efficiente stipule que des pratiques doivent être considérées comme illicites si elles sont susceptibles d'évincer un concurrent qui est au moins aussi efficient que l'entreprise dominante. Ce test est conçu pour faire une distinction entre ce qui porte atteinte à la concurrence et ce qui est préjudiciable aux concurrents et il repose sur l'idée qu'en l'absence de pratiques « répréhensibles » de la part de l'entreprise dominante, des concurrents aussi efficaces ne peuvent pas être éliminés. Ce test est aussi certainement trop indulgent puisqu'il permet l'élimination de nouvelles entreprises qui finiraient par être aussi ou plus efficaces que l'entreprise en place s'il leur était permis de survivre aussi longtemps que des entreprises moins efficaces.
- Il existe différentes sortes de tests du bien-être des consommateurs. Ils présentent tous un certain intérêt dans la mesure où ils tentent d'utiliser comme indicateur des pratiques de l'entreprise dominante les effets de celles-ci sur le bien-être des consommateurs et pas des éléments indirects comme le renoncement aux bénéfices. Malheureusement, c'est une chose de pouvoir dire que des pratiques augmentent ou réduisent le bien-être des consommateurs et une tout autre chose d'essayer de mesurer l'ampleur de ces changements. Ces mesures peuvent être extrêmement difficiles voire impossibles. Cependant lorsque les pratiques en question ont des effets à la fois positifs et négatifs sur le bien-être des consommateurs, il est indispensable de les mettre en

balance pour déterminer lesquels prédominent. Ce n'est pas une chose facile que de s'assurer que cette mise en balance peut être réalisée de manière précise, objective et cohérente.

- Enfin, le professeur Einer Elhauge a mis au point un test destiné à analyser les pratiques unilatérales de l'entreprise dominante. Ce test est relativement complexe dans sa conception mais s'il est bien compris il est relativement simple à appliquer. En résumé, ce test pose la question de savoir si des concurrents sont évincés parce que l'entreprise dominante améliore sa propre efficacité ou parce qu'elle entrave l'efficacité de ses concurrents. Si les pratiques en cause déclenchent ces deux types d'effets elles restent acceptables tant que l'effet d'éviction est en partie au moins causé par l'amélioration de l'efficacité de l'entreprise dominante. La majorité des inconvénients que l'on constate pour d'autres tests ne semble pas concerner le test d'Elhauge mais il est relativement nouveau et n'a pas encore été mis à l'épreuve par des actions en justice ou des ouvrages spécialisés.
- Une série de décisions de justice met en lumière la nécessité d'avoir une approche plus principielle de l'abus de position dominante et des affaires de création de monopole. Dans bien des cas, les tribunaux continuent de se référer à des notions vagues qui ne donnent pas d'orientations utiles aux entreprises dominantes qui souhaiteraient s'assurer que leur comportement ne contrevient pas aux dispositions légales sur la concurrence. L'exercice qui consiste à appliquer les tests ci-dessus à ces affaires présente un intérêt dans la mesure où il permet de voir quels résultats on obtiendrait en les appliquant et si de meilleures orientations ayant un caractère plus prévisible s'en dégageraient.

2. Objectifs des politiques de la concurrence à l'égard des pratiques unilatérales

Avant d'examiner les forces et les faiblesses de plusieurs tests qui servent à distinguer les pratiques renforçant la concurrence de celles portant atteinte à la concurrence, il est nécessaire de commencer par examiner la mission assignée en premier lieu aux politiques de la concurrence en matière de pratiques unilatérales. Autrement dit, une évaluation correcte de ces tests n'est possible que si leurs objectifs sont clairement définis. On s'est accordé à reconnaître lors de la table ronde précédente du Comité que la finalité des politiques de la concurrence est de protéger la concurrence et pas les concurrents.⁷ Mais qu'entend-on par protéger la concurrence et quels sont les buts à atteindre ? Voici quelques réponses possibles à ces deux questions :

- décourager les pratiques qui réduisent le bien-être des consommateurs ;
- décourager les pratiques qui réduisent l'efficacité productive ;
- décourager les pratiques qui entraînent au bout du compte une diminution du bien-être en général si on tient compte du bien-être des consommateurs et l'efficacité productive ;
- décourager les pratiques qui entravent l'ouverture des marchés ou faussent « le processus compétitif » ;
- décourager les pratiques qui évincent les entreprises plus petites et plus faibles.

Les choix à faire entre ces objectifs fondamentaux ont à eux seuls suscité des controverses.⁸ Fox pense que la notion de protection de la concurrence doit être envisagée dans un contexte qui ne se limite pas à la réduction de la production et l'augmentation des prix, facteurs pris en compte habituellement pour mesurer les effets sur le bien-être. A son avis, les atteintes à la concurrence pourraient englober de manière légitime les atteintes au processus compétitif mais savoir si ce doit être le cas serait essentiellement une

affaire de contexte et de perspective des politiques économiques. »⁹ De ce point de vue, même si les consommateurs ne subissent aucun effet négatif des pratiques de l'entreprise dominante, celles-ci pourraient être illicites dès lors qu'elles entraveraient la capacité de certaines entreprises d'entrer et de concourir sur un marché.

Fox semble avoir confondu la fin et les moyens. Le processus compétitif est un moyen et pas une fin. La concurrence mérite d'être protégée non pas pour la valeur intrinsèque du processus lui-même mais parce que la concurrence conduit à un accroissement du bien-être de la société. Comme l'a indiqué M. John Vickers « L'idée selon laquelle d'éventuelles atteintes au processus compétitif qui justifieraient une intervention en termes de politiques de la concurrence ne seraient même pas préjudiciables aux consommateurs ne présente aucun intérêt. L'objet des politiques de la concurrence est justement que la concurrence profite au public en général constitué de consommateurs et pas à une notion abstraite de la concurrence qui serait un but en soi. »¹⁰ La raison pour laquelle une telle intervention ne présente en l'occurrence aucun intérêt est qu'à partir du moment où les pouvoirs publics commencent à protéger un *processus* idéal de concurrence loyale au-delà des préjudices qui affectent la *concurrence* et le bien-être de la société ils commencent justement à protéger les concurrents comme un but en soi. A qui d'autre devrait bénéficier ces mesures ?

Il est intéressant de noter que cette question est évoquée dans un article de Gavil qui partage l'avis de Fox selon lequel il faut protéger le processus compétitif. Ce qui dérange Gavil c'est de voir qu'on accorde de plus en plus une importance excessive à l'évitement de faux positifs, du moins dans la jurisprudence antitrust américaine et les ouvrages universitaires sur les pratiques unilatérales : « Il reste à se poser une question légitime... qui est de savoir si la volonté d'éviter les faux positifs et une surpénalisation conduit à des faux négatifs et une souspénalisation des stratégies de prix qui évincent des concurrents de manière injustifiée et inutile. »¹¹ Le rôle des politiques de la concurrence n'est pourtant pas de redouter dans chaque affaire l'éviction injustifiée et inutile de concurrents mais en revanche de protéger la concurrence. Gavil déclare également que « la formule souvent reprise selon laquelle la législation antitrust est conçue pour protéger la concurrence et pas les concurrents est vide de sens. Il n'existe pas de concurrence sans concurrents. »¹² Il est vrai naturellement que la concurrence est conditionnée par les concurrents. Mais elle ne l'est pas par *chaque* concurrent. En outre, dans le cas où les pratiques préjudiciables d'une entreprise dominante risqueraient de priver un marché de concurrents les plaignants ne devraient avoir aucun mal à démontrer que les pratiques en question peuvent porter atteinte à la concurrence.

De plus, la formulation par Fox d'une norme fondée sur le principe du processus compétitif présente, comme le décrit Hawk, « une faiblesse théorique et une faiblesse opérationnelle ». La norme de Fox stipule que « l'analyste observe la structure et la dynamique du marché et se demande si les pratiques en question les altèrent et nuisent aux mécanismes de marché. La liberté du commerce (ainsi que la concurrence et l'innovation) en l'absence d'obstruction artificielle du marché est supposée favoriser l'intérêt général, tout particulièrement l'intérêt économique du public. L'existence de barrières nécessite une justification. Selon cette logique, des pratiques d'éviction notoires injustifiées sont anticoncurrentielles et doivent être prohibées. »¹³ Hawk indique que sur le plan théorique le risque est que le test de Fox serve plus à protéger les différents concurrents, y compris les moins efficaces, qu'à mettre l'accent sur les efficacies. Par ailleurs, sur le plan opérationnel, il est discutable qu'en se concentrant sur le processus compétitif il soit possible d'établir des critères capables de faire une distinction entre les pratiques souhaitables et non désirables. Cette difficulté ressort dans le test de Fox avec l'emploi de termes flous comme « artificiel » ou « injustifié ». ¹⁴

Fox souligne que la législation américaine antitrust appliquée jusque dans les années 80 se caractérisait par le fait qu'elle protégeait le processus de la concurrence mais elle reconnaît aussi que la législation a considérablement évolué depuis vers une protection du bien-être des consommateurs et de l'efficacité productive.¹⁵ Le fait que la première optique ait eu en son temps une grande influence est sans

doute principalement lié au contexte et aux perspectives mais cela ne signifie en rien qu'il s'agit d'une bonne politique. Fox remarque aussi qu'on pourrait plutôt définir la politique poursuivie jusqu'ici par la Commission européenne comme une protection du processus de la concurrence. Toutefois, plusieurs décisions rendues récemment s'appuyant sur l'article 82 ont soulevé de sérieuses critiques et la Commission a réagi en lançant un projet destiné à envisager une réforme de sa politique en la matière.¹⁶ Certains commentateurs appellent une stratégie qui serait davantage fondée sur des critères économiques, et moins sur des critères de forme ou fondés sur les intentions motivant ces pratiques, ce qui laisse présumer un abandon de la protection du processus compétitif comme but en soi.¹⁷ De plus, à la lumière de la table ronde du Comité sur les pratiques d'éviction il apparaît que le concept selon lequel il faut prouver que les pratiques unilatérales nuisent au bien-être des consommateurs gagne également du terrain dans d'autres pays de l'OCDE comme le montre l'appui croissant dont bénéficie le test de récupération des pertes dans l'analyse des prix d'éviction.¹⁸

Enfin, les principaux tests qui ont été proposés pour identifier la concurrence par les mérites correspondent à un ou plusieurs points parmi les trois premiers de la liste citée ci-dessus. Le quatrième point pourrait être compatible avec ceux-ci, mais seulement dans la mesure où l'entrave au processus compétitif est préjudiciable au bien-être des consommateurs ou à l'efficacité productive. Pour ce qui est de l'objectif cité dans le dernier point, Fox elle-même indique qu'il protège ostensiblement les concurrents et pas la concurrence.¹⁹ La présente note mettra donc l'accent sur les tests conçus pour atteindre un des objectifs cités dans les trois premiers points.

3. Concurrence par les mérites dans le principe

3.1 La problématique

Il est logique de commencer par chercher des critères qui définissent la concurrence par les mérites dans les dispositions réglementaires sur la concurrence mais les parlements ont rarement dépassé le stade des grandes généralités ou des listes d'exemples suscitant des impressions contradictoires sur l'objectif poursuivi. Par exemple, la section 2 de la Loi Sherman²⁰ appliquée à la lettre n'interdit que la constitution de monopoles et les tentatives de monopoliser un marché, indépendamment des moyens utilisés. Elle ne fournit aucune orientation quelle qu'elle soit sur l'application d'une stratégie plus prudente qui établirait une distinction entre une monopolisation préjudiciable et le résultat d'une concurrence supérieure légitime. L'article 82 du Traité de la CE²¹ va plus loin puisqu'il tente de clarifier les pratiques qu'il est censé viser mais il laisse certaines questions fondamentales sans réponse comme les prix ou conditions commerciales qui ont un caractère « déloyal ». Par ailleurs, la sous-section (b) est fondée sur un objectif de bien-être des consommateurs alors que la sous-section (c) semble porter sur le bien-être des concurrents en lice.

Ainsi, c'est essentiellement aux tribunaux qu'il appartient de livrer des interprétations raisonnables et pragmatiques de l'abus de position dominante et des dispositions légales sur la création de monopoles. La tâche s'est avérée délicate et conduit souvent les tribunaux à recourir à de vagues généralités, notamment à l'idée que les pratiques des entreprises dominantes sont licites si elles relèvent de la concurrence par les mérites, et suspectes dans le cas contraire. Pendant longtemps, cette façon de raisonner en rond a échappé à la critique.²² Confortés sans doute par l'idée de se sortir d'affaire sans qu'il soit nécessaire de définir l'expression en question, les tribunaux se sont mis à l'utiliser de plus en plus comme si tout le monde savait déjà de quoi il s'agissait.

« Une entreprise en position dominante ne peut pas recourir à d'autres moyens que ceux qui relèvent de la concurrence par les mérites. »²³ « Une entreprise monopolistique acquiert ou maintient délibérément un pouvoir de monopole lorsqu'elle affronte la concurrence sur d'autres bases que celles de la concurrence par les mérites. »²⁴ Un tribunal a compliqué le problème en utilisant l'expression « concurrence par les mérites » pour définir une autre expression floue dans le passage qui suit : « Au plus les pratiques

d'éviction englobent donc les pratiques qui (1) tendent non seulement à affaiblir les possibilités dont disposent les concurrents mais (2) ne favorisent pas non plus la concurrence par les mérites ou le font d'une manière inutilement restrictive. »²⁵

L'emploi d'autres expressions similaires n'a pas amélioré les choses. Il est possible d'en juger par le passage fréquemment cité du jugement Hoffman-La Roche prononcé par la Cour de justice européenne qui définit l'abus de position dominante en vertu de l'article 82 comme suit :

une notion objective qui vise les comportements d'une entreprise en position dominante qui sont de nature à influencer la structure du marché où, à la suite précisément de la présence de l'entreprise en question, le degré de concurrence est déjà affaibli et qui ont pour effet de faire obstacle, par le recours à des moyens différents de ceux qui gouvernent une *compétition normale* des produits ou services sur la base des prestations des opérateurs économiques, au maintien du degré de concurrence existant encore sur le marché ou au développement de cette concurrence.²⁶

On peut sans doute présumer que la « concurrence normale » et la « concurrence par les mérites » sont la même chose mais cela ne nous mène évidemment pas bien loin puisque la concurrence exercée dans des conditions normales et « anormales » peut avoir pour effet d'évincer ou d'affaiblir des concurrents. La définition de la monopolisation la plus fréquemment citée dans la jurisprudence américaine n'est pas beaucoup plus satisfaisante dans la mesure où elle définit celle-ci comme la possession d'un pouvoir de monopole et :

l'acquisition ou la préservation délibérée de ce pouvoir qui doit être distinguée de la croissance ou de l'expansion qui résulte d'un produit supérieur, d'un sens des affaires ou d'un événement fortuit.²⁷

Les expressions « produit supérieur » et « sens des affaires » ne sont pas d'une grande utilité étant donné que différents individus avisés leur donneraient une signification différente.²⁸

Parfois un tribunal s'insurge comme le montre le passage suivant d'une décision de la Cour suprême de Nouvelle-Zélande : « En aparté, puisque c'est devenu un slogan ou une expression consacrée du langage courant, nous notons avec satisfaction qu'une personne avisée comme l'éminent Professeur Baxter a qualifié d'insidieuse l'expression « règles du jeu équitables ». »²⁹ Il n'en demeure pas moins que de manière générale ce type d'expression se maintient et se reproduit au fil des ans.

Toutefois, on se rend compte maintenant que le temps est compté pour les tribunaux qui ne pourront plus employer de tels slogans sans s'attirer de sérieuses critiques. Des universitaires désarçonnés par l'incohérence et l'imprévisibilité des résultats dans des affaires de pratiques unilatérales ont attiré l'attention sur l'usage très répandu d'expressions consacrées telles que « la concurrence par les mérites », la « concurrence normale », « le sens des affaires » et « l'équité des règles du jeu ». Ils ont rigoureusement désapprouvé ces usages. Elhauge, par exemple, a déclaré à propos de la jurisprudence antitrust des Etats-Unis que « depuis des décennies la doctrine sur la monopolisation est régie par des normes qui sont floues et vides de sens. »³⁰ Poursuivant dans la même direction, il s'est également attaqué à la jurisprudence européenne faisant observer que l'idée que les normes « sont du vide est bien illustrée par le fait que la même pratique - l'application de réductions de prix restant supérieurs aux coûts dans le but d'évincer des concurrents - a été qualifiée de « concurrence par les mérites » aux Etats-Unis tandis qu'elle n'a pas été considérée comme relevant de la « concurrence normale » en Europe. Ce qui mène à ces conclusions ce n'est pas le sens précis de termes tels que « pratiques d'éviction », « concurrence », « mérites » ou « normal ». ³¹ Fox est du même avis et précise que « plusieurs affaires récentes sur les pratiques d'éviction ont tendance à être évasives si ce n'est obscurcissantes sur le sens qu'elles donnent à « anticoncurrentiel. »³² Ainsi, ce n'est plus un secret pour personne que des expressions telles que

« concurrence par les mérites » n'ont guère contribué à une meilleure compréhension de ce qui est licite et de ce qui ne l'est pas, car personne ne sait au juste ce qu'elles signifient.

On peut invoquer pour leur défense qu'il n'est pas surprenant que les tribunaux aient élaboré une série de clichés flous et d'exemples spécifiques au lieu d'un ensemble de principes universels bien définis. Outre le problème que la législation en la matière n'offre souvent qu'un faible appui il n'y a pas lieu d'occulter la difficulté que pose la distinction entre les pratiques unilatérales qui portent atteinte à la concurrence et celles qui favorisent la concurrence car elles peuvent présenter beaucoup de similitude. De plus, définir ce qui est illicite est une tâche délicate dans la mesure où il existe une préoccupation légitime qui est de savoir si l'intervention risque de nuire par hasard au bien-être des consommateurs, à l'efficacité des entreprises et aux incitations à rivaliser entre elles et innover. Les tribunaux ont donc adopté comme règle de prudence une démarche de bon sens au cas par cas.

Cela ne veut pas dire comme l'a mentionné Vickers que la jurisprudence sur les pratiques de l'entreprise en position dominante n'a élaboré aucune norme du tout.³³ A l'inverse, ce qui pose problème c'est qu'il existe de nombreuses normes et qu'elles n'aboutissent pas collectivement à des résultats cohérents, qu'elles sont parfois difficiles à appliquer et qu'il n'est pas toujours évident de savoir quels principes elles sous-tendent ou si elles reflètent de manière précise des politiques de la concurrence solides. Tous ces éléments contribuent à un système qui place les entreprises dans une situation qui les oblige à poser beaucoup d'hypothèses sur la façon dont leur comportement risque d'être jugé à un moment donné dans les années à venir. Il se peut vraiment que les pratiques concurrentielles qui auraient renforcé le bien-être des consommateurs soient découragées par les risques inhérents que comportent nos dispositifs juridiques.³⁴ Heureusement, les commentateurs ne se sont pas contentés de décrire ou de déplorer la situation actuelle mais ils s'efforcent de proposer et d'évaluer des critères capables de déterminer la légalité des pratiques de l'entreprise en position dominante.

3.2 *Solutions possibles*

Avant de passer à un examen des tests proprement dit, il serait intéressant de dresser une liste des caractéristiques du test idéal :

- précision – le test doit reposer sur des principes économiques généralement admis et produire un minimum de faux positifs comme de faux négatifs ;
- gestion – le test doit être relativement facile à appliquer ;
- application – l'idéal est que le champ des pratiques unilatérales que le test peut couvrir soit le plus vaste possible
- cohérence – le test doit fournir des résultats prévisibles ;
- objectivité – le test ne doit pas permettre au décideur de prendre en compte des éléments subjectifs ;
- transparence – le test et ses objectifs doivent être compréhensibles.

La conformité à ces caractéristiques des tests qui suivent est variable, chacun ayant ses propres forces et faiblesses. Même si aucun n'est parfait certains sont moins imparfaits que d'autres.

3.2.1 *Le test de renoncement à des bénéfices*

D'après le test de renoncement à des bénéfices, parfois désigné sous le nom de critère « hormis », lorsqu'une entreprise dominante exerce des pratiques qui l'obligent à renoncer à des bénéfices à court terme, celles-ci doivent être considérées comme illicites dès lors qu'elles seraient jugées irrationnelles si elles n'avaient pas tendance à éliminer ou restreindre la concurrence à long terme. Ce test est intéressant au moins à première vue dans la mesure où il semble faire une distinction entre des pratiques d'éviction délibérées et des réactions saines face à la concurrence.

Pour illustrer très simplement la façon dont le test de renoncement à des bénéfices fonctionne prenons comme hypothèse qu'une entreprise dominante réalise un bénéfice de 1000 dollars par semaine. Si elle exerce des pratiques qui nécessitent une dépense exceptionnelle de 600 dollars elle est alors en mesure d'évincer de manière permanente ses concurrents du marché. Après quoi elle dégagera un bénéfice de 1200 dollars par semaine. Il est rationnel que l'entreprise effectue cette dépense de 600 dollars mais cela n'aurait pas été le cas sans l'effet d'éviction. Le test de renoncement à des bénéfices révèle ces pratiques dès lors qu'il n'existe pas d'autre raison rationnelle d'exercer ce type de pratiques qui évincent les concurrents.³⁵

La plupart des juridictions utilisent actuellement une forme simplifiée du test de renoncement à des bénéfices dans leur évaluation concernant la fixation de prix d'éviction. Le test révèle la fixation de prix d'éviction, cette stratégie impliquant d'absorber des pertes à court terme en anticipant l'élimination ou la mise au pas des concurrents ce qui permet ensuite de réaliser des bénéfices plus importants et de compenser les pertes à court terme.³⁶ D'autre part, les octrois de remises qui maintiennent les prix au-dessus des coûts réussissent le test puisque la rentabilité ne dépend pas de bénéfices hypothétiques tirés d'une puissance de marché plus importante. Le fait que le concept de renoncement aux bénéfices puisse être appliqué aux affaires de prix d'éviction a favorisé son application systématique à toutes les affaires de pratiques unilatérales.³⁷ Pourtant comme on le verra, le test de renoncement aux bénéfices ne semble pas être adapté à l'évaluation de pratiques d'éviction qui n'impliquent pas la fixation de prix inférieurs aux coûts.

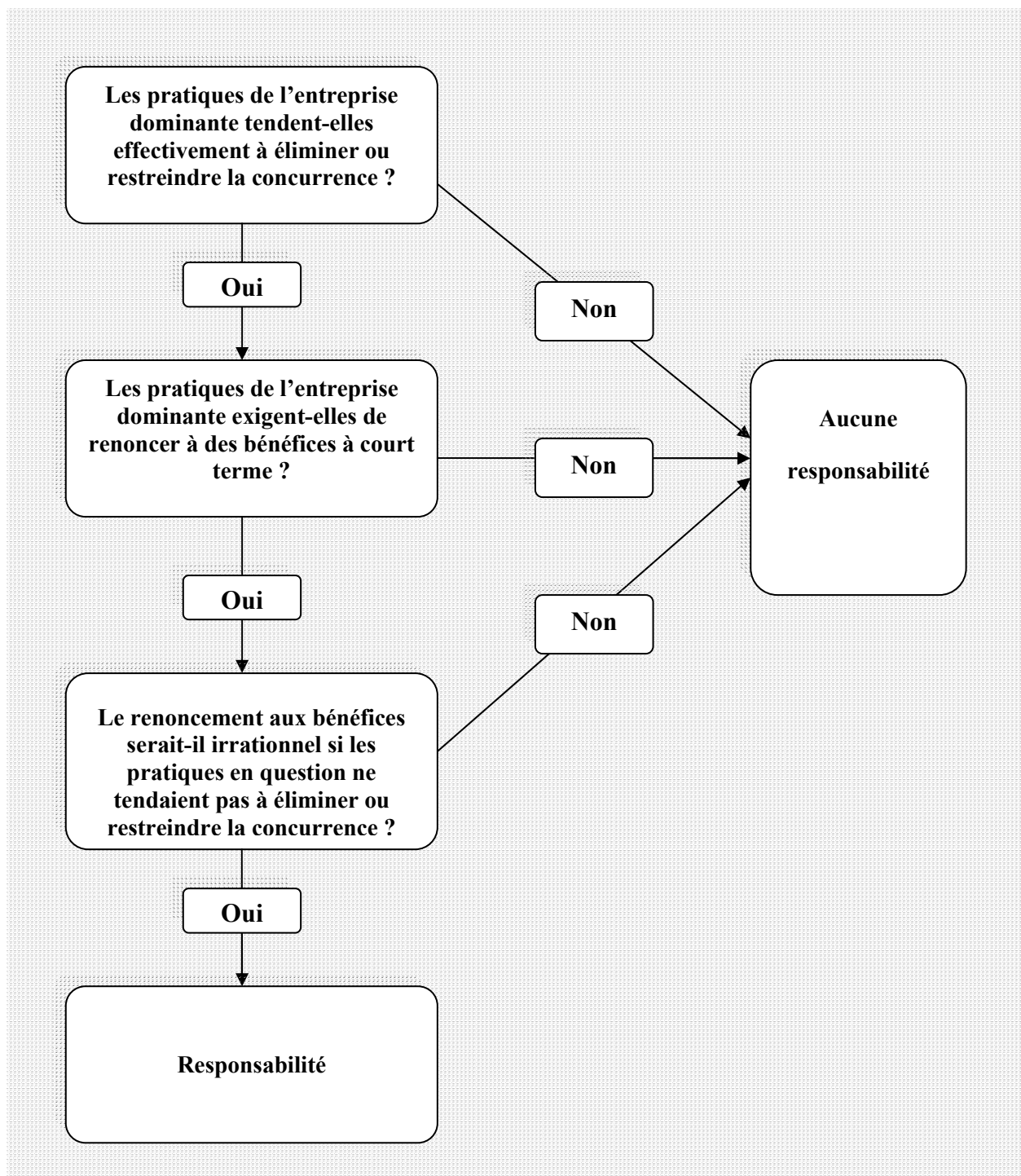
En fait, une des principales critiques dont fait l'objet le test de renoncement aux bénéfices est qu'il est trop étroit. Certaines pratiques peuvent n'impliquer aucun renoncement à des bénéfices à court terme tout en ayant des effets d'éviction portant atteinte à la concurrence. « L'éviction à bon compte » entre dans cette catégorie de pratiques de même que l'augmentation des coûts pour les concurrents.³⁸ Supposons, par exemple, qu'un monopoleur diffuse des informations mensongères sur la qualité du produit d'un nouvel entrant auprès des clients potentiels de ce dernier. Ces pratiques ne génèrent normalement aucun coût (en fait elles peuvent même être rentables à court terme si elles sont assez rapidement efficaces) et peuvent toutefois continuer à avoir un effet d'éviction si l'opérateur historique parvient à pousser l'entrant dans une position qui l'oblige soit à disparaître sans opposer de résistance ou à faire des dépenses au-dessus de ses moyens pour lutter contre la publicité négative faite contre lui. Ce test ne révélerait pas plus l'existence d'un projet destiné à débaucher un éminent scientifique chez un concurrent, ce qui pourrait générer des dividendes immédiats et donc être rentable ou au moins ne pas causer de pertes à court terme. Ainsi dans certaines affaires, les tribunaux peuvent aboutir à un résultat erroné en appliquant le test de renoncement à des bénéfices.

Il est vrai que débaucher un collaborateur est un cas extrême et on peut par conséquent estimer que personne n'aurait une idée aussi saugrenue que d'appliquer le test de renoncement à des bénéfices à ce type d'affaire. Elhauge qui critique ce test répond :

Il faut alors se demander quels sont justement les critères normatifs qui déterminent les cas où le test de renoncement à des bénéfices est applicable et ceux où il ne l'est pas. Si nous n'avons aucun autre repère que de dire « on le sait selon l'affaire qu'on voit » ce test n'est alors au bout du

compte rien de plus qu'une norme insuffisamment fondée [...] Si nous appliquons des critères normatifs implicites pour déterminer quelles pratiques d'éviction sont tolérables même si elles sacrifient des bénéfices alors ces critères implicites seraient réellement déterminants et nous devrions nous concentrer sur une définition explicite de ces critères au lieu de dissimuler des jugements normatifs lors de décisions ponctuelles sur les cas où il convient d'appliquer le test de renoncement à des bénéfices.³⁹

Graphique 1. Le test de renoncement à des bénéfices



Même s'il marque un point en l'occurrence, Elhauge est sans doute un peu trop agressif dans un autre volet de sa critique du test de renoncement aux bénéfices lorsqu'il décrit plusieurs scénarios portant sur des remises spéciales et parvient à la conclusion qu'elles permettraient à un monopoleur de restreindre la concurrence sans sacrifier de bénéfices à court terme. Il explique alors que le test de renoncement à des bénéfices ne permet pas de révéler les pratiques non dommageables. « Au contraire, dans tous ces scénarios les primes et les remises spéciales sont financées par des bénéfices supplémentaires qui sont supérieurs à ce que permet la concurrence et sont générés par le dispositif d'éviction. Ainsi, on peut s'attendre à ce qu'elles entraînent une *augmentation* des bénéfices à court terme et des bénéfices à long terme. »⁴⁰ Toutefois peu importe si les bénéfices générés par le dispositif d'éviction sont dégagés à court terme ou à long terme puisque ce serait une erreur d'un point de vue conceptuel de les prendre en compte si on applique le test dans son esprit et pas à la lettre. Les bénéfices provenant de l'élimination ou de la restriction de la concurrence ne doivent pas être pris en compte.⁴¹

Le fait que toutes les pratiques qui éliminent ou réduisent la concurrence ne soient pas tolérables pose un vrai problème. C'est la raison pour laquelle le test de renoncement à des bénéfices soulève la question de savoir quels bénéfices doivent être pris en compte lorsqu'il s'agit de déterminer si des bénéfices ont été sacrifiés. Ainsi, il semble indispensable de disposer de critères implicites normatifs qui seraient les éléments rendus publics dans le cas d'un test satisfaisant.

Toutefois, avant d'approfondir cette question il faut examiner un autre argument selon lequel le test de renoncement aux bénéfices ne serait pas assez strict. L'idée est que ce test serait trop laxiste puisque les défendeurs n'échoueraient pas au test, sauf si le seul but de leur comportement est d'exclure la concurrence. Ce que cette critique est censée signifier ce n'est pas que les défendeurs dont le comportement répond à plusieurs objectifs n'échouent jamais au test mais que les défendeurs qui à travers leur comportement poursuivent plusieurs objectifs n'échouent pas au test tant qu'au moins une de leurs motivations (autre que l'élimination de la concurrence) suffit à rendre leurs pratiques rentables. Une conséquence du test est donc que tous les défendeurs qui disposent d'une explication raisonnable indiquant que leurs pratiques sont susceptibles d'aboutir à une issue légitime et rentable n'échoueront jamais au test. Les défendeurs seront donc en mesure d'occulter tout objectif anticoncurrentiel s'il mettent en avant un objectif plausible et justifiable.

Cette critique n'est qu'en partie convaincante. Premièrement, le test n'est pas fonction d'un objectif ni d'une intention. Il repose sur un raisonnement logique, un critère plus objectif. Deuxièmement, un résultat légitime est légitime après tout et si le comportement en question est susceptible d'atteindre un tel résultat il n'est pas logique que le droit de la concurrence le condamne systématiquement au seul motif que ce comportement est également susceptible de servir un objectif illégitime. Bien sûr, il ne serait pas logique non plus que le droit de la concurrence occulte systématiquement ce comportement dans cette situation. L'occultation pose donc un vrai problème. De quelle façon convient-il alors de traiter les pratiques qui sont susceptibles de produire des effets bénéfiques et préjudiciables ? C'est le cœur du problème auquel sont confrontés tous les tests sur les pratiques unilatérales mais le test de renoncement à des bénéfices esquivé la question. Salop préconise un test de mise en balance mais cela présente une autre série de difficultés (examinée ci-dessous dans la partie III.B.4).

L'autre grande critique qui est formulée est que le test de renoncement à des bénéfices est trop large. Il n'en est plus question lorsque le test est appliqué à diverses pratiques qui augmentent le bien-être des consommateurs même si elles évincent aussi des concurrents. Par exemple, prenons le cas d'une entreprise qui investit dans la recherche-développement pour mettre au point un médicament qui ne sera rentable que s'il est assez efficace pour évincer les concurrents et donner à l'entreprise un pouvoir de marché. Une politique qui consiste à décourager de tels investissements est-elle saine ? Si c'était le cas, les pouvoirs publics ne faciliteraient pas l'effet d'éviction en accordant des brevets pour certains types d'innovation. De cette manière, les pouvoirs publics reconnaissent que l'innovation améliore le bien-être de la société dans

la mesure où elle crée de meilleurs produits moins chers. Il n'en demeure pas moins que le test de renoncement à des bénéfices sanctionne ce type d'investissement particulièrement appréciable. On constate ainsi que le test de renoncement à des bénéfices est à la fois trop large et trop étroit. En d'autres termes, échouer à ce test n'est une condition ni nécessaire ni suffisante pour qu'un comportement porte atteinte à la concurrence.

Enfin, il n'est pas toujours facile d'appliquer le test de renoncement à des bénéfices comme la table ronde précédente du Comité l'a montré à propos des prix d'éviction. Il faut décider de la définition à donner au terme « renoncement ». Dans les affaires de fixation de prix d'éviction il faudrait décider si les prix doivent être comparés au coût total moyen, par exemple, ou à une autre mesure des coûts. Toutefois, l'information qui est demandée dans le test dans sa forme rigoureuse n'est pas s'il y a des pertes comptables mais si on a renoncé à des bénéfices. L'élément de référence n'est donc pas du tout un coût mais un prix. De manière plus précise, il s'agit du prix que l'entreprise dominante aurait appliqué dans un monde hypothétique « hormis » où elle aurait exercé les pratiques présumées illicites, alors que celles-ci n'auraient pas eu pour effet d'évincer ou de pénaliser les concurrents. Cette formulation elle-même doit encore être peaufinée car l'effet sur les concurrents peut être en partie légitime. Il en résulte que les décideurs doivent distinguer les revenus « concurrentiels » des revenus « anti-concurrentiels » ce qui nous ramène exactement au point où nous avons commencé à faire une distinction entre bonnes pratiques et pratiques préjudiciables. Etant donné que le test du renoncement à des bénéfices ne fournit aucune indication sur la décision à prendre concernant le choix d'une référence judicieuse la décision sera comme l'affirme Salop « extrêmement subjective » et donc « sujette à erreur. »⁴²

Enfin, même après avoir choisi une référence, des problèmes comptables délicats peuvent continuer à se poser concernant l'évaluation qui doit indiquer si les prix d'une entreprise sont inférieurs ou non à cette barre. Ce problème a déjà été élucidé lors de la précédente table ronde.⁴³

Compte tenu des critiques et des problèmes qui ont été exposés précédemment il semble que même si le test du renoncement à des bénéfices peut servir à déceler des prix d'éviction il est peu prometteur dans la perspective de jeter des bases générales pour déterminer ce qui constitue des pratiques d'éviction illicites.

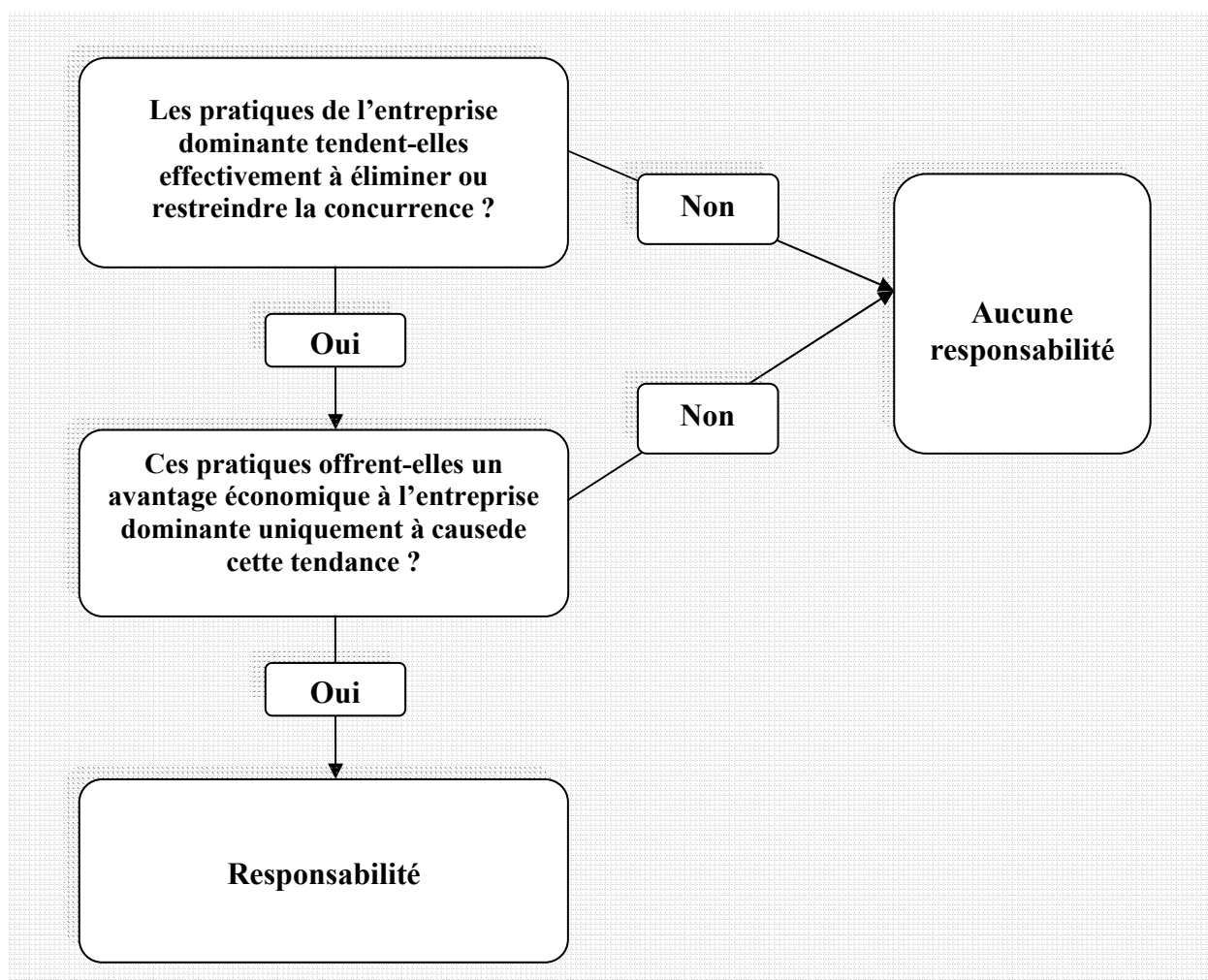
3.2.2 *Le test de l'absence de justification économique*

D'après le test de l'absence de justification économique un comportement est réputé illicite si en l'absence de toute tendance à éliminer ou restreindre la concurrence il n'y a pas de justification économique. On peut constater une similitude avec le test de renoncement à des bénéfices mais ses partisans estiment qu'il est relativement différent puisque le renoncement à des bénéfices n'est une condition ni nécessaire ni suffisante pour échouer au test de l'absence de justification économique. Il échappe donc aux deux principales critiques dont fait l'objet le test de renoncement à des bénéfices. Werden, par exemple, souligne que s'il y a renoncement à des bénéfices le test de l'absence de justification économique cherche à connaître les raisons pour lesquelles le défendeur accepte ce sacrifice. S'il n'y a pas de renoncement à des bénéfices il peut y avoir quand même atteinte à la concurrence et le test d'absence de justification économique demande pourquoi ces pratiques sont rentables.⁴⁴ Le test d'absence de justification économique a gagné la faveur du ministère de la Justice des Etats-Unis qui lui a témoigné son soutien dans plusieurs affaires jugées en vertu de la section 2 de la Loi Sherman au cours des dernières années.⁴⁵

Werden prend soin de préciser que le test d'absence de justification économique ne constitue en fait qu'un élément de la définition des pratiques d'éviction. Il permet de révéler des pratiques illicites uniquement dans le cas où il apparaît que les pratiques en question provoquent ou ont tendance à provoquer l'élimination ou la restriction de la concurrence.⁴⁶ C'est logique et c'est également vrai pour le test de renoncement à des bénéfices. Ce pas supplémentaire apparaît dans des affaires de prix d'éviction, par exemple, sous la forme du test de récupération de pertes. Les tests portant sur le rapport entre coûts et

prix peuvent révéler que le comportement d'une entreprise est irrationnel mais le test de récupération des pertes demeure indispensable pour démontrer que ce comportement est susceptible de porter atteinte à la concurrence.

Graphique 2. Le test de l'absence de justification économique



Ainsi, on peut formuler autrement le critère de l'absence de justification économique en disant qu'il prohibe les pratiques qui tendent effectivement à éliminer la concurrence lorsque ces pratiques apportent un avantage économique au défendeur uniquement du fait de cette tendance, indépendamment de l'absence ou non de coûts liés à ces pratiques. Cela contribue à montrer que le test de l'absence de justification économique n'est pas étroit, comme le test de renoncement à des bénéfices, puisqu'il permet de détecter les affaires d'« éviction à bon compte ». Toutefois il n'est pas semble-t-il aussi clair que le test de l'absence de justification économique échappe au problème du test de renoncement à des bénéfices qui est d'être trop large. Les pratiques qui augmentent le bien-être dans l'exemple décrit dans la section précédente, par exemple, seraient également décelées par le test d'absence de justification économique. Ce n'est pas un moyen très satisfaisant de plaider en faveur du test d'absence de justification économique que de dire simplement qu'il pose la question de savoir si ces pratiques sont rationnelles et qu'elles ne seraient donc jamais appliquées dans certaines situations. Si le test dans son ensemble a pour seul objet de s'interroger sur les raisons sans donner d'orientation sur l'utilisation à faire de la réponse apportée il nous laisse alors dans une sorte de zone d'ombre sur le chemin qui doit mener à une norme précise qui n'existe pas encore vraiment.

Un autre élément est que, comme le test de renoncement à des bénéfices, le test de l'absence de justification économique occulte en grande partie la question épineuse de la façon de traiter les pratiques qui seraient susceptibles de produire des effets favorables et préjudiciables ou, dans la logique du test d'absence de justification économique, des pratiques qui ont une justification économique parce qu'elles réduisent la concurrence *et* augmentent l'efficacité du défendeur. Pris à la lettre, le test semble tolérer les pratiques réputées préjudiciables dès lors qu'elles ont également un effet bénéfique qui est, en soi, suffisamment important pour apporter un résultat positif au défendeur. Cela éviterait qu'il soit nécessaire de procéder à une mise en balance mais c'est ouvrir la porte au problème d'« occultation » évoqué plus haut. Il faudrait en outre qu'un organisme ou un tribunal effectue une estimation ou fasse la part des choses entre les gains que l'entreprise peut logiquement escompter de l'élimination de la concurrence et ceux qui devraient logiquement découler de la justification mise en avant d'efficacité, après déduction des coûts liés à ces pratiques. Comme le remarque Werden, il n'est pas certain que le test d'absence de justification économique soit adapté pour les pratiques qui sont rentables parce qu'elles ont tendance à supprimer la concurrence et produisent également d'autres effets.⁴⁷

Enfin, le test d'absence de justification économique demande qu'une entreprise dominante qui détient un droit de propriété recherche le vende ou accorde une licence à n'importe quel concurrent qui en aurait besoin pour survivre ou offrirait une redevance rentable – même si l'entreprise dominante n'a jamais cédé de droits de propriété ou accordé de licence auparavant. Cette exigence pourrait nuire aux motivations à créer ou acquérir le droit de propriété en premier lieu.

3.2.3 *Le test de l'entreprise aussi efficiente*

Le test de l'entreprise aussi efficiente vise à identifier les pratiques de l'entreprise dominante qui portent atteinte à la concurrence en posant la question de savoir si ces pratiques seraient susceptibles d'évincer des concurrents qui sont au moins aussi efficaces que l'entreprise dominante. Si la réponse est qu'il est vraisemblable que l'entreprise aussi efficiente soit évincée les pratiques en question sont considérées comme portant atteinte à la concurrence. Dans le cas contraire, elles sont considérées comme licites. Ce test a un autre mérite non négligeable. Il préserve du risque de protéger les concurrents et pas la concurrence étant donné que, dans un contexte concurrentiel, un marché ne serait constitué que des entreprises les plus efficaces. Il n'est donc pas jugé préjudiciable que des entreprises moins efficaces soient évincées.

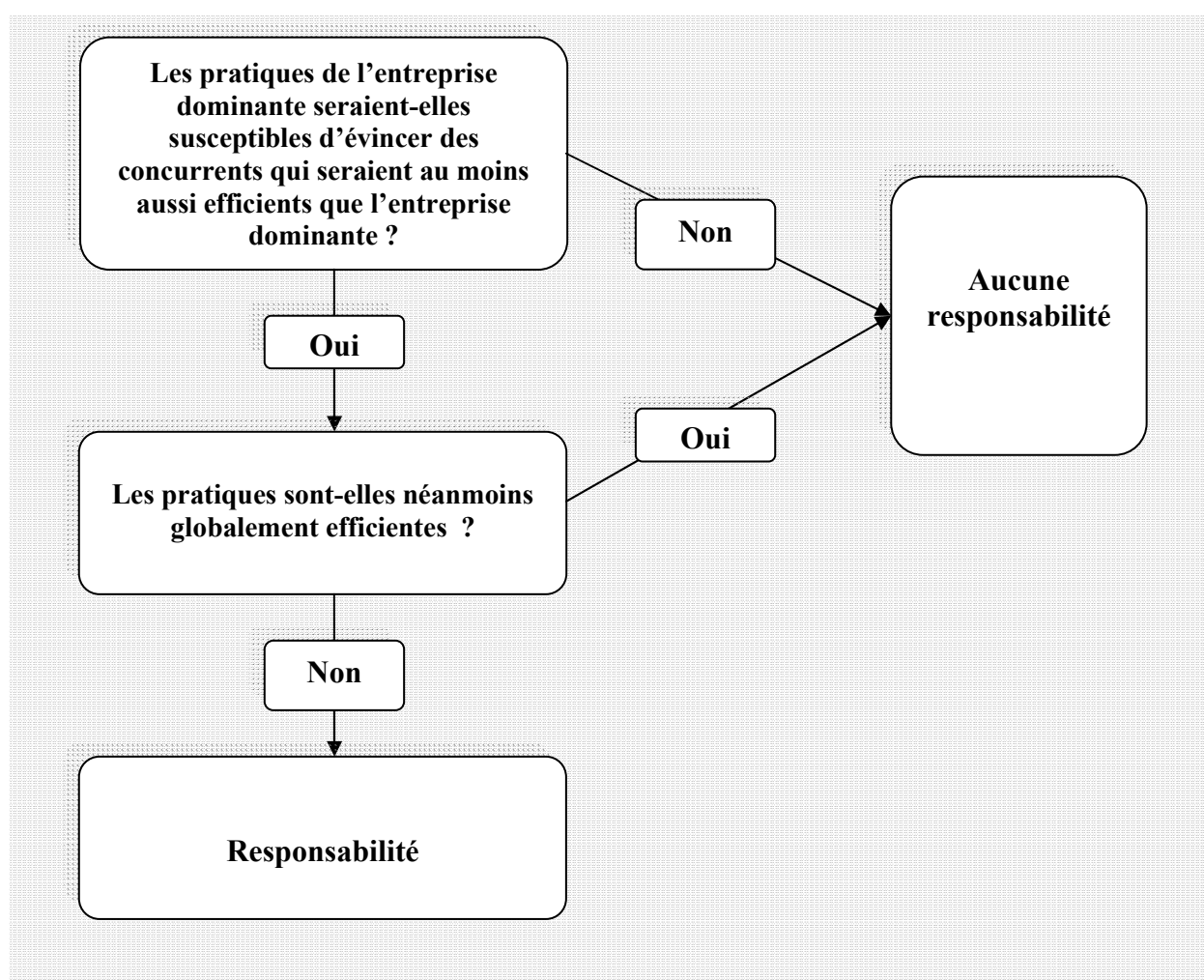
Comme le test de renoncement à des bénéfices, le test de l'entreprise aussi efficiente a un rapport avec certaines références de coûts utilisées par la jurisprudence sur les prix d'éviction. La logique que sous-tend le test des coûts variables moyens, par exemple, se rapproche du test du coût marginal ; une entreprise ne pourrait pas évincer un concurrent aussi efficace en fixant ses prix au niveau du coût marginal ou au-dessus.

La plupart des critiques dont fait l'objet le test de l'entreprise aussi efficiente lui reprochent son indulgence envers les entreprises dominantes. Ses détracteurs ont noté par exemple que même si un entrant est moins efficace que l'opérateur historique, il peut encore améliorer le bien-être social en faisant baisser les prix du marché (et accroître les quantités produites). Si le gain d'efficacité allocative provenant d'une baisse des prix/d'une augmentation des quantités fait plus que compenser la diminution d'efficacité productive liée à la présence d'un entrant ayant des coûts supérieurs, comme le remarque les critiques, il est souhaitable dans ce cas d'utiliser un test plus strict pour protéger cet entrant.

D'autres commentateurs ont répondu qu'il était trop difficile de prévoir de quel côté pencherait la balance dans ces tests de mise en balance, et si les entrants finiraient pas devenir plus efficaces.⁴⁸ De plus, ils pensent qu'il est plus raisonnable de ne pas adopter une politique qui encourage les entrées inefficaces et garantit que les prix augmentent davantage à court terme que ceux qui auraient été appliqués si

l'opérateur historique n'avait été obligé de permettre à des concurrents inférieurs de survivre.⁴⁹ Un autre problème en ce qui concerne la tentative d'aider les concurrents moins efficaces est que cela puisse améliorer le bien-être social à court terme au détriment du long terme. Tout particulièrement, cela occulte le préjudice causé à l'innovation et la concurrence puisque les entreprises dominantes sont privées de la capacité de se défendre elles-mêmes en éliminant les concurrents du fait d'une efficacité supérieure. Si les entreprises dominantes sont obligées de laisser de la place même aux concurrents inférieurs toutes les entreprises, pas uniquement les entreprises dominantes, peuvent alors commencer à se demander pourquoi elles devraient tout d'abord s'efforcer de conquérir une position dominante. En conséquence, cela pourrait nuire aux motivations à affronter la concurrence et à innover qui sont primordiales pour la performance à long terme d'un système reposant sur le marché.⁵⁰

Graphique 3. Le test de l'entreprise aussi efficace



Un autre raisonnement à propos du test de l'entreprise aussi efficace est proposé par Gavil qui écrit : « il est difficile d'imaginer comment un plaignant posséderait au moment de la plaidoirie les informations nécessaires pour prétendre qu'il était au moins « aussi efficace » que le défendeur. »⁵¹ Toutefois, il n'est pas évident qu'une telle affirmation de la part du plaignant soit indispensable. Au contraire, il suffirait d'affirmer que le comportement de l'entreprise dominante évincerait n'importe quelle entreprise aussi efficace, indépendamment de la question de savoir si le plaignant en était une. L'entreprise aussi efficace pourrait donc être purement hypothétique. En tout cas, c'est la façon dont le test est appliqué dans les affaires de prix d'éviction dans lesquelles les prix sont comparés aux propres coûts du défendeur,

et pas du plaignant, ce dernier n'étant pas tenu de prouver que ses coûts sont au moins aussi faibles que ceux du défendeur.

Il n'en demeure pas moins qu'il est délicat de répondre à la question de l'ampleur d'activité requise pour évaluer l'efficacité de l'hypothétique entreprise aussi efficace. Cette question revêt une grande importance dans la mesure où les nouveaux entrants ont tendance à entrer sur le marché à une échelle d'activité relativement limitée et n'ont pas encore infléchi la courbe du coût marginal. Par conséquent, ils peuvent être moins efficaces que l'entreprise dominante à court terme mais s'ils sont capables de survivre assez longtemps ils sont susceptibles de devenir aussi, voire plus, efficaces. On pourrait imaginer alors que le test de l'entreprise aussi efficace indique que le comportement doit être toléré du fait qu'une hypothétique entreprise aussi efficace pourrait lui résister, pourtant dans le monde réel, aucun entrant n'aurait jamais la chance de devenir une entreprise aussi efficace car les pratiques du défendeur l'élimineraient avant qu'elle atteigne ce stade. Cette tendance à donner de faux négatifs semble être une sérieuse faiblesse du test de l'entreprise aussi efficace.

Malgré cela, le test de l'entreprise aussi efficace a des partisans éminents, parmi lesquels le juge Richard Posner. Il est formulé de telle sorte qu'il tolérerait qu'un défendeur réfute la démonstration que ses pratiques évinceraient une entreprise aussi efficace à l'appui de la preuve que ces pratiques sont « globalement efficaces. »⁵² En d'autres termes, dans des affaires qui soulèvent le problème essentiel de l'attitude à adopter face à un comportement qui est à la fois pro- et anti-concurrentiel Posner recommande la mise en balance ce qui mène au type de test suivant.

3.2.4 *Les tests de bien-être des consommateurs*

D'après le test de bien-être des consommateurs dans sa forme la plus générale, des pratiques ne sont réputées illicites que si elles ont tendance à réduire le bien-être des consommateurs en augmentant les prix et en baissant la production. Ce test est intéressant à première vue car à la différence des tests qui reposent sur d'autres éléments comme le renoncement à des bénéfices pour prévoir les effets sur le bien-être, le test du bien-être des consommateurs a un rapport direct avec la promotion du bien-être des consommateurs. Si les pratiques d'une entreprise dominante réduisent le bien-être sans contribuer à une augmentation de l'efficacité de l'entreprise, ce test est relativement facile à appliquer. Le cas devient plus épineux bien sûr si le comportement de l'entreprise est susceptible de réduire le bien-être des consommateurs et d'augmenter l'efficacité du défendeur. Dans cette situation il semble qu'il existe quatre possibilités :

5. condamner systématiquement les pratiques qui sont susceptibles d'avoir un effet négatif sur le bien-être des consommateurs, indépendamment des efficacités ;
6. tolérer systématiquement les pratiques qui sont susceptibles d'avoir des effets positifs sur l'efficacité, indépendamment des effets négatifs sur le bien-être des consommateurs ;
7. mise en balance des deux effets pour déterminer lequel est susceptible d'être le plus important et prohiber le comportement si les effets négatifs probables sur le bien-être des consommateurs fait plus que compenser les améliorations probables en termes de performance ; ou
8. mise en balance des deux effets et examen du comportement illicite dans le seul cas où il est susceptible de causer un préjudice par rapport au bien-être des consommateurs qui est disproportionné par rapport à l'amélioration obtenue en termes d'efficacité.

Les options c) ou d) paraissent fournir des solutions intéressantes et ont recueilli un certain soutien dans des décisions judiciaires, des communications officielles et des articles de journaux.⁵³ Elles présentent l'inconvénient que la mise en balance du bien-être est difficile à réaliser de manière satisfaisante. Il est

improbable que les organismes chargés de la concurrence ou les tribunaux soient en mesure de quantifier de manière fiable et cohérente les effets prévus à long terme des comportements qui augmentent l'efficacité et réduisent le bien-être des consommateurs. Même Salop, un partisan de la mise en balance, admet que « les tribunaux seraient peu susceptibles de disposer de chiffres exacts mais qu'à la place ils procéderaient à une mise en balance approximative des effets, en utilisant des indications disponibles. »⁵⁴ Reconnaître cette possibilité c'est cependant céder beaucoup de terrain. Si les tribunaux ne disposent pas de chiffres et que leur mise en balance n'est qu'approximative le processus est alors prédisposé à être influencé par des impressions et raisonnements subjectifs qui le rendront moins prévisible. Gavil ajoute que comparer des évolutions de bien-être des consommateurs (efficacité allocative) et des évolutions d'efficacité productive des entreprises revient à comparer des oranges avec des pommes. Il n'est pas évident, selon lui, de parvenir à un arbitrage équitable entre ces deux éléments.⁵⁵

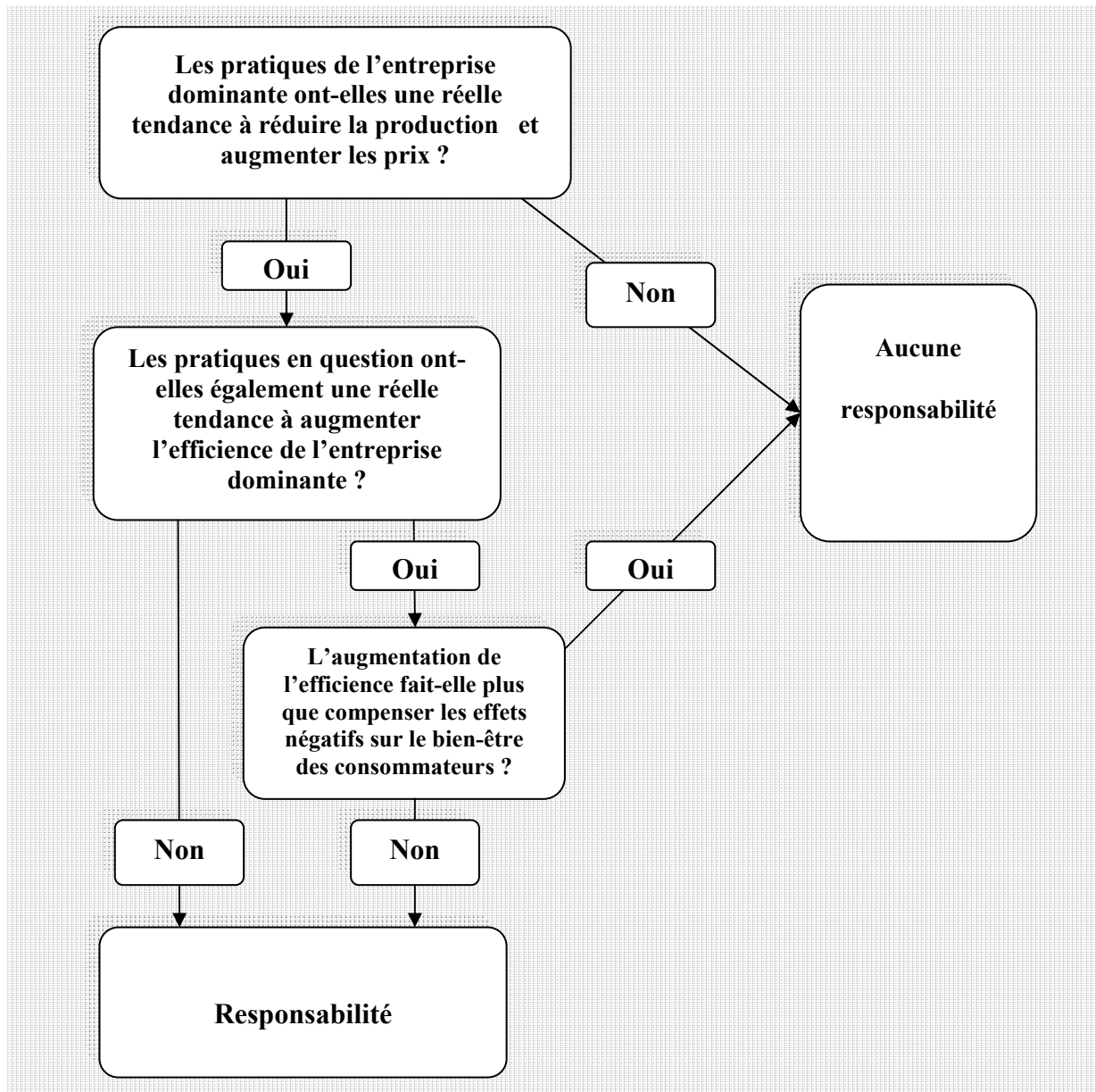
De plus, même si grâce aux progrès de l'économétrie il était possible d'estimer avec précision la taille relative des différents triangles de bien-être et même si les tribunaux pouvaient inclure ce type d'informations et les exploiter intelligemment, le monde des affaires risquerait de ne pas bien cerner et donc prévoir ce processus. Si l'essentiel du bénéfice de l'application du droit de la concurrence ne provient pas des effets qu'elle a sur les entreprises impliquées dans les différentes affaires mais plutôt de l'influence qu'exerce ces affaires sur le comportement de milliers d'autres sociétés alors il n'est pas logique de sacrifier la prévisibilité. Sans quoi, les politiques de la concurrence risquent involontairement de dissuader les pratiques concurrentielles saines.

Un autre inconvénient est que dans les pays où il existe des systèmes de jurés s'en tenir à une mise en balance laisse la porte ouverte aux faux positifs (condamner des pratiques qui ne devraient pas l'être) ce qui atténuerait également les pratiques concurrentielles saines. La règle d) semble préférable à cet égard puisqu'elle impose que les effets préjudiciables l'emportent largement sur les avantages avant qu'il soit possible de considérer les pratiques en question comme illicites. Mais « disproportionné » et « largement » sont des termes subjectifs qui ne fournissent aucune orientation précise.

Les tests de mise en balance de toutes sortes déplaisent à Elhauge qui remarque que « ce type d'enquête ouverte de mise en balance qui est réalisée par des juges et jurés antitrust est souvent imprécise, difficile à prévoir des années à l'avance lorsque les décisions commerciales doivent être prises et rendent les actions en justice trop coûteuses. Ainsi, les risques que représentent ce type d'enquête, associés au risque (de se voir infliger des amendes ou) de subir des dommages nuiraient considérablement à l'innovation ainsi qu'aux investissements destinés à améliorer les produits ou les méthodes de fabrication qu'il convient de favoriser. »⁵⁶

En outre, les tribunaux ne semblent pas désireux d'effectuer des exercices de mise en balance dans des affaires de pratiques unilatérales.⁵⁷ Bien qu'ils aient parfois indiqué que leurs décisions étaient influencées par une mise en balance il s'avère que les tribunaux ne s'engageront pas finalement dans cette voie.⁵⁸

Graphique 4. Le test de mise en balance du bien-être des consommateurs



Les règles a) et b), d'autre part, sont plus simples à cerner et à appliquer mais elles ne mènent pas toujours à un résultat optimal dans les différentes affaires. Elles restent prévisibles et cohérentes, des caractéristiques qui sont particulièrement importantes pour une application efficace du droit de la concurrence. Il serait peut-être plus judicieux de disposer de règles générales qui ne permettent pas d'obtenir une répartition parfaite du bien-être dans les différentes affaires portées devant les organismes et les tribunaux mais de meilleurs résultats à l'échelle de l'économie puisque les règles prévisibles sont préférables aux règles ponctuelles incompréhensibles. Cet avis présente un intérêt supplémentaire si on reconnaît que les affaires complexes sont difficiles à trancher correctement quelle que soit la règle utilisée. Dans ce cas, il convient de faire le nécessaire pour s'assurer que les affaires simples à régler sont tranchées correctement.

Il convient de mentionner ici une autre difficulté à laquelle on se heurte avec tous ces tests. Il faut décider du degré de probabilité du préjudice causé à la concurrence (ou au bien-être des consommateurs)

qui est nécessaire pour que le test échoue. Doit-il y avoir un préjudice réel, un risque sérieux de préjudice, une probabilité ou une simple possibilité de préjudice ? Les mêmes questions se posent pour la probabilité des efficacies déclarées. Ces questions ne peuvent pas être traitées dans la présente note. Chaque juridiction doit faire un choix en fonction de la position qu'elle souhaite adopter entre une forte possibilité d'éviter les faux négatifs et une forte possibilité d'éviter les faux positifs.

3.2.5 *Le test d'efficacie d'Elhauge*

Le Professeur Elhauge a inventé un test qui est plus difficile à comprendre que les autres mais qui pourrait s'avérer le plus utile actuellement. Ce test révèle :

si des pratiques d'éviction présumées réussissent à favoriser un pouvoir de monopole (1) uniquement dans le cas où le monopoleur a amélioré sa propre efficacie ou (2) dans le cas où il affaiblit l'efficacie de ses concurrents, que cela renforce ou non l'efficacie du monopoleur. Selon cette règle qui tolérerait le premier comportement et prohiberait le dernier un défendeur qui a augmenté sa propre efficacie en investissant dans des droits de propriété intellectuelle ou des biens physiques ne devrait pas être obligé de partager ces biens avec des concurrents mais n'aurait pas le privilège d'imposer des conditions discriminatoires en proposant des conditions plus défavorables aux concurrents ou aux partenaires des concurrents.⁵⁹

Diverses idées sont contenues dans cette présentation concise qu'il est préférable de décomposer tout d'abord en plusieurs parties. L'application du test d'Elhauge demande de répondre aux questions suivantes :

1. Le comportement du défendeur est-il d'une certaine manière discriminatoire par rapport à ses concurrents ? (Cette question n'est posée que dans des affaires concernant des refus de vente, des pratiques d'éviction ou des pratiques conditionnelles.)
2. Le comportement en question renforce-t-il ou maintient-il la position dominante de l'entreprise ou le pourrait-il ?
3. Si c'est le cas, l'influence sur la position dominante ne se produit-il que s'il existe une amélioration de l'efficacie du défendeur ?
4. Si ce n'est pas le cas, l'influence sur la position dominante est-elle due à l'impact des pratiques en question sur l'efficacie des concurrents, que ces pratiques améliorent ou non l'efficacie du défendeur ?

Pour que les pratiques du défendeur soient considérées comme illicites, les réponses aux questions posées doivent être : oui (si la question est applicable), oui, non et oui, respectivement. Toute divergence par rapport à cette série de réponses se solde par un résultat en faveur du défendeur.

Puisque même s'il est décomposé en plusieurs parties, le test semble rester étonnant il est peut-être utile de le décrire simplement. Ce test prévoit comme seuil que les pratiques du défendeur aient un caractère discriminatoire d'une manière ou d'une autre par rapport aux concurrents si elles concernent un refus de vente ou des transactions soumises à des conditions telles que l'exclusivité. Il exige aussi que ces pratiques renforcent ou maintiennent (ou puissent renforcer ou maintenir) la position dominante du défendeur. Il pose ensuite la question de savoir si le renforcement ou le maintien d'une position dominante est dû à une amélioration de l'efficacie du défendeur (licite) ou un affaiblissement de l'efficacie de son concurrent imputable au défendeur (illicite). Si l'efficacie des deux entreprises est affectée par les pratiques du défendeur ce dernier n'est pas responsable tant que les effets sur sa position dominante ne se produisent que si les pratiques considérées ont un impact positif sur l'efficacie du défendeur. Si, en

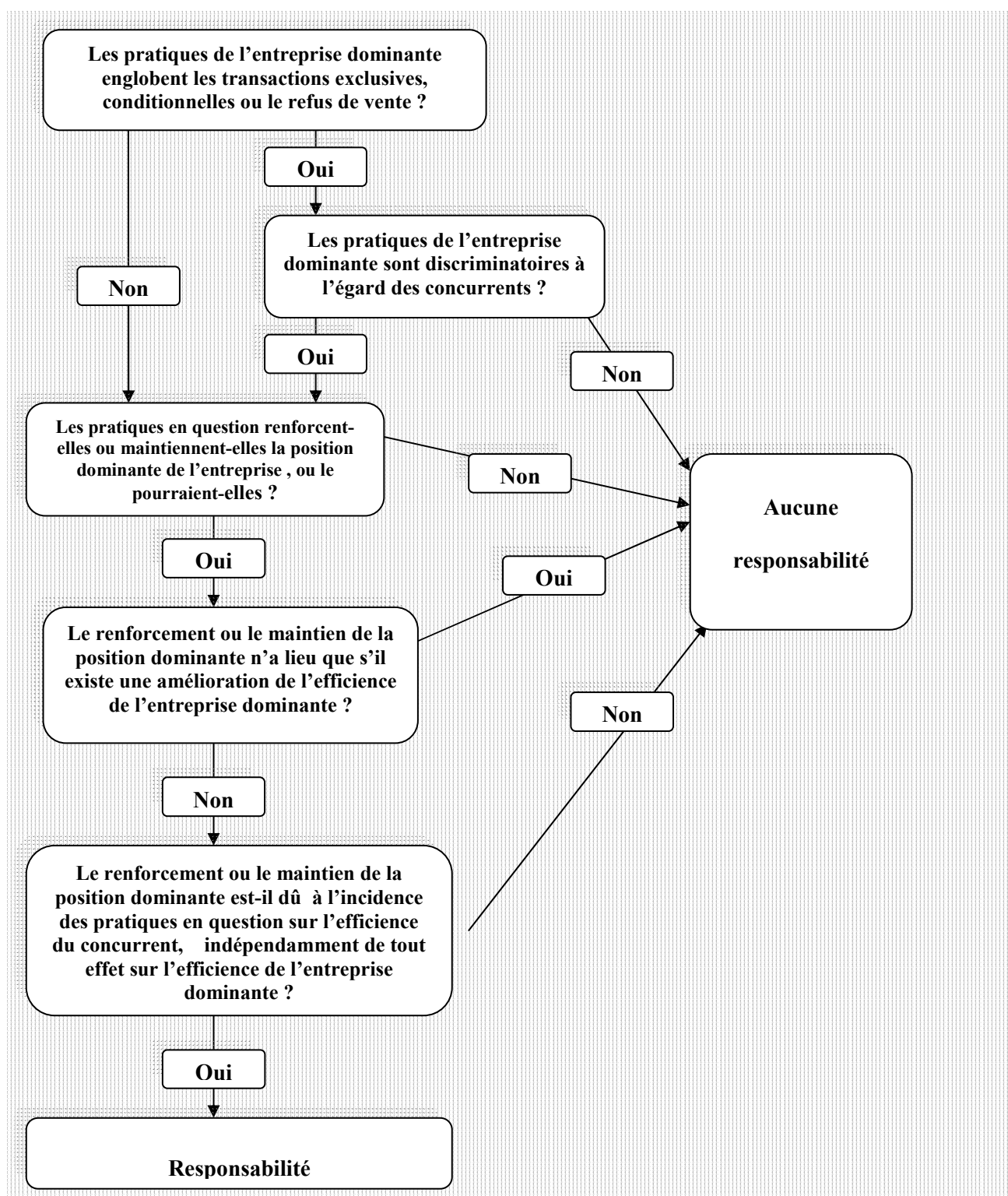
revanche, l'influence sur sa position dominante est entièrement imputable au préjudice que causent ces pratiques à l'efficacité du concurrent les pratiques en question sont illicites même si le défendeur est en mesure de présenter une version des faits qui fait ressortir une amélioration de l'efficacité. Ce type de situation risque de se produire, par exemple, dans des cas où le défendeur n'a pas eu recours aux moyens les plus restrictifs qui existent pour améliorer sa propre efficacité.⁶⁰ « L'élément essentiel qui distingue ces pratiques d'éviction qui méritent d'être réprimées est qu'elles peuvent accroître ou préserver le pouvoir de marché du monopoleur même si ce dernier n'a pas amélioré son efficacité d'une manière ou d'une autre. »⁶¹

On constate immédiatement que, même s'il tient compte des efficacités, il n'existe pas de mise en balance dans le test d'Elhauge. Ainsi, il évite un problème administratif important. Par ailleurs, il tolère les pratiques comme l'investissement dans la recherche et le développement en vue de fabriquer un meilleur produit moins cher alors que le test de renoncement à des bénéfices peut les prendre en compte. Par ailleurs, l'entreprise innovante est autorisée à vendre son nouveau produit ou son produit amélioré à un prix supérieur aux coûts (en l'absence d'effets discriminatoires sur des concurrents) même si ce faisant elle soustrait une part de marché à ses concurrents ce qui les rend moins efficaces. L'élément essentiel est qu'on ne considère le fait que les pratiques tolérées réduisent l'efficacité des concurrents que comme un effet secondaire inévitable de l'amélioration de la propre efficacité du défendeur.

Le test d'Elhauge contribue à élucider le mystère de la concurrence par les mérites dans la mesure où il établit un rapport entre les pratiques et l'efficacité, une notion concrète, au lieu de notions subjectives comme la concurrence « équitable », « normale » ou « dénuée de pratiques d'éviction ». Autrement dit, le test fournit une solution en qualifiant l'efficacité de synonyme de « mérites » dans l'expression « concurrence par les mérites ». Bien sûr, il nous reste à faire la distinction entre les pratiques qui augmentent l'efficacité de celles qui la réduisent.

Dans l'élaboration de son test, Elhauge s'est attaché tout particulièrement au traitement des refus de vente. Il voulait se garder d'établir une règle qui obligerait les défendeurs à mettre leurs biens à la disposition des concurrents même si les défendeurs ne les vendaient ou ne les louaient à personne d'autre. D'un autre côté, il souhaitait établir une règle qui sanctionnerait une entreprise qui aurait des pratiques discriminatoires à l'encontre de ses concurrents si ceux-ci voulaient procurer les mêmes biens que ceux que l'entreprise en question vend ou loue à d'autres. En mettant l'accent sur ces caractéristiques, Elhauge a tenté de remédier à un problème que pose le test de renoncement à des bénéfices qui est de cataloguer tous les refus inconditionnels de transactions comme des renoncements à des bénéfices (puisque vendre à des concurrents permet de dégager des bénéfices le refus de vente équivaut à un renoncement de bénéfices.) Selon Elhauge, le test de renoncement à des bénéfices présente des résultats erronés dans la mesure où il évalue les refus de vendre uniquement rétrospectivement, ce qui implique qu'il considère simplement comme un fait donné que le défendeur a déjà effectué un investissement en élaborant ou acquérant des biens quels qu'ils soient que ses concurrents veulent acheter. C'est pour cette raison qu'il ne parvient pas à prendre en compte le fait que pouvoir évincer des concurrents et acquérir ou maintenir du pouvoir de marché est ce qui crée en grande partie l'incitation à réaliser des investissements en acquérant ou élaborant en premier lieu des biens qui sont souhaitables.⁶²

Graphique 5. Le test d'Elhauge



Un meilleur test ne serait pas préjudiciable à cette incitation et celui d'Elhauge ne l'est pas puisqu'il sanctionne les défendeurs qui refusent de négocier avec des concurrents dans une seule situation, à savoir

lorsqu'ils négocient déjà avec d'autres concurrents. Dans ce cas, les défendeurs devraient déjà appliquer un prix qui inclut les bénéfices qui peuvent être tirés du pouvoir de marché qui correspond à leurs biens de sorte que vendre aux mêmes conditions à des concurrents ne serait ni une charge ni un inconvénient. Le test d'Elhauge présente la commodité de n'imposer aux tribunaux qu'une tâche administrative limitée dans la mesure où il ne leur demande pas de déterminer ce que serait un prix « équitable ». Le tribunal doit uniquement déterminer si les défendeurs négocient avec les concurrents aux mêmes conditions qu'avec les autres entreprises.⁶³

4. LA CONCURRENCE PAR LES MÉRITES EN PRATIQUE

La présente section examine la concurrence par les mérites d'un point de vue expérimental et compare la façon dont les tribunaux des différentes juridictions abordent certains types d'abus de position dominante et d'affaires de création de monopole. Il est difficile au vu des résultats de conclure qu'un test particulier est appliqué de manière cohérente ce qui contribue au sentiment d'imprévisibilité et même d'incohérence des politiques que les universitaires ont mis en lumière récemment. En aucun cas, le présent document ne couvre pas tous les types de comportement abusif mais il tente d'illustrer les problèmes actuels qui découlent de l'absence de normes adéquates et des résultats obtenus avec les tests proposés en se concentrant sur certains types de comportement. L'examen porte plus particulièrement sur des affaires de ristournes et remises de fidélité, de remises liées, d'opérations conditionnelles et de refus de vente.⁶⁴

4.1 Rabais et remises de fidélité et remises liées

4.1.1 British Airways (U.S.)

En 2001, la U.S. Court of Appeals for the Second Circuit a décidé que British Airways n'avait pas enfreint la section 2 de la Loi Sherman en appliquant un système d'incitations financières en faveur des agents de voyage.⁶⁵ Même après avoir examiné les faits sous la lumière la plus favorable pour le plaignant Virgin Atlantic, le tribunal a conclu que les éléments de preuve ne parvenaient pas à démontrer que les remises accordées par BA portaient préjudice aux consommateurs. C'est pourquoi la Cour a confirmé l'ordonnance en référé rendue par un tribunal de degré inférieur en faveur de BA.

Les incitations en question ont été versées à des agents dont les ventes de billets BA atteignaient certains seuils. Il n'existait pas de minima obligatoires. Les incitations étaient calculées sur la base d'un pourcentage appliqué aux ventes BA de l'agent pour toute une année et elles étaient payées sous la forme d'une remise. Virgin Atlantic a fait valoir que ces incitations faisaient partie d'un programme de prix d'éviction élaboré par BA pour acquérir et maintenir un monopole sur les liaisons aériennes desservant cinq villes américaines en provenance de l'aéroport d'Heathrow. Virgin indiquait notamment que, sans les prix inférieurs aux coûts qui étaient pratiqués par BA, Virgin aurait pénétré le marché pour desservir ces cinq villes à une date antérieure à celle où elle l'a fait.

La décision de Virgin de porter l'affaire devant le tribunal en vertu de la théorie des prix d'éviction a conduit à une forme particulière du test de renoncement à des bénéfices appliqué par les tribunaux des Etats-Unis dans les affaires de prix d'éviction. Le plaignant doit prouver que les prix du défendeur sont « inférieurs à une mesure appropriée » des coûts du défendeur et qu'il existe une sérieuse probabilité pour le défendeur de récupérer les pertes liées à ses pratiques d'éviction.⁶⁶ Toutefois comme on le montrera plusieurs éléments de preuve et motifs majeurs que le tribunal a présenté lorsqu'il a rendu sa décision auraient la même pertinence dans l'application plus générale du test de renoncement à des bénéfices et ne sont donc pas spécifiques aux plaintes ayant pour objet la fixation de prix d'éviction.

Le tribunal a commencé son analyse en indiquant que même si le défendeur avait un pouvoir de monopole et évinçait ses concurrents ses pratiques continueraient à être considérées comme licites s'il se

limitait à exploiter les avantages concurrentiels dont il dispose de manière légitime. »⁶⁷ Il a entrepris ensuite l'examen critique de l'exposé du plaignant selon lequel les éléments de preuve présentés établissaient que les prix étaient inférieurs aux coûts. Dans le détail, cet exposé et la critique qu'en a faite le tribunal sont relativement complexes et pas spécialement pertinents pour notre analyse. Ce qui nous importe c'est que l'enquête du tribunal a suivi les étapes d'une norme bien établie.

Un élément plus important encore est que le tribunal a directement posé la question essentielle que formule le test général de renoncement à des bénéfices, qui est de savoir si le défendeur aurait exercé les pratiques illicites présumées dans un contexte où ces pratiques n'élimineraient pas la concurrence. En dépit des problèmes posés par le test de renoncement à des bénéfices qui sont mentionnés plus haut il s'agit bien d'une affaire où l'application du test a été satisfaisante puisqu'elle a permis *d'obtenir* une réponse à la question posée. En d'autres termes, le monde réel et le monde hypothétique « hormis » se confondaient puisque Virgin a pénétré et est resté présent sur les cinq marchés principaux en dépit des pratiques illicites présumées de BA alors que ces pratiques ont continué à être appliquées par la suite pendant des années. C'est pourquoi le tribunal a conclu que le système de remises de BA était rationnel même sans effet d'éviction, et qu'il n'existait par conséquent aucun fondement pour le juger illicite. « Il n'y a pas lieu de présumer que les pratiques commerciales en question doivent être considérées comme une tentative de création de monopole dès lors que « les pratiques considérées sont appliquées depuis plusieurs années et que les concurrents ont réussi à dégager des bénéfices, que de nouvelles entrées sur le marché ont eu lieu et que leurs parts de marché totales sont stables. »⁶⁸ Dans cette affaire, la part de Virgin sur trois de ces marchés s'était développée en réalité pour atteindre approximativement la taille de celle de BA.

Même si le résultat de cette affaire a conduit à une norme précise il existe encore des possibilités d'améliorer la décision. De manière plus précise, le tribunal n'a fourni aucune orientation sur ce qui caractérise un « avantage concurrentiel » ou ce qu'on entend pas « en disposer de manière légitime ». Il cite simplement ces expressions et poursuit son analyse. Par ailleurs, les tribunaux aux Etats-Unis n'ont toujours pas tranché la question de savoir quels coûts il faut utiliser dans les affaires de prix d'éviction.

4.1.2 *British Airways (U. E.)*

Deux ans environ après la décision rendue par un tribunal américain dans l'affaire *British Airways*, le Tribunal européen de première instance a conclu que les mêmes pratiques en cause dans cette affaire avaient enfreint l'article 82.⁶⁹ Il est intéressant de mentionner que même si l'affaire européenne découlait d'une plainte déposée par Virgin Atlantic – concurrent du secteur des compagnies aériennes – le tribunal fondait sa décision sur le constat que BA occupait une position dominante monopsonistique sur le marché des services des agences de voyages au Royaume-Uni. Le tribunal a conclu que BA avait enfreint l'article 82 non seulement parce que ses remises avaient un effet discriminatoire à l'égard de certaines agences de voyage mais parce que ces remises pouvaient également avoir un effet d'éviction sur des concurrents du marché des services de transport aérien.

Les remises accordées ont été jugées discriminatoires parce qu'elles pouvaient désavantager certaines agences de voyages auxquelles avaient été attribuées des remises différentes de celles obtenues par d'autres agences qui avaient vendu le même nombre de billets BA. Cette incidence s'expliquait par le fait que les remises étaient calculées en fonction du taux de croissance des ventes de billets BA réalisées par chaque agence d'une année sur l'autre et pas sur la valeur absolue des ventes de billets BA de l'agence. Le tribunal est donc parvenu à la conclusion que « cette aptitude des agents à se concurrencer dans la fourniture aux voyageurs de services d'agences de voyages aériens et à susciter la demande des compagnies aériennes pour de tels services était naturellement affectée. »⁷⁰

En tant que fondement de la responsabilité dans le droit de la concurrence, le raisonnement que sous-tend la conclusion selon laquelle il existe une discrimination paraît discutable. Aucun élément de preuve

montrant que ces remises ont porté atteinte à la concurrence entre agences de voyage n'a été examiné par le tribunal. De plus, il ne serait pas logique que BA réduise la concurrence sur ce marché en aval puisque cela diminuerait la demande de ses produits (en amont). Au contraire, un objectif rationnel de l'offre de ristournes d'objectif aurait été de motiver les agences pour qu'elles s'efforcent de réaliser des ventes plus importantes ce qui est exactement leur rôle sur un marché concurrentiel d'agences de voyages.⁷¹ En conséquence, le fait qu'il soit possible d'affirmer que les pratiques de BA ont eu un caractère discriminatoire à l'égard de diverses agences de voyage ne s'avère pas être, en conclusion, un fondement solide de la décision établissant qu'il s'agit d'un abus de position dominante de BA en tant qu'acheteur sur le marché des services d'agences de voyage.

En ce qui concerne l'effet d'éviction des incitations de BA, le tribunal a cité l'arrêt Hoffman-La Roche qui fait jurisprudence en la matière et selon lequel l'abus existe dès lors qu'une entreprise dominante influe sur la structure du marché en recourant à des pratiques autres que celles relevant de la « concurrence normale ».⁷² Le tribunal a précisé qu'une société en position dominante ne peut pas adopter ces comportements « lorsqu'ils ont pour objet de renforcer cette position dominante ou d'en abuser. »⁷³ Dans ce cadre, le tribunal a conclu que les remises de BA induisaient une fidélité parmi les agences de voyage du fait que les concurrents ne bénéficiaient pas d'une base de revenu comparable sur laquelle établir leur propre programme de remises concurrentielles. De plus, étant donné que les remises n'augmentaient pas proportionnellement à l'augmentation des ventes mais plutôt par paliers le tribunal a estimé qu'il faudrait une incitation financière disproportionnée pour persuader une agence qui serait proche du prochain palier d'orienter ses ventes vers une compagnie aérienne concurrente. Par ailleurs, le tribunal a considéré que le programme de BA n'avait pas de justification économique parce que les remises étaient versées sur tous les billets de BA vendus par les agences et pas seulement sur les ventes additionnelles. C'est la raison pour laquelle BA « ne pouvait avoir aucun intérêt à appliquer ses systèmes de primes si ce n'est d'évincer les compagnies aériennes concurrentes. »⁷⁴

La méthode utilisée par le tribunal pour constater les éventuels effets d'éviction sur les compagnies aériennes concurrentes pose problème. Après avoir évoqué une vague notion de concurrence normale, la décision rendue fait état d'un test basé sur les intentions qui semble être présenté comme une condition suffisante pour constater un abus de position dominante. Mais le tribunal donne aussi l'impression qu'il applique le test de renoncement à des bénéfices ou le test d'absence de justification économique, ou peut-être le test de l'entreprise aussi efficiente, lorsqu'il affirme que les remises n'ont pas de justification économique et que BA ne pourrait pas avoir eu d'autre intérêt que d'éliminer ses concurrents. Il n'est donc pas évident de savoir sur quelle base on détermine ce qui est ou n'est pas une concurrence normale.

Pour ce qui est du contenu de ces tests, il ne semble pas judicieux de se fier au test évaluant les intentions puisque le fait d'engager la responsabilité des entreprises dominantes au seul motif de leur intention de renforcer leur position dominante impliquerait d'inclure des éléments bénéfiques comme l'investissement et l'innovation qui ont pour objet d'améliorer l'efficacité. Il tient compte également des tentatives d'augmentation du bien-être qui évincent les concurrents en accordant des remises.⁷⁵ Il est vrai qu'il s'agirait en effet d'une curieuse forme de concurrence si les entreprises dominantes n'avaient *pas* l'intention de renforcer leur position dominante par quelque moyen que ce soit.

Pour les tests de renoncement à des bénéfices et d'absence de justification économique, démontrer l'existence d'un atteinte réelle ou probable à la concurrence est une condition préalable comme on l'a vu plus haut. Cependant de toute évidence la décision ne tient pas compte du fait que les remises de BA aux agences de voyage seraient susceptibles d'avoir ou auraient effectivement un effet sur la concurrence entre les compagnies aériennes. Plusieurs éléments auraient pu être, ou ont été, pris en considération à cette fin :

- Le fait de savoir si les remises ont affecté au bout du compte les décisions des voyageurs quant à la compagnie qu'ils ont choisie pour leur voyage, plus particulièrement si des vols

moins chers étaient offerts par d'autres compagnies aériennes. Il semble difficile de convaincre les clients de ne pas prendre en compte les vols moins chers sauf si les agences de voyage sont la seule source d'information sur les prix des vols, mais l'arrêt ne fait pas mention de telles considérations.

- Le fait de savoir si les compagnies aériennes concurrentes pourraient s'aligner sur les remises de BA dans des conditions rentables. Au lieu de demander la preuve qu'elles ne le pouvaient pas le tribunal s'est contenté de supposer qu'elles ne le pouvaient pas.
- Le fait de savoir si BA était confrontée à une vive concurrence avec les autres compagnies aériennes sur certaines lignes et pas sur l'ensemble de ses lignes.
- Le fait de savoir si, compte tenu de l'incidence de son système de remises sur ses concurrents, BA pouvait appliquer des tarifs plus élevés qu'elle aurait pu le faire autrement.

Ces remarques n'ont pas pour but d'affirmer que le tribunal s'est trompé en considérant que le comportement de BA *avait pu* porter atteinte à la concurrence mais seulement que si le tribunal avait exigé des preuves sur ce qui se passait réellement sur le marché cela aurait suscité une plus grande confiance en ce sens que sa décision encourageait la concurrence et protégeait le bien-être des consommateurs.

Paradoxalement, le seul élément de preuve sur les effets réels qui est mentionné dans la décision porte à penser qu'aucune atteinte n'a été portée à la concurrence dans les services de transport aérien. Non seulement le plaignant Virgin Atlantic a pu entrer sur le marché dans des conditions rentables mais d'autres compagnies sont également entrées sur ce marché et leur part de marché s'est développée sur la période considérée. Toutefois, le tribunal n'a guère accordé d'attention à cet élément de preuve, jugeant qu'il n'était pas nécessaire de démontrer l'existence d'effets concrets puisqu'il suffisait de montrer que le programme de BA « tend à restreindre la concurrence ou, en d'autres termes, que le comportement est de nature ou susceptible d'avoir un tel effet. »⁷⁶ Bien que le fait d'être simplement capable de restreindre la concurrence paraisse être un critère excessivement strict il convient de remarquer que du point de vue du tribunal il existait un élément de preuve concret de la tendance à porter atteinte à la concurrence : 85 % des billets d'avion vendus au Royaume-Uni sont vendus par des agences de voyage. Ce constat a conduit le tribunal à conclure que les remises accordées par BA « ne peuvent en aucun cas n'avoir eu aucun effet d'éviction sur les compagnies aériennes concurrentes. »⁷⁷

Nous reviendrons brièvement sur la décision *British Airways* du Tribunal de première instance pour l'examiner à la lumière d'autres tests dont il a été question plus haut.

4.1.3 *Michelin II*

L'arrêt *Michelin II*⁷⁸ a été rendu quelques mois seulement avant la décision *British Airways* par le Tribunal de première instance, il s'appuie largement sur la même décision qui fait jurisprudence et a appliqué pour l'essentiel la même analyse. Le tribunal a conclu que Michelin avait abusé de sa position dominante sur le marché de remplacement de pneumatiques pour les poids lourds en France en appliquant un système complexe de primes et de rabais versés aux revendeurs de pneumatiques. Le tribunal a décidé que même les remises qui sont uniquement fonction du volume des achats effectués par un client peuvent être considérés comme des remises de fidélité, et donc avoir un caractère abusif dans certaines circonstances. Dans cette affaire, on a conclu que l'effet fidélisant provenait a) de la forte variation des pourcentages de remises appliqués en fonction des quantités, ainsi que du fait que ces pourcentages s'appliquaient au total des achats et pas seulement aux achats additionnels au-delà de certains seuils, b) la valeur des achats sur la période de référence d'une année, et c) le fait que les remises reposaient également

sur la totalité du chiffre d'affaires de pneumatiques réalisé par un client avec Michelin au lieu d'être calculées produit par produit.⁷⁹

Une autre remise que Michelin accordait aux revendeurs en contrepartie de la prestation de certains services a été elle aussi considérée comme abusive. Le tribunal a précisé que cette remise était « inéquitable » entre les revendeurs, indiquant que des critères subjectifs et flous étaient utilisés pour évaluer les services des revendeurs.⁸⁰ Un autre programme encore a été considéré comme illicite, il offrait un soutien commercial et financier aux revendeurs sur la base d'une condition tacite qui était d'atteindre un certain pourcentage de ventes Michelin dans leur chiffre d'affaires, et de plusieurs autres conditions concernant la demande spontanée des clients et l'obligation de fournir à Michelin des informations sur les ventes et stratégies des entreprises en question.

Enfin, les remises quantitatives accordées par Michelin ont été jugées discriminatoires envers les revendeurs (et ont donc été considérées comme ayant un caractère abusif pour cette raison), parce qu'elles n'étaient pas progressives, de manière lente et linéaire, proportionnellement à l'augmentation des quantités vendues par un revendeur. Le tribunal a expliqué que lorsque, du fait des seuils fixés pour les différents échelons de remises et les pourcentages de remises offerts, quelques parties seulement profitent de remises qui leur donnent un avantage économique qui n'est pas justifié par le chiffre d'affaires qu'ils apportent ni par les économies d'échelle qu'ils permettent au fournisseur de réaliser par rapport à leurs concurrents, un système de remises quantitatives conduit à appliquer des conditions inégales à des transactions équivalentes.

Cette décision a montré que conformément à l'article 82, les remises quantitatives doivent être non seulement non discriminatoires mais également économiquement justifiables, c'est-à-dire basées sur un avantage compensatoire tel que des économies d'échelle. Dans le cas présent, le tribunal a conclu que Michelin n'était pas parvenu à démontrer que ses remises étaient justifiables. Les éléments relatifs aux économies d'échelle en matière de coûts de production et de distribution qui ont été présentés par la société ont été jugés trop généraux.⁸¹ Il aurait fallu démontrer que les remises correspondaient véritablement et de manière spécifique à des coûts plus faibles pour le vendeur.

Il y a une certaine incohérence dans le fait que le tribunal a souligné que Michelin disposait d'éléments de preuve précis sur les inefficiences déclarées alors qu'il a rejeté la thèse de Michelin selon laquelle le constat de pratiques abusives exigeait de démontrer l'existence d'effets d'exclusion du marché. Le tribunal s'est contenté de fonder son jugement établissant la responsabilité de la société sur le constat théorique que le comportement de Michelin devait avoir eu en toute logique des effets préjudiciables sur la concurrence. Comme il l'avait fait dans son arrêt *British Airways*, le Tribunal de première instance a mis l'accent sur le fait que l'abus est une notion objective qui suffit à établir que les remises quantitatives ne peuvent qu'avoir un effet fidélisant.

Par ailleurs, le jugement indique qu'« aux fins de l'application de l'article 82 CE la démonstration de l'objet et de l'effet anticoncurrentiel se confond [...] S'il est démontré que l'objet poursuivi par le comportement d'une entreprise en position dominante est de restreindre la concurrence, ce comportement sera également susceptible d'avoir un tel effet. »⁸² Cet élément était primordial dans cette affaire car il aurait été difficile de prouver une fermeture réelle ou probable du marché étant donné que Michelin perdait des parts de marché par rapport à ses deux principaux concurrents et aux nouveaux entrants pendant la période où le système de remises en question a été appliqué. En réalité, Michelin a commencé à regagner effectivement des parts de marché après avoir mis un terme au système de remises. En résumé, le tribunal a adopté une approche des remises de fidélité évaluant les intentions et a refusé de prendre en compte leurs effets réels et probables sur la concurrence ou le bien-être des consommateurs.

Il apparaît que le Tribunal de première instance s'est préoccupé de la question de savoir si en réduisant considérablement les prix marginaux pour les rapprocher du seuil de chaque échelon de remises, les remises avaient changé le *processus* de la concurrence entre les fabricants présents sur le marché de remplacement de pneumatiques pour passer d'une bataille permanente pour la vente de chaque unité à un combat périodique concernant l'ensemble ou une grande partie de la demande émanant d'un revendeur. Toutefois, sans une évaluation du marché et des autres concurrents sur ce marché il n'est pas possible de savoir si cette évolution du processus était susceptible de porter atteinte à la concurrence en renforçant ou préservant le pouvoir de marché de Michelin.

Heimler a observé que si toutes les entreprises se font concurrence et sont capables de répondre à la demande totale d'un client dans des affaires comme *Michelin II*, la compétition entre elles se déroule au début de chaque période et les remises ne peuvent pas porter atteinte à la concurrence tant qu'elles permettent aux revenus d'être supérieurs aux coûts. C'est lorsque les concurrents ne sont pas de taille suffisamment importante, ne fournissent pas la même gamme de produits ou n'ont pas encore une réputation assez bien établie pour leur permettre de satisfaire toute la demande d'un client que les remises sont susceptibles de porter atteinte à la concurrence.⁸³ Mais dans l'affaire *Michelin II*, le tribunal n'a pas pris totalement en compte la réelle capacité des concurrents de s'aligner sur les remises accordées par Michelin dans des conditions rentables.

Heimler parvient ensuite à la conclusion qu'« une analyse économique approfondie fait grandement défaut » dans les affaires européennes de remises, ce qui a conduit à établir des critères flous.⁸⁴ En même temps, il estime que l'importance accordée aux effets d'exclusion concrets dans les affaires américaines mène sans doute à une trop grande rigidité. Il recommande aux deux juridictions d'utiliser le test de l'entreprise aussi efficiente dans les affaires de remises selon lequel les pratiques d'une entreprise dominante en matière de fixation de prix sont réputées licites, sauf en cas d'exclusion d'un concurrent aussi efficient.⁸⁵ Heimler propose des formules mathématiques qui reposent sur le test de l'entreprise aussi efficiente pour détecter des remises et rabais qui ont, dans certaines conditions, un effet d'éviction. Son approche prend en compte la capacité du concurrent de s'aligner sur les remises de l'entreprise dominante dans des conditions rentables, et pose principalement la question de savoir si une entreprise aussi efficiente, bien que de taille plus modeste que l'entreprise en place, serait en mesure de s'aligner sur l'importance des remises accordées par celle-ci et de réussir à maintenir des prix supérieurs à ses coûts. Bien que Heimler estime que les remises d'objectifs peuvent effectivement avoir un effet d'éviction important dans certaines conditions les informations disponibles ne sont tout simplement pas suffisantes (telles que les marges entre les prix et les coûts) dans l'affaire *Michelin II* pour évaluer si les remises accordées par Michelin auraient pu évincer une entreprise aussi efficiente.⁸⁶ Il estime que les informations suffisent toutefois à jeter le doute sur l'analyse et la conclusion du tribunal. L'élément le plus remarquable est que Michelin a perdu des parts de marché durant la période considérée.

Sher, lui aussi, critique les analyses effectuées dans les affaires *Michelin II* et *British Airways* parce qu'elles reposent essentiellement sur des objectifs qui sont a) d'encourager l'équité envers les revendeurs et les agences de voyages et b) de préserver les structures commerciales en place. Sher argumente que même si on considère ces objectifs comme valables il n'en demeure pas moins que les entreprises dominantes dans le secteur des pneumatiques et des compagnies aériennes sont de plus en plus intégrées verticalement à la suite de telles décisions ce qui prive d'activité les distributeurs, en général. Ainsi, les objectifs d'équité et de préservation des structures commerciales sont déjoués.⁸⁷

Dans l'optique du test de mise en balance du bien-être des consommateurs, les analyses faites par le Tribunal de première instance dans les affaires *British Airways* et *Michelin II* donnent une impression d'approche partielle. Le seul élément pris en considération a été que le comportement des défendeurs pouvait renforcer ou préserver leur position dominante en affaiblissant les chances des concurrents. L'autre côté des choses, à savoir que leur comportement a également pu produire des efficiences n'a pas été

examiné de façon rigoureuse. Par exemple, les décisions rendues ne tenaient compte d'aucun effet éventuel des remises sur l'efficacité tel qu'un effort de vente supplémentaire pouvant être suscité parmi les revendeurs et les agences. L'élément le plus important est que le tribunal n'a pas tenu compte du fait que le bien-être des consommateurs serait accru par les remises si les revendeurs et les agences en répercutaient une partie ou la totalité aux consommateurs finals.

Pour ce qui est de l'application du test de renoncement à des bénéfices, nous avons déjà vu quel résultat il a eu dans l'affaire américaine *British Airways*. Compte tenu des éléments disponibles, il semblerait qu'une application de ce test dans les affaires européennes aurait conduit au même résultat. Dans ces deux affaires jugées par le Tribunal de première instance, le monde réel et le monde hypothétique du test de renoncement à des bénéfices se confondaient et montraient que le défendeur a maintenu son système de remises pendant de nombreuses années en dépit des entrées de concurrents et en dépit des pertes de part de marché qui l'affectaient. Ce comportement n'aurait donc pas été considéré comme rationnel et licite selon le critère du renoncement à des bénéfices.

Enfin, si un tribunal devait appliquer le test d'Elhauge dans ces affaires il ne semble pas que l'une ou l'autre réussirait à passer l'étape (ii), qui pose la question de savoir si le comportement renforce ou préserve la position dominante de l'entreprise ou est susceptible de le faire. Aucun élément de preuve dans ce sens n'existait simplement et le seul disponible allait dans le sens opposé. Les affaires auraient été plus complexes si les tribunaux avaient été saisis pour rendre un jugement lorsque les remises ont commencé à être appliquées ou si des éléments de preuve d'un effet visible (ou au moins probable) sur la concurrence avaient existé tels qu'une absence persistante d'entrée sur le marché, des concurrents abandonnant le marché ou une part de marché constante ou accrue pour le défendeur. Ces affaires auraient été encore plus complexes si les défendeurs avaient ensuite réagi en produisant des arguments plausibles sur les raisons qui faisaient que ces remises amélioraient l'efficacité.

Néanmoins, il est intéressant d'examiner comment de manière hypothétique le stade (ii) du test d'Elhauge aurait pu être atteint et comment le reste de ce test aurait été appliqué dans les affaires *British Airways* et *Michelin II*. Il aurait démontré tout d'abord que les pratiques en question avaient un effet discriminatoire sur les concurrents étant donné que les remises et ristournes étaient accordées aux acheteurs en contrepartie d'achats réalisés en grande partie auprès des défendeurs. Il aurait fallu ensuite démontrer que les concurrents étaient exclus d'une partie si importante du marché que la demande résiduelle qui leur était laissée ne suffisait pas pour atteindre l'échelle d'efficacité minimale. Dans ce cas, leur efficacité aurait été affaiblie et les aurait obligés à relever leurs prix pour couvrir leurs coûts. En conséquence, la capacité des concurrents à faire baisser les prix de l'entreprise dominante aurait été affaiblie de sorte que sa position dominante en aurait été renforcée ou préservée. Ainsi, sauf si le défendeur avait pu produire des arguments convaincants montrant que ses pratiques augmentaient son efficacité et que l'effet qu'elles avaient sur sa position dominante ne se serait pas produit sans cet accroissement d'efficacité le test d'Elhauge sanctionnerait ces remises et ristournes.

4.1.4 *LePage's*

L'arrêt rendu en 2003 par la U.S. Court of Appeals for the Third Circuit dans l'affaire *LePage's/3M* concernait une plainte selon laquelle 3M avait monopolisé le marché du ruban transparent aux Etats-Unis en appliquant un système de remises liées.⁸⁸ *LePage's* a fait valoir que les remises de 3M induisait de fait des pratiques d'exclusion parmi les gros clients. *LePage's* invoquait également le fait qu'il était exclu du marché du ruban adhésif du fait qu'il ne pouvait couvrir ses coûts et n'en finissait pas de dédommager les clients du montant des remises perdues sur d'autres produits appartenant au système de remises 3M s'ils achetaient du ruban *LePage's* au lieu de 3M. La Cour s'est prononcée en faveur de *LePage's*, déclarant que 3M « exploitait son pouvoir de monopole sur le ruban transparent, s'appuyant sur un catalogue de produits conséquent, pour consolider son monopole au détriment de *LePage's*, son seul concurrent sérieux [...] »⁸⁹

Les remises 3M étaient calculées sur la base des achats réalisés par un client dans six lignes de produits 3M allant des produits pour les soins de santé aux produits de détail pour l'automobile. Pour chaque ligne de produits un objectif de croissance exprimé en pourcentage était fixé aux clients et plus les résultats du client étaient proches des objectifs plus les remises étaient importantes pour l'ensemble des lignes de produits. 3M a admis qu'il détenait un monopole sur le marché du ruban transparent, sa part de marché atteignant 90 %. La société a estimé que la méthode d'analyse appropriée était de traiter l'affaire comme une plainte ayant pour objet la fixation de prix d'éviction. 3M a invoqué notamment que ses prix étaient supérieurs à ses coûts, sans préciser la façon dont ceux-ci étaient calculés, et que LePage's ne contestait pas cette affirmation. Elle a soutenu par conséquent que les remises liées ne pouvaient pas être anticoncurrentielles. On peut considérer que cela constitue un argument en faveur du test de renoncement à des bénéfices ou du test de l'entreprise aussi efficiente.

Toutefois, le tribunal a rejeté l'analyse des prix d'éviction, soulignant qu'il s'agissait d'une affaire de pratiques d'exclusion et pas d'une affaire de prix inférieurs aux coûts. Il a ensuite commencé son analyse, s'inspirant du principe selon lequel « un monopoleur serait considéré comme violant le § 2 de la Loi Sherman s'il s'engageait dans des pratiques d'exclusion ou d'éviction sans une justification économique acceptable. »⁹⁰

Sans l'avaliser précisément le tribunal fait allusion au test de l'entreprise aussi efficiente dans sa description de l'éventuel préjudice causé par les remises liées. Ce préjudice, comme le tribunal l'a exposé, survient lorsqu'un client achète le produit B du défendeur au lieu du produit B du plaignant, pas parce que celui du défendeur est meilleur ou moins cher mais parce que de cette façon il permet au client de recevoir une remise plus importante sur le produit A que le plaignant ne produit pas. Ainsi le plaignant ne peut rivaliser sur le marché du produit B qu'en baissant suffisamment ses prix pour compenser la remise perdue par le client sur le produit A. En fonction du nombre d'autres produits similaires à A que le défendeur englobe dans les remises liées et des quantités achetées par le client « un concurrent même aussi efficient peut estimer qu'il est impossible de compenser des remises perdues sur des produits qu'il ne produit pas. »⁹¹

Le tribunal a ensuite établi la liste des totaux des remises annuelles reçues dans le cadre du programme 3M par plusieurs clients importants, observant que dans certains cas elles s'élevaient à la moitié des ventes totales de ruban de LePage's à un client donné. Le tribunal a également précisé quel avait été le recul de la part de marché, de la rentabilité et de l'efficacité productive de LePage's à la suite de l'application du programme de remises 3M. Dans la mesure où 3M n'était confronté à aucun autre concurrent sur le marché considéré le tribunal a décidé essentiellement que le préjudice causé à LePage's était équivalent à celui causé à la concurrence, en précisant que 3M pourrait dégager des bénéfices plus importants si LePage's n'était pas présente sur le marché.

Enfin, le tribunal a repris la notion de "justification économique valable". Il a défini cette expression comme étant liée à l'amélioration du bien-être des consommateurs qui pourrait être obtenue au moyen d'une plus grande efficacité ou d'un contrôle de qualité plus important. Le tribunal a précisé ensuite que 3M n'avait apporté aucun élément de preuve appuyant l'argument selon lequel 3M améliorait son efficacité lorsque des clients achetaient des produits dans plusieurs lignes de produits à la fois. Le tribunal a également observé qu'« il est très improbable que 3M ait commercialisé du ruban transparent parallèlement à des produits de détail pour l'automobile ou des produits d'amélioration de l'habitat auprès de clients comme Staples ou que, si cela a été le cas, les économies provenant d'une commercialisation parallèle aient avoisiné plusieurs millions de dollars répercutés aux clients de 3M sous forme de remises liées. »⁹²

Le tribunal n'a pas appliqué exactement de test particulier pour déterminer si le comportement de 3M était illicite. Il s'en est tenu, en majeure partie, aux effets que ces pratiques avaient sur LePage's. En

conséquence comme les Etats-Unis l'ont indiqué ultérieurement dans un mémoire remis au tribunal, « la Cour d'appel n'a pas été suffisamment précise sur l'aspect des remises liées qui a constitué les pratiques d'exclusion et il n'a été vraiment décidé ni par cette cour ni par d'autres tribunaux quels principes juridiques et quelles analyses économiques devaient permettre de les contrôler. »⁹³ Sa décision laisse donc une place considérable aux incertitudes sur la façon dont les futures affaires de remises liées seront tranchées, l'incertitude étant un des principaux maux que les bonnes politiques de la concurrence s'efforce d'éliminer car elle peut décourager les pratiques concurrentielles.⁹⁴

M. Heimler critique cette décision à juste titre parce qu'elle met l'accent sur l'ampleur des remises accordées par 3M à différents clients importants mais n'analyse pas sa capacité à exclure des concurrents. Convaincu que la preuve apportée des pertes subies par un concurrent suffisait, le tribunal s'en est contenté pour l'essentiel et a conclu que les remises liées de 3M *pourraient* exclure de certains secteurs du marché des concurrents aussi efficaces qui ne fabriquent pas une gamme de produits aussi diversifiée.⁹⁵ Toutefois, aucune attention particulière n'a été accordée au fait que les remises de 3M *auraient* obligé une entreprise aussi efficace à appliquer des prix inférieurs à ses coûts. Selon l'opinion contradictoire, le tribunal a simplement présumé que le défendeur avait exercé des pratiques illicites parce que la situation de LePage's s'était détériorée. En d'autres termes, le contradicteur a accusé la majorité de protéger un concurrent et pas nécessairement de protéger la concurrence.

Concrètement, l'application du test de l'entreprise aussi efficace dans des affaires de remises liées pose problème car elles portent sur différents marchés de produits ce qui fait que la notion d'entreprise aussi efficace est loin d'être évidente. « Aussi efficace » pourrait signifier que l'entreprise hypothétique produit toutes les mêmes lignes de produits que le défendeur et est aussi efficace pour chacune d'elles. Mais cette définition exige en effet qu'un véritable concurrent mondial pénètre plusieurs autres marchés de produits à côté de celui qu'il souhaite effectivement pénétrer de sorte qu'il puisse avoir la possibilité de s'aligner sur la stratégie de remises liées du défendeur. En d'autres termes, elle tolère que les défendeurs érigent des barrières à l'entrée qui obligent leurs concurrents à pénétrer plus d'un marché à la fois. Autrement, « aussi efficace » pourrait signifier que l'entreprise hypothétique produit, ou est aussi efficace, pour la production d'un seul produit sur le marché concerné. Toutefois, cette définition prive le défendeur de toute possibilité de profiter des efficacités qui sont susceptibles d'exister précisément parce que son activité concerne plusieurs lignes de produits. En d'autres termes, elle prive le défendeur du droit de répercuter sur les clients les économies qui peuvent être réalisées du fait qu'ils achètent une série de produits en une fois.

Une variante de l'analyse des prix d'éviction est susceptible de constituer une solution intéressante à première vue à ce problème, au moins à des fins de disculpation des défendeurs. Si le prix restait supérieur aux coûts même après l'application de toutes les remises liées accordées sur ce produit qui met le défendeur en concurrence, l'entreprise aussi efficace qui n'était présente que sur ce marché ne serait pas exclue et ces pratiques sembleraient ne pas être considérées comme illicites. Dans le cas où le prix net obtenu s'avèrerait, en revanche, inférieur aux coûts le problème que constitue l'absence de prise en compte des efficacités multi-produits du défendeur continuerait à se poser, ce qui expliquerait que le test semble avoir comme seul intérêt de disculper les défendeurs mais pas de les incriminer.

Toutefois, Greenlee, Reitman et Sibley parviennent à la conclusion que cette analyse est peu susceptible de présenter un intérêt dans des affaires de remises liées, à condition que l'objectif de telles mesures soit de promouvoir le bien-être des consommateurs. Ce travail théorique montre que les remises liées peuvent accroître ou diminuer le bien-être des consommateurs et que des entreprises aussi efficaces peuvent être exclues dans l'une et l'autre situation. Par ailleurs, des entreprises aussi efficaces peuvent être exclues par le biais de remises liées même lorsqu'il n'y a pas de renoncement à des bénéfices à court terme.⁹⁶ Ainsi leurs travaux peuvent être considérés comme une recommandation qui s'oppose à

l'utilisation du test de renoncement à des bénéfices ou du test de l'entreprise aussi efficiente dans les affaires de remises liées.

En tout cas, les informations contenues dans l'avis formulé sont insuffisantes pour appliquer correctement le test de renoncement à des bénéfices, dans la mesure où le tribunal n'a pas examiné la question de savoir si les remises de 3M auraient suffisamment stimulé la demande pour rendre les remises rentables même si LePage's s'était aligné sur celles-ci. D'autre part, les informations disponibles sont quasiment insuffisantes pour réaliser un test de mise en balance concernant le bien-être.

De plus, Werden reconnaît qu'il est « discutable que le test d'absence de justification économique ait été bien adapté aux remises liées qui font l'objet de l'affaire *LePage's*. Ces remises conduisent à une forme de discrimination des prix qui peut les rendre rentables, même indépendamment de toute tendance à éliminer la concurrence, et il est peut-être impossible de faire une distinction entre les bénéfices liés à la discrimination et ceux liés à une élimination de la concurrence. »⁹⁷

Pour ce qui est du test d'Elhauge, il ne semble pas difficile de satisfaire aux étapes (i) et (ii) du test dans cette affaire. Les remises sont discriminatoires à l'égard des concurrents puisque les remises ne sont pas accordées aux clients qui n'achètent pas à 3M tous les produits commercialisés par 3M et il existe des preuves qui montrent que ces remises ont renforcé le monopole de 3M sur le marché du ruban adhésif. Le tribunal a écarté l'existence d'efficacités provenant de la vente de multiples produits aux clients de sorte que la réponse à l'étape (iii) semble être qu'il n'existe une incidence sur la position dominante que s'il existe une amélioration de l'efficacité de 3M. Enfin, si les remises créent des barrières à l'entrée en obligeant les concurrents à disposer d'une gamme de produits similaire pour lutter contre le regroupement des remises, et, étant donné que le tribunal est parvenu à la conclusion que l'efficacité de LePage's a été mise à mal par les remises, il semblerait que le passage de l'étape (iv) soit également assuré. Il est donc possible de considérer que LePage's aurait réussi le test d'Elhauge.

Néanmoins, certains lecteurs continueront sans doute de penser que le principal argument de 3M semble être convaincant, à savoir que la société n'a pas appliqué de prix inférieurs aux coûts ce qui démontrerait que 3M améliorerait uniquement son efficacité. Toutefois, étant donné que le tribunal a écarté les efficacités multi-produits, si le seul argument de 3M est qu'elle a amélioré son efficacité en rapprochant ses prix des coûts marginaux sans qu'ils soient inférieurs à ceux-ci il est encore possible de conclure en faveur de LePage's selon le test d'Elhauge. Toutefois, la question est de savoir s'il existe un moyen moins restrictif qui soit un élément composant du test. On pourrait considérer que le fait que les remises accordées soient fonction des achats réalisés par les clients dans d'autres lignes de produits sur lesquelles son seul concurrent sur le marché du ruban adhésif n'était pas présent, 3M a exploité un moyen inutilement restrictif pour améliorer son efficacité. Au bout du compte, la société aurait pu accorder, sans perte d'efficacité, le même montant de remises sans que celles-ci soient liées.⁹⁸

4.2 Arrangement restrictif de l' Irish League of Credit Unions

Dans une affaire récente d'abus de position dominante portée devant la Haute Cour d'Irlande, la décision prononcée a été que l'association de caisses de crédit avait appliqué un arrangement restrictif illicite.⁹⁹ L'Autorité de la concurrence a soutenu que la Irish League of Credit Unions (ILCU) avait abusé de sa position dominante sur le marché des services de représentation des caisses de crédit en appliquant un accord qui liait l'adhésion à l'ILCU à un programme de protection de l'épargne très prisé et un produit d'assurance. L'Autorité a affirmé également que cet accord décourageait l'entrée et le développement d'associations de caisses de crédit. Le tribunal a pleinement approuvé, estimant non seulement que l'accord concernait des achats liés anticoncurrentiels mais qu'il n'avait aucune justification économique compensatoire. Il a donc été considéré que l'ILCU enfreignait la section 5 de la Loi sur la concurrence de 2002 qui correspond à l'article 82 du Traité de la CE.

Le programme de protection de l'épargne a été mis en place en tant que fonds de stabilisation pour les caisses de crédit membres. Celles-ci ont dû faire des apports monétaires pour permettre en contrepartie d'accorder une aide financière discrétionnaire aux membres qui sont confrontés à des difficultés et d'effectuer des paiements en faveur des épargnants en cas de faillite de leur caisse de crédit. Le programme de protection de l'épargne a été le seul programme de ce type en Irlande et les caisses de crédit ont considéré que participer à ce programme était très souhaitable en raison de la confiance qu'il suscitait envers elles auprès des consommateurs. Le règlement de l'ILCU précisait que la participation au programme de protection de l'épargne était réservée aux caisses de crédit qui adhéraient à l'ILCU.

Une autre disposition de l'ILCU obligeait tous les membres à acheter les contrats d'assurance-vie par l'intermédiaire de la filiale à 100 % d'ILCU, ECCU. Lorsque plusieurs caisses de crédit ont cherché à obtenir une autre couverture d'assurance car ils estimaient que les tarifs d'ECCU étaient trop élevés, l'ILCU a réagi en les poussant à résilier leur affiliation. La désaffiliation les aurait alors privé de l'accès au programme de protection de l'épargne. Ce qui plus est le règlement de l'ILCU prévoyait que si une caisse de crédit cessait d'être membre pour quelque raison que ce soit elle perdait toutes les contributions qu'elle avait faites en faveur du programme de protection de l'épargne.

Une autre association de caisses de crédit en Irlande, CUDA, a été constituée en 2001. Elle avait une part de marché de cinq pour cent environ mais la majorité de ses membres a choisi de rester également membre de l'ILCU. La Cour a estimé que la question primordiale était de savoir si CUDA, ou toute autre entité, pouvait également créer un service comparable au programme de protection de l'épargne de l'ILCU ; les éléments disponibles ont montré que ce n'était pas le cas, sauf si l'entité pouvait regrouper suffisamment de membres pour atteindre la masse critique nécessaire pour assurer un financement stable suffisant. La Cour a conclu toutefois que les dispositions du règlement de l'ILCU concernant le programme de protection de l'épargne dissuadaient les membres de s'orienter vers une autre association.

La Cour est parvenue à cette conclusion lorsqu'elle a examiné la question de savoir si le règlement de l'ILCU était constitué d'arrangements restrictifs illicites. L'orientation donnée par l'article 82(2)(d) qui cite un exemple qualifiant la notion d'abus n'est pas particulièrement intéressante : « subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats. » Ce qu'on entend par le terme « lien » est flou. Est-ce que le fait d'acheter un chapeau a un lien avec le fait d'acheter une écharpe, par exemple ? Les achats d'automobiles ont-ils un lien avec les achats de GPS ? La Cour a tranché ce problème en consultant les Lignes directrices sur les restrictions verticales de la Commission européenne et a établi que deux produits sont distincts dès lors que les acheteurs les achètent sur deux marchés séparés en absence d'arrangements restrictifs.¹⁰⁰

La Cour a conclu ensuite qu'ILCU appliquait en fait un « arrangement restrictif double » pour maintenir et tirer parti de sa position dominante.¹⁰¹ L'adhésion à l'ILCU était liée au programme de protection de l'épargne et les contrats d'assurances d'ECCU étaient liés à l'adhésion à l'ILCU. Les caisses de crédit pouvaient ne pas souhaiter appartenir à l'ILCU ou pouvaient uniquement souhaiter acheter des contrats d'assurance autres que ceux d'ECCU à un coût moins élevé. Si elles confirmaient l'un ou l'autre choix elles perdaient accès au programme de protection de l'épargne et sacrifiaient les apports qu'elles avaient réalisés en faveur du programme. Le coût qu'impliquait le passage à une autre organisation s'en trouvait relevé ce qui contribuait à affaiblir la concurrence sur le marché des services de représentation des caisses de crédit.

Ensuite, la Cour s'est penchée sur la question de savoir si l'ILCU disposait d'une justification objective pour son arrangement restrictif. Elle a commencé par une description qui s'apparentait à la version de la disproportionnalité du test de mise en balance du bien-être des consommateurs déclarant que « la Cour doit poursuivre son enquête pour établir s'il existe une justification objective ou non à

l'affirmation de l'ILCU selon laquelle les dispositions du règlement et les pratiques sont disproportionnées par rapport au but qui est de légitimer des objectifs coopératifs [...]” Ensuite, sans établir que les pratiques avaient des objectifs légitimes la Cour a statué que « la sanction imposée à toute caisse de crédit qui résilie son affiliation à l'ILCU est disproportionnée »¹⁰² L'emploi du terme « disproportionné » est malencontreux car il donne l'impression que la Cour se livre à une évaluation subjective. En fait, la Cour n'a pris en considération que les aspects négatifs des pratiques d'ILCU parce que les éléments de preuve n'appuyaient aucune déduction positive. (L'ILCU se nuisait à elle-même en refusant d'accepter des non-membres dans le programme de protection de l'épargne car ils auraient accru la solidité et la stabilité financière du programme). Ainsi aucune mise en balance n'était nécessaire à première vue puisque les éléments de preuve allaient tous dans le même sens.

De plus, bien que les avocats impliqués dans l'affaire semblent avoir tenté d'empêcher la Cour de se laisser aller à utiliser des notions telles que « règles du jeu équitables » ou « considérations équitables » celle-ci n'a pas pu résister à la tentation, précisant que « ce sont des notions auxquelles il convient d'accorder une certaine importance au moins dans l'argumentation des justifications objectives. »¹⁰³ C'était lancer la balle aux partisans des mises en balance qui affirment qu'il s'agit d'un processus inévitablement subjectif parce qu'il n'existe pas de définition objective de « règles du jeu équitables ». Les décisions qui seront dépendantes de ces notions seront donc plus imprévisibles que celles qui ne le seront pas.

Le résultat dans l'affaire *ILCU* est sans doute correct du point de vue des politiques mais la façon dont il a été atteint est aussi importante, si ce n'est plus, compte tenu de l'impact de cette décision qui fait jurisprudence. L'application pure et simple, explicite, d'un autre test examiné plus haut aurait pu conduire à un processus plus transparent et prévisible. Le test de l'entreprise aussi efficiente, par exemple, s'avérerait tourner à la défaveur d'ILCU dans la mesure où les pratiques de celle-ci auraient eu tendance à exclure une association de caisses de crédit hypothétiquement plus efficiente, en s'attachant les caisses de crédit par le biais de l'arrangement restrictif que constitue le programme de protection de l'épargne. Même si l'entreprise aussi efficiente était définie comme une association de caisses de crédit plus efficiente dotée d'un aussi bon programme de protection de l'épargne les pratiques de l'ILCU pourraient exclure cette entreprise aussi efficiente à cause de la condition stipulant que les caisses de crédit qui se séparent de l'ILCU perdent les apports qu'elles ont réalisés en faveur programme de protection de l'épargne de l'ILCU.

Le test d'Elhaug irait dans le même sens. L'ILCU a exercé des pratiques discriminatoires à l'égard de concurrents en refusant de traiter avec des caisses de crédit qui n'étaient pas ses propres clients. Ses pratiques ont contribué à maintenir sa position dominante sur le marché des associations de caisses de crédit. Ces pratiques n'ont entraîné absolument aucune amélioration de l'efficacité de l'ILCU et ont en réalité affaibli la solvabilité de son programme de protection de l'épargne. Enfin, les pratiques de l'ILCU ont réduit l'efficacité des concurrents en entravant leur expansion et en les empêchant d'atteindre la masse critique nécessaire pour constituer leur propre programme de protection de l'épargne.

4.3 Obligation d'aider les concurrents

Trinko

Dans l'affaire *Verizon Communications, Inc./Trinko*, la Cour suprême des Etats-Unis a clarifié les dispositions légales sur l'obligation d'assister ses concurrents, mais elle a eu recours à une diversité de normes qui a laissé intacte l'incertitude considérable liée à la législation sur la création de monopole, en général.¹⁰⁴ L'affaire résulte de l'obligation prévue par la loi sur les télécommunications de 1996 visant à introduire la concurrence sur les marchés de services locaux de téléphonie qui impose aux opérateurs locaux historiques de téléphonie de partager leurs réseaux avec les concurrents. C'est la raison qui explique qu'une société dénommée ILEC (intégrée ultérieurement à Verizon) a conclu des accords d'interconnexion

avec ses concurrents et mis à leur disposition des infrastructures destinées à traiter les ordres des clients. Toutefois des plaintes qui avaient pour objet l'incapacité d'ILEC de remplir sur la même base les ordres des concurrents ont conduit à un jugement expédient en application de la Loi sur les télécommunications. Un jour après l'entrée en vigueur de cet arrêt, Trinko – le client d'un concurrent – a déposé une plainte en vertu de la législation antitrust. Elle prétendait que les mêmes pratiques qui avaient conduit au jugement expédient enfreignaient la section 2 de la loi Sherman, décourageant les clients d'utiliser les services des concurrents et entravant ainsi la capacité des concurrents à entrer et rivaliser sur le marché.¹⁰⁵

La Cour a expliqué que la loi Sherman n'impose aucune obligation générale aux monopoleurs de partager la source de leur avantage avec des concurrents parce que ce faisant ils entreraient en conflit avec l'objectif sous-jacent de la loi antitrust. Une telle obligation pourrait notamment réduire l'incitation du monopoleur, du concurrent, ou des deux à investir en premier lieu dans des installations présentant un intérêt économique. Par ailleurs, l'application de cette obligation demanderait aux tribunaux « d'agir comme des planificateurs centraux, de définir le juste prix, des quantités adaptées et d'autres conditions de transaction – ce qui est un rôle inapproprié pour eux. »¹⁰⁶

Néanmoins, la Cour a reconnu que des exceptions à la règle générale ont été faites dans le passé, notamment dans la décision *Aspen Skiing*, selon laquelle la section 2 exigeait qu'une entreprise en particulier rétablisse un accord commercial qui avait été rompu avec un concurrent.¹⁰⁷ Exposant le raisonnement que sous-tend la décision *Aspen*, la Cour a d'abord précisé qu'il existait des relations commerciales antérieures entre les deux sociétés dans cette affaire. Ensuite, la Cour a mentionné que le défendeur dans la décision *Aspen* refusait de traiter avec le plaignant même aux mêmes conditions qu'il appliquait avec ses clients détaillants. Ces faits étayaient la conclusion selon laquelle le défendeur était « prêt à renoncer à des bénéfices à court terme pour atteindre une fin anticoncurrentielle. »¹⁰⁸ Finalement la Cour a indiqué que le défendeur dans *Aspen* avait refusé de fournir à son concurrent des services qu'il était prêt à fournir au public.

La Cour a précisé ensuite qu'aucun de ces éléments ne s'appliquait à l'affaire *Trinko*. Il n'existait entre Verizon et ses concurrents aucune relation antérieure. Il n'a pas pu être déduit que Verizon renonçait à des bénéfices en ne coopérant pas entièrement parce que le prix qu'il aurait reçu n'était pas un prix qu'il fixait lui-même mais un prix basé sur les coûts qui était imposé par la réglementation. Enfin, le service concerné dans *Trinko* n'était pas proposé au public. En fait, l'unique raison pour laquelle Verizon le proposait à des concurrents était que la loi sur les télécommunications l'obligeait à le faire. Ainsi, comme la situation ne correspondait pas à celle de l'exception définie dans l'arrêt *Aspen*, la Cour a confirmé le rejet de la plainte de Trinko puisque celle-ci ne parvenait pas à formuler une plainte ayant pour objet un motif établi en vertu de la loi Sherman. Il en résulte que même si toutes les allégations que Trinko formulait dans sa plainte étaient censées être vraies elles n'auraient pas suffi à étayer une décision selon laquelle Verizon avait créé un monopole de manière illicite sur le marché en question. En d'autres termes, Trinko n'a nullement été proche de remporter l'affaire.

Dans l'affaire *Trinko*, plusieurs normes entrent en jeu, en particulier dans la description que fait la Cour de la décision *Aspen*. La première (concernant les premières relations entre le défendeur et son concurrent) est exactement la même que celle qu'Elhauge a critiqué parce qu'elle décourage pour toujours les monopoleurs à traiter avec des concurrents afin d'éviter d'être obligé à le faire perpétuellement.¹⁰⁹ La Cour a donné de l'envergure, en tous cas, à cette norme en l'utilisant pour établir une distinction entre les faits incriminés dans l'affaire *Trinko*.

La deuxième raison qui justifie la décision *Aspen* ressemble à la première partie du test d'Elhauge (pratiques discriminatoires envers des concurrents) avant de passer à une formulation qui semble avaliser le test de renoncement à des bénéfices. Cependant, un problème habituel de ce test reste sans réponse, à savoir l'absence d'orientation intéressante donnée par la Cour concernant la signification de l'expression

« une fin anticoncurrentielle ». Porter préjudice à un concurrent ne peut pas toujours être considéré comme une « fin anticoncurrentielle » même si cela nécessite le sacrifice de bénéfices puisque, comme il a déjà été mentionné, ces pratiques accroissent parfois le bien-être social. La troisième justification invoquée est évidemment identique à celle de la première partie du test d'Elhauge mais c'est là leur dernier point commun.

Il importe de noter que la décision déclarait également qu'*Aspen* se situe « à la limite extérieure ou à proximité » des affaires dans lesquelles un refus de coopérer avec des concurrents peut constituer une violation de la section 2.¹¹⁰ Ainsi, le tribunal s'est servi de deux normes qui posent problème en général et d'une partie d'une troisième norme éventuellement méritoire pour ensuite jeter le doute sur elles toutes en disant que l'affaire était atypique. Il laisse de cette façon une impression floue sur la façon d'identifier les affaires qui se situent à la limite de la responsabilité définie par la section 2.

Si la Cour avait appliqué le test d'Elhauge l'enquête se serait achevée à l'étape (i) car les pratiques concernées ne peuvent être considérées comme ayant eu un caractère discriminatoire à l'égard des concurrents de Verizon (car Verizon ne traitait pas avec des non-concurrents, non plus). Le résultat de l'absence de discrimination implique qu'il n'existe pas de violation selon ce test, ainsi le test d'Elhauge aurait conduit au même résultat que celui de la Cour mais l'analyse aurait été plus facile et plus prévisible. En fait, il n'y aurait vraisemblablement jamais eu de décision à prendre en premier lieu si un test comme celui d'Elhauge avait été avalisé dans le passé par la Cour étant donné que le plaignant aurait su à l'avance que sa plainte n'aurait aucune chance d'être retenue.

Il n'est pas possible de savoir ce que le test de renoncement à des bénéfices ou le test d'absence de justification économique auraient donné dans l'affaire *Trinko* sur la base des faits exposés dans la décision parce que la plainte du plaignant a été rejetée avant que des éléments de preuve aient été examinés. Nous ne pouvons pas déterminer, par exemple, si les frais d'interconnexion reçus par Verizon étaient supérieurs aux coûts. Cela ne nous permet pas d'établir si Verizon a sacrifié des bénéfices en retardant ou refusant l'exécution d'ordres de clients de ses concurrents. L'absence d'éléments de preuve dans cette affaire pose les mêmes problèmes concernant l'application du test de mise en balance du bien-être des consommateurs.

De manière surprenante, il est possible que Verizon aurait échoué au test de l'entreprise aussi efficiente, à condition qu'on entende par entreprise aussi efficiente que celle-ci est justement aussi efficiente que Verizon à tous égards, sauf qu'elle ne dispose pas d'infrastructures ni de réseau local. Ensuite il aurait fallu également montrer que les pratiques de Verizon avaient tendance à évincer l'entreprise aussi efficiente. Il semble un peu insensé de s'attendre à ce que les concurrents créent leur propre réseau local identique de téléphonie pour ne pas être dépendants d'un accord d'interconnexion avec une entreprise qui détient un monopole naturel. C'est sans doute une raison pour laquelle Le Congrès a adopté la loi sur les télécommunications. En tout cas, l'affaire *Trinko* n'est pas très utile en tant que passerelle vers une norme générale plus précise pour les pratiques unilatérales.

5. Conclusion

Les politiques de la concurrence se trouveraient renforcées si les tribunaux et les organismes renonçaient à utiliser des expressions vides de sens telles que « compétition par les mérites ». En même temps, ils doivent redoubler leurs efforts pour définir des critères précis à appliquer dans les affaires d'abus de position dominante ou de création de monopole. Avec des normes établies plus transparentes et prévisibles, la législation en vigueur serait certainement mieux respectée car les sociétés seraient davantage en mesure de se discipliner elles-mêmes.

Il faut toutefois accepter qu'il n'existe pas de test parfait unique. Elhauge, par exemple, reconnaît que son test n'est pas sans défaut.¹¹¹ Werden lui aussi reconnaît que l'intérêt que présente le test de l'entreprise

aussi efficiente est variable selon la difficulté à déterminer si les pratiques ont ou non une justification économique autre que leur tendance à éliminer la concurrence.¹¹²

Par ailleurs, on doit admettre que les tests quels qu'ils soient conduisent à des conclusions erronées dans une série d'affaires, sans préconiser qu'il est vain de rechercher de meilleurs critères. Le coût d'erreurs commises peut être largement compensé par les avantages d'un processus rationalisé, compréhensible, prévisible qui parvient le plus souvent à un résultat correct dans les affaires complexes et systématiquement dans les affaires simples. Ce point de vue est soutenu par Gavil qui estime que « la plupart des affaires seront écartées avant d'être jugées en raison de lacunes dans les affirmations du plaignant concernant le pouvoir ou les effets de monopole [sur la concurrence]. Dans la mesure où un petit nombre d'affaires seront poursuivies la plupart seront tranchées sur la base de preuves faisant apparaître un déséquilibre, de nombreux préjudices et peu ou pas d'efficacité ou bien peu de préjudices et une efficacité importante. »¹¹³ Si c'est vrai seule une petite fraction d'affaires pose la question épineuse des mesures à prendre concernant les pratiques qui produisent de toute façon à la fois des efficacités et inefficacités substantielles. De plus, la seule alternative semble être l'existence de règles complexes, onéreuses et imprévisibles qui visent à la perfection dans chaque affaire mais n'y parviennent pas toujours.

Il est trop tôt pour dire qu'il existe actuellement un meilleur test disponible. Le débat reste intense et les universitaires ne cessent de fournir d'excellentes réflexions et critiques. Les organismes devraient s'y associer et contribuer à ces échanges d'idées.

NOTES

1. OCDE (2005), Predatory Foreclosure, voir à <http://www.oecd.org/competition>, Executive Summary p. 7.
2. William Shakespeare, *Measure for Measure*, acte II, scène 2.
3. “Dominant” est en l’occurrence un terme général qui est censé englober tous les seuils fixés par la législation régissant les pratiques unilatérales dans les pays membres de l’OCDE. Par conséquent, ce terme recouvre aux fins de la présente Note la norme qui définit une position dominante mais aussi le seuil de pouvoir de marché, par exemple, ainsi que d’autres références qui sont utilisées actuellement. La définition de la position dominante, du pouvoir de marché, etc. sont des questions distinctes qui n’entrent pas dans le champ de la présente note. En revanche, celle-ci se penche sur la question de savoir de quelle façon déterminer si les pratiques d’une entreprise qui a déjà été jugée en position dominante doivent être considérées comme préjudiciables à la concurrence.
4. *Par exemple*, John Vickers, “Abuse of Market Power,” Discours lors de la 31ème conférence de l’Association européenne pour la recherche en économie industrielle, Berlin (3 septembre 2004), disponible à l’adresse www.oft.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf; Brian Sher, “The Last of the Steam-Powered Trains: Modernising Article 82,” 25 European Competition Law Review 243, 243 (2004) (il indique que “l’art. 82 est le dernier élément du droit de la concurrence européen qui n’a pas été modernisé,” qu’il n’y a pas de “cohérence interne au niveau de l’application,” et qu’ “il n’existe plus de fondement cohérent au niveau des politiques pour appliquer l’art. 82”); Sven Völcker, “Developments in EC Competition Law in 2003: An Overview,” 41 Common Market Law Review 1027, 1048 (2004) (il affirme que la loi en vertu de l’article 82 “ne fournit pas actuellement d’approche globale cohérente et ne participe pas pour l’essentiel à la focalisation de plus en plus importante sur l’analyse économique qui caractérise l’évolution de la loi et son application en vertu de l’article 81”).
5. *Par exemple*, Einer Elhauge, “Defining Better Monopolization Standards,” 56 Stanford Law Review 253 (2003);_ Andrew Gavil, “Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance,” 72 Antitrust Law Journal 3 (2004); Steven Salop, “Section 2 Paradigms and the Flawed Profit-Sacrifice Standard,” __ Antitrust Law Journal __ (à paraître 2005).
6. *Voir, par exemple*, Akinori Uesugi, “Recent Developments in Japanese Competition Policy: Prospect and Reality,” discours tenu devant l’Ordre des avocats américain (24 janvier 2005) (examine les modifications de la loi antitrust du Japon et observe que pour encourager l’entrée dans les secteurs récemment déréglementés, la Fair Trade Commission du Japon veille de plus en plus au respect de la loi sanctionnant l’abus de position dominante).
7. OCDE (2005), Predatory Foreclosure, voir à <http://www.oecd.org/competition>.
8. *Par exemple*, Eleanor Fox, “We Protect Competition, You Protect Competitors,” 26 World Competition 149 (2003); Gavil, *supra* n.5.
9. Fox, *supra* n.8 p. 150.
10. Vickers, *supra* n.4 p. 23.
11. Gavil, *supra* n.5 p. 17.
12. *Id.* p. 81.
13. Eleanor Fox, “What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect,” 70 Antitrust Law Journal 371, 372 (2002) (note de bas de page omise).

14. Barry Hawk, Discours devant la Cour de Cassation, Paris (24 février 2005), p. 9, dossier de la Division de la concurrence.
15. Fox, *supra* n.8 p. 151-155; Fox, *supra* n.13 p. 382.
16. Philip Lowe, Discours lors de la 30ème Conférence annuelle sur les lois et les politiques internationales antitrust (23 octobre 2003), p. 6-7.
17. Vickers, *supra* n.4; Alberto Heimler, “Pricing Below Cost and Loyalty Discounts: Are they restrictive and if so when?,” monographie (2004), disponible à l’adresse <http://ssrn.com/abstract=634723>; Sher, *supra* n.4 p. 245 (qui demande instamment une interprétation de l’article 82 “cohérente avec la pensée économique moderne et l’objectif fondamental qui est de protéger le bien-être des consommateurs”).
18. OCDE (2005), Predatory Foreclosure, voir à <http://www.oecd.org/competition>.
19. Fox, *supra* n.8 p. 149; Fox, *supra* n.13 p. 372.
20. La Section 2 dit : “ Quiconque crée un monopole, ou tente de créer un monopole, ou s’associe ou est complice d’une personne ou de personnes, en vue de monopoliser une partie du commerce ou des échanges entre plusieurs Etats, ou avec des nations étrangères, doit être jugé coupable d’une infraction majeure[.]”
21. Le texte de l’article 82 est le suivant : “Est incompatible avec le marché commun et interdit, dans la mesure où le commerce entre Etats membres est susceptible d’en être affecté, le fait pour une ou plusieurs entreprises d’exploiter de façon abusive une position dominante sur le marché commun ou dans une partie substantielle de celui-ci. Ces pratiques abusives peuvent notamment consister à :
 - (a) imposer de façon directe ou indirecte des prix d’achat ou de vente ou d’autres conditions de transaction non équitables,
 - (b) limiter la production, les débouchés ou le développement technique au préjudice des consommateurs,
 - (c) appliquer à l’égard de partenaires commerciaux des conditions inégales à des prestations équivalentes, en leur infligeant de ce fait un désavantage dans la concurrence,
 - (d) subordonner la conclusion de contrats à l’acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n’ont pas de lien avec l’objet de ces contrats.”
22. L’expression “concurrence par les mérites” apparaît pour la première fois dans la jurisprudence dans l’affaire *Northern Pacific Railway Co./ United States*, 356 U.S. 1, 6 (1958).
23. Affaire T-228/97, *Irish Sugar/Commission*, [1999] ECR II-2969, paragraphe 111.
24. *LePage’s Inc /3M*, 324 F.3d 141, 147 (3d Cir. 2003).
25. *Aspen Skiing Co./Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (citation de 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* 78 (1978)).
26. Affaire 85/76 *Hoffman-La Roche & Co/Commission*, 1979 E.C.R. 461, [1979] 3 C.M.L.R. 211, paragraphe 91 (italiques ajoutés).
27. *United States/ Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).
28. Voir Elhauge, *supra* n.5 p. 263 (“Pourquoi ne relève-t-il pas simplement du bon sens en affaires de refuser de partager un produit supérieur avec des concurrents pour les évincer du marché ?”). Le même genre de question pourrait être posé concernant les remises de fidélité, par exemple.
29. *Fisher & Paykel Ltd v Commerce Commission*, [1990] 2 NZLR 731.
30. Elhauge, *supra* n.5 p. 255.
31. *Id.* p. 264-65 (citations omises).
32. Fox, *supra* n.13 p. 383; voir également Hawk, *supra* n.14 (critique les tribunaux des Etats-Unis et de l’UE à propos de l’usage qu’ils font d’appellations insuffisamment fondées qui n’offrent aucune orientation

solide dans des affaires complexes d'abus de position dominante ou de création de monopole qui concernent des pratiques obscures en matière de concurrence).

33. Vickers, *supra* n.4 p. 6.
34. Elhauge, *supra* n.5 p. 266.
35. Concernant diverses hypothèses plus élaborées dans l'application du test de renoncement à des bénéfices, voir Salop, *supra* n.5.
36. Une forme stricte du test de renoncement à des bénéfices ne sanctionnerait pas seulement les prix inférieurs aux coûts mais tous les prix inférieurs au niveau de maximisation à court terme qu'ils incluent un montant de bénéfices ou non. Pour un examen couvrant les inconvénients de l'obligation de maximisation des bénéfices à court terme dans les affaires d'éviction, voir OCDE (2005), Predatory Foreclosure, voir à <http://www.oecd.org/competition>, note de référence p. 24.
37. Voir, par exemple, Janusz Ordover & Robert Willig, "An Economic Definition of Predation: Pricing and Product Innovation," 91 Yale Law Journal 8, 9-10 (1981); Robert Bork, The Antitrust Paradox 144 (1978).
38. Pour plus de détails sur l'éviction à bon compte, voir Susan Creighton, Speech to Charles River Associates 9th Annual Conference (Washington, D.C.) (8 février 2005), disponible à l'adresse www.ftc.gov/speeches/creighton/050425cheapexclusion.pdf
39. Elhauge, *supra* n.5 p. 278-79.
40. *Id.* p. 292 (italiques dans l'original).
41. Elhauge a reconnu ce point ultérieurement et conclut à juste titre que même ainsi le test de renoncement à des bénéfices est trop large et trop étroit. Voir *id.* at 293. Salop formule le même type de thèse et de constat que Elhauge. Salop, *supra* n.5.
42. Salop, *supra* n.5.
43. OECD (2005), Predatory Foreclosure, voir à <http://www.oecd.org/competition>.
44. Gregory Werden, "The 'No Economic Sense' Test for Exclusionary Conduct," ____ Journal of Corporation Law ____ (à paraître 2005).
45. Voir, par exemple, Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Verizon Communications Inc. v. Trinko*, 540 U.S. 398 (2004), disponible à l'adresse www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf; Brief of the Appellees United States and the States Plaintiffs at 48, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), disponible à l'adresse www.usdoj.gov/atr/cases/f7200/7230.htm; Brief for the United States at 26 (version rédigée), *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005), disponible à l'adresse www.usdoj.gov/atr/cases/f202100/202141.htm. Voir également R. Hewitt Pate, "The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct," discours prononcé lors de la 30th Annual Conference on International Antitrust Law and Policy, New York (23 octobre 2003), p. 5, disponible à l'adresse www.usdoj.gov/atr/public/speeches/202724.htm (indique que la Division considère le test de l'absence de justification économique "utile" dans de nombreux contextes, bien qu'il n'englobe pas obligatoirement tous les types de pratiques qui peuvent enfreindre la Section 2 de la loi Sherman).
46. Werden, *supra* n.44.
47. *Id.*
48. Voir, par exemple, Damien Geradin, "Limiting the Scope of Article 82 EC," 41 Common Market Law Review 1519, 1542 (2004) (qualifiant les tests de mise en balance "d'intrinsèquement non fiables et non prévisibles," au moins dans les affaires d'accès obligatoire).
49. C'est l'essentiel du débat entre les professeurs Edlin et Elhauge qui était décrit dans la note de référence pour la table ronde précédente sur les pratiques d'exclusion des marchés. Voir OCDE (2005), Predatory Foreclosure, DAF/COMP(2005)14 p. 24; Aaron Edlin, "Stopping Above-Cost Predatory Pricing," 111 Yale Law Journal 941 (2002); Einer Elhauge, "Why Above-Cost Price Cuts to Drive Out Entrants Are Not

- Predatory,” 112 Yale Law Journal 681 (2003). Gavil défend le point de vue de Edlin dans la discussion concernant le test de l’entreprise aussi efficiente. Gavil, *supra* n.5 p. 59.
50. Voir l’avis de A.G. Jacobs dans l’affaire C-7/97, *Oscar Bronner v. Mediaprint*, [1998] ECR I-7791, paragraphe 57 (examine le pour et le contre entre renforcer la concurrence à court terme et la restreindre à long terme en autorisant les concurrents à partager les installations de l’entreprise dominante trop facilement); mais voir Gavil, *supra* n.5 p.43 (indique que l’attrait des profits du monopole n’est en aucun cas toujours nécessaire pour stimuler l’innovation ; il existe de nombreux exemples de secteurs dans lesquels des entreprises innovent sans escompter acquérir un monopole).
 51. Gavil, *supra* n.5 p. 60.
 52. Richard Posner, *Antitrust Law* (2d ed. 2001), pp. 194-195.
 53. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); Salop, *supra* n.5; Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of the Petition for a Writ of Certiorari, p. 14, dans *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), disponible à l’adresse www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf; Phillip Areeda & Herbert Hovenkamp, 3 *Antitrust Law* para. 651(a) (2d ed. 2002).
 54. Salop, *supra* n.5 p. n.15.
 55. Gavil, *supra* n.5 p. 71-72.
 56. Elhauge, *supra* n.5 p. 317.
 57. Voir Gavil, *supra* n.5 p. 72 (“en dépit d’un siècle quasiment d’attachement au concept de “mise en balance” on constate une pénurie notoire d’exemples concernant des tribunaux procédant à des mises en balance de quelque type que ce soit”).
 58. Voir, e.g., Elhauge, *supra* n.5 p. 318-19 (examine l’incapacité du tribunal à appliquer une analyse de mise en balance bien qu’il indique que ce soit le test applicable dans l’affaire *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)); Gavil, *supra* n.5 p. 21-22.
 59. Elhauge, *supra* n.5 p. 253.
 60. Il faut remarquer que cela résout le problème d’occultation qui se pose avec d’autres tests comme le test de renoncement à des bénéfices, puisque Elhauge exige qu’il existe une relation de cause à effet entre l’efficacité déclarée et l’effet préjudiciable sur les concurrents. En d’autres termes, il ne suffit pas que les défendeurs identifient simplement une efficacité imputable à leurs pratiques. Pour qu’elle ne soit pas répréhensible selon le test de Elhauge, l’efficacité déclarée doit elle-même au moins contribuer partiellement à l’effet d’élimination de la concurrence.
 61. *Id.* p. 323.
 62. Gavil est sceptique sur cette position. Dans un article récent, il s’interroge d’un point de vue rhétorique “Est-il correct que l’espoir de profits de monopole soit le principal moteur qui stimule l’innovation et le progrès économique ? Si c’est le cas la plupart des grands chefs d’entreprise sont de doux rêveurs et les incitations pour aiguïser leur sens des affaires sont faibles – car le monopole heureusement demeure une exception, pas une règle, dans la plupart des secteurs Les *bénéfices* et pas les profits de monopole sont le principal éperon de l’innovation qui aiguïse la perspicacité en affaires. Il suffit d’observer le rythme rapide de l’innovation sur les marchés dynamiques et hautement concurrentiels – où il n’existe aucun espoir réel de monopole – pour savoir que quelque chose de plus modeste que l’espoir de monopole semble suffire pour inciter les entreprises à être créatrices. Protéger les monopoles parce qu’il est nécessaire d’encourager l’innovation est une proposition générale douteuse sur laquelle fonder la loi sur la création de monopole[.]”Gavil, *supra* n.5 p. 43 (italiques dans l’original). Même si le point de vue de Gavil semble solide il demeure difficile de mettre en cause la proposition selon laquelle les incitations à innover seraient réduites, même sur des marchés hautement concurrentiels, si les éventuels innovateurs savaient qu’ils seront obligés de partager leurs innovations avec leurs concurrents.
 63. Il convient de remarquer que Elhauge ne tentait pas uniquement de mettre au point un test sensé, gérable et prévisible mais aussi cohérent avec la jurisprudence actuelle des Etats-Unis. C’est pourquoi il a été freiné

par des affaires telles que *Aspen Skiing* qui ont écarté l'idée que les monopoleurs ne doivent jamais traiter avec des concurrents. *Aspen Skiing Co. / Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Toutefois cette décision qui fait jurisprudence ne limite pas l'investigation dans la présente note. En fait, même la Cour suprême des Etats-Unis a récemment fait marche arrière, dans une large mesure, déclarant que la décision *Aspen Skiing* se situe « à la limite extérieure de la responsabilité en vertu du § 2. » *Verizon Communications, Inc. / Trinko*, 540 U.S. 398, 409 (2004). (L'affaire *Trinko* est examinée plus loin.) En tout cas, il est justifié de se demander s'il existe des raisons valables pour exercer des pratiques discriminatoires à l'égard de concurrents en refusant de traiter avec eux aux mêmes conditions que celles appliquées aux autres clients. Il est évident qu'une possibilité est d'éviter de faire quoi que ce soit qui serait susceptible d'aider le concurrent à se développer et à devenir une menace pour le pouvoir de marché de l'entreprise dominante. Cette éventualité nuirait à l'incitation a priori d'innover et d'investir que Elhauge tentait de protéger. C'est pourquoi si la loi permet aux concurrents d'obliger les entreprises dominantes à mettre leur biens à la disposition de toute le monde lorsqu'elles ont choisi de les mettre à la disposition de quelqu'un, il serait logique de décider dans ce cas dans certaines affaires de ne traiter avec personne. Elhauge a fait valoir tout d'abord que « ce type de comportement est invraisemblable et auto-dissuasif car si un monopoleur ne vend pas à *quelqu'un* il ne peut pas faire de bénéfices ni obtenir de retour d'investissement. » Elhauge, *supra* n. 5 p. 314. C'est peut-être juste mais le résultat probable dans cette affaire n'est pas qu'une entreprise investirait dans l'acquisition ou la création de biens souhaitables pour les conserver purement et simplement. Au contraire, il serait logique de décider de ne pas investir dans des biens en premier lieu ce qui correspondrait justement à une perte pour la société. De plus, la thèse d'Elhauge s'avère car si ne vendre à personne est invraisemblable les monopoleurs vendront toujours leurs biens à quelqu'un. Ainsi, en vertu de la règle qu'il établit ils auraient toujours une obligation à traiter avec leurs concurrents, et aux mêmes conditions (sauf si cela produit des inefficiences ex post qu'il décrit ailleurs et qui ne semblent pas être très courantes ; voir *id.* p. 311).

64. La fixation de prix d'éviction n'est pas examinée ici pour deux raisons. Premièrement, des progrès considérables dans l'abandon d'appellations insuffisamment fondées ont déjà été réalisés dans ce domaine, puisque la plupart des tribunaux ont commencé à utiliser des tests relativement bien définis (bien que différents) dans ces affaires. Deuxièmement, la fixation de prix d'éviction a été examinée de façon approfondie dans la table ronde précédente du Comité. Voir OCDE (2005), Predatory Foreclosure, DAF/COMP(2005)14.
65. *Virgin Atlantic Airways Ltd /British Airways*, 257 F.3d 256 (2d Cir. 2001). La plainte a également été déposée en vertu de la Section 1 de la loi Sherman, mais ce motif d'accusation a été rejeté car le plaignant n'avait pas de faits à invoquer pour appuyer la proposition selon laquelle les remises de British Airways faisaient partie d'une action concertée.
66. *Virgin Atlantic Airways Ltd /British Airways*, 257 F.3d p. 266 (citation de *Brooke Group Ltd./ Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993)).
67. *Id.*
68. *Id.* p. 269 (citation de 3A Phillip Areeda & Herbert Hovenkamp, Loi antitrust paragraphe 807f (1996)).
69. Affaire T-219/99 *British Airways/Commission*, (17 décembre 2003). Cette décision fait l'objet d'une action en appel devant la Cour de justice européenne (affaire en instance C-95/04).
70. *Id.* au paragraphe 238.
71. Heimler, *supra* n.17 p. 6.
72. *British Airways v Commission*, paragraphe 241 (citation de l'arrêt *Hoffman-La Roche* au paragraphe 91).
73. *Id.* au paragraphe 243.
74. *Id.* au paragraphe 288.
75. Premièrement, même si ces pratiques ont évincé des concurrents, ceux-ci seraient moins efficaces dans plusieurs cas au moins, ce qui implique que des gains à court terme liés à la fixation de prix et à long terme liés à l'efficacité de la production pourraient plus que compenser une éventuelle augmentation des prix à long terme du fait que peu d'entreprises sont présentes sur le marché ; deuxièmement, certaines

tentatives pourraient ne pas aboutir à évincer un (des) concurrent(s) du marché auquel cas les consommateurs bénéficieraient de prix moins élevés mais ne subiraient aucune perte de concurrence.

76. *British Airways /Commission*, paragraphe 293.
77. *Id.* au paragraphe 297. La juxtaposition de ce raisonnement avec le fait que les concurrents de BA ont accru leur part de marché reste surprenante. Le Tribunal de première instance a certainement eu raison de mentionner que bien que l'activité enregistrée par les concurrents se soit développée il ne faut pas exclure le fait que ceux-ci auraient pu se développer encore plus en l'absence de remises accordées par BA. *Id.* au paragraphe 298.
78. Affaire T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission* (30 septembre 2003) ("*Michelin II*"). Les paragraphes 241-247 de *British Airways* correspondent aux paragraphes 54-59 de *Michelin II*.
79. *Michelin II*, paragraphe 95.
80. *Id.* aux paragraphes. 136-141.
81. *Id.* au paragraphe 109.
82. *Id.* au paragraphe 241.
83. Heimler, *supra* n.17 p. 5.
84. *Id.* p. 1.
85. *Id.*
86. *Id.* p. 11-12.
87. Sher, *supra* n.4 p. 245.
88. *LePage's Inc./3M*, 324 F.3d 141 (3d Cir. 2003).
89. *Id.* p. 169.
90. *Id.* p. 152.
91. *Id.* p. 155 (citation de Phillip Areeda & Herbert Hovenkamp, Antitrust Law, paragraphe 794 p. 83 (Supp. 2002)).
92. *Id.* p. 164.
93. Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 8, No. 02-1865 (mai 2004), *3M / LePage's Inc.*, disponible à l'adresse www.usdoj.gov/atr/cases/f203900/203900.htm.
94. En fait, un conseiller en matière antitrust d'un grand groupe a fait observer que le message sans équivoque de la décision *LePage's* à l'attention des entreprises est qu'elles peuvent lier des transactions à leur propre risque et péril. "Si vous êtes une entreprises multi-produits et que vous avez une position importante sur un ou plusieurs produits, et que vous accordez des remises liées, vous êtes confrontés à l'existence de sérieux préjudices si votre concurrent de taille plus petite ne peut pas suivre le rythme [C'est pourquoi] Les consommateurs ne bénéficieront pas de l'avantage de prix plus faibles grâce à ces systèmes. » Gary P. Zanfagna, "*LePage's v. 3M: A Reality Check*," The Antitrust Source (November 2004), disponible à l'adresse www.abanet.org/antitrust/source/11-04/Nov04-Zanfagna1129.pdf. Ainsi, même si le Third Circuit aurait eu raison d'appliquer des critères plus rigoureux pour conclure en faveur de *LePage's* le fait que sa décision était formulée de telle façon qu'elle créait beaucoup d'incertitude peut laisser les consommateurs dans une situation plus défavorable dans l'ensemble.
95. Heimler, *supra* n.17 p. 14.
96. Patrick Greenlee, David Reitman, & David S. Sibley, "An Antitrust Analysis of Bundled Loyalty Discounts," U.S. Department of Justice Economic Analysis Group Working Paper 04-13 (octobre 2004), disponible à l'adresse http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600799.
97. Werden, *supra* n.44.

98. Pour plus d'informations sur les remises de fidélité, voir OCDE (2002), *Loyalty and Fidelity Discounts and Rebates*, voir à <http://www.oecd.org/competition>.
99. *Competition Authority /Irish League of Credit Unions*, [2003 No. 8608P] (22 octobre 2004).
100. *Id.* p. 154.
101. *Id.* p. 153.
102. *Id.* p. 156.
103. *Id.* p. 158.
104. 540 U.S. 682 (2004).
105. La loi prévoit que "Rien dans la présente loi . . . doit être interprété pour modifier, empêcher ou remplacer l'application . . . de la législation antitrust." *Trinko*, 540 U.S. p. 406 (citation § 601(b)(1) de la Loi sur les Télécommunications).
106. *Trinko*, 540 U.S. p. 407-08.
107. *Aspen Skiing Co. / Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
108. *Trinko*, 540 U.S. p. 409
109. Elhauge, *supra* n.5 at 314. Geradin considère qu'il n'est pas logique de permettre aux fournisseurs en position dominante de couper la route aux entreprises en aval lorsque le fournisseur n'est pas (encore) présent sur ce marché en aval. Geradin, *supra* n.48 p. 1535-36. Dans les décisions *Aspen* et *Trinko*, la société dominante en amont est déjà présente sur le marché en aval.
110. *Trinko*, 540 U.S. p. 409.
111. Elhauge, *supra* n.5 p. 330.
112. Werden, *supra* n.44.
113. Gavil, *supra* n.5 p. 77.

FRANCE

Lorsque des entreprises en position dominante sont confrontées à l'entrée sur le marché de concurrents et qu'elles essaient de défendre leur position, la question se pose de savoir si les moyens auxquels elles ont recours correspondent à un comportement légitime et acceptable.

S'agissant notamment d'entreprises qui détiennent un (quasi-) monopole, on estime en général que leur comportement, surtout unilatéral, ne doit pas excéder les limites d'une « concurrence par les mérites » en évinçant artificiellement la concurrence. Cette notion de concurrence par les mérites est longtemps restée imprécise, même si, ponctuellement, certaines pratiques ont pu clairement être qualifiées d'abus.

Mais les entreprises effectivement ou potentiellement concernées souhaitent connaître les conditions exactes d'opération à respecter pour ne pas finalement se voir sanctionnées, par exemple pour certaines « subventions » accordées à leurs filiales, pour certains refus de négociations ou pour l'imposition de certaines conditions contractuelles à certains partenaires, ainsi que pour l'octroi de primes de fidélité.

En outre, les conceptions d'une « concurrence par les mérites » diffèrent au niveau international, puisque les différents Etats poursuivent des politiques diverses dans le domaine de la concurrence.

Enfin, ces problématiques sont d'un intérêt particulier face aux débats actuels sur la révision de l'article 82 du traité CE.

Dans sa jurisprudence, tant sur le fond qu'en mesures conservatoires ou en avis, le Conseil de la concurrence a successivement affirmé sa conception d'une « concurrence par les mérites ». Représentant un aspect d'un comportement compétitif normal, loyal et légitime, la notion de la « concurrence par les mérites » repose sur un certain nombre de conditions et principes assez précis qui ont été dégagés par le Conseil : ces principes sont définis au cas par cas, en fonction des différentes pratiques dans les différents secteurs concernés et permettent de dégager les limites à respecter pour la sauvegarde d'un équilibre structurel de la concurrence, menacé notamment par les détenteurs de positions dominantes, surtout ceux détenant ou ayant détenu des monopoles légaux.

La présente contribution répond aux questions, telles que posées dans un questionnaire de l'OCDE, concernant la définition et les critères d'une concurrence par les mérites ainsi que leur mise en pratique et leurs justifications dans la jurisprudence française.

On a conservé les titres des paragraphes en anglais, langue de rédaction de ce questionnaire pour des raisons de commodité d'analyse durant les débats. Un tableau annexe détaillé complète la substance de la note permettant d'apprécier la diversité des secteurs et des problèmes traités par la jurisprudence française.

1. "The Current State of Competition on the Merits"

En s'interrogeant sur la position et les fonctions de la notion de la « concurrence par les mérites » dans la jurisprudence française, il apparaît que la conception française semble se distinguer de celle d'autres Etats (a). Ceci permet de préciser ensuite les conditions d'usage de cette notion dans la jurisprudence du Conseil de la concurrence (b).

1.1 « *Aggressive tactical behaviour such as discounting* »

Pour le Conseil de la concurrence, une « concurrence par les mérites » n'inclut pas, comme cela semble être le cas dans d'autres pays non européens (par exemple aux Etats Unis), un « *aggressive tactical behaviour such as discounting* », dans la mesure où les entreprises ayant une position dominante ou se coordonnant au sein d'une entente ne doivent justement ni offrir leurs prestations à des prix prédateurs ni octroyer des rabais dans le seul but d'évincer des concurrents existants ou potentiels. De ce point de vue, l'approche du Conseil reprend la démarche européenne assimilant la promotion de l'innovation à la mise en œuvre de la notion de « concurrence par les mérites ».

Dans la décision n° 97-D-39 du 17 juin 1997 (ayant prononcé des sanctions pécuniaires sanctionnant une entente de pratique des prix de vente inférieurs aux coûts moyens totaux mais supérieurs à leurs coûts moyens variables dans le but d'évincer des concurrents,) le Conseil analyse le danger susceptible d'être entraîné, en considérant

« qu'en effet les entreprises détenant la quasi-totalité du marché et se livrant à une répartition dudit marché n'ont pas d'intérêt à pratiquer des prix inférieurs à leurs coûts totaux et a fortiori à leurs coûts moyens variables si ce n'est pour éliminer un ou des concurrents, pour pouvoir par la suite relever le niveau des prix et tirer parti de la rente ainsi constituée. »¹

L'amélioration successive de la qualité des produits, fruit de l'innovation, qui est l'un des caractères d'une concurrence par les mérites, est aussi prise en compte : le Conseil a ainsi considéré en l'espèce, que « *la remise de couplage accordée aux annonceurs, qui pourraient être tentés de devenir également clients d'une entreprise concurrente, représentait une prime de fidélité qui ne correspondait pas au jeu d'une concurrence par les mérites caractérisée par une baisse sans discrimination du tarif unitaire de vente et pour rendre plus compétitifs ses produits en améliorant la qualité* ».²

1.2 Conditions d'usage de la notion d'une « concurrence par les mérites »

La notion de concurrence par les mérites se justifie aisément à partir du moment où la position dominante n'est pas le fruit de la seule demande sur le marché, mais que cette position est due aux privilèges d'un (ancien) monopole public et donc « héritée sans mérites », ce qui rend notamment possible de recourir à des ressources non accumulées par le libre jeu de la concurrence.

1.2.1 Application de la notion de concurrence par les mérites aux pratiques abusives d'ancien monopoles publics

En premier lieu, la notion de la « concurrence par les mérites » a généralement été utilisée jusqu'ici pour incriminer des abus de position dominante, surtout ceux provenant des anciens détenteurs de monopoles publics, mais aussi des entreprises détenant un monopole légal ou résultant de clauses contractuelles, réservant des droits exclusifs³ ou bien des entreprises qui, en situation de se faire concurrence, se coordonnent (ententes) afin de se répartir le marché⁴.

La notion de la « concurrence par les mérites » paraît ainsi être synonyme d'un « comportement compétitif normal »⁵, « loyal et légitime »⁶.

Ainsi, comme la Commission Européenne, le Conseil de la concurrence adopte une position assez proche de celle qui est qualifiée en Allemagne « *d'ordo-libérale* » en particulier lorsqu'il estime qu'une entreprise dominante sur un marché a la responsabilité particulière de ne pas porter atteinte à la concurrence sur son marché pertinent ou tout autre marché connexe⁷. Cette responsabilité est d'autant plus forte lorsque l'opérateur dominant est un ancien opérateur public ou lorsqu'il est en position de monopole non ou peu contestable. Cette conception se manifeste aussi dans le cadre de pratiques de ciseau tarifaire

ou d'accès à une infrastructure essentielle où le détenteur de l'infrastructure nécessaire à l'activité des autres concurrents est dans une position telle qu'il maîtrise une large partie des coûts de ces concurrents et qu'il détient donc le contrôle de leur politique de prix. Il en va de même pour d'autres pratiques comme le couplage, les remises « fidélisantes » qui, lorsqu'elles sont le fait d'entreprises très dominantes ont un effet structurel pouvant potentiellement être anti-concurrentiel sur un marché. Dans certaines circonstances, il apparaît ainsi que certaines pratiques qui pourraient relever de la concurrence par les mérites pour des opérateurs non dominants soient interdites à des opérateurs dominants ou ultra-dominants.

Par ailleurs, le Conseil emploie le concept de « répliquabilité » de la stratégie de l'opérateur dominant par des concurrents efficaces comme un critère permettant d'évaluer une concurrence effective, i.e. une concurrence par les mérites.⁸ Cette notion de « répliquabilité » sous-entend que l'opérateur dominant a un droit de riposte « proportionnée » sur le marché : il peut donc répondre à toutes attaques stratégiques de ses concurrents mettant en danger son parc de clients. Néanmoins, ce droit de riposte proportionnée est limité à la concurrence par les mérites car il ne saurait autoriser un opérateur dominant à mettre en œuvre des pratiques anti-concurrentielles. Par exemple, il ne saurait justifier des pratiques de prix d'éviction ou de prix prédateurs en réponse à une attaque des concurrents. Ce cas de figure s'éloigne de la concurrence par les mérites puisque l'opérateur utiliserait non pas son efficacité mais sa capacité financière (ce que les anglo-saxons nomment les « *deep pockets* ») pour répondre à « l'agression » des nouveaux entrants (cas des stratégies de « *raising rival costs* » ou de réputation). La concurrence par les mérites signifierait plutôt en l'espèce que l'opérateur dominant utilise sa solidité financière pour diminuer ses coûts et devenir plus efficace que ces concurrents.

1.2.2 Application de la notion de concurrence par les mérites pour apprécier la gravité des pratiques

En second lieu, la notion de la « concurrence par les mérites » est utilisée pour apprécier la gravité d'une pratique incriminée, ce qui peut entraîner une répercussion sur la sévérité de la sanction ou sur la nécessité de prononcer des mesures conservatoires⁹.

Le Conseil retient comme *facteurs particuliers de gravité et d'immédiateté* entre autres : la qualité d'opérateur historique, bénéficiant de l'intégration verticale et de son omniprésence géographique (dominance large), maîtrisant beaucoup de paramètres dont dépendent les conditions de l'entrée sur le marché de nouveaux concurrents¹⁰ ou encore le fait d'avoir fait, en tant qu'établissement public, un usage illicite et improprie des avantages accordés pour l'accomplissement de sa mission.¹¹

1.2.3 L'application de cette notion dans le cas des marchés émergents

Le non respect des principes d'une concurrence par les mérites peut être une circonstance aggravante lorsqu'il s'agit de l'ouverture récente d'un marché émergent, en forte croissance, période dans laquelle le marché est particulièrement exposé au risque d'une captation et nécessite une protection structurelle renforcée¹², ce que le Conseil nomme un « *contexte temporel particulier* »¹³.

Enfin, le Conseil tient compte de *l'environnement réglementaire* (contraintes imposées par la réglementation dans le secteur) et de l'asymétrie de l'information (la mauvaise information des clients peut ralentir ou contrarier l'avènement d'une saine concurrence par les mérites et la rend de surcroît difficile).¹⁴ Dans la décision n° 02-D-59 du 25 septembre 2002, une entente a été sanctionnée d'autant plus sévèrement que son objet entraînait dans le champ d'application d'une nouvelle loi dont l'objectif était justement d'assurer le plein exercice de la concurrence.¹⁵

2. "Evaluation of the Current Situation"

Le Conseil de la concurrence a dégagé des principes et, au cas par cas, déduit des critères précis qui permettent d'identifier les comportements excédant les limites d'une concurrence par les mérites.

Qualifiables d'abus de position dominante ou étant mises en œuvre dans le cadre d'ententes, les pratiques sanctionnées par le Conseil pour le non-respect d'une concurrence par les mérites sont présentées ci-après en rappelant les décisions les plus pertinentes.

2.1 *Abus de position dominante*

Le Conseil a exigé qu'une entreprise en position dominante demeure dans les limites d'un "*comportement compétitif normal*"¹⁶, "*loyal et légitime*"¹⁷.

Dans la décision de principe dite "Citélum"¹⁸, citée à plusieurs reprises¹⁹, le Conseil a ensuite considéré qu'"il est licite, pour une entreprise publique qui dispose d'une position dominante sur un marché en vertu d'un monopole légal, d'entrer sur un ou des marchés relevant de secteurs concurrentiels, à condition qu'elle n'abuse pas de sa position dominante pour restreindre ou tenter de restreindre l'accès au marché pour ses concurrents en recourant à des moyens autres que la concurrence par les mérites."

Le Conseil en a dégagé des conditions concrètes en fonction des différentes pratiques sur différents points en ce qui concerne les subventions directes ou croisées, la fixation de tarifs vis à vis d'opérateurs susceptibles d'être en situation de dépendance économique, la pratique d'offres de remise de couplage et des clauses contractuelles d'exclusivité :

2.1.1 *Les subventions directes ou croisées*

Les subventions des entreprises en position dominante au bénéfice de leurs filiales ont fait l'objet de plusieurs décisions²⁰ :

Le Conseil considère que le seul fait qu'une subvention soit rendue possible grâce aux ressources de son activité monopolistique, n'est pas constitutif d'un abus en lui-même. En revanche, il peut y avoir un abus lorsque la subvention croisée est utilisée pour pratiquer des *prix prédateurs* ou lorsqu'elle a conditionné une pratique commerciale qui a entraîné une perturbation durable du marché, qui n'aurait pas eu lieu sans elle.²¹

- a. Ainsi la demande de versement d'une commission en contrepartie d'une commande ne constitue-t-elle pas, en soi et en l'absence d'autres circonstances, une pratique anticoncurrentielle.²²
- b. Le Conseil a précisé, dans l'affaire « Citélum »²³, que la mise à disposition de moyens tirés de l'activité de monopole pour le développement d'activités relevant du champ concurrentiel, sans contrepartie financière, constitue une subvention croisée susceptible d'être qualifiée de pratique anticoncurrentielle, si l'une des conditions relevées ci-dessus (prix prédateurs ou perturbation durable du marché) est remplie.
- c. Dans une affaire concernant des pratiques de l'Institut national de la consommation (INC), le transfert financier des activités sous monopole vers les activités soumises à la concurrence (couplage entre des produits ou des services offerts en monopole et des produits ou des services offerts en concurrence) se présente différemment.²⁴

L'INC est un établissement public national à caractère industriel et commercial dont la mission essentielle est d'informer les consommateurs. Il lui était reproché d'avoir, en 1992 et 1993, fait de la publicité illicite pour ses publications, notamment la revue "*50 millions de consommateurs*", dans des émissions de télévision prévues par le cahier des charges des chaînes publiques, d'avoir financé le déficit de ses publications commerciales au moyen d'une partie des subventions publiques dont il bénéficiait et, enfin, d'avoir pratiqué des prix de vente, en kiosque et par abonnement, inférieurs à ses coûts de revient, d'une part, et aux prix de vente de son principal concurrent, l'Union fédérale des consommateurs (UFC), d'autre part.

L'enquête avait établi que l'INC, en 1992 et 1993, avait utilisé partiellement le temps d'antenne qui lui était donné pour l'information des consommateurs pour effectuer la promotion de sa revue " *50 millions de consommateurs* ", en contradiction avec les règles édictées par le décret du 27 mars 1992, qui interdisait la publicité télévisée en faveur des organes de presse.

Pour sa défense, l'INC avait, notamment, fait valoir que son principal concurrent l'UFC avait adopté le même comportement et que la pratique n'avait eu ni objet, ni effet anticoncurrentiels dans la mesure où elle n'avait pas eu d'effet, notamment négatif, sur les ventes de la revue de l'UFC " *Que choisir ?* ".

Le Conseil, relevant que les ventes des publications de l'INC s'étaient fortement développées pendant la période considérée, puis avaient fortement chuté après la cessation des pratiques, a estimé que la publicité télévisuelle avait procuré à l'Institut, qui était seul sur le marché à pouvoir utiliser la télévision pour promouvoir ses publications, un avantage concurrentiel certain en lui permettant d'augmenter de manière sensible ses ventes en kiosque et de détenir une part de marché élevée. Il a donc considéré que cette publicité, au demeurant illicite, effectuée par l'INC au seul bénéfice des revues qu'il éditait, alors que le temps d'audience qui lui était gratuitement affecté lui conférait un monopole de l'information des téléspectateurs, avait eu pour objet et pour effet de fausser le jeu de la concurrence sur le marché de la presse consumériste. A cet égard, le Conseil a relevé que la pratique avait pu faire obstacle au développement d'une compétition par les seuls mérites et que, même si l'UFC n'avait pas enregistré, en valeur absolue, une chute de ses ventes, la pratique en cause avait pu limiter ses perspectives de progression, ainsi que celle des autres opérateurs, et exercer un effet dissuasif à l'égard de nouvelles entrées sur le marché (sanction pécuniaire d'un million FF).

2.1.2 *La fixation de tarifs ou de prix de produits ou de services vis-à-vis des fournisseurs en dépendance économique*

L'augmentation de tarifs et de prix par l'entreprise en (quasi-) monopole peut être notamment abusive et, de ce fait, ne pas relever d'une concurrence par les mérites.

- a. Il en est ainsi si elle a pour objectif de porter atteinte au libre jeu de la concurrence au profit d'une entreprise au détriment d'une autre²⁵,
- b. ou encore pour l'application de nouvelles modalités de commissionnement conduisant à supprimer toute rémunération en cas de réduction du chiffre d'affaires.²⁶
- c. L'opérateur bénéficiant d'un ancien monopole dans le secteur des télécommunications, qui exerce une influence significative sur le marché de détail de la téléphonie fixe, a l'obligation de traiter les demandes d'accès des fournisseurs de services de télécommunication dans des conditions non discriminatoires, transparentes, à des tarifs orientés vers / reflétant les coûts du service rendu, introduite par l'ordonnance n° 2001-670 du 25 juillet 2001.²⁷
- d. Les mêmes critères représentent les conditions de licéité pour la mise en place, par une entreprise en situation dominante, d'un barème général fixant tarifs et remises : celui-ci doit s'appuyer sur des caractéristiques transparentes, objectives et non discriminatoires : « ...peuvent constituer, à défaut de justifications objectives, des indices d'un tel traitement discriminatoire, un seuil de déclenchement du système élevé, ne pouvant concerner que quelques partenaires importants de l'entreprise en position dominante, ou l'absence de linéarité de l'augmentation des taux de rabais avec les quantités. »²⁸
- e. La mise en pratique par France Télécom d'un ciseau tarifaire ayant retardé l'entrée de nouveaux opérateurs sur les marchés des communications fixes vers mobiles représente une structure anormale des prix et ne correspond pas à une concurrence par les mérites.²⁹ En l'espèce on reproche à France Télécom d'avoir conclu une offre sur mesure en consentant à la société Renault des tarifs, qui auraient engendré, pour les opérateurs concurrents, qui n'étaient pas en mesure de proposer une offre équivalente, un effet de ciseau tarifaire.

2.1.3 La pratique d'offres de remises de couplage de prestations en concurrence avec des services en monopoles

- a. Le Conseil a considéré que la remise de couplage accordé aux annonceurs, qui pourraient être tentés de devenir également clients d'une entreprise concurrente, représentait une prime de fidélité, qui ne correspondait pas au jeu d'une concurrence par les mérites caractérisée par une baisse sans discrimination du tarif unitaire de vente et pour rendre plus compétitifs ses produits en améliorant la qualité.³⁰ La potentialité de l'effet anticoncurrentiel résulte, selon le conseil, du fait que la pratique était de nature à détourner artificiellement les annonceurs de s'adresser à la concurrente même au cas d'une équivalence du tarif et de la qualité (sanction pécuniaire de 10 millions FF à France Télécom et injonction de cesser de consentir des remises de couplage aux annonceurs pour l'achat d'espaces publicitaires dans les Pages jaunes locales et départementales).
- b. De même, le Conseil souligne le caractère artificiel et discriminatoire de l'octroi d'une remise (jusqu'à 15%) sur un médicament, dont l'entreprise détenait le monopole grâce à un brevet, en cas d'achat d'un autre médicament qui n'est plus protégé par un brevet, dont la vente a été désormais ouverte à la concurrence (générique): cet octroi aurait eu pour objet et pour effet de dissuader les pharmacies d'établissements hospitaliers de s'adresser à des entreprises concurrentes pour l'un des médicaments. Cette remise était aussi assimilable à une prime de fidélité destinée à récompenser les clients qui renonçaient à s'adresser aux concurrentes.³¹
- c. Dans un autre cas, le Conseil a examiné si l'offre d'abonnements gratuits sur les abonnements de téléphonie fixe lors de la conclusion de contrats de téléphonie mobile, représente un abus en prenant recours à des moyens autres que ceux qui relèvent d'une concurrence par les mérites. Il a rejeté la demande de mesures conservatoires pour absence d'atteinte grave et immédiate au secteur et aux concurrents et faute d'un lien de causalité entre l'offre promotionnelle et les résultats négatifs de la partie saisissante.³²

2.1.4 Les clauses contractuelles d'exclusivité

- a. Le Conseil a considéré dans une affaire que la situation implique que France Télécom en tant qu'opérateur dominant, occupant plus de 80% du marché, n'adopte pas des comportements de nature à faire obstacle à l'ouverture du marché et à la concurrence par les mérites qui doit s'y dérouler.³³ Il lui a enjoint de suspendre l'application de clauses relatives à la perte du droit d'utilisation des marques de France Télécom. On avait reproché à France Télécom de détourner, sous couvert du droit des marques, la finalité essentielle de la loi en réservant à son seul profit l'usage de certaines dénominations de numéros, ce qui reviendrait à une imposition aux clients, à la faveur de son monopole, de l'utilisation, aboutissant à une appropriation de ces numéros.
- b. Les exigences d'une concurrence par les mérites ne sont pas seulement valables pour une position dominante résultant d'un (ancien) monopole légal, mais aussi pour celles qui ont comme base des droits exclusifs contractuels. Ainsi le Conseil a enjoint de renoncer à l'application d'une clause contenant une option prioritaire pour le contrat d'organisation et d'exploitation télévisuelle d'événements sportifs, assurant le renouvellement sans remise en concurrence, après avoir détenu le monopole durant les années précédentes.³⁴⁾
- c. Le Conseil a enjoint aux entreprises, dans la décision n° 99-MC-07 du 13.10.1999, de suspendre l'application de la clause d'exclusivité d'adhésion à leurs banques de coupon, sur le marché du traitement des coupons publicitaires de réduction, considérant qu'il ne s'agit pas d'un comportement compétitif normal.³⁵
- d. Dans la décision n° 98-D-52 du 07.07.1998, le Conseil a enjoint, entre autres, de ne proposer aux collectivités publiques ni l'insertion d'une clause prioritaire pour l'installation

de mobilier urbain supplémentaire ni l'insertion d'une clause de tacite reconduction.³⁶ Le conseil ne tient pas seulement compte de la restriction artificielle du jeu de la concurrence en contradiction avec une concurrence par les mérites, mais aussi de l'affectation d'un marché voisin (de la publicité extérieure en l'espèce).

- e. Dans la décision n° 01-MC-01 du 11 mai 2001 le Conseil, considérant qu'une entreprise position dominante doit demeurer dans les limites d'un comportement compétitif normal et ne pas limiter l'accès du marché sur lequel elle est en position dominante, ou d'un autre marché, en recourant à des moyens autres que ceux qui relèvent d'une concurrence par les mérites a enjoint, a enjoint aux sociétés Canal Plus et Kiosque de s'abstenir de procéder, directement ou indirectement, à l'acquisition de droits de diffusion télévisuelle exclusifs de films cinématographiques d'expression française récents pour le paiement à la séance, jusqu'à l'intervention de la décision au fond, face au risque de la disparition de l'une des deux sociétés offrant la télévision à péage à la séance.³⁷

2.2 Les ententes

L'usage de la notion de concurrence par les mérites a été également utilisée dans des affaires d'ententes, mais la jurisprudence est sensiblement plus limitée pour ce qui concerne les ententes.

- a. Dans une affaire de marchés publics de transport routier pour le compte d'un Conseil Général, le Conseil a sanctionné des pratiques visant « *le comportement coordonné d'entreprises en situation de se faire « concurrence par leurs mérites »* » et par le « *montant de leurs offres, qui seront ensuite négociés avec le Conseil Général.* »³⁸
- b. Peut également être constitutif d'une entente prohibée une stratégie commune de commercialiser un produit à des prix de vente inférieurs aux coûts moyens totaux mais supérieurs à leurs coûts moyens variables, si elle a pour objet d'éliminer un concurrent en pratiquant une concurrence qui ne relève pas d'une concurrence par les mérites.³⁹

3. "Candidate Standards/Tests"

Le Conseil ne met pas en œuvre de tests mathématiques et économiques spécifiques pour mesurer l'existence d'une atteinte à une concurrence par les mérites et que l'on procède plutôt à une appréciation au cas par cas sans avoir recours à des solutions trop schématiques. En effet, la question de savoir si l'on est en présence d'une atteinte à la concurrence par les mérites n'est pas seulement de nature économique, mais aussi normative.

Cependant, pour mesurer la gravité d'une atteinte à la concurrence, le Conseil tient compte des conséquences pour l'économie générale, pour le secteur concerné (p.e. l'effet dissuasif sur de nouvelles entrées sur le marché), pour l'intérêt des consommateurs et pour les entreprises victimes des pratiques (chute des ventes, limitation de leurs perspectives de progression).⁴⁰ Ces « tests » ne sont toutefois pas susceptibles de qualifier ou non une pratique d'atteinte à la concurrence par les mérites. Il ne s'agit que d'apprécier les conséquences nuisibles d'une telle atteinte déjà constatée pour le secteur.

4. "Economics"

Comme en France la qualification d'atteinte à la concurrence par les mérites ne dépend pas des seuls facteurs économiques, mais que d'autres facteurs plus normatifs sont utilisés, il n'apparaît pas qu'une théorie économique puisse permettre avec certitude une telle qualification, même si des éléments économiques peuvent représenter d'importants indices.

5. Agency Experience

En ce qui concerne le rôle qu'a joué le Conseil de la concurrence dans l'effort de définition du terme de « concurrence par les mérites », la coopération des autorités européennes ainsi que la prééminence du droit communautaire font que le Conseil oriente ses décisions dans le sens des positions de la CJCE.

En ce qui concerne la présomption d'intention d'éviction par exemple⁴¹, le Conseil reprend les conditions définies par la CJCE en citant l'une de ces décisions, qui porte sur les seuils des barèmes de rémunération des diffuseurs concessionnaires de presse :

*"... peuvent constituer, à défaut de justifications objectives, des indices d'un tel traitement discriminatoire, un seuil de déclenchement du système élevé, ne pouvant concerner que quelques partenaires particulièrement importants de l'entreprise en position dominante, ou l'absence de linéarité de l'augmentation des taux de rabais avec les quantités".*⁴²

La jurisprudence du Conseil étant contrôlée par la Cour d'appel de Paris et par la Cour de cassation, il tient compte des appréciations de celles-ci, même si le droit français ne connaît pas réellement des « précédents » comme dans le sens anglo-saxon. Ainsi le Conseil s'est référé, dans la décision n° 03-D-09 du 14.02.2003, aux arrêts de la Cour d'appel du 19.05.1993 et de la Cour de cassation du 14.05.1995, qui posent les principes généraux d'un comportement loyal est légitime, et à l'arrêt de la Cour d'appel du 18.02.1997, qui énonce, également d'une façon générale, que le recours à des moyens autres que ceux qui relèvent d'une concurrence par les mérites.⁴³ Les seuls critères détaillés, que le Conseil a empruntés jusqu'ici, viennent de l'arrêt de la Cour de cassation du 19 février 1991, n° 89-14517, considérant que la fixation des prix de ses produits et services peut révéler une exploitation abusive de la domination d'une entreprise, surtout quand une augmentation de tarif est décidée dans le but avoué de porter atteinte au libre jeu de la concurrence au profit d'une entreprise et au détriment d'une autre.⁴⁴

Si le Conseil s'est alors référé à ces arrêts, il n'en reste pas moins que c'était lui qui a pour une grande partie dégagé en détail les critères respectifs d'une concurrence par les mérites.

6. Intent

Le rôle que joue l'intention d'évincer un concurrent par la pratique de prix prédateurs, quand cette intention peut être démontrée, est primordial : une entreprise publique profitant d'une position dominante, résultant d'un ancien monopole légal, ne doit exercer une activité ou entrer sur un ou des marchés relevant de secteurs concurrentiels que si elle n'abuse pas de sa position dominante pour restreindre ou tenter de restreindre l'accès au marché à ses concurrents, en recourant à des moyens autres que ceux qui relèvent d'une concurrence par les mérites.⁴⁵

A cet égard, comme il a déjà été mentionné ci-dessus⁴⁶, il existe même une présomption d'éviction, cette dernière « pouvant être déduite de certains éléments objectifs, soit de documents, soit du comportement en cause, notamment lorsque la politique tarifaire est différenciée de sa politique commerciale habituelle sans qu'aucune autre raison puisse l'expliquer ou lorsque elle a pour cible manifeste un concurrent à éliminer ». ⁴⁷

7. Exceptions

Le non-respect des règles de la « concurrence par les mérites » n'est en principe jamais exempté.

S'il est vrai que l'on accorde, sous certaines conditions, aux entreprises dominantes le droit de défendre ou de développer leurs parts de marché, le fait que l'entreprise ait perdu des parts de marché ne

suffira pas en tant que tel à exempter une pratique ne respectant pas la notion de « concurrence par les mérites ».

Même si un éventuel déficit structurel était compensé par les résultats positifs tirés des activités d'un monopole, l'entreprise ne pourra pas être exemptée, car cela conduirait au maintien, sur le marché, d'une offre artificiellement compétitive qui sinon disparaîtrait. En outre, la permanence de cette offre rétroagirait sur le fonctionnement concurrentiel du marché.⁴⁸

Ainsi, que leur position vienne ou non d'un ancien monopole public, ces entreprises doivent toujours demeurer dans les limites d'un comportement « loyal et légitime » vis-à-vis des autres acteurs sur le marché.⁴⁹ Ou, en d'autres termes, ces entreprises doivent demeurer dans les limites d'un « *comportement compétitif normal* »⁵⁰ en traitant par exemple « *les demandes de prestations dans des conditions non discriminatoires, transparentes et à des tarifs reflétant les coûts du service rendu* »⁵¹.

NOTES

1. Décision n° **97-D-39** du 17 juin 1997 relative à des pratiques mises en œuvre par différentes entreprises dans le secteur du béton prêt à l'emploi dans la région Provence-Alpes-Côte-d'Azur
2. Décision n° **96-D-10** du 20 février 1996 relative à des pratiques mises en œuvre par France Télécom et l'ODA
3. Décisions n° **98-MC-07** du 15 juillet 1998 relative à une saisine et à une demande de mesures conservatoires présentées par la société Arenis Leo ; n° **98-D-52** du 07 juillet 1998 relative à des pratiques relevées dans le secteur du mobilier urbain
4. Décisions n° **02-D-59** du 25 septembre 2002 relative à des pratiques mises en œuvre dans les secteur des transports routiers de voyageurs dans le département de l'Ain ; n° **97-D-39** du 17 juin 1997 relative à des pratiques mises en œuvre par différentes entreprises dans le secteur du béton prêt à l'emploi dans la région Provence-Alpes-Côte-d'Azur
5. Décisions n° **01-MC-01** du 11 mai 2001 relative à une saisine et à une demande de mesures conservatoires présentées par les sociétés Multivision et Télévision Par Satellite ; n° **99-MC-07** du 13 octobre 1999 relative à une demande de mesures conservatoires présentée par la société Scan Coupon concernant des pratiques mises en œuvre sur le marché du traitement des bons de réduction (citant d'autres sources jurisprudentielles nationales et communautaires) ; n° **99-D-63** du 20 octobre 1999 relative à la saisine présentée par la société Twinsys-Dataguard (concentration Being-Jeppersen) ; n° **99-MC-04** du 10 mars 1999 relative à une demande de mesures conservatoires présentée par l'Association française des opérateurs privés de télécommunications et par l'Association des opérateurs de services de télécommunications
6. Décisions n° **03-D-09** du 14 février 2003 relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire ; n° **99-D-63** du 20 octobre 1999 relative à la saisine présentée par la société Twinsys-Dataguard ; n° **99-MC-12** du 23 décembre 1999 relative à une demande de mesures conservatoires présentée par la société Bouygues Télécom ; **CA Paris, 18 février 1997 ; Cass. Com. 14 mai 1995**
7. Décision n° **04-D-17** du 11 mai 2004 relative à la saisine et à la demande de mesures conservatoires présentées par les sociétés AOL France SNC et AOL Europe SA ; décision n° **04-D-48** du 14 octobre 2004 relative à des pratiques mises en œuvre par France Télécom, SFR Cégétel et Bouygues Télécom
8. Décisions n° **04-D-17** du 11 mai 2004 (voir ci-dessus) et n° **04-D-18** du 13 mai 2004 concernant l'exécution de la décision n° 00-MC-01 du 18 février 2000 relative à une demande de mesures conservatoires présentée par la société 9 Télécom Réseau
9. Décision n° **04-D-48** du 14 octobre 2004 relative à des pratiques mises en œuvre par France Télécom, SFR Cégétel et Bouygues Télécom
10. Décision n° **04-D-48** du 14 octobre 2004 relative à des pratiques mises en œuvre par France Télécom, SFR Cégétel et Bouygues Télécom ; n° **03-D-09** du 14 février 2003 relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire ; n° **96-D-12** du 5 mars 1996 relative aux pratiques mises en œuvre par la société Lilly France dans le secteur des spécialités pharmaceutiques destinées aux hôpitaux ; n° **96-D-10** du 20 février 1996 relative à des pratiques mises en œuvres par France Télécom et l'ODA
11. Décision n° **00-D-54** du 28 novembre 2000 relative au comportement de l'Institut national de la consommation (INC)

12. Décisions n° **03-MC-02** du 5 mars 2003 relative à la saisine et à la demande de mesures conservatoires présentées par la société Cégétel ; n° **02-MC-03** du 19 juillet 2002 relative à la saisine et à la demande de mesures conservatoires présentées par la société T-Online France , n° **01-MC-07** du 21 décembre 2001 relative à une saisine et à une demande de mesures conservatoires présentées par la société Kosmos ; n° **01-D-07** du 11 avril 2001 relative à des pratiques mises en œuvre sur le marché de la répartition pharmaceutique ; n° **00-D-57** du 6 décembre 2000 relative à des pratiques mises en œuvre par la SEM Gaz et Electricité de Grenoble et les sociétés GESTE et GEG Achats sur le marché des prestations de services dans le domaine de l'énergie et du bâtiment
13. Décision n° **02-MC-03** du 19 juillet 2002 relative à la saisine et à la demande de mesures conservatoires présentées par la société T-Online France
14. Décisions n° **03-D-09** du 14 février 2003 relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire ; n° **00-D-66** du 07 janvier 2001 relative à des pratiques relevées dans le secteur de la distribution des laits infantiles (entente de prix afin d'imposer des prix de revente à un certain nombre de distributeurs ; sanctions pécuniaires de 4 millions FF et de 600 000 FF)
15. Décision n° **02-D-59** du 25 septembre 2002 relative relative à des pratiques mises en œuvre dans le secteur des transports routiers de voyageurs dans le département de l'Ain
16. Décisions n° **01-MC-01** du 11 mai 2001 relative à une saisine et à une demande de mesures conservatoires présentées par les sociétés Multivision et Télévision Par Satellite ; n° **99-MC-07** du 13 octobre 1999 relative à une demande de mesures conservatoires présentée par la société Scan Coupon concernant des pratiques mises en œuvre sur le marché du traitement des bons de réduction (citant d'autres sources jurisprudentielles nationales et communautaires) ; n° **99-D-63** du 20 octobre 1999 relative à la saisine présentée par la société Twinsys-Dataguard ; n° **99-MC-04** du 10 mars 1999 relative à une demande de mesures conservatoires présentée par l'Association française des opérateurs privés de télécommunications et par l'Association des opérateurs de services de télécommunications
17. Décisions n° **99-D-63** du 20 octobre 1999 relative à la saisine présentée par la société Twinsys-Dataguard ; n° **99-MC-12** du 23 décembre 1999 relative à une demande de mesures conservatoires présentée par la société Bouygues Télécom
18. Décision n° **00-D-47** du 22 novembre 2000 relative aux pratiques mises en œuvre par EDF et sa filiale Citélum sur le marché de l'éclairage public
19. Voir décisions n° **02-D-34** du 11 juin 2002 relative à des pratiques d'Electricité de France dans les secteurs de l'énergie et de l'ingénierie relative à l'utilisation des énergies ; n° **00-D-50** du 5 mars 2001 relative à des pratiques mises en œuvre par la société Française des Jeux dans les secteurs de la maintenance informatique et du mobilier de comptoir ; n° **00-D-57** du 6 décembre 2000 relative à des pratiques mises en œuvre par la SEM Gaz et Electricité de Grenoble et les sociétés GESTE et GEG Achats sur le marché des prestations de services dans le domaine de l'énergie et du bâtiment
20. Voir notamment rapport annuel 2000, 3ème partie « Etudes thématiques », point 5. « les pratiques mises en œuvre par les monopoles publics »
21. Décisions n° **03-D-44** du 17 septembre 2003 relative à des pratiques relevées dans les secteurs du chauffage collectif au gaz et des compteurs d'énergie thermique ; n° **02-D-63** du 8 octobre 2002 relative à des pratiques constatées dans le secteur des télécommunications ; n° **02-D-34** du 11 juin 2002 relative à des pratiques d'Electricité de France dans les secteurs de l'énergie et de l'ingénierie relative à l'utilisation des énergies ; n° **02-MC-03** du 19 juillet 2002 relative à la saisine et à la demande de mesures conservatoires présentées par la société T-Online France (injonctions à France Télécom de fournir sans discrimination de l'accès Internet haut débit (ADSL), de mettre en place un serveur Extranet et de suspendre temporairement la commercialisation au bénéfice de la filiale Wanadoo Interactive, que France Télécom avait favorisée d'une façon injustifiée)
22. Décision n° **03-D-38** du 30 juillet 2003 relative à une saisine et à une demande de mesures conservatoires présentées par Mme X, en sa qualité d'exploitante à titre individuel du commerce de fleurs Le Lys d'Albret, contre la société Pompes funèbres rurales des 3B

23. Décision n° **00-D-47** du 22 novembre 2000 relative aux pratiques mises en œuvre par EDF et sa filiale Citélum sur le marché de l'éclairage public
24. Décision n° **00-D-54** du 28 novembre 2000 relative au comportement de l'Institut national de la consommation (INC)
25. Décision n° **03-D-09** du 14 février 2003 relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire ; **Cass. Com. 19 février 1991 n° 89-14517**
26. Décisions n° **03-D-09** du 14 février 2003 relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire; n° **94-D-21** du 22 mars 1994 relative à des pratiques de l'office d'annonces, régisseur exclusif de la publicité dans les annuaires de France Télécom
27. Décisions n° **01-MC-07** du 21 décembre 2001 relative à une saisine et à une demande de mesures conservatoires présentées par la société Kosmos et n° **01-D-07** du 11 avril 2001 relative à des pratiques mises en œuvre sur le marché de la répartition pharmaceutique: injonctions aux opérateurs de se conformer
28. Décision n° **03-D-09** du 14 février 2003 relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire: sanction pécuniaire de 600 000 € et injonction de supprimer les éléments discriminatoires
29. Décisions n° **04-D-48** du 14 octobre 2004 relative à des pratiques mises en œuvre par France Télécom, SFR Cégétel et Bouygues Télécom, sanctions pécuniaires infligées : 18 millions € à France Télécom, 2 millions € à SFR (Attention, un arrêt de la Cour d'appel du 12 avril 2005 a annulé cette décision); n° **01-D-46** du 23 juillet 2001 relative à des pratiques mises en œuvre par la société France Télécom à l'occasion d'une offre sur mesure conclue en 1999: sanction pécuniaire de 40 millions FF infligée à France Télécom.
30. Décision n° **96-D-10** du 20 février 1996 relative à des pratiques mises en œuvre par France Télécom et l'ODA
31. Décision n° **96-D-12** du 5 mars 1996 relative aux pratiques mises en œuvre par la société Lilly France dans le secteur des spécialités pharmaceutiques destinées aux hôpitaux
32. Décision n° **99-MC-04** du 10 mars 1999 relative à une demande de mesures conservatoires présentée par l'Association française des opérateurs privés de télécommunications et par l'Association des opérateurs de services de télécommunications
33. Décision n° **03-MC-02** du 5 mars 2003 relative à la saisine et à la demande de mesures conservatoires présentées par la société Cégétel (point 33)
34. Décision n° **98-MC-07** du 15 juillet 1998 relative à une saisine et à une demande de mesures conservatoires présentée par la société Arenis Leo
35. Décision n° **99-MC-07** du 13.10.1999 relative à une demande de mesures conservatoires présentée par la société Scan Coupon concernant des pratiques mises en œuvre sur le marché du traitement des bons de réduction
36. Décision n° **98-D-52** du 07.07.1998 relative à des pratiques relevées dans le secteur du mobilier urbain
37. Décision n° **01-MC-01** du 11 mai 2001 relative à une saisine et à une demande de mesures conservatoires présentées par les sociétés Multivision et Télévision Par Satellite
38. Décisions n° **02-D-59** du 25 septembre 2002 relative à des pratiques mises en œuvre dans le secteur des transports routiers de voyageurs dans le département de l'Ain : sanctions pécuniaires d'environ 900 000 € au total ; n° **02-D-58** du 23 septembre 2002 relative à des pratiques mises en œuvre dans le secteur des transports routiers de voyageurs dans le département du Rhône : non-lieu
39. Décision n° **97-D-39** du 17 juin 1997 relative à des pratiques mises en œuvre par différentes entreprises dans le secteur du béton prêt à l'emploi dans la région Provence-Alpes-Côte-d'Azur

40. Décision n° **99-MC-12** du 23 décembre 1999 relative à une demande de mesures conservatoires présentée par la société Bouygues Télécom
41. Voir point VI. ci-dessous
42. Décision n° **03-D-09** du 14 février 2003 relative à relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire
43. Décision n° **03-D-09** du 14.02.2003 relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire
44. Voir point II. A. 2. a., décision n° **03-D-09** du 14 février 2003 relative à relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire ; **Cass. Com. 19 février 1991**
45. Décision n° **01-MC-01** du 11 mai 2001 relative à une saisine et à une demande de mesures conservatoires présentées par les sociétés Multivision et Télévision Par Satellite
46. Voir point I. B
47. Décision n° **03-D-44** du 17 septembre 2003 relative à des pratiques relevées dans les secteurs du chauffage collectif au gaz et des compteurs d'énergie thermique ; voir pour la pratique d'offre de remises de couplage de prestations en concurrence avec des services en monopoles : décisions n° **05-D-13** du 18 mars 2005 relative aux pratiques mises en œuvre par le groupe Canal Plus dans le secteur de la télévision à péage ; n° **01-MC-06** du 19 décembre 2001 relative aux saisines et aux demandes de mesures conservatoires présentées par les sociétés Télé2 et Cégétel
48. Décisions n° **02-D-63** du 8 octobre 2002 relative à des pratiques constatées dans le secteur des télécommunications ; n° **00-D-57** du 06 décembre 2000 relative à des pratiques mises en œuvre par la SEM Gaz et Electricité de Grenoble et les sociétés GESTE et GEG Achats sur le marché des prestations de services dans le domaine de l'énergie et du bâtiment ; **avis n° 94-A-15** du 10 mai 1994 relatif à une demande d'avis sur les problèmes soulevés par la diversification des activités d'E.D.F. et de G.D.F. au regard de la concurrence
49. Décision n° **03-D-09** du 14 février 2003 relative à relative à la saisine de la société Tuxedo relative à des pratiques constatées sur le marché de la diffusion de la presse sur le domaine public aéroportuaire
50. Décisions n° **01-MC-01** du 11 mai 2001 relative à une saisine et à une demande de mesures conservatoires présentées par les sociétés Multivision et Télévision Par Satellite ; n° **99-MC-07** du 13 octobre 1999 relative à une demande de mesures conservatoires présentée par la société Scan Coupon concernant des pratiques mises en œuvre sur le marché du traitement des bons de réduction (citant d'autres sources jurisprudentielles nationales et communautaires) ; n° **99-D-63** du 20 octobre 1999 relative à la saisine présentée par la société Twinsys-Dataguard ; n° **99-MC-04** du 10 mars 1999 relative à une demande de mesures conservatoires présentée par l'Association française des opérateurs privés de télécommunications et par l'Association des opérateurs de services de télécommunications
51. Décision n° **01-MC-07** du 21 décembre 2001 relative à une saisine et à une demande de mesures conservatoires présentées par la société Kosmos

ANNEXE

**Tableau analytique des principales décisions du Conseil de la concurrence
traitant le sujet d'une « concurrence par les mérites »**

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
télévision à péage	05-D-13 du 18 mars 2005	Télévision Par Satellite (TPS) ./. Groupe Canal Plus	pratiques tarifaires et de couplage: remises et promotions successives ayant excédé les limites d'un comportement normal de concurrence par les mérites	infractions ni démontrées ni établies	Le conseil considère que ni une <u>pratique de couplage ayant excédé les limites d'un comportement de concurrence par les mérites</u> , ni un objet anticoncurrentiel <u>visant à évincer</u> TPS ou à rendre son lancement plus difficile, n'ont été démontrés
secteur de la distribution de la presse, marché de la distribution de la presse au numéro	05-D-01 du 12 janvier 2005	Soc. Messageries Lyonnaise de Presse (MLP) ./. Soc. Nouvelles Messageries de Presse Parisienne (NMPP), Société Auxiliaire pour l'Exploitation de Messagerie Transports Presse (SAEM-TP)	pratique d'éviction " <u>ne correspondant pas à une concurrence par les mérites</u> " par l'octroi d'avantages tarifaires conditionnels et par des facilités de trésoreries (prêts) au bénéfice de certains éditeurs qui pourraient être tentés de retirer les titres des sociétés assignées, alors que leurs publications ne satisfont pas aux conditions nécessaires prévues dans les barèmes. Ceci pour dissuader ces éditeurs de changer de messageries	rejet de la demande de mesures conservatoires (s'il ne pas exclu que les deux sociétés assignées (filiales du groupe Hachette et menant une politique commerciale commune) occupent conjointement une position dominante sur le marché de la distribution de la presse au numéro, une atteinte immédiate et certaine au secteur, par les pratiques dénoncées, n'a pas été établie)	La notion "concurrence par les mérites" n'est alléguée que par la seule partie saisissante

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
fabrication de terminaux de téléphone domestique fixe et de répondeurs enregistreurs	04-D-72 du 21 décembre 2004	Soc. Geemarc SA, Geemarc Télécom /. Philips Electronique Grand Public SAS	pratique prédatrice d'une baisse de prix de vente au public de 50%, en mettant successivement sur le marché deux nouveaux produits, dont les performances et le caractéristiques techniques sont équivalentes à celles de leur prédécesseur vendu plus cher (élément trop ponctuel pour relever un abus) ; pratique d'un service après vente particulièrement agressive que les grandes surfaces ont tenté d'imposer ce qui aurait diminué les chances de survie des petits fournisseurs	non-lieu	<i>"En ce qui concerne le service après vente, aucun élément ne démontre que le coût du service rendu aux consommateurs ne serait pas couvert par le prix de vente des produits et que le remplacement à l'identique des produits Philips sous garantie sur la période concernée ne relèverait pas d'une concurrence par les mérites."</i> (point 44)
téléphonie fixe vers mobile	04-D-48 du 14 octobre 2004	L'association TENOR /. France Télécom, SFR Cegetel, Bouygues Télécom	pratique d'éviction (d'avoir retardé l'entrée de nouveaux opérateurs sur les marchés des communications fixes vers mobiles) par la mise en pratique d'un ciseau tarifaire (caractère anormal de la structure des prix)	sanctions pécuniaires: 18 millions € à France Télécom (facteurs <u>aggravant son recours à des pratiques ne relevant pas d'une concurrence par les mérites</u> : la position d'opérateur historique, bénéficiant de l'intégration verticale et de son omniprésence géographique, maîtrisant beaucoup de paramètres dont dépendent les conditions de l'entrée sur le marché de nouveaux concurrents, tels que les modalités du rééquilibrage entre le trafic entrant international et le trafic entrant national) ; 2 millions € à SFR	fonction de la notion de la "concurrence par les mérites" en l'espèce: moyen d'estimation de la gravité des sanctions

Secteur/	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
Marché en cause					
secteurs de la publicité extérieure et du mobilier urbain, marché de fourniture du mobilier urbain publicitaire	04-D-32 du 8 juillet 2004	Soc. More group France ./. Sociétés du groupe Decaux	maintenance et exploitation du mobilier urbain publicitaire de Rennes au-delà de l'échéance du contrat ; affichage (quasi-) gratuit sur des panneaux grand format et prise en charge des frais techniques liés à la transformation du format des affiches pour nombre de campagnes publicitaires à Rennes ;	sanction pécuniaire: 700 000 € infligée à la société JC Decaux	la "mise en œuvre des moyens ne relevant pas d'une concurrence par les mérites" paraît être le synonyme du fait "d'avoir altéré la concurrence", la notion restant indéfinie
application thermique de l'énergie: marché du gaz; marché de l'énergie destinée à assurer le chauffage	03-D-44 du 17 septembre 2003	Le ministre délégué aux finances et au commerce extérieur ./. GDF	subvention perturbant le marché, dans le cadre d'une politique de soutien au chauffage individuel centralisé, de l'activité commerciale de sa filiale Calliance, en lui communiquant des informations commerciales et en réalisant la promotion nationale de ses offres; avantages injustifiés accordés à deux fournisseurs de compteur d'énergie thermique	abus de position dominante non établi	Le prix prédateur (qui quant à lui va à l'encontre d'une saine concurrence <u>par les mérites</u>) est caractérisé par un <u>élément intentionnel</u> : la <u>volonté</u> <u>d'éliminer des concurrents</u> , une " <u>présomption d'éviction</u> " pouvant être déduite de certains éléments objectifs, soit de documents, soit du comportement en cause, notamment lorsque la politique tarifaire est différenciée de sa politique commerciale habituelle sans qu'aucune autre raison puisse l'expliquer ou lorsque elle a pour cible manifeste un concurrent à éliminer. (point 50)
secteur les convois funéraires de la région d'Orthez	03-D-38 du 30 juillet 2003	Mme X...exploitante à titre individuel du commerce de fleurs Le Lys d'Albret ./. Soc. Pompes funèbres rurales des 3B	pratique d'éviction par la non information des familles de leur liberté de choix concernant les commandes de fleurs funéraires de "dessus de cercueil" en ne confiant la réalisation des commandes qu'à deux fleuristes locaux, ses concurrents, ce qui serait le résultat d'une entente	rejet de la saisine et de la demande de mesures conservatoires (pas d'éléments suffisamment probants pour en déduire une entente)	<i>"Le conseil relève à titre liminaire qu'une demande de versement d'une <u>commission en contrepartie d'une commande ne constitue pas, en soi et en</u> <u>l'absence d'autres circonstances, une pratique anticoncurrentielle</u>. En revanche, l'exigence d'une telle commission pourrait être qualifiée de pratique anticoncurrentielle si elle intervient dans des conditions qui portent atteinte à l'exercice d'une <u>compétition par les mérites</u>." (point 40)</i>

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
services de télécommunications spéciaux de libre appel ("numéros verts") et à coûts partagés ("numéros azur" et "numéros indigo")	03-MC-02 du 5 mars 2003	Cegetel ./. France Télécom	réserve à son seul profit l'usage des dénominations "numéro vert", "numéro azur" et "numéro indigo" sous couvert du droit des marques en détournant la finalité essentielle de la loi; imposition aux clients à la faveur de son monopole l'utilisation de ces dénominations, afin de les transformer en un "standard de communication dans des conditions aboutissant à une appropriation des numéros de téléphone concernés	injonction de suspendre pour tous les contrats "numéros d'accueil" l'application de la clause relative à la perte de droit d'utilisation des marques de France Télécom et d'informer les clients concernés là-dessus	Le conseil estime que vue la <u>mise en œuvre très récente de la portabilité pour les numéros à coûts partagés</u> (s'agissant d'un marché de forte croissance, générateur de forts revenus pour les opérateurs), qui n'est intervenu en avril-mai 2002, des pratiques susceptibles de <u>ralentir l'ouverture</u> à la concurrence ne faussent non seulement le jeu de la concurrence entre les opérateurs alternatifs, mais portent aussi <u>atteinte grave et immédiate</u> au secteur concerné, aux entreprises victimes des pratiques et aux consommateurs. (point 35)

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
secteur de la distribution de la presse, marché de la distribution de la presse au numéro	03-D-09 du 14 février 2003	Soc. Tuxedo ./. Soc. Nouvelles messageries de la presse parisienne (NMPP) et Relais H (filiales du groupe Hachette)	élimination de la saisissante du marché de la distribution de la presse dans les aéroports au profit de la société Relais H, par: le non renouvellement des concessions d'occupation du domaine public de Tuxedo par Aéroport de Paris (ADP) ; la mise en place d'un barème de rémunération des diffuseurs de presse ayant le statut de concessionnaire de domaine public par les NMPP ; l'organisation par les NMPP d'un réseau de vente spécifique aux Relais H	sanction pécuniaire: 600 000 € infligée à NMPP; injonctions de supprimer les éléments discriminatoires de son barème général de rémunération des diffuseurs concessionnaires ; (facteur aggravant: contraintes imposées par la réglementation dans ce secteur ; dominance très large des NMPP; non respect d'injonctions précédentes) de publication de la décision	"Une entreprise disposant d'une position dominante est en droit de défendre ou de développer sa part de marché lorsqu'elle est confrontée à l'arrivée d'un concurrent mais elle doit le faire dans les limites d'un <u>comportement loyal et légitime</u> (CA de Paris, 19 mai 1993 et Cass. Com., 14 mai 1995). Ce n'est pas le cas "si elle tente de limiter l'accès du marché à son concurrent en recourant à des moyens autres que ceux qui relèvent d'une concurrence par les mérites" (CA Paris, 18 février 1997)". (point 50) ; "La mise en place, par une entreprise en situation dominante, d'un barème général fixant tarifs et remises est <u>licite, dès lors que ce barème s'appuie sur des caractéristiques transparentes, objectives et non discriminatoires.</u> " (point 55) ; "La jurisprudence considère que la <u>fixation par une entreprise dominante des prix de ses produits et de ses services peut révéler une exploitation abusive de sa domination. Il en a été ainsi pour des augmentations de tarif décidées dans le but avoué de porter atteinte au libre jeu de la concurrence au profit d'une entreprise et au détriment d'une autre</u> (Cass. com., 19 février 1991, n° 89-14517) ou encore <u>pour l'application de nouvelles modalités de commissionnement conduisant à supprimer toute rémunération en cas de réduction du chiffre d'affaires</u> (Cons conc., déc. n° 94-D-21, 22 mars 1994, ODA)." (point 58) ; Le conseil cite aussi une décision de la CJCE du 29 mars 2001, C-163/99, République portugaise c/ Commission), énonçant les critères pour juger des seuils des barèmes condamnables : "... peuvent constituer, <u>à défaut de justifications objectives, des indices d'un tel traitement discriminatoire, un seuil de déclenchement du système élevé, ne pouvant concerner que quelques partenaires particulièrement importants de l'entreprise en position dominante, ou l'absence de linéarité de l'augmentation des taux de rabais avec les quantités</u> ". (point 59)

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
télécommunications	02-D-63 du 8 octobre 2002	Le ministre de l'économie, des finances et de l'industrie ./. France Télécom	subventions accordées aux filiales, ententes	non-lieu	Selon le conseil, une entreprise publique profitant d'une position dominante résultant d'un ancien monopole légal ne doit exercer une activité ou entrer sur un ou des marchés relevant de secteurs concurrentiels que si elle n'abuse pas de sa position dominante pour restreindre ou tenter de restreindre l'accès au marché à ses concurrents, en recourant à des <u>moyens autres que ceux qui relèvent d'une concurrence par les mérites</u> ; <u>pas d'exemption même dans le cas où un éventuel déficit structurel des activités de diversification serait indéfiniment compensé par les résultats positifs tirés de l'activité du monopole</u> , parce que cela conduirait au <u>maintien sur le marché d'une offre artificiellement compétitive</u> qui sinon disparaîtrait et que la permanence de cette offre <u>rétroagirait sur le fonctionnement concurrentiel du marché</u> (page 10; 94-A-15 du 10 mai 1994)
transports routiers de voyageurs dans le département de l'Ain	02-D-59 du 25 septembre 2002	Le ministre de l'économie, des finances et de l'industrie ./. L'Union professionnelle des transports routiers de l'Ain et différents transporteurs	<u>Entente anticoncurrentielle horizontale</u> : échanges d'informations lors de la passation de délégations de service public avant le dépôt des offres <u>afin de se répartir le marché</u>	sanctions pécuniaires de 884 010 € en total (facteur aggravant: première application de la nouvelle procédure d'attribution de délégations de service public prévues par la loi Sapin, dont l'objectif est justement d'assurer un plein exercice de la concurrence.	<i>"Les pratiques visaient le comportement coordonné d'entreprises en situation de se faire concurrence par leurs mérites et par le montant de leurs offres, qui seront ensuite négociés avec le conseil général".</i>
transports routiers de voyageurs dans le département du Rhône	02-D-58 du 23 septembre 2002	Saisine par le ministre de l'économie, des finances et de l'industrie ./. Différents transporteurs	réunion entre transporteurs candidats à l'attribution des lots mis en concurrence	non-lieu (le parallélisme du comportement observé n'a pas suffi, en l'espèce, à établir une entente)	Reprise de la formulation similaire de la décision prénommée n° 02-D-59 du 25 septembre 2002: <i>"(...) les pratiques... ne concernent ni la légalité, ni encore l'opportunité des tarifs fixés à l'issue des négociations conduites par le conseil général avec les sociétés ayant déposé des offres mais seulement le comportement d'entreprises en situation de se faire concurrence par les mérites et par le montant auquel elles offrent d'effectuer les prestations demandées, offres qui seront ensuite éventuellement négociées avec le conseil général:..."</i> (page 19)

DAF/COMP(2005)27

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
fourniture d'accès à Internet haut débit (ADSL)	02-MC-03 du 19 juillet 2002	T-Online ./. France Télécom	abus de position dominante en favorisant sa propre filiale Wanadoo Interactive par rapport aux autres fournisseurs d'accès Internet (FAI): création d'une discrimination structurelle entre les opérateurs (tous ne disposant pas de la même implantation territoriale et en raison du délai dans lesquels France Télécom proposait aux concurrents de Wanadoo une connexion ADSL; le risque étant encore aggravé par une pratique de partenariat avec les fournisseurs d'accès dans le cadre de la grande distribution, limitant la liberté de fixation des prix	1) injonction de mise en place d'un serveur Extranet et de respecter le principe de non-discrimination lors de la fourniture du service de vérification de l'éligibilité à l'ADSL de la ligne téléphonique du client et de passation de commande, afin de rétablir l'égalité entre les FAI; 2) injonction de suspendre temporairement la commercialisation au bénéfice de Wanadoo (levée par décision n° 02-D-46 du 19 juillet 2002; 3) injonction de toute offre de partenariat avec des fournisseurs d'accès destinée à être commercialisée en grande distribution	<u>critère de gravité et d'immédiateté</u> retenu par le conseil, renforçant l'importance du respect d'une "saine concurrence par les mérites": le <u>contexte temporel</u> particulier où la diffusion rapide de l'ADSL devait, <u>en peu de mois, déterminer la structure des parts de marché</u> des divers concurrents, <u>alors que le marché était en très forte croissance.</u>
énergie et l'ingénierie relative à l'utilisation des énergies	02-D-34 du 11 juin 2002	Le ministre chargé de l'économie ./. EDF	octroi d'avantages préférentiels aux Industelec et utilisation d'un dispositif d'aides commerciales pour favoriser la vente d'électricité	non-lieu (pas de preuve d'une perturbation durable et importante du marché de l'ingénierie et absence de caractère prédateur avéré des prix)	référence à la décision n° 00-D-47 qui énonce les conditions d'une subvention licite d'une entreprise de position dominante ayant détenu un monopole et entrant sur un marché concurrentiel

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
marché français de la téléphonie fixe prépayée	01-MC-07 du 21 décembre 2001	Kosmos ./. France Télécom	pratiques de prédatations: prix de détail du "Ticket de Téléphone" inférieurs aux coûts variables de l'opérateur historique, comblant ainsi les pertes réalisées sur cette activité grâce aux ressources dégagées sur ces autres activités de téléphonie fixe; niveau de tarifs de collecte abusif conditions dans lesquelles sont facturés des appels à destination de ses numéros d'accueil payant pour l'appelant; caractère abusif des propositions commerciales; refus annoncé de fourniture d'accès	injonctions: de mettre en place la filiation de son activité de fournitures de communications prépayées; de cesser la vente du Ticket de Téléphone à des prix excessivement bas ainsi que la publicité et la promotion; offrir des conditions tarifaires pour la collecte et la terminaison du trafic, permettant aux concurrents d'offrir à leurs clients les mêmes tarifs et conditions de vente; ne pas couper la fourniture de service sur les numéros d'accueil de Kosmos jusqu'à la décision au fond	obligation de l'opérateur, exerçant une influence significative sur le marché de détail de la téléphonie fixe, de <u>traiter les demandes d'accès dans des</u> <u>conditions non discriminatoires, transparentes, à des tarifs reflétant les</u> <u>coûts du service rendu</u> (voir ordonnance n° 2001-670 du 25 juillet 2001; page 8 de la décision) <u>finalité de l'obligation</u> : empêcher l'éviction de concurrents (réels ou potentiels découragés d'investir) dans le seul but de maintenir la position dominante "héritée" de l'ancien monopole public urgence des MC, à cause du <u>risque d'une captation du marché</u> ne relevant pas d'une <u>concurrence par les mérites</u> et jugées nécessaires pour une <u>concurrence réelle</u>

DAF/COMP(2005)27

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
téléphonie fixe	01-MC-06 du 19 décembre 2001	Télé 2 et Cégétel ./. France Télécom	abus de position dominante, éviction des concurrents potentiels par le couplage de prestations en quasi-monopole (abonnement téléphonique et accès aux numéros Internet payants pour l'appelant) et de services en concurrence (services complémentaires, communications locales et longue distance) la promotion anticoncurrentielle d'offres tarifaires (entre autres à des prix prédateurs)	injonctions: de suspendre la commercialisation d'offres auprès de nouveaux abonnés tant qu'elles couplent des prestations offertes en concurrence et celles maintenues en monopoles; de modifier les offres tarifaires afin de séparer ces différentes catégories de prestations (ne pouvant pas être regroupées jusqu'à la mise en place effective des conditions de concurrence permettant aux opérateurs tiers de proposer à ses clients des offres alternatives) de proposer pour les clients de contrats en cours de nouvelles offres découplées d'information	référence à l'avis n° 00-A-26 du 15 février 2001 : une pratique de couplage entre des produits ou des services offerts en monopole et des produits ou des services offerts en concurrence peut constituer une atteinte à la concurrence. En l'espèce, le conseil a pris en compte <u>l'effet dissuasif pour les clients de s'intéresser aux nouvelles offres par des concurrents potentiels</u> (qui ne sont pas dans la mesure de proposer une offre comparable) après la poursuite de la commercialisation par France Télécom de tels offres couplées dans la période qui précède immédiatement l'ouverture du marché des communications téléphoniques. <u>L'option d'une résiliation auprès France Télécom de tels engagements attractifs et simples ne suffisent vraisemblablement pas à contrebalancer cet effet d'éviction.</u> Selon le conseil, l'homologation de <u>nouvelles décisions tarifaires découplant</u> l'abonnement et les services complémentaires n'aura d'effet que pour l'avenir et <u>reste sans incidence sur les offres en cours</u> , de sorte que la cessation temporaire des pratiques dénoncées ne soit pas disproportionnée.
téléphonie fixe vers mobiles	01-D-46 du 23 juillet 2001	ART ./. France Télécom	établissement d'une barrière artificielle à l'entrée sur le marché par l'offre sur mesure conclue avec la société Renault en 1999, en lui consentant des tarifs engendrant pour les opérateurs concurrents, qui n'était pas en mesure de proposer une offre équivalente, un effet de ciseau tarifaire	sanction pécuniaire: 40 millions FF ; injonction de publication	La notion de "concurrence par les mérites" n'apparaît pas dans la décision même mais dans un communiqué de presse du 26 juillet 2001 (espace presse du site Internet du conseil), indiquant que la pratique de France Télécom n'aurait pas relevé d'une telle.

Secteur/	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
Marché en cause télévision à péage	01-MC-01 du 11 mai 2001	Télévision Par Satellite (TPS), Multivision ./. Canal Plus et Kiosque	non-respect à l'injonction prononcée par la Cour d'appel de Paris dans son arrêt du 15 juin 1999 par: la conclusion d'un accord général avec les professionnels, en ne prenant pas en compte le paiement à la séance, liée à la conclusion des contrats d'achat de droits de diffusion en paiement à la séance avec les producteurs, comportant une clause d'exclusivité, empêchant la vente des droits de diffusion télévisuelle aux concurrents	injonction de s'abstenir de procéder, directement ou indirectement, à l'acquisition de droits de diffusion télévisuelle exclusifs de films cinématographiques d'expression française récents pour le paiement à la séance jusqu'à l'intervention de la décision sur le fond (face au risque de la disparition de l'une des deux sociétés offrant la télévision à péage à la séance).	<i>"Considérant que, si une entreprise en position dominante confrontée à l'arrivée d'un concurrent est en droit de défendre ou de développer sa part de marché, elle doit demeurer dans les limites d'un comportement compétitif normal; que le fait, pour l'entreprise disposant d'une telle position, de tenter de limiter l'accès du marché sur lequel elle est en position dominante, ou d'un autre marché, en recourant à des moyens autres que ceux qui relèvent d'une concurrence par les mérites revêt un caractère abusif"</i> (page 5).
télécommunications, marché de détail de la téléphonie fixe prépayée (cartes à code)	01-D-07 du 11 avril 2001	Kosmos ./. France Télécom	non respect de l'obligation de faire droits <u>aux demandes d'accès</u> et d'accès spécial justifiées des fournisseurs de services de télécommunications <u>dans des conditions (tarifaires pour la collecte de trafic) objectives, non discriminatoires, transparentes et à des tarifs reflétant les coûts du service rendu</u> , introduite par l'ordonnance n° 2001-670 du 25 juillet 2001	injonction d'orienter vers les coûts, qu'elle supporte pour la fourniture de ce service, les tarifs qu'elle pratique sur ses prestations de collecte de trafic téléphonique émanant de son réseau téléphonique commuté public fixe en France métropolitaine et à destination des numéros spéciaux de ses clients fournisseurs de services de télécommunications au titre de l'art. L. 34-2 du code des postes et télécommunications, tels Kosmos, pour leurs services de cartes à code au public	risque de captation du marché et d'exclusion de fournisseurs de services de télécommunications concurrents, facilitant la conquête ou le maintien par France Télécom d'une position dominante, par des pratiques ne relevant pas d'une <u>concurrence par les mérites</u> (pages 8, 9)
secteur de la distribution des laits infantiles	00-D-66 du 7 janvier 2001	Le ministre de l'économie ./. Différentes sociétés	entente de prix afin d'imposer des prix de revente à un certain nombre de distributeurs	sanctions pécuniaires: 4 millions FF à la société ITM Marchandises International SA ; 600 000 FF à la société Nutricia	Le conseil énonce les facteurs ayant une répercussion négative sur l'exercice d'une concurrence par les mérites: <i>"(...) l'environnement réglementaire et la mauvaise information des mères rendaient, en pratique, la concurrence par les mérites extrêmement difficile, et cela, même si la pratique des tours de lait n'avait pas existé..."</i> (page 22)

DAF/COMP(2005)27

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
services de maintenance informatique	00-D-50 du 5 mars 2001	Le ministre de l'économie, société Telci /. société Française des Jeux et sa filiale, la société Française de Maintenance	La Française des Jeux, utilisant les ressources tirées du monopole des jeux, a consenti à sa filiale une subvention lui permettant de pratiquer, sur le marché concurrentiel de la maintenance informatique (=connexité), des <u>prix</u> <u>inférieurs à ses coûts variables</u> , ayant eu pour effet de remporter dix-sept contrats de maintenance que des concurrents auraient remportés si cette pratique de prix n'avait pas eu lieu.	sanction pécuniaire de 17 million FF infligée à la société Française des Jeux (facteur aggravant: connaissance du préjudice causé au sociétés indépendantes; facteurs atténuants: la bonne collaboration lors de l'enquête; la durée limitée des pratiques; le faible impact sur le marché	Dans la logique de la décision n° 00-D-47, qui énonce les conditions d'une subvention licite d'une entreprise détenant un monopole entrant sur un marché concurrentiel, le conseil estime qu'en l'espèce, les prix abusivement bas ne sont <u>pas de caractère prédateur, mais qu'ils perturbent durablement</u> <u>le marché connexe</u> et que par là il s'agit d'une <u>subvention illicite</u> .
services dans le domaine de l'énergie et du bâtiment	00-D-57 du 6 décembre 2000	Le ministre délégué aux finances et au commerce extérieur, CAPEB de l'Isère /. SEM Gay et Electricité de Grenoble, GESTE, GEG Achats	mise en commun de la trésorerie, mise à disposition de moyens de fonctionnement, confusion entre GEG et GESTE, (la GEG disposant seule de la concession de la distribution d'électricité et du gaz sur le territoire de la ville de Grenoble)	non-lieu (pas d'éléments suffisamment probants permettant de considérer que l'obtention d'avantages aurait été déséquilibrée ou sans contrepartie ou qu'il y a risque d'éviction des concurrents)	référence aux décisions n° 00-D-47 du 22 novembre 2000 et n° 94-A-15 du 10 mai 1994, voir ci-dessus décision n° 02-D-63 du 8 octobre 2002

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
marché de la presse consumentiste	00-D-54 du 28 novembre 2000	L'union fédérale des consommateurs (UFC) /. L'institut national de la consommation (INC)	publicité illicite de l'INC pour ses publications dans les émissions de télévision prévues par les cahiers des charges des chaînes publiques; financement du déficit de ses publications commerciales, qui se situent sur un marché concurrentiel, par une partie des subventions qu'il reçoit chaque année en ne distinguant pas ses activités non commerciales des activités commerciales (non établi); pratique de prix de vente en kiosque et par abonnement inférieurs et à des coûts de revient et aux prix de vente de son principal concurrent, l'UFC qui publie la revue Que choisir (non établie)	<u>sanction pécuniaire:</u> un million FF pour infraction aux dispositions du décret du 27.03.1992 interdisant la publicité télévisuelle des publications de presse (facteurs aggravants: l'illicéité de la pratique ; le fait d'avoir fait, en sa qualité d'établissement public, un usage impropre de son temps d'antenne pour faire de la publicité au lieu de le consacrer à la seule information des consommateurs	Selon le conseil, la publicité illicite de l'INC " <i>a pu faire obstacle au développement d'une compétition par les mérites ; que, même si l'UFC n'a pas enregistré, en valeur absolue, une chute de ses ventes, la pratique en cause a pu limiter ses perspectives de progression ainsi que celles des autres opérateurs et exercer un effet dissuasif sur de nouvelles entrées éventuelles sur le marché...</i> " (page 12)

DAF/COMP(2005)27

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
éclairage public	00-D-47 du 22 novembre 2000	Le ministre de l'économie ./. EDF et sa filiale Citélum	abus de position dominante d'EDF en tant que monopoliste de la production, distribution et du transport de l'électricité: par la mise à dispositions de moyens au profit de Citélum (considérée comme non-injustifiée faute de position dominante de celle-ci) à l'occasion de la passation de conventions de distribution d'électricité et d'éclairage public à des prix artificiellement bas et à un renouvellement par reconduction tacite en concluant dans nombre de communes des conventions d'entretien et de maintenance de l'éclairage public d'une durée trop longue; Citélum: entente en signant une convention comportant des clauses anticoncurrentielles	non-lieu partiel; sanctions pécuniaires: 800 000 F à EDF, 200 000 F à Citélum	Il s'agit d'une décision de principe, à laquelle se réfèrent maintes décisions postérieures, énonçant les <u>conditions d'une subvention licite d'une entreprise de position dominante ayant détenu un monopole et entrant sur un marché concurrentiel</u> : <i>"Il est licite, pour une entreprise publique qui dispose d'une position dominante sur un marché en vertu d'un monopole légal, d'entrer sur un ou des marchés relevant de secteurs concurrentiels, à condition qu'elle n'abuse pas de sa position dominante pour restreindre ou tenter de restreindre l'accès au marché pour ses concurrents en recourant à des moyens autres que la concurrence par les mérites."</i> (page 13) Le seul fait d'une subvention, rendue possible grâce aux ressources de son activité monopolistique, n'est pas encore constitutif d'un abus. En revanche, étant donné que l'acquisition n'a supposé aucune dépense et qu'elle est insusceptible d'être contestée, est susceptible de constituer un abus une subvention, lorsque elle est utilisée pour pratiquer des <u>prix prédateurs</u> ou lorsqu'elle a conditionné une <u>pratique commerciale qui a entraîné une perturbation durable du marché</u> , qui n'aurait pas eu lieu sans elle. (page 13)
marché du traitement des bons de réduction	00-MC-12 du 17 juillet 2000	Soc. Scan Coupon ./. Soc. Sogec	inclusion d'une clause d'exclusivité dans les contrats passés les clients annonceurs pressions exercées sur les clients annonceurs pour les dissuader d'émettre des bons portant simultanément un numéro Sogec et la mention "traitement Scan Coupon" (aucun élément probant les pratiques dénoncées et aucune demande de MC formulée, propre à mettre fin à une telle pratique)	rejet de la demande de mesures conservatoires	La notion "concurrence par les mérites" n'est alléguée que par la seule partie saisissante

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
marché de la téléphonie mobile	99-MC-12 du 23 décembre 1999	Bouygues Télécom ./. France Télécom	pratique de prix prédateurs par l'offre gratuite (dite "OLA") de portables combinée avec 2000 secondes gratuites par moi pendant douze moi pour toute souscription durant un certain délai; publicité agressive en corrélation directe avec l'évolution, du dessus d'un seuil de 20%, de ses parts de marché instantanées, afin d'éliminer Bouygues et d'empêcher l'accès des tiers au marché	rejet de la demande de mesures conservatoires (Bouygues n'ayant ni établi, en quoi l'offre ou la promotion de France Télécom se distingueraient de celles de ses concurrents dans des conditions telles qu'elles seraient susceptibles d'entraîner une atteinte grave et immédiate à l'économie générale, au secteur concerné ou à l'intérêt des consommateurs, ni que la position, voire la survie de Bouygues sur le marché serait menacée)	exigence d'un <u>comportement loyal et légitime</u> (page 3)
secteur du secours informatique	99-D-63 du 20 octobre 1999	Soc. Twinsys-Dataguard ./. Soc. Intégris	abus de position dominante par le refus de renouveler le contrat de secours informatique, en sachant que la société plaignante n'avait pas les moyens de procéder elle-même aux prestations fournies par la société assignée (création d'un second centre de secours pour faire face à une survenance éventuelle de plusieurs sinistres informatiques), afin d'évincer la plaignante du marché de secours informatique pour exercer une pression dans le cadre des négociations de l'assignée avec une société américaine	non-lieu (effet ou objectif anticoncurrentiels non établis, la saisissante ayant disposé de plusieurs solutions pour mettre en œuvre son projet d'une créations d'un deuxième niveau de secours informatique, soit en recherchant à l'étranger; pas de diminution du chiffre d'affaires, au contraire)	" <i>Considérant qu'il est de jurisprudence constante (CJCE, Akzo, 3 juillet 1991 - CA de Paris, Labinal/Mors, 1re ch., 19 mai 1993) qu'une entreprise disposant d'une position dominante et confrontée à l'arrivée d'un concurrent est en droit de défendre ou de développer sa part de marché pourvu qu'elle demeure dans les limites d'un <u>comportement loyal et légitime</u>; qu'en revanche, le fait, pour l'entreprise disposant d'une telle position, de tenter de limiter l'accès du marché à son concurrent en recourant à des moyens autres que ceux qui relèvent d'une <u>concurrence par les mérites</u> revêt un caractère abusif</i> "

DAF/COMP(2005)27

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
marché du traitement des coupons publicitaires de réduction	99-MC-07 du 13 octobre 1999	Soc. Scan Coupon ./. Soc. Financière Sogec Marketing, Sogec Gestion	abus de position dominante et une entente par la mise en place d'un système sécurisé vis-à-vis des annonceurs et des distributeurs lui assurant une exclusivité quasi-absolue de la gestion des coupons de réduction émis sur le marché national, empêchant ainsi les annonceurs liés de faire appel en parallèle à un autre prestataire de services même pour des opérations ponctuelles, et laissant les fournisseurs sans alternative	injonctions de suspendre l'application de la clause d'exclusivité insérée dans les contrats d'adhésion à leurs banques de coupons; de ne plus proposer de contrats comportant une telle clause; d'informer tous les clients concernés de la présente décision	"Considérant... qu'il résulte d'une <u>jurisprudence constante</u> (CJCE, affaire C 18/88 13 décembre 1991 Régie des télégraphes et téléphones et C62/86 Akzo, 3 juillet 1991; cour d'appel de paris, Labinal/Mors; Conseil de la concurrence, France Télécom et ODA, décision n° 96-D-10 du 20 février 1996, et Lilly France, décision n° 96-D-12 du 5 mars 1996) que si une entreprise, disposant d'une position dominante et confrontée à l'arrivée d'un concurrent, est en <u>droit de défendre et de développer sa part de</u> <u>marché</u> , elle n'en doit pas moins <u>demeurer dans les limites d'un</u> <u>comportement compétitif normal</u> ; que le fait, pour cette entreprise, de tenter de limiter l'accès du marché sur lequel elle est en position dominante, ou d'un autre marché, en recourant à des moyens autres que ceux qui relèvent d'une <u>concurrence par les mérites</u> , revêt un caractère abusif..."
téléphonie fixe et mobile	99-MC-04 du 10 mars 1999	L'Association française des opérateurs privés de télécommunications (AFOPT), l'Association des opérateurs de services de télécommunications (AOST) ./. France Télécom	Remise de couplage de secteurs en monopole et en concurrence en offrant à tout nouveau souscripteur de forfaits OLA ou LOFT six mois d'abonnement gratuit à l'option "Primaliste Longue Distance", commercialisée par France Télécom sur les abonnements de téléphonie fixe, en vue de fidéliser ses abonnés au service téléphonique fixe, de gagner massivement de nouveaux abonnés à son service téléphonique mobile, et d'ériger ainsi une barrière à l'entrée sur le marché de la téléphonie fixe longue distance	Rejet de la demande de mesures conservatoires (absence d'atteinte grave et immédiate au secteur intéressé ou aux entreprises concurrentes; pas de lien causal entre les résultats négatifs faits par Bouygues et l'offre promotionnelle de France Télécom)	Citation du même considérant réité ci-dessus, voir 99-MC-07

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
diffusion de programmes audiovisuels	99-MC-02 du 27 janvier 1999	Soc. Planète Câble ./. France Télécom Câble	Dénonciation simultanée de plusieurs contrats de diffusion par le monopoliste: Arrêt de diffuser la chaîne Planète sur les réseaux de Bayonne-Anglet-Biarritz au profit de la chaîne Odysée (filiale de TF1); Annonce de cesser éventuellement la diffusion sur les réseaux d'Angers, de Tours, de Yveslines, de Rennes, de l'Essonne, de la Côte d'Opale et de l'Est aussi	rejet de la demande de mesures conservatoires (pas d'atteinte grave et immédiate car: l'arrêt de la diffusion déjà réalisé n'a qu'une portée limitée; sinon les négociations sont toujours ouvertes)	Contrairement à l'usage habituel, le conseil <u>n'utilise pas la notion de la "concurrence par les mérites" pour incriminer le comportement du monopoliste, mais pour examiner (positivement) son exemption</u> , sans pour autant en donner une définition plus précise: Selon le conseil, le fait que la chaîne Odysée demande une redevance moins élevée que la chaîne Planète, <u>la différence du seul prix en d'autres termes, ne fait pas encore preuve de ce que l'éviction de Planète soit motivée par la concurrence par les mérites, mais qu'il faut tenir compte de la qualité des programmes</u> (France Télécom ne remettant pas non plus en question la programmation de LCI, dont la redevance est encore plus élevée que celle de Planète). <u>Cependant, dans le même contexte, la notion des "mérites" se réfère au comportement des entreprises non monopolistes; le conseil parle "des mérites respectifs" des deux chaînes Planète et Odysée:</u> Si France Télécom Câble avait réussi à démontrer, que lors des négociations, sa décision de favoriser l'une des entreprises au détriment de l'autre, a été déterminée par leurs seuls mérites, France Télécom Câble aurait été exempté. Il paraît ainsi que l'exigence d'un choix par les "mérites" des entreprises ne représente ici qu'une concrétisation des "conditions normales du marché".
organisation et exploitation télévisuelle d'événements sportifs	98-MC-07 du 15 juillet 1998	Soc. Arenis Leo ./. Soc. Stuart Sawyer Marketing Limited (SSM), Professional Windsurfers Association (PWA); Soc. Williwaw, Sese (du groupe Canal Plus)	insertion de clauses d'exclusivité dans des contrats d'organisation et d'exploitation télévisuelle d'événements sportifs (avec une option prioritaire assurant le renouvellement sans remise en concurrence, après avoir détenu le monopole durant les dernières années)	injonction de renoncer à l'application d'une clause contractuelle réservant des droits exclusifs et contenant une option pour l'organisation d'événements de la PWA qui seraient organisés successivement en France au cours des années 1999, 2000 et 2001	Application des principes d'une "concurrence par les mérites" aux détenteurs d'un <u>monopole non légal, mais contractuel</u>

DAF/COMP(2005)27

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
secteur de la publicité sur le mobilier urbain	98-D-52 du 7 juillet 1998	La Chambre syndicale française de l'affichage ./. Groupe Decaux	d'avoir trompé les collectivités publiques sur la valeur économique réelle des prestations fournies et d'avoir essayé de leur imposer l'adoption de contrats comportant des clauses anticoncurrentielles susceptibles d'évincer des concurrents (caractère délibéré des pratiques non établi)	injonctions I. de ne proposer aux collectivités publiques souhaitant contracter avec elles A) ni l'insertion d'une clause reconnaissant à la société du groupe Decaux cocontractante un droit de priorité pour l'installation de mobilier urbain supplémentaire ; B) ni l'insertion d'une clause selon laquelle les équipements installés en cours de contrat ont une durée contractuelle propre différente de celle du contrat ; C) ni l'insertion d'une clause de tacite reconduction ; II. d'information	mention de "pratiques qui auraient contribué à renforcer la puissance économique du groupe Decaux par des moyens qui ne relèvent pas exclusivement d'une "compétition par les mérites", ont eu pour objet et pour effet de restreindre artificiellement le jeu de la concurrence sur le marché de la fourniture aux collectivités locales de mobilier urbain publicitaire et sur une partie substantielle du marché voisin de la publicité extérieure, en limitant les possibilités des entreprises concurrentes d'y accéder et en limitant la liberté des collectivités à choisir leur cocontractant ;..." (page 24)
secteur du béton prêt à l'emploi dans la région PACA	97-D-39 du 17 juin 1997	Le ministre d'Etat, ministre de l'économie, des finances et du budget ./. différentes entreprises	concertation relative à la répartition systématique et au cloisonnement de marché ayant eu pour objet et pour effet de fausser le jeu de la concurrence; pratique des prix de vente unitaires inférieurs à leurs coûts totaux pour éliminer des concurrents	sanctions pécuniaires; (facteurs aggravants particulier: des entreprises multinationales; le rôle actif d'organisation au sein de l'entente) injonction de publication de la décision	"(...) le fait, pour les producteurs, de commercialiser du béton à des prix de vente inférieurs aux coûts moyens totaux mais supérieurs à leurs coûts moyens variables peut également être constitutif d'une entente prohibée par les dispositions de l'article 7 de l'ordonnance, s'il est établi que cette stratégie commune avait pour objet d'éliminer un concurrent en pratiquant une concurrence qui ne relève pas d'une concurrence par les mérites; qu'en effet, des entreprises détenant la quasi-totalité du marché et se livrant à une répartition dudit marché n'ont pas intérêt à pratiquer des prix inférieurs à leurs coûts totaux et a fortiori à leurs coûts moyens variables si ce n'est pour éliminer un ou des concurrents, pour pouvoir par la suite relever le niveau des prix et tirer parti de la rente ainsi constituée..." (page 60)

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
secteur des spécialités pharmaceutiques destinées aux hôpitaux, marchés du médicament Dobutrex d'une part et du médicament Vancomycine, d'autre part	96-D-12 du 5 mars 1996	Le ministre de l'économie et des finances ./. Lilly France	politique d'éviction de la part de Lilly France vis-à-vis des laboratoires pharmaceutiques concurrentes, en offrant aux hôpitaux une remise de couplage pour l'achat lié des médicaments Dobutrex et Vancomycine (dont Lilly France détenait le droit exclusif de commercialisation, grâce au dépôt de brevets et à l'autorisation ministérielle, mais le dernier médicament étant désormais ouvert à la concurrence)	<u>sanction pécuniaire</u> : 30 millions FF (facteurs aggravants particuliers: le degré de captivité élevé par la dépendance des prescriptions médicales; position mondiale de l'assignée; la durée de la pratique; sa poursuite postérieure au lancement de l'enquête; la limitation du développement des médicaments génériques susceptibles de réduire les coûts de la santé; l'augmentation des tarifs malgré les ventes élevées) <u>injonction</u> de publication	voir citation des décisions 99-MC-07, 99-MC-04 (le fait qu'un (ancien) monopoliste entre dans un marché ouvert à la concurrence ne constitue pas en soi un abus de position dominante, page 120 du rapport d'activité); Le conseil estime que l'octroi d'une remise (jusqu'à 15 %) sur le Dobutrex en cas d'achat de Vancomycine avait pour objet et a eu pour effet de dissuader les pharmacies d'établissements hospitaliers de s'adresser à des entreprises concurrentes pour obtenir séparément de la Vancomycine, et qu'il revêtait un caractère artificiel et discriminatoire. Cette remise est, selon le conseil, assimilable à une prime de fidélité destinée à récompenser les clients qui renonçaient à s'adresser aux concurrentes.

Secteur/ Marché en cause	N° de décision/ date	Parties	Pratique reprochée/ nature du comportement	Dispositif	Observations concernant les critères d'une « concurrence par les mérites »
marché de l'édition d'annuaires, marché de vente d'espaces publicitaires	96-D-10 du 20 février 1996	Soc. Communication Média Services (C.M.S.) /. France Télécom et son ancienne filiale l'Office d'annonces (ODA)	publication, en tant que fournisseur exclusif des listes d'abonnés indispensable pour la confection d'annuaires par les entreprises privées, d'un nouvel annuaire au même moment que son concurrent C.M.S. (ne constituant pas en soi un abus de position dominante); politique de prix prédateurs pour la vente d'espaces publicitaires par France Télécom et ODA dans les annuaires de Pages jaunes locales éditées dans la zone de Versailles (non établie, le prix excédant le coût moyen variable de production de support); politique d'éviction par l'offre d'une remise de couplage tarifaire par l'ODA (régisseur exclusif de la publicité dans les annuaires officiels de France Télécom) aux annonceurs qui acceptaient de souscrire simultanément de la publicité dans les Pages jaunes départementales et locales	<u>injonctions</u> à l'ODA de cesser de consentir des remises de couplage aux annonceurs pour l'achat d'espaces publicitaires dans les Pages jaunes locales et départementales (pour l'effet dissuasif sur la décision de clients potentiels de s'adresser à la concurrente C.M.S. ayant publié un annuaire local) de publier la décision; <u>sanction pécuniaire</u> : 10 millions FF (facteurs aggravants: l'utilisation de la marque France Télécom comme référence ("l'opérateur public"); la création récente de la société concurrente; la notoriété: caractère "incontournable" des Pages jaunes nommées "annuaires officiels"; l'ouverture du marché étant encore toute fraîche	voir citation des décisions 99-MC-07, 99-MC-04 (le fait qu'un monopoliste entre dans un marché ouvert à la concurrence ne constitue pas en soi un abus de position dominante, page 114 du rapport d'activité); En plus, le conseil a considéré en l'espèce, que la <u>remise de couplage</u> <u>accordée aux annonceurs, qui pourraient être tentés de devenir également</u> <u>clients d'une entreprise concurrente, représentait une prime de fidélité qui</u> <u>ne correspondait pas au jeu d'une concurrence par les mérites caractérisée</u> <u>par une baisse sans discrimination du tarif unitaire de vente et pour rendre</u> <u>plus compétitif ses produits en améliorant la qualité.</u> (page 114 du rapport d'activités) La potentialité de l'effet anticoncurrentiel résulte, selon le conseil, du fait que la pratique était de nature à <u>détourner artificiellement les annonceurs</u> <u>de s'adresser à la concurrente même au cas d'un équivalence du tarif et de</u> <u>la qualité.</u> (page 114 du rapport d'activités)

GERMANY

After discussing the significance of “competition on the merits” in German competition law in general and in abuse control in particular (1), the contribution describes recent case law and general guidelines concerning national abuse provisions (2). For general considerations on how to modernise abuse control, please refer to the enclosed speech of Dr. Ulf Böge, President of the Bundeskartellamt, about “The Role of Economics in Antitrust Enforcement” given at the conference “Antitrust Reform in Europe: A Year in Practice” hosted by the International Bar Association and European Commission, DG Competition on 10 March 2005 in Brussels.

1. The term “Competition on the merits”

In Germany, the term “competition on the merits” plays a role both in the application of the Act against Unfair Competition (AUC), which aims at preventing dishonest commercial conduct, and the Act against Restraints of Competition (ARC), i.e. the core provisions of competition law.

1.1 *Unfair competition*

The AUC of 1909 prohibited certain trade practices considered to be unfair. The former general clause in section 1 read : “Any person who, in the course of business activity and for purposes of competition, commits acts contrary to honest practices may be enjoined from these acts and held liable for damages.” Last year, the AUC of 1909 was replaced by a new act, which entered into force in June 2004. In the new Act the definition of unfair competition expressly states that the conduct in question has to be suitable to affect competition. Section 3 AUC now prohibits “unfair acts of competition which are liable to have more than an insubstantial impact on competition to the detriment of competitors, consumers or other market participants”. Instead of the former concept of *honest practices* the new Act thus uses the concept of unfairness. This change in terminology, however, is seen merely as a modernisation and Europeanisation and not as a change of substance.

In delineating these “acts contrary to honest practices”, both jurisprudence and literature referred to the notion of competition on the merits as a starting point. For the first time, competition on the merits was defined in an expertise by *Hans Carl Nipperdey* in the 1930’s as “positive competition”, promoting the sales activities of a company by means of its own efforts. In contrast, , “impediment competition” (*Behinderungswettbewerb*) was considered to be negative competition hindering competitors in order to smooth the way for one’s own sales. The landmark case *Benrather gas stations* before the *Reichsgericht* for which the expertise mentioned above was made dealt with a price cartel of oil suppliers and involved gas stations which systematically undercut the prices of a freelance gas station operating in the city of Benrath by 0.01 *Reichsmark*. The cartel just lowered their prices in this area in order to oblige the freelance to align his prices to the cartel price. The freelance, however, considered this regional undercutting of prices to be unfair competition and went to court. The legal expert Nipperdey consulted by the oil companies concluded that the undercutting of the prices provided a clear example of competition on the merits in which the more efficient competitor with regard to price and quality prevails. The *Reichsgericht*, however, found that it was faced with a case of impediment competition, since the low gas price was proposed by the cartel only in the sales area of the freelance and nowhere else. This meant that the cartel aimed at bankrupting the freelance in order to raise prices at their ease afterwards.

Later, other forms of harming or obstructing competitors or consumers were included in a more general definition of “competition off the merits” (Nichtleistungswettbewerb). Nowadays, the decisive criterion for distinguishing competition on and off the merits is whether benchmarking is hindered or falsified. This includes the five standard cases of unfair influence on the freewill of the customer, obstruction of competitors by unfair means, imitation and exploitation, creation of a competitive advantage by disrespecting legal limitations and use of advantages due to market power. Briefly, this includes all behaviour which interferes with the functioning of competition on the merits in the competitive acts of individual companies or as an institution.

Competition on the merits is therefore not equivalent to, but a strong indicator for fair competition. The general clause prohibiting unfair competition has been interpreted by the courts as mainly protecting the fairness of competition on the merits. In the interest of competitors, consumers and other market players as well as the general public, competition should be protected from competitive acts which are contrary to moral and legal standards. For example in a 2002 ruling the Federal Constitutional Court (Bundesverfassungsgericht) decided that competitive conduct can only be qualified as unfair if the object of legal protection of the AUC, i.e. the competition on the merits, is sufficiently threatened by it.

However, this decision has been criticised for stressing the term “competition on the merits” and for attaching normative impact to it.

Many critical authors claim that “competition on the merits” is nothing but an empty phrase. Instead, they advocate referring to the guiding principles of the existing economic and competitive order to define unfair competition.

1.2 *Competition Rules*

Furthermore, the ARC contains provisions relating to the establishment of competition rules by trade and industry associations and professional organisations. These declarations are not legal instruments. Even if they are binding for the members of the associations or organisations according to their statutory rules, they are not generally applicable. The trade and industry associations and professional organisations may apply to the cartel authorities for recognition of these rules. Third-party undertakings operating at the same level of the economy, trade and industry associations and professional organisations of the suppliers and purchasers affected by the competition rules, as well as the federal organisations of the levels of the economy involved are given an opportunity to comment before recognitions are issued by way of a decision by the cartel authority and published in the Federal Gazette. The recognition by the competition agencies under the current ARC is equivalent to an authorisation of the competition rules as individual exceptions to the general ban on cartels. The seventh amendment to the ARC, which is currently undergoing legislation, will replace the system of notification and authorisation of anti-competitive agreements with a system of legal exception. The recognition will therefore just be a legal assessment reflecting the opinion of the competition authority and will not be binding for third parties (e.g. in the context of civil actions).

All in all, about eighty competition rules have been registered by the Federal Cartel Office and the Cartel Authorities of the German *Länder*, which contain examples of practices considered to be either fair competition or competition on the merits or both. A list is published in the biennial activity report of the Federal Cartel Office. Important examples include the rules for the brand name industry established by the trademark association (Markenverband) and registered by the Federal Cartel Office in 1976 as well as the competition rules for the pharmaceutical industry.

Section 24 ARC states that competition rules are provisions which regulate the conduct of undertakings in competition for the purpose of counteracting conduct which violates the principles of *fair*

competition or *effective competition based on performance*, and of encouraging conduct in competition which is in line with these principles.

The possibility of establishing competition rules had been introduced into the ARC in 1958 as a compensation for the general ban on cartels in order to allow the economy to arrange for fair and respectable competition on the merits even if such competition rules restrict the ban on cartels. The criterion of *effective competition based on performance* was added to section 24 ARC in 1973 in order to protect competition against unjustified advantages obtained by dominant or otherwise powerful companies irrelevant of their own performance. The legislator stated that this addendum was supposed to encourage small and medium-sized enterprises to cooperate and to oppose practices which violate the principle of competition on the merits.

It is understood that *effective competition based on performance* is just another expression for competition on the merits. The legislator considered competition on the merits to be functioning, efficient competition, i.e. competition fulfilling its economic tasks as well as possible. In contrast to the civil law term “fair competition”, which protects individuals, competition on the merits safeguards competition as an organising principle of economic policy and therefore as an institution.

There have been very few administrative decisions or court rulings dealing with the general notion of competition on the merits in the context of Section 24 in more general terms. Therefore, this issue is still not settled. Some critical literature even considers the term of competition on the merits to be elusive and to lack a palpable normative content .

1.3 Abuse of dominance

The concept of competition on the merits has been used in the context of the national provisions on abuse of dominance . German abuse control differentiates between *exclusionary abuse* (Section 19 (4) no. 1, Section 20 (1) ARC) which includes the special case of refusal of access to essential infrastructure facilities (Section 19 (4) no. 4 ARC) and *exploitative abuse* (Section 19 (4) No 2,3 ARC). Exploitative abuse is characterised by the instrumental use of market power to achieve certain commercial goods and can only be applied by dominant companies. Such business practices are in themselves abusive. Exploitative abuses are more difficult to establish, since they can include “normal methods of competition” which - if enforced by a dominant undertaking – distort competition and hinder competitors.

The general concept of “competition off the merits” has been used by the Berlin Court of Appeals (Kammergericht Berlin) in order to establish the existence of *exclusionary abuses* under section 19 (4) no.1 ARC. The Berlin Court of Appeals developed the so-called “two barriers” theory in its landmark case *combined tariffs (Kombinationstarif)* in 1977. It stated that an abuse might be presumed (i) if the conduct of the dominant company is not within the bounds of competition on the merits (Nichtleistungswettbewerb) and (ii) if the market structure is further worsened by it by profoundly restricting or even eliminating the competition remaining on the dominated market (Restwettbewerb).

When defining abusive behaviour, the court explained that under German law an abuse does not necessitate a causal link between the dominant position and the abusive conduct. This is why the dominant company cannot justify its behaviour by proving that it is common or widespread in the relevant business community. This different treatment of dominant companies with regard to their competitors is justified because of their powerful economic position. On the other hand, German competition law tolerates the emergence or strengthening of a dominant position if it is due to a company’s inner growth. Therefore, the law cannot forbid all the business activities of a dominant company that influence the market structure – which they potentially do in most cases. Otherwise , the competitors of the dominant company would not

have to face any competition by the market leader at all and competition would come to a complete standstill.

When interpreting the term “abusive”, the foremost objective of abuse control, which is to keep the entry to the dominated market open, has to be taken into consideration. An abuse therefore does not equate with condemnable conduct. It might be defined by keeping in mind the fundamental principles governing a competitive economy, and most of all the principle of freedom of competition. The Berlin Court of Appeal therefore concluded that an abuse might be constituted by all conduct outside the area of competition on the merits, i.e. promoting sale activities by the company’s own able merits, even if it does not fall within the scope of application of the Act against Unfair Competition.

In the case at hand, the court considered that a combined advertising tariff for two different newspapers at an overall lower price than separate advertisements in the individual newspapers could not be qualified as competition on the merits. It further explained that linking two offers serves the purpose of pushing the sales of the less popular product or of enhancing the overall attractiveness of both products. In any case, the individual offer is not competing by its own merits anymore, but has something added to it. Incidentally, an abuse was finally denied since the second criterion was not met, i.e. there was no noticeable restriction of the remaining competition in the market.

In a later judgement, the court mentioned improved product or service quality or the passing on of cost advantages of mass production in the form of price reductions as examples for competition on the merits. (Fertigfutter II 1980)

An example for competition “off” the merits is provided by a temporary fidelity rebate awarded to buyers who had collected a certain number of tokens printed on the product. However, this special offer was not considered to be abusive since it did not create a serious and durable threat to the competition on the dominated market (Rama-Mädchen 1978).

In another case in 1979, the Berlin Court of Appeal further explained that dominant companies are allowed to compete by their merits even if this endangers weak competitors. Given the aim of the ARC to protect competition in order to increase efficiency and assure the best possible supply to consumers, behaviour contributing to these objectives can be qualified as competition on the merits. Furthermore, the dominant company has a right to fend off competitive measures/actions by its competitors on the same or substitute markets. Applying these principles, the court decided that the distribution of a newspaper’s Sunday edition to subscribers for free qualifies as competition on the merits. It argued that the Sunday edition refurbishes the original offer of a daily newspaper without coupling it to a new one. Such competition on the merits is not abusive, irrelevant of the possible threat it poses to the market structure.

However, this jurisprudence has been largely criticised for employing terms which cannot be properly defined. Generally speaking, competition on and off the merits are considered to be impossible to distinguish. Therefore, most authors as well as the Federal Supreme Court apply the theory of the so-called moveable barriers in order to establish the existence of an exclusionary abuse. This method mainly focuses on an extensive weighing of the interests at stake on a case by case basis. More specifically, the question whether the conduct in question can be objectively justified is examined. This criterion plays an important role in all forms of abuse. Some provisions expressly state the requirement of such objective justification (e.g. section 19 (4) no. 1 and 3; section 20 (1) ARC), in other cases this requirement has been developed by courts or the Bundeskartellamt. To determine whether a behaviour is justified an extensive weighing of the interests of the parties concerned has to take place. The interests of the dominant company on the one hand and those of the companies whose opportunities to compete are impeded on the other hand have to be balanced. The purpose of the ARC, which is to guarantee freedom of competition, must be given its due weight. Apart from that only interests that are acknowledged by the existing legal order are relevant. Public

interest (such as the environment, health issues) are only restrictively taken into account. Efficiency aspects are generally not considered when balancing the different interests.

2. General guidelines on national abuse provisions and recent case law

The term “competition on the merits” does not play a decisive role in either the guidelines published or the recent case law and they are just exposed for completeness’ sake. Incidentally, in the seventh amendment of the Act against restraints of competition, which is undergoing legislation right now, “competition on the merits” has not been mentioned in the government’s explanatory statement or in the Bundeskartellamt’s advisory opinion either.

2.1 Guidelines

The Bundeskartellamt has published principles for interpreting the ban on selling below cost price (section 20 (4) sentence 2 ARC). The principles take account of the findings from proceedings conducted so far and court rulings issued in this area in order to provide the companies with the necessary legal certainty. The principles explain in practical terms that an unfair hindrance exists if an undertaking with superior market power sells not merely occasionally below cost price, unless there is objective justification for so doing. In these guidelines it is clarified that sales below cost price over a period of up to three weeks are to be considered merely temporary. On the other hand, the requirements of section 20 (4) ARC can be fulfilled even if there is neither a predatory intent nor proof of a tangible restraint of competition conditions. The company concerned can only dispel the presumption that it is selling below cost price by proving that the conduct was objectively justified. Matching a competitor’s below cost price strategy cannot generally be regarded as constituting such an objective justification. Rather, an objective justification of below-cost prices is limited to product specific characteristics such as the sale of perishable or seasonal goods. In the view of the Bundeskartellamt, sales below cost price may also be objectively justified when an undertaking enters a market for the first time in cases where its market share under the Bundeskartellamt’s definition will be marginal anyway. That does not apply, however, when a firm changes hands or when a merger is involved. Moreover the principles also make clear that an offer below cost price may also be assumed if a constant offer price is exceeded by an increasing cost price. In this case the offer price is in principle to be raised to the extent that it no longer falls below the new cost price. Nevertheless, in individual cases and in the event of unexpected price increases, it may be objectively justified to temporarily maintain the offer price, provided this serves to establish a new supply source.

Furthermore, the Bundeskartellamt has published a discussion paper about the assessment of long-term gas supply contracts under competition law in January 2005. It deals with supply contracts concluded by German gas transmission and gas production companies on the supply side and the regional and local gas distributors in Germany on the demand side. The Bundeskartellamt considers problematic

- periods of contract of more than two years and supply quantities of more than 80 per cent of the respective consumer requirements and
- periods of contract of more than four years and supply quantities between 50 and 80 per cent of the respective consumer requirements.

Although the assessment is mainly based on the violation of the ban of cartels, national and European abuse provisions also come into play if the individual gas distributor holds a dominant market position.

Besides that, no other guidelines or policy statements on the application of the national abuse provisions exist. It is noteworthy that the term “competition on the merits” does not appear in any of the guidelines named above.

2.2 *Recent case law*

The prohibition of abusive behaviour of a dominant firm was established in 1958 when the German Act against Restraints of Competition (ARC) entered into force. Over nearly 50 years numerous administrative or civil proceedings (seldom fine proceedings) have been conducted pursuant to sections 19, 20 ARC. Although there were a number of leading cases over the last decades this contribution focuses on precedents from the last five years.

The most important cases concerning exploitative abuse can be found in the energy sector. The leading cases are Stadtwerke Mainz, TEAG and RWE Net. Concerning exclusionary abuse the leading cases over the last years were WalMart (below cost sales), Deutsche Lufthansa/Germania (predatory pricing), Oil Companies (price squeeze), Metro/allkauf (preferential terms), Puttgarden (essential facilities) and Mainova (essential facilities).

- *Preferential terms: Metro/allkauf*

In 1999, the Bundeskartellamt prohibited Metro, which took over the allkauf group, from causing suppliers to adjust their terms in Metro's favour and to make the corresponding compensatory payments to Metro. After the Metro/allkauf merger had been allowed to go ahead, Metro had asked both firms' suppliers to adjust their terms. The Bundeskartellamt found that Metro's conduct vis-à-vis at least half of the firms questioned met the conditions of unjustified hindrance within the meaning of section 20 (2) ARC. Metro obtained preferential terms by causing suppliers to retroactively grant it the most favourable prices and terms that had been agreed in the annual contracts with Metro and allkauf. This placed Metro at an advantage which had the same effect as preferential clauses. The Bundesgerichtshof (Federal Supreme Court) confirmed that retroactively granted most favourable prices are preferential terms that are prohibited by section 20 ARC.

- *Price squeeze: Oil Companies*

In 2000 the Bundeskartellamt prohibited with immediate effect the major six oil companies in Germany from demanding higher prices (plus a freight surcharge) for supplying independent petrol station operators than they charge final consumers at their own petrol stations. By opening up a price gap and charging small petrol station operators at their refineries higher prices than those charged to consumers at their own petrol stations the large oil companies were unfairly hindering independent petrol station operators. This pricing policy prevented independent petrol station operators right from the start from making a profit on fuel sales. Unlike the large vertically integrated six oil companies, small and medium-sized firms did not have the same access to the crude oil market and the financial resources to cushion any losses on the fuel market. In 2001 the Oberlandesgericht Düsseldorf (Higher Regional Court) reversed the decision.

- *Sales below cost price: WalMart*

In 2000 the Bundeskartellamt prohibited pursuant to section 20 (4) ARC the companies Wal-Mart, Aldi Nord and Lidl from selling certain basic foods below their respective cost prices. The Bundeskartellamt established that owing to their size, market shares and resources the three firms had superior market power over the independent grocers. The manufacturers' selling prices, discounts and other price-related terms, were decisive factors in determining the cost prices. Products were considered not to be sold merely occasionally below cost price if such offers lasted for more than two months. WalMart was the only company to appeal before the Oberlandesgericht Düsseldorf (Higher Regional Court) which finally acknowledged WalMart's appeal because it did not regard WalMart's sale of sugar below cost price as sufficient for prohibition. The Bundesgerichtshof (Federal Supreme Court) granted for the most part the

appeal lodged by the Bundeskartellamt especially clarifying that an unwritten criterion, i.e. “appreciability”, should not be added to the conditions of section 20 (4) sentence 2 ARC.

- *Predatory pricing: Deutsche Lufthansa/Germania*

In 2002 the Bundeskartellamt prohibited Deutsche Lufthansa AG (DLH) from demanding a price for a one-way ticket per passenger on the Frankfurt-Berlin route which is not at least 35 euro above Germania’s price, as long as DLH did not have to charge more than € 134 as a result. The Bundeskartellamt saw the pricing strategy of DLH as an attempt to squeeze its new competitor Germania out of the market and feared that emerging competition would be substantially impaired as a result. Germania started operating scheduled flight services between Berlin and Frankfurt/Main in November 2001. The company offered tickets at € 99 for a one-way, fully-flexible and re-bookable flight. The conditions essentially corresponded to DLH’s economy tariffs suitable for business travellers. DLH reacted by also introducing a fully-flexible economy tariff which offered an immense price reduction (up to €485). In January 2002 DLH raised the price to € 105 clearly undercutting Germania’s price of € 99 as it included services which were not offered by Germania. The price DLH set was clearly below its average operating costs per passenger. The only rational explanation for this pricing strategy was that DLH attempted to force Germania from this route and to recoup resulting losses at a later stage by discontinuing this price tariff and resorting to previous ones. Consequently, the Bundeskartellamt prohibited DLH from demanding a price (including passenger fees) for a one-way ticket per passenger on the Frankfurt-Berlin route which was not at least €35 above Germania’s price, as long as DLH did not have to charge more than €134 as a result. The decision was confirmed for the most part by the competent court. The court made it clear that the decision did not constitute an active market structure control by the Bundeskartellamt. Instead, the Bundeskartellamt protected the newcomer Germania from being hindered by the dominant Lufthansa.

Against this background the Bundeskartellamt in 2002 considered the pricing strategy of Deutsche Lufthansa AG (DLH) for the Berlin – Frankfurt route abusive because DLH attempted to squeeze its new competitor Germania out of the market. In addition to the competitive problems on the affected route, the abusive conduct of DLH could have had a considerable deterrent effect on other potential rivals and on other routes which are currently dominated by DLH.

- *Essential Facilities: Puttgarden*

In 1999 the Bundeskartellamt prohibited Scandlines Deutschland from refusing competing ferry companies access to the Puttgarden terminal on payment of an adequate fee. The proceedings were based on complaints by competitors, who would have liked to start a ferry service on the Puttgarden-Rødby (Denmark) line, but whose application for the shared use of the Puttgarden ferry terminal was refused by Scandlines, the terminal owner. Back in 1993, the European Commission refused the Danish government permission to prevent Stena Rederi from setting up a ferry service in Rødby. The Bundeskartellamt found that Scandlines was infringing section 19 (4) no. 4 ARC in preventing terminal access. Scandlines dominated the market, both with regard to its terminal facilities and the downstream market for ferry services between Puttgarden and Rødby. Legal and physical obstacles stand in the way of the construction of a new terminal in Puttgarden, whereas the shared use of existing terminal facilities by an additional ferry operator would have been possible following appropriate construction and organisational modifications. Weighing Scandlines’ interest in having the unlimited use of its own terminal against the applicants’ interest in starting up competing ferry operations, the decisive factor for the Bundeskartellamt’s decision was the public interest in opening up the market to competition.

The Düsseldorf Higher Regional Court set aside the decision of the Bundeskartellamt holding that the operative provisions of the decision were too vague. On the appeal of the Bundeskartellamt the Federal Supreme Court repealed the judgement stating that the decision was formally correct and not too

indefinite. It referred the case back to the Düsseldorf Higher Regional Court to decide on the material issues of the case (access to the terminal port) but the case was settled before the Higher Regional Court between the Bundeskartellamt and Scandlines.

- *Essential Facilities: Mainova*

In October 2003 the Bundeskartellamt prohibited Mainova AG from denying other energy suppliers connection to its medium-voltage network. The complaining companies depended on this network connection in order to operate site network facilities on premises used for business or housing purposes and to supply end customers located there with electricity generated by the companies themselves or by third suppliers. Both site network operators were in accordance with section 19 (4) no. 4 ARC entitled to have access to Mainova AG's medium-voltage network. According to the Bundeskartellamt the grounds given by Mainova AG to justify the denying of connection were not valid. No additional network costs would arise to Mainova AG nor would its existing customer structure be negatively affected. Energy law provisions provided no legal basis for Mainova AG to claim each new site for itself either. The Düsseldorf Higher Regional Court affirmed the decision of the Bundeskartellamt.

- *Exploitative Abuses: The Energy Cases*

The Bundeskartellamt prohibited German Network Operators in three model cases from charging abusively excessive network fees in respect of metering and billing fees. The Bundeskartellamt ordered Thüringer Energie AG (TEAG) in February 2003 to reduce its current fees for network use with immediate effect. The Bundeskartellamt regarded TEAG's method of charging as abusively excessive and as a violation of section 19 Abs. 1, Abs. 4 Nr. 2 and 4 ARC on the basis of a cost calculation approach. It was the first ruling on abusive practices issued by the Bundeskartellamt within the context of the several abuse proceedings in the energy sector. The aim of all proceedings was to substantially reduce fees for network use which due to their level constituted the main obstacle to effective competition in the electricity markets. The decision was quashed by the Düsseldorf Higher Regional Court in February 2004 and has not been appealed by the Bundeskartellamt.

Also in February 2003 the Bundeskartellamt prohibited RWE Net from charging excessive electricity metering and billing prices on the basis of the comparable market test. The Bundeskartellamt found that these prices were abusively excessive and constituted a violation of section 19 (4) No 1, 4 ARC. In comparison with the other major electricity providers RWE Net's metering and billing prices were among the highest in Germany. This decision was also repealed by the Düsseldorf Higher Regional Court in December 2003 .

Finally, the Bundeskartellamt prohibited Stadtwerke Mainz AG (Mainz municipal utilities) from demanding abusively excessive fees for network use and ordered it to reduce its current fees for network use by 20% and declared the decision to be immediately enforceable. The Bundeskartellamt used a revenue-based comparison with another network operator for its findings (comparable market test, a kind of benchmarking). The Düsseldorf Higher Regional Court set aside this decision in March 2004 holding that the network fees of Stadtwerke Mainz are not abusively high and do not infringe section 19 (4) No. 2 and 4 ARC. This judgement has been appealed by the Bundeskartellamt.

ANNEX I.

Dr. Ulf Böge
President of the Bundeskartellamt

Speech
on
“The Role of Economics in Antitrust Enforcement
- a German and European Approach” -

at the conference
“Antitrust Reform in Europe: A Year in Practice”

hosted by the
International Bar Association and European Commission, DG Competition

on 10 March 2005
in Brussels

I.

1. If we look at the themes of competition conferences taking place in the next few weeks and months we find that everything seems to revolve around modernisation and economisation.

Both sound good: Competition law which is applied in a modern way and is founded on solid, in other words, empirically based economic findings.

However, on closer inspection we find that those calling for modernisation also mean economisation. This simplifies our discussion. The more economic approach is equated with one which is modern.

Or is this just a catchword?

I think that we can deny this because the term “more economic approach” is based on one concept: The aim being in examining the conduct of a company for its potential abusive effect to prove or estimate in economic terms the market effect of an action which has either already been performed or announced or is impending.

One could say: So far so good, if the devil wasn’t in the details.

Alone the approach of proving a market effect as evidence of abuse and that of only estimating it lie worlds apart.

But neither are really possible without economics.

I think that there is general consensus on this.

2. So what do we mean by the more economic approach?

The emphasis here is not on “economic“ but on “more”.

“More” can refer to quality, although in this case it could be called “better economic approach“, i.e. those taking decisions in the authorities and possibly courts and, vice-versa, those representing companies, usually law firms, i.e. legal experts, need better economic expertise, either their own or hired from independent experts.

This would produce better results – pro competition, of course, because, after all, that is the aim of abuse control.

Or “more” could refer to quantity.

This would mean substantiating actual market effects or estimations of such more comprehensively and intensively on the basis of various expert opinions.

In reality no clear cut distinction between the two will be possible. The objective, however, is clear: A comprehensive economic assessment of each individual case is desired.

In the light of the heavily case-based analysis under Anglo-American law it is not surprising that this approach originates above all from this particular legal tradition.

But does such an economic approach stand in the way of the system of per-se regulations?

I don't think so because in any case the point is to assess the individual case appropriately. The application of economic methods is of great practical use in this.

3. Let me illustrate this with an example of the prosecution of a suspected cartel agreement.

In 2003 the Bundeskartellamt proved the initial suspicion of a price agreement in the nationwide public tender for service contracts of "Der Grüne Punkt – Duales System Deutschland AG" (DSD) ("The Green Dot") based on statistical analyses and economic argumentation. Only in this way could a search warrant be obtained from the competent court.

The outcome of the first round of the DSD's nationwide tender was, in fact, not what would have been expected under competitive conditions.

In around half of the contract areas only one waste management company had submitted a bid although many more would have been in a position to do so. As a result the bid prices in the contract areas with only one offer were on average approx. 70 per cent above those in the other contract areas.

Another striking feature was that in many cases only the former contract holder had submitted a bid.

This gave rise to the suspicion of a cartel agreement.

Consequently DSD put out a second tender in some contract areas, which reduced costs by over 20 per cent (200 mio €).

In these proceedings the Bundeskartellamt conducted extensive economic analyses based on the first round of the tender to prove the suspicion. On this basis the competent court permitted searches of the accused companies, which then confirmed the suspicion of a cartel agreement.

II.

4. And now to the issue of abuse.

The aim of the comprehensive economic assessment of an individual case is to ensure that no entrepreneurial conduct, not even by a dominant company, is punished which might not be at all abusive in its effects on the market.

Some advocate the view that the hindering conduct of dominant companies would be acceptable if this achieved efficiencies which benefit the consumer.

For example, the producer of a bulk product can reduce his unit costs by squeezing out his smaller rivals and partially pass these reduced costs on to the consumer in the form of price reductions.

But the economic analysis cannot end here. When competitors disappear from the market the competitive pressure on the dominant producer, who is now even stronger, to pass on his efficiency gains to the consumer, also reduces. And does a narrowing of the supply structure to in some cases only one provider not ultimately bring innovation to a standstill?

Should it not rather be possible to fall back on experience, in other words empiricism, to assess this issue or is there need for concrete economic substantiation?

Under German and European competition law the effects on competition and other competitors have so far been the decisive direct criterion for evaluating whether and to what extent a certain conduct is abusive. Economists do not dispute the possible restraining effects of cut prices.

On the other hand it must be examined in each individual case whether or to what extent possible benefit arises from a dominant company's conduct for the opposite side of the market and the consumers, also in the medium and long term.

This must not mean, however, that per-se rules cease to be justified and should generally be replaced by an economic analysis of each individual case.

Per-se rules are essentially important abstracts from economic facts and prognoses which have been investigated empirically and found to be correct for the most part.

They are indispensable in legal practice. They ensure legal certainty and predictability.

This is fundamentally important for companies, authorities and courts which have to make assessments under competition law.

Although in some cases economic methods can provide answers to precisely formulated individual questions they cannot replace an overall competitive assessment.

Moreover the quantification of efficiency gains poses enormous evaluation difficulties.

The dynamics which are often connected with efficiency gains add to these difficulties.

Weighing up efficiency gains against the negative effects of the restraint of competition can thus result in considerable problems even if economic methods are applied. A possible consequence is lower enforceability.

I have chosen this case because it demonstrates that it is absolutely possible for the more economic approach to result in disadvantages in competition law enforcement.

Or, as a provocative question: Can economisation also lead to a paralysis in competition law enforcement?

5. Let me give you another practical example:

In November 2001 the newcomer Germania entered into competition with the dominant Lufthansa on the Berlin-Frankfurt route by offering considerably lower prices. Lufthansa already reacted in December by reducing its ticket prices, in some cases by more than half of the original price, using a cut-price strategy to squeeze Germania out of the market.

In a swift reaction the Bundeskartellamt issued a decision two months later prohibiting Lufthansa's predatory pricing strategy. In a preliminary decision issued only one and a half months later the Düsseldorf Higher Regional Court confirmed this decision.

By using economic studies and investigations it would have been possible to substantiate the abusive conduct in this case in more detail and evaluate the actual market effects even further. However, this would have been time-consuming.

And would this not ultimately have played into the hands of the dominant company? In the meantime the newcomer Germania would long have been squeezed out of the market! And the result of this development would certainly have been that no other newcomer would have dared to enter the market either.

The mere existence of market power, combined with lengthy proceedings, can thus already hinder competition without the existence of a specific abusive conduct.

III.

6. I have thus come to the question of whether Article 82 EC aims at prohibiting conduct that is potentially detrimental to competition or whether an actual impact on the market is required.

According to the Commission's previous practice and the Court of First Instance's 2003 judgments in the Michelin II and British Airways/Virgin cases it is not necessary to provide proof of actual market effects in order to prove abusive conduct. The abstract threat effect is sufficient.

In contrast, mainly literature calls for an adoption of a market-based analysis in order to take into account the economic effect of such practices. Otherwise, according to this, there is the threat that possible negative effects could be exaggerated and the companies' freedom of action could be curbed inappropriately. Even such conduct by dominant companies which on the whole enhances welfare could otherwise be prohibited.

7. In my view the market-based analysis involves a number of disadvantages:

First of all the causality between conduct and market effect would have to be proven. However, such proof requires a comparison between the actual market situation and the potentially possible market result. As the possible market result can ultimately only be speculated upon, the market-based analysis as a whole can be challenged at any time.

Let me illustrate this by using the rebate system as an example.

A market-based consideration is always an ex-post consideration. The decisive criterion in determining abuse is, however, the ex-ante incentive effect emanating from the rebate system.

If a dominant company uses a rebate system as a prevention against expected competitive pressure from competitors, and if this rebate system provides a strong incentive for its customers to continue to purchase the product from that company, there will be no effect on the market.

An ex-post consideration of market shares is thus not appropriate to ascertain the actual effects of a rebate system.

As I explained in the Lufthansa/Germania case, a second considerable disadvantage of a market-based consideration of conduct lies in the time perspective.

The protection of competition requires that abusive practices are prohibited at the earliest possible stage in order to avoid long-term damage to the competitive structures.

If proving abusive conduct required the presence of a market effect, an intervention by the competition authorities would only be possible at a stage where the negative market effects had already emerged. At this late stage, however, competition could possibly have already been damaged irreversibly. Even a clarification of the abusive conduct by way of legal action would hardly be possible.

The Bundeskartellamt is therefore always interested in having abusive practices discontinued at an early stage, possibly by means of negotiation.

Let me give you an example:

In 2003 the Bundeskartellamt initiated abuse proceedings against Deutsche Bahn AG as the company intended to tie two large orders for the supply of railway cars and engines to the purchase of vehicle maintenance works (with employment guarantees). The Bundeskartellamt regarded this as an abusive exploitation of Deutsche Bahn's dominant position and initiated proceedings. The company subsequently abandoned its tie-in plan for the invitation for tenders.

IV.

8. What conclusion can be drawn from this?

- (1.) The application of competition law is unthinkable without economics. However, we must be cautious about the call for **more** economics (which would certainly be good for consultancy firms). This must not be allowed to unduly prolong proceedings. Also we should not immediately jump on every new theory and method. First of all they must be verified and their usefulness proven.
- (2.) Greater awareness of economic correlations is indispensable. In this respect the more economic approach can be positively evaluated.

On the other hand, however, it could have disadvantages such as less legal certainty and predictability and the prolongation of proceedings which is often problematic.

- (3.) In my opinion, per-se rules and focusing on the abstract threat effect continue to be useful instruments of abuse control.

However, per-se rules must be developed further and adjusted to new economic insights and methods.

- (4.) In Germany we have been developing per-se rules for almost 50 years. Currently we are working on the 7th amendment of our competition law. Each amendment casts into law new insights which have often been gained through economics.

Perhaps this explains the difference why we in Germany advocate economics on the one hand, but initially considered the call for an “economic approach” as incomprehensible since we had taken it for granted, and why we continue to be somewhat sceptical about the word “more”: This is because we are concerned about a weakening of competition law enforcement.

IRELAND

1. Introduction

The Irish Competition Authority's ("the Authority") response to the OECD questionnaire on competition on the merits is divided into three parts. First, some introductory comments are made on the Authority's approach to unilateral conduct by firms. Second, a series of cases that illustrate the Authority's approach to unilateral conduct by firms are outlined. These are all instances where the Authority decided to close the file because, in the Authority's view, the conduct did not breach the Competition Act 2002 ("the Act"). Third, the approach of the Irish courts is illustrated using (a) a case brought by the Authority where the courts found a breach of the Act, and (b) a case brought by a private party against the incumbent mobile telephony operator where the court found no breach.

2. Dominance, Abuse, & Competition on the Merits: The Authority's Approach

Under Irish and European Union ("EU") competition law a dominant firm does not fall foul of the law simply by virtue of the fact that it is dominant. In well functioning, competitive, markets firms strive to out-do their rivals by providing better goods and services through, for example: better design; new products; innovative manufacturing and distribution methods; superior technology; and, lower prices. They win on the merits. Such competition increases consumer welfare and promotes economic growth. It is important that competition law is not applied in a way that punishes success. Applying a form based approach could deter potentially beneficial competition if firms curtail their behaviour unnecessarily for fear of incurring Article 82 penalties.

Dominance or significant market power is defined as the ability, on a sustained basis, to raise prices above the competitive level. In short, to earn a supra competitive rate of return. A necessary condition is that entry is not sufficient to compete away the 'high' rate of return. A legal definition of dominance is a "position of economic strength enjoyed by an undertaking which enables it to prevent effective competition ... [and] behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."¹

In defining dominance the Authority uses measures of the size distribution of firms, such as the market share of the leading N firms and/or the HHI index. However, it would never conclude that a firm is dominant on the basis of market share data alone. Other aspects of market structure, such as barriers to entry and expansion, buyer power etc., are equally important when considering dominance. The Authority's approach is usefully illustrated in the Drogheda newspaper case, discussed below, where a firm with a 70% market share is considered not dominant.

While dominance itself *does not* breach competition law, the abuse of that dominant position *does* breach competition law. Abuses include:

- The dominant firm charging customers prices that are excessively high relative to the cost of production or the value of the product to consumers. In the case of a dominant firm with monopsony power the complaint would of course be the converse – payment of excessively low 'prices' to suppliers. These are often classified as exploitative abuses.

- Various forms of conduct such as market foreclosure, rebates, predatory pricing and refusal to supply may also constitute an abuse. These are often classified as exclusionary abuses.

An undertaking can only profitably charge an excessively high price or pay an excessively low price to suppliers if there is some force protecting that undertaking's position, such as barriers to entry or a deliberate exclusionary form of conduct. Typically the Authority seeks to identify the source of such protection – which may be an abuse – rather than a symptom. This approach is illustrated in the Aer Lingus and Vodafone case studies, discussed below, that are concerned with allegations of excessively low prices. The approach is also indicated by the Authority's decision to make a declaration (a form of block exemption) limiting the term of exclusive purchasing agreements in the market for cylinder liquefied petroleum gas ("LPG") to two years. The two incumbent operators in that market² favoured five year exclusive purchasing agreements with retailers of cylinder LPG. The pattern of development of the market suggests that five year agreements would foreclose the market to new entry. The Authority's declaration – which came into effect in April 2005 – only permits exclusive purchasing agreements where the length of the contract does not exceed two years.

In evaluating such abuses it is important to consider the appropriate standard that should be used. Abusive conduct is not considered unlawful *per se*. The Authority typically considers whether the alleged conduct harms consumers. In other words, whether or not output is restricted and price raised. Under this rule consumer welfare enhancing behaviour – competition on the merits – would be permitted, while abusive conduct with no objective justification would not be since consumer welfare would be lowered.

Such an approach is consistent with *Irish Sugar plc v Commission*, for example, where the Court of First Instance stated that where a dominant firm takes action to protect its position its conduct, "must, at the very least, in order to be lawful, be based on criteria of economic efficiency and consistent with the interests of consumers."³

The standard is not concerned with whether small and medium sized enterprises ("SMEs") are adversely affected or whether plants located in particular regions or owned by a large multinational deserve special consideration. In other words, the Authority is not concerned with protecting certain categories of firm, including competitors. This is illustrated in the Vodafone, and Aer Lingus case studies discussed below where the unilateral action of these firms arguably disadvantaged downstream firms – retailers and travel agents, respectively – but the Authority decided that consumers were not harmed by the alleged abusive conduct.

Next, consideration needs to be given to what analytical framework should be employed in deciding whether or not a dominant firm abuses its dominant position. The Authority uses an economic effects based approach, which applies the settled principles of economic analysis to determine whether a particular form of conduct harms consumers. This approach was used in the Aer Lingus case when considering the conditions under which depressing the price in an input market might lead to a reduction in an output market, thus having an adverse effect on consumer welfare.

The Authority avoids a form based approach which argues that if a dominant firm indulges in, for example, certain sorts of loyalty rebates, then it breaches competition law. Under this approach much less attention is paid to the economic effects *per se*, which are presumed rather than demonstrated and more on the facts of supply in considering whether a *per se* rule has been breached.⁴ The question for the Authority is not:

- Is this a loyalty rebate scheme? But rather;
- What are the competitive effects of the loyalty rebate scheme?⁵

In the Xtravision case, discussed below, the Authority carefully considered the economic impact of the exclusive arrangement, rather than determining whether it was an exclusive agreement that disadvantaged competitors and hence should be condemned.

This is not inconsistent with current EU practice. The Authority receives a large number of complaints every year. It must prioritise these cases. Within the class of loyalty rebate schemes or other forms of conduct, the Authority ranks the ones that harm consumers first.

3. Non-Infringement Decisions of the Authority

The Authority is not a court of first instance like other competition authorities in the European Union (“the EU”). Only the courts can decide that a firm has breached the Act and impose appropriate remedies. The Authority acts only as plaintiff. Nevertheless, in a number of cases in which the Authority has closed a file because no breach of the Act was found, reasoned decisions were published so as to increase the transparency and predictability of the enforcement of the Act, thus resulting in greater legal certainty and in a reduction in compliance costs. Four such cases involving unilateral action by allegedly dominant firms are presented.⁶

It should be noted that the Authority was not required to determine whether or not in its view the undertakings cited in these cases were dominant for the purposes of competition law. However, in one of the four cases discussed below – Drogheda newspapers – the Authority did come to a conclusion concerning dominance. Its decisions to discontinue the investigations cited were based on conclusions that the behaviour cited did not result in harm to consumers.

3.1 *Xtravision: Exclusive Arrangements for Video Rental*

The Authority examined several complaints from competitors to Xtravision, the largest video rental chain in the State accounting for 40-50% of the market. These complaints concerned arrangements whereby Xtravision receives exclusive early release of certain films titles in the State. The complainants asserted that this practice placed them at a significant competitive disadvantage as the initial release period of any title is typically the most important in terms of volume of rentals.

The Authority found that Xtravision had entered into an arrangement with a number of small film producers⁷ whereby it invests in the production and marketing of titles by those producers in return for an exclusive period of advance release of the titles. The arrangement allows Xtravision to secure a return on its investment. The Authority concluded that beneficial effects for consumers outweigh any negative effects on competitors, as those titles might not be available in the State but for the arrangements in question.

3.2 *Aer Lingus: A Reduction in Travel Agent Commissions*

The Irish Travel Agents’ Association submitted a complaint to the Authority concerning a unilateral decision by Aer Lingus to reduce the commissions paid to travel agents for air travel sales. It was claimed that this would reduce the number of travel agents in the State. The Authority concluded that the commissions paid were not excessively low, and abusive, as claimed. Further, the Authority took the view that a decline in the number of travel agents would not necessarily equate to a reduction in competition. This view was based, in large part, on the additional forms of selling air travel that had emerged in the State; including the move toward online sales by Aer Lingus.

The Authority concluded that while the reduction in commissions to travel agents may affect the welfare of travel agents, it is not clear that there is a corresponding damage to the consumer or the competitive process. For the exercise of any monopsony power that Aer Lingus might have to be harmful

to consumers, this requires that it must be correlated with market power on the seller side. Specifically, a firm with market power on both sides can reduce the price it pays for inputs – the services of travel agents – in order to reduce overall supply of airline tickets sold so that prices to the consumer can be raised. However, the strategy that Aer Lingus has adopted is to *lower* prices to the consumer.

Aer Lingus's decision to reduce commissions was an initial step in its move away from a reliance on travel agents toward online sales in the State and part of an efficiency enhancing cost reduction strategy. Aer Lingus's 2003 annual report states that this switch resulted in savings in the region of €40 million.

3.3 *Vodafone: A Reduction in Wholesale Margins to Retailers*

The Authority took a similar approach in relation to complaints from a number of retailer representative groups in the State against a decision by Vodafone to reduce the wholesale margins paid on sales of pre-paid mobile phone top-up, the largest mobile phone operator. The Authority concluded that while Vodafone's decision could lead to a reduction in retailers' welfare it was unlikely to result in consequent welfare losses to consumers due to the variety of alternative methods for purchasing top-up available to pre-paid mobile phone users. These include facilities for purchasing online, via text message, telephone credit card purchase, and on bank ATMs. The effect of Vodafone's decision would be to increase competition between the different distribution channels.

3.4 *Drogheda Newspapers: Predatory Pricing in Local Newspaper Advertising*

The Authority concluded that the Drogheda Independent Company ("the DIC") – which accounted for approximately 70% of the market for advertising in local newspapers in the Drogheda area – had not engaged in predatory behaviour by offering discounts in one of its two local titles. The DIC had priced below average variable cost for short period in 2003. However, this pricing strategy was implemented by the DIC to compete with innovations introduced by the DIC's closest rival – accounting for approximately 30% market share – the Drogheda Leader. This pricing strategy represented a move by the DIC to address the competitive threat of the low cost innovative rival rather than predatory behaviour. The Authority accepted that these interactions in the market resulted in benefits to consumers and customers of increased choice and quality in the relevant advertising market.

It is important to note that in this instance the Authority concluded that despite its high market share the DIC could not be considered dominant in the relevant market. Low barriers to entry, low barriers to expansion, low customer switching costs, and the relative strength of the Drogheda Leader were considered sufficient to constrain the ability of the DIC to raise price profitably above the competitive level in the long-term.

The Authority set out a structured rule of reason approach to the issue of predatory pricing as a result of this case.

4. Court Judgments

4.1 *Competition Authority –v- The Irish League of Credit Unions*

An additional illustration of the Authority's approach is provided by the judgement of the Irish High Court in the Authority's case against the Irish League of Credit Unions ("ILCU").⁸ In this case the Authority argued that the decision of ILCU to deny access to its deposit protection scheme to any non-members of ILCU constituted an abuse of dominance in the market for credit union representation services.

Deposit protection is a form of cover made available through ILCU whereby if a credit union runs into financial difficulty and faces insolvency, the scheme will protect individual credit union members' savings to a maximum value. The Authority's investigations revealed that it would be almost impossible for a new entrant into the credit union representation services market to create an equivalent protection scheme. Further, while it is not impossible for a credit union representation organisation to operate without providing access to a deposit protection scheme, the regulator of credit unions described it as "financially imprudent" for any credit union to operate without such cover.

Thus, while *prima facie* the Authority's case concerns harm to a new competitor in the credit union representation services market, the Authority's decision to take the case was based on its belief that if left unchallenged ILCU's refusal to deal would prevent or deter any future development of competition in the market for credit union representation services and would ultimately harm consumers saving in credit unions.

4.2 Meridian Communications Limited –v- Eircell Limited

Eircell was a wholly owned subsidiary of the Eircom group, the incumbent telecommunications monopolist. Eircell began trading in 1985 and was the first mobile phone operator within the State. It had a monopoly on the mobile telephony market from 1985 until the arrival of Esat Digifone in 1997. At the time of the hearing Eircell was one of only two network operators providing mobile telephony services on the market. Meridian initiated court proceedings against Eircell alleging abuse of dominance contrary to national competition law, in respect of a refusal to deal with Meridian, and breach of contract.

The court found that despite having a high market share of 60% in a market with significant barriers to entry, Eircell was not dominant. Factors such as low barriers to expansion – evidenced by the fact that Esat Digifone has won 40% of the market in a two year period were considered sufficient to constrain Eircell's behaviour. Evidence that mobile telephony prices in Ireland were high was relied on by Meridian to support its assertion that Eircell was dominant. The court stated that even if it were proven that prices were high compared with other countries, evidence of high prices would not prove that Eircell was dominant in the market. The court cited behavioural evidence of aggressive competition by Eircell in concluding that the company was not dominant. This included "[t]he fall in prices, the dramatic decline in market share, the evidence of 'leapfrogging' in tariff reduction, the general tendency towards price convergence, the incentives to compete, the fact that so many subscribers are new and therefore independent, and the number and scale of innovations [in the market]".⁹ This suggests that the Irish courts expect undertakings, even those with significant market share – or by extension, a dominant position – to compete on the merits.

5. Conclusion

The approach of the Irish Competition Authority to the question of competition on the merits is thus not to define a set of circumstances or behaviour that can be considered as competition on the merits. Any list would of necessity be less than exhaustive and may in any event so qualify any particular behaviour as to be of limited use. Rather the approach adopted by the Authority to the question of competition on the merits is to set out the Authority's approach to allegations of abusive behaviour by dominant firms in a series of published non-infringement decisions and court cases. As noted above, the underlying approach is economic effects based using the settled principles of economics and a consumer harm test to distinguish conduct that is abusive from that which is neutral or procompetitive and proconsumer.

NOTES

1. This is the standard definition by the European Court of Justice (“ECJ”) in *United Brands v Commission* as set out in Whish (2003) *Competition Law*, 5th Edition, London: LexisNexis. p.179.
2. The two account for in excess of 85% of the market in terms of volumes of LPG sold per annum.
3. Quoted in Whish (2003), supra note 1, p. 199.
4. For a discussion of form vs. economic effects see Vickers, J. (2004) “Abuse of Market Power.” Speech to the 31st Conference of the European Association for Research in Industrial Economics, Berlin, 2nd September.
5. These include fidelity rebates, growth rebates, and quantity rebate schemes. The key feature is that they all give percentage retroactive rebates on total sales, rather than only on incremental sales.
6. Details on these and other case decisions by the Authority are available at www.tca.ie/enforcement_decisions.html.
7. These film producers accounted for less than 1% of titles released in the State annually.
8. The full text of this judgment is available from www.tca.ie.
9. See paras. 124-127 of the judgment.

JAPAN

1. Introduction

The aim of the Japanese Antimonopoly Act (hereinafter referred to as “AMA”) is to promote fair and free competition (Article 1).

The AMA does not give a precise definition of fair and free competition. However, competition on efficiency by such means as prices, quality, services, etc., is protected by the AMA. In this sense, competition on efficiency can be regarded as competition on the merits.¹

Of course, competitors can on occasion be excluded from the market as a result of competition on the merits. In such cases, exclusion of competitors from the market is not within the scope of the AMA. On the other hand, if competitors are excluded from the market by means other than those based on the competition on the merits, such exclusion can be subject to the AMA.

Such exclusionary practices are regulated by Article 3 on private monopolisation or Article 19 on unfair trade practices as provided in the AMA.

In this paper, an overview of these two regulations is given, followed by a brief expose on exclusionary conduct that can be regarded as private monopolisation or unfair trade practices. Finally, mention is made of the guidelines issued by the Fair Trade Commission (hereinafter referred to as “JFTC”) that clarify JFTC’s position on the cases that whether the company has a significant position in a market or not is considered when its conduct is deemed to be subject to unfair trade practices.

2. Regulations in Japan

2.1 *Private monopolisation*

Private monopolisation is prohibited in the Article 3 of the AMA. It is defined in the Article 2 (5) as: “such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

“Exclusion” in this definition is interpreted as making it difficult for other firms to continue their business activities or prevent other firms from entering the market. “Control” in this definition is interpreted as depriving other firms of their freedom of decision-making concerning their business activities and forcing them to obey the controller’s intent.

Concerning “substantial restraint of competition in any particular field of trade”, the Tokyo High Court ruled that “substantially to restrain competition means to bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific firm or a group of firms can control the market by determining price, quality, volume, and various other terms with some latitude at its or their own volition.”²

In other words, AMA's private monopolisation regulates not only conduct eliminating other firms by a firm that has a dominant position in a market but also obtaining dominant position in a market by eliminating competitors from the market.

The provision in the AMA concerning private monopolisation does not refer to the position of a firm in a market. But it requires the firm to be considerably influential in a market so that the firm can bring about the situation in which it can control the market with some latitude at its own volition by excluding or controlling business activities of other firms.

2.2 *Unfair trade practices*

Unfair trade practices are prohibited in Article 19 of the AMA. Unfair trade practices mean such conduct as unjustly discriminating against other firms, dealing at unjust prices which tend to impede fair competition and which are designated by the JFTC.

Regulations against unfair trade practices historically target those typical behaviours used to eliminate competitors and create monopolies, and are aimed at preventing the creation of monopolies at an incipient level. Therefore, a firm that is not subject to regulations of private monopolisation, because it does not have sufficient power to gain a dominant position in a market, can be subject to the regulations of unfair trade practices if it engages in conduct that falls within the definition of unfair trade practices.

In addition, conduct that would impede competition on efficiency in a market, such as using means for competition, which would be blamed for itself, are now also subject to regulation of unfair trade practices.

Typical examples of former types of conduct (which would impede free business activities or which have an undesirable effect on the terms of competition in a market,) are resale price maintenance, unreasonable refusal to deal, dealing with exclusive terms, etc. Those of the latter types of conduct are deceptive customer inducement, interference with a competitor's transaction, etc.

Whether a case is in violation of unfair trade practices is decided on a case-by-case basis. For instance, in a case concerning discriminatory pricing, the Tokyo Local Court ruled that market trends, differences in supply costs, market power of the retail company concerned, substantive intent to set the price differences, etc. should all be considered as a whole.³

3. *Exclusionary conduct*

As already mentioned, exclusion of other firms from a market by means of competition on the merits would not fall within the scope of the AMA even though such conduct is made by a firm with a dominant position.

Exclusionary conduct is regulated only in the case when it would substantially restrict competition in a particular field of trade (private monopolisation) or where it tends to impede fair competition (unfair trade practices); in other words, where it would have an undesirable impact on competition in a market, not for the purpose of protecting competitors.

One conduct that violates the AMA would be the elimination of other firms by means other than those based on competition on the merits. When a firm has a significant position in the market, such as a dominant firm, it is easier for other firms to be excluded from the market.

There are no specific guidelines that specify the kinds of conducts that are in violation of the AMA and much depends on the individual case. However, in the case of unfair trade practices, violating conducts are described in the designation by the JFTC.

One recent case in which JFTC judged that private monopolisation by exclusionary conduct occurred is the recommendation decision against Intel K.K.⁴ In this case, Intel K.K., which has almost 90% share in the market of CPUs sold to the Japanese PC manufacturers, promised rebates to the five major Japanese PC manufacturers providing that they refrain from adopting competitors' CPUs for all PCs. The JFTC found such conduct by the Intel K.K. to be conduct in violation of the AMA.

Another example of private monopolisation case is the consent decision against Hokkaido Shimbun [newspaper] Press.⁵ When a potential new competitor was likely to enter the area with a high circulation of Hokkaido Shimbun Press, Hokkaido Shimbun Press applied a trademark on the title of the newspaper which the company was expected to use, offered high discounts on newspaper advertisement fees in the area where the new entry was expected, approached the communication media not to distribute news to the newcomer, and requested TV companies not to broadcast commercials of the newcomer. The JFTC found such conduct by Hokkaido Shimbun Press as violating conduct.

4. Consideration of status in a market

In determining whether a conduct falls within private monopolisation, there are no specific criteria on the market share of a company and the existence of market power should be decided comprehensively, taking into account all the circumstances. One important factor to be taken into consideration is whether the market power is strong enough to allow a firm to control the market by excluding or controlling the business activities of other firms with some latitude at its own volition.

On the other hand, concerning some of the conducts designated as unfair trade practices, whether a firm is influential in a market or not is considered as one of factors to decide the existence of violation. (Guidelines Concerning Distribution Systems and Business Practices⁶).

Conduct by an influential firm is considered to be illegal as unfair trade practices if it engages in transactions with its trading partners on the condition that the trading partners shall not deal with competitors of the firm or another firm having close relations with the firm, or causes the trading partners to refuse to deal with those above-mentioned competitors, and if such conduct may result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners (Article 2 (Other Refusal to Deal), 11 (Dealing on Exclusive Terms), or 13 (Dealing on Restrictive Terms) of the General Designation).

This approach is based on the viewpoint that, in the case of a firm ranked low in the market share or newly entered, the conduct usually would not result in reducing business opportunities of the competitors or making it difficult for them to find alternative trading partners. Whether a firm is "influential in a market" is in the first instance judged by a market share of the firm, that is, whether it has no less than 10% of the market or its position is within the top three in the market (meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by the conduct, and competing with each other based on geographical conditions, transactional relations, etc.).

Conclusion

The JFTC has prepared and has made public various kinds of guidelines with the aim of enhancing predictability on violation and transparency of enforcement. The JFTC believes that such guidelines have been of great help in determining if a conduct is in violation of the AMA.

In the case of Japan, there have been few cases where judicial review is sought concerning violation of the AMA. However, the number of administrative hearing cases has increased about three-fold in the past five years. Furthermore, the number of cases going to the appeals court has also increased. The growing number of court decisions will result in an accumulation of cases concerning various issues on the AMA, including competition on the merits.

NOTES

1. However, there were no cases in which the interpretation of competition on the merits was a main issue.
2. Tokyo High Court Decision, December 7, 1953.
3. Tokyo District Court Decision, March 31, 2004.
4. Recommendation Decision, April 13, 2005.
5. Consent Decision, February 28, 2000.
6. The Guidelines were made public on July 11th, 1991. Available at <http://www2.jftc.go.jp/e-page/legislation/ama/distribution.pdf>

KOREA

1. Legal Provisions on Abuse of Market-Dominating Position

In Korea, abuse of market-dominating position is regulated by Article 3-2 of the Monopoly Regulation and Fair Trade Act (MRFTA). Article 3-2 classifies types of abuse of market dominance into five categories, and the Enforcement Decree of the MRFTA and a sub-rule, the Notification on the Criteria for Abuse of Market-Dominating Position, classify the abusive acts more specifically into 20 categories. The five categories are as follows:

- i. An act determining, maintaining, or changing unreasonably the price of commodities or services (price abuse);
- ii. An act unreasonably controlling the sale of commodities or provision of services (supply control);
- iii. An act unreasonably interfering with the business activities of other enterprisers (obstruction of business activities of other enterprises);
- iv. An act unreasonably impeding the participation of new competitors (obstruction of new entry); and
- v. An act unfairly excluding competitive enterprisers, or which might considerably harm the interests of consumers (exclusion of competitors and harm to consumer welfare).

Based on the purpose and nature of the acts, these five types can be divided into exploitative abuse and exclusive monopolisation. Price abuse, supply control and harm to consumer welfare are practices of taking away benefits from transaction partners including consumers, using monopolistic power while obstruction of business activities of other enterprises, obstruction of new entry and exclusion of competitors are acts of monopolisation by excluding competitors or new entrants.

The purpose of the MRFTA enactment and our experience of law enforcement show that reviews on exploitative abuse have put focus on harmful effects on benefits to consumers and transaction partners while reviews on exclusive monopolisation focus on anti-competitiveness and possible exclusion of competition.

2. Competition on the Merits

To determine whether a conduct of a market dominant firm constitutes abuse of market dominance, the KFTC first decides which category the conduct falls into and then examines whether the conduct meets each requirement stipulated in the relevant provisions before making a final decision.

Whether a conduct is within the bounds of competition on the merits depends on whether the behaviour meets the conditions under the MRFTA and its Enforcement Decree. Therefore, to interpret each condition is enormously important. Particularly difficult is to decide “unreasonableness” of the conduct, which is expressed as “unreasonably”, “without justifiable reason” and “unreasonable compared to normal practices” in the MRFTA and the Enforcement Decree. If the behaviour has no unreasonableness or has justifiable reason, it is within the bounds of competition on the merits. If not, it is outside the bounds of competition on the merits.

It is impossible, however, to include the general definition of “unreasonableness” in relevant laws and regulations, or to set up criteria for judging “unreasonableness” that can be applied to every abuse of market dominance. Recognising this, the KFTC put forward as an alternative the Notification on the Criteria for Abuse of Market-Dominating Position on September 8, 2000, in order to carry out consistent reviews on abusive acts. The notification was revised once on May 16, 2002.

The notification provides the criteria by which to determine whether a conduct is an abusive act, clarifying somewhat obscure conditions prescribed in the Enforcement Decree.

For example, in Article 5, paragraph (1) of the Enforcement Decree, price abuse is defined as “a sharp increase or insignificant decrease, without justifiable reason, in the price/cost of goods or services relative to changes in the supply and demand or in supply cost”. To set clear criteria for determining “a sharp increase or insignificant decrease”, the notification stipulates more specifically that it is determined based on changes in price and the supply and demand situation of the product, the producer price index of the product, price growth rate in the export market of the enterprise and whether the enterprise is in a position to lead a price increase in the market”.

One specific type of acts unreasonably impeding the participation of new competitors is an act impeding the use of or the access to essential facilities. In terms of this type of act, Article 5, paragraph (4) of the Enforcement Decree provides for that “refusing or limiting, without justifiable reason, the use of or the access to essential facilities for the manufacturing, providing, selling of the products or services of new competitors”. In order to provide more detailed criteria, the notification specifies that the “justifiable reason” is determined based on the followings:

- i. Whether justifiable reward for investment of enterprisers providing essential facilities is sharply hindered.
- ii. Whether it is impossible to provide essential facilities without sharply decreasing the amount of essential facilities supplied to existing users.
- iii. Whether the provision of essential facilities might sharply reduce the quality of service being provided.
- iv. Whether it is technically impossible to provide essential facilities due to disagreement on technology standards.
- v. Whether there are concerns over possible threats to life or bodily integrity of service users.

3. Agency Experience – Case

Judgment regarding competition on the merits is not made entirely based on rules or guidelines. It is common that competition on the merits is determined case by case based on various market situations and nature of conduct. We want to introduce one of the relevant cases in Korea.

3.1 Case Brief

Enterprise A is a fully integrated iron and steel maker equipped with all the facilities for steelmaking: iron making mill, steel making mill, hot rolling mill and cold rolling mill. The case was involved with hot coil, the material necessary to make cold rolled steel. As the only manufacturer of hot coil in Korea, enterprise A is in a dominating position in the hot coil market which is the upstream market. It is also a dominant firm in the cold rolled steel market, the downstream market. To enter the cold rolled steel market, enterprise B established a cold rolling mill and asked enterprise A to supply hot coil many times from August 1997 to February 2001. Enterprise A continuously refused to supply the material.

The KFTC decided that enterprise A's refusal to deal constitutes an abuse of market dominance, and imposed a surcharge along with a corrective order in April 2001. Enterprise A was dissatisfied with the decision and filed an appeal. The appeals court, the Seoul High Court, upheld the KFTC's ruling in August 2002.

3.2 *The Ground for the Decision*

In the lawsuit process, enterprise A alleged that in a situation where an existing firm has established an integrated manufacturing system in both upstream and downstream industries through long-term technological development and facilities investment, it was unjustifiable for a new entrant to request the existing firm to supply the product of the upstream industry in order to easily enter the downstream because such request by the new entrant is tantamount to demanding a "free ride" into the market.

As a consequence of the refusal of enterprise A, enterprise B had to depend entirely on hot coil imports, which caused additional cost (including freight rates, tariffs and the loading/unloading cost), difficulty in securing a stable supply of the material, difficulty in quickly adjusting to market changes because of a longer shipping period. The KFTC made a decision that the conduct of enterprise A undermines competition in the cold rolled steel market by hampering the business activities and weakening competitiveness of enterprise B.

One of the theoretical grounds of the decision is "raising rival's costs". Generally, when a firm makes an attempt to raise rival's costs, the costs of its own also increase. However, since the competitor will witness more increase in its costs, the firm will be able to enhance its relative competitiveness in the market. And increased cost will lead to a fall in supply throughout the market. With declined supply, the company can raise the price of the product and thus make more profits.

In this case, enterprise A alleged that it had not have enough capacity to provide the hot coil enterprise B while continuing exports. Even though the exporting price was lower than the domestic price, enterprise A turned down to divert the exports to domestic supply. This, of course, increased the cost of enterprise A. But the negative effect of the conduct on its competitor was greater since enterprise B had to totally depend on imports and had a weak purchasing power. On the theory of "raising rival's cost" the KFTC decided that enterprise A tried to augment its profits by raising the relative competitiveness in the cold rolled steel market.

3.3 *Ruling of the Court*

In its ruling, the Seoul High Court said that anti-competitiveness which is the criterion for judging unreasonableness of abuse of market dominance is not necessarily confined to the restriction of competition in the market where the dominant firm operates, but to the restriction of competition in other related markets, like upstream or downstream markets, through market dominance in the first market.

The court added that since enterprise B has to rely entirely on hot coil imports because of enterprise A's refusal to deal, enterprise B has a weak purchasing power and is in a disadvantageous position in negotiating terms of trade with foreign suppliers. The court ruled that enterprise A's behaviour is unjustifiable because it causes an effect of hindering enterprise B from fully carrying out its function as a competitor beyond simply causing inconvenience or economic loss.

4. *The Role of Intent in This Case*

"Intent" is not prescribed in the law or the enforcement decree as an explicit factor in determining illegality, but is considered as an important element in deciding whether a conduct is an abuse of market

dominance. In this case too, intent of enterprise A to exclude a competitor and maintain its dominance was reflected.

Based on executive meeting minutes, interviews with the media and internal notices of enterprise A, the KFTC verified that the behaviour of the company was done out of the intent to exclude enterprise B from competition and maintain its market-dominating position in the cold rolled market, and decided that such behaviour is tantamount to an abusive conduct.

5. Exceptions & Dominant Firm's Special Responsibility

5.1 *Exceptions*

The current law and regulations have no provisions that require an abusive act to directly result in an increase or stability of a dominant firm's market share. However, in review of exclusive monopolisation (obstruction of business activities of other enterprises, obstruction of new entry and exclusion of competitors), the increase of a dominant firm's market share or the probability of market share might be considered because of the nature of exclusive monopolisation.

5.2 *Dominant Firm's Special Responsibility*

Illegal acts of dominant firms (abuse of market-dominating position) are regulated by Article 3-2 of the MRFTA, and those of non-dominant firms (unfair trade practices) are regulated by Article 23 of the same law. Article 3-2 classifies abuse of market-dominance into five types while Article 23 divides unfair transactions into eight types.

Whereas three out of the five types of abusive act (price abuse, supply control and entry barrier) are provided for only by Article 3-2, the remaining two abusive acts (obstruction of business activities of other enterprises and exclusion of competitors) are stipulated also as types of unfair trade practices in Article 23.

If a dominant enterprise undertakes a conduct falling into one of the former three categories, the conduct will be regulated as an abuse of market-dominance. However, if a non-dominant company does the same conduct, it will not be regulated. It is based on the premise that those three types can take effect only when dominant firms engage in the acts.

The latter two types, obstruction of business activities of other enterprises and exclusion of competitors, are regulated either as an abusive act if done by a dominant enterprise or as an unfair trade practice if done by a non-dominant firm. The punishment of a dominant firm is harsher on the ground that its abusive act harms market competition more than that of a non-dominant firm. For an abusive act, the dominant firm receives a surcharge not exceeding three percent of the turnover, imprisonment for up to three years or a fine not exceeding 200 million won (around 200,000 \$). And for an unfair transaction, the non-dominant firm receives a surcharge not exceeding two percent of turnover, imprisonment for not more than two years or a fine up to but not exceeding 150 million won(around 150,000 \$).

6. Conclusion

It is not easy to find the definition of competition on the merits that can be applied to every abuse of market-dominance in various market conditions. Even though types of abusive acts and criteria are clearly specified, flexible law enforcement is needed to meet rapid changes in competition environment, such as fast technology development led by the IT sector and accelerating convergence of different products. It is meaningful to make an effort to find the boundary of competition on the merits in the current situation by sharing competition law enforcement experience of OECD members. Recognising this, the KFTC looks forward to contributing to the effort.

MEXICO

1. Introduction

This document summarises the treatment that Mexico's competition legislation gives to competition on the merits. The first section of the paper describes the legal framework and types of conduct that could be construed as merit-based. The next section includes an illustrative case in the market for national self-service stores where one of the economic agents under investigation presented a defence for its conduct based on merits arguments. Final remarks follow.

2. The treatment of "Competition on the merits" under Mexican legislation

The recommended readings for this roundtable note some divergence between the competition policies of the United States and Europe regarding the treatment of abuse of dominance. This divergence has an effect on how competition on the merits is defined and addressed in each jurisdiction. Reflecting on some of the elements described in these readings, it seems that the concept of competition on the merits in Mexico is closer to that of the US than it is to Europe's.

Competition on the merits is understood as conduct that involves, among other elements, greater efficiency or enhanced consumer appeal. Mexico's competition legislation, however, does not define or even address this concept explicitly; the concept has not been used either by the Federal Competition Commission (FCC or Commission) in resolutions or criteria; so far, it is also absent from any arguments presented or decisions taken in court. Nevertheless, in both spirit and practice, the idea of preserving conduct that can be construed as competition on the merits is at the heart of the legislation.

In the US, to be guilty of monopolisation, a firm must have both monopoly power in a well-defined market, and have acquired or maintained that monopoly power by means of exclusionary or predatory conduct rather than from competition on the merits. Since dominance may have resulted from a firm's successful performance in the market, the protection of rival firms, while having some appeal and even possibly producing short-term gains, is thought to lead to long-term costs as any winners arising from this protection will tend to be inefficient rivals.

European policy, on the other hand, assigns a "special responsibility" to 'undertakings' with a dominant position: they cannot conduct themselves in a way that impairs genuine, undistorted competition in the common market. This restriction often results in the existence of a grey area whereby a dominant undertaking, while acting in accordance with competition on the merits, can conduct itself in a way that undermines its "special responsibility".

2.1 *The Federal Law of Economic Competition (FLEC)*

While there is no section in the FLEC that explicitly deals with competition on the merits, Article 2 states that "The purpose of this law is to protect the competition process and free market access, by preventing monopolies, monopolistic practices and other restrictions that deter the **efficient operation of goods and services markets**" [emphasis added]. Hence, market efficiency is at the heart of the competition legislation.

Even though the Commission has not pronounced itself officially on the concept of ‘competition on the merits’, for the purposes of this article, we will consider it to be lawful conduct undertaken by an ‘economic agent’ with ‘substantial market power’, as defined by the law. This agent’s dominance may be derived, for example, from any elements that allow it to favourably influence the competition process and/or market access conditions, such as greater efficiencies. Accordingly, under the Rulings of the law (RFLEC) a dominant agent is allowed to present an efficiency defence for its allegedly anticompetitive conduct under Article 6, which will be discussed in more detail below.

In both the FLEC and RFLEC, the concepts of abuse of dominance or monopolisation are treated as ‘relative monopolistic practices’, which according to Article 10, of the FLEC comprise acts, contracts, agreements or combinations, whose aim *or effect* is to improperly displace other agents from the market, substantially hinder their access, or establish exclusive advantages in favour of one or several entities or individuals. A relative monopolistic practice requires the showing of market power, and as such, they apply to dominant agents. To violate the law, these practices do not require the showing of intent, consequently, economic agents with substantial market power need to take into account that their conduct can be construed as damaging to the competition process and free market access. This is a somewhat different way in which Mexican competition legislation assigns dominant agents a ‘special responsibility’.

Article 10 also typifies as relative monopolistic practices the following conducts: vertical market division, resale price maintenance, tied sales, exclusive dealing, refusal to deal, and collusive, vertical boycott. It contains a final “catch-all” provision aimed at allowing other relative practices to be typified and subsequently punished by law. Additional relative monopolistic practices, arising out of this “catch-all” provision, are laid out in Article 7 of the RFLEC. These include predatory pricing, loyalty discounts, cross-subsidisation, discrimination in price or conditions of sale, and raising rivals’ costs. In a recent decision, however, the Supreme Court of Justice of the Nation (SCJN) declared the “catch-all” provision in Article 10 unconstitutional, with the subsequent effect of making all of the practices arising from this provision unconstitutional as well. As a result, at present, relative monopolistic practices described under Article 7 of the RFLEC are not punishable by law for any agent who promotes an *amparo* suit before the SCJN.¹

Article 11 of the FLEC establishes that relative monopolistic practices are only illegal if the economic agent undertaking them has substantial market power in the relevant market where the practice takes place. Therefore, economic agents committing these practices but without substantial market power, do not violate the law. Economic agents with substantial market power can present arguments about efficiency-enhancing benefits that may result from these practices, and outweigh their potential anticompetitive effects.

The definition and elements to consider when determining an agent’s degree of market power are set out in Article 13 of the FLEC. This article establishes that an evaluation of substantial market power must include:

- an economic agent’s market share, and whether it can unilaterally set prices or restrict supply in the relevant market;
- any entry barriers and elements that may alter those barriers and also other competitors’ supply;
- the existence and power of competitors; and
- the access that the economic agent and its competitors have to input sources.

Article 12 of the Regulations further establishes that the following criteria must be taken into account when determining whether an economic agent has substantial market power:

- the degree of positioning of goods or services in the relevant market;
- its lack of import access or the existence of high importation costs;
- the existence of large cost differentials that consumers could face when switching to alternate suppliers.

Firms wielding substantial market power are still subject to a rule of reason analysis and can present arguments about any potential efficiency-enhancing benefits of the relative monopolistic practices they undertake. Article 6 of the RFLEC explicitly establishes that economic agents may offer an efficiency defence for these types of conduct, and states that the Commission will consider the following elements, amongst others, when presented with an efficiency defence:

- the practice achieves resource savings, which permits the allegedly responsible agent, to produce the same quantity of the good at a lower cost, or to produce a greater quantity of the good at the same cost, on a permanent basis;
- the actions achieve lower costs if two or more goods or services are produced jointly as opposed to separately;
- the conduct in question lowers administrative costs significantly;
- the conduct in question transfers production technology or market know-how;
- these actions lower production or trade costs arising from an expansion of infrastructure or a distribution network.

3. The Case of Wal-Mart²

On May 16th 2002, the FCC initiated an *ex officio* investigation into large self-service chain stores. One of the principal motivations was a concern that some multiproduct self-service retailers were forcing their suppliers to charge higher resale prices to other competing stores under the threat of suspending their purchases. This concern, however, did not discard other potentially unlawful behaviour that has come to the attention of other competition authorities, such as discrimination as to the terms these stores offered when “selling” distribution services to upstream suppliers,³ or possible conduct arising from the fact that these self-service chain stores, who purchased from suppliers, were progressively becoming their competitors as they increased their reliance on private branding.

Although the allegations had been principally aimed at Wal-Mart’s Mexican subsidiary, Walmex, the Commission sought to undertake a general comparison of purchasing and marketing policies of the different multiproduct self-service retailers in order to ascertain whether these had damaging effects on the competition process. Thus, the FCC first began by investigating whether the alleged anticompetitive behaviour consisted of relative monopolistic practices whose aim or effect was, or could be, to unduly displace other economic agents from the market, impede their access or establish exclusive advantages, by imposing conditions on distributors or suppliers, that is, of violating article 10, index II of the law.⁴ One of the first elements to prove then was whether Walmex, or any other large self-service chain store, could have “substantial market power” in terms of the FLEC.

Throughout the investigation, the FCC gathered information from the main multiproduct self-service chain stores (SS) in the country (Walmex, Auchan, Casa Ley, Comercial Mexicana, Gigante, Carrefour, and Soriana) as well from their principal suppliers. In addition, it undertook various price-monitoring exercises for several products in these stores. The Commission also requested information from the Office of the Federal Attorney for Consumer Protection (PROFECO), on its continuous monitoring exercises on behalf of consumers.

3.1 Relevant Market

To determine the relevant market, the FCC analysed the services that these SS's provide to both consumers as well as suppliers. In its analysis of services to suppliers the Commission considered that the final price for goods that an SS obtained, largely depended on the bargaining power of each party to the transaction as well as on the types of services that a SS offered to its suppliers;⁵ the mere fact that a supermarket managed to obtain lower prices from suppliers did not in itself amount to a relative monopolistic practice.

In its analysis of services to consumers, the Commission reviewed different store formats such as megamarkets, hypermarkets, warehouses, price clubs, supermarkets and convenience stores. In 2001, Wal-Mart was the chain store with the most store formats and had the largest share of market participation as measured by its value of sales, roughly equal to the joint market shares for its closest competitors in that same year: Soriana, Gigante, and Comercial Mexicana.⁶ Pricing policies are also important in determining the types of services offered to end consumers; these are characterised by high-low pricing and everyday low pricing. The SS that has used this latter policy for the longest period of time is Walmex, although Comercial Mexicana, one of its closest competitors, is gradually adjusting its pricing policy to everyday low pricing.

The analysis also showed that the highest share of sales occurs in the central and metropolitan area (the Federal District), where Walmex, Gigante and Comercial Mexicana have a strong presence. Nevertheless, all of the large SS mentioned here, with the exception of Soriana and Casa Ley, who only have a regional presence –the former in the north and northeast and the latter in the northeast– have coverage in most of the national territory. Consequently, the Commission determined that, although a SS has a local area of influence, the economic agents investigated had national presence so that the geographic dimension of the relevant market was national.

In sum, the relevant market was defined as the acquisition, distribution and marketing of goods by self-service stores with a national geographic dimension. On the demand side, the definition of self-service stores was associated to their product offering and the surface they occupied. Stores included under the definition of relevant market, must have three product lines: perishable and edible goods, clothes, and general merchandise. Store surface area must meet 1,600m² of average sales floor space. This definition of relevant market effectively excluded government stores, traditional commercial stores, including markets, convenience stores, and department stores, since their formats did not meet SS product line and area specifications. On the supply side, services provided to wholesalers, as well as SS's procurement, are centralised, and national systems are managed directly by the chains who will seek to buy in larger volumes from selected producers and from specialised or dedicated wholesalers. These supplier services systems provide SS's with distinguishing features from other traditional marketing channels.

3.2 Market Power

Walmex not only has the largest market share as measured by the value of its sales and number of stores, it is the most important commercial firm in Mexico and Latin America and the second most important firm listed in Mexico's stock exchange, the *Bolsa Mexicana de Valores*, as measured by the

market's index as a function of its number of traded shares. Walmex's growth over the last few years is directly related to an international trend in the growth of self-service chain stores, which have become increasingly important as retail distribution changes.⁷

Sixteen of the main product suppliers use Wal-Mart stores as their most important distribution outlet, and there is an asymmetry in the importance that suppliers attribute to Wal-Mart as a distribution channel and the importance that any individual supplier's sales represents for Walmex's total sales. Moreover, the use of self-service stores that provide a comprehensive selection of goods and services at a single location, known as "one-stop shopping", has become more widespread, and this had the potential of conferring Walmex substantial market power.

Finally, the CFC noted that Walmex had exhibited accelerated growth following its 2000 strategy of low prices everyday, and that this growth had continued amid a slowdown in private spending. In fact, its market participation had increased while that of Comercial Mexicana and Gigante, with stores located in similar regional markets, had decreased. Soriana stores had not been affected but this was mostly attributed to the fact that they are principally located in the northern region of the country where the presence of Wal-Mart stores is less important.

After reviewing the facts uncovered by the investigation, the FCC determined that Walmex was an economic agent with substantial market power.

3.3 *Efficiencies*

Among the efficiencies of SS chains are: (a) that they have scale and scope economies because of their procurement systems, which lets them handle larger volumes in a centralised manner and allows them to cut brokerage costs since they can avoid paying a margin to traditional wholesalers, giving them greater ability to monitor quality and reduce backlog; and (b) they are more efficient in identifying consumption patterns and adjusting their pricing policies, discounts, and services for specific consumers. Thus these companies have greater bargaining power with suppliers compared to other marketing channels and therefore tend to be more efficient.

Walmex's procurement system has introduced important efficiencies into Mexico's distribution markets which have led to increases in productivity and profit margins, that translate into a greater ability by Walmex to invest its own resources without resorting to debt. These efficiencies have arisen from innovations in its distribution system and its everyday low pricing policy aimed mainly at cutting operational costs. Walmex has invested in specialised distribution centres, logistics and telecommunication systems, it has its own transportation fleet, which not only has led to reduced coordination costs, but improves inventory management.⁸ Both efficiencies, cost reductions and low pricing policy, are passed on as benefits to suppliers, by moving merchandise more rapidly and shortening their average payment period, and to consumers, as low prices.

3.4 *Resolution*

The Commission found the claim that Walmex was pressuring its suppliers to charge higher prices to its competitors, under threat of suspending purchases of their products, unsubstantiated by the facts. There was no evidence that Walmex had removed products from its offering because they were being offered at a lower price to its competitors. In fact, studies on prices for a sample of SS, undertaken by both the FCC and PROFECO, concurred in their finding of overall lower prices in these sampled Wal-Mart stores, relative to other stores in the sample, for a selected group of products over a pre-specified time frame. This did not mean, however, that all products reviewed had a lower price in the sampled Wal-Mart stores.

The Commission therefore concluded that Walmex's conduct did not violate article 10 index II of the law.

3.5 *A related case: Sinergia*⁹

The case of Sinergia can be seen as a reaction to Walmex's dominance in the relevant market. In 2003, its three closest competitors, Comercial Mexicana, Gigante, and Soriana, notified their intention to create Sinergia, a firm that would acquire inputs and merchandise for their retail stores and be operated by its stockholders. The Commission resolved this case in 2004, after an internal appeal.

In its initial analysis, the Commission took into account the parties' efficiency arguments about attaining scale economies, greater operative efficiencies, improvements in the stores' cost structures, and a greater ability to achieve better buying conditions in negotiating with suppliers. However, when weighed against the potential risks for anticompetitive behaviour, it decided that Sinergia could become a vehicle that would facilitate conduct that would violate the law.

The parties appealed this decision and offered evidence and procedures that would neutralise the effects that had led to the Commission's objection. The FCC resolved that, while the procedures presented were adequate, the economic agents had not proposed a mechanism that would allow the Commission to verify that Sinergia would not facilitate practices that could damage the competition process and free market access. Thus, it considered the appeal to be partially founded, revoking its initial resolution and issuing a new one that authorised the merger on the condition that the parties present a mechanism to verify that Sinergia would not be a vehicle that would facilitate anticompetitive conduct.

4. Final remarks

This document established the treatment that Mexico's competition legislation gives to competition on the merits. Although the term is not expressly defined or used by the FCC, the economic agents, or the judiciary, efficiency, which is at the core of competition on the merits, is the legal mandate of the FLEC. Moreover, the Rulings of the FLEC explicitly open the possibility for efficiency arguments to be considered by the Commission. The case of Wal-Mart's Mexican subsidiary, Walmex, presented here, illustrates an instance where allegations of relative monopolistic practices in the national market for the acquisition, distribution and marketing of goods by self-service stores, were effectively countered with a merit-based defence by Walmex.

NOTES

1. An *amparo* suit is available to any party who can raise a claim that he is being subjected to an unconstitutional statute or that his due process rights are being infringed. Due process, in this context, has a broad sweep and is not limited to “procedural” issues. Participants can, and do, attack the merits of agency decisions in an *amparo* because the due process clause in Article 16 of the Mexican Constitution requires that agency orders articulate the “legal basis and justification for the action taken.” This language has been construed by the Supreme Court to permit judicial abrogation of agency action that is arbitrary or capricious, unsupported by substantial evidence, or founded on reasoning that is illogical or contrary to general principles of law.
2. File number IO-02-2002.
3. The effect of such practices has been discussed in a previous OECD report, which notes that these large multiproduct retailers are likely to favour the larger and especially more diversified suppliers. Such discrimination, while not directly diminishing welfare, can lead to potential problems as suppliers’ incentives to innovate diminish over time. Refer to OECD report, *Buying power of multiproduct retailers*, DAF/CLP(99)21, July 16th, 1999 (hereafter, OECD report).
4. *“ARTICLE 10. - Subject to confirmation that conducts foreseen in articles 11, 12 and 13 of this Law have effectively occurred, relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, whose aim or effect is or may be to improperly displace other agents from the market, substantially prevent their access, or to establish exclusive advantages in favour of one or more persons, in the following cases:*

II. To set price or other conditions that a distributor or supplier should follow when marketing or distributing goods or when providing services; ...”
5. For example, supermarkets may temporarily promote products by offering different sized shelf-space or publicity campaigns. They can also offer incentives in the form of discounts to suppliers if the produce they receive does not have to be returned, if payment is prompt, etc.
6. In accordance with confidentiality restrictions, numerical information is omitted from this summary.
7. Refer to the OECD report.
8. Supermarkets traditionally sent trucks to wholesale markets or brokers to supply their stores. Instead, Walmex has invested in 5 distribution centres: 3 in Mexico City, one in Guadalajara and another in Monterrey.
9. Files CNT-97-2003 and RA-22-2004.

NEW ZEALAND

Introduction

This paper responds to the invitation to make a written contribution to the June 2005 roundtable on competition on the merits. The paper is arranged in two parts. The first part discusses New Zealand's understanding of the phrase "competition on the merits", the approach taken in competition legislation and the interpretation of this by the Courts. The second part briefly evaluates the current New Zealand position and the alternatives.

PART ONE

"Competition on the Merits" in New Zealand

1. General Principle

The aim of competition laws is to promote competition on the merits (the so-called "level playing field" for competitors). For the purposes of this paper the focus is on how to distinguish between pro and ant-competitive behaviour by firms with market power. However, it is noted that in New Zealand "competition on its merits" can be used to describe a number of situations and not simply competition by incumbents with market power.

The general principle is that conduct that is aggressively competitive, but that can be proved to benefit consumers, should not be subject to sanction, as that is the exact behaviour that the law in New Zealand seeks to encourage. It is only when that behaviour harms the competitive process that the law should intervene. The aim is to protect competition and consumers, not competitors. In New Zealand a monopolist is entitled like everyone else to compete with his competitors. He is not required to stand idly by as he sees his market share being eaten into by others who are not dominant¹. That would be stifling competition – the very thing the competition legislation is to promote, for the consumer's benefit.

Abuse of market power is a developing area of competition law in New Zealand, with principles and standards developing over time to help resolve the uncertainties that surround its application. The following discussion outlines this development and identifies questions that remain outstanding.

2. New Zealand Legislation

The competitive process is protected by way of s 36 of the Commerce Act 1986, which prevents firms with a substantial degree of market power from taking advantage of that power for an anti-competitive purpose.

2.1 *Section 36 of the Commerce Act*

To establish a breach of s 36 requires that the Commission establish that the firm in question²:

1. Has a substantial degree of market power; and
2. Takes advantage of that market power; and

3. Does so for the purpose of:

- a) restricting entry into a market;
- b) preventing or deterring a person from engaging in competitive conduct in a market; or
- c) eliminating a person from a market.

There have been two notable amendments to s 36. In 2001 the threshold for market power was changed from “a dominant position” to “a substantial degree of market power”. The new threshold is lower and therefore allows a wider range of activities to come under s 36 scrutiny.

The question of how to differentiate between aggressively competitive conduct and anti-competitive conduct by a firm with a substantial degree of market power arises when the Court’s consider whether the firm has used its power for one of the stated purposes. In 2001 Parliament substituted the need for the firm to “use” its market power, for the requirement that it “take advantage” of that market power.

The 2001 amendments have yet to be tested in the Courts.

2.2 Influential Jurisdictions

This paper contains references to Australia. Section 36 was amended in 2001 to make the language of s 36 the same as the equivalent Australian provision, s 46 of the Trade Practices Act 1974, and New Zealand courts have signalled a willingness to consider Australian case law when addressing issues under s 36.

Additionally, the considerable experience of the US Courts in analysing s 2 of the Sherman Act has proved helpful in the development of our own laws in this area.

2.3 Underlying purpose

The application of s 36 is dictated by the purpose of the Commerce Act as a whole. Section 1A states the purpose of the Act as to promote competition in the market for the long-term benefit of consumers. It follows that conduct that is aggressively competitive, but that can be proved to benefit consumers, should not be subject to sanction, as that is the exact behaviour that the Act seeks to encourage. It is only when that behaviour harms the competitive process that s 36 comes in to play.

The Courts have reiterated that s 36 exists to protect competition and consumers, not competitors. The Privy Council in *Carter Holt Harvey*³ cites a passage from the Australian case, *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 191:

Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to “injure” each other in this way. This competition has never been a tort ... and these injuries are the inevitable consequence of the competition section 46 [of the Trade Practices Act] is designed to foster.

The underlying purpose of s 36 helps us to understand the difficulties faced in applying s 36 in practice, namely, where to draw the line between conduct that is aggressively competitive, and conduct that is anti-competitive – the purpose making it essential to draw that line.

3. Application of market power prohibition

New Zealand Courts have faced difficulty in giving effect to laws designed to facilitate competition on the merits, namely how to differentiate between aggressively competitive conduct and anti-competitive conduct by a firm with a substantial degree of market power.

In practice the distinction between permissible conduct and conduct that damages the competitive process is an extremely fine one not easily addressed by the statutory language of s 36. As noted by the Privy Council⁴ ‘As to what constitutes “use of a dominant position” ... the statutory words provide no explanation as to the distinction to be drawn between conduct which does, and conduct which does not, constitute such use’. Recognising that the “anti-competitive” purposes stated in s 36 may also be construed as natural, competitive motivations, the Courts have tended to give models based on intention a wide berth, focusing instead on the connection between market power and the alleged anticompetitive behaviour – captured in s 36 by the terms “use” or, post 2001, “take advantage of”.

The following section of this paper discusses the principles and models that the Courts have applied to supplement the statutory language of s 36.

4. Court approach to distinguishing anticompetitive actions

To mitigate against a broad application of s 36, courts have emphasised that s 36 must be interpreted to provide certainty to those firms with substantial market power as to what they can legitimately do. Firms with market power are entitled to compete with their competitors as much as other firms.⁵

The Courts have established the connection between a dominant firm’s power and its conduct by applying a counterfactual test. Essentially this test states if a firm without a substantial degree of market power would have undertaken that course of action as a matter of commercial judgment, it would ordinarily follow that a dominant firm engaging in the same conduct is not taking advantage of its power.

The test was first set out by the Privy Council in *Telecom v Clear* and reaffirmed by the Privy Council in *Carter Holt Harvey* last year. The reaffirmation clarified that the counterfactual test is necessary in determining whether there was a connection between power and conduct. Some doubt existed after the Court of Appeal suggested in 2001⁶ that the hypothetical test, while relevant, was not a mandatory test for “use”. The Court of Appeal suggested that if in a particular case the hypothetical test is not relevant, then a process of inference, based upon economic analysis, is unnecessary and direct observation will determine whether a firm has “taken advantage” of its market power. This conclusion followed the review of the development of “use” through *Telecom v Clear* and the Australian cases *Queensland Wire* and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*⁷.

The following cases outline how the counterfactual test has been applied in different circumstances.

4.1 Access Pricing

In *Telecom v Clear*⁸, Clear had set up as a competitor to Telecom in the telecommunications market. To be able to connect calls from one area to another in New Zealand, Clear had to connect its network to the Public Service Telecommunications Network owned by Telecom. It was a fundamental requirement of anyone offering telecommunications services in any part of the system that its customers should be connected to all other telephone users in New Zealand. The issue was as to the terms of which that interconnection was to be made; this had been left to the market to decide. Telecom argued that it was entitled to charge Clear an access levy to its network on the grounds that it was entitled to a contribution to the general common cost of Telecom’s network. Clear argued there should be no access levy and that the charges demanded by Telecom were a breach of s 36 since they raised Clear’s costs.

The Privy Council adopted the hypothetical counterfactual test for determining when a person has “used” its market power. The inquiry in the case was whether the terms being demanded by Telecom were higher than would have been demanded by a firm, not in a dominant position, which is being asked to supply a component of the service to a competitor.

The Privy Council approved the “Baumol-Willig” rule (commonly referred to as the efficient component pricing rule, ECPR) as an appropriate economic model for applying the hypothetical counterfactual test in this case. That rule provides in part:⁹

When one firm provides facilities or some other inputs to another firm, *and this process entails some sacrifice of profit by the supplier firm* (as when it thereby gives up some capacity that it would otherwise have used itself), then the supplier firm must be permitted to price the article in question at a level sufficient to compensate it for the profit it is forced to sacrifice because of its supply to the other firm. Economists refer to the sacrifice of profit unavoidably entailed in an activity as the *opportunity cost* of that activity.

The Privy Council concluded that while Telecom would be acting anti-competitively if it refused to permit Clear to interconnect with Telecom’s network, it was not acting anti-competitively in charging its opportunity cost, as part of the overall access charge, since that is what it would have charged in a fully competitive market.

4.2 Predatory behaviour

In *Magic Millions*¹⁰ Wrightson’s was a well-established firm dealing in bloodstock, and had held the national yearling sales (of thoroughbred horses) annually for over 60 years by the time this case was heard. These sales were traditionally held over the third weekend in January. In 1989, Magic Millions, a new competitor, planned to hold their inaugural sale at the same time as Wrightson’s. The parties managed to reach a settlement whereby their sales were held on different days. However, a direct clash arose again with the 1990 dates.

Tipping J in the High Court found that Wrightsons were aware of Magic Million’s proposed 1990 dates when they announced their own dates for 1990. It was held that Wrightsons had a dominant position in the market for the sale of thoroughbred yearlings by auction, and used that dominant position to try to eliminate Magic Millions from the market, or prevent or deter them from engaging in competition with Wrightsons. Section 36 was therefore breached.

4.3 Bundling – Predatory pricing

In 1996 the principles espoused in *Telecom v Clear* were applied by the Court of Appeal in *Port Nelson*¹¹. This was a bundling case in which issues of predatory pricing arose.

Port Nelson refused to hire tugs to ships which did not use pilots employed by Port Nelson; it offered a 5% discount to port users who bought the whole range of their services; and reduced its minimum pilotage charge for small vessels to below the cost of provision. The tug hire was found to be a breach of s 36 on the basis the action was undertaken by a dominant firm as a central part of a strategy to kill prospective competition in pilotage, and deter others.¹² However, the discount and the \$100 minimum charge did not breach s 36 because a non-dominant firm in similar circumstances would have acted likewise.

4.4 *Recoupment – Predatory pricing*

In *Carter Holt Harvey*¹³ Carter Holt Harvey was alleged to have breached s 36 by selling a product below the cost of production in response to competition from a new entrant into the market for insulation. A 3-2 majority of the Privy Council overturned a New Zealand Court of Appeal decision in this case and found that Carter Holt Harvey had not engaged in predatory conduct in breach of s 36.

Two key points arose out of the decision. First, it confirmed that the counterfactual test is a necessary test under the old s 36. Second, the majority emphasised that it is the raising of prices after a competitor has been forced to exit, or competition deterred, that is harmful to consumers (“recoupment”). Without the post-exit price increases to the previous levels, consumers benefit from the lower prices. Therefore, there must be evidence of a prospect of recoupment of losses, or intention to do so, before a firm can be said to be using its market power and engaging in so-called predatory pricing.

PART TWO

Evaluation – current and alternatives

Like other jurisdictions, New Zealand has found the analysis of unilateral conduct by firms difficult. However, it is important that s 36 contains some sort of objective filter, to help distinguish between competitive anti-competitive behaviour.

One view is that the counterfactual test arguably performs this function. It provides some guidance in terms of what is required under s 36. It also provides some certainty on the interpretation of s 36, which businesses are likely to value.

Another view is that the *Carter Holt Harvey* decision, while offering some clarity, may present difficulties. One is that it reaffirms the application of a strict counterfactual test, which is difficult to formulate and apply in practice. This requirement has the potential to narrow the scope of s 36, which could be contrary to the policy behind the 2001 amendments. Parliament considered that changing from “use” to “taking advantage of” would allow a more flexible interpretation of s 36. While the 2001 amendment is yet to be tested in New Zealand courts, it is noted that Australian Courts have equated “use” with “taking advantage of”.

5. Privy Council minority decision

It should be noted that the *Carter Holt Harvey* Privy Council decision contained a strong dissent by two judges towards both the application of the test, and the construction of hypothetical scenarios in general. The minority said that the test was flawed because it is not clear what the attributes of the firm in the counterfactual scenario are. For example, the minority considered that it was arguable that attributes that make the firm dominant, for example in INZCO’s (division of Carter Holt Harvey) case a strong distribution network, should not be present in the counterfactual.

However, the majority had said that it was only the actual market power that should be removed from the hypothetical firm. The minority criticised this, saying that it was artificial to imagine a firm that has no market power and yet retains the attributes that give it the market power. Thus, the minority indicated that the counterfactual test was of very limited use. The minority also reiterated that the counterfactual test is a judicially constructed tool, not one demanded by statute. Overall they considered that the construction of a hypothetical firm in the *Carter Holt Harvey* case to be “highly unreal”.¹⁴

5.1 *Comment*

The Privy Council, whilst laying down a mandatory test, leaves the above matters identified by the minority unresolved.

One interpretation could be that the counterfactual test appears to work well in access pricing cases where the economics is quite well developed, however in other cases there could be a critical difficulty in trying to work out how the counterfactual test should be applied

This promotes the question of if the hypothetical counterfactual test is not to be mandatory, what are the alternatives?

5.2 *Australia's position*

Although the High Court of Australia has applied the hypothetical competitive market test, the approach of the High Court of Australia has differed from the Privy Council in one important respect. The High Court in *Queensland Wire v BHP*¹⁵ did not state that this was the *only* way that a taking advantage of market power could be established.

The test for “take advantage of” has recently been considered again by the High Court of Australia in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (Trading as Auto Fashions Australia)*.¹⁶ *Melway* involved a refusal to supply. In light of the 2001 amendment of section 36 and the clear statement by Parliament that the purpose of the amendment was to allow the Courts to apply the more flexible Australian test, this case is important when determining the approach New Zealand courts may take in the future.

The High Court of Australia again confirmed that an entity takes advantage of market power if it “uses” that power. The High Court of Australia also considered that, although the hypothetical test remains relevant, the hypothetical competitive market must be based on the facts of the case and the reality of the market. It could not simply be assumed that a refusal to supply would not occur in a competitive market.

The second important aspect of the decision in the *Melway* case is that, although the High Court of Australia ultimately decided that there was no taking advantage of market power on the basis that the behaviour would occur in a competitive market, it also indicated that there were other ways of establishing a taking advantage of market power.

First, the High Court of Australia indicated that a different threshold of causation may be appropriate. Under the Privy Council test the level of causation required to establish the taking advantage of market power is that the behaviour would not occur in a competitive market. However, the High Court of Australia considered that where a substantial degree of market power makes the behaviour possible or easier this amounts to a taking advantage of market power. In other words, the High Court of Australia accepted a lower threshold of causation than that required by the Privy Council.

Second the High Court of Australia indicated that the hypothetical test of how a person would behave in a competitive market may not always be necessary. Although not appropriate on the facts of that case, the High Court indicated that in some situations a test similar to that applied by Deane J in *Queensland Wire* case may be appropriate. Under that test it would be possible to infer a taking advantage of market power from the fact that the purpose of the behaviour could only be achieved because of the market power.

6. *Privy Council compared with Australian High Court*

Under both the alternative tests set out in *Melway* there may be situations which amount to a taking advantage of market power even though the behaviour would also occur in a competitive market. This differs from the Privy Council test which excludes from the meaning of taking advantage of market power situations in which the behaviour in question would occur in both competitive and uncompetitive markets.

This could mean that, although a person may well undertake certain behaviour in a competitive market, where they have substantial market power, the same behaviour is prohibited if the market power makes it easier to engage in the conduct or the purpose could only be achieved by reason of the market power. This may have the effect of imposing “special responsibility” on firms with a substantial degree of market power, a position expressly rejected by the Privy Council in applying s 36 in its pre-amended form.

If it is suggested that if these alternative tests for taking advantage of market power were adopted, a robust analysis of purpose would be required to ensure that competitive behaviour is distinguished from anti-competitive behaviour. To this extent the New Zealand Courts current reluctance to place too much emphasis on purpose is noted.

7. **Alternatives to the counterfactual test**

The following alternatives to the counterfactual test are discussed below:

- 9. Cost price relationship;
- 10. Intent; and
- 11. Market structure and recoupment.

8. **Cost-price relationship**

One alternative that has been discussed in the New Zealand academic literature is the measure of cost to which prices should be compared for the purpose of determining whether they are predatory. Price cutting is predatory if it has the purpose of harming competition. In New Zealand, no cases seriously discuss the issue of whether below-cost pricing is necessary for predatory pricing (and therefore the purpose of harming competition under s 36). There have been two cases that only briefly mention the issue. In *Carter Holt Harvey*, the firm in question was pricing below cost. In *Port Nelson*, it was found that it was not necessary to choose between the average fully allocated, opportunity, avoidable or incremental cost approaches because any one of them led to a conclusion that prices were substantially below cost on those facts.¹⁷

In *Carter Holt Harvey*, there were references made to prices being 30-40% below average variable cost¹⁸ and references to prices being 17-28% below the cost of production.¹⁹ However, there was no reference to the conventional Areeda-Turner test for predatory pricing on appeal in the Privy Council. The Privy Council instead focused on recoupment as being the key factor in identifying cases of predatory pricing. In the Australian case *Boral v ACCC*, it was said that a dominant firm uses its position of dominance when it engages in price-cutting with a view to recouping its losses without loss of market share by raising prices without fear of reprisals afterwards. This statement may imply that pricing below cost is a necessary element of s 36, because if there is no loss then recoupment cannot occur.

An earlier Australian case, *Victorian Egg Marketing Board*,²⁰ suggested that when one can infer the requisite purpose from other evidence, then price cutting may be regarded as predatory, notwithstanding that it is not marginal or average variable cost and does not result in a loss being incurred. In terms of below cost pricing, the position in New Zealand is that it is the degree to which a firm can raise prices after the exit or deterrence of a competitor that is most important, not the measure of costs.

Likewise, the courts have not discussed the importance of price histories, the patterns to look for, or the timing and extent of price cuts, though timing and extent has been taken as being an indicator of the purpose of the action.²¹ It has been acknowledged in New Zealand literature that there are many legitimate reasons for pricing below cost. Examples include where a firm prices below cost to induce customers to try a new product, or to boost profits in a complementary product.

8.1 Comment

Potential problems with this cost-based approach were identified by Rhonda Smith and David K Round in their article, “*Section 46, After Boral – some lessons for New Zealand*”. They criticise the cost-based approach on the basis that it may cause behaviour that is pro-competitive to be prosecuted, whilst allowing conduct which is anti-competitive in nature but where price remains above the average variable costs, to continue unhampered.

Smith and Round find that a test based on below-cost pricing in isolation will not adequately distinguish between competitive and anti-competitive price cuts.

9. Intent

The second approach concentrates on the defendant’s intent, or purpose as it described in s 36. This was the approach favoured by the US Courts in the past whereby if a seller intended to drive out competition by wrongful means, the court would infer that its price was unlawfully low in the present, and would be too high later²².

However, as this paper has already pointed out, an approach based on intent risks that it will overreach by targeting aggressively competitive permissible conduct as well as anti-competitive conduct. As Matthew Bender²³ states, “‘intent to harm’ without more offers too vague a standard in a world where executives think no further than ‘Let’s get more business,’”. Indeed, New Zealand Courts have shown a reluctance to formulate tests and principles based on intent when applying s 36 of the Commerce Act.

10. Price plus - hybrid

Smith and Round have attempted to create a new approach with their “price plus” test,²⁴ which combines intent with the concept of rationality. They find that price cuts, even those that fall below the cost levels set out in the cost-based approach above, have the potential to be pro-competitive as well as anti-competitive:

10.1 Competitive price cuts

Smith and Round suggest there may be valid competitive reason for cutting price such as:

- Adoption of lower cost technology;
- General reduction in input costs;
- Loss leading to establish reputation for a new product;
- Disposal of excess or obsolete stock.

What may appear to be “recoupment” may also have a competitive explanation such as:

- Raising product quality;
- Value adding.

10.2 *Anti-competitive price cuts*

Predatory pricing will normally be evidenced by an initial price reduction accompanied by OTHER anti-competitive conduct (thus the term “price plus”) such as:

- Investment in excess capacity based on inferior technology;
- Attempts to purchase entrants’ operations;
- Spreading disinformation concerning the quality of a competitor’s products or its ability to supply.

While one of the above on its own will not establish that the price reduction was predatory, a coincidence of several would. Such conduct cannot be explained as pro-competitive and supports a conclusion that the price cut was predatory.

This test appears to be a hybrid of the intent and market structure and recoupment test in the sense that it focuses on purpose, but also on whether the predator has made a rational business decision. However, it does not appear to adequately address the need to show a causal connection between the dominant position and the conduct in question. It is questionable whether this test addresses the requirement that a firm in with market power “use” or “take advantage” of that power as expressly required by s 36.

11. **Market structure and recoupment**

The market structure and recoupment approach recognises that predatory pricing cases involve a two-phase process. First, the defendant sets prices below its marginal cost hoping to eliminate rivals and increase its share of the market. The second stage is the recoupment period where the low prices charged in the first stage give way to high prices as the predator seeks to recoup losses made by dropping its price by charging monopoly prices. Recoupment makes the otherwise irrational nature of below cost pricing rational.

It has been suggested that what is required is an objective expectation of recoupment. Thus where recoupment is unlikely or highly risky, it may be held that there is no expectation of recoupment and thus no predatory pricing notwithstanding below cost pricing.

Matthew Bender notes that this approach using recoupment has become increasingly influential²⁵.

11.1 *Comment*

New Zealand’s current approach, as set out in *Carter Holt Harvey*, most resembles this approach. It is worth noting that in New Zealand, the requirement of recoupment sits comfortably with the overall purpose of the Commerce Act in promoting the best interests of the consumer. Without recoupment, the consumer benefits from the lower prices of pricing below cost. The concept of recoupment shows how lower prices may harm the consumer in the long term.

Significantly, this approach does not appear to require the application of the counterfactual test as such. If the Courts in New Zealand adopt an approach more in line with Australian cases in the future, that is where the counterfactual test is a legitimate model that may be used in appropriate cases but need not be applied in all cases, New Zealand’s approach will more or less accord with that of the market structure and recoupment test.

12. Role of the commerce commission

The Courts are responsible for interpreting the legislation and providing principles to guide behaviour. Obtaining this guidance in unsettled areas of the law can be critical for the business community.

The Commission has an important role to play in this respect. It is the enforcement agency charged with investigating and taking enforcement action in the Courts when it perceives there has been an abuse of market power under s 36. For example, the Commerce Commission was the prosecuting body in the most recent predatory pricing case, *Carter Holt Harvey*. This case provided useful guidance on the operation of s 36 and the resulting clarity is expected to assist market participants. The Commission also has a role to play in disseminating information on the outcomes of such cases and implications for business.

Additionally, the Commission can inform Government on its practical experiences in applying the legislation.

NOTES

1. As stated by the Privy Council in *Carter Holt Harvey Building Products Group Limited v Commerce Commission* [2004] UKPC 37
2. Refer Annex One for section 36.
3. Note *Carter Holt Harvey Building Products Group Limited v Commerce Commission* [2004] UKPC 37
4. Lord Browne-Wilkinson in *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* p407
5. See for example *Telecom Corporation of NZ Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 and *Carter Holt Harvey*, above.
6. *Telecom Corporation of New Zealand v Commerce Commission* [1995] 1 NZLR 385
7. (2001) HCA 12
8. *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385
9. *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385, 405.
10. *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 (HC).
11. *Commerce Commission v Port Nelson* (1995) 6 TCLR 406, 557 (HC) McGechan J.
12. *Commerce Commission v Port Nelson* (1995) 6 TCLR 406, 557 (HC) McGechan J.
13. *Carter Holt Harvey Building Products Group Limited v Commerce Commission* [2004] UKPC 37
14. *Carter Holt Harvey v Commerce Commission* (Decision PC6/2004 of the Privy Council of 14 July 2004, Unreported), para 78, Lord Scott of Foscote and Baroness Hale of Richmond.
15. (1989) ATPR 40-925.
16. (2001) HCA 13.
17. *Commerce Commission v Port Nelson* (1995) 6 TCLR 406, 535.
18. *Commerce Commission v Carter Holt Harvey Building Products Ltd* (2000) 9 TCLR 535 (HC), para 43.
19. *Carter Holt Harvey Building Products Ltd v Commerce Commission* (Decision PC6/2004 of the Privy Council of 14 July 2004, Unreported) para 16.
20. *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) ATPR 17,783.
21. *Commerce Commission v Carter Holt Harvey Building Products Ltd* (2000) 9 TCLR 535 (HC), supplementary judgment of Professor Lattimore, paras 57-60.
22. *Antitrust Laws and Trade Regulation*, Second Edition, Matthew Bender & Company at chapters 25 and 27.
23. Ibid.
24. Section 46: *After Boral – Some Lessons For New Zealand*.
25 Ibid.

ANNEX 1.

LEGISLATION

Section 36 – Taking advantage of market power

- (1) Nothing in this section applies to any practice or conduct to which this Part applies that has been authorised under Part 5.
- (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of –
 - a. Restricting the entry of a person into that or any other market; or
 - b. Preventing or deterring a person from engaging in competitive conduct in that or any other market; or
 - c. Eliminating a person from that or any other market.
- (3) For the purposes of this section, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of section 45(2), in New Zealand.
- (4) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.

ANNEX 2.

SUMMARY OF CASE FACTS

Telecom Corp of New Zealand Ltd v Clear Communications Ltd [1995] 1 NZLR 385

Briefly, the facts of this case are:

- Telecom is a telecommunications provider which, until the market was opened to competition in 1990, had a virtual monopoly in the telecommunications market.
- Clear was recognised as a network operator for the purposes of the Telecommunications Act 1987.
- The requirement of ubiquity meant that Clear required access to the PSTN in order to make its entry into the CBD business telecommunications market practical. It was necessary for Clear's customers to be able to phone Telecom numbers and vice versa. It was anticipated that eventually, Telecom would need to negotiate access to Clear's network.
- In August 1990 the parties entered into a memorandum of agreement covering Clear's toll by-pass service and its proposed local business service. The terms proposed by Telecom were that:
 1. Where a call was delivered by Telecom to Clear, Telecom would bill the caller at standard local call charge, if any.
 2. Where a call was delivered by Clear to Telecom, Telecom would bill Clear at its standard local call charge.
 3. Telecom would provide Clear with integrated numbering (i.e. no access code) by supplying blocks of Telecom numbers at tariff rates.
 4. Clear would pay the full cost of the necessary links interconnecting its network with that of Telecom.
- On 4 March 1991 Clear and Telecom entered into a restated memorandum of agreement which did not require Clear to pay for access, only for traffic.
- On 13 March 1991 Clear proposed there should be no charge whether by way of rental or traffic charge by either Telecom or Clear for the use of the other's network, save that Clear would periodically pay for any imbalance between calls terminating in the Clear system and those terminating in the Telecom system.
- Despite prolonged negotiations no agreement could be reached on the terms of the interconnection.
- Following the start of proceedings, Telecom instructed two American economists, Professors Baumol and Willig. They advised that Telecom could, without unlawful use of its dominant market position, require Clear to contribute to the general common cost of Telecom's network. That was based on the Baumol-Willig Rule, not a general rule of economics but rather a shorthand description of their joint evidence to the effect that in a fully contestable market, someone selling to a competitor the facilities necessary to provide a service that the seller could otherwise provide would demand a price equal to the revenues that would have been obtained if the seller had provided the service — in short, the price equals the opportunity cost.

Port Nelson

*Port Nelson*¹ provided various services and facilities for ships using the port at Nelson including wharves, tugs, pilots and stevedoring. When faced with new competitors - independent pilots setting up their own businesses providing pilotage services - Port Nelson adopted a predatory strategy. It refused to hire tugs to ships which did not use pilots employed by Port Nelson; it offered a 5% discount to port users who bought the whole range of their services; and reduced its minimum pilotage charge for small vessels to below the cost of provision.

The High Court found that the discount and the \$100 minimum charge did not breach s 36 because a non-dominant firm in similar circumstances would have acted likewise, and as such the “use” of a dominant position was not made out under the Privy Council approach. The tug tie, meanwhile, was found to be a breach of s 36, constituting a use of the dominant position for the purpose of preventing, deterring, or eliminating other pilots from competing with Port Nelson. This was a course of action undertaken by a dominant firm as a central part of a strategy to kill prospective competition in pilotage, and deter others.²

*Carter Holt Harvey Building Products Group Limited v Commerce Commission*³

Briefly, the facts were:

- *Carter Holt Harvey* involved an insulation company INZCO (a division of CHH) with a dominant position in the insulation market, its main product being Pink Batts (fibreglass insulation).
- In the early 1990s, INZCO faced competition in the form of insulation products made of wool.
- NWP was the main competitor in this market with its Wool Bloc, attaining 30% of the Nelson insulation market by December 1993.
- INZCO responded by producing its own wool-based product, Wool Line.
- Initially INZCO set the price of Wool Line above that of Pink Batts to recover cost of production. However, this did not prove to be competitive. INZCO responded by changing its pricing for Wool Line in the Nelson area.
- INZCO offered one free bale for every bale purchased, effectively reducing the price of each bale by half.
- This was at least 17-28% below the cost of production, transport and delivery into store in Nelson.
- The purpose of the offer was to enable the distributors to compete with Wool Bloc in that region. The promotion lasted just over six months.
- At the beginning of 1994, NWP decided to increase its price for Wool Bloc by 12%. The reduction in price of Wool Line had the desired effect on INZCO’s turnover. At or about the same time there was a sharp drop in the sales of Wool Bloc.

NOTES

1. Commerce Commission v Port Nelson Ltd (1995) 6 TCLR 406 (HC) and Port Nelson Ltd v Commerce Commission (1996) 7 TCLR 217 (CA). The decision of the High Court was affirmed on appeal.
2. Commerce Commission v Port Nelson (1995) 6 TCLR 406, 557 (HC) McGechan J.
3. [2004] UKPC 37

NORWAY

The term “competition on the merits” is a rather new concept for the Norwegian Competition Authority. Until May 2004 the Norwegian Competition Act had an explicit total welfare standard, where the concept of dominance was non-existent. Abuse of a dominant position was not prohibited. However, we could ban the behaviour if it was in conflict with the goal of the Competition Act, which was to ‘achieve an efficient use of resources’. Such an explicit goal implied that there was a direct link from text books in economics to application of the Competition Act in specific cases. As we all know, there are no such phrase as competition on the merits in text books in economics.

Since we had such an explicit goal in The Norwegian Competition Act, it had an economics-based foundation. However, our present Competition Act, in force from May 1 2004, is harmonised with the EU law. In particular, we have copied Article 82 almost word by word. Now the concept of dominance is introduced explicitly and indirectly also the concept ‘competition on the merits’. We must admit, though, that it is hard to understand the exact meaning of the concept “competition on the merits”. However, the concept can be useful when applied in the forthcoming guidelines for Article 82. In what follows we will explain how this can be done.

Under the present legal ban on abuse of market power a firm must – in every market that it operates – consider whether it

1. is dominant, and if so;
2. whether its conduct should be classified as an “abuse” under the competition act.

We could use a form-based approach to define abuse of dominance. In a pure form-based approach we would define certain kind of actions as per se illegal and other kinds of actions as per se legal. For example, we could have that quantity rebates – whatever that means – is always legal while all other rebates made by a dominant firm is per se prohibited. Furthermore, we could define all kinds of action that are legal as “competition on the merits”. A certain kind of action is then either defined as “competition on the merits”, or as “an abuse of dominance”. If we choose such an approach quantity rebates could for example be defined as competition on the merits, and all other rebates by dominant firms are defined as an abuse of dominance.

However, there are good reasons for not choosing such an approach. The main reason is that – as far as we know – there are no examples of any kind of unilateral behaviour that is always harmful or never harmful. For example, rebates can in some instances lead to lower prices and in other instances to foreclosure and higher prices. Even a quantity rebate can be used to foreclose a rival and thereby to dampening competition. It is also true that exclusion in some instances can lead to more intense rivalry for becoming the exclusive supplier, and in other instances it can lead to foreclosure and higher prices. Moreover, price discrimination may lead to lower prices to some consumers or it might be an instrument to foreclose a rival.

According to this, defining competition on the merits based on such a form-based approach can be misguided. Then we need an alternative definition of “competition on the merits”. It is announced that the

forthcoming guidelines for Article 82 will be based on a more effect-based economic approach. This is welcomed, because it would help to clarify the concept “competition on the merits”.

In an effect-based approach, we will – as the phrase indicates – focus on the effects of an action rather than on the action as such. It should be made very explicit that the goal of Article 82 is to protect competition, not competitors. The distinction is crucial. If the goal is to protect competition, then it is clear that even a dominant firm can compete in a way that leads to lower profits for its rivals. For example, a dominant firm could be allowed to offer rebates that lead to higher market shares for his own firm and to lower market shares for its non-dominant rival(s). As long as this action leads to lower prices, both in the short and in the long run, this should not be in conflict with Article 82. We should then define this action as competition on the merits, not an abuse of dominance. The concept is then directly linked to the effect of the action made by the firm, and thereby directly linked to the effect-based approach, rather than the form of action by the firm.

Rebates that lead to lower prices – both in the short and the long run – can then be defined as competition on the merits. However, in other settings rebates can be anti-competitive and therefore not competition on the merits. This is the case if rebates lead to exclusion, either partial or total exclusion. Total exclusion would enable the dominant firm to raise prices in the future. Partial exclusion could imply that a rival does not have any prospects to earn satisfactory profits, and then it has low incentives to invest in new products and to compete fiercely in the long run. In such a situation where rebates lead to exclusion it can not be defined as competition on the merits, but rather as an abuse of dominance.

This example once again illustrates that it is difficult to find one particular action from a dominant firm that is always harmful or never harmful. We need a case to case approach, where we have that one particular kind of action in some situations can be defined as competition on the merits – even by a dominant firm – and in other situations as an abuse of a dominant position. This favours an effects-based rather than a form-based approach.

However, we can do better than having a pure effect-based approach. It should be possible to point at some particular actions that can potentially be more harmful than other kinds of action. Again, think about rebates. The discussion in the last couple of years has shown that retroactive rebates – where a sale above a threshold level triggers a large rebate – can be used as a foreclosure instrument. Therefore we should watch with particular scepticism that kind of action by a dominant firm. The dominant firm knows this, and should be especially careful when implementing actions that are listed as a potential abuse of dominance. There should be no general ban, though, even of such a behaviour.

In new guidelines for Article 82 the phrase ‘competition on the merits’ could thus be used to point out that we are concerned about competition, not competitors. It is behaviour by a dominant firm that leads to tougher competition, in the short as well as the long run. It clarifies that a dominant firm should be allowed to take action that leads to lower profits for its rivals, as long as it does not have any anti-competitive effect in the short or long run. It would also clarify that we are concerned about effects rather than form of action. Guidelines should give examples of actions that are potentially more harmful than other kinds of action, for example retroactive rebates. In that respect there would be an element of a form-based approach. But in any case, all kinds of actions should be analysed according to the effect on competition. It remains to be decided, though, which criteria that should be applied when analysing the effect on competition. It could for example be (i) a sacrifice test, (ii) exclusion of an equally efficient rival test or (iii) a consumer harm test. This should be an important question that will be raised under the discussion of the guidelines for Article 82.

TURKEY

This paper aims to contribute to the discussions in the Roundtable on the Competition on the Merits to be held on June, 2005.

1. Act on the Protection of Competition No 4054

The Act on the Protection of Competition No 4054 (the Act) has been enacted in 1997. The provisions of the Act are compatible with Articles 81 and 82 of the Rome Treaty and Merger Regulation of the EU as part of Turkey's aim and commitments towards becoming a member of the EU. The principles contained in the case-law of the European Commission, Court of First Instance (CFI) and the European Court of Justice (ECJ) are taken into account as precedent in the decisions of the Turkish Competition Board (the Board), the decision making body of the Turkish Competition Authority.

Purpose of the Act is to prevent anticompetitive agreements, decisions and practices and abuses and ensure protection of competition. The reasoning of the Article concerning the purpose foresees that aim of the Act is to protect competition because competition is the driving force for efficient use of resources, decrease in prices of rival products, use of new technology by the undertakings, increase in the quality of the products, continuous and balanced growth of the economy and achievement of social benefit that is the protection of consumers. Therefore, the ultimate purpose of the Act is protection of competition rather than competitors as the cases decided by the Board prove.

The term dominance is defined in the Act as "the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers." The Act does not prohibit dominance because it is desirable for an undertaking to gain dominant position as a result of its growth through its own internal dynamics. However, the abuse of a dominant position is prohibited when a dominant undertaking abuses its dominant position if the purpose or the effect of its behaviour is to prevent, restrict or distort competition. The purpose of the dominant undertaking is overtly mentioned apart from effect in the reasoning of the Article, therefore intent of the dominant undertakings can also be determinative in the analysis of abusive behaviour. Article 6 (the Article) of the Act entitled "Abuse of Dominant Position" cites some non-exhaustive abusive practices as complicating the activities of competitors in the market or preventing new entry; discrimination; tying; distorting competition in another market by abusing dominance in a certain market and restricting production, marketing or technological development to the prejudice of consumers.

As the reasoning of the Article implies, any conduct by a dominant firm as a result of its internal dynamics will not be prohibited (therefore will be seen as behaviour on the merits) even if the competitors in the markets face difficulties in remaining in the market or they are obliged to exit the market. To determine whether a behaviour is caused by internal dynamics of a dominant firm or by anticompetitive purpose or effect is a delicate matter and requires sensitive analysis of the market conditions. However, while determining abuse, it should also be kept in mind that dominant undertakings have a special responsibility not to impair competition in the market and this causes some conduct to be deemed abusive when pursued by a dominant firm, whereas it is not regarded so when conducted by a non-dominant one.

It is imperative to analyse some of the important decisions of the Board to have possible conclusions about the boundaries of the term competition on the merits.

2. Decisions by the Turkish Competition Board

2.1 Excessive prices

2.1.1 Belko

Belko Ankara Coal and Asphalt Ltd (Belko) is the only organization that has the right and authority to sell coal in the provincial centre of Ankara and its environs. It was alleged that the prices it charged were excessive and therefore constituted abusive practice in violation of the Article.

This case is important because it highlighted the position of the Turkish Competition Board (the Board) vis-à-vis pricing policy of a dominant firm.

Turkish Competition Board referred to the definition of monopolistic price as “*the price set above competitive prices as a consequence of the use of one’s market power*” while stating that there does not exist a rule for determining what proportion of the price should be qualified to be excessive and therefore it should be assessed on a case-by-case basis and many factors like the degree of barriers to entry; positions of other enterprises; and prices of relevant products in different geographical markets should come into play.

The Board took into account as the most important criterion the prices (*charged by the dominant enterprise, that is Belko*) with the prices of identical or equivalent products in other geographical markets, that are relatively more competitive but otherwise have comparable market characteristics to establish monopolistic price. The Board also analysed cost-price relationship and ruled that “*... while, along with high prices, a large margin between the sale price and the total cost (excessive profit) could be considered a sign of excessive pricing, monopolistic pricing is also possible in situations where the profit margin turns out low or even negative due to establishment of real or fictitious costs in excessively large magnitudes (along with prices set at relatively high levels).*”

The Board in this case mentioned that a firm in a dominant position had special responsibilities and cited prudent and efficient management as the leading one. In contrast to that special responsibility, the state of affairs surrounding the case, especially the concession granted to Belko to sell coal in Ankara without necessary legal checks against abuses in the form of pricing, led to lack of maximum care and diligence in protecting the Company’s interests in making purchases; overstaffing; costs higher than what they should have been, due to ineffective style of management; and finally high prices. Therefore, the high levels of the costs incurred by the Company stemmed to a large extent from failure to act with care and diligence in coal purchases and the Company operations outside of the coal trade.

As a result, it has been established that Belko’s sale prices have been set at levels 50-to-60 percent higher, on the average, relative to prices for the same or equivalent coal being sold in other geographic markets that were open to competition and the undertaking was held responsible for abusing its dominant position. The Board dismissed the theory that monopolistic prices would attract new entry in the long run and therefore they should not be condemned as abusive due to the fact that there was absolute barrier to entry to the coal market in Ankara in the form of legal concession.

In preventing excessive pricing, the Board presumed that there would be improvement in income distribution as well as allocative efficiencies that could contribute to betterment of social welfare. The practice of monopolistic pricing was seen as within the scope of the Act due to its exploitative character especially at consumer level while not directly harming the competitive environment in the relevant market.

The Board, in this case, accepted that the special responsibility of the dominant firms obliges them to avoid cost-increasing practices and that excessive profits that might come as a result of efficient management and effective cost control along with price levels that could be considered normal as not incompatible with the Act. Therefore, competition on the merits in this case refers to conduct by dominant firms involving efficient management and effective cost control and inefficient management is seen as an important element lacking merit. Moreover, prices charged by dominant firms 50-60% higher than those in comparable competitive markets are excessive enough to be abusive when the peculiarities of the case is taken into consideration.

2.2 *Selective pricing*

2.2.1 *Anadolu Cam*

In another case, pricing policy of Anadolu Glass Industry Inc. (Anadolu Cam), the dominant undertaking in glass packaging market, against its rival Marmara Glass Industry and Trade Co. Ltd. (Marmara Cam) in a tender by Tekel Tobacco, Tobacco Products, Salt and Alcohol Enterprises Incorporated Company (Tekel) reflects the Board's attitude regarding selective pricing.

The case is about the application of a pricing policy by Anadolu Cam that would complicate the market activity of Marmara Cam which is perceived as a threat by it against its "overwhelming superiority" in the glass packaging market, but that would also not reduce the overall proceeds sought to be attained by it. In other words, two goals are intended to be attained as a result of this practice:

3. Complicating the market activities of Marmara Cam,
4. The absence of reduction in the overall proceeds sought to be attained while complicating the market activities of Marmara Cam.

The Board takes into account the fact that it would be the consumers who would suffer under both goals.

Under the first goal, the competitive process defined in Article 3 of the Act as *"the contest between undertakings in markets for goods and services, which enables to take economic decisions freely"* would be distorted; this situation would affect consumers in the long term and when analysed ultimately.

On the other hand, the second goal prevents Tekel from benefiting as well. In other words, should Anadolu Cam had made a reduction in other products too, Tekel and consequently consumers would have benefited from it as well in the short term and when analysed ultimately.

As a result, both goals were attained in the relevant event, and consumer loss emerged due to both the distortion of the competitive process and the increased purchasing cost of the relevant buyer; therefore, the welfare of the society at large diminished. These explanations also prove that it is the competition that is protected, not the competitors in the Board decision.

The Board took into account the cases of Hilti¹, Cewal² and Irish Sugar³ concluded by the European Commission and approved by CFI and ECJ and cited the elements of selective pricing as granted in the literature as follows:

1. The undertaking in dominant position should have the opportunity of being able to complicate the activities of its competitors with strategic behaviour independent of costs,
2. The relevant undertaking should explicitly be in a dominant position,

3. The undertaking in a dominant position should have only one competitor,
4. There must be evidence indicating the goal of the undertaking to complicate the market activity of its competitor.

All the 4 elements above existed in this case:

1. Anadolu Cam has the opportunity, owing to the structure of the tender, to apply a price policy complicating the activity of Marmara Cam without incurring a significant cost and without being required to sell below the cost.
2. That Anadolu Cam is in dominant position is even acknowledged by the representatives of the undertaking.
3. The only competitor of Anadolu Cam in the tender is Marmara Cam.
4. Evidence indicating the goal was found during the on-the-spot inspection made at Anadolu Cam. Moreover, this intent is also acknowledged in the defence of Anadolu Cam.

Within the framework of such statements, the Competition Board decided that the pricing policy of Anadolu Cam in Tekel tender be considered as an abuse of dominant position by having committed actions with a view to complicating the market activity of Marmara Cam. It should be kept in mind that intent played a crucial role in concluding abuse in this case.

2.3 *Predatory Pricing*

2.3.1 *Coca Cola – Frito Lay 2000*

These two separate cases highlight the approach of the Board to predatory pricing. In *Coca Cola*, the Board mentions four elements to take into account in general while deciding the existence of predatory price as economic superiority (dominant position), extremely low price, intent and recoupment. Recoupment was discarded by the Board because even if predatory price is unsuccessful, it causes transition from producer's welfare to consumer's welfare meaning inefficient use of resources. Therefore, it was agreed that intent could be used within the structural features of the sector besides commercial superiority and low price.

Previously, in *Frito Lay* the Board's following remarks focus on intent:

“During the process of price-cost analysis concerning with the predatory price, the concept of average variable cost constitutes the main movement point. A price under the average variable cost creates doubt toward the existence of the predatory price. If this doubt is supported with the intention of hardening activities of competitors or driving them out of the market, this case rules the existence of the predatory price also in reference law application sources⁴...

It may be expressed that there are two exceptions to evaluate the sales under cost as the predatory price, these are promotion activities and following the competitors. In a pricing policy carrying out within the framework of a certain promotion activity and for a temporary period the sales prices under the average variable cost may be accepted.”

Moreover, the Board in *Coca Cola* cites widely the literature and the case law of the US and EU concerning predatory price and as a result accepts that even if the prices change between variable cost and total cost, the practice can be predatory price if there is predatory intent. In this case, no document proving

evidence of predatory pricing could be found and the motive behind the pricing strategy was tried to be found within the context of the structural features of the sector and the economic features of the period when the predatory prices were alleged to be applied and as a result no intent was proved.

2.4 *Exclusivity Clauses*

2.4.1 *Karbogaz*

Another case deserves to be mentioned is against Karbogaz Carbon Dioxide Industries Joint-Stock Company (Karbogaz) that concluded long term exclusive contracts with its clients.

In this case, the Board tried to establish whether Karbogaz, the dominant firm in the market of liquid carbon dioxide, had abused its dominant position via long term exclusive supply contracts with direct users.

Although no definition of abuse is given in the Act, the Board defined “abuse” as “...every kind of activities which is related to the existence of the undertaking and prevent the continuity or the improvement of the competition and thus cause weakening the competition through influencing to market's structure by different methods from conditions in normal operation of competition ...” in the light of European competition law. The Act, as mentioned above, does not prohibit dominance but its abuse. This distinction recognises as legitimate the increase of the market share of a firm via internal efficiencies and as a result the undertakings are accepted to have the opportunity to outperform their rivals via their internal efficiencies and dynamics. The crucial point is the market power as a result of internal dynamics and efficiency. If the undertaking cannot keep internal efficiency, it is expected that the rivals would limit its power on the condition that no entry barrier, structural or behavioural, existed. The abuse is an objective concept and therefore, no intent to restrict competition is absolutely needed. A conduct can be prohibited if its effect restricts competition. It is accepted that dominant undertakings have special responsibilities unlike those that are not dominant. Thus, within this special responsibility dominant undertakings are expected to know the effects of its conduct in the relevant market and control its conduct accordingly.

Based on this theoretical basis, the Board analysed whether Karbogaz abused its dominant position: That Karbogaz strived to prolong the duration of the exclusive contracts in the face of a new entrant is regarded as a policy of preserving its position and excluding the rival strategically against the new rival. This policy is basically dependent on long term exclusive contracts and the result is elimination of freedom of clients to work with alternative suppliers and foreclosure of the market to competition for these clients. The conduct to prolong the duration of the contracts to 3-5 years was regarded as aiming to sustain the market power, achieved by its own internal dynamics, through uncompetitive methods. The effect of the long term exclusive contracts is entry of limited number of undertakings into the relevant market and unwillingness of potential entrants. The basic reason for existence of two entrants in the relevant market and their survival is their activities in other business fields. It was hard to enter or remain in the market if they involved in only liquid carbon dioxide. Such exclusive agreements were regarded as creating entry barriers in a market where no structural or legal entry barriers and complicating the actual or potential rivals and enabling the preservation of dominant position of Karbogaz. It was Karbogaz's special responsibility not to restrict competitive conditions that were already restricted in the market by conduct that were not the result of its internal efficiency although Karbogaz gained its market power by its internal efficiency to a great extent. Thus, Karbogaz should know about the fact that its market strategy, which was essentially based on the exclusive supply contracts made with the clients to protect its market position, would have created negative effect in the market and this negative effect would not originate from its own dynamics and Karbogaz should have acted according to this. As a result, when the effects and the supposed intentions behind them are taken into consideration Karbogaz violated the provision of "preventing,

directly or indirectly, other enterprises in its area of commercial activities or practices which aim to impede the activities of the competitors in the market" in subparagraph (a) of the Article 6 of the Act.

The Board in this case again emphasised the special responsibility of dominant undertakings and took into account foreclosure effect of the exclusive agreements. Intent in this case is taken into consideration while alleging abuse, however, it can be said that it is not an essential component of the analysis. Rather, effect of the contracts has constitutive feature in determining abuse. That Karbogaz lost some market share although it prolonged the duration of the contracts was not enough for relief because existing level of effects of the contracts was sufficient to condemn the conduct.

2.4.2 *Frito Lay 2004*

The decision discusses whether a dominant undertaking's exclusive agreements with retail outlets for sale of only its products complicate the rival's activity and constitute abuse or not. Agreements with exclusivity clauses that require a sales point to sell only the products of a supplier to the exclusion of the products of rival suppliers normally benefit from the block exemption of the Communiqué concerning vertical agreements (the Communiqué). Block exemption communiqués legalise such otherwise anti-competitive unlawful agreements on the condition that beneficial effects on competition outweigh anti-competitive impacts and consider them as lawful. The beneficial effects must ensure new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services; benefit consumers; avoid elimination of competition in a significant part of the relevant market and avoid limitation of competition more than what is compulsory for achieving the beneficial goals. These conditions are known as conditions for exemption. The Communiqué is applicable to agreements of any undertaking regardless of its market power. However, the Communiqué foresees that benefit of block exemption can be withdrawn in case exemption conditions are proved to be lacking. Moreover, the benefit of block exemption does not avoid application of the Article prohibiting abuse of dominant position. As a result, it is accepted that exclusivity may be condemned as abusive because it prevents rival suppliers to deal with certain customers. The Board again reiterates the special responsibility of a dominant undertaking to know about the effects of its conduct in the relevant market and control their conduct accordingly and warns dominant undertakings to cease their relationships including exclusivity if they reach a level that complicates the activity of the actual or potential competitors or cover an important part of the relevant market. The Board says that abusive intent is not absolutely required to condemn a conduct or a transaction by a dominant undertaking because it is an objective concept and therefore it is sufficient to find abuse if the effect of a conduct restricts competition. Intent, on the other hand can be taken into account while imposing fine.

The Board further gives the elements of the analysis as internal dynamics, just cause (objective justification) and proportionality. The Board seeks for whether the conduct is derived from internal efficiency of the undertaking or it has a just cause. If the conduct is just and can be connected to internal dynamics, then the conduct might be deemed lawful even the competitive conditions are distorted against the competitors. Besides, another factor to be considered is the principle of proportionality meaning there must be proportionality between just cause and the conduct. Moreover, if the conduct does not lead to any efficiency gain for the consumers but merely drives the competitor out of the sales point, then the conduct might not have any connection from internal efficiency and might be named as abuse.

It is useful to distinguish complication of competitors' activities as a result of competition that is expected to be in the market and as a result of conduct of dominant undertaking that is not competitive. Otherwise the prohibitions would punish only the dominant undertakings. Utmost care must be taken to eliminate the risk that many conduct of the dominant undertaking that complicates competitors might be condemned as abusive as part of their special responsibility. Therefore, concept of complication must be construed narrowly in line with economic reasons and only the conduct that diminishes or totally abolishes

the power of the competitors to compete must be seen under the concept of complication. Within the concept of complication, a substantial part of the market must be foreclosed and the competitive process must be disrupted as a result of the conduct.

The conduct of Frito Lay, the dominant undertaking in salty snack market, in the form of discounts, products for free and cash in return for exclusivity was proved to be realised in limited time periods and areas and therefore produced limited effect with no power to drive the competitor out of the market. Therefore no abuse was found in the end.

3. Conclusion

Competition law is a field of law where it is not easy to draw clear-cut conclusions beforehand as to what constitutes competition on the merits. Reading of the decisions of the Turkish Competition Board gives some principles as to conduct on the merits and off merits, however it is not always easy to draw clear cut conclusions in advance without sensitive analysis on a case by case basis. The nature of the market, the content and purpose of the conduct in question, the effects in the market are all relevant to an extent. The intent might play an important role for cases involving predatory or selective prices whereas intent might not be required in other cases such as those involving foreclosure allegations because abuse is an objective concept. The dominant undertakings should know that their conduct should come from their superior competitive capabilities to avoid competition investigations and any conduct should be accountable in terms of internal dynamics.

NOTES

1. Eurofix-Bauco v. Hilti (1988) OJ L65/19 [The European Commission]
Case T-30/89, Hilti v. Commission (Hilti) [1991] ECR II-1439 [CFI]
Case C-53/92 P, Hilti v. Commission (Hilti) [1994] ECR I-666 [ECJ].
2. Cewal (1993) OJ L34/20 [The European Commission]
Cases T-24-26&28/93, Compagnie Maritime Belge Transports SA and Others v. Commission (Cewal) [1996] ECR II-1201 [CFI]
Case C-395&6/96 P, Compagnie Maritime Belge Transports SA and Compagnie Maritime Belge SA v. Commission (Cewal) [2000] ECR I-1365 [ECJ].
3. Irish Sugar (1997) OJ L258/1 [The European Commission]
Case T-228/97, Irish Sugar plc v. Commission (Irish Sugar) [1999] ECR II-2969 [CFI]
Case C-497/99 P., Irish Sugar plc v. Commission (Irish Sugar) [2001] ECR I-5333 [ECJ].
4. “Reference law application resources” refers to European competition law applications

UNITED KINGDOM

1. Summary

This Roundtable is focussed on ‘competition on the merits’, and the use of this concept in assessing unilateral behaviour by dominant firms. While this concept has been defined in various different ways, it is typically employed as follows: behaviour will be viewed as anti-competitive if it falls outside an area circumscribed by the term ‘competition on the merits’.

The key question for competition authorities, when assessing abuse cases, is how to distinguish competition on the merits (pro-competitive behaviour), which is good for consumers, from anti-competitive behaviour (rivalry-impeding competition) which will – at least over the long term – be bad for consumers.

In our view, it is not possible to reach a reasonable, and economically consistent, view on whether a given behaviour constitutes competition on the merits without examining its likely anti-competitive effect. Looking simply at the *form* of the behaviour under investigation is not a reliable way of assessing whether behaviour is or is not competition on the merits.

Economics tells us that ‘competition on the merits’ can encompass various forms of competition to offer customers good deals, including behaviour that is sometimes considered aggressive and tactical such as discounts, rebates, etc. While it is true that such behaviour on the part of a dominant firm can be anti-competitive in some market contexts, it can equally, in other market contexts, play a key part in the effective functioning of competition. This means that there is no obvious ‘form-based’ way to assess whether behaviour constitutes competition on the merits.

In the UK, therefore, analysis of whether a given behaviour comprises competition on the merits is typically wrapped up with our analysing its likely anti-competitive effect. We would not favour trying to deduce anti-competitive effects from a form-based analysis of whether or not behaviour constitutes competition on the merits.

In endeavouring to distinguish between anti-competitive and pro-competitive behaviour, we have found it helpful to consider three approaches.

The consumer welfare test. This examines the likely impact of the behaviour on consumer welfare. If the behaviour is found to be unlikely to harm consumer welfare, then it is presumed to be competition on the merits. In practice, the UK authorities typically examine at least whether a reasonable story of consumer harm can be told, recognising that adverse effects on consumers may be indirect. We would not usually intervene against behaviour which had no reasonable likelihood of harming consumers. However, the difficulty with laying a strong emphasis on this consumer welfare standard as a necessary condition for a finding of abuse is that it can be difficult to demonstrate clearly that consumers are likely to be harmed.

The ‘but for’ or profit sacrifice test. This involves assessing whether a given behaviour would entail profit sacrifice *but for* any anti-competitive effect. This test again requires a clear analysis of the likely anti-competitive effect of the behaviour in order to be applied effectively, since it otherwise begs the

question of what we mean by ‘anti-competitive effect’. The test also raises difficult issues of specification, for example of the benchmark against which profit sacrifice is assessed.

The ‘as efficient competitor’ test. A final possible approach to allowing competition on the merits while disallowing ‘anti-competitive behaviour’ is to require that a ‘level playing field’ is preserved for competition between the dominant firm and its competitors on which competitors can thrive, and match the offers made by the dominant firm, so long as they are no less efficient than the dominant firm. So, under the as efficient competitor test, behaviour will be presumed to be competition on the merits (and not anti-competitive behaviour), so long as an equally efficient competitor would not be excluded by it.

A criticism sometimes made against using careful economic analysis to distinguish between anti-competitive behaviour and competition on the merits, especially when compared with a simple form-based approach to making this delineation, is that it can lead to paralysis or delay in enforcement, can undermine deterrence, and can erode legal certainty.

In our view, however, carrying out a proper analysis of likely effect, based on economic principles, is crucial for aligning competition law consistently with its economic purpose. Competition, productivity, and consumer welfare will only be enhanced by competition policy interventions so long as such interventions neither (i) deter pro-competitive behaviour nor (ii) leave genuine anti-competitive behaviour unchallenged. Simple form-based rules for intervention run both risks.

Moreover, the economic approach should help improve legal certainty by avoiding both:

- ‘category shopping’ (which can occur where the treatment of a given behaviour under competition law will depend on precisely how it is categorised); and
- ‘ad hocery’ (which can occur under a form-based approach whenever a new ‘form’ of behaviour needs to be assessed).

In addition, timely enforcement should be facilitated through the use of clear tests (such as those set out above) and also through the development of more structured rules for reaching (rebuttable) presumptions of abuse. The *AKZO* two-part test for predation¹ is a good example of such a rule. It is clear and provides legal certainty, and yet is strongly grounded in economics. Thought is being given to the development of similar rules (mostly variants of the *AKZO* test) for other types of abuse case. We recognise that there is some way still to go in this area, but remain hopeful that other such rules can be developed relatively quickly.

Laying emphasis on the assessment of anti-competitive effect also focuses due attention on a number of key questions about what sorts of ‘effect’ we should properly be addressing with competition policy. There is now a degree of consensus that it is *likely* (i.e. not actual) effect *on competition* (i.e. not competitors) that is important. However, some controversy remains about how substantial the likely effect on competition needs to be, whether there are any arguments for protecting inefficient competitors, and how clear any likely harm to consumers needs to be.

The remainder of this UK response sets out brief responses to the specific questions raised in the OECD request for submissions.

2. Responses to questions raised in the OECD request for submissions

Question 1: The Current State of Competition on the Merits. *In some countries (e.g., the U.S.), the phrase “competition on the merits” is interpreted to include aggressive, tactical behaviour such as discounting, whereas in others (e.g., the EU), competition on the merits has seemed to mean only innovation. Describe what this term means to courts and competition agencies in your jurisdiction, using the context of any relevant guidelines and cases.*

The concept of competition on the merits is typically employed as follows: behaviour will be viewed as anti-competitive if it falls outside an area circumscribed by the term ‘competition on the merits’. This distinction is consistent with the use of the concept in UK jurisprudence.² For example, the UK Competition Appeals Tribunal (CAT)³ makes the following statement in its judgement on the OFT’s *Genzyme*⁴ decision:

“If the elimination of competition in the related market is not the result of competition on the merits, then an abuse may be found.” (Paragraph 489)

However, within this, views vary as to what types of behaviour can constitute ‘competition on the merits’.

In the UK, we consider that ‘competition on the merits’ can encompass various forms of competition to offer customers good deals, including behaviour that is sometimes considered aggressive and tactical such as discounts, rebates, etc.

While it is true that such behaviour can be anti-competitive when practised by a dominant firm in some market contexts, it can equally, in other market contexts, not only characterise normal competitive markets but also play a key part in the effective functioning of normal competitive markets.⁵ It is also not obvious that there are any forms of behaviour of which it is possible to say that they will tend to be harmful *on average* (i.e. more often harmful than not) when carried out by dominant firms, without considering the market context in which the behaviour occurs.⁶

This means that looking simply at the form of the behaviour under investigation is not a reliable guide to whether behaviour is or is not competition on the merits. Moreover, while any given form of behaviour can cause substantial consumer harm when it has an anti-competitive effect, there is a very real risk that beneficial competition will be stifled if firms curtail their behaviour unduly as a result of Article 82 worries.

In our view, therefore it would be inappropriate to reach a view on whether behaviour constitutes competition on the merits without examining its likely anti-competitive effect. For this reason, the UK Office of Fair Trading (OFT) typically gives primary emphasis to analysing whether the available evidence supports a finding of anti-competitive effect.

The OFT’s emphasis on effects-based analysis has also been supported by the CAT. It is noteworthy that, in its judgment on the OFT’s *Genzyme* decision, the CAT rejected one element of the OFT’s infringement findings – relating to bundling – on the basis that that, while the OFT had shown that there was a reasonable theoretical case for bundling having an anti-competitive effect, it had not demonstrated that this effect was actually likely to occur in the particular market context involved.⁷

Question 2: Evaluation of the Current Situation. *What tests/principles underpin the decisions and guidelines that relate to competition on the merits? Does the jurisprudence in your jurisdiction clearly identify what the criteria are for applying the concept of competition on the merits? Are the decisions clear and consistent enough to make it possible to accurately predict which practices by dominant firms will be ruled legal and which will not?*

As set out above, analysis of whether a given behaviour comprises competition on the merits is typically wrapped up, in the UK, with our analysing its likely anti-competitive effect. We would not favour trying to deduce anti-competitive effects from a form-based analysis of whether or not behaviour constitutes competition on the merits. In endeavouring to distinguish between anti-competitive and pro-competitive behaviour, we have found it helpful to consider three approaches.

- *The consumer welfare test:* is the behaviour likely to reduce consumer welfare? If not then it is presumed to be competition on the merits.
- *The ‘but for’ or profit sacrifice test:* would the behaviour entail profit sacrifice *but for* any anti-competitive effect? If not, then it is presumed to be competition on the merits.
- *The ‘as efficient’ competitor test:* would a competitor that is as efficient as the dominant firm be able to compete effectively against the behaviour? If so, then it is presumed to be competition on the merits

Each of these tests has been applied within the UK, and examples are given below.⁸

We consider that the jurisprudence on abuse in the UK is sufficiently consistent to give rise to an acceptable level of legal certainty. However, we would agree that there is a need for the appropriate use of these tests to be further developed, such that they can be applied more comprehensively and consistently across cases.

2.1 UK jurisprudence: The consumer welfare test

In assessing abuse, the UK authorities do typically examine whether a reasonable story of consumer harm can be told at least, and would not usually intervene against behaviour which had no reasonable likelihood of harming consumers.

Two recent decisions which explicitly discuss the potential for recoupment are *Napp*⁹ and *Aberdeen Journals*¹⁰. In the former, Napp was found to be able to recoup its losses in the hospital segment on a direct ongoing basis through its excessive prices in the community segment. In the latter, Aberdeen Journals argued, in its defence, that its conduct could not be abusive because it had no realistic possibility of recouping its losses. This argument was rejected on factual grounds. There were found to be a number of routes by which recoupment could be achieved.

2.2 UK jurisprudence: The ‘but for’ or profit sacrifice test

The OFT’s non-infringement decision on BSkyB’s mixed bundling of premium TV channels (*BSkyB*¹¹) explicitly adopts a ‘profit sacrifice test’ in assessing whether the mixed bundling behaviour constitutes ‘normal competition’.

The OFT accepted that mixed bundling was likely to be a profit-maximising form of pricing for this type of product, since it allows the efficient recovery of high fixed costs (of acquiring premium channel content) from a variety of consumers, some of whom valued its channels very highly, and others less so.

The OFT also accepted that some form of mixed bundling would tend to be good for consumers. Absent such a price structure, BSKyB would need to charge more for additional channels, and as a result many customers whose willingness to pay exceeds the incremental cost of providing the channel to them would be inefficiently deterred from taking additional channels.

As such, the OFT took the view that:

“[G]iven the nature of the industry and its consumers, BSKyB is not required by the Act to offer a wholesale pricing structure that implies a zero level of mixed bundling, nor is it permitted to offer all forms of mixed bundled discounts as it sees fit. To find mixed bundling to infringe the Chapter II prohibition, the Director considers that its extent must exceed that which would occur in conditions of normal competition.” (Paragraph 590)

*“[T]he key principle to adopt in assessing a state of normal competition in this industry is whether, absent any entry deterrence, the mixed bundling **represents a clear deviation from a profit maximising strategy.** In the absence of evidence of intent or consumer preferences showing such a deviation, the Director would not normally expect a pricing structure characterised as mixed bundling to be grounds for a finding of infringement of the Chapter II prohibition.”* (Paragraph 591, Underlining added)

The profit sacrifice test was also invoked as a defence by Napp, in response to the allegation that it was offering exclusionary discounts for its sustained release morphine product, MST, in the hospital segment of the market (*Napp*). Napp argued that its low prices in this segment merely reflected normal competition, that the price cuts had been instigated by its competitors, and that Napp had had *no commercial alternative but to match these low prices*.

In this case, the argument was rejected. Napp was found to have priced several tablet strengths at below average variable costs for many years and to have done so selectively where it faced competition. It was not clear how such loss-making behaviour could be the result of normal competition. Moreover, it was not accepted that Napp had no commercial alternative but to meet these price cuts. There were found to be substantial switching costs and other first mover advantages in the hospital segment, which meant that competitors would have faced difficulties in building up a significant market share even if Napp's hospital prices had remained substantially higher.

2.2 UK jurisprudence: The ‘as efficient’ competitor test

The ‘as efficient’ competitor test has been employed by the UK competition authorities on a number of occasions.

For example, in the margin squeeze part of the *BSkyB* non-infringement decision, the OFT decision sets out that, in assessing whether BSKyB's margin squeeze is abusive:

*[...] the correct test, consistent with these precedents, should determine whether an undertaking **as efficient** in distributing as BSKyB can earn a normal profit when paying the wholesale prices charged by BSKyB to its distributors, and that this should be tested by reference to BSKyB's own costs of transformation.* (Paragraph 356, Underlining added)

Likewise, in two recent exclusionary pricing judgements, *Napp* and *Aberdeen Journals*, the CAT made reference to the following quote from Advocate General Fennelly:¹²

*“[I]f the dominant undertaking’s competitors are **equally or more efficient**, they should be able to compete on the same terms. Community competition law should thus not offer less efficient undertakings a safe haven against vigorous competition even from dominant undertakings.”*
(Underlining added)

This would seem to provide some legal authority for employing the ‘as efficient’ competitor test in abuse cases. In its judgment on *Aberdeen Journals* the CAT appears regard the *AKZO* test for predation¹³ applied in that case as a version of the ‘as efficient’ competitor test, making several explicit references to whether the pricing behaviour under investigation would drive out an ‘equally efficient’ competitor.^{14,15}

A version of the ‘as efficient’ competitor test was also put forward by *Napp* in defence of its pricing behaviour. *Napp* argued that its below-cost sales to hospitals were incrementally profitable on what it described as a ‘net revenue’ basis. According to *Napp*, for each unit a supplier sells to a hospital, it can expect to sell ‘follow-on’ units in the community sector, and the profits on these community sales are sufficient to recoup the initial losses in the hospital segment. Since similar linkages are equally available to other suppliers, they should be able to compete with *Napp* by pricing in the same manner, and thus the pricing behaviour should not be viewed as abusive. Although *Napp* did not state so explicitly, the suggestion here seems to be that if competitors have been unable to break into this market, this must be due to inherent inefficiencies or disadvantages, rather than due to *Napp*’s pricing behaviour.

This argument was not accepted in this particular case, primarily on the basis that the ‘follow-on’ linkages available to *Napp* were not in practice equally available its competitors given *Napp*’s first mover advantages.¹⁶

Question 3: Candidate Standards/Tests. *Not all conduct by a dominant firm that somehow harms or inconveniences its competitors is harmful to competition. But what principles or standards ought to drive the determination of which types of competition are on the merits and which are not? What are the strengths and weaknesses of the various standards and tests that have been used and/or proposed for identifying what competition on the merits is? E.g., equally efficient competitor test, profit sacrifice test, consumer welfare test, etc.*

The OFT very much supports the view that ‘not all conduct by a dominant firm that somehow harms or inconveniences its competitors is harmful to competition’. In the past, EC case precedent on Article 82 has sometimes been criticised for laying too much emphasis on effect on competitors, without considering whether there is actually any harm to competition. In this respect, it is worth noting that firm B may be harmed whenever firm A offers a better deal to consumers. But this is precisely how competition on the merits works.

It is competition, not competitors, that improves the prices and quality offered to consumers and drives innovation and competitiveness. The key question for competition authorities is how to distinguish pro-competitive behaviour (pro-consumer competition), which is good for consumers, from anti-competitive behaviour (rivalry-impeding competition) which will – at least over the long term – be bad for consumers.

Each of the three tests listed above can be used to this end, and the pros and cons of each are discussed in some detail by John Vickers in his recent paper on ‘Abuse of Market Power’¹⁷. Rather than replicating his points in full here, we simply make a few observations on each test.

2.3 *Consumer welfare test*

Many types of anti-competitive behaviour involve giving (certain) consumers a better deal than they would otherwise get, but recouping the associated losses once the anti-competitive effect of the behaviour has been achieved.

The potential for such recoupment is important for analysing abuse because it provides both a rationale for policy intervention in terms of consumer harm and also an incentive for a firm's alleged anti-competitive behaviour. Absent potential for recoupment, the behaviour likely to be on balance good for consumers. Moreover, absent any anti-competitive incentive, it would seem more appropriate to view the behaviour as competition on the merits.

In practice, however, EC case precedent has been interpreted as meaning that there is no need to examine the potential recoupment in predation cases, at least in cases where there is a risk of elimination of a competitor.¹⁸ In the US, by contrast, there is a requirement to prove – or at least demonstrate a ‘dangerous probability’ - that such recoupment will occur.

It is not obvious that either the EC or the US approach is ideal. One frequently-mentioned rationale for the difference between the EC and US approaches to recoupment is that the EC is only able to bring abuse findings against firms with existing dominance, whereas the US regime does not require existing dominance in order to make a finding of monopolization. The argument here would appear to be that recoupment will always be possible in a market where there is existing dominance and elimination of a competitor, and as such there is no need to prove recoupment under the EC regime in such circumstances. However, it is not clear that this presumption has a strong basis in economics.

The problem with the US approach, meanwhile, is that it can be very hard to prove recoupment. Recoupment can occur in a variety of different ways, which can sometimes be fairly intangible or hard to evaluate. For example, a well-recognised benefit of predation is the gaining of a ‘reputation for predatory behaviour’. The benefits of this, in terms of deterring potential future entry, can potentially be recouped across a wide set of markets (i.e. not just the market in which the original predation occurred) and can be exceptionally hard to evaluate. Perhaps due to this requirement to prove recoupment, introduced in 1993, not a single predation case has been successfully brought in the US over the last decade.

In practice, the OFT typically reviews the potential for recoupment in investigating abuse cases, and considers whether a reasonable story of consumer harm can at least be told, recognising that adverse effects on consumers can be indirect. If no such story can be told, then the OFT would not usually wish to make an infringement finding. However, we would not wish to make demonstration of consumer harm a necessary condition for a finding of abuse, given the difficulties involved in demonstrating clearly that consumers are likely to be harmed, since this could lead to a serious risk of under-intervention.

2.4 *Profit sacrifice test*

Application of the profit sacrifice test raises difficult issues of specification, and in particular of the benchmark against which profit sacrifice is assessed. If the relevant benchmark is the firm's profit-maximising strategy, then this can be very difficult to determine, especially if information on the consumer demand and cost structures facing the dominant firm is imperfect.

This can make demonstration of profit sacrifice very difficult. It is not the same as examining whether the firm is making *actual* losses. Evidence of actual losses will tend to be strong (albeit not conclusive) evidence of profit sacrifice, but profit sacrifice can in principle occur without actual losses being incurred.

This point was recognised by the OFT when it applied the profit sacrifice test to the assessment of BSkyB's mixed bundling of its premium TV channels, as discussed in the *BSkyB* decision. In practice, the OFT was only able to assess the negative; that is, whether there was clear evidence that that BSkyB's behaviour represented a *clear* deviation from a profit-maximising strategy. This was done by examining whether BSkyB was making incremental losses in supplying any of its channels to additional subscribers.

It was not possible for the OFT to prove the converse - that is, that BSkyB's behaviour actually represented a profit-maximising strategy and thus normal competition – given the complicated pattern of consumer preferences in this market, and the fact that the optimal profit-maximising strategy was very likely to involve some form of non-linear pricing/mixed bundling.

It is also worth noting that the profit sacrifice test itself is neither necessary nor sufficient as evidence that a given behaviour does not constitute 'normal competition'. The test is not *sufficient* for reaching such a conclusion, since firms can sacrifice short-run profits for any number of non-problematic reasons (for example low start-up pricing to develop a new market). In its non-infringement decision case of *First Edinburgh/Lothian*¹⁹ (an alleged predation case), the OFT found that First Edinburgh's price lay below average variable cost, which in turn implied short term losses, but nevertheless concluded as follows:

*"There is no evidence in this case that First Edinburgh's conduct was intended to drive Lothian out of the Greater Edinburgh area, nor that it believed that it was capable of doing so. Instead, the balance of evidence suggests that First Edinburgh's conduct was intended to establish a more secure commercial basis for its Edinburgh operations. As a result, the presumption of predation which arose as a result of its pricing below average variable cost can be rebutted."*²⁰ (Paragraph 75)

The profit sacrifice test is also not *necessary* as evidence that a given behaviour does not constitute 'normal competition', since it is only relevant to certain types of abuse. Exclusionary abuses can be broadly categorised into two types:²¹

- *predation-type abuses*: where competition is damaged through the *revenues* available to rivals being *reduced*; and
- *raising Rivals' costs (RRC) abuses*: where competition is damaged through the *costs* of rivals being *increased*.

While predation-type abuses typically involve some form of profit sacrifice²², abuse which involves raising rivals' costs need not involve profit sacrifice at all.

A slight variant of the profit sacrifice test, which is more widely applicable, is the 'but for' or 'no economic sense' test.²³ This asks whether the behaviour would make economic sense but for its tendency to eliminate or lessen competition. For predation-type abuses, this will effectively equate to the profit-sacrifice test, but it can also be employed for assessing other forms of abuse.

Similarly to the consumer welfare test, the OFT typically reviews whether behaviour would make economic sense, but for its anti-competitive effect, when assessing abuse. However we would not wish to make failure of this 'but for' test a necessary condition for a finding of abuse, due to the demonstrability difficulties outlined above.

2.5 'As efficient' competitor test

Under this test, a given piece of behaviour will be viewed as acceptable so long as a competitor that is 'as efficient' as the dominant firm would be able to compete effectively against it.

Critics of this test argue that it is inherently flawed, at least as a necessary condition for abuse. In practice, it is argued, there may simply not be any 'as efficient' competitors around to compete in the market. Consider, in particular, a situation where competitors are not currently 'as efficient' as the dominant firm but are expected to become so as they learn about the market and expand in size. This may be especially likely to occur in dynamic or network industries. If the 'as efficient' competitor test is applied too strictly in such a case, there is a risk of dominant firms doing substantial harm both to actual competition and to potentially 'as efficient' competitors without being found abusive. And as is well-known, one of the key benefits of monopoly is a 'quiet life'. A dominant firm that faces no competitive challenge, because there are no 'as efficient' challengers on the horizon, is hardly likely to spearhead efficiency or productivity growth.

Proponents of the test argue that without some form of efficient competitor test, competition policy may end up protecting inefficient competitors. This would dull firms' incentives to improve their efficiency, and stifle the beneficial competitive process by which more efficient firms displace less efficient firms in the marketplace. In addition they argue that the test is sufficiently flexible to accommodate the scenarios outlined above. For example, in certain circumstances it may be possible and desirable to modify the test to take account of the first mover advantages enjoyed by the dominant undertaking.

It is clear that overly strict adherence to the 'as efficient' competitor test can raise difficulties. However, we agree with those who argue that if competition policy were to protect inefficient competitors, it would risk compromising the very efficiency and productivity growth that the law should properly be spearheading. Employed flexibly, we believe that this test can help ensure that competition law is not used inappropriately, to the long term benefit of effective competition and of consumers.

Question 4: Economics. *Does economic theory offer pertinent criteria that make it possible to identify what competition on the merits is?*

As discussed above, economic theory tells us a great deal about the ways in which different sorts of behaviour can be anti-competitive and also about the ways in which they can be pro-competitive and have efficiency benefits. Economics can therefore provide a clear and well-structured framework for distinguishing between anti-competitive behaviour and competition on the merits. Within the OFT, economic analysis plays a key role in all abuse cases.

A criticism sometimes levelled against using careful economic analysis in abuse cases is that it can lead to paralysis or delay in enforcement, can undermine deterrence, and can erode legal certainty.

In our view, however, carrying out a proper analysis of likely anti-competitive effect, based on economic principles, is crucial for aligning competition law consistently with its economic purpose. Competition, productivity, and consumer welfare will only be enhanced by competition policy interventions so long as such interventions neither (i) deter pro-competitive behaviour nor (ii) leave genuine anti-competitive behaviour unchallenged. Any form-based rules for intervention run both risks.

Moreover, the UK approach arguably helps improve legal certainty by avoiding both:

- ‘category shopping’ (which can occur where the treatment of a given behaviour under competition law will depend on precisely how it is categorised); and
- ‘ad hocery’ (which can occur under a form-based approach whenever a new ‘form’ of behaviour needs to be assessed).²⁴

In addition, concerns about paralysis or delays in enforcement are increasingly being alleviated by the development by economists of more structured rules for reaching (rebuttable) presumptions of abuse. The *AKZO* two-part test for predation is a good example of such a rule.²⁵ It is clear and provides legal certainty, and yet is strongly grounded in economics. This test (or a variant of it, based on avoidable or incremental costs) is applied by the OFT in all predation cases, including *Napp*, *Aberdeen Journals* and *First Edinburgh/Lothian*.

Some progress is being made in the development of similar rules (mostly variants of the *AKZO* test) for other types of abuse case. For example, a variant of the first element of the *AKZO* test was utilised by the OFT in analysing BSKyB’s mixed bundling in the *BSkyB* case. Specifically, the OFT examined whether BSKyB’s incremental avoidable cost per additional subscriber of supplying particular premium channels exceeded the implied incremental price (given the mixed bundling) of such channels.

We recognise that there is some way still to go in this area, but remain hopeful that such rules can be developed relatively quickly.

Question 5: Agency Experience. *What role, if any, has your agency played in helping to define the term “competition on the merits” in your jurisdiction? Please report on any arguments you have made in court papers, or in helping to draft legislation, relevant to this concept.*

See responses to other questions.

Question 6: Intent. *What role, if any, should exclusionary intent play in determining whether conduct is within the bounds of competition on the merits?*

The role of exclusionary intent in abuse cases is not entirely clear. On the one hand, it is clear from EC case precedent that the concept of abuse is intended to be an objective one, meaning that behaviour can be abusive even where the dominant undertaking had no intention of infringing Article 82.²⁶ On the other hand, it is clear that evidence of intent can be relevant to a finding of abuse, and indeed it plays a key role under the second leg of the *AKZO* two-part test for predation.

It is noteworthy that in all three CAT judgments on exclusionary pricing cases so far²⁷, the CAT has looked explicitly at the issue of intent. Indeed, it has done this even for the predation cases where prices lay below average variable costs.

It is the OFT’s view that intent is neither necessary nor sufficient for an abuse finding, but that it can provide useful evidence towards such a finding, since anti-competitive intent will often be likely to give rise to anti-competitive effect. However, in assessing intent, it is useful to distinguish two types of possible evidence of intent: subjective and objective.

‘Subjective’ evidence of intent comprises documentary evidence on the thinking and motivation of the dominant firm in adopting its behaviour. Documentary evidence that a firm was attempting to squeeze its competitors out of the market has frequently been employed by competition authorities, in particular in predation cases (where the role of intent is well-specified). Such evidence can be useful, especially if the anti-competitive strategy is laid out explicitly. However, the difficulty with this sort of evidence, especially where it is less specific, is that it can also be consistent with aggressive (but non-predatory) competition.

‘Objective’ evidence, by contrast, involves assessing intent through examination of the behaviour itself. This sort of evidence can be – and often is – employed badly. For example, it is dangerous to infer intent from the mere form of a particular pricing behaviour, as has sometimes been done in EC cases. For example, price cutting that is selectively targeted at those market segments where a dominant firm faces competition can be consistent with both exclusionary behaviour and normal competitive reaction. It can be erroneous to treat such pricing behaviour – in itself – as blatant evidence of intent. On the other hand, if employed rigorously, such objective evidence on intent (or the lack of it) can be extremely powerful.

Particularly useful in this regard is the ‘profit sacrifice’ test. If a firm’s behaviour would entail profit sacrifice but for its anti-competitive effect, this is strong evidence that the firm (objectively) intends to behave anti-competitively. As such, when the profit-sacrifice test is employed to assess whether a firm’s behaviour comprises competition on the merits, this inherently also involves examining whether the behaviour is motivated by anti-competitive intent.

Question 7: Exceptions. *Should a dominant firm be held liable for having competed “off the merits” even if it loses market share during the period of the allegedly unlawful conduct? If so, under what circumstances, and why? What other exceptions should be recognisable under the law?*

As set out above, we believe that competition authorities should not intervene against unilateral behaviour, even by a dominant firm, unless this behaviour has a (likely) anti-competitive effect. Given this, competition authorities might typically want to be cautious in finding abuse if a dominant firm is losing share, since this might often be evidence against a finding of anti-competitive effect.

However, there may nevertheless be situations in which intervention may be appropriate, even though the dominant firm loses share. The relevant question in assessing anti-competitive effect is how soon the firm would have lost market share absent the abusive behaviour. If share would have been lost more quickly absent the behaviour then an abuse finding may be appropriate. Moreover, in a growing market, a decreasing market share can nevertheless be consistent with the dominant firm gaining sales, in absolute terms, at the expense of its competitors.

In practice, the OFT has not so far made abuse findings against any firms that were losing market share, but we do not consider ourselves prevented from doing so in the future, so long the evidence loss in market share is considered to be consistent with a finding of (likely) anticompetitive effect.

In a number of UK cases, parties have proposed an alternative exception. In each of the *Napp*, *Aberdeen Journals* and *Genzyme* cases, the dominant firm under investigation argued that it should not be found abusive given that the firm that was allegedly being foreclosed had in practice remained in the market.

It is perhaps possible that, under some market circumstances, the absence of actual foreclosure could constitute evidence against likely anti-competitive effects from the behaviour, and thus against an abuse finding. However, in practice this argument was in fact rejected in every one of the above cases. In each case, it was found either that there were good grounds for the foreclosure not yet having occurred (and thus that it remained reasonable to expect, on the basis of the available evidence, that foreclosure was likely) and/or that the behaviour was anti-competitive in that it prevented or hindered the growth of competition.

For example, in *Genzyme*, the CAT found that:

“Genzyme is in a position potentially to exclude Healthcare at Home and other homecare services providers [...], and would have already done so but for these proceedings. In those circumstances it does not seem to us that the OFT has to wait until Healthcare at Home has

actually been eliminated from the market before the Chapter II prohibition is applicable.”
(Paragraph 534)²⁸

Question 8: Dominant firms’ special responsibility. *Does a dominant firm have a “special responsibility” not to harm competition, such that conduct which constitutes competition on the merits when undertaken by a non-dominant firm becomes just the opposite when the firm crosses the dominance threshold? Is there a sound basis for that special responsibility? If so, what is it, and how should that responsibility be defined? Is it limited to markets in which the firm is dominant, or does it include complementary product markets?*

It is clear that there is strong legal precedent in EU law for dominant firms having a ‘special responsibility’ not to harm competition. This can include complementary product markets, although the OFT would not typically bring such a case unless:

- *either* the markets are sufficiently close, or linked, to enable the dominant firm to leverage its market power into a neighbouring market;
- *or* the likely effect of the behaviour on the non-dominant market will be to protect or enhance the firm’s position on the market which it dominates.

However it is less clear from existing case precedent what the precise meaning of this ‘special responsibility’ concept is. Most controversial is the question of whether the concept covers situations in which a dominant firm is shown to be damaging competition *unintentionally*, simply by acting in its own short-run non-strategic interest and essentially engaging in ‘competition on the merits’.²⁹

The benefit of intervening in such situations is clear; it prevents competition from being damaged. The problem with adopting a policy of intervening in such situations, however, is that it risks forcing firms to engage in inefficient pricing behaviour that is in fact bad for consumers and does not in fact constitute competition on the merits. This issue can be particularly problematic if the concept is applied to complementary product markets, in which the firm is not dominant, since it will typically need to be allowed to ‘compete on the merits’ in such markets if it is to be an effective competitor.

Until the precise legal scope of the special responsibility concept is established, it will be difficult to reconcile these views. In many ways however this debate may merely be a restatement of the main issue addressed above; that is, how to distinguish benign conduct from abusive behaviour.

NOTES

1. This test is set out at footnote 25.
2. While this roundtable focussed on the concept of ‘competition on the merits’, the concept of ‘normal competition’ (which has EC precedent in Hoffman-La Roche) has been utilised more frequently within UK jurisprudence to date, than the concept of ‘competition on the merits’. However, the two concepts seem to be employed interchangeably. For the purposes of this submission, therefore, we treat the two concepts as both identical and interchangeable, but for simplicity have employed the term ‘competition on the merits’ other than where it would be misleading to do so.
3. Amongst other duties, the CAT hears appeals against OFT decisions made under Chapters I and II of the UK Competition Act 1998 and under Articles 81 and 82 of the EC Treaty.
4. OFT Decision No. CA98/3/03, *Exclusionary behaviour by Genzyme Limited*, March 2003. CAT Case: *Genzyme Limited and The Office of Fair Trading* [2004] CAT 4.
5. A simple example is price discrimination. Retailers compete in various different ways, but a key component of competition, at least for retailers of a reasonable size, are the vigorous negotiations retailers have with suppliers. By extracting a better deal from its suppliers, each retailer hopes to gain a competitive edge over its retail competitors. This competitive negotiation process plays a key role in bringing prices down for consumers.

Now suppose that a dominant supplier is not allowed to price discriminate, for example because it is considered to lie outside the area circumscribed by the term ‘competition on the merits’. Each retailer realises that any deal it extracts from this supplier will also be available to its competitors, and thus retailers have less incentive to negotiate vigorously. At the same time, the supplier realises that any deal it offers to one retailer will have to be given to all, and thus it has less incentive to give any retailer a price cut. It does not take much imagination to see that the likely result is higher prices for all, with the supplier increasing its profits, and less pressure on the supplier to enhance its productivity.
6. For example, exclusive dealing arrangements are sometimes viewed as *per se* abusive under EC competition law, if carried out by a dominant firm. It may well be true that such arrangements will tend to be harmful when they tie up a majority of the distributors in a market (although even then this is not obvious, since an efficient competitor may be able to make such distributors an offer that displaces the incumbent entirely). It is far less clear that a single exclusive dealing arrangement, with a single downstream distributor, will damage competition or cause consumer harm. Thus, market context is crucial when assessing unilateral behaviour.
7. See paragraphs 547 and 548.
8. The pros and cons of these tests are discussed under Question 3.
9. OFT Decision No. CA98/2/2001, *Napp Pharmaceutical Holdings Limited*, March 2001. CAT Case: *Napp Pharmaceutical Holdings Limited and Subsidiaries and Director General of Fair Trading* [2002] CAT 3. This case concerned the supply of sustained release morphine tablets in the United Kingdom. The OFT found that Napp’s pricing practices amounted to predatory pricing in the hospital segment of the market with the aim of excluding competitors from both the hospital and community segments, and then excessive pricing in the community segment.
10. CAT Case: *Aberdeen Journals Limited and The Office of Fair Trading* [2003] CAT 11. This was in fact the CAT’s judgment on the OFT’s second infringement decision on *Aberdeen Journals* (CA98/14/2002). The OFT’s first decision (CA 98/5/2001) was also appealed to the CAT and was remitted back to the OFT for it to give further consideration to the issue of market definition. This was a predation case relating to the behaviour of Aberdeen Journals in the market for local newspaper advertising in the Aberdeen area.

11. OFT Decision No. CA98/20/2002 *BSkyB investigation: alleged infringement of the Chapter II prohibition*, 17 December 2002. This element of the case related to BSkyB's wholesale supply of certain premium sports and movie channels (premium channels). These were priced such that the first channel taken by a subscriber had a high wholesale price (of over £12) but that the second, third and fourth channels taken cost substantially - and increasingly - less (from £2.51 down to £1.00). The concern was that most subscribers would take at least one of BSkyB's popular channels, such that alternative channel suppliers were forced to compete against BSkyB's very low incremental prices, and that this in turn would foreclose such competition.
12. Opinion of Advocate General Fennelly on Cewal's appeal to the Court of Justice, *Compagnie Maritime Belge v Commission* [2000] ECR I-1365, paragraph 132. It is noteworthy, though, that this paragraph goes on to state that "*Different considerations may, however, apply where an undertaking which enjoys a position of dominance approaching a monopoly particularly on a market where price cuts can be implemented with relative autonomy from costs, implements a policy of selective price cutting with the demonstrable aim of eliminating all competition.*"
13. This test is set out at footnote 25.
14. It is worth noting that in its judgment on Genzyme, the CAT makes explicit mention of the ability of 'reasonably efficient' (i.e. not 'as efficient') competitors to compete. This wording follows that used by the European Commission in *Napier Brown/British Sugar* [Commission Decision IV/30.178, OJ 1998, L 284/41]. In practice, however, the CAT points out that the zero margin available to Genzyme's downstream rivals in this case meant that no competing undertaking could trade profitably, irrespective of its relative efficiency. As such, the CAT was not required in this case to address the issue of whether 'reasonably efficient' provides a sensible benchmark for assessing effect.
15. It is also noteworthy that in the recent Microsoft decision, the Commission set out clearly its finding that Microsoft's bundling of its media player "... shields Microsoft from effective competition from potentially more efficient media player vendors which could challenge its position." EC Case COMP/C-3/37.792, *Microsoft* (2004), Paragraph 981.
16. See paragraph 299 for details. Any such linkage was found likely to be more reliable and predictable for Napp than for its competitors, for example because of Napp's established reputation, and because it was found that up to 30 per cent of patients with a hospital prescription or referral letter may be switched by their GP to another brand, which is most likely to be MST (i.e. Napp's product).
17. John Vickers, "Abuse of market power", speech to the 31st annual conference of the European Association for Research in Industrial Economics, Berlin, 3 September 2004. Available at www.ofi.gov.uk.
18. The relevant case precedent here is *Tetra Pak II*. The ECJ did not, in fact, make a general finding that there is no need to consider the potential for recoupment, but rather stated that "*it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalise predatory pricing whenever there is a risk that competitors will be eliminated.*" (Underlining added).
19. Decision No. CA98/05/2004, *First Edinburgh/Lothian*, 29 April 2004. This case related to the pricing practices of First Edinburgh Limited in a commercial bus services market in the Greater Edinburgh area. The investigation followed a complaint received from Lothian Buses plc that First Edinburgh was engaging in predation within the Greater Edinburgh area.
20. Relevant factors in this assessment were that: (i) if First Edinburgh held a dominant position, then it did so on a market or markets outside the Greater Edinburgh area (albeit, a market or markets which may have been sufficiently "closely associated" to the Greater Edinburgh market for First Edinburgh to occupy a position comparable to that of holding a dominant position "on the markets in question as a whole", in accordance with the ECJ's judgment in *Tetra Pak II*); (ii) the alleged predatory behaviour took place on the Greater Edinburgh market; and (iii) of the two undertakings, Lothian was the more likely to hold a dominant position on the Greater Edinburgh market. Hence, consumers had benefited from a period of low fares and more frequent services, without any weakening of competition.
21. NB some abuses, such as margin squeeze, have elements of both of categories.

22. Although such profit sacrifice can be hard to observe, especially where recoupment effectively occurs contemporaneously with the profit sacrifice.
23. The ‘no economic sense’ test is advocated by Gregory J Werden, Senior Economic Counsel, Antitrust Division, US DoJ, in ‘*The “No Economic Sense” Test for Exclusionary Conduct*’. This paper argues that the *Trinko* judgment itself employed the ‘no economic sense’ test, not the ‘profit sacrifice’ test.
24. Arguably, the analysis of volume rebates in Michelin II is a good example of ‘ad hocery’. It was far from clear from the existing EC case precedent that these were of a form that would be found to infringe Article 82, given that they were equally available to all customers, and comprised many small steps rather than a few large ones. See *Michelin v Commission* [2003], Case T-203/01.
25. See *AKZO Chemie v Commission* [1991], Case C-62/86, ECR I-3359, paragraphs 70-72. This test essentially states that (i) pricing below average variable costs by a dominant firm (where these are recognised as a proxy for marginal costs) is normally to be regarded as an abuse, with separate evidence on intention not being required; and (ii) pricing above average variable costs but below average total costs (i.e. including fixed costs) may nevertheless be abusive if the intention is to eliminate a competitor.
26. See, for example, *Hoffmann-La Roche v Commission*, Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211, para 91.
27. *Napp* (2002), *Aberdeen Journals* (2003) and *Genzyme* (2003).
28. In taking this approach in the two predation cases, *Napp* and *Aberdeen Journals*, the CAT relied on paragraph 44 of the CFI Judgment in *Tetra Pak II* (Case 333/94P *Tetra Pak v Commission* [1996] ECR I-5951 (“*Tetra Pak II*”). This states that: “*It must be possible to penalise predatory pricing whenever there is a risk that competitors will be eliminated. [...] The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.*”
29. This form of foreclosure was recognised by Bain as early as 1956, who coined the term ‘blockaded entry’ for such unintentional entry barrier, as distinct from strategically ‘deterred entry’.

A simple example might be a dominant firm which supplies two complementary products. It is well known that the short-run profit-maximising strategy for such a supplier will be to charge less for the products when sold as a bundle than when sold separately. However, it is also well recognised that such ‘bundling’ can lead to the unintended foreclosure of competing firms that only supply one of the two products.

UNITED STATES

This brief memorandum responds to an invitation for submissions to a roundtable discussion on “competition on the merits” to be held by the OECD’s Competition Committee. The invitation notes that “competition on the merits” is a phrase “commonly used by courts and practitioners in their analyses of unilateral conduct by dominant firms.” Care must be taken in using the phrase “competition on the merits” because it is often used as though it brings specific content to dominance analysis; in fact, defining abuse by reference to “competition on the merits” tends to be circular because there is no clear agreement on what if anything it actually means.

Although the phrase is used in different ways by courts in the United States, “competition on the merits” always refers to conduct regarded as lawful when undertaken by firms that are “dominant,” which in U.S. parlance would mean firms that possess monopoly power. Thus, a firm – no matter how “dominant” – cannot be found to have committed an illegal act if all the firm did was to engage in “competition on the merits.” Conversely, as the invitational letter states, “when a dominant enterprise is confronted with rivals or the prospect of their entry, it cannot lawfully counter the competitive challenge with conduct that falls outside an area circumscribed by the term ‘competition on the merits.’” Under U.S. law, such conduct is referred to as “predatory” or “exclusionary” conduct.¹

Analysts disagree both about why certain conduct is typically thought to fall outside the area of “competition on merits” and, at other times, whether certain other conduct should fall outside or within its perimeter. Our note provides some perspective, from the vantage point of the U.S. antitrust enforcement agencies, on some of the issues identified in the invitation for submissions.²

1. Some Principles for Evaluating Single-Firm Conduct

We suggest that some of the confusion surrounding “both the perimeter of [‘competition on the merits’] and the underlying principles that ought to define it” stem from three interrelated considerations. First, not all monopolies are unlawful. A monopoly that is obtained by “superior skill, foresight, and industry” does not violate competition law.³ It is important to recall, in setting precedent for the kinds of behaviour that competition agencies are trying to deter, that striving for monopoly is “an important element of the free market system,” because “it induces risk taking that produces innovation and economic growth.”⁴ Accordingly, “the successful competitor, having been urged to compete, must not be turned upon when he wins,”⁵ even where that success might have a short-term adverse effect on the welfare of consumers.⁶ The consumer-oriented goal of competition policy dictates an overarching need to protect the freedom of even dominant firms to compete.

Competition policy, therefore, requires distinguishing permissible from impermissible means to obtain, or maintain, a monopoly. The need to draw this distinction highlights a second consideration: conduct that will defeat competitors is what monopolists engage in to obtain and maintain monopoly power, but it is also what we expect competitors to do in open, freely competitive markets. As one judge put it: “Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally. . . . These injuries to rivals are by-products of vigorous competition, and the antitrust laws are not balm for rivals’ wounds. The antitrust laws are for the benefit of competition, not competitors.”⁷ In other words, competitive conduct frequently looks like exclusionary conduct, because aggressive competition may harm less-efficient firms – even though it is “precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.”⁸

The importance and the difficulty of the need to distinguish between exclusionary and competitive conduct exacerbate yet a third consideration, common to all legal regulation of marketplace behaviour. In measuring behaviour that has taken place, one wants to get correct results, but at the same time to give clear and specific guidance to those who have not yet acted. So, to say one will just weigh all the factors carefully after the fact may generate very defensible results after the fact, but will justifiably be criticised for failing to give sufficient guidance to businesspeople who must make choices before all the consequences of those choices can be known.⁹

2. Application of These Criteria to Potential Monopolisation Claims

For many reasons, especially those sketched above, U.S. law has evolved a textured approach to the question of what constitutes illegal monopolising conduct or illegal monopoly maintaining conduct. This textured approach recognises that when applied to the wide range of business behaviour that might create or protect monopoly power, legal claims vary with respect to their potential chilling effect on competition; the ease with which exclusionary conduct can be distinguished from aggressive competition; and the feasibility and importance of creating “safe harbours” for firms in the marketplace. For example, under U.S. law, pricing practices, especially aggressive price cutting, entail the greatest danger that restricting single-firm conduct ultimately will harm consumers by chilling the competitive process. In contrast, the improper manipulation of government processes to create or maintain monopoly power lacks any cognisable justification. The following expands upon this point with respect to how the principles enumerated above apply to three different types of conduct: pricing and similar practices; distribution practices; and abuse of government processes.

Pricing and Similar Practices – U.S. courts have recognised that claims that low pricing have led to a monopoly (or are alleged to maintain a monopoly) must be treated with particular caution, for several important reasons. First, with aggressive price cutting, the mechanism through which competition may be excluded “is the same mechanism by which a firm stimulates competition.”¹⁰ The exclusionary and competitive acts thus look precisely alike. Second, “mistaken inferences” of predatory pricing are “especially costly, because they chill the very conduct the antitrust laws are designed to protect.”¹¹ Third, given the heavy costs of predation to the would-be predator, and the usual lack of entry barriers to potential rivals, the strategy is unlikely to succeed.

Given these concerns about predatory pricing claims, U.S. courts have deliberately chosen a rule that seeks to minimise the risk of falsely proscribing competitive acts. In particular, they have held that before low pricing can be condemned, the conduct must be shown to involve the short-run sacrifice of profits in order to attain the probability of long-run market power.¹² At the same time, aggressive, but above-cost, pricing is considered “competition on the merits” and is placed within a safe harbour.¹³ Moreover, the Supreme Court has recently relied on many of the same concerns in rejecting the imposition of antitrust liability for other unilateral conduct, in particular, a refusal to deal.¹⁴

Distribution practices – When firms compete, one of the ways in which they compete is through their methods of distribution. Restraints such as exclusive dealing arrangements are very common in highly competitive markets, reflecting that such distribution methods can reduce costs and improve firm efficiency, providing “competition on the merits” to the benefit of consumers. It is the case that, in some circumstances, denying rivals access to key distribution channels may be an effective strategy for acquiring or maintaining market power. Nonetheless, because distribution restraints are a frequent and effective form of competition, claims of exclusion based on such practices have the potential to chill conduct that benefits consumers. It is therefore important to provide clear guidance to firms to minimise the undue chilling effect on efficient conduct.

The U.S. Department of Justice (“Department”) recently addressed this issue in the *Dentsply* case, in which it prevailed in establishing that the defendant unlawfully maintained monopoly power.¹⁵ The Department argued that the defendant’s policies of not using dealers that distributed products of rivals could be determined to be exclusionary because the policies made “no economic sense” apart from their exclusionary effect, explaining that “[c]onduct is exclusionary when its profitability is attributable to elimination of competition, rather than to successful competition on the merits.”¹⁶ Put another way, “[c]onduct is exclusionary, even if its cost poses minimal ‘burden,’ if incurring that cost makes sense only because the conduct serves to eliminate competition.”¹⁷

Abuse of government processes – One of the most effective ways for a firm to acquire or maintain market power is to use the rules of government against competitors. While such conduct often is perfectly legitimate, it can be unlawful if it is achieved by abusing governmental processes. Indeed, “[m]isuse of courts and governmental agencies is a particularly effective means of delaying or stifling competition.”¹⁸ Obtaining a patent by perpetrating fraud on the patent office, for example, is a well-known example of such abuse that may be part of a scheme of unlawful monopolisation.¹⁹ The United States Federal Trade Commission (“Commission”) has brought several cases in recent years that involve the alleged abuse of governmental processes to obtain market power shielded by law.²⁰

Abuse of government processes presents a very different trade-off of risks and benefits than aggressive price cutting for several reasons. First, unlike predatory pricing, it frequently is likely to succeed, because the exclusionary effect often operates by force of law. Second, by comparison with predatory pricing, it may cost little to attempt. Finally, and most fundamentally, the conduct does not in any way resemble “competition on the merits.” False statements to government agencies are not susceptible to any justification. They cannot be explained in terms of the defendant’s effort to increase output or improve product quality, innovation, or service. They therefore do not raise the same concerns with respect to chilling procompetitive behaviour.²¹ Identifying what is properly construed as an abuse of government process, however, can sometimes raise some difficult issues, including the scope of rights guaranteed by the Constitution or intellectual property law.

3. Implications for an Enforcement Agenda

We believe that the variety of business conduct that might be subject to claims of “exclusion,” viewed in light of the various policy issues discussed above, have three implications for enforcement agencies as they consider their enforcement priorities in this area.

First, competition law’s impact is felt not only when an enforcement action is initiated or a judicial decision is rendered, but also when businesses take steps (or avoid taking steps) in the context of prevailing legal standards. Accordingly, in deciding what standard to use to determine whether particular conduct constitutes exclusion or “competition on the merits,” we believe that enforcement agencies should take into consideration not only the relative risks of “false positives” compared to “false negatives” in the particular case, but also the effect of the articulated standard generally on business conduct in the marketplace. In deciding whether to adopt any particular standard, therefore, we believe that agencies should give careful thought to the relative balance between identifying conduct that may be exclusionary, and the risk of deterring a wide range of conduct that might be highly beneficial to consumers.

Second, and following largely from the first, we believe that the issues raised by this roundtable may be advanced by further empirical research. Underlying the various legal formulations and analyses of different forms of business behaviour are a set of assumptions that might be tested by empirical work. For example, with respect to concerns regarding false negatives and false positives, how likely are various practices, frequently attacked as creating or maintaining monopoly power, in fact to be useful methods for reducing costs or lowering output? Where behaviour seems reasonably likely to be efficient, in that it will

reduce costs, under what if any circumstances might that behaviour also threaten to generate market power, of sufficient magnitude and probability, that net social welfare will be greatly reduced?

Finally, in the allocation of always-scarce enforcement resources, a sound and sensible enforcement program might focus first and foremost on forms of exclusionary conduct that do not even arguably raise cognisable efficiency justifications. Given the ease with which regulatory structures can be “gamed,” and the relatively low cost of trying, such conduct not only is lacking in any benefit to consumers, but is likely to be common relative to other forms of exclusionary conduct. The abuse of government processes and other forms of “opportunism” should have an important place on an enforcement agenda that challenges exclusionary conduct.

NOTES

1. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985).
2. U.S. national law proscribes both monopolization and attempted monopolization. This short note will discuss only the offence of monopolization. Most of the states also prohibit monopolization or monopolizing conduct, but their experiences are not reviewed here.
3. The phrase comes from Judge Learned Hand's opinion in *United States v. Aluminum Co. of Am.*, 148 F.2d 416,430 (2d Cir. 1945).
4. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).
5. Judge Hand also coined this phrase in the *Alcoa* case. 148 F.2d at 430.
6. Harm to consumers from an efficient monopolist may come about in some cases where the monopolist would restrict market output further (and consequently raise market price higher) than would have been the case in a market with, for example, three rivalrous but slightly less efficient firms. The monopolist is not condemned, nevertheless, because it merely engaged in "competition on the merits." An example of how similar harm to consumers may occur from a merger that generates both market power and merger-specific efficiencies is neatly explained in Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 *Antitrust L.J.* 375, 404-06 (2005).
7. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).
8. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).
9. Still, a "case-by-case approach, one that bases decisions more explicitly on their likely impact on welfare," may be better than "'bright line proxies' and rules of thumb" at reducing business uncertainty and enhancing welfare. Heyer, *A World of Uncertainty*, supra note 6, at 417 et seq.
10. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).
11. *Id.*
12. See *id.*
13. *Brooke Group*, 509 U.S. at 223 ("As a general rule, the exclusionary effect of prices above a relevant measure of cost 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").
14. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).
15. *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005).
16. Reply Brief for the United States, *United States v. Dentsply Int'l, Inc.* (3d Cir. 2004) at 3.
17. *Id.* at 4. The Department also has applied the "no economic sense" test in its other recent cases under Section 2 of the Sherman Act. In *Microsoft*, the Department argued that a course of conduct that served to protect the defendant's operating system monopoly was exclusionary because it "would not make economic sense unless it eliminated or softened competition." Brief of the Appellees United States and the States Plaintiffs at 48, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), available at <http://www.usdoj.gov/atr/cases/f7200/7230.htm>. In *American Airlines*, the Department contended that the defendant drove out rivals by adding "money-losing capacity" and that "distinguishing legitimate competition from unlawful predation requires a common-sense business inquiry: whether the conduct

would be profitable, apart from any exclusionary effects.” Brief for Appellant United States of America at 2, *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003), *available at* <http://www.usdoj.gov/atr/cases/f9800/9814.htm>. See generally Gregory J. Werden, The “No Economic Sense” Test for Exclusionary Conduct, *Journal of Corporation Law* (forthcoming 2005).

The “no economic sense” test may be most useful when it can play what is essentially the role of a sufficient condition: if challenged conduct with a demonstrated tendency to eliminate competition would make “no economic sense” but for that tendency, it must follow that the conduct is exclusionary. The test is not intended as the last word on the subject of exclusionary conduct. There may be cases in which it is infeasible to apply the test, and it may be possible to formulate a better test in the context of a particular case.

18. Robert Bork, *The Antitrust Paradox* 159 (1978, rev. 1993).
19. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); see also *American Cyanamid Co.*, 72 F.T.C. 623, 684 (1967), *aff’d*, *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968).
20. See, e.g., *Bristol-Myers Squibb Co.*, FTC Docket No. C-4076 (Apr. 14, 2003) (consent order), *available at* <http://www.ftc.gov/os/2003/03/bristolmyersconsent.pdf> (alleged false listings and false statements to the Patent and Trademark Office and the Food & Drug Administration for the purpose of maintaining a monopoly in connection with two anti-cancer drugs and an anti-anxiety drug); *Union Oil Co. of Cal.*, FTC Docket No. 9305 (Mar. 4, 2003) (Complaint), *available at* <http://www.ftc.gov/os/2003/03/unocalcmp.htm> (alleged false representations to Air Resources Board for the purpose of ensuring that firm’s technology was incorporated into mandatory government regulations).
21. Some staff members at the FTC have described abuse of government processes as an example of “cheap exclusion” – exclusionary conduct that is “cheap” both in the sense that it is inexpensive to attempt, and that it has little positive value to consumers because it lacks any cognizable efficiencies. See Creighton, Hoffman, Krattenmaker & Nagata, *Cheap Exclusion*, 72 *Antitrust L.J.* __ (2005) (forthcoming) (describing false government filings, abuse of standard-setting processes, certain intentional tortious conduct, and abusive litigation as examples of “cheap exclusion”).

EUROPEAN COMMISSION

1. Introduction

This paper contains reflections on the application of the concept of ‘competition on the merits’ in the framework of Article 82 of the EC Treaty.

During recent years, the Commission carried out an extensive review and modernisation of the application of the procedural rules on the application of Articles 81 and 82 EC and the application of Article 81 EC as to the substance. Thus, new block exemptions were adopted regarding vertical agreements¹, specialisation agreements², research and development agreements³ and technology transfer agreements⁴; guidelines were adopted on vertical restraints⁵, horizontal co-operation agreements⁶, technology transfer agreements⁷ and on the application of Article 81(3) of the Treaty⁸; and a new regulation was adopted on the procedural implementation of Articles 81 and 82 of the Treaty⁹. Finally, a new Merger regulation was adopted¹⁰ and guidelines were issued on the assessment of horizontal mergers¹¹.

An area where until now there is however little policy guidance is that of the application as to the substance of Article 82 EC¹². The Commission is currently reflecting on its policy in this multi-faceted area. Given the mixture of economic and legal aspects to investigations under Article 82 EC it is not evident to develop a comprehensive methodology and approach for all abuses together. For the moment it is therefore unclear whether at the end of the process it will be possible to provide guidelines on Article 82 EC. Therefore, the main object of the current exercise is to evaluate policy, to assess how it could be made more effective and to define ways in which it can be made more transparent. Ideally, this should lead to (draft) guidelines.

In the framework of this policy review it also has become opportune to consider the concept of ‘competition on the merits’. In view thereof, this concept will be discussed below in the context of the more general considerations that surround the review of the Commission’s policy on the application of Article 82 EC.

2. Starting points of an economic approach

As a logical consequence of the modernised policy regarding mergers¹³ and restrictive agreements and practices¹⁴ the main considerations regarding the Commission’s approach to the application of Article 82 EC are:

- As in the two other areas mentioned, the *protection of competition on the market as a means of enhancing consumer welfare* and of ensuring an efficient allocation of resources should be put at the centre of competition policy regarding the application of Art. 82. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers¹⁵. By protecting the market structure from artificial distortions the interests of the consumer in the medium to long term are best served.

- A key element of the new Guidelines on the application of Article 81 (3) and the guidelines on vertical and horizontal restrictions is that they *take an economic approach* to already well developed principles of competition law¹⁶. The different sets of Guidelines offer a framework primarily based on economic criteria that help to analyse the economic context of behaviour that may violate the competition rules. Economic criteria such as market power and other factors relating to the structure of the market form a key element of the assessment of market impact likely to be caused by certain behaviour.
- Competition law enforcement should concentrate on genuine competition problems. Also in relation to Article 82 EC an economics based approach should therefore focus on how and to what extent the examined behaviour is likely to affect competition on the market. Unlike under Article 81 and on mergers there has not been until now a comprehensive reassessment of practice under Article 82 in the light of economic thinking. A credible policy on abusive conduct must be compatible with mainstream economics.
- There is a balance to be struck between on the one hand the ambition, when applying Article 82, to approach economic reality as closely as possible and on the other hand to *maintain the article as a useful instrument* for competition authorities, 'victims' and courts to address illegal behaviour. DG Competition's approach to the review will therefore be based on three main elements: case law, economic elements and the effectiveness of enforcement.
- Protection of the competitive process is not protection of *competitors*. When analysing the effects of behaviour by dominant companies competition authorities should not disturb competition by protecting competitors that are inefficient and are likely, in the short or medium term, to disappear from the market on the basis of the competitive process if no intervention will take place;
- On the same notion, in cases regarding refusal to deal, competition authorities should *not* disturb the competitive process by *intervening in order to grant access to the market to competitors who, as an efficient operator, should be able to create their own access to the market*.
- Although Article 82 prohibits both exclusionary and exploitative abuse, the occurrence of exploitative behaviour that is effectively harmful to consumers is often a consequence of exclusionary behaviour and not a cause of harm to competition or consumers in itself. For that reason, it could be argued that *when exploitative abuse occurs competition authorities should rather focus on addressing the exclusionary behaviour that is causing the harm to consumers than on prohibiting the harm itself*. That would obviously leave the Commission's competence to also challenge and sanction 'stand alone' exploitative behaviour unprejudiced.
- Dominant companies should be able to successfully defend themselves against challenges of abuse by demonstrating that there is an *objective justification* for their behaviour. That may include that they demonstrate that if the efficiencies produced by their conduct are taken into account the conduct on balance does not have the effect of hindering the maintenance or growth of competition on the market.

It is in particular in relation to the last issue raised -the possibility of dominant undertakings to justify their behaviour and defend themselves against allegations of abusive behaviour and consistency between the application of Article 81 and Article 82 EC- that the question arises what exactly the scope is of "competition on the merits".

2.1 "Competition on the merits"

In EU jurisprudence, the notion of 'competition on the merits' was given a central place in the interpretation of 'abuse' as prohibited by Article 82 EC by the ECJ, when it defined 'abuse' in Hoffmann-La Roche¹⁷ as:

'An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is 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.*'

In view of this definition, which was repeated in numerous later cases on Article 82 EC, it appears that for the application of the notion of 'abuse' two requirements need to be fulfilled, which in a way are 'two sides of one medal':

- Can the behaviour be classified as 'competition on the merits', i.e., methods not different from those which condition normal competition in products or services on the basis of transactions of commercial operators and
- Does it have the effect of hindering the maintenance of growth of competition?.

The ECJ and CFI have given indications of what they understand under the concept of 'methods different from those which condition normal competition in products or services on basis of the transaction of commercial operators'.

A balanced approach based on the concept of 'competition on the merits' has been taken in the cases on rebates. It follows from those cases that once it has been established that rebate schemes have a fidelity enhancing effect it needs to be established whether those schemes are based on '*economically justified considerations*'¹⁸.

In British Airways¹⁹ and Irish Sugar²⁰ the CFI clarified that with 'economically justified considerations' it meant '*criteria of economic efficiency*'. The dominant company needs to show that there is a relationship between economies of scale achieved by virtue of extra sales and the rebates or bonuses paid²¹. The scheme will not fall under the qualification of 'abuse' if it '*constitutes the exercise of the normal operation of competition or allows the company to reduce costs*'.

In Michelin II, the CFI worded it as follows: 'It is necessary to consider whether, in spite of appearances, the quantity rebate system *is based on a countervailing advantage which may be economically justified or, in other words, if it rewards an economy of scale made by the applicant because of orders for large quantities*. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff'²².

In the context of rebates, such a reasoning cannot be general and must explain specifically the discount rates chosen for the various steps in the rebate system in question²³.

In the context of an 'attack' of the dominant undertaking by a competitor the Court held in United Brands²⁴ that 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'*. Furthermore the Court held that even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other²⁵.

A certain conduct cannot easily be considered as 'competition on the merits' when it constitutes an obstacle to entry in the market, which was the case regarding the stipulation of an exclusive purchasing commitment in respect of a substantial proportion of purchases by an economic operator who holds a strong position in the market^{26 27}. In this context the Court rejected a dominant player's arguments that it was under a duty to ensure continuity and reliability of supplies.

The Court also held that, since the concept of abuse is an objective one, the fact that the dominant undertaking does not have the intention to discourage or weaken its competitor's position has no bearing on the legal classification of the conduct as abuse²⁸.

The fact that certain conduct is standard practice in a certain sector generally may be an indication but does not suffice to classify it as 'competition on the merits'. According to the CFI conduct cannot cease to be abusive merely because it is the standard practice in a particular sector²⁹. Referring to Michelin, the CFI noted that dominant undertakings within the meaning of Article 82 of the Treaty have a special responsibility not to allow their conduct to impair genuine undistorted competition on the relevant market³⁰. That responsibility is not limited solely to conduct likely to reinforce the dominance of the undertaking concerned or reduce the level of competition on the market, since Article 82 of the Treaty concerns not only practices which hinder effective competition but also those which, as in this case, may cause damage to consumers directly³¹.

In the literature, the view has been defended that a suitable test whether competition takes place 'on the merits' is: 'If the practice reduces the costs of the dominant undertaking or otherwise increases its efficiency, it will normally be considered as an example of normal competition, even if it contributes to the elimination of competitors not able to match this increase in performance. If, on the other hand, a practice leads to the exclusion of competitors without increasing at all the efficiency of the dominant undertaking, it is much more likely that such a practice would be considered an abuse within the meaning of Article 82'³².

An approach to formulate a more 'proportionality-oriented' test under the concept of 'competition on the merits' was taken by Advocate-General Kirschner in Tetra Pak I, as follows: *'the undertaking in a dominant position may act in a profit oriented way, strive through its efforts to improve its market position and pursue its legitimate interests. But in doing so it may only employ such methods as are necessary to pursue those legitimate aims. In particular, it may not act in a way which, foreseeably, will limit competition more than is necessary.'*³³

These indications from the Courts are by necessity linked to cases and their specific circumstances. Although it is not easy to define the scope of the concept, the foregoing shows that the Courts are willing to allow dominant undertakings a defence based on efficiency considerations in the framework of the definition of abuse as competition 'not on the merits'. Even behaviour that *prima facie* can be classified as abuse may help to produce savings in production, distribution or transaction costs and may thus rather be seen as *'recourse to methods which condition normal competition'*.

3. Objective justifications

Efficiency considerations not only enter analyses and judgments under the assessment of what is competition on the merits, but also under the concept of 'objective justification'.

Under certain circumstances conduct which is generally not considered to be based on competition on the merits may still escape the prohibition of Article 82 EC. The ECJ has always emphasised that conduct is abusive unless it is objectively justified³⁴.

The cases where objective justifications have been invoked are few but nevertheless they provide some guidance with regard to the circumstances that may serve as objective justifications.

In BP³⁵ the ECJ made it clear that a dominant undertaking cannot be held responsible for reducing its supplies to a non regular customer in a time of crisis in the industry. The exceptional circumstances affecting the entire industry justified the reduction of supplies. The judgments in Hilti and Tetra Pak suggest that public policy concerns might in certain limited situations serve as justifications for conduct restrictive of competition. In Hilti the dominant undertaking attempted to justify its tying policy with product safety reasons and prevention of misleading advertising.³⁶ Similarly, in Tetra Pak the dominant undertaking invoked public health concerns in order to justify the tied sale of filling machines and cartons. In both cases the community courts rejected the justifications because they found that the protection of public health could be guaranteed by other means which would not have the negative effect of restricting competition, in particular by appropriate legislation or regulations. It should be noted that in those cases the Community courts did not exclude in principle the possibility of public health concerns to justify certain restrictions of competition, but in the two cases the undertakings' measures were simply not the appropriate means.

Whereas in some circumstances the lack of government measures could provide objective justifications, it should be noted that in other circumstances the presence of government measures will rather cause Article 82 EC not to apply at all³⁷.

Absence of objective justification is now an established requirement in the case law on refusal to deal. In Telemarketing³⁸ the ECJ held that an abuse was committed where *without any objective necessity* the dominant undertaking reserved to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market with the possibility of eliminating all competition from such undertaking. Also in other cases such as Magill and in the recent IMS case, the Community courts established that the refusal to licence intellectual property rights would be abusive only if the refusal could not be justified by objective considerations³⁹.

A particular application of the concept of objective justification occurs in the Syfait-case, which is presently pending before the ECJ⁴⁰. The case concerns the compatibility with Article 82 EC of a refusal of a pharmaceutical company to meet in full the orders which it receives from pharmaceutical wholesalers in order to limit parallel trade. In his conclusion of October 2004 Advocate-General Jacobs expresses doubts whether the assessment whether there is abuse and whether there is an objective justification should take place in two stages: in his view it is more accurate to say that certain types of conduct of a dominant undertaking do not fall within the category of abuse at all because they are objectively justified. As to the case at hand he finds that the refusal to supply at issue could possibly be objectively justified in view of the specificities of the European pharmaceutical market, and in particular the State intervention and the regulation of the market by the Community and the Member States.

The case law thus suggests that a dominant undertaking should be allowed to rely on exceptional circumstances or on public policy concerns to justify their conduct. However, the defence would be accepted only where the challenged conduct is an appropriate measure and is the least restrictive means through which a legitimate aim worth of legal protection can be achieved.

4. Consistency in applying Articles 81 and 82 EC

Coherent development of competition policy requires that Article 81 and Article 82 be applied in a consistent manner with a view to achieving identical objectives and protecting the same values. This has been clearly spelled out in *Continental Can*⁴¹ where the ECJ held that Article 81 and Article 82 pursue the same objectives albeit at a different level.

The similarity of the texts of the two provisions prohibiting identical type of practices also calls for an adoption of consistent approaches in analysing practices that fall under the two provisions. This is especially important with regard to practices which may be reviewed under the two provisions in parallel or alternatively. In *Hoffman La Roche* the ECJ took the view that Article 82 is also aimed in fact at situations which clearly originate in contractual relations and in such cases the Commission is entitled to proceed on the basis of Article 81 or Article 82.⁴²

Parallel application of Article 81 and 82 is most likely in the area of vertical restraints. Exclusive dealing, tying, and agreements that reward loyalty are practices that can be considered under the two provisions. For instance in *Van den Bergh*⁴³ the ECJ applied both Article 81 and 82 EC to agreements stipulating freezer exclusivity, coming to the same conclusions as to the restrictive effect and forbidden character of the agreements.

According to settled case law the application of Article 81 (3) cannot prevent the application of Article 82⁴⁴. Moreover, since Articles 81 and 82 pursue the same aim of maintaining effective competition on the market, consistency requires that Article 81 (3) be interpreted as precluding any application of this provision to restrictive agreements that constitute an abuse of dominant position⁴⁵. However, not all restrictive agreements concluded by a dominant undertaking constitute an abuse of a dominant position. This is for instance the case where a dominant undertaking is a party to a joint venture which is found to be restrictive of competition but at the same time involves a substantial integration of assets⁴⁶.

5. Balancing of negative effects and efficiencies under Article 81 and the Merger Regulation

5.1 Article 81 (3) Guidelines

Under Article 81 (3) EC it is recognised that agreements that restrict competition may have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the costs of production, improving the quality of the product or creating a new product. When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The positive effect of such agreements is the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals. This analytical framework is reflected in Article 81 (1) and 81 (3). The latter provision expressly acknowledges that restrictive agreements may generate objective economic benefits so as to outweigh the negative effects of the restriction of competition⁴⁷.

The condition that a fair share of the benefits of the efficiencies should be passed on to consumers incorporates a sliding scale: the greater the restriction of competition found under Article 81 (1) the greater must be the efficiencies and the pass-on to consumers. This sliding scale approach implies that if the restrictive effects of an agreement are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers. If, on the other hand, the restrictive effects of the agreement are substantial and the cost savings are relatively insignificant, it is very unlikely that the second condition of Article 81 (3) will be fulfilled. The impact of the restriction of competition depends on the intensity of the restriction and the degree of competition that remains following the agreement⁴⁸.

In the Article 81 (3) Guidelines the Commission notes in this context that if the agreement has both substantial anti-competitive and substantial pro-competitive effects a careful analysis is required. In the application of the balancing test in such cases it must be taken into account that competition is an important long-term driver of efficiency and innovation. Undertakings that are not subject to effective competition constraints - such as for instance dominant firms - have less incentive to maintain or build on the efficiencies. The more substantial the impact of the agreement on competition, the more likely that consumers will suffer in the long run⁴⁹.

5.2 *Merger Guidelines*

Also under the Guidelines on the assessment of horizontal mergers it is clear that a 'balanced' approach is taken with respect to the assessment of the positive and negative effects of a merger. They state that mergers may be in line with the requirements of dynamic competition and are capable of increasing the competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community. According to the Guidelines it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have. In order to assess whether a merger would significantly impede effective competition the Commission performs an overall competitive appraisal of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about there are no grounds for declaring the merger incompatible with the common market⁵⁰.

In making this assessment, the Commission takes due account of the effects of the efficiencies to consumers: The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised and likely to be passed on, to a sufficient degree, to the consumer. It is highly unlikely that a merger leading to a market position approaching that of a monopoly or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects⁵¹.

6. **Conclusion**

It is clear that also under Article 82 behaviour that on a strict interpretation of the concept of 'abuse' may fall under the prohibition may also be explained as genuine competition and may even generate positive effects for competition. One of the challenging questions of the Article 82 review is whether and, if yes, to what extent, this provision leaves room for balancing of positive and negative effects.

Although efficiency considerations have not played an important role in the case law under Article 82, the pursuance of common objectives by the Article 81 and 82 requires an alignment of the approaches towards such concerns under the two provisions. The ECJ and CFI have already demonstrated readiness to examine efficiency justifications for practices which have been found to have foreclosure effect.

In the literature many tests have been developed in order to distinguish 'genuine competition' or 'competition on the merits' from behaviour, the 'actual purpose of which is to strengthen the dominant position and abuse it'⁵². However, given the mixture of economic and legal aspects to investigations under Article 82 EC it would not seem that one particular test can be identified as the only appropriate one. In view of the aim to protect competition and not competitors, a first goal will have to be to protect efficient competitors against exclusionary conduct of dominant undertakings. Conduct that is likely to exclude efficient competitors is unlikely to be qualified as competition on the merits.

NOTES

1. Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements, OJ L 203, 01.08.2002, pages 30-41.
2. Official Journal L 304, 05.12.2000, p. 3.
3. Official Journal L 304, 05.12.2000, p. 7.
4. Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, Official Journal L 123, 27.04.2004, pages 11-17.
5. OJ C 291, 13.10.2000, pages 1-44.
6. Guidelines on the applicability of Article 81 to horizontal co-operation agreements Official Journal C 3 of 06.01.2001, p. 2.
7. OJ C 101, 27.04.2004, page 2.
8. OJ C 101, 27.04.2004, pages 97-118.
9. Regulation 1/2003 in the implementation of Articles 81 and 82 of the EC Treaty, OJ L 1/1 of 2004, see also Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.04.2004, pages 18-24.
10. Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, pages 1-22, see also Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 (the "Implementing Regulation") OJ L 133, 30.04.2004, pages 1-3.
11. OJ C 31, 05.02.2004, pages 5-18.
12. It is for this reason that Article 82 EC was recently referred to as 'the last of the steam powered trains' , Brian Sher, ECLR 2004 25 (5), 243-246.
13. See the Guidelines on the assessment horizontal mergers, footnote 6.
14. See the Guidelines on Article 81 (3) EC and on Vertical restraints, footnotes 8 and 6.
15. See Art 81 (3) Guidelines Pars. 13 and 33.
16. See Art 81 (3) Guidelines Par. 5 and Guidelines on Vertical restraints Par. 102 and Guidelines on horizontal co-operation Pars 4-7.
17. Case 85/76, Hoffmann-La Roche v. Commission, [1979] ECR 461.
18. Michelin CFI 30 September 2003 Case T-203/01 [2003] ECR Page 00000 Par. 73, Portugal v. Commission ECJ 29 March 2001, Case C-163/99, [2001] ECR Page I-02613 Par. 52 and Irish Sugar CFI 7 October 1999 in Case T-228/97 [1999] ECR II-2969 Par. 114, British Airways, Case T-219/99 CFI 17 December 2003 [2003] ECR 000 Par. 271.
19. See footnote 18, Par 279.
20. See footnote 18, Par. 189.
21. Irish Sugar see footnote 18 Par. 290.
22. Michelin II see footnote 18 Par. 98.
23. Michelin II see footnote 18 , Par. 109 and Portugal see footnote 18 Par. 56.
24. Case 27/76 United Brands v Commission [1978] ECR 207.

25. United Brands see footnote 24 Par. 190.
26. BPB Industries, Case T-65/89, CFI 1 April 1993, [1993] ECR Page II-00389 Pars 66-70.
27. See also Van den Bergh Foods, Case Case T-65/98 [2003] ECR 0000 Par. 160.
28. See Par. 70 BPB Industries footnote 26.
29. CFI in TACA, Joined cases T-191/98, T-212/98 to T-214/98, Par. 1123.
30. Michelin II see footnote 18 Par 57.
31. Europemballage and Continental Can , ECJ 26 February 1973, [1973] ECR Page 215 at Par 26.
32. Faull & Nikpay, The EC law of competition page 148.
33. Advocate-General Kirschner in Tetra Pak I, Case T-51/89 [1990] ECR II-309 at Par. 68.
34. See for instance cases Sirena S.r.l v Eda S.r.l. and others Case 40/70 [1971] ECR 69, Ministère Public v Tournier case 395/87 1989 [ECR] 2521, Gottrup-Klim, case C-250/92, [1994] ECR I-5641.
35. BP v Commission, Case 77/77, [1978] ECR 1513.
36. Hilti v Commission, Case C-53/92 P, [1994] ECR I-667. Hilti had argued that its tying practice was justified because the nails produced by its competitors suffered deficiencies, which were rendering them incompatible with Hilti's PAF system. Hilti was also concerned that these competitors had engaged in misleading advertising by presenting their nails as being equivalent to and conforming to Hilti's standard. Hilti invoked its duty of care under product liability law and claimed that the obstacles it had set up to entry of those competitors were justified by its duty of care as a manufacture, See Pars 105-107.
37. Joined Cases C-359/95 P and C-379/95 P Commission and France v Ladbroke Racing [1997] ECR I-6265, paragraph 33; judgments of 11 September 2003 not yet published in the ECR in Case C-198/01 Consorzio Industrie Fiammiferi, paragraphs 52 to 55, and Case C-207/01 Altair Chimica, paragraphs 30, 35 and 36; Case T-111/96 ITT Promédia v Commission [1998] ECR II-2937, paragraph 96; Irish Sugar paragraph 130; Case T-513/93 Consiglio Nazionale degli Spedizionieri Doganali v Commission [2000] ECR II-1807, paragraphs 58 and 59; and Case T-154/98 Asia Motor France and Others v Commission [2000] ECR II-3453, paragraphs 78 to 91.
38. Case 311/84 CBEM v CLT and IPB [1985] ECR 3261
39. IMS ECJ 29 April 2004 Case C-418/01, [2004] ECR 0000 Para 52
40. Syfait and others/ Glaxosmithkline, Case C-53/03, Cobclusion of Advocate-General Jacobs of 28 October 2004.
41. Continental Can, see footnote 31.
42. Hoffman-La Roche para 116
43. Van den Bergh Foods CFI 23 October 2003, case T-65/98, [2003] ECR 0000.
44. See joined cases C-395/96 P and C-396/96 P, Compagnie Maritime Belge, [2000] ECR I-136, paragraph 130.
45. See Case T-51/89, Tetra Pak (I), [1990] ECR II-309 and joined cases T-191/98, T-212/98 and T-214/98, Atlantic Container Line (TACA) [2003] ECR 0000, Par. 1456.
46. Par. 106 of the Guidelines on Art. 81 (3) EC. See also Par. 151 of the Commission Notice on Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ C 101/2, 2004.
47. See Par. 33 Guidelines on Art. 81 (3).
48. See Pars. 90 and 91 and 101 of the Guidelines on Art. 81 (3), footnote 8.
49. See Par. 92 of the Art. 81 (3) Gudelines footnote 8.
50. See Pars 76-77 of the Merger Guidelines, footnote 11.

51. See Par. 84 Merger Guidelines, footnote 11.
52. See for instance J. Vickers, Speech Berlin 3 September 2004, discussing both the ‘sacrifice’ test and the ‘as efficient competitor test’, T. Eilmansberger: ‘How to distinguish good from bad competition under Article 82 EC’, CMLR 2005, 129-177, discussing i.a. the ‘intention to alter the market structure’ in relation to leveraging abuses, Elhauge, Defining better monopolisation standards’ Stanford law review 56, pp. 253-344, proposing as a test to condemn conduct that furthers monopoly power by impairing rival efficiency whether or not the efficiency of the dominant player is enhanced and G. Werden ‘The no economic sense test for exclusionary conduct’, defending this test for most of the Section 2 cases.

BRAZIL

1. General discussion of the concept

Competition on the merits is a very difficult concept to define, as well as to use. Definition can vary between jurisdictions and also, between legal and economic versions. It is related to nation's definition on unlawful conducts, or in other words, the definition of “competition on the merits” concept shall be discussed on what basis jurisdictions consider a conduct as “harm to competition”.

Abuse of dominance or monopolization is one of the most difficult chapters of the competition policy and where we find greatest divergence. The reason may be found on the difficulty to separate competition on the merits from exclusionary and predatory conduct (the thin line that separates a strategy from an unlawful conduct), and the risk of benefiting competitors instead of competition. Abuse of dominance and monopolization embrace a broad range of practices such as predatory pricing, discrimination, tying, among others.

Competition rules are designed to assure that market outcomes are determined by the relative efficiency of the rivals. *This allows us to define exclusionary and predatory conduct as conduct that is likely to exclude equally (or more) efficient rivals from the market.*⁽²¹⁾ (Kolaski, 2002). However, in order to guarantee this outcome, it is suggested that the conduct is likely to cause serious harm to consumers, not just to rivals.

Eleanor Fox¹ described some criteria used by different jurisdictions to classify a practice as anticompetitive: (i) a microeconomic model which require that the transaction is likely to diminish aggregate consumer or total wealth; (ii) a methodology based on market structure and dynamics, by which consider the practice as anticompetitive if it interferes with and degrades the market mechanisms; and (iii) a protectionist criteria that assess if the practice harms the competitive dynamic among small and middle-sized firms.

The Brazilian Antitrust Law (Law n. 8,884, of June 11, 1994) defines some criteria for definition of an anticompetitive practices, in Article 20, as follows:

“Article 20. - Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

- I. - to limit, restrain or in any way injure free competition or free enterprise;*
- II. - to dominate a relevant market of a certain product or service;*
- III. - to arbitrarily increase profits; and*
- IV. - to abuse of a dominant position.*

Paragraph 1. - Achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in item II above.

Paragraph 2. - *A dominant position occurs when a company or group of companies controls a substantial share of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology.*

Paragraph 3. - *The dominant position mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20%) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy. [As amended by Law No. 9069/1995]."*

Article 20 above, establishes that a company shall be condemned by an anticompetitive practice depending on the evaluation of the effects of its practices, efficiencies being considered.

In order to better specify how the effects of the conduct should be examined, CADE issues Ordinance nr. 20 that suggests that the analysis of anticompetitive effects shall be based on the specific context in which the practice occurs and its economic reasonableness, as well as the costs resulting from the impact of such procedure and the possible benefits resulting from such impact in order to verify its net effects on the market and on consumers. Ordinance nr. 20 is based under the assumption that practices that injure competition and not only competitor(s) usually require the prior existence of leverage in one market to attempt to gain market share in another or the search for a dominant position in the relevant market by the party adopting such practice. The Ordinance also indicates that Brazilian conducts will be reviewed under the rule of reason, by which it is necessary to assess its anticompetitive effects and weigh them against its possible compensatory benefits (efficiencies).

Competition on the merits is not a very well established concept in Brazil. Like in other jurisdictions, it lacks a stronger definition and, in fact, it has never been formally used to justify a decision in Brazil. Nevertheless, the general idea underlies many decisions concerning abuse of dominant position in which the greatest challenge is to part indications of lawful aggressive strategies from unlawful ones.

Recent cases on Microsoft strategies have involved exclusive dealing, as in Microsoft/TBA (box 1) and tying as in Microsoft/Paiva Piovesan (box 2). Predatory pricing is the only conduct that has a more precise definition and a proposed methodology to be applied, established on the SBDC Guideline.

2. The Concept's application: the ports' case

A recent case of dominance involved the four Brazilian Port Operators (PO) at the Santos Port, State of Sao Paulo². The Brazilian Ports were recently privatized. Four Port Operators at Santos Port are now in charge to provide infrastructure services³ to exporters and importers, what included a large amount of investments. Port operations are regulated by the ANTAQ, the Water Transportation Agency.

The players involved in the case: Four players were involved in the import activity: the importer, the shipping company, the port operator and the bonded warehouses (BW). Among them, there were three relationships: a) the importer chooses the shipping company for shipping and freight forwarding services and pays the THC (*Terminal Handling Charge*) for those services; b) the shipping company contracts the PO services to handle the containers and pays the box rate to port operators for that service; and c) the importer contracts the warehouse to provide customs clearance, warehousing and delivery services.

General Description of the Conduct: The Bonded Warehouse (BW) accused the 4 Operators of exclusionary conduct, as they start charging a fee, named TLC (or THC₂), in order to handle and deliver containers to Bonded Warehouses.

POs have adopted a partial vertical integration strategy, offering storage services to importers. Therefore, POs have become a new competitor for the non-integrated bonded warehouses. BWs must pick

up the containers at the POs in order to clear the cargo, store and deliver the imported goods to the customer. BWs have accused the PO of using the TLC to exclude non-integrated BWs through price discrimination and double charges (raising rival's costs). According to the BW, the box rate paid by the shipping company to the POs included the delivering services up to the terminal gate. BWs argue that the TLC is a second and undue charge for the same cargo handling service already paid by the shipping companies within the box rate (explaining the name THC2).

The BWs complaint could be interpreted as an exclusionary conduct based on the strategy of raising rivals cost. BW accused PO of using price discrimination to exclude rivals in the warehouse business.

In order to define the conduct as exclusionary the following questions should have been asked: a) are there market forces that disciplines the TLC or THC2?; c) is there incentive for the PO to exclude non-integrated warehouses? d) Is the charge of the TLC a strategy strong enough to exclude a rival that is equally efficient or more than the integrated BW?; e) is there any harm to costumers, or only to rivals?

The defendants allegations: PO alleged that the charge of TLC was a lawful conduct for three basic reasons: a) TLC was charged to cover the costs not related to services rendered to shipping companies, covered by the box rate; b) competition in the markets of freight shipping and handling on one hand and storage and customs clearance services on the other hand were strong enough too discipline TLC, therefore there was not dominance in any of the markets; c) the vertically integrated BW are more efficient than non integrated BW, therefore the increasing market share of integrated BW is the outcome of market forces in operation. In total, defendants argue that there is competition on the merits in the storage market.

2.1 *The proofs provided by the defendants and CADE's analysis:*

TLC reflects costs and there is no price discrimination. Three expert opinions were brought by the largest defendant. The first was a report of an independent auditing company, which showed the costs involved in segregation, and immediate delivery of containers to non-integrated BW. The report concluded that there are higher costs involved in this operation compared with integrated BW operations, due to changes in operational routines and allocation of more resources to immediately deliver ship's load to non-integrated BW. The two other opinions used the data collected by the auditing firm. The first concluded that the TLC was lower than the cost and the second concluded that there was no discrimination between the non-integrated and integrated warehouses. Two additional opinions were brought by other defendant and showed that was no difference in costs to attend the own warehouse or the non-integrated and that the charged TLC was the same no matter who will store the cargo.

CADE's commissioners found inconsistencies in the cost reports and a clear bias to overvaluation of average costs. It was clear that there was no relationship between TLC and costs behaviour. CADE also found different prices for different warehouses not justified by costs. Based on these evidences, the commissioners concluded that TLC could have been used to discriminate or raise the rivals' costs. Notwithstanding, it should be shown that the PO had market power; incentive to exclude rivals and that the strategy would harm their costumers, the importers.

TLC was disciplined by the competition in the upstream and downstream markets and there was no incentive to forward integration and exclusionary practices in the downstream market. The defendants argued that there was fierce competition in the warehouse market and as a consequence, no economic profit could be collected through forward integration. There were, at least 14 non-integrated BW and no barrier to entry or exit. Upstream, there are at least two shipping companies operating in each terminal. As the importers can change the shipping company, they could negotiate the best THC. On the other hand, the importers can change the warehouse based on a price basis. According to the defendants, if the PO charges a high TLC, the shipping company would change of terminal looking for a better commercial condition. As

a consequence, the OP strategies are contestable and there is no dominance to support exclusionary downstream strategies.

Notwithstanding, CADE concluded that there were incentives for the PO to forward integrate and to raise rivals cost in order to discipline the downstream competition among competitors, even without their exclusion, based on the following reasons:

- *Upstream Competition does not contest TLC.* As shipping companies do not pay the TLC, they have no incentive to change the terminal in order to minimize this cost. Moreover, shipping companies do have market power to not allow the PO to charge high box rates.
- *Importers pay for bonded warehouse services, whose price includes the TLC.* However importers do not discuss TLC with the port terminals where BW has to pick up the containers. The defendants argue that this is a repeated game and that the BW would change terminal reacting to a high TLC. The outcome would be a TLC regulated by the marginal cost of containers handling and no economic profits for the PO. CADE concluded that this was not the case because only the largest Port Terminal, Santos Brazil, has enough area to grow in the storage market. The others could increase their profits following the leader price, exploring their total capacity. This explains why all four terminals charge TLC and why the prices have converged. As a consequence the BW cannot benefit from a TLC competition.
- *There is no free entry and exit in the downstream market.* On the one hand, the BW depends on the Customs permission to operate and this permission is given by a bidding process that is not opened in a regular and frequent basis. Moreover, the permission cannot be transferred to another warehouse. On the other hand, there are fines to be paid due to services interruption. Therefore, economic profits would not be contested by a free entry process. If the vertically integrated PO could discipline the competition downstream, they could collect this economic profit. PO can use the TLC to regulate rivals costs in order to make profit in the storage services. As a consequence there are incentives to vertically integrate and to adopt unfair strategies.
- Vertically integrated warehouses are more efficient and the outcome would be larger output and lower prices what would benefit costumers. In order to support this argument, an economic study was brought, based on the Salinger model (1988)⁴.
 - The result of the simulation based on Salinger model lead to the conclusion that there would not be welfare loss in a completed Bonded Warehouses vertical integration and that non-integrated Bonded Warehouses would be excluded from the market due to competition on the merits and not due to exclusionary conducts. However, the simulation was based on very strong hypothesis about consumers and firms' behaviour, which were not explicitly discussed on the economic report brought in by Port Operators. In this sense, its conclusions about welfare loss were very fragile to be taken into account by CADE decision.
 - For instance, Salinger considers that both intermediate (cargo handling service) and downstream products (storage service) are homogeneous products. Nevertheless, that is apply to the concrete situation. There was enough information brought in during the investigation, showing that services offered by different Bonded Warehouses are very distinct: integrated warehouses do not handle dangerous cargo and most of them do not operate refrigerated containers. Moreover, non-integrated BW in different locations can better attend the importer needs.

- A crucial assumption of the model is a linear demand function in the downstream market. However, there is no test or indication that this characteristic would apply to the concrete case. Furthermore, full vertical integration would be a possible result only if the PO had no capacity constraint, what is far from the reality. Last, the simulation was based on costs data that are not accurate.
- In short, the welfare analysis made by simulation based on Salinger's model did not reflected essential aspects of the case. Then, CADE could not accept it as evidence that vertical integration is the most efficient governance structure in this market and that the current situation reflects competition on the merits.

CADE concluded that there would be incentives and the instruments to adopt exclusionary conduct in the storage market, but it should be demonstrated that there was harm to rivals and costumers still.

The most important indication of the harm to rivals is that despite the huge increases in port operations productivity after privatization and a corresponding decrease in the box rate, the TLC has consistently increased, squeezing the margin of non-integrated bonded warehouses. According to the plaintiffs, many of them have not exit the market due to fines that have to be paid for interrupting the permission contract.

The TLC can and did vary for different BW, irrespective of costs associated to handling and forwarding the containers⁵. Port Operators did not present convincing justifications for this fact, what suggests that the objective of TLC is to regulate final price of cargo storage, keeping the desired level of PO economic profit. It is important to add that the Port Terminal representatives affirmed that the only activity that guarantees economic profits is the storage!! And, that they would increase the TLC if there were no case in progress.

Therefore, using the TLC, PO can preclude the transference of productivity gains to the importers (costumers). It is worth mentioning the importance of infrastructure costs for Brazil's economic growth.

CADE's decision. CADE convicted the four Port Operators of restraining free competition, controlling relevant market and abusing dominant position (article 20, I, II and IV of Law No. 8884/94) through the practices of limiting market access by other companies and posing difficulties for establishment, operation or development of a competitor company (article 21, IV and V of Law No. 8884/94).

3. Conclusions

The competition on the merits concept is something that is still very incipient in Brazil. As said, CADE has never taken a decision that explicit the concept "competition on merits". As a matter of fact, it can be said that there are not enough decisions in order to reach a definition under jurisprudence. The very few antitrust cases dealt by the Brazilian judiciary do not also allow building a definition. However, the number of cases in what the idea of this concept has come up is growing up, as it can be noticed by the different analyses made on the Paiva Piovesan/Microsoft case (when the aggressive conduct adopted by Microsoft was not considered illegal) and the Microsoft/TBA (condemned by discriminatory practices).

In terms of standards to proof an illegal conduct, the main methodology is, as seem by Article 20 of Law 8,884/94 and CADE's Ordinance nr. 20) the evaluation of the effects of the practice (on consumer and social welfare), with the analysis based on economic theory having an important role in the conclusions. The Port Operators case has illustrated how the Brazilian competition authority addresses the issue of separating aggressive competition from exclusionary practices. Although we do not have a formal

provision apply, some criteria have been adopted in a regular basis. For instance, the identification of dominance, the incentive to adopt the conduct and capacity to accomplish the strategy and the harm to rivals and costumers or consumers. However, the multiple criteria adopted in the PO case are not present in all cases that involve abuse of dominance.

One of the main challenges that the competition authority faces to identify competition on the merits is the asymmetric and lack of information. Cost structures and prices are not transparent and the information comes from the defendants as a general rule. Furthermore, details of how the market dispute occurs are rarely well understood and needs to be incorporated into de analysis. Last, but not least, proofs have to be strong enough to be upheld in the Judiciary.

Box 1.

The Microsoft/TBA case, ended in 2003, was an example of a case that indirectly deals with the competition on the merits definition on its conclusion. TBA Informática Ltda. is a Microsoft's Large Account Reseller (LAR) and it was the only company entitled to selling Microsoft products for Federal Government in Middle West Region of Brazil. TBA had a kind of exclusivity of reselling Microsoft products for Federal Government in this area and this had consequences for bidding at purchases of the government, who had only one firm to buy for. This exclusivity, nevertheless, was based on criterions Microsoft have built to accredit his resellers all over the country, to which TBA was the only firm that complied with. In fact, the defence alleged that this is a worldwide Microsoft's practice.

IOS Informática Ltda., a competitor of TBA, alleged that these criterions were manipulated in the geographic relevant market of Middle West region in order to make TBA the only LAR in this area, mainly because governmental purchases. IOS complained yet that the selling of Microsoft products to Federal government has impacts on technical assistance post-market, once the Federal Government's contracts with TBA predicts that the technical assistance for Microsoft products was bought together with the products in itself, preventing another bidding at an auction for buy it.

The whole case's discussion, then, involved the analysis of the right of Microsoft to establish such criterions, once they have a great impact on the structure of the market for software licensing as well as on technical assistance post-selling market. In theory, establishment of the criterions could be something legitimate for Microsoft business, despite its negative effects on competition.

Additionally, it is important to describe two elements: (i) if Microsoft have only one exclusive distributor, no bid was necessary to be carried out for governmental purchases; and (ii) the evidence that the there were no efficiencies related to the practice is that Microsoft and TBA tried to make the same practice of exclusivity for governmental purchases in other places where Microsoft had another distributors. If the criteria applied only led TBA as exclusivity distributor for governmental sales, no bid was necessary.

Nevertheless, particular aspects of the case led to the conclusion that Microsoft did manipulate the criterions designed to accredit resellers in order to make TBA the only LAR in Middle West Region. Microsoft and TBA were convicted of violation of the economic order.

Box 2

A firm called Paiva Piovesan Engenharia e Informática Ltda. charged Microsoft for tying its Money 97 software into the Microsoft Office for Small Business (MOSB), a suite aimed to attend small firms needs. For Paiva Piovesan enterprise, the tying of Money into MOSB was an anticompetitive practice because it will exclude all other financial applicative producers from the market due to the fact that consumers, buying MOSB, would already have financial software in their computers and then the size of the market for other producers would be squeezed. Microsoft alleged that the inclusion of Money in MOSB was only a strategy to introduce this financial applicative software in the Brazilian market and it was not an anticompetitive conduct delineated to exclude or foreclose rivals from the market.

CADE accepted the argument of Microsoft, as a reasonable economic reason for the conduct. Focusing on the effects, CADE characterizing the practice not as a tying but as a strategy of bundling. Based on an economic research about software market, CADE concluded that the marginal cost associated to putting another applicative software into a suite is near zero and that bundling is a perfect rational conduct to be adopted in the software market. Beyond that, the analysis of the market concluded that the practice did not lead to rival's exclusion. On the contrary, at the time of the decision, Paiva Piovesan was the biggest player in the financial applicative software market and Money was not commercialized in Brazil anymore. Then, CADE decided to file the case and not convict Microsoft, understanding that bundling was a legitimate practice.

NOTES

1. FOX, Eleanor, What is harm to competition? Exclusionary Practices and Anticompetitive Effect”. Vol. 70 Antitrust Law Journal 372.
2. Santos Port is one of the most important ports in Brazil and is strategic for Brazilian international trade.
3. Handling, discharge, clearance and warehousing services.
4. Salinger’s model (1988) takes the number of firms in the market and the number of vertically integrated firms as exogenous variables, before and after a presumed operation that concentrates the market. The endogenous variables are the variation in the mark up and in the quantity
5. In accordance with port operations’ legislation, there are three types of non-integrated Bonded Warehouses: EADIs (“*Estações Aduaneiras do Interior*”- Countryside Customs Agency), TRAs (“*Terminais Retroportuários Alfandegados*” – Warehousing and Customs Clearance Terminal) e EAFs (“*Estações Aduaneiras de Fronteira*” – Border Customs Agency) In fact, EADIs were charged with higher level of TLC than other non-integrated Bonded Warehouses.

LITHUANIA

The Law on Competition of the Republic of Lithuania prohibits abuse of a dominant position. The prohibition can be found in the Article 9 of the law and it is very similar to the Article 82 of the EC Treaty:

Article 9. Prohibition to Abuse a Dominant Position

It shall be prohibited to abuse a dominant position within the relevant market by carrying out actions which restrict or may restrict competition, limit without justification the possibilities of other undertakings to act in the market, or violate the interests of consumers, including:

1. direct or indirect imposition of unfair prices or other purchase or selling conditions;
2. limitation of trade, production or technical development to the prejudice of consumers;
3. application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage;
4. making the conclusion of contract subject to acceptance by the other party of supplementary obligations which, by their commercial nature or usage, have no connection with the subject of such contract.

Despite the fact that substantive norms concerning the prohibition of the abuse of a dominant position are very similar, the national case law in Lithuania is much less developed and at this time the Competition Council is much less constrained by the national case law than competition authorities in some other countries. Nevertheless, the Competition Council and the national courts usually take into account the EU case law even when only national law is applicable. Article 1 of the Law on Competition states that “[t]his Law seeks for the harmonisation of the Lithuanian and the European Union law regulating competition relations.” Although the exact meaning of this statement could be interpreted differently the present consensus is that the Competition Council and the national courts should always pay attention to the EU case law.

So far the approach taken by the Competition Council when investigating the cases of the abuse of dominance used to be very similar to the one applied by the Commission. Therefore many critical remarks and conclusions presented by John Vickers¹ and Alberto Heimler² with respect to the principles determining the types of conduct by a dominant firm that fall outside of the acceptable area (competition of the merits) apply not only to the cases decided by the European Commission but also to the ones decided by the Competition Council.

Nevertheless, the extent of the obligation to take the EU case law into account is ambiguous. The Competition Council agrees that a dominant firm “has a special responsibility not to allow its conduct to impair undistorted competition”³, according to the principle formulated by the ECJ in *Michelin v Commission*. However, the Competition Council also tries to pay the utmost attention to the principle that a dominant firm which “defeats” a competitor because of its superior economic efficiency should not be condemned⁴.

The Competition Council of the Republic of Lithuania completely agrees that a notion of “competition on the merits” should be given a more precise meaning. A test of an equally efficient competitor and/or consumer welfare test should be the guiding principles when deciding which type of competition is on the merits and which is not. The rest of this contribution to the roundtable will be based on the case study of the particular investigation conducted last year.

1. The investigation concerning possible violation of Article 9 of the Law on Competition by the leading brewery *UAB Svyturys-Utenos alus*

In 2003 the Competition Council opened the investigation concerning possible infringement of Article 9 of the Law on Competition by the leading brewery *UAB Svyturys-Utenos alus* after having received complaints from the rival breweries, that is *AB Kalnapilio-Tauro grupe*, *AB Gubernija*, *AB Ragutis* and one of the leading retail chains *UAB Norfos mazmena*. The alleged violator of the law was and still is the leader among the breweries in Lithuania. According to the research conducted by ACNielsen in Lithuania in 2004, 96% respondents think that the beer produced by *UAB Svyturys-Utenos alus* is the best local beer. In the segment of premium beer sold in hotels, restaurants, and cafes (further – HoReCa) *UAB Svyturys-Utenos alus* had 74% share in 2003. *UAB Svyturys-Utenos alus* share in the overall beer sales was slightly less than 40% in the same year.

Rival breweries claimed that the *UAB Svyturys-Utenos alus* offered supply contracts with loyalty discounts for the participants of HoReCa market that resulted in exclusionary effects. They alleged that because of such contracts *UAB Svyturys-Utenos alus* was able to strengthen its dominant position, inflict harm on competitors and reduce consumers' choice.

During the investigation the Competition Council thoroughly examined the supply contracts and the overall market situation. It turned out that *UAB Svyturys-Utenos alus* indeed offered discounts to HoReCa participants in the contracts concerning sales promotion and advertising services. A typical contract contained a clause that a buyer of beer who accepted obligation to perform sales promotion and advertising services could receive an advance payment for those services from *UAB Svyturys-Utenos alus*. The final settlement concerning the payment for the services provided would be calculated on the basis of the total volume of beer purchased by the retailer from *UAB Svyturys-Utenos alus*. The brewery and the buyer agreed to calculate the monthly payment M_i for actually performed services according to the formula $M_i = d(V)V$, where V = volume of beer purchased during the month (in thousands of litres), $d(V)$ = payment rate that depends on V . From the table we can see that the payment rate schedule could be approximated by $d(V) = 100V$ as long as $V \leq 5$.

V , in thousand litres	$1 < V \leq 1.5$	$1.5 < V \leq 2$	$2 < V \leq 2.5$	...	$4.5 < V \leq 5$	$V > 5$
d , LTL	100	150	200	...	450	500

At the end of the contract the parties agreed to settle their claims according to the formula:

$$S = \sum_{i=1}^T M_i - A, \text{ where } T \equiv \text{contract duration, } A \equiv \text{advance payment. When } S < 0, \text{ the buyer}$$

had to pay the brewery $F = 2(A - \sum_{i=1}^T M_i)$ or to agree with the contract extension.

It is easy to see that when a retailer doesn't sign an agreement on sales promotion and advertising services he pays pV for V volume of beer, where $p \equiv$ constant price of a thousand litres. When a retailer signs an agreement but does not receive an advance payment for the alleged services, he pays an average monthly payment $pV - d(V)V = [P - d(V)]V$, where V = average monthly volume of beer. In such a case $d(V)$ is just a quantity discount because it is related only to the bought volume of beer and doesn't depend

on actually performed advertising or sales promotion services⁵. The effective purchase price of beer was $p - d(V)$ and it declined with the volume, therefore it was a clear case of non-linear pricing.

When a retailer not only signs an agreement but also accepts an advance payment and fulfills his contractual obligation he pays in a year $12pV + A - 12d(V)V - A = 12[p - d(V)]V$, where $V \equiv$ average monthly volume of beer. It is important that he can receive discounts only in some period T_0 when $\sum_{i=1}^{T_0} M_i - A$ becomes positive. When a retailer is able to reach only such level of annual purchases that $\sum_{i=1}^T M_i - A$ is negative, he has to pay a fine $F = 2(A - \sum_{i=1}^T M_i)$. Therefore in a year he pays $12pV + 2(A - 12d(V)V) - A = A + 12[p - 2d(V)]V$ or he has to agree on the contract extension with the remaining liability F . Thus the effective monthly purchase price when a retailer had to pay a fine was $\frac{A}{12V} + p - 2d(V)$.

Assuming that $d(V) = 100V$, the effective price for all retailers fulfilling contractual obligations is $p - 100V$ but doesn't fall below $p - 500$ for those exceeding $V = 5$. It is also possible to calculate a break-even volume⁶ $V_0 \approx 0.029\sqrt{A}$ for a retailer who accepts an advance payment. A retailer with a very small capacity, for example $V = 1.1$, would be induced to make all his purchases from the brewery if he accepted an advance payment⁷ of 1452 LTL or 420 EUR. When such a capacity constrained retailer fails to purchase V_0 by an arbitrary small amount he has to pay the effective purchase price $p - 100$. However, when he purchases only $V_0/2$, he has to pay the effective price $p + 110$.

The above analysis allowed to conclude that the offered contracts had the built in loyalty inducing incentive structure. However, the Competition Council examined a large number of contracts and found only an insignificant number of signed contracts with advance payments. There were no cases that a retailer had to pay a fine during the investigated period. The Competition Council concluded that the contracts had an abstract ability to create a lock-in effect for a retailer who accepted an advance payment and constrain his abilities to change a supplier. However, there was no ground to believe that they had any significant effect on competition. In 2003 *UAB Svyturys-Utenos alus* sold only 4.45% of all its beer in the HoReCa market through the retailers that accepted advance payments. Absolute majority of HoReCa participants stated that they prefer to buy *UAB Svyturys-Utenos alus* production because of the preferences of the customers. Finally, the Competition Council took into account the fact that the market share of the alleged violator of the law significantly declined during the investigated period.

Nevertheless, the question remained whether the quantity discounts were objectively justified by the cost savings or by provision of actual services by the retailer. The quantity discounts also could have been simply a loyalty-inducing instrument. It was obvious that discounts offered by *UAB Svyturys-Utenos alus* were not individualized target discounts. However, they would have been if advance payments had been individually imposed on each retailer. In the analysis of the discounts the Competition Council decided that an equally efficient competitor should be able to match the offer made by *UAB Svyturys-Utenos alus*. The situation in the Lithuanian beer market could be characterised as an oligopoly, however, effectively competitive. The market is growing, though prices are not. Shares of the major market players are not stable. The main competitor of *UAB Svyturys-Utenos alus* is of similar productive capacity and doesn't fall behind in technological innovations. Without going into a deep economic analysis the Competition Council concluded that at least the main rival was able offer comparable quantity discounts and that the benefit of such aggressive pricing was passed to the final consumers.

Therefore the only competitive concern was the penalty payment that a retailer had to pay to the brewery when he accepted the advance payment but failed to reach a break-even volume of purchases. During the investigation phase the Competition Council raised its concerns and the investigated party agreed to modify the contracts and waived the claims for the penalty payments imposed upon retailers. *UAB Svyturys-Utenos alus* also assumed an obligation to refrain from imposing such conditions in the future. The Competition Council also took into account that investigation did not find any significant anticompetitive effect of such clauses but only an abstract possibility and decided to terminate the investigation. One of the rival companies that submitted the original complaint appealed the decision of the Competition Council to the Court. At present time only some procedural questions but not the substance are being investigated.

NOTES

- 1 John Vickers, "Abuse of Market Power," Speech to the 31st conference of the European Association for Research in Industrial Economics, Berlin (3 September 2004), available at www.offt.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf
- 2 Alberto Heimler, "Pricing Below Cost and Loyalty Discounts: Are They Restrictive and If So When?," monograph (2004), available online at <http://ssrn.com/abstract=634723>.
- 3 Case 322/81 [1983] ECR 3461, [1985] 1 CMRL 282.
- 4 "Article 86 covers practices that are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on trader's performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market." Case 322/81 [1983] ECR 3461, [1985] 1 CMRL 282 at para 70.
- 5 HoReCa participants actually performed some sales promotion and advertising services. However, they consisted mostly of informing customers about a possibility to participate in a lottery when buying a particular brand of beer. A winner could receive a prize ranging from a free beer to a trip to some important sports competition. Nevertheless, the discounts were directly determined by the volume of the purchases and not by the efforts of sales personnel.
- 6 A break-even volume can be found from the condition $A - 12 \cdot 100V \cdot V = A - 1200V^2 = 0$.
- 7 $A = 1200 \cdot 1.1^2 = 1452$

ISRAEL

1. The Israel Antitrust Authority's Perception of the Term

The Israel Antitrust Authority (hereinafter: "IAA") views the term "competition on the merits" as an overriding principle in light of which one should examine monopolies' conduct. This principle clarifies that promoting innovation, improving products, upgrading the distribution and marketing channels or reducing prices cannot and should not be condemned by competition law, even if exercised by a monopoly. At the same time it clarifies that monopolies' conduct (and even arrangements and mergers) that block, narrow or significantly impede the possibility to compete on the merits should be condemned and prohibited.

The Restrictive Trade Practices 5748 - 1988 (hereinafter – "the Antitrust Law" or the "Law") defines specific causes, such as tying and discrimination, which justify condemnation. To this end, the Israeli Law adopted Article 82 into its wording (Article 29A).

"Competition on the merits" is not an autonomous cause in the Israeli Antitrust Law on which one can base a legal proceeding against a monopoly (such as in the case of tying). Rather, it serves as a primary criteria that could assist the agency in deciding whether a monopoly exercised an unlawful practice or whether the monopoly's actions have a business justification (delineating a distinction between good and bad).

It is very difficult, and even impossible in some cases, to reveal the motive or intention behind a monopoly's conduct or specific practice. An understanding of whether the competition was "on the merits", i.e., whether the specific conduct granted the monopoly a legitimate competitive advantage, can assist the agency in categorizing the conduct as unlawful or legitimate. Thus, the agency is put in a better position to identify whether the conduct is merely exclusionary or, rather, it reflects genuine competitive efforts and enhances efficiency.

It is the IAA's view that "competition on the merits" is to a monopoly's conduct what "rule of reason" is to restrictive arrangements.

The dilemma the IAA struggles with is not whether the standard of "competition on the merits" is relevant to the analysis of monopolies' conduct. The answer to this is clearly positive. Rather, the dilemma concerns the methodology according to which the agency and courts should apply this criteria.

Israeli adjudication in the competition field is relatively young. It has not been clearly decided yet whether the criteria should be a single stage test or a twofold test: first examining whether the monopoly lacks any "business justification" based on "competition on the merits" that explains its so called "exclusionary conduct" and then proving that the monopoly's conduct also has a consequential component, meaning that the conduct is expected to drive the monopoly's rivals out of the market (or that a reasonable probability of doing so exists). To date it seems that the basic trend is towards a twofold test, as the Yedioth Ahronoth case exemplifies.

1.1 Implementation: The Newspaper Monopoly – “Yedioth Ahronoth” - Case

In the “Yedioth Ahronoth” (hereinafter: “Yedioth”) litigation, the IAA asserted that a monopoly did not compete on the merits, and sought an injunction that would enable competition on the merits in the local newspapers market.

Background: The Hebrew daily newspaper Yedioth was declared a monopoly by the General Director in 1995. (The declaration was renewed in 1999). The Hebrew daily newspaper market in Israel is highly concentrated and features high barriers to entry (import is not relevant in this case). At the time, according to a survey that was conducted in 1996, 70% of the readers read Yedioth on weekends.

The litigation proceeding: In 1996 the IAA initiated litigation proceedings against Yedioth, alleging that it engaged in unlawful monopolistic practices in order to strengthen and widen its monopolistic position in the daily Hebrew newspaper market in Israel.

The IAA referred specifically to 4 practices, that it considered harmful to competition: a. Engagement in exclusivity arrangements with selling points; b. Provision of fidelity rebates to selling points; c. Predatory pricing; and d. Attachment of local newspapers of its own publication into the national monopoly newspaper and instruction to sellers to sell both as a single product.

The IAA alleged that the attachment of the local newspapers (which are usually distributed on Fridays) to the monopoly newspaper is unlawful “leveraging” and “tying”. Concurrently, the IAA claimed that the attachment granted Yedioth an unfair automatic advantage over its competitors since it did not compete on the merits.

The use of the term: According to the allegation, the local newspaper was not required to prove its merit, since its attachment to the national monopoly newspaper gave the local newspaper the automatic high circulation rate of that monopoly. Thus, the local newspaper almost automatically received market power and a substantial advantage over its competitors, but that advantage was not earned by competition on the merits, namely by introducing a superior product, but rather by receiving a “shelter” from the “mother monopoly” (a nation wide newspaper). With no competitive endeavor on its own behalf, the local newspaper affiliated with the monopoly and succeeded in getting into 70% of the readers’ houses, thereby leaving the competitors of Yedioth behind.

In the General Director’s written summation, it was argued that leveraging negates “regular competition”, i.e., the type that is on the merits. Different forms of competition were given as examples to competition on the “merits”. Among these were competition on price, quality (for example: better reporters who write better articles), service, terms of provision for sellers, and availability. It was also argued that the attachment of the local newspaper deprived the consumer of the ability to choose the optimal combination of the two products and thus promoted Yedioth’s position in the local newspaper market.

The General Director’s summation expressed the view according to which the Law applies also in cases in which the monopoly exploits its market power in order to gain an unfair and artificial advantage in the “other” market and by raising barriers to entry which harm its competitors, even if these practices are not accompanied by monopolization efforts of the “other” market.

The decision of the Antitrust Tribunal: In its decision, the Antitrust Tribunal did not specifically analyze the case of “competition on the merits”. It focused on analyzing the allegations concerning leveraging and tying.

The Tribunal adopted the thesis according to which one should prove harm to the public in order to justify the issuance of instructions against a monopoly. The Tribunal, in this case and in former decisions, adopted the criteria of reasonable possibility of actual harm to competition.

To this end, the Tribunal found, based on the opinion and quantitative findings of the expert economist who it appointed, that there was no evidence of harm and surely no evidence of a substantial likelihood that Yedioth will succeed in driving its competitors from the market and monopolize the local newspapers market based on that practice. Therefore, it was decided that no proof of substantial harm to competition and the consumer, by collecting monopolistic prices, was demonstrated.

1.2 *Use of Different Tests in Other Cases*

As seen in the Yedioth case, the IAA did not employ or suggest a didactic analysis of the “competition on the merits” doctrine.

But a review of the IAA’s cases shows that there are cases in which it implements some of the tests mentioned in the Secretariat’s paper, (though not specifically referring to “competition on the merits”).

1.3 *The Retail Chains and Dominant Suppliers Case - An Example of the Use of the “Equally Efficient Firm Test”*

In the “General Director’s Position Regarding Restrictive Practices between Dominant Suppliers in the Food Industry and Three Large Retail Chains” (published on January 5, 2005), the General Director applied the “equally efficient firm” test.

A brief summary of the facts: For a relatively long period, the IAA engaged in the exposure, investigation and legal examination of various restrictive arrangements between 14 dominant suppliers and the three large retail chains in Israel.

Evidence of violation of the Antitrust Law was found, including one practice concerning bonuses given by dominant suppliers to retail chains for the attainment of sales targets.

In his position, the General Director expressed the view that such agreements are legal manifestations of a marketing technique through which the supplier gives the retailer an incentive to increase the latter’s marketing efforts of the supplier’s product. This marketing technique may be legitimate. However, when a powerful supplier practices this technique, there is reason to believe it attests not to the existence of competition, but rather to an attempt to decrease or eliminate said competition.

In accordance, this practice may increase the market share of the dominant supplier at the expense of his competitors. This “discount” is not based on uniform objective parameters for all retailers, but is rather tailored to the dimensions of each client and directed towards a certain portion of the individual sales volume of each retailer. Clearly, therefore, competing suppliers cannot approach the retailer with counter-offers of similar value, since their sales volumes are far smaller than those of the dominant supplier. The bonus system fully exploits the existing asymmetry between dominant suppliers and others, and places the competitors in a position of inferiority, with no regard to their relative efficiency.

In this connection, the General Director clearly stated that bonuses schemes that enable the monopolistic supplier to preserve its position and injure its rivals’ competitiveness, regardless of their relative efficiency, should be deemed unlawful, even applying the most tolerant approaches towards monopolies.

In order to insure that the parties employ only legitimate bonus schemes, the General Director set a number of directives. These guarantee that benefits will be given as a reduction of the purchase price (which increases the probability of its “trickling down” to the consumer), that it shall be given only for units beyond the goal (and not for the existing and assured sales of the dominant supplier), and that it shall be given for each of these units.

Conclusion

Although competition on the merits was not discussed thoroughly in the Israeli Antitrust Tribunal decisions, the IAA addresses this concept extensively and views “competition on the merits” as an overriding principle; an aid test to distinguish legitimate practices of a monopoly from those that should be condemned.

Generally speaking, competition on the merits is a useful concept in examining practices and evaluating the possible consequences from a certain conduct: will the competitors have a fair chance to compete on the merits or does the practice prevent such competition? In this respect the principle is also relevant to the analysis of mergers and restrictive arrangements.

This test is of special importance as it exemplifies the core values of competition law: competition laws were not meant to protect competitors from aggressive competition, but rather to remove barriers and impediments that do not allow these competitors to compete on the merits - by introducing better products, enhancing innovation and reducing prices.

ANNEX A

THE NORMATIVE FRAMEWORK

1. The Antitrust Law consists of three main chapters, two of which concern the creation or strengthening of market power, i.e. the restrictive arrangements and mergers chapters, and the other, the monopoly chapter, concerns the prevention of abuse of dominant position. This paper focuses on the latter.

2. According to Section 26(a) to the Antitrust Law, the concentration of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of a service, in the hands of one person shall be deemed a monopoly. The General Director is empowered to declare a body as a monopoly once its market share exceeds 50%.

3. Section 29A(a) of the Law prohibits the monopoly from abusing its power, and without derogating from the general nature of the prohibition, also lists specific circumstances that establish its violation:

“29A(b)...(1) Determination of an unfair buying or selling price of an asset or a service over which a monopoly exists;

(2) reduction or increase in the quantity of the assets or the scope of the services offered by a monopolist, not within the context of fair competitive activity;

(3) Establishment of different contractual conditions for similar transactions in a manner which is liable to accord certain customers or suppliers with an unfair advantage vis-a- vis their competitors;

(4) Stipulation of a contrat regarding an asset or a service over which a monopoly exists with conditions that, by their nature or according to accepted trading practices, are unrelated to the subject matter of the contract...”

4. In addition, Section 29 prohibits a monopoly to unreasonably refuse to provide an asset over which a monopoly exists.

5. Section 30 vests the General Director with the power to give the monopolist instructions.

6. One should bear in mind that the existence of a declaration is not an essential condition for the application of the Antitrust Law, nor even for the application of Section 29A. However, the fact that a declaration does exist that a body is a “monopoly” – a declaration that has been published - establishes a prime facie presumption of its existence in any legal process and strongly reinforces the link between the act of deception carried out and the Antitrust Law together with the objectives which the Law is intended to achieve.

ARTICLE 82 AND SECTION 2

by Barry E. Hawk¹²

The application of antitrust law to dominant firm behavior raises fundamental legal, economic and public policy issues, such as assumptions about erosion of market power, the ability of authorities and courts to distinguish competitive from anticompetitive practices, disincentives to investment and efficiency-enhancing business conduct from overly broad legal rules and tensions between short-term consumer benefits and long-term (structural) harms. Application of antitrust law to dominant firm behavior can also implicate the highly difficult task of reconciling competing/conflicting policy considerations, e.g. tensions between consumer welfare/efficiencies and fairness.

I have been asked to provide a comparative analysis of the conduct element in Article 82 and its U.S. counterpart section 2 of the Sherman Act ("abuse" and "monopolising" conduct). Section 2 and Article 82 present two differing models. For example, Article 82's condemnation of excessive prices contrasts starkly with the U.S. courts' rejection of such a condemnation.

I offer five propositions around which I organise my remarks.

1. **The texts of the statutes themselves offer little guidance in distinguishing acceptable (lawful) business conduct from unacceptable (unlawful) business conduct**

Section 2 has very general language ("Every person who shall monopolise") which is open to broad interpretation. Courts and commentators in the U.S. have struggled for more than a century with the difficult task of distinguishing acceptable conduct of a firm with monopoly power from unacceptable conduct. The standards have shifted and evolved over the years which should not be unexpected or abhorred. Although the present era of U.S. antitrust is dominated by efficiency considerations, consumer welfare analysis and judicial modesty, earlier periods were dominated (or at least greatly influenced) by populist attitudes toward large private firms.

Article 82 itself does not define abuse in general terms, but at first glance its non-exhaustive list of examples seems to provide more guidance than the text of section 2. For example, some underlying policy objectives are more easily discernible with respect to Article 82 such as fairness which is reflected in the example of "unfair trading conditions." But Article 82 has its own ambiguities. For instance, the examples include only so-called exploitative abuses and not exclusionary abuses (e.g., predatory pricing) or structural abuses (e.g. mergers and acquisitions that strengthen a dominant position).

2. **Both the community and the u. S. Courts have formulated general definitions of "abuse" and "monopolise" in the jurisprudence but these general formulations are largely conclusory labels which offer no firm guidance in hard cases involving competitively ambiguous conduct (like reduced pricing, refusals to deal and product innovations)**

The classic definitions of an Article 82 abuse distinguish "normal competition" from abusive conduct.³ This echoes early U.S. jurisprudence where the Supreme Court stated that acts not constituting "normal methods of industrial development" constituted unlawful monopolisation.⁴ But judgments and

decisions in both jurisdictions use "not normal" in a normative sense and not in the descriptive sense of aberrant, infrequent, atypical or peculiar. For example, acquisitions of competitors were condemned in *Standard Oil* and the Court of Justice in *Michelin* condemned exclusive purchase agreements as not "normal methods of competition" although such agreements are not aberrant or atypical either generally or in the oil and tire industries. But the courts have not provided criteria for the normative test. For example, are selective price cuts to meet new entry, adding new functionalities to a product and refusing to license, all of which may be "normal" empirically, "not normal" under some ill-defined legal definition?

The definitions of abuse in *Vitamins* and *Michelin I* also provide little guidance as to the kind of competitive effect (e.g. consumer harm in terms of price or output effects as compared with impairment of rivals, actual harm or future harm, etc) or the degree of the effects.⁵ Moreover, later Community judgments like *Michelin II*⁶ require no proof of competitive harm but appear to establish a "per se" rule for certain practices (fidelity rebates in *Michelin II*).

The classic definition of actual monopolisation under section 2 is the Supreme Court's 1966 decision in *Grinnell*: "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."⁷ But this test also provides little guidance (and no underlying normative theory) as to what is a "superior product" or "business acumen." As Professor Elhauge asks: "Why isn't it just good 'business acumen' to refuse to share one's superior product with rivals in order to drive them out of the market? . . . If a firm lowers prices whenever rivals enter the market in order to drive those rivals out and restore monopoly prices, is that succeeding by 'business acumen' or a 'superior product' if the lowered prices are above cost?"⁸

Assuming "willful" subsumes some kind of "intent" concept, it adds little to the analysis. U.S. courts generally infer "intent" from conduct and thus the finding of an [unlawful] intent to monopolise or exclude follows the determination that the conduct was unlawful. Moreover, evidence of intent is a vague and slippery concept.⁹ Evidence of an intent to achieve a monopoly or even to exclude rivals is inherently suspect (if not meaningless) in the sense that attainment of a monopoly (100 % of a market) is itself not unlawful and thus a subjective intention to attain a monopoly by "excluding" all rivals should not be evidence of unlawful conduct; in other words, only monopoly created (or maintained) through "bad" or monopolising conduct is unlawful and the focus of the inquiry should be (exclusively) on the determination whether conduct is undesirable and not on intent.¹⁰ Thus intent should not be part of the substantive test itself for unlawful monopolisation or abuse, i.e. any general test should not contain an intent element such as an intent to monopolise or harm competitors. This is not to conclude that all evidence of purpose should be rejected in principle. Such evidence should be limited, however, to two issues: 1) the likelihood of competitive effects and 2) asserted justifications for challenged conduct.¹¹

Under section 2 and despite *Grinnell's* reference to "willful," intent plays a lesser role with respect to recurring claims/practices (e.g. predatory pricing) where courts have developed specific rules (e.g. below cost rules and recoupment).¹² Courts have become familiar with the general class of allegedly unlawful conduct and apparently feel less need of "intent" evidence to understand the competitive effects of the particular conduct, i.e. evidence of intent is limited to ambiguous/ acts that courts lack experience with.

In addition to the classic definitions of Article 82 abuse and section 2 actual monopolisation quoted above, other cases speak in terms of "*exclusionary*," "*anticompetitive*," "*predatory*" and "*competition not on the merits*."¹³ These terms also provide little guidance because they offer no well-defined criteria for sorting out desirable from undesirable conduct.

The principal flaw of "*exclusionary*" is that all successful competitive practices that increase firm's market share "exclude" rivals. Offering higher quality products can "exclude" competitors; it is only in a perfectly competitive market (where there are no antitrust problems in the first place) that competitors do

not consider particular rivals. Professor Elhauge concludes: "The utter vacuity of this sort of standard is neatly illustrated by the fact that the same conduct - using above-cost price cuts to drive out rivals - has been labelled 'competition on the merits' in the United States but not 'normal,' competition' in Europe. Something is driving these conclusions, but it is not the determinate meaning of terms like 'exclusionary,' 'competition on the merits,' or 'normal.'"¹⁴

3. The inadequacy of the general definitions and conclusory labels above are reflected in their replacement by specific tests that have been developed for recurring challenged practices like predatory pricing

Both the EC and the U.S. courts have developed specific (albeit differing) tests to decide recurring claims. For example, the tests for predatory pricing under Article 82 and section 2 do not rely either on the classic definitions of abuse/monopolising conduct or on conclusory labels like "competition on the merits," "exclusionary," etc. Rather the courts have adopted tests specific to recurring claims/practices (e.g. below cost rules and recoupment for predatory pricing claims).

This raises the interesting question whether there is a unifying test or at least an underlying analytical framework capable of dealing with all the multiple and complex kinds of dominant firm conduct challenged as unlawful. For example, it is not clear that the specific tests for predatory pricing can be generalised to cover non-price conduct. As seen below, several unifying tests are now being hotly debated in the U.S.

4. Differing policy considerations, historical contexts and underlying assumptions (economic and juridicial) explain the generally greater scope of article 82 better than the general definitions and conclusory labels

It is politically correct in most jurisdictions today to place "consumer welfare/efficiencies" as the primary objective of competition law, including laws like Article 82 and section 2. The terms "consumer welfare" and "efficiencies" mask, however, deep differences in application and enforcement of those laws.

Despite affirmations of support for consumer welfare and efficiency, the U.S. and the EC take different approaches and emphases even when professing to consider consumer welfare/efficiency. The U.S. in the last several decades has made consumer welfare efficiency the paramount if not exclusive policy consideration. Accordingly, most of the currently debated U.S. formulations focus on efficiency/consumer welfare as their keystone. An exclusive focus on consumer welfare efficiency is difficult under Article 82 given the market integration and fairness considerations expressed in the Treaty.¹⁵

Historically, the EC notion of competition has been heavily influenced by the Ordoliberal or Freiburg school¹⁶ which advocates the "economic freedom" rationale.¹⁷ This rationale appears to underlie a "per se" approach to exclusive purchasing and fidelity rebates where no harmful effects need be proved (e.g. amount of foreclosure) and efficiencies/justifications are rejected in principle.

Many EC judgments and Commission decisions support "structuralist" tests for abuse that tend to take a long-run perspective. In other words, the EC tends to resolve the tension between the long-run versus short-run perspective in favor of the long-term i.e. protect present competitors despite short-run efficiencies in order to ensure that there will be competitors in the long-run ("there can be no competition without competitors"). The emphasis is on the long-run preservation of competitors without apparently rigorous inquiry into their relative efficiency. This emphasis on rivalry and long-run preservation of competitors fits nicely with the fairness consideration and the Ordoliberal approach.

Attitudes toward the relationship between markets and governments also are critical and compound the differences in economic approaches. In the U.S. there is deep skepticism about the efficacy of government antitrust intervention. The most recent expression of U.S. courts' modesty about their capabilities and their reluctance to take on a "regulatory" role is the Supreme Court's decision last year in *Trinko*.¹⁸

There also is deep skepticism in the U.S. about the feasibility of judicial intervention which would turn courts into public utility commissions in trying to determine "reasonable" or "non-abusive" prices, costs, etc. This judicial modesty strongly influences the application of section 2.

The scepticism about the efficacy of antitrust intervention, particularly through courts, does not appear shared by some interpreters of Article 82. The Court of Justice speaks of dominant firms having a "special responsibility" toward competitors and customers. This leads to a more interventionist or regulatory approach. As Professor Amato notes, Article 82 reflects a "European regulatory itch."¹⁹ The EC historically has been willing to accept the enduring dominant position of a firm but then "regulate" the firm's conduct under Article 82. This contrasts with the U.S. historical position which is more willing to attack and break up dominant firms which create or maintain their dominance through unacceptable means but which rejects an antitrust "regulatory" role under section 2.

Another significant juridicial assumption concerns deterrent effects. U.S. courts' have expressed greater concern with overdeterrence (false positives) and less with underdeterrence (false negatives).²⁰ There appears to be greater toleration of "hard" competition in the U.S. and greater sensitivity to efficiencies and possible disincentives caused by overly broad legal rules, although some question whether this threat of overdeterrence may be exaggerated.²¹ The disagreement about false positives and (over)deterrence of investment/efficiency enhancing conduct is fundamental. One highly useful project would be an empirical study of the effect of antitrust dominant firm rules on business innovation and performance.

U.S. courts also appear more willing to make the economic assumption that market power will erode in a shorter term and they hold a stronger belief in the self-correcting tendencies of markets. Many commentators contrast the U.S. with Article 82's historical context of state dominant firms with little to no prospect of erosion of market power.²² This explanation, however, does not fit many of the Article 82 judgments which have concerned private firms and not state enterprises, e.g., *Michelin I and II*, *Hoffman La Roche*, *United Brands*, *Commercial Solvents* and *Microsoft*.

"Fairness" no longer plays a prominent role under section 2. This contrasts starkly with Article 82 where fairness is expressly stated as a policy consideration in the Treaty. Indeed, all the examples of an abuse listed in Article 82 concern exploitative abuses which rest on fairness concerns. The most controversial application of fairness under Article 82 concerns "excessive pricing."²³ Little attention appears to have been paid to the disincentives from such a prohibition, perhaps not unreasonably on the assumption that most dominant firms were entrenched state (or state-protected) monopolists whose market power would not erode in the foreseeable future. The same historical context explains why transition and developing economies frequently apply abuse statutes as an instrument of price regulation.²⁴

5. Dissatisfaction with the general definition of actual monopolisation under section 2, the current emphasis on efficiencies and the concerns about over deterrence and judicial administration have led to a number of proposed tests

Dissatisfaction with the general definition of monopolising conduct, concerns about overdeterrence and judicial capabilities, and the current emphasis on efficiencies have prompted a number of other proposed tests for monopolising or abusive conduct. Debate about the appropriate test has intensified

among commentators and officials. At the risk of considerable oversimplification, they can be lumped into two general groups: 1) tests emphasising consumer welfare/efficiencies and 2) tests emphasising rivalry/structure. The following is a very brief tour d'horizon.

5.1 *Tests emphasising consumer welfare/efficiencies*

At present perhaps the most discussed tests are consumer harm, profit sacrifice, no economic sense and efficiency standards.

Consumer harm tests can usefully be distinguished from the other tests. First, consumer harm tests have attractions and flaws similar to those of the rule of reason under section 1 of the Sherman Act dealing with restrictive agreements. In contrast, the other tests --- sacrifice, no economic sense and efficiency tests --- are intended/hoped to provide a more focused and narrower analysis that is easier to implement by courts (ex post) and parties (ex ante).²⁵ Second, consumer harm tests focus on consumer effects or the market, while the other tests focus on the dominant firm.²⁶

a. *Consumer harm test*

Professor Vickers proposes a consumer harm test: there is an abuse only if challenged conduct has the effect of raising prices, restricting output, innovation or quality. The standard of proof here is critical, for example, must there be an actual or potential effect?²⁷

Professor Salop advocates a consumer harm test which focuses directly on anticompetitive effects on consumer welfare, that is, market prices and product quality, including price and quality effects from innovations.²⁸ Under a rule of reason-like fact-based analysis, conduct is unlawful if it reduces competition without creating a sufficient improvement in performance to fully offset the potential adverse effects on prices and prevent consumer harm.

Professor Hovenkamp offers the following test:²⁹ "exclusionary conduct" are actions that:

- (1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and
- (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits that the acts produce, or (2c) produce harms disproportionate to the resulting benefits."

Courts sometimes have articulated³⁰ a balancing/rule of reason test under section 2: the test first requires the plaintiff to establish "anticompetitive effect," which also harms "competition." If it does so, the burden of production shifts to the defendant, who can offer evidence of a "procompetitive justification." If the justification stands "unrebutted," plaintiff then must "demonstrate that the anticompetitive harm outweighs the procompetitive benefit."

One significant question is whether an efficiency justification is sufficient to make the conduct legal or must the efficiencies be "balanced" against the competitive harms? The U.S. decisions are mixed.³¹ One commentator concludes that there are few examples of courts actually engaging in any kind of balancing.³² For the most part, litigated cases turn on the absence of sufficient evidence of anticompetitive effects (inefficiencies) or of business justifications (efficiencies), including the D.C. Circuit in *Microsoft* which did not engage in balancing in any robust manner.³³

Critics like Judge Easterbrook³⁴ argue that courts are not competent to implement consumer harm tests given, among other problems, the difficulty in measuring the challenged conduct's (short-term) effects

on prices, output or product quality. Other critics argue that consumer harm tests overdeter (i.e. too many false positives) and that an additional test or screen is needed such as a profit sacrifice or no economic sense test (discussed below).

b. Profit sacrifice test

Another test is the profit sacrifice test: conduct that involves a sacrifice of short-run profits that would not be profitable unless a firm reaped long-run monopoly returns by excluding or disciplining rivals.³⁵ The costs and benefits of the challenged conduct to the dominant firm are weighed: conduct is unlawful if, but only if, it is unprofitable for the dominant firm but for the exclusion of rivals and resulting supracompetitive recoupment. The Department of Justice and the Federal Trade Commission advocated a sacrifice test as *amicus curiae* in *Trinko*.³⁶ Asserted benefits include a lesser risk of false positives and clearer predictable rules for courts and firms *ex ante*.

The sacrifice test has been criticised by a number of commentators³⁷ and, indeed, the Government may have retreated somewhat in its final brief in *Trinko*. Critics argue, among other, that: 1) the sacrifice test may not capture undesirable exclusionary conduct that does not entail cost sacrifices;³⁸ 2) the test may be overly inclusive in condemning conduct that enhances efficiency *ex ante*;³⁹ and 3) the test posits a hypothetical that makes its operation too subjective, difficult and unpredictable (e.g., choice of the correct benchmark price for analysis).⁴⁰ It should be noted that proponents of a sacrifice test (and the no economic sense test below) respond that their tests are easier to implement and are better able to strike an appropriate balance between overdeterrence and underdeterrence than the consumer harm tests.

A final complication is whether sacrificing conduct is sufficient or whether additional anticompetitive effects must be proved. For example, one proponent of a sacrifice test requires, in addition to proof of exclusionary conduct, proof that the conduct enabled the dominant firm to gain or maintain market power that it otherwise would not have had.⁴¹ Thus the test appears to operate more as a screen than a comprehensive (or unifying) standard.

c. No economic sense test

A variation of the sacrifice test is the "no economic sense" test.⁴² The U.S. Government advocated a form of this in its certiorari brief in *Trinko*: "conduct is 'exclusionary' or 'predatory' in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for its elimination or softening of competition."⁴³

The no economic sense test avoids some of the criticisms leveled against sacrifice tests. Where a dominant firm's conduct entails short-run profit sacrifice, the no economic sense test asks the further question why it is rational to make that sacrifice. Moreover, a short-run profit sacrifice is not necessary, because the anticompetitive gains from exclusionary conduct can be reaped immediately.⁴⁴

The no economic sense test has been criticised on several grounds, notably: 1) it focuses exclusively on the incentives of the dominant firm, largely ignoring the effects of its conduct on rivals or consumers;⁴⁵ and 2) it lacks operational clarity and predictability.⁴⁶

A final complication is whether proof of irrational conduct is sufficient or whether additional anticompetitive effects must be proved. For example, one proponent of the no economic test requires in addition that the challenged conduct actually tends to eliminate or harm competition.⁴⁷ Thus the test appears to operate more as a screen than a comprehensive (or unifying) standard.

d. *As-efficient competitor test*

Judge Posner has proposed an as-efficient competitor test, i.e. there is monopolising conduct only where a more or equally efficient rival is excluded.⁴⁸ This test underlies the cost-based rules in predatory pricing cases under the reasoning that a dominant firm should not be penalised for having lower costs than its rivals and pricing accordingly.⁴⁹

Professor Gavil⁵⁰ critiques this test on several grounds, including: 1) "it presumes that there can be no consumer harm from the exclusion of a 'less efficient rival.' However, the entry of even a less efficient rival can stimulate competition and lower prices if an incumbent dominant firm is charging monopoly prices;" 2) "even if such a test were supportable as an economic and policy matter, it would be difficult to translate into practice. Measuring 'comparative efficiency' is a tricky business, at best, and is likely to prove a very difficult standard to apply in practice;" and 3) "it is difficult to imagine how a plaintiff would, at the pleading stage, possess the information necessary to allege that it was at least 'equally efficient' as the defendant."

e. *Elhauge efficiency test*⁵¹

Professor Elhauge proposes the following test: does: the alleged exclusionary conduct succeed in furthering monopoly power (1) only if the monopolist has improved its own efficiency or (2) by impairing rival efficiency whether or not it enhances monopolist efficiency. Where the defendant has improved its own efficiency in order to make a better or cheaper product, it should be free to sell that product at any above-cost price it wants, even though that may shrink rival market share to a size that leaves rivals less efficient.⁵²

Conduct that succeeds by improving the monopolist's own efficiency is lawful and there is no balancing of harms.⁵³ Conduct that succeeds by impairing rival efficiency whether or not it enhances the monopolist's own efficiency is unlawful because normally it forecloses rivals from supplies or outlets they need to achieve full efficiency. For example, if foreclosure prevents a competitive number of rivals from maintaining [minimum efficient] scale, or from expanding their operations to reach it, then it impairs their efficiency. Or where network effects exist, foreclosure can impair rival efficiency by denying rivals access to the number of buyers they need to make their products more valuable to all buyers. In markets where competition by innovation is important, foreclosure can deny rivals economies of scale in recouping investments in research.

5.2 *Tests emphasising rivalry/structure*

More "populist" or "structuralists" commentators propose broadening the monopolisation test to include harm to business rivalry or harm to the dynamic process. For example, Professor Fox:⁵⁴

"Freedom of trade (and competition and innovation) without *artificial* market obstruction is presumed to be in the public interest, especially the public's economic interest. Barriers must be justified. By this metric, significant *unjustified* exclusionary practices are anticompetitive and should be prohibited." (emphasis added).

There is a theoretical and an operational weakness. First, there is a significant risk that this test will be used more to protect individual competitors (including less efficient competitors) than focus on efficiencies. Second, it is highly questionable whether a concern for business rivalry can generate operable

legal criteria to distinguish desirable from undesirable conduct. For example, Professor Fox's test above contains two highly ambiguous terms which are more conclusory labels than operable criteria, i.e. "artificial" and "unjustified."

Structuralist tests also derive from the Ordoliberal approach to competition law.

NOTES

1. Skadden, Arps, Slate, Meagher & Flom LLP; Director, Fordham Corporate Law Institute.
2. Professor Hawk has been invited as discussant to the OECD Committee Roundtable.
3. Hoffman La Roche/Vitamins: "an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." Hoffman La Roche & Co. v. Commission, Case 85/76 (1979).

Michelin I: "Article [82] of the Treaty imposed on an undertaking in a dominant position, irrespective of the reasons for which it has such a dominant position, a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market, in accordance with the general objective set out in Article 3(f) of the Treaty as it was then worded. Thus Article [82] covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened." NV Nederlandsche Banden Industrie Michelin v. Commission, Case 322/81 (1983).
4. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
5. Those judgments arguably require some proof of anticompetitive effect. The behavior of the dominant undertaking must have "the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."
6. Case T-203/01- Michelin v. Commission [2003] ECR, 4071.
7. United States v Grinnell Corp., 384 U.S. 563 (1966).
8. Elhauge, Defining Better Monopolisation Standards, 56 Stanford L. Rev. 253, 263 (2003).
9. Evidence of intent to harm/exclude rivals can be ambiguous, as Judge Easterbrook noted in Poultry Farms: "Almost all evidence bearing on 'intent' tends to show both greed-driven desire and glee at a rival's predicament. . . . [But,] firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition." 881 F.2d 1396, 1401-02 (7th Cir. 1989), cert. denied, 494 U.S. 1019 (1990). For a recent defense of intent under section 2, see Lao, Reclaiming a Role for Intent Evidence in Monopolisation Analysis, 54 American U L Rev. 151, 188 (2004): "In short, in difficult cases like Microsoft, where an effects analysis would require speculating about the impact of conduct on future innovation, the court has shown a willingness to consider evidence of intent. Given that a pure economic analysis is unworkable in these types of cases, the consideration of intent can hardly be said to undermine the 'certainty' of economic analysis."
10. Hawk, Attempts to Monopolise --- Specific Intent as Antitrust's Ghost in the Machine, 58 Cornell Law Review 1121 (1973).
11. As the Circuit Court stated in Microsoft:

"[O]ur focus is upon the effect of [the challenged] conduct, not upon the intent behind it. Evidence of the intent behind the conduct is relevant only to the extent that it helps us understand the likely effect of the monopolist's conduct."

253 F.3d 34, 59 (D.C. Cir. 2001).

12. Brooke Group v. Brown & Williamson, 509 U.S. 209 (1993).
13. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp, 472 U.S. 585 (1985); Case T-65/89, BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities, [1993] ECR II-0389. The term "competition on the merits" has never been defined by the Supreme Court.
14. Elhauge, *supra* note 7, at 264-65.
15. Three (principal) policy considerations inform the application of Article 82: market integration, fairness and consumer welfare/efficiency. The basic Treaty goal of market integration is not further discussed here because it is unique to the EC.
16. See Möschel, Competition Policy from an Ordo Point of View, in A.Peacock & H. Willgerodt ed. German Neo-Liberals And The Social Market Economy 142, 147 (1989).
17. See, e.g., Hoffman-LaRoche and Michelin I; see also J Kallaugher and B.Sher, Rebates revisited: anti-competitive effects and exclusionary abuse under Article 82, (2004) ECLR 263. Where dominant firms use performance-based methods of competition (e.g., improvements in quality or improved after-sales service), they should be free to compete, even if their conduct harms competitors. This criterion or approach seems to have been adopted by the European Court of Justice in Hoffman-LaRoche and Michelin I: abuse consists of conduct:
 - (1) that has the effect of reducing the competition in a market or preventing the emergence of new competition; and
 - (2) where the effect is caused "by means other than normal competition on the basis of the performance of commercial operators."A key issue in Hoffmann-LaRoche was whether the rebates in question could be characterised as a form of performance-based competition. The Court ruled that the rebates in that case could not be regarded as performance-based, because "they are not based on an economic performance which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market."The Court also indicated that a pure, non-discriminatory quantity rebate scheme was a form of performance-based conduct that fell outside Article 82.
18. Verizon Communications Inc. v. Trinko, 124 S. Ct. 872 (2004).
19. G. Amato, Antitrust and the Bounds of Power (1997).
20. One critic of the present U.S. approach describes it as follows: "competition, itself, is portrayed as a rough-and-tumble process, and monopolists are portrayed as 'aggressive' or 'hard' competitors whose inclination to exploitation and exclusion should be proven rather than presumed. Moreover, legal rules that too readily allow for the condemnation of the dominant firm's business strategies, no matter how 'aggressive,' are likely to over-deter through false positives and hence dampen competitive zeal in the long-run. The likelihood of false negatives is discounted, often based simply on the general assumption that successful exclusionary strategies are rarely successful and, therefore, rarely attempted. . . .typical . . . is the view that dominant firms have 'earned' their dominance, and when under siege from their rivals, big and small, they should have a 'right' to defend themselves rather than merely to surrender the fruits of their superior skill." Gavil, Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance, 72 Antitrust L. J. 3 (2004).
21. See, e.g., Gavil, *id.*: "is it really true that the hope of monopoly profits is the principal engine that drives innovation and economic progress? . . . Profits, not monopoly profits, are the principal spur to innovation that ("attracts 'business acumen.'") One need only observe the rapid pace of innovation in highly competitive and dynamic markets--where no real hope of monopoly exists--to know that something less than the hope of monopoly appears quite adequate to drive firms to create."
22. Professor Geradin: "one possible explanation for the greater general willingness in the EC to impose duties to deal on monopolists is that, compared to the United States, more of the monopolies in Europe were created by regulations, government subsidies, or permitted combinations rather than by innovation or

other investments." Geradin, Limiting the Scope of Article 82 EC: What Can the EC Learn from the U.S. Supreme Court Judgment in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*? Voir 41 Common Market Law Review 1519 (2004).

23. See generally Gal, Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly, Antitrust Bulletin 343 (2004).
24. Aggressive application of abuse of dominant laws is not limited to transition and developing economies. For example, one commentator argues that the Dutch competition authority has gone further than even the EC in prohibiting/regulating "excessive prices." See Pijnacker Hordick, Excessive Pricing under EC Competition Law; an Update in the Light of "Dutch Developments," in 2001 Fordham Corporate Law Institute 463 (B. Hawk ed. 2002).
25. Critics of the rule of reason-like consumer harm tests cite the Supreme Court's admonition in Copperweld that tests for examining concerted conduct should not (automatically) be applied to unilateral conduct: "Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 767, 775 (1984).
26. Compare Salop, Section 2 and the Flawed Profit-Sacrifice Standard (unpublished work in progress), with Melamed, Exclusive Dealing e.g., Melamed, Exclusive Dealing Agreements and Other Exclusionary Conduct --- Are There Unifying Principles? (unpublished work in progress), at p. 15 (cases do not suggest that competition on the merits is lawful unless it imposes disproportionate harms on rivals or customers; they direct attention simply to the nature of the conduct of the dominant firm). The dominant firm perspective is more sensitive to the overdeterrence/false positive risks.
27. Vickers, in Abuse of Market Power, September 3, 2004 (European Association for Research in Industrial Economics), at 21-23.
28. See Salop, Section 2 and the Flawed Profit-Sacrifice Standard (unpublished work in progress). The evaluation is about harm to consumers and not to aggregate welfare.
29. Areeda and Hovenkamp, III Antitrust Law para. 651a (2d ed. 2002).
30. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C.Cir. 2001).
31. Compare the Supreme Court decision in Aspen with the D.C. Circuit decision in Microsoft.
32. See Gavil, *supra*.
33. See, Elhuage, *supra* at 318-19: the court "did not really apply that sort of balancing test to claims that a superior product has anticompetitive effects. For example, the en banc opinion considered a claim that Microsoft had designed certain software in a way that made Java applications both faster on its operating system and incompatible with rival operating systems. Although the opinion stated that the applicable test was that 'the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design,' it went on to hold that the fact that the product ran faster on Microsoft machines sufficed to make it legal. This technological benefit was certainly a procompetitive justification but did not really eliminate the anticompetitive effect (although the court said it did) since the product design still impaired rival efficiency in a way that reduced the ability of rivals to constrain Microsoft's monopoly power. It thus amounted to a holding that any technological benefit suffices when the monopolist has improved its own product, without any need to weigh it against any anticompetitive consequences that the product design may have created by impairing rival efficiency. Further, when the D.C. Circuit had earlier considered in isolation the product design question of whether technologically bundling the operating system and browser was anticompetitive, the court had specifically concluded that any technological benefit from the bundling would suffice to make the bundle legal. The court recoiled in horror from the dissent's suggestion that it should decide whether to condemn the creation of such a superior product by weighing its technological benefit against any resulting anticompetitive harm because a social welfare calculus was 'not feasible in any predictable or useful way' since placing a value on any technological benefit is beyond the ability of antitrust courts, and weighing any such technological value against the anticompetitive harm would involve trading off 'incommensurable' factors." In the en banc

decision, the D.C. Circuit condemned this technological bundling as exclusionary conduct not because its anticompetitive effect outweighed its technological benefit, but because it turned out not to have any technological benefit at all." [Footnotes omitted]

34. See *The Limits of Antitrust*, 63 *Texas L. Rev.* 1, 28 (1984). See also Melamed, *Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal* (unpublished work in progress).
35. See, e.g., Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct --- Are There Unifying Principles?* (unpublished work in progress); Melamed, *Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal* (unpublished work in progress).
36. Brief for the Government, at 16, *Trinko* ("[A] monopolist's right to refuse cooperation with rivals is not wholly unqualified. If such a refusal involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary and potentially unlawful.").
37. See, e.g., Elhauge, *supra*; Gavil, *supra*; Vickers in *Abuse of Market Power*, September 3, 2004 (European Association for Research in Industrial Economics).
38. Professor Gavil writes: "The principal flaw of a sacrifice test is its assumption that 'predation' is never of concern to the antitrust laws if it is costless. Yet examples abound in the cases and commentary of conduct that is unreasonably exclusionary, yet involved either little or no sacrifice of profit, or some sacrifice in a context where recoupment could be achieved simultaneously. . . . in the Microsoft case, Microsoft did not appear to sacrifice any profits when it imposed various exclusionary licensing and contractual restrictions on its various classes of customers, or when it integrated its various programs into its operating system. . . . the presence or absence of sacrifice does not make either the defendant's monopoly power or the effects of its conduct on rivals and consumers any more or less probable. It is actually the absence of sacrifice that may be relevant to a Section 2 case because it suggests that the defendant was engaged in competition on the merits. But the evidence to support such an allegation will be entirely in the hands of the defendant."
39. Elhauge writes: "sacrificing profits in the short-run to drive out rivals and reap long-run monopoly profits is normally socially desirable, and thus should be rewarded rather than penalised with treble antitrust damages.... Investments in innovation that create monopoly power typically would be unprofitable but for the prospect of the monopoly returns reaped by excluding rivals. . . . To condemn [as "predatory" any product innovations whose profitability depends on their ability to drive rivals out of the market] is to fetishise the ex post avoidance of static allocative inefficiency under given cost and demand curves, and ignore the disastrous ex ante effects such a standard would have on dynamic productive efficiency that either raises demand curves by making the product more desirable or lowers cost curves by making the product cheaper to make."
40. See Salop, *supra*.
41. See Melamed, *Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal* (unpublished work in progress).
42. See, e.g., Werden, *The "No Economic Sense" Test for Exclusionary Conduct*. (unpublished article).
43. Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of the Petition for a Writ of Certiorari, at 10, *Verizon Communications Inc. v. Trinko*, 124 S. Ct. 872 (2004).
44. See Werden, *supra*.
45. See Gavil: " As a consequence, it seemingly would credit any efficiency gains to the monopolist as a complete defense to charges of monopolisation. It would disregard the amount of those gains and the degree to which the challenged conduct also may have resulted in significant anticompetitive effects on rivals and consumers. There would be no 'weighing' or 'balancing.'"
46. See Salop, *supra*.
47. See Werden, *supra*.
48. See Posner, *Antitrust Law* 194-95 (2d ed 2001).

49. See Hovenkamp, Exclusion and the Sherman Act, U. Chi. L. Rev. 147, 153-54 (2005).
50. See Gavil, *supra*. See also Salop, *supra*.
51. See Elhauge, *supra*.
52. For one critique, see Hovenkamp, *supra* note 48, at 160-62 (rejecting price discrimination as a factor to define monopolising conduct).
53. "[I]t is also true that driving out the less efficient rivals can produce anticompetitive effects that might, if one could do the social welfare calculation accurately, outweigh those efficiency benefits. . . . [Should] efficiency benefits from producing this "superior product" then have to be weighed against the harm? [No.] So some have concluded, noting that it is possible that any efficiency gain from the improved product would be offset by the inefficiency costs created by the exclusion of browser rivals. . . . when a firm figures out how to make a better or cheaper product, and then uses that advantage to drive out rivals, antitrust tribunals will [should] not engage in a social welfare calculus to determine whether the product improvement offsets the inefficiency produced by the loss of competition. Such an open-ended balancing inquiry by antitrust judges and juries would often be inaccurate, hard to predict years in advance when the business decision must be made, and too costly to litigate." Elhauge at 316.
54. Fox, What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70 Antitrust L. J. 371, 372 (2002).

BIAC

BIAC appreciates the opportunity to submit the perspective of the business community on the issue of competition on the merits.

The objectives of any rational business enterprise are to expand its position in the marketplace to the greatest extent possible and to maximize the return on investment of its stakeholders. These objectives drive companies to out-perform their peers through superior innovation, efficiency and industry. Companies that are the most successful at achieving one or more of these metrics are the most likely to become dominant firms. Often, the firms achieving these objectives employ the most aggressive competitive means possible, combining their skill in innovation and production with savvy and creativity in marketing, distribution and customer relationships that help to maximize the value of their goods to consumers. In protecting competition through the regulation of dominant or monopolistic firms, enforcement agencies must engage in the difficult task of distinguishing between firms that have achieved or maintained a dominant position through the accomplishment of these desirable metrics, and those that have done so through means that retard, rather than advance, the competitive process. The challenge is particularly great when firms employ means that can have both pro-competitive and anti-competitive aspects.

A primary consideration in preserving competition on the merits is ensuring that the enforcement process itself does not undermine benefits to consumers. Thus, in order for a practice by a dominant firm, or would-be dominant firm, to qualify for enforcement action, it should cause harm to the competitive process itself. For this reason, no meaningful competition standard can be premised on the concept of harm to or elimination of a competitor, even to the point of eliminating all competitors from a market. It is generally accepted that in a free-market economy competition enforcement agencies should not intentionally act to manipulate a market that is functioning competitively by seeking to promote an industry champion or to hinder a disfavoured company. If this principal is accepted, then agencies should not seek to disrupt a competitive process which in some cases legitimately may lead to single firm dominance or exclusivity. Enforcement premised on maintaining competitors, therefore, can no more be justified than enforcement designed to manipulate a market. “Results-oriented” enforcement should be rejected.

The appropriate model for enforcement should focus on preserving the competitive process by distinguishing between those practices that allow the market to play-out according to the true economic performance of the competitors and those which instead prevent firms in a market from meeting with their true economic fate. It should be recognized that this is a very fact-intensive consideration. There are few, if any, unilateral practices that can be condemned as anticompetitive without consideration of their actual effect on competition. Unlike some horizontal restraints, which long experience and empirical study have shown can lead to competitive harm in virtually all cases – reducing the risk of false positives to a *de minimus* level – unilateral practices can not so neatly be pigeon-holed. Exclusive distributorships, for instance, most often benefit competition but can, in some circumstances, unduly foreclose competition. Even practices that would be facially suspect – for example the manipulation of government regulatory structures as identified in the note by the United States, may be justified in some circumstances and do not admit the application of *per se* rules. In short, unilateral practices do not lend themselves to bright-line rules or guidelines. Rather, there are certain basic economic principles that should uniformly be applied by regulatory agencies in the consideration of such practices.

1. Focus on Establishment or Maintenance of Market Power, Not Structural Dominance

Consideration of the effects of a practice should focus on the maintenance or enrichment of market power, not mere structural dominance. For example, remedial relief is not warranted where smaller competitors have difficulty competing in a market simply because a dominant entity is more efficient, or has achieved significant economies of scale or other advantages. As stated by the U.S. Supreme Court, “It is axiomatic that the antitrust laws were passed for “the protection of competition, not competitors.”¹

Competition laws frequently look in the first level of analysis to a party’s market share as an indication of market power or dominance. There is, however, no specific market share threshold that reliably establishes that a firm has market power. In the U.S. and Canada, a *prima facie* determination of market power may be made on the basis of market share in a relevant market.² For example, in determining whether a supplier has market power, the Competition Tribunal has indicated in addition to a firm’s market share, it will also consider factors such as the number of competitors and their respective market shares, excess capacity in the market, ease of entry, profits, dissatisfied customers and pricing policies will also be taken into account. In assessing barriers to entry, relevant factors include observed entry and exit, sunk costs, incumbent advantages, length of time to enter, process patents/technological barriers, and regulatory approvals required.

In the United States, market share alone is not enough to prove dominance. While a *prima facie* showing may be made in cases involving high market shares, there is no “bright line” test that applies.³ Judicial guidance suggests certain screening levels, specifically: (i) a market share above 70 percent will likely establish *prima facie* monopoly power; (ii) a share between 50 and 70 percent will create a possibility of establishing monopoly power; and, (iii) a share below 50 percent are unlikely to result in a finding of monopoly power.⁴ Importantly, however, factors such as barriers to entry, excess capacity, market dynamics, and effectiveness of competitors in the market can rebut this presumption, regardless of a firm’s market share.⁵ Ease of entry, in particular, provides an example of a fact that would undermine the ability of a firm to establish or enhance – or even to exercise – market power. This determination, however, can only be made through full consideration of the conditions of entry and the current constraints placed on market participants by the threat of entry. Thus, while market structure can provide an indication of the risk that monopolisation or enhancement of a dominant position is theoretically possible, it cannot be used as the sole basis for drawing such a conclusion.

Moreover, the entry issue provides just one example of the difficulty in establishing bright-line policies for the application of competition laws to the area of dominance or monopolization. While it may be possible to develop screening mechanisms to determine “safe harbors” (e.g., firms with a low market share may presumptively be able to engage in certain unilateral conduct without undue risk of creating market power), it is a dubious proposition to conclude that certain acts that occur within a given market structure necessarily harm competition.

2. Avoid Attacking Practices With Ambiguous or Procompetitive Economic Effects in Order to Preserve Efficiency-Enhancing Conduct

The challenge for businesses and competition law authorities is distinguishing anticompetitive conduct from superior competitive performance and avoiding the deterrence of legitimate competitive conduct. From this perspective, enforcers should consider that attacking practices that may have anticompetitive consequences only in certain narrow applications, may discourage those same practices in situations where they may provide significant economic benefits.

Competition laws and jurisprudence often highlight practices that may harm competition. Usually, in the area of dominance or monopolisation these practices are provided as non-exclusive examples.⁶

Recognizing that even dominant firms must be allowed to compete aggressively, most laws require an affirmative demonstration that the practices result in demonstrable economic harm.

In practice, it is often difficult in abuse of dominance cases to distinguish between when an act is anticompetitive as opposed to when it is a “sign of healthy or at least normal commercial competition.”⁷ A particularly high risk is present in cases involving discounting, rebates, loyalty programs, predatory pricing or other practices that facilitate lower prices to consumers. Even if – and there is significant dispute in the economic literature on the point – such discounting practices might lead to a serious risk of anticompetitive effects in some cases, the anticompetitive effect of challenging such practices in a market must carefully be weighed. As enforcement agencies desire, prudent firms base their marketplace activities on perceived enforcement standards. Thus, there is a significant probability that an enforcement action against a particular practice will lead to a decline in that practice across a spectrum of industry.

Recognising, as we discuss above, that a single practice may have quite different competitive effects in various markets, there is a risk the practice will be discontinued even in markets in which the practice would benefit competition. For example, one result of the Third Circuit decision in *LePage’s Inc. v. 3M* is that many firms having one arguably dominant product discontinued their multi-product discounts, despite the fact that these often reflected real economic savings for the manufacturer.⁸ This risk is compounded by the indisputable fact that there is significant dispute in the regulatory, economic and academic community about the competitive effects of discounting practices. Thus, enforcement agencies must weigh the possible economic consequences of challenging a discounting practice that provides at least short term consumer benefit against the impact that the discontinuation of that practice may have not only in the affected market but in other markets as well and should seek to avoid enforcement against practices with ambiguous or equivocal effects.

3. Facilitate Competition Not Competitors

The primary purpose of competition law and enforcement is to enhance consumer welfare by facilitating the operation of competitive markets, not to aid particular competitors. As noted above, enforcement agencies acting with the purpose of aiding particular competitors interferes with the effective functioning of competitive market forces.

Under Canadian law, for example, in determining whether a practice has had or is having the requisite effect on competition the Competition Act requires the Tribunal to consider whether the practice is a result of superior competitive performance. The Canadian Competition Tribunal has remarked that:

It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even “tough” competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct.⁹

A core principal of U.S. competition law rests on the premise that “the successful competitor, having been urged to compete, must not be turned upon when he wins.”¹⁰ Recently, the U.S. Supreme Court also suggested that the consequence of monopoly pricing is to induce investment, risk-taking, innovation and economic growth.¹¹

The Canadian Competition Tribunal has acknowledged, moreover, that decisions restricting competitive actions on the grounds that a competitor feels a dominant firm’s response has been “overwhelmingly intense” instead may chill competition:

Decisions by the [Competition] Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the [Competition] Act, as set forth in section 1.1.

We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a “competitive” versus an “anticompetitive” response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising).¹²

In this connection, a rule fashioned upon a “proportionality” test, as identified in the note of the EC is particularly hazardous to the efficient operation and advancement of a market. Restricting a dominant firms’ ability to compete freely on the merits deprives the relevant market of the full benefits of the efficiency that should be made available. The only explanation for such an approach is that consumers should be denied the benefits of competition now because, if the dominant firm were actually allowed to operate based on its economic efficiency, it *necessarily* would be able to eliminate competition to the point that it could and would charge supracompetitive prices at some point in the future which more than offset the benefits now being denied to the market. This approach, however, presupposes incredible foresight by a competition authority, subjugating – at a minimum – the concepts of innovation, actual or potential entry, and repositioning. Obviously, the confluence of circumstances that circumstances necessary to allow a confident decision to this effect is doubtful. Rather, competitors should not be protected for the sake of maintaining competitors. Consumers should be permitted to derive the full measure of economic efficiency from the market, competitors should be forced to produce their full measure of ingenuity and industry and market forces should be allowed to determine the market participants in the long run.

4. Competition Law Should Not Trample Intellectual Property Rights That Promote Innovation

Real efficiencies should give rise to consumer benefits¹³, for example: (i) lower product prices through economies of scale and synergies; and (ii) innovation and technological advances that lead to the development of new products or more efficient production methods. The protections offered by intellectual property laws provide incentives to innovation, leading to such dynamic efficiency gains.¹⁴ The requirement that IPRs be protected in order to provide incentives for the development of valuable works, has been accorded global recognition in treaties such as the World Intellectual Property Organisation (WIPO) treaties and the WTO treaty concerning Trade-Related Aspects of Intellectual Property (TRIPs). As a result, it is important that competition laws be designed and implemented in a manner that avoids overriding these valuable protections, and the objectives of competition law must be advanced in a manner consistent with the exclusive rights afforded to owners of intellectual property, and the incentives for innovation that such rights confer.

Traditional competition law, particularly in its enforcement, cannot foreshadow the pace of invention. A focus on short-term allocative efficiency goals (versus dynamic efficiencies) may result in enforcement activities which could adversely affect the incentives to innovate and the long-term benefits to society that flow from the research and development activities which are fostered by the protection of IPRs. This principle is best reflected by balancing the exclusive rights afforded to the owner of IPRs and the objectives of competition law:

Antitrust law promotes market structures that encourage initial innovation with a competitive market ‘stick’ - that is, firms that fail to innovate will get left behind. Intellectual property law encourages initial innovation with the ‘carrot’ of limited exclusivity, and the profits that flow there from. Antitrust law enables follow-on innovation by protecting competitive opportunities beyond the scope of the exclusive intellectual property right. Intellectual property law enables follow-on innovation by requiring public disclosure of the initial innovation (at least in the patent context) and affording follow-on innovators rights of ‘fair use’ and freedom from intellectual property ‘misuse’. The basic principle that mediates the tensions ... is that intellectual property rights provide legal monopoly power, but only within the defined, limited scope of the right.¹⁵

Canadian law implicitly recognises that traditional competition laws and IPRs are designed for the same purpose – to reward success on the merits of skill and hard work. For example, section 79(5) includes an intellectual property exception to the abuse of dominance provisions, which provides that an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

An application of competition law that forsakes the risk-reward structure embodied in the balance that currently exists threatens to reduce the level of innovation that will result. As in the case of enforcement against discount practices, the mandatory licensing of intellectual property as a remedy for perceived abuse of dominance in one case carries substantial negative “spillover effect.” It thereby places in jeopardy the expected rewards of every innovation worthy of IPR protection. Predictably, this upsets the status quo in two ways, both of which have significant negative consequences. First, it will reduce the incentive to invest in innovation. Second, it will reduce the incentive to disclose (e.g., through patent applications) those innovations that do occur. Derivative of the second point, it will reduce the occurrence of follow-on innovation (which is already reduced by the first point).

NOTES

1. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).
2. The Canadian Competition Tribunal has provided the following framework for analyzing whether the alleged dominant entity has the requisite control:
 - examine whether an entity has the ability to maintain prices above competitive levels for a considerable period;
 - determine the entity's market share;
 - under 25% - unlikely to find dominance, but consider any evidence of an increasing trend;
 - under 50% - no prima facie finding of dominance;
 - 100% - prima facie finding of dominance absent evidence that there are no barriers to entry;
 - assess market structure - the smaller the number of competitors and the tighter the capacity, the more likely a given entity will be found to have market power;
 - evaluate entry barriers – the higher the entry barriers, the more likely an entity will be found to have market power; and
 - consider the profits of the dominant entity - if profits are above levels expected in a competitive market, a company likely has market power.
3. *United States v. Aluminium Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) [hereinafter *Alcoa*] (90 percent market share is sufficient to establish a prima facie determination of market power, doubtful whether sixty or sixty-four percent would be enough and thirty-three per cent would certainly not be enough).
4. See ABA Section of Antitrust Law, *Antitrust Law Developments* 234-37 (5th ed. 2002) citing *Grinnell Corp.*, (87% of the relevant market left no doubt of the existence of market power); *du Pont*, (75% of a market, had it been defined as the relevant one, would have sufficed); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 75 (1911) (90% of the business of producing shipping, refining, and selling petroleum and its products constituted monopoly power); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 43 (1st Cir. 1990) (70-90% indicative of monopoly power); *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 967 (9th Cir. 1990) (noted in dicta that courts generally require a minimum market share between 70% and 80%); *Fineman v. Armstrong World Industries Inc.*, 980 F.2d 171, 201 (3d Cir. 1992) (55% share, absent other relevant factors, is insufficient); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) ("Supreme Court cases, as well as cases from this Court, suggest that, absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization."); *The Movie 1 & 2 v. United Artists Communications*, 909 F.2d 1245, 1254 (9th Cir. 1990) (noting that market share as low as 45-70% might constitute monopoly power); *Langerdorfer v. S.E. Johnson*, 917 F.2d 1413, 1431 (6th Cir. 1990) (existence of market share ranging from 40-30% is insufficient on the facts of the case to constitute monopoly power); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 874 (9th Cir. 1986) (16% "is far below what we would require for a monopoly").
5. In *Microsoft*, the District Court made a finding of fact that Windows accounted for a greater than 95% share of the relevant market. Microsoft did not challenge this finding before the Court of Appeal, but claimed that even a predominant market share did not by itself indicate monopoly power. The Court of Appeal agreed that, while the existence of monopoly power may ordinarily be inferred from a predominant share of the relevant market, looking to current market share alone could be misleading. *Massachusetts v. Microsoft Corp.*, 362 U.S. App. D.C. 152 (D.C. Cir. 2004).

6. Neither Canada nor the United States has a definitive list of activities that constitute anticompetitive conduct. However, Section 78 of the Canadian Competition Act does provide a non-exhaustive list of anticompetitive acts. Similarly, the EC Treaty also includes a non-exhaustive list of offences.
7. *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.*, Case No. CT-1991-002, The Competition Tribunal (1992) at 78.
8. *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 2932; 159 L. Ed. 2d 835 (2004).
9. *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, Case No. CT-1994-003, The Competition Tribunal (1997) at 258 [hereinafter *Tele-Direct*].
10. *Alcoa* at 430.
11. *Verizon Communications Inc., v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
12. *Tele-Direct* at 291.
13. See, e.g., "Antitrust and Competitiveness: Efficiencies, Failing Firms, and the World Arena," Statement by Eleanor M. Fox before the Global And Innovation-Based Competition Hearings Before The Federal Trade Commission (December 13, 1994). See remarks of Deborah Platt Majoras when she was the Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "GE-Honeywell: The U.S. Decision", before the Antitrust Law Section State Bar of Georgia, November 29, 2001. See also *Draft Commentaries to Possible Elements for Articles of a Model Law or Laws*, United Nations Conference on Trade and Development, prepared as a background document by the UNCTAD Secretariat, 21 August 1995.
14. See Brian Jackson (2003), "Innovation and Intellectual Property: the Case of Genome Patenting" 22 *Journal of Policy Analysis and Management*, and John Barton (1999), "Intellectual Property Rights and Innovation" in Nicholas Imparato, ed. *Capital for our Time: The Economic, Legal, and Management Challenges of Capital* (Stanford: Hoover Institution Press) at 123.
15. Debra A. Valentine, former General Counsel, U.S. FTC: "Abuse Of Dominance In Relation To Intellectual Property: U.S. Perspectives And The Intel Cases", Remarks before The Israel International Antitrust Conference, Tel Aviv, Israel, November 15, 1999.

SUMMARY OF DISCUSSION

Competition Committee Chairman Frédéric Jenny began by stating that a number of delegates suggested the topic of this roundtable because there are several ways to interpret the concept “competition on the merits” in regulating the abuse of dominance. He introduced two experts attending the roundtable, Professor Barry Hawk of Fordham University and Professor Patrick Rey of the University of Toulouse.

The Chairman noted that the written contributions from member countries mainly reflect three kinds of differences underlying their interpretations of competition on the merits. They are (a) the goals of competition laws, (b) the time frame in the sense of whether they look at the short-term effects or long-term effects of unilateral practices, and (c) the level of their appreciation for the relative usefulness of various economic tests. Some countries focused on protection of competition and others on protection of the process of competition. The Chairman asked Professor Hawk for his initial statement.

1. Statement by Professor Barry Hawk

Professor Hawk offered four propositions concerning Section 2 of the United States Sherman Act and Section 82 of the EC Treaty: (a) the texts of both statutes offer little guidance, if any, to distinguish lawful and unlawful conduct; (b) courts in both jurisdictions have formulated general definitions of “abuse” and “monopolise” that provide no firm guidance in difficult cases and incorporate ambiguous terms; (c) the inadequacy of those general definitions is reflected in their replacement by specific tests for certain repeatedly challenged conduct such as predatory pricing; and (d) dissatisfaction with the general definitions, concerns about over-deterrence and judicial capabilities, and the current emphasis on efficiencies have prompted a number of other proposed tests for monopolising or abusive conduct.

Professor Hawk also made three proposals: (a) underlying assumptions about the relationship between market power and government intervention should not remain implicit, and should be constantly reviewed; (b) governments should not overreact to the demand of legal certainty by lawyers; and (c) governments should not overreact to less risky kinds of abuse of dominance because that would harm innovation.

2. Statement by Professor Patrick Rey

Professor Rey began by stating that one could not find “competition on the merits” in economics textbooks and that there is no common interpretation of the phrase among economists. He emphasised that one should focus on the impact that dominant firm conduct has on consumers, and that various kinds of abusive conduct should be dealt with consistently, based on the conduct’s effects. He also mentioned that the difference between a form-based approach and an effects-based approach is different from the difference between a per se approach and a rule of reason approach. A form-based approach does not necessarily give more legal certainty, and an effects-based approach is more difficult to enforce.

Professor Rey also noted that the profit sacrifice test is not applied to conduct other than predatory pricing because it is difficult to find an appropriate benchmark for every type of conduct. With respect to the equally efficient firm test, he said that less efficient firms have competitive pressure to some extent and thus they might become more efficient later, especially in a market with economies of scale. Regarding the consumer welfare test, he stated that consumer welfare is well defined but it is necessary to decide whether likely effects as well as actual effects on consumers will be taken into account.

3. A Form-Based Approach

The Chairman directed his first question toward Germany, noting that its contribution takes a very clear but somewhat controversial stand. It appears to call for a form-based approach, both because such an approach offers more legal certainty and because competition agencies may be rendered ineffectual by spending too much time on economic analysis. Second, the Federal Supreme Court applies the theory of the moveable barrier to establish the existence of exclusionary abuses, focusing on a weighing of the interests at stake on a case by case basis. Third, the German contribution contains examples of exploitative cases in the energy sector but it seems that the three cases presented were overturned by the Düsseldorf higher regional court. The Chairman asked why an extensive weighing of the interests on a case by case basis would be less cumbersome or more predictable than applying an economics-based test. He also asked how the theory of the moveable barrier is applied and whether cases alleging exploitative abuses of dominant positions are ever successful.

A delegate from Germany noted that Germany's approach does not differ very much from that of other countries in practical terms, and that using a form-based approach does not exclude economic analysis. The guidelines give more certainty to Article 82 since the Competition authorities are bound to them, though they are not binding in private enforcement cases. A form-based approach has the same aim as a case-by-case approach, which is to prevent the abuse of dominance. The delegate also noted that decisions at the Bundeskartellamt are made by three people, at least one of whom is an economist, so economists automatically participate in decision-making.

The German delegate further stated that decisions pursuant to every provision of the competition law are based on economics, a typical example of which is merger control. However, if economic analysis is taken into account fully in legal procedures in the form of econometric studies that involve huge amounts of data, it would lengthen the process and thereby force consumers and competitors to pay higher costs. For example, exploitative price increases for the provision of gas services to private households could be prevented sooner by making if the competition agency is able to make a decision in the short term. Because of principles in the German constitution, courts take into account matters other than the protection of competition, but this does not mean they exclude economic reasoning from their decisions.

4. Fairness and Reasonableness

The Chairman then asked the Japanese delegation to explain how Sections 3 and 19 of Japan's Antimonopoly Act are applied, and whether it uses a form-based approach or an effects-based approach. He also invited the Japanese delegation to present an abuse of dominance case, *Intel K.K.*, in terms of how Japan assessed the impact on consumers.

A delegate from Japan first described the difference between unfair trade practices in Section 19 and exclusionary conduct as private monopolisation under Section 3 of the Antimonopoly Act. The JFTC prohibits certain concrete forms of conduct under Section 19, so this could be called a kind of form-based approach. For the conduct that offends Section 19, the JFTC can only take action by issuing cease and desist orders. Section 3 articulates that the JFTC has to examine whether the conduct substantially restrains competition. When the JFTC identifies exclusionary conduct, it issues a cease and desist order and may refer the case to a court. Therefore, there is a substantial difference between Section 19 and Section 3 in terms of both the requirement of an actual effect as well as enforcement actions.

The Japanese delegate next described a case in which Intel K.K. had prevented Japanese personal computer manufacturers from using competitors' microchips by providing funds and rebates on the condition that the manufacturers use only Intel K.K.'s chips. With this strategy, Intel K.K. increased its market share from 75% in 2002 to about 90% in 2003. The JFTC issued a recommendation against this

conduct, which violates Section 3. Such conduct harms consumer welfare because of the exclusion of competitors. The Japanese delegate also pointed out that new entry could not be expected once competitors were excluded, due to the nature of the PC market, in which consumers require a network of after-market services.

The Chairman next asked the Korean delegation to explain how the KFTC defines “unreasonably,” which is stipulated in the Monopoly Regulation and Fair Trade Act. He also observed that the Seoul High Court has said that anti-competitiveness was the criteria for judging unreasonableness of abuse of market power. It therefore seems that there is a circularity problem in that an anticompetitive abuse is an unreasonable practice, and an unreasonable practice is an anti-competitive practice. Nevertheless, the KFTC was able to win a case brought against a vertically integrated firm based on its refusal to deal with a downstream rival. The Chairman asked the Korean delegation to present that case, focusing on the analysis that was used to conclude that competition was harmed.

A delegate from Korea responded that the Monopoly Regulation and Fair Trade Act classifies abusive practices into five categories and that the Enforcement decree further divides such practices into 20 sub-categories. When investigating a practice, the KFTC first determines which of the 20 sub-categories the practice falls into. It then determines whether it can prove the illegality of that practice. Therefore, the Act could be recognised as a form based approach. The delegate added that there is room for flexibility with respect to determining what category to apply in abuse of dominance cases. Because the law includes “any other practice hindering business activities” and Article 3, Paragraph 2 of the Act includes other practices reducing consumer welfare as abuses of a dominant position, almost all practices that reduce consumer welfare can be seen as abusive.

The Korean delegate then described a case in which an enterprise refused to supply an input to its downstream competitor. The KFTC determined that this action raised the defendant’s own costs but raised the costs of its competitor by an even greater amount, thereby weakening that rival’s competitiveness. The KFTC concluded that the defendant not only intended to restrict competition, but that its action actually had that effect. Regarding the term “unreasonable,” the delegate said that its meaning varies, depending on which of the five categories is applicable. In any case, he added, the term “unreasonable” is broader than the concept of restricting competition.

5. Special Responsibility of Dominant Firms

The Chairman then turned to the issues of whether dominant firms have a special responsibility not to restrict competition and, if so, what the extent of that responsibility is. He also mentioned the related issue of whether monopolists are prohibited from engaging in some practices that non-monopolists are allowed to engage in. To engage these questions, the Chairman focused first on the Turkish contribution, which takes the position that there is a special responsibility for dominant firms. He asked the Turkish delegation to explain the reason why it was found illegal for a dominant company to sign exclusive supply contracts in the liquid carbon dioxide market, which is not a per se violation in Turkey.

A delegate from Turkey first explained that the case involved exclusive supply contracts between a dominant supplier and buyers of liquid carbon dioxide, which is a vital component for carbonated beverage producers. The exclusive agreements required the buyers to purchase all or most of their requirements from the dominant firm on a yearly basis. The dominant firm sent a notice to all of its customers requesting that the duration of exclusivity be extended to five years and warning that if the customers refused, the dominant firm had the right to terminate their supply agreement. Most of the customers were beverage producers for whom carbon dioxide was an indispensable input. Therefore, the customers could not risk challenging the dominant firm and were obliged to accept the extension. The immediate result of this practice was that new competitors were left with no customers for whom they could compete.

The Turkish Competition Board concluded that such long term exclusive agreements resulted in the elimination of freedom for buyers to use alternative suppliers and the foreclosure of the market to competitors for these buyers. The Board analysed whether new firms could have made similar offers and found that the agreements rivals were able to make had different characteristics. For instance, some of them were able to sign long term agreements, but they contained no exclusivity clauses. Furthermore, although the dominant firm had lost some market share over time due to new entry and competition from an existing rival, the state of competition in the market had not changed significantly and thus the dominant firm sustained its dominance. In the absence of the dominant firm's long term, exclusive agreements, the effect of rivals on competition might have been so great that the dominant position would have been eliminated. Therefore, the fact that the dominant firm lost some share did not prevent the Board from finding an abuse in this case.

The Chairman then moved on to France, which has a similar approach regarding dominant firms, and mentioned the idea in France's contribution that dominant firms who have formerly been a public entity in a monopoly position have even more of a responsibility not to impair competition. In particular, he asked whether dominant firms have a different responsibility and if so how this approach is put into action.

A delegate from France pointed to the changes occurring in French jurisprudence to find a balance between a form based approach and a case by case approach structured purely on economic analysis. The delegate detailed two cases that were in discord with the notion of competition on the merits. The first concerned a public company, Francaise des Jeux, which holds a legal monopoly in the gaming and lottery sector and which was sanctioned by the Conseil de la Concurrence for its handling of public funds. The company was using the profits of its unique position as a legal monopoly to bolster other ventures and put new games on the market. The delegate added that pricing abuses by dominant firms, even if they do not constitute predatory pricing, completely disrupt the free market.

He went on to describe the case of the Canal Plus Group, which was a dominant firm that historically offered television plans for terrestrial cable channels and then began to include satellite channels in its plans. This practice was considered a flagrant abuse of dominance by the Conseil de la Concurrence, as it was aimed at ridding Canal Plus of its main competitor TPS, which offered only satellite television plans. He closed by saying that in the case of Francaise des Jeux, its massive subsidy of its own products would certainly deter anyone from entering the market.

The Chairman returned to the topic of form-based approaches, noting that Mexico's competition law sets out a list of relative monopolistic practices. Those practices include contracts, combinations or agreements whose aim or effect is to improperly displace other agents from the market, substantially hinder their access, or establish exclusive advantages in favour of one or several entities or individuals. The Chairman asked the delegation from Mexico to specify the criteria it uses to determine whether an act is "improper," since that is essentially the same as deciding whether the act is "competition on the merits."

The delegate from Mexico noted that Mexico's competition legislation articulates non-permissible conduct or abuse of dominance by firms possessing monopoly power, as opposed to articulating permissible conduct. Although the Mexican law does not define explicitly either monopoly or abuse of dominance, it has a provision for "relative monopolistic practices," which are unlawful only if the responsible parties have substantial market power in a relevant market and if they harm competition. The Supreme Court has already validated all key economic concepts involving these practices. Additionally, Section 7 identifies all types of predatory monopolistic practices, including five newly added practices, which are "predatory pricing," "loyalty discounts," "cross subsidisation," "discrimination in price or condition of sales," and "raising rival's cost." Article 6 establishes that defendants may offer an efficiency defence for relative monopolistic practices and states that the FCC must take it into consideration when evaluating anti-competitive effects.

The delegate from Mexico then presented the Walmex case, in which the FCC conducted an investigation of a large self-service chain store. The stores were allegedly forcing suppliers to charge higher resale prices to competing stores on the threat of suspending their purchases. Walmex had substantial market power, which allowed it to obtain lower prices and better terms. Walmex offered an efficiency defence for this practice. It claimed that its procurement system had provided benefits for suppliers and lowered prices for consumers. However, the FCC found the allegation that Walmex was pressuring suppliers to charge higher prices to competitors on the threat of suspending its purchases of products to be unsubstantiated by the facts.

6. Transitions

The Chairman turned next to the EC's contribution, which focuses on exclusionary abuses by dominant firms and raises two questions. One is whether aggressive rebates are always prohibited because their actual purpose is to strengthen a dominant position of the firm or they are permissible provided they realise economies of scale. The other is whether there is a movement away from being concerned about competitive processes and towards economics-based tests instead.

The delegate from the EC began by stating that the Commission is in the process of reviewing its policy on Article 82. He also noted his disagreement with the President of the Bundeskartellamt, who had stated earlier that guidelines themselves are a kind of form-based system. Guidelines, the EC delegate said, can set out a form-based system or they can set out a system which is economics-based and therefore effects-based. Guidelines could not set out the answer to every case, and an economics-based approach requires case-by-case assessments. Therefore, all guidelines will do is set out principles, methodologies and factors to be taken into account in making assessments.

The EC delegate emphasised that the objective in enforcing the EC's competition laws is to protect competition, not competitors. That, however, means that we have to protect all operators in the market, not against competition, for that would be protecting competitors for their own sake, but against foreclosure and artificial barriers that could be erected by certain conduct. The difficulty of a form-based approach is that, depending on the circumstances, the same type of conduct could be either an expression of "normal competition" or of "abusive competition." Looking at the economic effect of conduct in order to arrive at the true nature of its impact on the market is unavoidable. Similarly, one must not look only at the negative effect of a particular action, such as foreclosure, but rather one must also look at its positive effects, if any, such as an efficiency that might be produced by that action.

The EC delegate added that no single test can always determine what "competition on the merits" means, but that in his opinion, the one that is most effective is the as efficient competitor test. The concept of competition on the merits should neither prevent a dominant firm from competing aggressively nor give protection to other competitors in the market. He noted that less efficient competitors may still provide a degree of competitive pressure in a market. Particularly in a situation where the gap between a dominant firm and the residual competition is large, new entry may need to be protected up to a point so that it can reach the minimum efficient scale and thus become as efficient as other firms in the market.

The EC delegate went on to point out certain problems with the consumer welfare test, such as the difficulty of choosing an appropriate time horizon and whether to focus on direct or indirect effects. If we focus on the short term, for example, then we would have to allow predation, which in the short term is very good for consumers. However, a longer term perspective might yield a very different outcome. The same is true with respect to direct versus indirect effects. If we were to look only at direct, short term effects, we might be ignoring longer term, indirect effects which could harm consumers through the distortion of the competitive process.

The EC delegate also noted that there is an inherent tension between fostering legal certainty, ease of administration, and accuracy. Form-based or per-se rule systems provide legal certainty and are relatively easy to administer, but may generate results that are contrary to what the effects actually are in a market. Case-by-case basis or effects-based approaches may yield results that are appropriate given the actual effects that a practice has, but having to uncover every last detail in a case would be an unworkable, unenforceable system. Either approach, driven to excess, would certainly be wrong.

Accordingly, the EC delegate noted that important questions are how far one can go in formulating rules that create rebuttable presumptions and where the burden of proof should be placed. He also pointed out that in an effects-based approach, efficiencies should be allowed. Finally, he noted that it is important to base assessments on provable effects of behaviour and therefore allow the use of empirical studies.

The Chairman then turned to Norway and asked why its former Competition Act had an explicit welfare standard under which the concept of dominance did not exist, but behaviour that conflicted with achieving the efficient use of resources was prohibited. He noted that Norway decided to harmonise its competition law with EU competition law in 2004, and that it had therefore moved away from a general welfare test and adopted the concept of dominance. He called upon the delegation to discuss any problems encountered in the transition as well as its views on the concept of competition on the merits.

A delegate from Norway began by stating that the old law had a very clear economic foundation that focused on effects. After harmonising with the EU, Norway moved away from the old system toward a more form-based system. The delegate noted that there was general agreement that “competition on the merits” is a difficult concept to define, and that economics textbooks do not address the subject. Problems could arise with a purely form-based approach, he continued, because there is no unilateral behaviour that is always harmful or never harmful. For example, one particular rebate may be pro-competitive in some settings, while the same rebate is anti-competitive in other settings. Being concerned about protecting competition, both in the short term and the long term, and focusing on the effects of an action rather than on its form is essential. A general treatment where one looks at the case on the whole is preferable.

The delegate from Norway concluded by stating that competition on the merits is a useful concept because it stresses that we care about protecting competition, not competitors. Therefore, even a dominant firm can behave in a way that increases its market share in some situations, and that could be good for consumers. This leads to different tests, but it is not clear that one test is better than another. All of the tests could be used, but in different settings.

7. Economic Effects-Based Approaches to Competition on the Merits

Next, the Chairman observed that the contribution from Ireland contrasts sharply with some of the previous contributions in that the Irish Competition Authority does not take a form-based approach to unilateral conduct cases because it believes that could deter potentially beneficial competition. Instead, abusive conduct is not considered unlawful per se, and the ICA typically considers whether the alleged conduct harms consumers,” or in other words, whether or not output is restricted and price is increased. The Chairman then called on Ireland to elaborate on its approach to competition on the merits and to illustrate how that approach was used in actual cases.

A delegate from Ireland noted that in his country, economics is used in unilateral conduct cases to answer the questions of what the effects are on the market and what the effect is in general. This does not mean that the Irish approach is less interventionist than a form-based approach, but rather that the circumstances of intervention are different. Ireland has chosen its economic-effects approach not just because it protects consumer welfare, but because it is more clearly linked to the efficient allocation of

resources. Furthermore, this approach is consistent with the approach to mergers in Article 81, which defines dominance around barriers to entry.

Our job as competition law enforcers, he stressed, is not to protect specific firms in specific instances, although some times injunctions are needed. Moreover, our role is not to protect specific consumers but rather to allow the market process to do that for them. The delegate added that speed itself is not an objective, but rather that getting the right answer even if that takes some time and some analysis is vital. Therefore, bringing small numbers of cases that act as valuable precedents by elucidating the rules of competition is the ICA's priority, rather than trying to resolve every last issue that comes up, which would lead to being overwhelmed by cases.

Turning to a sampling of the ICA's cases, the delegate noted that no predatory pricing investigations have led to prosecution. For example, although one local newspaper had a 70% market share, it was discovered that no exclusion had taken place and that, if anything, the alleged predatory pricing was pro-competitive. The ICA also addressed the question of whether prices would ultimately increase as a result of the pricing in question, and in that case the answer was no.

In the Eircell/Meridian case in the High Court, Eircell had a 60% market share but the court looked at a series of factors such as mobility, ability to enter the market, customer switching, and pricing and concluded that in fact Eircell was not dominant. Conversely, it could be found that there is dominance even with a relatively low market share if there are harmful economic effects resulting from some particular conduct.

The delegate concluded by saying that the method for testing for abuse of dominance is an accumulation of reasoned decisions, rather than a single test. He also advised that more lessons should be drawn from matters in which proceedings were not brought, and that the reasons for not having done so should be routinely written up.

The Chairman then noted that New Zealand's contribution expressed a similar viewpoint, namely that conduct which is aggressively competitive, but that can be proved to benefit consumers, should not be subject to sanction. He asked New Zealand to discuss its approach in more detail, and particularly to comment on the counterfactual test referred to in the contribution.

A delegate from New Zealand began by stating that firms with a substantial degree of market power are entitled to compete aggressively for a share in the market and what needs to be examined is when aggressive competition will become anti-competitive and therefore illegal. New Zealand's legislation prohibits firms with a substantial degree of market power from taking advantage of that market power for anti-competitive purposes. First, there needs to be a correlation between market power and the behaviour under investigation. New Zealand courts tend to use a counterfactual test and the question posed is how a non-dominant firm would behave if it faced with the same circumstances, which leads to two further questions: what a hypothetical market would look like, and how the hypothetical competitor would behave in that market.

The delegate added that before the recent *Carter Holt Harvey* case, the counterfactual test was not considered mandatory. The Privy Council determined in that case, however, that the counterfactual test was not optional. In *Carter Holt Harvey*, which involved insulation products, the defendant introduced a fighting brand that was priced well below average variable cost. The Privy Council ultimately decided that it was rational for a competitor to match the price of the new entrant. It also ruled that one would have to show that the defendant would be able to recoup its predatory investment after the elimination of the entrant in order to establish that consumers were harmed by the conduct.

The Chairman then turned another country with a similar contribution, the United Kingdom. He asked the U.K. delegation to outline the tests they employ in unilateral conduct cases, in view of the fact that their contribution plainly discusses the strengths but also the weaknesses of various tests.

A delegate from the UK stated that the most frequently discussed tests are the profit sacrifice test, the no economic sense test, the as-efficient competitor test, and finally, the consumer harm test. Some pedigree can be found in EC case law for all of them, but the question remains whether the case law is a wilderness of isolated cases. The as-efficient competitor and consumer harm tests both answer the question of whose exclusion it is that we care about. The two tests are related because if a practice has the likely effect of excluding as-efficient competitors, then that is going to be harmful for consumers. There may also be situations in which conduct that is harmful to consumers would not exclude as-efficient competitors. All of the tests can be employed in addressing allegations of abuse, but they can also be useful more as a foundation on which to build a structured rule of reason approach, such as that which exists for predatory pricing in EU law. Unless there is such an approach for structured analysis of market facts, and unless it is consistent across different kinds of abuse, there will be a danger of “category shopping.” The delegate added that the purpose of competition law should be consumer-oriented.

He further stated that both legal certainty and clear, structured analysis of market facts in an economic effects-oriented way are needed, and that it is possible that per se approaches can be bad for legal certainty in the area of unilateral conduct. The delegate also noted his agreement with the Irish delegate that taking the necessary time to get decisions right is of primary importance. In the meantime, he advocated that the law should be applied as it is to cases in a way that weaves together more fact-oriented, economic approaches. More key facts can be brought into play in infringement decisions, even if the most formalistic approaches might not require it, and non-infringement decisions need to be very clear in explaining why conduct that might appear superficially unlawful is actually competition on the merits when looked at soberly in the light of market facts.

The Chairman then turned to observer delegations from three countries that had made use of certain tests, Brazil and Israel, which had used the equally efficient competitor test, and Lithuania, which had used a consumer welfare test. The Chairman asked how an equally efficient firm was defined in Brazil’s Ports case, whether the equally efficient firm was deemed to be vertically integrated, and what the reason was for choosing this test rather than some other test.

A delegate from Brazil clarified that it was in fact the defendant who tried in vain to show the authority that the defendant was the most efficient firm and that it could compete on the merits. This was determined to be a case of abuse without profit sacrifice. It also illustrates that the equally efficient test has several limitations. Information on cost structure and prices come from the defendant as a general rule. A lot of assumptions have to be made and sometimes they are not properly applied to actual cases.

In the Ports case, importers hired a shipping line and negotiated and paid the terminal handling charge (THC). The shipping line pays for a port terminal where the cargo will arrive, chooses a port operator and pays for its service. That is included in the THC charge paid by the importer. The port operator then has to deliver the containers to bonded warehouses. Importers choose their bonded warehouses and pay them a negotiated price. In this case, four port operators vertically integrated and operated bonded warehouses. They thus became a new competitor for the non-integrated bonded warehouses. The case centred on the competition between the non-integrated warehouses and the integrated warehouses. The non-integrated warehouses accused the four operators of exclusionary conduct because they began charging an extra fee to handle and deliver containers to non-integrated warehouses, specifically claiming raising rivals’ costs.

The defendant argued that if all of the non-integrated warehouse were excluded, there would actually be more output and lower prices, *i.e.*, a more efficient outcome. The problem was that the product in

question was not homogeneous and the linear demand function, which is quite important for this model to apply, was not there. Also, there was no competition in the storage market to discipline the TLC charge. In fact, there were substantial barriers to entry, so economic profits could be collected and preserved.

There was an important indication of the harm, namely that despite huge increases in import operations productivity after privatisation, the TLC steadily increased. Finally, there was also an increase in the market share of the integrated operators. It turned out to be the case that it could be shown that being integrated was more efficient only if all the players offered the same set of services.

The Chairman moved on to Israel, asking for an example of the use of the equally efficient competitor test.

A delegate from Israel outlined a case in which there were dominant suppliers and three retail chains, together covering 60% of the food consumption in Israel. The overall picture drawn from the findings revealed a net of arrangements, not just a rebate system. There was some very blunt exclusion of competitors and a reduction of the number direct payments to the retail chains. The rebates were only one component of these arrangements.

Each of the monopoly suppliers gave discounts to each chain, in accordance with its market share at the chain. These were really targeted discounts aimed at enlarging the monopoly. These arrangements had to be examined in light of the overall industry setting, which was a market with high barriers to entry. In addition, the discounts were crucial to the chains because of the volume of sales they had. A simulation led to the conclusion that even if competing suppliers offered to charge half the price the monopolist charged, they could not match the overall volume of discounts. That is to say, they could not offer products equally as good at a low enough price to compensate for the discounts that would be forfeited. Toward the end of the year, the chain would turn away competing products, not because consumers no longer liked them, but because all of the chains had to meet the targets set by the dominant suppliers. Therefore, the continuance of these rebates was prohibited.

The Chairman next turned to Lithuania and asked its delegation to elaborate on a case in which the consumer welfare test was applied to a loyalty discount program offered by a dominant brewery to its distributors.

A delegate from Lithuania began by stating that in 2003, the Competition Council opened an investigation concerning the possible abuse of a dominant position by the leading brewery in Lithuania. The brewery's local rivals complained that the market leader's loyalty discounts to distributors were creating exclusionary effects. The defendant had a 74% share of the market for premium beer sold in hotels, restaurants and cafes, and slightly less than a 40% share in overall beer sales. The discounts were disguised as payments for sales promotions and advertising, but in fact they depended only on the quantity of beer supplied.

In addition, buyers were offered an advance payment for future services. However, failure to purchase the corresponding quantity of beer resulted in a fine equal to double the difference between the advance payment for future services and the value of services actually provided. The payments, it was discovered, could create a lock-in effect for that distributor by making it very costly to switch suppliers in the middle of a year.

Nevertheless, the Competition Council found only an insignificant number of signed contracts with advance payments. There were no actual instances in which a retailer had to pay a fine during the investigated period. The Council concluded that the contracts had an abstract ability to create a lock-in effect for a retailer who accepted an advance payment and to constrain his abilities to change a supplier.

However, there was no ground to believe that they had any significant effect on competition. In 2003, the alleged violator sold only 4.5% of all its beer in the relevant market through the retailers that accepted advance payments. A majority of market participants stated that they preferred to buy the products of the alleged violator. Finally, the Council took into account that the market share of the alleged violator of the law significantly declined during the investigated period, something in the range of five percentage points.

Nevertheless, the question remained whether the quantity discounts were objectively justified by the cost savings or by provision of actual services by the retailers. The Competition Council decided that an equally efficient competitor should be able to match the alleged violator's offer. The main competitor had a similar productive capacity and was not technologically disadvantaged. It was able to offer comparable quantity discounts and the benefit of such aggressive pricing was passed to end users because the downstream market was very competitive.

Therefore, the only competitive concern was the penalty payment that a retailer would have to pay to the brewery if it accepted an advance payment but failed to reach the agreed volume of purchases. The investigated party agreed to modify its contracts and waive its claims for the penalty payments. The brewery also assumed an obligation to refrain from imposing such conditions in the future. The Competition Council took into account that the investigation did not reveal any significant anti-competitive effects of such clauses, but only an abstract possibility of such effects and thus decided to terminate the investigation.

The Chairman commented on the interesting reasoning of that case, which shows how looking at the effects of particular practices can be useful in assessing their legality or illegality. He then called on the United States to explain its "textured approach," which uses a number of different criteria to assess legal claims of monopolisation, and to give details as to why the Justice Department favours the no economic sense test in monopolisation cases.

A delegate from the United States stated that three important principles underlie Section 2 of the Sherman Act, the most fundamental of which is that the aim of the Act is not to protect businesses from the workings of the market, but to protect the public from the failure of the market. Secondly, a monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits. Finally, subjecting a firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote, given the difficulty of distinguishing robust competition from conduct that has long-run anticompetitive effects.

In the *Trinko* case, the Department of Justice and the Federal Trade Commission argued that conduct is not exclusionary or predatory unless it would make no economic sense but for its tendency to eliminate or lessen competition. The DOJ and FTC advocated the test only in the context that was before the court, which involved an assertion that the defendant had a duty to assist a rival.

In the *Microsoft* case, the Department of Justice argued that the course of conduct that served to protect the defendant's operating system monopoly was exclusionary because it would make no economic sense unless it eliminated or softened competition. Ultimately, the only practices held by the Court of Appeals to violate section 2 were practices for which Microsoft had no justification at all. In *Dentsply*, the Department argued that the defendant's policy of not using dealers that distributed rivals' products made no economic sense but for its tendency to harm the rivals because that policy cost the defendant something but produced no possible benefit for it other than reducing competition. In that case, the defendant did put forward an efficiency justification, but the District Court rejected it, finding it had no basis. That left only an anti-competitive explanation for the conduct and indeed the conduct had some exclusionary impact.

In applying the no economic sense test, it is critical that the burden is placed on the plaintiff to demonstrate that the conduct is truly exclusionary. The test can be used both offensively and defensively, though. In the Department of Justice's cases, it uses the test offensively, *i.e.*, to argue that conduct was exclusionary because it made no economic sense. The test can also be used by a defendant defensively to demonstrate that conduct should not be condemned because it would make economic sense. The delegate also acknowledged that the no economic sense test is certainly not infallible, and that there may be cases in which it is simply infeasible to apply it.

He added that some potentially exclusionary conduct is so likely to benefit consumers that United States courts have placed a safe harbour around it, thereby exempting it from the application of any test. For example, aggressive but above cost pricing is lawful, as is the introduction of new products.

The delegate noted that the consumer welfare test has a serious problem in that it is prone to error simply because it is so hard to figure out the consumer welfare effects of conduct, even in the short-term. The long-term is crucial, but many long-term effects are simply impossible for economists to figure out. The consumer welfare test would have a serious chilling effect on legitimate, pro-competitive conduct. The equally efficient competitor test has merit but a problematic question is, equally efficient at what? In the cases where the DOJ has thought about this test, there was a problem because the potentially excluded competitor was trying to produce something different in a different way.

Another delegate from the United States added that one area that the Federal Trade Commission has focused on recently is what is called "cheap exclusion," which may occur when a firm attempts to acquire or has acquired market power by abusing government processes. This may involve the patent process, for example, or certain state standard setting processes.

The delegate added that the subject of remedy is also relevant to liability. The Supreme Court specifically pointed that out in *Trinko*, which involved an alleged refusal to assist a competitor. The court stressed the difficulty of devising a remedy, even if the conduct were such that the courts would want to condemn it, because in fact condemning it might involve the courts in a remedy that would require court supervision, such as contracting or licensing among private parties.

Finally, the delegate agreed with other commentators that further empirical research would be useful and that one way to provide parties with more guidance would be to tell them why action has not been taken in particular cases involving unilateral conduct by a dominant firm. This would be especially helpful because, as was pointed out by the Irish delegate, many more investigations of unilateral conduct are carried out than result in court cases. Explaining our non-action is important, and that is what the FTC is trying to do in the United States.

8. Comments by Experts

The Chairman then turned to Professor Rey for comments. Professor Rey began by stating that there is economics in form-based approaches, so he disagreed with the notion that adopting a form-based approach means no economics. The question is to focus on the facts and the effects instead of relying on presumptions or beliefs. Second, one may worry about preserving the competitive process because we worry about competition and consumers in the future, so why not compose a story of why consumers may be hurt in the future? For instance, it would be interesting to know if in Japan's *Intel K.K.* case, the possibility of the rivals' future ability to compete was considered.

Third, moderate use of economics is good but excessive use of it can be fatal. If the definitions are too precise then you encourage a firm to engage in bypass techniques, category shopping, and so on. Finally, in looking at whether an equally efficient firm could enter a market and survive, we may also want

consider whether that firm would be able to exert competitive pressure. The mere fact that it can survive is not necessarily adequate.

The Chairman then gave the floor to Professor Hawk. Professor Hawk emphasised that the first step in determining what competition on the merits means is to decide what one's policy objectives are. If it is decided that one wants to promote some type of consumer welfare, which everyone does, then is it going to be consumer welfare as many economists think of it, or will it be based on competitive rivalry or market structure? Germany, for example, tends very much toward competitive rivalry and process. If one decides to promote competitive rivalry, there will be tougher rules on refusals to license and on product innovation, since the focus will be on protecting access to the market.

Professor Hawk also expressed his surprise and pleasure that no one had mentioned fairness as a goal of competition policy during the roundtable. One simplifies the law if goals such as fairness and market integration are eliminated and one focuses instead on consumer welfare or competitive rivalry.

Professor Hawk stated that if a competition authority is going to condemn certain conduct, it is of the utmost importance for the authority also to structure a way for firms to continue to be able to innovate and be competitive in the marketplace, rather than just condemning.

In addition, he noted the importance of developing legal rules for recurring claims like predatory pricing. It would also be useful to have specific rules for refusals to deal, for example. He closed by saying that simpler tests for anticompetitive conduct are preferable to complicated ones.

9. General Discussion

A delegate from Italy began by noting that economic approaches are mainly effects-based. The problem, he said, is that the effects that are considered are not always based on sound economic analysis. A rebate is not necessarily unlawful, for example. The analysis in the *Michelin* decision is based on effects, but the effect considered was really not very relevant and was based on incorrect assumptions.

Secondly, the equally efficient competitor test is appropriate to use for price abuses like predation, and it is a short cut for a consumer welfare test. It is really the same test. The only difference, the delegate maintained, is that we presume that exclusion of efficient competitors would worsen consumer welfare.

However, the equally efficient competitor test is not appropriate for other types of abuses. If there is bundling with irreversible technology where two products cannot be immediately taken apart, that is something that may or may not be an abuse. It depends on the circumstances, like radios in cars. These things are technologically reversible. It's not abuse. The delegate disagreed with the U.S. position on not interfering in the case of a new product. There are instances in which bundling can be an abuse because it could be the same as a predation case.

A delegate from Austria then stated that although Austria did not have a long history with the term "competition on the merits," there seemed to be an inconsistency in the economics-based approach. Economics should be used only in moderate quantities. If we were forced to prove things economically either by law or by guidelines, that would not increase the efficiency of competition but decrease the efficiency of the national competition authority, especially with respect to small competition authorities.

The other question is that what is meant by a firm's efficiency. Is it really satisfactory to measure efficiency primarily by turnover, production cost, or economy of scale in investment? If economy of scale does not have the same importance in all economic sectors, it might be difficult to measure efficiency in business activities comprising, say, handcrafts, knowledge, or R&D, for example.

A delegate from the EC stated that the no economic sense test itself makes no economic sense because behaviour can have both foreclosure effects and efficiency effects. Why would one refrain from balancing the negative and positive effects? Authorities do that kind of balancing when they apply the rule of reason in Section 1 cases, Article 81 cases, and when they analyse mergers. Why not perform that balancing process in the context of conduct by dominant firms, as well?

The delegate further stated that he agreed with the U.S. delegate that it is absolutely necessary to have in mind not only that we can prohibit something, but what the remedy should be. The remedy should not define the test, though.

Next, a delegate from BIAC reiterated that it was competition, not competitors, that competition laws seek to protect, and one must be very wary of establishing presumptions, which are simply another way of switching the burden of proof to the defendant rather than to the plaintiff. Particular caution is called for in condemning discount pricing, including bundled pricing or loyalty discounts providing benefits to consumers, without knowing more about the operation of the market. Intensive analysis is needed. Condemning those kinds of practices can cause more consumer harm than consumer benefit.

The delegate added that a secondary thing that calls for caution is a requirement to assist competitors. In the U.S., there is no obligation for a firm to assist its competitors, and it is the predominant legal view that one does not have to share intellectual property with a competitor. Furthermore, per se rules should be avoided in areas where there has not been as much experience as there has been in certain other areas, such as predatory pricing.

The delegate agreed that the no economic sense test makes no economic sense on an objective basis. On the other hand, he said, the equally efficient competitor test could be very difficult to apply. What is an equally efficient competitor? This ends up being a kind of cost-based analysis. Do we look at the dominant firm's efficiency or at the efficiency of some hypothetical firm that may or may not exist in the market?

A delegate from Brazil concurred with the US that the no economic sense test is more applicable than other ones for many reasons. It has one problem, though, which is how can one differentiate antitrust infringement from unfair competition? In other words, how can competition authorities weed out unfair competition cases and keep only the antitrust infringement cases? After all, unfair competition does not make economic sense, either, but for its exclusionary effects.

A delegate from Chinese Taipei said that the first question should be how to formulate better economic criteria in monopoly cases on the basis of efficiency. In Chinese Taipei, sanctions have been imposed on two monopolies, but the question remains how not to colour the reasoning with a superficial analysis that is not rigorously economic. Finally, there is also the question of how to fashion good remedies.

A delegate from Germany expressed relief that the difference between form-based and effect-based approaches is less and less stressed. If any forms are used, one must define them by looking at the effects they have on market behaviour and the competitor's behaviour. For example, rebates are often considered to be unlawful, and the form of illegal rebates is defined by their effects of attracting customers and excluding other competitors. This is a combined way of looking at the issue, so is there really a big difference between the systems applied?

A delegate from Australia briefly concurred on the importance of sound economic analysis when bringing cases.

A delegate from Japan wished to answer Professor Rey's question on the *Intel K.K.* case. He explained what was happening in the CPU market in Japan before the conduct in question occurred. Intel had lost 5% of its market share in Japan to competitors. But by providing funds or rebates conditioned on the agreement that PC manufacturers would not use non-Intel CPUs, Intel increased its share to 90%. This was clearly designed to have the impact of excluding a competitor, which would lead to a situation of no competition in the Japanese market. Therefore, he stated, such conduct could not be defended regardless of any possible short-term benefits.

Lastly, a delegate from Switzerland reiterated that the different tests are more or less suitable depending on the situation one is examining.

The Chairman then made his closing comments, stating that in contrast to other roundtables, there was wide consensus in this one. The difficulty comes when trying to decide the variables at which to look and how we should deal with them. There are tests that are very difficult to implement and therefore there is a lot of hesitation. As Professor Hawk said at the beginning of the roundtable, the transparency of reasoning in decisions is very important. Exposing the decisions and their reasoning to public criticism may be useful in the sense that it provokes the kind of debate that is helpful and may be a way to improve the quality of the tests. While waiting for a better test to emerge, competition authorities are being viewed negatively because their reasoning is not always clearly spelled out and there is a belief that the authorities use certain beliefs, other than intellectual reasoning, when coming to their conclusions.

COMPTE RENDU DE LA DISCUSSION

Le Président du Comité de la concurrence, M. Frédéric Jenny, commence par expliquer qu'un certain nombre de délégués ont proposé le thème de cette table ronde parce qu'il existe plusieurs façons d'interpréter le concept de "concurrence par le mérite" dans le cadre de la réglementation de l'abus de position dominante. Il présente deux experts participant à la table ronde : le professeur Barry Hawk, de l'université de Fordham, et le professeur Patrick Rey, de l'université de Toulouse.

Le Président fait observer que les contributions écrites des pays membres permettent de distinguer trois grandes catégories de différences dont découle leur interprétation de la concurrence par le mérite. Ces différences concernent a) les objectifs du droit de la concurrence, b) l'horizon temporel, à savoir si l'on considère les effets à court terme ou à long terme des pratiques unilatérales et c) l'appréciation de l'utilité relative de divers critères économiques. Certains pays ont mis l'accent sur la protection de la concurrence et d'autres sur la protection du processus de concurrence. Le Président demande alors au professeur Hawk de présenter son analyse.

1. Analyse du professeur Barry Hawk

Le professeur Hawk formule quatre constats à propos de l'article 2 de la loi Sherman des États-Unis et de l'article 82 du traité instituant la CE : a) ces deux textes ne donnent pas ou ne donnent que très peu d'indications permettant d'établir une distinction entre les pratiques légales et illégales ; b) dans les deux cas, les tribunaux compétents ont formulé des définitions générales des termes "abuser" et "monopoliser", qui ne donnent pas de directives rigoureuses dans les cas difficiles et qui sont ambiguës ; c) ces définitions générales n'étant pas appropriées, elles ont été remplacées par des critères spécifiques pour certaines pratiques donnant lieu à un contentieux récurrent, notamment les prix d'éviction ; et d) l'insatisfaction face à ces définitions trop générales, la crainte d'une dissuasion excessive et le problème des capacités judiciaires, de même que l'accent actuellement mis sur l'efficacité, ont suscité un certain nombre d'autres propositions de critères pour les comportements de monopolisation ou d'abus.

Le professeur Hawk expose en outre trois propositions : a) les hypothèses sous-jacentes concernant la relation entre pouvoir de marché et intervention des pouvoirs publics ne devraient pas rester implicites et devraient être réexaminées en permanence ; b) les pouvoirs publics ne devraient pas réagir de façon excessive à la demande de sécurité juridique de la part des juristes ; et c) les pouvoirs publics ne devraient pas réagir de façon excessive aux cas d'abus de position dominante les moins risqués, car cela risque de nuire à l'innovation.

2. Analyse du professeur Patrick Rey

Le professeur Rey commence par signaler que l'expression "concurrence par le mérite" ne figure pas dans les manuels d'économie et que les économistes ne proposent aucune interprétation commune de cette expression. Il souligne l'importance qu'il faut accorder à l'impact qu'exerce sur les consommateurs le comportement d'une entreprise dominante, et pense qu'il conviendrait de traiter de façon cohérente les différents types de comportement abusif, sur la base de leurs effets. Il ajoute que la différence entre une approche fondée sur la forme et une approche fondée sur les effets n'est pas la même que la différence entre une démarche reposant sur l'illicéité automatique et une démarche reposant sur la règle de raison.

Une approche fondée sur la forme n'améliore pas nécessairement la sécurité juridique, et une démarche fondée sur les effets est plus difficile à appliquer.

Le professeur Rey note aussi que le critère du sacrifice de bénéfices n'est appliqué qu'aux pratiques de prix d'éviction, car il n'est pas facile de trouver une référence appropriée pour chaque type de comportement. À propos du critère de l'entreprise aussi efficiente, il indique que les entreprises moins efficaces doivent, dans une certaine mesure, faire face à la pression exercée par la concurrence et peuvent donc améliorer leur efficacité, à une date ultérieure, surtout sur un marché à économies d'échelle. Quant au critère du bien-être des consommateurs, il est, selon lui, bien défini, mais il faut décider si les effets probables sur le consommateur seront pris en compte au même titre que les effets réels.

3. Une approche fondée sur la forme

Le Président pose sa première question à l'Allemagne, en faisant observer que la contribution de cette dernière défend une position très claire mais quelque peu discutable. Elle semble préconiser une approche fondée sur la forme, à la fois parce que cette approche offre plus de sécurité juridique et parce qu'elle éviterait aux autorités de la concurrence de perdre de leur efficacité en consacrant trop de temps à l'analyse économique. Deuxième point, la Cour suprême fédérale applique la théorie de la barrière mobile pour établir l'existence d'un abus par éviction, en privilégiant une prise en compte des intérêts en jeu au cas par cas. Troisième point, la contribution allemande donne des exemples d'exploitation abusive d'une position dominante dans le secteur de l'énergie, mais il semble que dans les trois affaires la décision ait été réformée en appel par le Tribunal régional supérieur de Düsseldorf. Le Président demande pourquoi une évaluation générale des intérêts au cas par cas serait moins complexe ou plus prévisible que l'application d'un critère de nature économique. Il demande aussi comment la théorie de la barrière mobile est appliquée et si des allégations d'exploitation abusive d'une position dominante ont déjà été couronnées de succès.

Un membre de la délégation allemande souligne que la démarche allemande ne diffère pas beaucoup, en pratique, de celle des autres pays et que le recours à une approche fondée sur la forme n'exclut pas l'analyse économique. Les lignes directrices donnent plus de certitude pour l'application de l'article 82, puisque les autorités de la concurrence sont tenues de les respecter, même si elles ne sont pas obligatoires en cas de poursuites privées. Une approche fondée sur la forme a le même objectif qu'une approche au cas par cas, à savoir empêcher l'abus de position dominante. Ce délégué note aussi que les décisions du Bundeskartellamt sont rendues par un collège de trois personnes, dont au moins un économiste, et que les économistes participent donc automatiquement à la prise de décisions.

Le délégué allemand indique ensuite que les décisions concernant chacune des dispositions de la législation de la concurrence ont une base économique, l'exemple type étant le contrôle des fusions. Toutefois, si l'analyse économique est pleinement prise en compte dans les procédures juridiques sous forme d'études économétriques qui nécessitent une très grande quantité de données, cela ralentira la procédure et augmentera donc les coûts encourus par les consommateurs et les concurrents. Par exemple, si les autorités de la concurrence pouvaient rendre rapidement une décision, elles pourraient empêcher plus tôt les augmentations de prix excessives pour la fourniture de gaz aux particuliers. En application des principes énoncés par la constitution allemande, les tribunaux prennent en considération des aspects autres que la protection de la concurrence, mais cela ne veut pas dire qu'ils excluent tout raisonnement économique de leurs décisions.

4. Équité et raison

Le Président demande alors à la délégation japonaise d'expliquer comment sont appliquées les articles 3 et 19 de la loi japonaise antimonopole, et si cette loi est fondée sur la forme ou sur les effets. Il

invite aussi cette délégation à présenter une affaire d'abus de position dominante, l'affaire *Intel K.K.*, en précisant comment le Japon a évalué dans ce cas l'impact sur les consommateurs.

Un délégué du Japon commente d'abord la différence entre les pratiques commerciales déloyales de l'article 19 et les pratiques d'exclusion par monopolisation privée, visées à l'article 3 de la loi antimonopole. La *Fair Trade Commission* (FTC) japonaise interdit certaines formes concrètes de comportement au titre de l'article 19, ce qui peut être considéré comme relevant d'une approche fondée sur la forme. Dans le cas d'une pratique qui enfreint l'article 19, la FTC ne peut intervenir qu'en rendant une ordonnance de ne pas faire. En vertu de l'article 3, la FTC doit examiner si le comportement restreint sensiblement la concurrence. Lorsque la FTC identifie une pratique d'exclusion, elle rend une ordonnance de ne pas faire et peut saisir le tribunal compétent. L'article 19 et l'article 3 sont donc très différents, aussi bien en termes de nécessité d'un effet réel qu'en termes de mesures d'application.

Le délégué japonais évoque ensuite une affaire dans laquelle Intel K.K. avait empêché des fabricants japonais d'ordinateurs personnels d'utiliser les circuits intégrés de concurrents, en accordant des financements et des rabais aux fabricants qui n'utilisaient que les circuits intégrés d'Intel K.K. Grâce à cette stratégie, la part de marché d'Intel K.K. est passée de 85% en 2002 à près de 90% en 2003. La FTC a formulé une recommandation à l'encontre de ce comportement, qui n'est pas conforme à l'article 3. Ce type de pratique nuit au bien-être des consommateurs en évinçant les concurrents. Le délégué japonais fait en outre remarquer qu'une fois exclus, les concurrents ne peuvent pas espérer entrer de nouveau sur le marché, du fait de la nature même du marché des PC, dont l'une des caractéristiques est que les consommateurs ont besoin d'un réseau de services après-vente.

Le Président demande ensuite à la délégation coréenne d'expliquer comment la FTC coréenne (KFTC) définit l'expression "de manière déraisonnable", qui est employée dans la loi sur la réglementation des monopoles et les pratiques commerciales loyales. Il observe en outre que la Haute Cour de Séoul a jugé que le caractère anticoncurrentiel était le critère utilisé pour se prononcer sur la nature déraisonnable de l'abus de pouvoir de marché. Il semble donc que l'on se trouve dans un cercle vicieux, puisqu'un abus anticoncurrentiel est une pratique déraisonnable et une pratique déraisonnable est une pratique anticoncurrentielle. Toutefois, la KFTC a eu gain de cause dans l'action qu'elle a intentée à l'encontre d'une entreprise intégrée verticalement qui avait refusé de traiter avec un concurrent en aval. Le Président demande à la délégation coréenne de présenter cette affaire en s'attachant surtout à l'analyse qui a permis de conclure qu'il y avait atteinte à la concurrence.

Un délégué coréen répond que la loi sur la réglementation des monopoles et les pratiques commerciales loyales classe les pratiques abusives en cinq catégories et que le décret d'application subdivise ces pratiques en 20 sous-catégories. Lorsqu'elle enquête sur une pratique, la KFTC détermine d'abord la sous-catégorie à laquelle la pratique appartient. Elle détermine ensuite si elle est en mesure de prouver l'illégalité de cette pratique. La loi pourrait donc être considérée comme relevant de l'approche fondée sur la forme. Le délégué ajoute que, dans les cas d'abus de position dominante, la détermination de la catégorie concernée laisse une certaine marge de manoeuvre. La loi couvrant "toute autre pratique entravant les activités industrielles ou commerciales" et le paragraphe 2 de l'article 3 de la loi visant comme abus de position dominante les autres pratiques qui réduisent le bien-être des consommateurs, presque toutes les pratiques portant atteinte au bien-être des consommateurs peuvent être considérées comme abusives.

Le délégué coréen décrit alors une affaire dans laquelle une entreprise a refusé de fournir un composant à son concurrent en aval. La KFTC a constaté que ce refus avait augmenté les coûts du défendeur, mais aussi les coûts de son concurrent et, dans ce dernier cas, d'un montant beaucoup plus élevé, ce qui a affaibli la compétitivité de ce concurrent. La KFTC a conclu que le défendeur avait non seulement l'intention de restreindre la concurrence, mais que son refus a effectivement eu cet effet. À

propos du terme “déraisonnable,” le délégué indique que sa signification varie selon celle des cinq catégories qui est applicable. En tout cas, ajoute-t-il, le terme “déraisonnable” a un sens plus large que le concept de restriction de la concurrence.

5. Obligation particulière des entreprises dominantes

Le Président passe alors à la question de savoir si les entreprises dominantes assument une obligation particulière de ne pas restreindre la concurrence et, si c’est le cas, jusqu’où va cette obligation. Il évoque aussi une question liée à la précédente : est-il interdit aux monopoleurs de se livrer à certaines pratiques que les non-monopoleurs sont autorisés à exercer ? Pour lancer ce débat, le Président s’appuie sur la contribution turque, qui fait valoir que les entreprises dominantes ont une responsabilité particulière. Il demande à la délégation turque d’expliquer pour quelle raison il a été jugé illégal pour une entreprise dominante de conclure des contrats d’exclusivité pour l’approvisionnement en dioxyde de carbone liquide, pratique qui ne fait pas l’objet d’une interdiction automatique en droit turc.

Un délégué turc explique d’abord que l’affaire concernait des contrats d’approvisionnement exclusif entre un fournisseur dominant et des acheteurs de dioxyde de carbone liquide, composant essentiel pour les fabricants de boissons gazeuses. Les contrats d’exclusivité obligeaient les acheteurs à effectuer la totalité ou la plupart de leurs achats auprès de l’entreprise dominante, sur une base annuelle. L’entreprise dominante avait envoyé un avis à tous ses clients pour demander une prolongation de la durée d’exclusivité à cinq ans et pour prévenir qu’en cas de refus des clients, l’entreprise dominante serait en droit de résilier leur contrat de fourniture. La plupart des clients étaient des producteurs de boissons pour qui le dioxyde de carbone était un composant indispensable. Ils ne pouvaient donc pas risquer de s’opposer à l’entreprise dominante et ont été obligés d’accepter la prolongation. Le résultat de cette pratique ne s’est pas fait attendre : les nouveaux concurrents se sont retrouvés sans aucune clientèle à conquérir.

Le Conseil de la concurrence turc a conclu que de tels contrats d’exclusivité à long terme privaient les acheteurs de leur liberté de faire appel à d’autres fournisseurs et fermaient le marché aux concurrents intéressés par ces acheteurs. Le Conseil s’est demandé si de nouvelles entreprises auraient pu proposer des offres similaires et il a constaté que les contrats que les concurrents avaient réussi à conclure présentaient des caractéristiques différentes. Ainsi, certains concurrents avaient réussi à signer des contrats à long terme mais sans clause d’exclusivité. En outre, s’il est vrai que l’entreprise dominante avait progressivement perdu une certaine part de marché, suite à de nouvelles entrées et à la concurrence d’un rival existant, la situation de la concurrence sur le marché n’avait pas beaucoup changé et l’entreprise dominante conservait donc sa position dominante. Si l’entreprise dominante n’avait pas conclu ses contrats d’exclusivité à long terme, les concurrents auraient pu jouer un si grand rôle qu’elle aurait perdu sa position dominante. Le fait que l’entreprise dominante ait perdu une certaine part de marché n’a donc pas empêché le Conseil de juger qu’elle avait abusé de son pouvoir dans cette affaire.

Le Président s’adresse alors à la France, qui applique une démarche similaire vis-à-vis des entreprises dominantes, et évoque l’idée exposée dans la contribution française, à savoir que les entreprises dominantes qui étaient précédemment des entreprises publiques en position de monopole assument une obligation encore plus lourde de ne pas restreindre la concurrence. Il demande notamment si les entreprises dominantes ont une obligation différente et, si c’est le cas, comment cette approche est mise en oeuvre.

Un délégué français souligne l’évolution de la jurisprudence française en vue de trouver un équilibre entre une démarche fondée sur la forme et une approche au cas par cas, uniquement fondée sur l’analyse économique. Il expose deux affaires dans lesquelles la notion de concurrence par le mérite était bafouée. La première concerne une entreprise publique, la Française des Jeux, qui détient un monopole légal dans le secteur des jeux et loteries et qui a été sanctionnée par le Conseil de la Concurrence pour son usage de fonds publics. Elle profitait de son statut exceptionnel de monopole légal pour soutenir d’autres opérations

et introduire de nouveaux jeux sur le marché. Le délégué ajoute que les prix abusifs pratiqués par les entreprises dominantes, même s'ils ne constituent pas des pratiques de prédation, perturbent considérablement le marché libre.

Il décrit ensuite l'affaire du groupe Canal Plus, entreprise dominante qui proposait au départ des programmes de télévision pour les chaînes câblées terrestres, puis s'est lancé dans les chaînes satellitaires. Cette pratique a été considérée comme un cas flagrant d'abus de position dominante par le Conseil de la Concurrence, car elle visait à débarrasser Canal Plus de son principal concurrent, TPS, qui n'offrait que des programmes de télévision par satellite. Il conclut en expliquant que, dans le cas de la Française des Jeux, les subventions massives qu'elle a accordées à ses propres produits ne pouvaient que dissuader tous ses concurrents d'entrer sur le marché concerné.

Le Président revient au thème de l'approche fondée sur la forme, en faisant observer que la loi mexicaine sur la concurrence dresse une liste de pratiques monopolistiques relatives. Il s'agit des contrats, accords ou arrangements ayant pour objectif ou pour effet d'évincer abusivement du marché d'autres agents, d'entraver substantiellement leur accès au marché ou d'établir des avantages exclusifs en faveur d'une ou plusieurs entités ou personnes. Le Président demande à la délégation du Mexique de préciser les critères que ce pays utilise pour déterminer si un acte est "abusif," car cela revient pratiquement au même que de déterminer s'il y a "concurrence par le mérite."

Le délégué du Mexique fait remarquer que la loi mexicaine sur la concurrence traite des comportements et des abus de position dominante interdits aux entreprises bénéficiant d'un pouvoir de monopole, plutôt que d'énoncer les comportements autorisés. S'il est vrai que la loi mexicaine ne définit pas explicitement, ni le monopole ni l'abus de position dominante, l'une de ses dispositions concerne néanmoins les "pratiques monopolistiques relatives," qui ne sont illégales que si les parties concernées ont un pouvoir de marché substantiel sur le marché pertinent et si elles portent atteinte à la concurrence. La Cour suprême a déjà validé tous les concepts économiques clés relatifs à ces pratiques. En outre, l'article 7 recense tous les types de pratiques monopolistiques prédatrices, dont les cinq nouvelles pratiques suivantes : "prix d'éviction," "remises de fidélité," "subventions croisées," "discrimination par le prix ou les conditions de vente" et "augmentation des coûts du concurrent". En vertu de l'article 6, le défendeur peut apporter la preuve de l'efficacité pour les pratiques monopolistiques relatives et la CFC doit en tenir compte pour évaluer les effets anticoncurrentiels.

Le délégué du Mexique présente alors l'affaire Walmex, dans laquelle la CFC a mené une enquête sur une grande chaîne de distribution. Il était reproché aux magasins en cause de forcer leurs fournisseurs à facturer des prix de revente plus élevés aux magasins concurrents, en menaçant ces fournisseurs de suspendre leurs propres achats. Walmex avait un pouvoir de marché substantiel, ce qui lui permettait d'obtenir des prix moins élevés et de meilleures conditions. Walmex a fait valoir que cette pratique était efficace : son système d'approvisionnement était bénéfique pour les fournisseurs et aussi pour les consommateurs, qui profitaient de prix plus bas. La CFC a toutefois considéré comme infondée dans les faits l'accusation selon laquelle Walmex exerçait une pression sur les fournisseurs pour que ces derniers facturent des prix plus élevés aux concurrents en menaçant de suspendre ses achats.

6. Transitions

Le Président passe ensuite à la contribution de la Commission européenne. Elle traite des abus à effet d'exclusion qui sont le fait d'entreprises dominantes et pose les deux questions suivantes : les rabais agressifs sont-ils toujours interdits, parce qu'ils visent en fait à renforcer une position dominante de l'entreprise, ou sont-ils autorisés à condition qu'ils permettent de réaliser des économies d'échelle ; y a-t-il évolution en ce sens que les critères économiques prennent le pas sur les préoccupations liées au processus concurrentiel même ?

Le délégué de l'UE commence par indiquer que la Commission est actuellement en train de réviser sa politique pour ce qui est de l'article 82. Il fait également part de son désaccord avec le Président du Bundeskartellamt, qui a précédemment considéré que les lignes directrices constituent en quelque sorte un système fondé sur la forme. Selon le délégué de l'UE, des lignes directrices peuvent instaurer un système fondé sur la forme ou un système fondé sur des critères économiques et donc sur les effets. Elles ne peuvent pas donner une réponse dans tous les cas et une démarche fondée sur des critères économiques nécessite une évaluation au cas par cas. Les lignes directrices ne pourront donc rien faire de plus que d'énoncer des principes, des méthodes et des facteurs dont il faudra tenir compte pour l'évaluation.

Le délégué de l'UE insiste sur le fait que l'application du droit de la concurrence de l'UE vise à protéger la concurrence et pas les concurrents. Cela signifie toutefois que nous devons protéger tous les acteurs du marché, non pas de la concurrence, car cela reviendrait à protéger les concurrents dans leur propre intérêt, mais des pratiques d'éviction et des barrières artificielles que risquent de créer certains comportements. La difficulté d'une approche fondée sur la forme vient de ce que, selon les circonstances, le même type de comportement peut être soit l'expression d'une "concurrence normale", soit celle d'une "concurrence abusive". Il faut inévitablement considérer l'effet économique d'un comportement pour comprendre la véritable nature de son impact sur le marché. De même, il ne faut pas seulement considérer les effets négatifs d'une action donnée, tels que le verrouillage du marché, mais prendre en compte aussi, s'il y a lieu, ses effets positifs, notamment l'efficacité qui peut en résulter.

Le délégué de l'UE ajoute qu'aucun critère unique ne permet de déterminer en toutes circonstances ce que le terme "concurrence par le mérite" signifie mais que, selon lui, le critère le plus efficace est celui des concurrents efficaces. Le concept de concurrence par le mérite ne doit ni empêcher une entreprise dominante d'être un concurrent agressif, ni protéger ses concurrentes. Il souligne que les concurrents les moins efficaces peuvent néanmoins exercer une certaine pression concurrentielle sur un marché. Un nouvel entrant peut avoir besoin d'être protégé tant qu'il n'a pas atteint un niveau lui permettant d'obtenir une efficacité suffisante pour être à la hauteur des autres entreprises du marché concerné, surtout si l'écart entre une entreprise dominante et les autres concurrents est important.

Le délégué de l'UE signale ensuite un certain nombre de problèmes posés par le critère du bien-être des consommateurs. Il évoque par exemple la difficulté de choisir un horizon temporel approprié et de déterminer s'il faut s'attacher surtout aux effets directs ou indirects. Ainsi, si l'on se situe dans le court terme, il faudra autoriser la prédation qui, à court terme, est excellente pour les consommateurs. En revanche, une perspective à plus long terme pourrait donner un résultat tout à fait différent. Il en va de même pour les effets directs ou indirects. Si nous ne considérons que les effets directs, à court terme, nous ignorons les effets indirects, à plus long terme, qui risquent de nuire aux consommateurs en faussant le processus de concurrence.

Le délégué de l'UE note aussi qu'il y a par essence conflit entre trois préoccupations : la sécurité juridique, la facilité d'administration et la précision. Les systèmes fondés sur la forme ou sur l'illicéité automatique assurent la sécurité juridique et sont relativement faciles à administrer, mais ils peuvent donner des résultats contraires aux effets réellement observés sur un marché. Les approches au cas par cas ou fondées sur les effets peuvent donner des résultats appropriés au regard des effets réels qu'une pratique donnée peut avoir, mais vouloir mettre à jour les moindres détails d'une affaire est irréalisable. Quelle que soit l'approche adoptée, elle ne pourra qu'être mauvaise si elle est poussée à l'extrême.

Le Président se tourne alors vers la Norvège et demande pourquoi son ancienne loi sur la concurrence prenait explicitement en compte le bien-être des consommateurs sans s'appuyer sur le concept de position dominante, mais interdisait tout comportement contraire à une utilisation efficiente des ressources. Il fait observer que la Norvège a décidé d'harmoniser son droit de la concurrence avec celui de l'UE en 2004, et qu'elle a donc adopté la notion de position dominante au lieu d'un critère de bien-être général. Il invite la

délégation à évoquer toute difficulté rencontrée au cours de cette transition et à faire connaître son point de vue sur le concept de concurrence par le mérite.

Un délégué de la Norvège explique tout d'abord que l'ancienne loi reposait sur des fondements économiques très clairs, qui mettaient l'accent sur les effets. Après l'harmonisation avec l'UE, la Norvège a abandonné l'ancien système pour adopter une approche davantage fondée sur la forme. Selon lui, le concept de "concurrence par le mérite" est difficile à cerner et les manuels d'économie n'abordent pas ce sujet. Une approche purement fondée sur la forme risque de poser des problèmes, car on ne peut pas dire d'un comportement unilatéral qu'il est toujours nuisible ou qu'il ne l'est jamais. Ainsi, un rabais peut être favorable à la concurrence dans certains contextes et anticoncurrentiel dans d'autres. Il est essentiel de veiller à protéger la concurrence, aussi bien à court terme qu'à long terme, et de s'attacher aux effets d'un acte plutôt qu'à sa forme. Un traitement général lorsqu'on examine un cas d'espèce est au total préférable.

Le délégué de la Norvège conclut en observant que la concurrence par le mérite est un concept utile car il souligne qu'on se soucie de protéger la concurrence et pas les concurrents. Même une entreprise dominante peut donc se comporter de façon à augmenter sa part de marché dans certaines situations, et cela peut être bon pour les consommateurs. C'est pourquoi différents critères peuvent être utilisés sans qu'on sache clairement si l'un est meilleur que les autres. Tous les critères peuvent être utilisés, mais dans différents contextes.

7. Approches de la concurrence par le mérite fondées sur les effets économiques

Le Président note que la contribution de l'Irlande est très différente de certaines des contributions précédentes, dans la mesure où l'Autorité irlandaise de la concurrence n'adopte pas une approche fondée sur la forme dans les cas de comportement unilatéral, parce que cela risquerait, selon elle, de décourager une concurrence qui peut être bénéfique. Elle ne considère pas automatiquement comme illégal un comportement abusif et elle examine en général si la pratique en cause porte atteinte aux consommateurs ou, en d'autres termes, s'il restreint la production et s'il se traduit par une augmentation des prix. Le Président invite alors l'Irlande à donner davantage de précisions sur son approche de la concurrence par le mérite et à illustrer son application concrète.

Un délégué de l'Irlande fait remarquer que, dans son pays, on applique des critères économiques, dans des cas de comportement unilatéral, pour répondre aux questions concernant les effets sur le marché et les effets en général. Cela ne veut pas dire que l'approche irlandaise est moins interventionniste qu'une approche fondée sur la forme, mais plutôt que les circonstances d'intervention sont différentes. L'Irlande a choisi une approche fondée sur les effets économiques non seulement parce que cette approche protège le bien-être des consommateurs, mais aussi parce qu'elle est plus clairement liée à une allocation efficace des ressources. En outre, cette approche est conforme à celle retenue pour les fusions à l'article 81, qui définit la position dominante à partir des barrières à l'entrée.

Pour l'application du droit de la concurrence, précise-t-il, notre tâche n'est pas de protéger des entreprises spécifiques dans certaines circonstances, même si des mises en demeure sont parfois nécessaires. De plus, notre rôle ne consiste pas à protéger des consommateurs spécifiques, mais plutôt à permettre aux mécanismes du marché de le faire. Le délégué ajoute que la rapidité n'est pas un objectif en soi, mais qu'il est essentiel d'obtenir la bonne réponse même si cela doit prendre du temps et nécessiter une analyse approfondie. L'Autorité irlandaise de la concurrence préfère donc engager en priorité un petit nombre de poursuites qui serviront de précédents très utiles en élucidant les règles de la concurrence, plutôt que d'essayer de résoudre chaque nouvelle affaire et de courir le risque de se retrouver submergée.

Le délégué évoque ensuite un certain nombre d'affaires traitées par l'Autorité irlandaise de la concurrence (ICA) et souligne qu'aucune enquête concernant des prix d'éviction n'a donné lieu à des

poursuites. Ainsi, dans le cas d'un journal local qui détenait une part de marché de 70%, il s'est avéré qu'il n'y avait pas éviction et que le prix pratiqué, prétendument prédateur, était même plutôt favorable à la concurrence. L'ICA s'est aussi demandé si les autres prix finiraient par augmenter sous l'influence du prix considéré et, dans cette affaire, sa réponse a été négative.

Dans l'affaire Eircell, jugée par la Haute Cour, Eircell avait une part de marché de 60%, mais la Cour a examiné toute une série de facteurs tels que la mobilité, les possibilités d'entrée sur le marché, les possibilités de changement de fournisseur et les prix, et a conclu qu'en fait Eircell n'était pas dominante. Il pourrait en revanche y avoir position dominante de la part d'une entreprise, alors même qu'elle ne détient qu'une part de marché relativement faible, si une pratique donnée a des effets économiques nuisibles à la concurrence.

Le délégué conclut en indiquant que la méthode d'examen des abus de position dominante consiste en une accumulation de décisions raisonnées et pas en l'application d'un critère unique. Il pense aussi qu'il faudrait tirer davantage d'enseignements des affaires qui n'ont pas donné lieu à des poursuites et que les raisons invoquées pour ne pas engager de poursuites devraient être systématiquement consignées.

Le Président note ensuite que la contribution de la Nouvelle-Zélande exprime un point de vue similaire, à savoir qu'un comportement concurrentiellement agressif, mais dont on peut établir le caractère bénéfique pour les consommateurs, ne devrait pas être sanctionné. Il demande à la Nouvelle-Zélande de donner davantage de précisions sur son approche et notamment sur le test contrefactuel mentionné dans sa contribution.

Un délégué de la Nouvelle-Zélande commence par indiquer que les entreprises qui ont un niveau substantiel de pouvoir de marché sont en droit de livrer une concurrence agressive pour obtenir des nouvelles parts de marché. Ce qu'il faut déterminer, c'est le moment où une concurrence agressive devient anticoncurrentielle et donc illégale. La législation de la Nouvelle-Zélande interdit aux entreprises qui ont un niveau substantiel de pouvoir de marché de profiter de ce pouvoir à des fins anticoncurrentielles. Il faut d'abord qu'il y ait une corrélation entre le pouvoir de marché et le comportement examiné. Les tribunaux de Nouvelle-Zélande ont tendance à recourir à un test contrefactuel ; la question est de savoir comment une entreprise non dominante se comporterait si elle se trouvait dans les mêmes circonstances, ce qui conduit à se poser deux autres questions : à quoi ressemblerait le marché hypothétique et comment un hypothétique concurrent se comporterait-il sur ce marché ?

Le délégué ajoute qu'avant la récente affaire *Carter Holt Harvey*, le test contrefactuel n'était pas considéré comme obligatoire. Le Privy Council a toutefois jugé, dans cette affaire, que le test contrefactuel n'était pas facultatif. Dans l'affaire *Carter Holt Harvey*, qui concernait des produits isolants, le défendeur avait lancé une marque d'attaque dont le prix était nettement inférieur au coût variable moyen. Le Privy Council a finalement jugé qu'il était rationnel, pour un concurrent, de s'aligner sur le prix du nouvel entrant et qu'il fallait démontrer que le défendeur pourrait récupérer son investissement prédateur après l'élimination de l'entrant pour établir que ce comportement portait préjudice aux consommateurs.

Le Président passe alors à un autre pays dont la contribution est similaire : le Royaume-Uni. Il demande à la délégation britannique d'exposer les critères que ce pays emploie dans les cas de comportement unilatéral, sachant que sa contribution présente clairement les atouts mais aussi les faiblesses de différents critères.

Un délégué du Royaume-Uni observe que les critères les plus fréquemment évoqués sont ceux du sacrifice de bénéfices, de l'absence de justification économique, du concurrent aussi efficient, et enfin du préjudice subi par les consommateurs. On peut trouver des précédents dans la jurisprudence de l'UE pour tous ces critères, mais on peut se demander si la jurisprudence n'est pas une vaste jungle de cas d'espèce.

Les critères du concurrent aussi efficient et du préjudice subi par les consommateurs répondent tous deux à la question de savoir quelle est l'exclusion qui nous intéresse. Ces deux critères sont liés, car si une pratique risque d'exclure les concurrents aussi efficients, elle risque aussi de nuire aux consommateurs. Il peut également y avoir des situations dans lesquelles le comportement qui porte préjudice aux consommateurs n'exclurait pas les concurrents aussi efficients. Tous les critères peuvent être utilisés pour traiter les allégations d'abus, mais ils peuvent aussi et plutôt servir de base à une analyse structurée selon une règle de raison, comme celle qui est mise en œuvre pour les pratiques de prix d'éviction dans le droit de l'UE. Si l'on n'adopte pas une telle approche impliquant une analyse structurée de la situation du marché et si cette approche n'est pas cohérente dans les différents cas d'abus, il y aura danger de catégorisation excessive. Le délégué ajoute que l'objectif du droit de la concurrence devrait être axé sur le consommateur.

Il ajoute que la sécurité juridique est nécessaire, tout comme est nécessaire une analyse claire et structurée de la situation du marché, axée sur les effets économiques, et qu'il se peut qu'une démarche fondée sur l'automatisme ne soit pas satisfaisante, sur le plan de la sécurité juridique, dans le cas d'un comportement unilatéral. Le délégué note aussi que, comme son collègue irlandais, il juge essentiel de prendre son temps pour parvenir à la bonne décision. Il préconise d'appliquer la loi telle qu'elle est d'une façon qui imbrique mieux les approches plus économiques et plus axées sur les faits. Dans les décisions concluant à une violation de la loi, un plus grand nombre de faits importants pourrait entrer en jeu, même si les approches les plus formalistes ne l'exigent pas forcément, et dans les décisions concluant à l'absence de violation, il faut expliquer très clairement pourquoi un comportement qui pourrait à première vue paraître illégal est en fait un cas de concurrence par le mérite, si l'on y réfléchit sérieusement en tenant compte de la situation du marché.

Le Président se tourne alors vers les délégations de trois pays observateurs qui ont utilisé certains de ces critères : le Brésil et Israël, qui ont appliqué le critère du concurrent aussi efficient, et la Lituanie, qui a mis en œuvre le critère du bien-être des consommateurs. Le Président demande comment a été définie l'entreprise aussi efficiente dans l'affaire Ports, au Brésil, si l'entreprise aussi efficiente a été considérée comme verticalement intégrée, et pourquoi ce critère a été choisi plutôt qu'un autre.

Un délégué du Brésil explique que c'est en fait le défendeur qui a essayé en vain de démontrer à l'autorité compétente qu'il était l'entreprise la plus efficiente et qu'il pouvait concurrencer les autres par le mérite. Cette affaire était un cas d'abus de position dominante sans sacrifice de bénéfices. Elle illustre aussi le fait que le critère de l'entreprise aussi efficiente a plusieurs limites. Les informations concernant la structure des coûts et les prix sont généralement fournies par le défendeur. Il faut formuler de nombreuses hypothèses, qui ne sont pas toujours appliquées de façon appropriée à la situation réelle.

Dans l'affaire Ports, des importateurs faisaient appel aux services d'une compagnie de navigation et ils avaient négocié et payaient les frais de manutention terminaux (FMT). La compagnie de navigation paie pour le terminal portuaire où le cargo arrive et choisit un opérateur portuaire dont elle rémunère les services. Tous ces paiements sont compris dans les FMT acquittés par l'importateur. L'opérateur portuaire doit ensuite livrer les conteneurs dans des entrepôts sous douane. Les importateurs choisissent leurs entrepôts sous douane et acquittent à ce titre un tarif négocié. Dans cette affaire, quatre opérateurs portuaires avaient réalisé une intégration verticale pour exploiter les entrepôts sous douane. Ils ont ainsi constitué une nouvelle concurrence pour les autres entrepôts sous douane non intégrés. L'affaire portait principalement sur la concurrence entre les entrepôts non intégrés et les entrepôts intégrés. Les entrepôts non intégrés reprochaient aux quatre opérateurs intégrés des pratiques d'éviction parce qu'ils avaient commencé à facturer des frais supplémentaires pour le traitement des conteneurs et leur livraison dans les entrepôts non intégrés, en augmentant ainsi les coûts de leurs concurrents.

Le défendeur soutenait que si tous les entrepôts non intégrés étaient exclus, la production augmenterait et les prix baisseraient, c'est-à-dire que le résultat serait plus efficient. Le problème, c'est que le produit en question n'était pas homogène et que la fonction de demande n'était pas linéaire, ce qui est très important pour l'application de ce modèle. De plus, il n'y avait pas de concurrence sur le marché de l'entrepôt pour réguler les FMT. En fait, les barrières à l'entrée étaient substantielles, ce qui permettait de dégager des profits économiques et de les préserver.

L'un des indices flagrants de l'atteinte à la concurrence tenait à ce que, malgré des gains importants de productivité sur les opérations d'importation après la privatisation, les FMT ont augmenté régulièrement. Enfin, la part de marché des opérateurs intégrés a également augmenté. Cette affaire a démontré en définitive qu'une entreprise intégrée ne pouvait être plus efficiente que si tous les acteurs du marché offraient la même gamme de services.

Le Président donne la parole à Israël afin d'illustrer l'utilisation du critère du concurrent aussi efficient.

Un délégué d'Israël présente une affaire impliquant des fournisseurs dominants et trois chaînes de vente au détail, couvrant ensemble 60% de la consommation alimentaire en Israël. D'après les résultats de l'enquête, il s'agissait d'un réseau d'accords et non d'un simple système de remises. L'exclusion des concurrents était flagrante et on constatait une diminution du nombre de paiements directs aux chaînes de distribution. Les remises n'étaient que l'un des éléments de ces accords.

Chacun des fournisseurs monopolistiques accordait des remises à chaque chaîne de distribution, en fonction de sa part de marché dans la chaîne. Il s'agissait en fait de remises ciblées visant à élargir le monopole. Ces accords devaient être examinés en tenant compte du contexte général, qui était celui d'un marché protégé par de fortes barrières à l'entrée. En outre, les remises jouaient un rôle primordial pour les chaînes de distribution du fait de l'importance de leur volume de ventes. Une simulation a permis de conclure que, même si les fournisseurs concurrents offraient de facturer la moitié du prix pratiqué par le fournisseur monopolistique, cela ne compensait pas le volume total des remises. En d'autres termes, ils ne pouvaient pas proposer des produits de même qualité à un prix suffisamment bas pour compenser les remises accordées. Vers la fin de l'année, les chaînes refusaient les produits concurrents, non pas parce que les consommateurs n'en voulaient plus, mais parce que toutes devaient remplir les objectifs fixés par les fournisseurs dominants. Ces remises ont donc été interdites.

Le Président s'adresse ensuite à la Lituanie et demande à la délégation de ce pays de donner plus de précisions sur une affaire dans laquelle le critère du bien-être des consommateurs a été utilisé dans le cas de remises de fidélité offertes par une brasserie dominante à ses distributeurs.

Un délégué de la Lituanie explique d'abord qu'en 2003 le Conseil de la concurrence a ouvert une enquête sur un éventuel abus de position dominante de la part de la plus grande brasserie de Lituanie. Ses concurrents locaux se sont plaints de ce que les remises de fidélité accordées par ce leader du marché avaient des effets d'éviction. Le défendeur détenait 74% du marché de la bière de première qualité vendue dans les hôtels, restaurants et cafés, et un peu moins de 40% du marché total. Les remises étaient camouflées en paiements pour promotion et publicité, mais, en fait, elles ne dépendaient que de la quantité de bière fournie.

De plus, les acheteurs avaient droit à un paiement anticipé pour leurs futurs services. En revanche, s'ils n'achetaient pas la quantité prévue de bière, ils devaient verser une pénalité égale au double de la différence entre l'avance versée pour les futurs services et la valeur des services effectivement fournis. Il s'avérait que ce système pouvait créer un effet de blocage des distributeurs, à qui il aurait coûté très cher de changer de fournisseur en milieu d'année.

Le Conseil de la concurrence n'a toutefois constaté l'existence que d'un nombre insignifiant de contrats signés prévoyant une avance. Aucun distributeur n'a dû verser d'amende pendant la période couverte par l'enquête. Le Conseil a conclu que les contrats étaient en théorie en mesure de créer un effet de verrouillage vis-à-vis d'un distributeur qui acceptait un paiement anticipé et de restreindre ses possibilités de changement de fournisseur. Il n'y avait toutefois aucune raison de penser que ces contrats avaient un effet important sur la concurrence. En 2003, la brasserie en cause n'a vendu que 4.5 % de l'ensemble de sa production sur le marché concerné via les distributeurs qui ont accepté une avance. La plupart des acteurs du marché ont déclaré qu'ils préféraient acheter les produits du défendeur. Enfin, le Conseil a tenu compte du fait que la part de marché du défendeur a nettement diminué pendant la période concernée, d'environ cinq points de pourcentage.

Il restait néanmoins à déterminer si les remises sur quantité étaient objectivement justifiées par les économies réalisées sur les coûts ou par la fourniture effective de certains services par les distributeurs. Le Conseil de la concurrence a considéré qu'un concurrent aussi efficace devait être en mesure de s'aligner sur l'offre du défendeur. Le principal concurrent avait une capacité de production similaire et n'était pas désavantagé sur le plan technologique. Il a pu proposer des remises sur quantité comparables et le bénéfice de ces prix très intéressants a rejailli sur les utilisateurs finals du fait que le marché en aval était très compétitif.

Le seul problème pour la concurrence était donc la pénalité que le distributeur devait à la brasserie s'il acceptait un paiement anticipé mais ne parvenait pas à atteindre le volume d'achats prévu. La brasserie en cause a accepté de modifier ses contrats et de renoncer à sa demande de versement d'une pénalité. Elle a aussi pris l'engagement de ne pas imposer de telles conditions à l'avenir. Le Conseil de la concurrence a tenu compte du fait que l'enquête n'avait pas révélé d'effets anticoncurrentiels significatifs des clauses visées, mais uniquement une possibilité théorique de tels effets. Il a donc décidé de clore l'enquête.

Le Président souligne l'intérêt du raisonnement suivi dans cette affaire, qui montre toute l'utilité d'un examen des effets de pratiques données pour évaluer leur légalité ou leur illégalité. Il demande ensuite aux États-Unis d'expliquer leur approche « texturée », qui a utilisé différents critères pour évaluer des allégations de monopolisation, et de préciser les raisons pour lesquelles le ministère de la Justice privilégie le critère de l'absence de justification économique dans les affaires de monopolisation.

Un délégué des États-Unis explique que l'article 2 de la loi Sherman repose sur trois principes essentiels, dont le plus important est que la loi ne vise pas à protéger les entreprises du fonctionnement du marché, mais à protéger le public des déficiences du marché. De plus, un monopoleur, autant que tout autre concurrent, est autorisé et même encouragé à mener une concurrence acharnée sur la base de ses mérites. Enfin, soumettre tous les actes d'une entreprise à un contrôle judiciaire, pour vérifier qu'ils sont raisonnables, risquerait de décourager l'ardeur concurrentielle que les lois antitrust cherchent à promouvoir, sachant qu'il est bien difficile de distinguer une vive concurrence d'un comportement qui peut avoir à long terme des effets anticoncurrentiels.

Dans l'affaire *Trinko*, le ministère de la Justice et la Federal Trade Commission (FTC) ont fait valoir qu'un comportement ne relève pas de l'éviction ou de la prédation sauf s'il n'a pas d'autre justification économique que sa tendance à éliminer ou restreindre la concurrence. Le ministère de la Justice et la FTC n'ont préconisé ce critère de l'absence de justification économique que dans la situation examinée par le tribunal (il était allégué que le défendeur avait l'obligation de prêter assistance à un concurrent).

Dans l'affaire *Microsoft*, le ministère de la Justice a fait valoir que le dispositif qui servait à protéger le monopole du système d'exploitation du défendeur était prédateur parce qu'il n'avait pas d'autre sens, sur le plan économique, que d'éliminer ou de restreindre la concurrence. En définitive, les seules pratiques que la Cour d'appel a jugées contraires à l'article 2 étaient des pratiques pour lesquelles Microsoft n'avait

absolument aucune justification. Dans l'affaire *Dentsply*, le ministère de la Justice faisait valoir que la politique du défendeur, qui consistait à ne pas avoir recours à des distributeurs commercialisant les produits de concurrents n'avait pas d'autre sens économique que de chercher à porter atteinte aux entreprises concurrentes. En effet, cette politique avait un coût pour le défendeur et ne lui offrait aucun avantage potentiel autre que de réduire la concurrence. Dans cette affaire, le défendeur a avancé une justification en termes d'efficience, mais la Cour de district l'a rejetée car elle l'a considérée comme infondée. Le comportement mis en cause ne pouvait donc être qu'anticoncurrentiel et il avait effectivement un effet d'éviction.

Pour l'application du critère d'absence de justification économique, il est crucial que ce soit au demandeur de faire la preuve que la pratique a véritablement un effet d'éviction. Notons toutefois que ce critère peut être utilisé aussi bien de manière offensive que défensive. Le ministère de la Justice l'utilise de façon offensive, c'est-à-dire pour prouver que le comportement est prédateur parce qu'il n'a pas de justification économique. Ce critère peut aussi être utilisé par le défendeur pour démontrer qu'il ne faut pas condamner le comportement concerné puisqu'il se justifie d'un point de vue économique. Le délégué reconnaît en outre que le critère d'absence de justification économique n'est certainement pas infaillible et qu'il peut arriver qu'il soit tout simplement impossible à appliquer.

Il ajoute qu'une pratique pouvant avoir un effet d'exclusion a de si fortes chances de profiter aux consommateurs que les tribunaux des États-Unis l'assortissent d'une règle libératoire qui peut la faire échapper à l'application de tout critère. Ainsi, un prix agressif, mais supérieur au coût, est légal, tout comme l'est l'introduction de nouveaux produits.

Le délégué fait observer que le critère du bien-être des consommateurs présente un inconvénient majeur dans la mesure où il est sujet à l'erreur, tout simplement parce qu'il est difficile de déterminer les effets d'un comportement sur ce bien-être, même à court terme. Le long terme est essentiel, mais nombreux sont les effets à long terme qu'il est absolument impossible aux économistes de déceler. Le critère du bien-être des consommateurs aurait un effet tout à fait sclérosant sur les pratiques pro-concurrentielles légitimes. Le critère du concurrent aussi efficace a des avantages, mais la question est de savoir de quel point de vue le concurrent est aussi efficace. Dans les affaires où le ministère de la Justice a songé à ce critère, il y a eu problème parce que le concurrent qui risquait d'être évincé essayait de produire, de manière différente, quelque chose de différent.

Un autre délégué des États-Unis ajoute que l'un des aspects sur lequel la FTC s'est récemment penchée est ce que l'on appelle "l'éviction à bon compte", lorsqu'une entreprise tente d'acquérir ou a acquis un pouvoir de marché en abusant de procédures gouvernementales. Il peut s'agir de brevets, par exemple, ou de certaines procédures de normalisation.

Le délégué ajoute qu'il se pose le problème de la mesure correctrice en cas de responsabilité. La Cour Suprême l'a notamment souligné dans l'affaire *Trinko*, qui concernait un refus allégué d'assistance à un concurrent. La Cour a mis en lumière la difficulté de concevoir une mesure correctrice, même si le comportement était tel que les tribunaux souhaitaient le condamner car, en fait, une telle condamnation risquait d'entraîner les tribunaux dans la mise en place d'une mesure qui nécessiterait une supervision judiciaire, par exemple la conclusion d'un contrat ou l'octroi d'une licence entre parties privées.

Enfin, le délégué est d'accord avec d'autres commentateurs pour dire qu'il serait bon de poursuivre les recherches empiriques et que l'une des façons de mieux guider les parties serait de leur faire savoir pourquoi aucune poursuite n'a été intentée dans des affaires impliquant un comportement unilatéral de la part d'une entreprise dominante. Cela serait particulièrement utile du fait que, comme l'a souligné le délégué irlandais, il y a beaucoup plus d'enquêtes menées sur un comportement unilatéral que de

poursuites intentées contre un tel comportement. Il importe donc d'expliquer pourquoi et c'est ce que la FTC essaie de faire aux États-Unis.

8. Commentaires des experts

Le Président s'adresse ensuite au professeur Rey pour qu'il fasse part de ses commentaires. Le professeur Rey commence par indiquer qu'il y a une part d'économie dans l'approche fondée sur la forme. Il n'est donc pas d'accord avec l'idée que l'adoption de cette approche exclut tout aspect économique. Il s'agit de se concentrer sur les faits et les effets plutôt que de se fier aux présomptions ou aux convictions. Deuxièmement, on peut se soucier de préserver le processus de concurrence parce que l'on se préoccupe de la concurrence et des consommateurs pour l'avenir. Pourquoi donc alors ne pas chercher les raisons pour lesquelles les consommateurs risquent d'être lésés dans le futur ? Il serait intéressant, par exemple, de savoir si, dans l'affaire d'*Intel K.K.* au Japon, on a envisagé la possibilité d'une future capacité de concurrence pour les entreprises rivales.

Troisièmement, la consommation modérée de l'économie est une bonne chose, mais une consommation excessive peut être fatale. Si les définitions sont trop précises, on encourage les entreprises à se lancer dans des techniques de contournement, à se mouler dans la catégorie qui leur est favorable, etc. Enfin, lorsqu'on cherche à savoir si une entreprise aussi efficiente pourrait entrer sur un marché et survivre, on peut aussi avoir envie de savoir si elle serait capable d'exercer une pression concurrentielle. Le simple fait qu'elle puisse survivre n'est pas nécessairement suffisant.

Le Président donne alors la parole au professeur Hawk. Celui-ci souligne que la première étape, pour déterminer ce que désigne l'expression « concurrence par le mérite », est de décider quels sont les objectifs que l'on poursuit. Si l'on décide, comme tout le monde, que l'on veut encourager un certain type de bien-être des consommateurs, l'objectif sera-t-il ce bien-être tel que l'envisagent de nombreux économistes ; ou bien l'objectif sera-t-il fondé sur la rivalité entre les concurrents ou sur la structure du marché ? L'Allemagne, par exemple, a largement tendance à privilégier la rivalité et le processus concurrentiel. Si l'on décide de promouvoir une telle rivalité, les règles seront plus rigoureuses en matière de refus de licence et d'innovation de produit, puisque l'accent sera mis sur la protection de l'accès au marché.

En outre, le professeur Hawk constate volontiers, non sans surprise, que personne, pendant la table ronde, n'a mentionné l'équité comme objectif de la politique de concurrence. On simplifie la loi si on laisse de côté des objectifs tels que l'équité et l'intégration des marchés et si l'on envisage uniquement le bien-être des consommateurs ou la rivalité entre concurrents.

Le professeur Hawk indique que si une autorité de la concurrence a l'intention de condamner un certain comportement, il est extrêmement important qu'elle trace également une voie qui permettra aux entreprises de continuer à innover et à rester concurrentielles sur le marché ; il ne faut pas se borner à condamner.

Il note en outre l'importance de règles juridiques pour les allégations récurrentes comme les pratiques de prix d'éviction. Il serait également utile d'établir des règles précises pour le refus de traiter, par exemple. Il conclut en observant que, pour se prononcer sur un comportement anticoncurrentiel, les critères les plus simples sont préférables aux plus compliqués.

9. Débat général

Un délégué de l'Italie note tout d'abord que les approches économiques sont principalement fondées sur les effets. Le problème, selon lui, est que les effets qui sont pris en compte ne sont pas toujours fondés sur une bonne analyse économique. Ainsi, un rabais n'est pas forcément illégal. Dans l'affaire *Michelin*,

l'analyse est fondée sur les effets, mais l'effet considéré n'était vraiment pas très pertinent et reposait sur des hypothèses erronées.

Deuxièmement, le critère du concurrent aussi efficient est approprié aux abus en matière de prix, par exemple en cas d'éviction, et ce critère est un condensé de celui du bien-être des consommateurs. Il s'agit en fait d'un seul et même critère. L'unique différence, d'après ce délégué, c'est qu'on suppose que l'éviction des concurrents efficients porte atteinte au bien-être des consommateurs.

En revanche, le critère du concurrent aussi efficient ne convient pas à d'autres types d'abus. En cas de couplage avec une technologie irréversible, si les deux produits ne peuvent pas être immédiatement dissociés, il peut y avoir ou non abus. Cela dépend des circonstances, comme dans le cas des autoradios. Ces produits sont technologiquement réversibles. Il n'y a pas abus. Le délégué n'est pas d'accord avec la position des Etats-Unis, qui préconisent de ne pas intervenir dans le cas d'un nouveau produit. Dans certains cas, une offre groupée peut constituer un abus parce qu'elle pourrait revenir au même qu'une pratique d'éviction.

Un délégué de l'Autriche indique que, même si son pays n'a pas beaucoup d'expérience dans l'application de la notion de "concurrence par le mérite," il semble y avoir une incohérence dans l'approche fondée sur l'économie. L'économie ne devrait être utilisée qu'en quantité modérée. Si l'on est obligé de prouver les faits sur la base de l'économie, que ce soit par une loi ou par des lignes directrices, cela n'augmentera pas l'efficacité de la concurrence, mais réduira l'efficacité de l'autorité nationale de la concurrence, surtout si elle est de petite taille.

Autre question, que veut-on dire par efficacité d'une entreprise ? Est-il vraiment satisfaisant de mesurer l'efficacité principalement en fonction du chiffre d'affaires, du coût de production ou des économies d'échelle au niveau de l'investissement ? Si les économies d'échelle n'ont pas la même importance dans tous les secteurs économiques, il peut s'avérer difficile de mesurer l'efficacité dans des activités se rapportant par exemple à l'artisanat, au savoir ou à la R&D.

Un délégué de l'UE explique que le critère d'absence de justification économique n'est lui-même pas justifié d'un point de vue économique, car le comportement peut avoir un double effet. Il peut y avoir à la fois un effet d'éviction et un effet d'efficacité. Qu'est-ce que la justification économique si ce n'est la conviction qu'on n'équilibrerait pas les effets négatifs et positifs ? Les autorités assurent cet équilibre lorsqu'elles appliquent la règle de raison dans les affaires relevant de l'article 1 du Sherman Act ou de l'article 81 du traité CE, et lorsqu'elles examinent les fusions.

Ce délégué considère ensuite qu'il faut absolument avoir à l'esprit non seulement la possibilité d'interdire, mais aussi la nature de la mesure correctrice à prendre. La mesure correctrice ne doit cependant pas déterminer le critère à utiliser.

Un délégué du BIAC rappelle ensuite que c'est la concurrence et non les concurrents que le droit de la concurrence cherche à protéger et qu'on doit faire très attention lorsqu'on établit les présomptions, qui ne sont rien d'autre qu'une autre façon de transférer la charge de la preuve sur le défendeur au lieu du demandeur. Il faut être particulièrement prudent pour condamner les rabais, notamment en cas de vente groupée ou de remise de fidélité favorables aux consommateurs, sans examiner de plus près comment fonctionne le marché. Il faut alors procéder à une analyse approfondie. La condamnation de ce type de pratiques peut causer plus de mal que de bien aux consommateurs.

Le délégué ajoute qu'il faut aussi être prudent quant à l'obligation d'assister ses concurrents. Aux Etats-Unis, les entreprises ne sont pas obligées de le faire et, à en croire la doctrine juridique dominante, il n'est pas obligatoire de partager la propriété intellectuelle avec un concurrent. De plus, il faudrait éviter les

règles d'illicéité automatique dans les domaines où l'on n'a pas autant d'expérience que dans d'autres, ce qui vise en particulier les prix d'éviction.

Ce délégué convient que le critère d'absence de justification économique n'est objectivement pas justifié d'un point de vue économique. D'un autre côté, le critère du concurrent aussi efficient risque d'être très difficile à appliquer. Qu'est-ce qu'un concurrent aussi efficient ? Ce critère aboutit à une sorte d'analyse fondée sur les coûts. Est-ce que l'on considère l'efficience de l'entreprise dominante ou celle d'une entreprise hypothétique qui peut ou non exister sur le marché ?

Un délégué du Brésil est d'accord avec le représentant des États-Unis pour considérer que, pour de nombreuses raisons, le critère d'absence de justification économique est plus applicable que les autres. Il présente néanmoins un inconvénient : comment différencier un cas de violation du droit de la concurrence d'un cas de concurrence déloyale ? En d'autres termes, comment les autorités de la concurrence peuvent-elles faire le tri pour ne conserver que les cas de violation du droit de la concurrence ? Après tout, la concurrence déloyale n'a pas non plus d'autre justification économique que ses effets d'éviction.

Un délégué du Taipei chinois estime qu'il faudrait avant tout savoir comment mieux formuler dans l'optique de l'efficience les critères économiques. En Taipei chinois, des sanctions ont été imposées à deux monopoles, mais il reste à savoir comment ne pas fausser le raisonnement par une analyse superficielle qui ne soit pas rigoureusement économique. Enfin, il faut aussi bien concevoir les mesures correctrices.

Un délégué de l'Allemagne se dit soulagé de constater que la différence entre les approches fondées sur la forme et les approches fondées sur les effets est de moins en moins marquée. Si l'on se fonde sur la forme, il faut réfléchir aux effets que cela peut avoir sur le comportement du marché et des concurrents. Ainsi, les rabais sont souvent jugés illégaux et la forme des rabais illégaux est définie en fonction de leurs effets d'attraction des clients et d'éviction d'autres concurrents. C'est une façon de considérer la question en combinant divers facteurs et on peut alors se demander s'il existe réellement une grande différence entre les différents systèmes appliqués.

Un délégué de l'Australie exprime brièvement son accord quant à l'importance d'une bonne analyse économique pour engager des poursuites.

Un délégué du Japon souhaite répondre à la question du professeur Rey concernant l'affaire *Intel K.K.* Il commente la situation sur le marché des unités centrales au Japon avant que la pratique en question n'apparaisse. Intel avait perdu 10% de sa part de marché au Japon en faveur de ses concurrents. Or, en proposant des financements ou des rabais aux fabricants d'ordinateurs qui s'engageaient à n'utiliser que les processeurs d'Intel, il a conquis une part de marché de 90%. Il s'agissait clairement d'évincer un concurrent, ce qui devait créer une situation de monopole sur le marché japonais. Selon ce délégué, un tel comportement n'était donc pas défendable quels qu'en soient les éventuels effets bénéfiques à court terme.

Enfin, un délégué de la Suisse rappelle que les différents critères sont plus ou moins appropriés selon le cas d'espèce.

Le Président formule alors quelques observations finales, en constatant que, contrairement à d'autres tables rondes, celle-ci a dégagé un large consensus. Le plus difficile est de choisir les variables qu'il faut prendre en compte et de savoir comment les utiliser. Certains critères sont très difficiles à mettre en oeuvre, ce qui donne lieu à de nombreuses hésitations. Comme l'a souligné le professeur Hawk au début de la table ronde, la transparence du raisonnement qui sous-tend les décisions est très importante. Il peut être fructueux d'exposer à la critique les décisions et le raisonnement qui s'y rattache, en ce sens que cela suscitera un débat très utile et permettra probablement d'améliorer la qualité des critères. En attendant l'apparition d'un meilleur critère, les autorités de la concurrence donnent une image négative parce que

leur raisonnement n'est pas toujours clairement articulé et qu'on pense souvent qu'elles s'appuient sur certaines convictions, et pas sur un raisonnement intellectuel, pour en arriver à leurs conclusions.