BUNDESKARTELLAMT

Written Statement
of the German Bundeskartellamt and
the German Ministry of Economics and Technology
on the DG Competition discussion paper
on the Application of Article 82 of the Treaty to exclusionary abuses

Bonn 2006

I. GENERAL COMMENTS

1. Introductory remarks

The Bundeskartellamt and the German Ministry of Economics and Technology welcome the opportunity to comment on the DG COMP discussion paper on the application of Article 82 EC to exclusionary abuses. In principle, we welcome the approach taken by the Commission. The Commission takes into account recent economic insights. In the discussion the Bundeskartellamt has emphasized the importance to keep abuse control manageable. This concern has been taken into account to an acceptable extent. In some contexts, however, it would still be desirable to place greater emphasis on this.

The Bundeskartellamt and the German Ministry of Economics and Technology generally support the Commission in establishing the protection of competition as the aim of Article 82 EC , in proposing presumptions wherever this is economically and empirically justified and in allocating the burden of proof for justifications to the dominant companies. This contributes to an effective enforceability of Article 82 EC, to legal certainty for the undertakings and to an appropriate application of a more economics- and effects-based approach. However, considering the different views and

approaches on the application of Article 82 EC the possible aim of the Commission to use the discussion paper as a basis for guidelines on Article 82 EC seems to be quite ambitious. We would also like to stress that guidelines based on the discussion paper might not be clear and precise enough for undertakings which need concise guidelines to assess in advance which behaviour is abusive and unlawful. Finally we would point out that the framework for any kind of guidance is the Court of Justice's interpretation of Article 82 EC.

2. The role of economics in abuse control

In order to adequately assess abusive practices, abuse control always requires an in-depth analysis of the market structure and the behaviour of the companies concerned. Economic insights should be applied in this context to support necessary analyses. Consequently, the significance of economic analyses has consistently increased. Against this background the Commission has systematically reviewed abuse control in its guidance paper and has identified the possibilities offered by economic analyses in this field.

An in-depth consideration of the economic aspects seems an adequate way to reduce the occurrence of wrong decisions, especially those of type I where the economic freedom of enterprises may be too much restricted. On the other hand administrative procedures should not become too complicated in order to avoid type II errors which will result simply due to the lack of resources to handle cases. As a result competition would be insufficiently protected. Economic analysis offers the opportunity to consider and evaluate the conduct examined within an economic context. In this way it can be ascertained whether or not the conduct objected to is objectively justified.

3. Ensuring public and private enforcement and legal certainty for companies

Another principle objective of Article 82 EC must be the establishment of workable standards of enforcement to guarantee companies the necessary legal certainty and ensure an effective protection of competition. The threat that enforceability of abuse control might suffer as a result of increased economic analysis should not be underestimated in cases where requirements for proof of abusive conduct are set too high or make extensive economic analysis necessary. In view of often diverging economic

estimations and analyses a high degree of economic expertise is required from competition authorities and relevant courts in weighing up competing economic findings.

The protection of competition requires that unjustified abusive practices are prohibited by the competition authority or the courts within a reasonable timeframe at the earliest possible stage so that efficient competitors can survive in the market. It is an unsatisfactory result if an administrative abuse procedure is pursued for several years and as a result there is a perfect economic assessment but the competitive structures of the market are destroyed as a result of the abusive conduct and the actual efficient competitors are driven out of the market. The Bundeskartellamt has already witnessed similar scenarios in the past and would welcome it if the new approach would not lead to an increase of resource-intensive but ultimately futile attempts to preserve competitive structures.

Efficient public and private enforcement within a reasonable timeframe requires a justified allocation of the burden of proof and the use of presumptions wherever this is justified by sound economic and empirical analysis and experience. It is the primary goal of merger control to prevent companies from gaining market power and to thereby preserve competitive market structures. For various reasons, merger control - which by its very nature is an ex-ante control - alone is not sufficient to achieve the goal of efficient and undistorted competition. The ex-post control of abusive behaviour of dominant companies plays an important and indispensable role in addition to merger control. Securing the effective application of Art. 82, therefore, is a key element of competition policy that has to be balanced against the need of a more economic approach.

The Article 82 EC policy should also be in line with the Commission's policy which aims to strengthen private enforcement. An (actual-) effects-based approach combined with the application of cost analysis places a huge burden on a plaintiff wanting to sue a dominant company for allegedly abusive behaviour. The significant private enforcement activity in Germany and Europe should not be “foreclosed” by setting the requirements for establishing an abuse of Article 82 EC too high to prove.

4. Discussion paper/guidelines not binding for national competition authorities

Neither a DG Competition discussion paper nor guidelines on Article 82 EC issued by the Commission are legally binding for national courts and national competition authorities. However, the Bundeskartellamt is aware that the Article 82 EC guidelines will have a practical impact on the application of Article 82 EC in the ECN and the Member States of the European Union, and the Bundeskartellamt will consider the guidelines in its Article 82 EC cases. Against this background we would prefer to state in the paper or future guidelines that the discussion paper or guidelines as such do not bind national competition authorities and national courts.

II. COMMENTS ON DOMINANCE

1. Market definition

The Commission is right in saying that the application of the SSNIP test may lead to a too wide market definition since the prevailing price in a dominated market is often above the competitive level (cellophane fallacy). Thus often a more detailed look at the characteristics and structure of the market is required. The proposed methods are appropriate for the definition of the relevant market. Nevertheless, it is doubtful whether the reconstruction of the competitive price (para 16) in order to avoid the cellophane fallacy is really a feasible method. Looking at prices in other (time, region) but similar markets could be an easier and more reliable proxy.

2. Dominance

The assessment of dominance is mainly based on market shares and barriers to entry taking account of demand conditions. An analysis of barriers to market entry should include financial and investment requirements, information asymmetries with regard to significant cost structures and demand conditions, brand loyalty, economies of scale/scope or the necessity of sequential market entry[1] and the dynamic effects of (potential) competitors on production costs and product quality.

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[1] This enables the dominant company to use “low cost” cut price strategies (e.g. limit pricing) in relatively small (sub-) markets, and deter potential newcomers from entering the market.

Other factors could also play a role in the assessment of dominance. Our national competition law specifies a number of other factors used to establish dominance: financial power, access to supplies or markets, links with other undertakings, actual or potential (cf. barriers to entry) competition, ability of the undertaking to shift its supply or demand to other goods or commercial services, ability of the opposite market side to resort to other undertakings. We recommend that these criteria should also be mentioned because they have been helpful and of practical relevance in a large number of cases in the Bundeskartellamt's daily work. As dominance is the precondition for the application of Article 82, the chapter on dominance should cover and explore all criteria for dominance.

Furthermore the discussion paper should emphasize that dominance may be established in different ways in abuse cases and merger cases as the time horizon in abuse and merger cases differs (actual dominance assessment in abuse cases versus prognosis of a creation or strengthening of dominance in merger cases).

III. COMMENTS ON THE FRAMEWORK FOR EXCLUSIONARY ABUSES

1. Objective of Article 82 EC: Protection of Competition

We welcome the Commission's statement that the main objective of Article 82 EC is to protect competition itself (as a means of both enhancing an efficient allocation of resources and consumer welfare) and not competitors (para 4). Consequently, we reject the idea of moving to the protection of consumer welfare or consumer interests as the primary objective of competition law. This view is supported by the case law of the European Court of Justice which states that Article 82, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or the consumers, but to protect the structure of the market and thus competition as such.[2]

The protection of competition is of course not an end in itself. As a means of both enhancing consumer welfare and ensuring an efficient allocation of resources com-

[2] Cf. Court of Justice, Case 6/72 "Continental Can" [1973] ECR 215, paragraph 26; Case 85/76 "Hoffmann-La Roche" [1979] ECR 461, paragraph 91, 125; Case 322/81 "Michelin I" [1983] ECR 3461, paragraph 70; Case 31/80 "L´Oréal" [1980] ECR 3775, paragraph 27.

petition helps to prevent other welfare decreasing effects (such as environmental degradation or a rise in prices of production input factors). Thus not only consumers benefit from the protection of competition, at least in the medium or long term. Consumers are indirectly protected, as they would have to face disadvantages such as little innovation or higher prices if competition was harmed.

2. The likely-effects-based approach

We endorse the effects-based approach taken by the Commission in its discussion paper. We understand that this approach requires a standard of proof in line with the need to protect effective and undistorted competition in the common market. Therefore in general it is sufficient and appropriate to establish the likely effects of the market behaviour of the dominant company. The Bundeskartellamt, in its practice, focuses on the likely market effects of a prima-facie abusive behaviour without the requirement to prove actual market effects. An approach based on the assessment of likely-effects is explicitly endorsed by Advocate General Kokott in her opinion on the British Airways case of 23 February 2006 (para 70f.):

> *"70. Significantly, BA itself states that it is not necessary in each case to establish actual anti-competitive effects of a rebate or bonus scheme on competitors. The burden of competition authorities, courts, and, in some cases, private complainants, in even attempting to establish this would in many cases be entirely disproportionate.*
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> *71. What is to be proved is, rather, the mere likelihood of the conduct in question hindering the maintenance or development of competition still existing in the market by means other than competition on the merits, thereby prejudicing the goal of effective and undistorted competition in the common market."*
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> *75. [T]he Court […] was correctly satisfied with proof that the abusive conduct of the dominant undertaking 'tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect'.*

The case law of the courts backs this position.[3] Advocate General Kokott argued (para 76) that the reference of the Court of First Instance to "capable of having" and "likely to have" is more a semantic distinction and should not be over-interpreted. We

[3] Cf. Court of Justice Case 85/76 "Hoffmann La-Roche" [1979] ECR 461, para 91; Court of Justice, Case 40-48, 50, 54-56, 111, 113, 114/73 "Suiker Unie" [1975] ECR 1663, para 526/527. In Michelin II (para 74) it was decided that even the intention to foreclose the market (here through a rebate system) violates Art. 82 EC.

do agree that the Court of First Instance seems to use “capable” more in the meaning of “likely” but would prefer to use the term “likely” as this implies in general a stronger test than just “capable”. The discussion paper points out that the Commission focuses in its assessment of the conduct in question more on the likely effects of the conduct (para 54, 58). We welcome this approach.

However, in the chapters on predatory pricing and single branding and rebates the Commission considers both likely and actual effects (see para 115, 117, 144). This would in practice lead to the result that in all cases actual effects have to be considered as this is the “higher” test standard. We would prefer to focus on the likely effects here.

If the conduct has already begun, actual effects can and should of course be taken into account (see para 55). But as those effects can originate from a multitude of reasons the standard of proof for the competition agencies should still be a persuasive demonstration of the likely market effects. We understand “likely” in the way of probability meaning that the agency is convinced about the foreclosure effect but not beyond reasonable doubt.

It must be emphasized that proving actual effects is generally a very difficult and time-consuming task. A consideration based on actual facts would have to prove the causality between conduct and actual effect on the market. It would hardly be possible to measure the incentive effects of the conduct in question on the entrepreneurial decisions of actual or potential competitors: Firstly, there is a time gap between the effects measured during a certain period of time and the entrepreneurial decisions on which they are based which makes it difficult to prove the causality. Secondly, opportunities cannot be considered, i.e. the question as to how the market would have developed without the allegedly abusive conduct simply cannot be answered by looking at the past, because in order to guarantee an effective abuse control the assessment of rebate incentives requires an ex-ante consideration. In this context game theory considerations from which investment or competition incentives are derived with or without the conduct under consideration (“likely effects”) appear to be more reliable.

However, some constellations are conceivable in which actual market developments would have to be considered. This would apply in particular in cases where improvements of competition could be observed although a dominant company used allegedly abusive practices, i.e. practices that are considered to be abusive by economic theory and experience, for a substantial period of time. The operationalisation of these ”improvements of competition” depends on the individual case or the initial situation in the market. Indicators could be (sustainable) market entries, product innovations, strategies or measures increasing efficiency applied by the competitors (e.g. vertical integration), market share fluctuations to the detriment of the dominant company etc.

As a caveat it must, however, be mentioned that, particularly when considering shorter periods of potentially abusive conduct, it might not be possible to adequately cover negative incentives to (potential or actual) competition and therefore type II errors could occur. If, however, the relevant conduct could be observed for a longer period of time, e.g. exceeding an investment cycle, and competitive improvements occurred nevertheless, it is to be assumed that type I errors are more likely. The relevant statements in para 55 of the discussion paper should be interpreted or put into concrete terms accordingly.

We support the suggested two-step approach (para 58), analysing the capability of a conduct to foreclose a market by its nature in a first step and the likely market distorting foreclosure in a second step. According to the case law of the European Court of Justice a third step would be the “objective justification”.

3. The “as efficient” competitor test and cost methods

The discussion paper proposes the “as efficient” competitor test as the appropriate approach to distinguish abusive from non-abusive behaviour (para 63). The rationale behind this test is that Article 82 EC aims at protecting competition and not (inefficient) competitors. Since we know that inefficient companies will sooner or later disappear from the market due to their inability to compete with efficient competitors, we can conclude that abuse control should only protect competitors that are at least as efficient as the dominant undertaking. Therefore the conduct of a dominant company can only be regarded as abusive if it is suitable to eliminate an at least as efficient

competitor. We agree that the "as efficient" competitor test is in principle the best available test to assess abusive behaviour (better than for example the consumer welfare test)[4].

However, we would also like to clearly underline the limits and shortcomings of this test. Although they are now much better addressed in the discussion paper (para 67) we would suggest the following addenda:

- The test fails whenever companies produce with increasing economies of scale. The reason for this failure is that average costs decrease with increasing production quantities. Since the dominant undertaking always produces a greater quantity than its competitors, its average costs can be lower than those of its competitors even if its cost function is always above the competitors' cost function. This is especially relevant in network industries where the incumbent has generally an advantage over its competitors because of its scale and size.

- Even less efficient competitors may raise the competitive pressure in the market. This can be of importance if the relevant market is characterized by high barriers to entry. High barriers to entry always deter the entry of potential competitors and therefore it is not guaranteed that efficient competitors can enter the market. In this case the protection of less efficient companies may limit the scope of actions of the dominant undertaking. As the OECD pointed out in the Executive Summary of the Roundtable Discussion on Competition on the Merits of 7 December 2005[5]: "The ["as efficient" competitor] test may be too lenient, 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."

- Applying the "as efficient" competitor test involves an analysis of the costs of the dominant company (see predation and rebates). The experience of the Bundeskartellamt in energy cases shows that cost analysis is a very complex and

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[4] See the Summary Record of 94th Meeting of the Competition Committee held on 1-2 June 2005 (DAF/COMP/M(2005)2/ANN5 of 7 December 2005) where the different tests are described (also in the Policy Brief of the OECD on competition on the merits).

[5] Summary Record of 94th Meeting of the Competition Committee held on 1-2 June 2005: DAF/COMP/M(2005)2/ANN5 of 7 December 2005.

extremely time and resource intensive method. The definition and assessment of costs are very controversial in theory and practice. Cost methods and benchmarks are therefore likely to be challenged in court. The value of data needed for applying cost benchmarks also depends to a large extent on the willingness of the companies to cooperate with the competition authority.

- We would suggest using the "as efficient" competitor test to assess potentially abusive strategies on a case by case basis, rather than making the "as efficient" competitor test the standard approach: A general application of the "as efficient" competitor test may diminish type I errors but could due to scarce administrative resources lead to an increase of type II errors in other markets. The application of the "as efficient" competitor test might be justified in cases of economic significance (size, significance and structure[6] of the market affected) or legal relevance (precedents) but it constitutes an excessive burden on enforcement if it has to be applied in all unilateral conduct cases.

The Commission has addressed some of these concerns in para 67 where certain caveats are stressed (e.g. as regards the use of cost data and the necessity of applying the test). We welcome the caveat that the test should not be applied if no reliable information on cost data is available and that it may sometimes be necessary in the consumers' interest to protect competitors that are not (yet) as efficient as the dominant company. Where the "as efficient" competitor test would be appropriate we suggest to use empirical data, e.g. cost benchmarks, in addition to concrete costs, because it is not always possible to establish, and even less possible to compare the exact costs. This two-stage approach[7] would also address the concern that competition authorities might be instrumentalised and competitive pressure artificially reduced for the benefit of inefficient suppliers.

Finally we would suggest that the Commission could build a case on applying the "as efficient" competitor test as a very good method for assessing price-related abuses,

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[6] As to the relevant structural factors, the degree of market dominance (cf. above II. 2) and the dynamic effects of (potential) competitors on production costs and product quality are of particular relevance. The more the technical progress in a market depends on newcomers the more the protection of competition is necessary.

[7] Explicitly proposed with regard to predation cases by Joskow, Paul; Klevorick, Alwin (1979): A Framework for Analysing Predatory Pricing Policy in: Yale Law Journal, 89 (1979), p. 213-270.

but not make it binding, and that it could also build the case of a foreclosure effect on other strong arguments.

4. Objective justification (and application of Article 81 (3) EC)

The Commission points out that exclusionary conduct does not fall under the prohibition of Article 82 EC if the dominant undertaking can provide an objective justification for its behaviour or the conduct produces efficiencies which outweigh the negative effect on competition (para 74). The European Court of Justice has not explicitly mentioned objective justifications so far. Whilst assessing them carefully, it seems to be hesitant to generally allow for generous objective justifications under Article 82 EC. In Hoffmann-La Roche[8], it stated that neither investments in capacity which are not client specific nor the reliability of delivery serve as defence. Only economies of scale were permanently considered as objective justification for assessing rebates.[9]

a) Applying the Criteria of Article 81 (3) EC

In order to assess the objective justification the Commission proposes in its paper to apply the criteria of Article 81 (3) EC also in Article 82 EC cases (para 8, 84). We would like to point out that Article 82 EC and the case law of the European Court of Justice clearly do not provide for such an exemption. According to the established case law of the European Court of Justice conduct which is exemptable under Article 81 (3) EC or which does not violate Article 81 (1) EC can constitute an infringement of Article 82 EC.[10] Under European case-law Article 81 (3) EC is therefore not applicable in Article 82 EC cases.

The case law of the European Court of Justice[11] provides for an objective justification as the second step of the examination. This can be an objective economic justifica-

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8 Court of Justice, Case 85/76 “Hoffmann-La Roche” [1979] ECR 461, para 115.

9 Cf. Court of First Instance, Case T-203/01 “Michelin II”, [2003] ECR II-4071, para 100; Court of First Instance, Case T-228/97 “Irish Sugar” [1999] ECR II-2969, para 114.

10 Court of Justice, Case 66/86 “Ahmed Saeed Flugreisen” [1989] ECR-803, para 35, 37; Court of Justice, Case 85/76 “Hoffman-La Roche [1979] ECR-461 para 116; Court of First Instance, Case T-51/89 “Tetra Pak I” [1990] ECR II-309, para 25, 30.

11 Court of Justice, Case 322/81 “Michelin I” [1983] ECR 3461, para 85; Court of Justice, Case 85/76 “Hoffmann-La Roche” [1979] ECR 461, para 90; Court of Justice, Case 40-48, 50, 54-56, 111, 113, 114/73 “Suiker Unie“ [1975] ECR 1663, para 518).

tion or a justification for other reasons. We understand the objective justification as one which balances the different interests of the parties involved and aspects of a case while giving the objective of Article 82 EC to protect competition its due weight.

b) Meeting Competition Defence

Objective justifications can be based – as described in the discussion paper (para 77ff.) – on an objective necessity defence, a meeting competition defence or an efficiency defence. We support the Commission in allowing for an objective necessity defence (para 80).

We have some reservations as regards the meeting competition defence. This defence could probably be claimed by many dominant companies as their behaviour is almost always a reaction to the market. While every dominant company is without doubt entitled to pursue its own commercial interests as a legitimate aim, competition law cannot allow this behaviour if it leads to the foreclosure of the market. The Commission therefore refuses to allow the meeting competition defence as a justification for single branding obligations. In our view this applies to many other types of behaviour as well.

c) Efficiency Defence

The discussion paper allows for an efficiency defence if conditions which are equivalent to those of Article 81 (3) EC are fulfilled. So far, such an approach has not been applied to abuse control cases, nor is there any case law on efficiency defence with regard to Article 82 EC. Dealing with such an efficiency defence will be very time and resource intensive for the competition authority. It could be questioned whether this effort is justified considering that the efficiency defence will presumably be successful only in a few cases. We are therefore reluctant to accept the proposal of the Commission to allow for an efficiency defence in Art. 82 cases.

Furthermore, we welcome that the Commission has established high requirements for such considerations and placed the burden of proof on the dominant companies which raise the efficiency defence.

The Commission generally sees no scope for an efficiency defence in predatory pricing cases (para 127). The predation test will be also applied, in principle, to certain rebate schemes. We would therefore like to question whether there is any scope for an efficiency defence in such rebate scheme cases and also in general for price-related abuses.

5. Burden of proof and presumptions

The guidance paper allocates the burden of proof in abuse cases similar to Article 2 of Regulation 1/2003 EC. The burden of proving an infringement of Article 82 EC lies with the authority or party alleging the infringement. However, an undertaking claiming the conduct is not abusive bears the burden of proving objective necessity, meeting competition or economic efficiencies. We endorse the proposed burden of proof. Especially the fact that undertakings have to prove possible justifications is an adequate approach since the undertakings have private information about efficiencies that competition authorities often cannot obtain. The Commission also uses positive or negative presumptions with regard to predatory pricing (para 108, 124), rebates (negative in para 146, positive in para 151, 165, 168) and refusal to supply (para 222) if certain conditions are fulfilled. We promote and welcome the use of such presumptions as all these presumptions are based on sound economic theory and empirical assessment. However, especially in assessing rebates, the sound theoretical concept of comparing the required share with the commercially viable share seems to be too abstract to implement.

IV. COMMENTS ON TYPES OF ABUSES

1. Predatory pricing

The cost benchmarks proposed by the Commission are a more elaborated version of the AKZO test and are also based on common case law and sound economic theory. We agree with the Commission that this is the correct approach in establishing and proving predatory pricing. Moreover, the standard of proof is not set too high since the Commission's assessment is based on likely effects.

The necessary proof of predatory intent in cases of pricing above average avoidable cost, but below average total cost, may be difficult. Intent is always a subjective element of conduct and may not be proven by means of objective findings. One has to

keep in mind that providing direct evidence of abusive intent is often hardly possible, so that indirect evidence is required.

The question of intent is closely related to the question of recoupment. The Commission states that a separate proof of recoupment is not necessary in order to establish an abuse (para 122). We fully agree with this assessment. There is no need for a separate proof of recoupment although it is the possibility of recoupment that causes consumer harm in the end. Firstly, future returns on investment can only be calculated with uncertainty. Therefore the calculation raises several non-trivial analytical questions. Secondly, investing in a predatory strategy is only reasonable if the dominant company assumes that recoupment is possible. Furthermore, a calculation of recoupment may be very difficult or even impossible if, for example, predatory pricing is used to build up a strong reputation in order to deter entry to other markets.

2. Single branding and rebates

We agree with the Commission´s assessment of single branding to the extent that a likely-effects-based approach is pursued (we would recommend to eliminate “actual” in para 144).

The assessment of rebate schemes in the guidance paper deviates from the previous approach taken by the Commission. The previous differentiation between quantity and loyalty/target rebates is abandonned und replaced with the proposed differentiation between retroactive and incremental rebates. This approach is an important improvement in abuse control and is in clear accordance with economic theory. Incremental rebates are non-abusive in a majority of cases, but retroactive rebates have likely foreclosure effects if strong loyalty effects are induced by the rebate scheme. We agree with the proposed approach but recommend some clarifications:

- The calculation of the viable amount may be too complicated for competition authorities and even for undertakings, especially because the dominant company needs private information on its competitors. It is necessary that possible methods of calculation are made clearer.
- It can be doubted whether retroactive rebate schemes are not abusive if the threshold is only set at or below the level that would anyhow be purchased by the buyer from the dominant company (para 152). By that it is ignored that the loyalty

enhancing effect has to be assessed from an ex-ante point of view. The relation between actual purchases and the threshold is an ex-post observation that does not reflect incentives existing at the moment of decision on the purchases.

3. Tying and Bundling

We basically agree with the chapter on tying and bundling. Nevertheless, problems may arise if the calculation of the incremental price of a single product sold in a bundle becomes more complicated. Especially if multi-product rebates are granted (para 193) or if customers differ in their purchasing behaviour (para 194) the calculation of the incremental price may be too complex and time-consuming and may require a multitude of information. But as there are fall back options presented in the following para (especially the proof that a rival was actually excluded or marginalised) there is no need to abandon incremental cost as a better indicator.

The level of the tied percentage of total sales in the tied market is a good proxy to show likely foreclosure effects (para 196). But one has to keep in mind that foreclosure is a dynamic process and achieved in tying and bundling cases by leveraging dominance in the tying market into the tied market. Therefore the possibility of leverage, regardless of the actual percentage of total sales, is an important factor in assessing a foreclosure effect.

4. Refusal to supply

We agree with the section on refusal to supply and support the Commission in its approach. With regard to sunk investments as objective justifications (cp. para 235), it could be made clearer that exclusion is the measure which most hinders competition and that there are usually other less restrictive possibilities to recover the investments while maintaining the incentive to invest in the future. One could think of temporarily tolerating excessive but not prohibitive prices without fearing an objection of the competition authority.

5. Aftermarkets

We welcome the fact that the paper now confines itself to exclusionary abuse. Unfortunately, the paper does not mention potential exclusionary effects deriving from cross-subsidising: an undertaking could use profits achieved due to dominance in the

secondary market to cross-subsidise the primary market product and thus exclude competitors from the primary market, especially those who are not active or at least not dominant in the secondary market. A corresponding extension of the chapter would be welcomed. As to lifecycle considerations, differences in conduct between private individuals and companies (para 258) should not be presumed without empirical evidence.