

THE EC COMMISSION'S GUIDANCE PAPER ON THE APPLICATION OF ARTICLE 82 EC: AN EFFICIENT MEANS OF COMPLIANCE FOR GERMANY?

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Abstract *This article aims to introduce the Guidance Paper's key features in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings. It will therefore examine the concepts of consumer welfare, anticompetitive foreclosure, consumer harm, the efficiency-based defence and balancing test, and some issues that apply to predation and tying. It will also discuss how the Guidance Paper could be perceived from the perspective of German competition law and policy and what kind of transitional regime might be required for the effective implementation of its major analytical concepts. The central issue is therefore to answer the questions of how efficient it really is to reform Article 82 by means of a soft-law instrument, and whether the GP presents an efficient means of compliance for Germany.*

Key words: Article 82 EC, antitrust law, Germany, EC competition law

A. THE CHALLENGES OF THE GUIDANCE PAPER

1. Introduction

The European Commission's Guidance Paper (GP) aims to overcome the lack of economic rigour in the traditional, formalistic approach to Article 82 EC¹ and shift to an effects-based approach. One of the reasons to pursue such a shift is that the form of a conduct in itself is not relevant for assessing its actual impact on the market; rather the pro-competitive effects of the conduct of a dominant undertaking or its anticompetitive effects or both need further

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¹ See Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Communication of December 3, 2008.

examination.² The Commission therefore intends to endeavour to conduct a more balanced analysis of each case based on its economic merits. Nevertheless, a closer look reveals that the GP is limited to establishing the enforcement priorities that the Commission will apply to exclusionary conduct by undertakings holding single dominance and does not re-state any of the substantive principles of Article 82.³

This article aims to introduce the GP's key features, which require extensive analysis. It will therefore examine in detail the concepts of consumer welfare, anticompetitive foreclosure, consumer harm – even in the absence of a persuasive theory of harm – the efficiency-based defence and balancing test, and some issues that apply to such selected types of exclusionary abuse as predation and tying. It will also discuss how the GP could be perceived from the perspective of German competition law and policy and what kind of transitional regime might be required for the effective implementation of its major analytical concepts. The central issue is therefore to answer the simple questions of how efficient it really is to reform Article 82 by means of a soft-law instrument, and whether the GP presents an efficient means of compliance for Germany.

Including a possible response from Germany is necessary because several features of competition law, in particular the traditional understanding of an order with free competition as a value in itself and the efficiency-based defence, are currently in conflict with the consumer-welfare standard and much disputed in Germany. Nevertheless, the controversies surrounding the proper competition-policy standard for abuse of dominance do not imply that no clear line of acceptance exists between legal and economic scholars in regard to the concepts of consumer harm or efficiencies. In terms of German theoretical analysis, this article's answers to the above questions attempt to reveal whether only one voice may be heard within academia and whether the Commission's recent decisions or European courts' judgments adequately reflect a consistent and comprehensive application of the effects-based approach to the abuse of dominance in practise.

2. Clearing up the Ambiguities: A Clear Policy Standard?

Although the Commission stated in the GP's introductory paragraph that the effective enforcement of Article 82 helps markets to work better for “the benefit of businesses and

² See, eg J Briones, “A Balance of the Impact of Economic Analysis on the EU Competition Policy” (2009) 32 *World Competition* 1, 35.

³ EC Guidance *supra* n 1, para 3.

consumers”, which introduced total welfare as a standard, it did not unambiguously provide a clear statement as to its policy objectives when assessing potentially abusive conduct, as its Discussion Paper had done previously.⁴ Its first recognition of a doctrine of consumer harm was when it made it clear that it intended to focus only on “those types of conduct that are most harmful to consumers”.⁵ This, however, falls short of promoting consumer harm as a criterion of restraint of competition, and the Commission was unfortunately somewhat vague about what kind of consumer interests it intends to protect. It reiterated that its aim is to protect “an effective competitive process and not simply competitors”, by which it meant that competitors who offer inadequate price, choice, quality and innovation will leave the market.⁶ In this way, the Commission stated explicitly that competitor protection is not an end in itself and responded to the criticism that it applies Article 82 for the protection of competitors rather than for that of the process of competition,⁷ but undertakings that enjoy a dominant position are entitled to “compete on the merits of the products and services they provide”.⁸ The focus is therefore upon “safeguarding the competitive process in the internal market”, leaving the total-welfare standard untouched. The GP therefore failed to consider the extent to which such limitations could reduce long-run economic efficiency and ultimately harm consumers by removing incentives to invest and innovate. Moreover, it left open the possibility that the Commission could decide to intervene if undertakings engage in such exploitative abuses as charging excessively high prices.

Whilst still looking for the right standard, the confusion persists in paragraph 19, which introduces the concept of anticompetitive foreclosure, noting that it must have an adverse impact on consumer welfare. The GP recognised consumer harm at all levels in both the short and long run, noting that consumers may be harmed by a loss in innovation, loss of market dynamism, reduction in variety of choice or all three. The Commission therefore maintained that business rivalry in the market is critical for delivering benefits to consumers.⁹

Finally, the GP unfortunately left the marginal clarification of the term “consumers” to a footnote,¹⁰ which defined it as all the users of a product, including intermediate producers, distributors and final consumers, making its understanding of consumer welfare not necessarily

⁴ The Discussion Paper stated in paragraph 4: “the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources”.

⁵ *Supra* n 1, para 5.

⁶ *Ibid*, para 6.

⁷ EM Fox, “We Protect Competition, You Protect Competitors” (2003) 26 *World Competition* 2, 149–65.

⁸ *Ibid*, 6, para 6.

⁹ *Supra* n 1, para 29.

¹⁰ *Ibid*, 9, footnote 15.

the same as that of customer welfare.¹¹ This concept of what consumers are should also throw light on a passage in paragraph 11 that referred to all “the parameters of competition – such as prices, output, innovation, the variety or quality of goods or services – [that] can be influenced to the advantage of the dominant undertaking and to the detriment of consumers”.¹²

The Commission's approach therefore seems to resemble the German concept of competition on its merits, which overlaps with German consumer law. Its original meaning was competition in terms of better service for consumers in order to achieve consumer sovereignty, which was to be a key criterion against which to measure market performance,¹³ with competitors who deliver less leaving the market. Nevertheless, because of its market-outcome focus the concept failed to ensure successfully that overall quality of performance would determine market success. This failure has led to the adoption of a market-structure-conduct paradigm compatible with effective competition.¹⁴

However, safeguarding the competitive process and protecting effective competition are in line with the German approach. The German Act Against Restraints of Competition (ARC) aims to protect against restraints of competition affecting so-called *third parties*, including consumers, and to safeguard the static and, even more so, the dynamic functions of competition law. Even so, the ARC does not have the intention of preventing direct harm to consumer welfare, although an original memorandum to the ARC explicitly referred to improving “efficiency and the optimal maintenance for the consumer”.¹⁵ Even the GP's focus on a loss in business rivalry between competing parties or third parties or both resembles the German approach, which focuses upon freedom of action and the effects of agreement on the process of rivalry as ends in themselves.¹⁶

3. The New Shift in Competition Policy – Which Tensions?

¹¹ Cf P Akman, “‘Consumer Welfare’ and Article 82 EC: Practice and Rhetoric” (2009) 32 *World Competition* 1, 10 in the sense that the Commission's understanding of *consumer welfare* is that of a “wealth transfer from the customers to the dominant undertaking”.

¹² *Ibid*, 9, para 11.

¹³ AD Chiriță, “The Analysis of Market Dominance and Restrictive Practices under German Antitrust Law in Light of EC Antitrust Law” (2008) 4 *European Competition Journal* 2, 417.

¹⁴ See, eg EJ Mestmäcker, “Competition Policy in an Industrial Society”, in *Standard Texts on the Social Market Economy* (Stuttgart and New York, Gustav Fischer, 1973), 138-9.

¹⁵ Explanatory Memorandum to the Act Against Restraints of Competition Deutscher Bundestag, *Begründung zu dem Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen*, Drucksache 1158, 1955, 21. Cf B Heitzer, Speech, “Consumer welfare at the heart of competition enforcement”, European Competition Day, Paris, 18-19 November 2008, 3.

¹⁶ See, eg VC Irelli, “Article 81(1) EC: Some Remarks on the Notion of Restriction of Competition” (2009) 34 *European Business Law Review*, 295.

This shift towards a consumer-welfare standard¹⁷ raises some issues that need to be addressed. Beginning with the normative foundations of both constitutional and welfare economics, it is difficult to find agreement on the definition of competition. Constitutional economics sees competition as an instrument for limiting economic and political power.¹⁸ This perspective views the protection of competition as a process involving both protecting competition as an institution and protecting individual freedom of action within an effective competitive system. Therefore, its view of the protection of competition includes both competition as an institution and the traditional order of free competition as desirable goals. This implies the protection of individual freedom of action under effective competition. Welfare economics, however, views competition as merely an instrument for achieving welfare optimization, which means producing efficiencies, including dynamic efficiencies through product or process innovation.

For constitutional economics, then, competition is an open process with results that can never be known in advance, with efficiencies being one of the process's outcomes,¹⁹ whilst welfare economics is oriented toward efficiencies a priori. However, constitutional economics has been unable to develop a consistent concept in regard to protecting free competition that could enable its theoretical foundation to become effective by providing the basis for monitoring and regulating the effects of anti-competitive conduct restricting competition and, more importantly, situations in which such conduct limits third parties' freedom of action.²⁰ Controlling such conduct, from this perspective, is a restriction of its own freedom, calling for a proper balancing of the interests of the parties involved.

¹⁷ Bundeskartellamt rejected the protection of consumer welfare or consumer interests as a primary objective of competition law: see, eg the 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, 5.

¹⁸ F Böhm, "Demokratie und ökonomische Macht", in Institut für ausländisches und internationales Wirtschaftsrecht (ed), *Kartelle und Monopole im modernen Recht* Band 1 (Karlsruhe, Müller, 1961), 22.

¹⁹ See, eg W Möschel, "The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy" (2001) 157 *Journal of Institutional and Theoretical Economics*, 4.

²⁰ See, eg A Schmidt, "Ordnungsökonomische Wettbewerbskonzepte: Die Wettbewerbspolitik im Spannungsfeld zwischen Freiheit und Effizienz", *ORDO Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* Band 59 (Stuttgart, Lucius & Lucius, 2008), 216, 223.

The lack of criteria²¹ against which such balancing is undertaken is even more obvious in the area of abuse of dominance, with balancing being based on the absolute assumption that dominant undertakings' freedom in choosing their action parameters must be limited more than that of non-dominant undertakings. This is the result of empirical observations that undertakings having a dominant position are likely to raise additional entry barriers to actual or potential competitors. It can be argued that the German functional definition of free competition as a system aimed at safeguarding individual rights makes the establishment of boundaries for these rights questionable by blurring the line between what should be allowed and what should not.²²

For example, in the area of abuse of dominance, the presumption that an undertaking enjoys a paramount market position in relation to its competitors does not indicate, *a priori*, when such an undertaking might infringe the law. This presumption also illustrates a German paradox in which protecting competitors achieves the protection of competition itself. In the past, the structural approach also failed to ensure predictability. For example, the German concept of substantial competition, similar to those of rivalry or the foreclosure of competitors, failed to quantify the degree or intensity of competition that could provide the necessary requirements and involved conflicting aims between the market-structure-performance and freedom of action paradigms and between static and dynamic competition functions.²³

Freedom of competition therefore postulates that individual freedom of action ends when the rights of a third party could be affected. However, whilst allowing dominant undertakings reduced behavioural leeway to act in the market, this actually restricts the third parties' own freedom of action. Contrastingly, welfare economics tolerates restrictions imposed on individuals' freedom when any such restrictions can be justified by producing efficiencies.

²¹ See, eg CC von Weizsäcker, "Konsumentenwohlfahrt und Wettbewerbsfreiheit: Über den tiefen Sinn des 'Economic Approach' " (2007) 57 *Wirtschaft und Wettbewerb*, 1078-84; M Hellwig, "Wirtschaftspolitik als Rechtsanwendung", *Preprint of the Max Planck Institute for Research on Collective Goods* 17 (2007), accessed on www.coll.mpg.de/pdf_dat/2007_19online.pdf 4 May 2009.

²² See, eg D Schmidtchen, "Effizienz als Leitbild der Wettbewerbspolitik: Für einen 'more economic approach' ", in P Oberender (ed) *Effizienz und Wettbewerb*, (Duncker & Humblot, Berlin, 2005); D Schmidtchen, "Wettbewerb und Effizienz? Zur Zweisamkeit von Recht und Ökonomie im Bereich der Wettbewerbspolitik", *ORDO Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* Band 59 (Stuttgart, Lucius & Lucius, 2008), 143-84; Cf EJ Mestmäcker, "Wettbewerbsfreiheit und unternehmerische Effizienz. Eine Erwiderung auf Schmidtchen", *ORDO* Band 59 (Stuttgard, Lucius & Lucius, 2008), 185-208.

²³ See, eg E Katzenbach, *Die Funktionsfähigkeit des Wettbewerbs* (Göttingen, 2nd edn, 1967).

Therefore, no clear borderline is present to prove the extent to which a state intervention is capable of affecting individual rights except for the optimisation standard, which reduces economic efficiency to a merely optimisation calculus.²⁴

The German approach, as well as the old form-based approach, therefore rejects the consumer-welfare standard,²⁵ so the real questions are whether the methodological framework of analysis the GP proposed fits into modern economic thinking and whether the rationale behind a consumer-welfare policy is that it is solely for the sake of ensuring consistency with such other areas of competition law as non-horizontal mergers or with Article 81 EC.

In 2005, Commissioner Kroes made clear her intention to ensure that the Commission's policy on the abuse of dominance is that such abuse essentially be assessed on the basis of its effects on the market, consistent with its approach in both Article 81 and merger control.²⁶ Commission Director General Lowe has also supported this intention, together with the need to establish a theory of consumer harm.²⁷ A superficial analysis of the relationship between the abuse of dominance and non-horizontal mergers reveals that: a) whilst the aim of non-horizontal merger assessments is consumer welfare, Article 82's focus is upon preserving a particular market structure that makes its policy goal one of protecting the competition process by protecting competitors rather than one of benefiting consumers, b) the GP's use of "consumer" as a leitmotiv, with anti-competitive foreclosure leading to consumer harm, as well as its assessment of effects based on the merits of each case, ensures consistency within the above areas of competition law, and c) the standard of proof in non-horizontal mergers focuses upon their likely impact on competition, whilst the GP focuses upon their likely impact on consumers.²⁸

²⁴ Schmidt, *supra* n 20, 216.

²⁵ For the courts' formalistic approach, which had repeatedly confirmed that Article 82 applies not only to practices directly harming consumers, but also to conduct which is detrimental to them as a result of its impact on an effective competition structure, see generally Case 6/72 *Continental Can v Commission* [1973] ECR 215, para 26; Case C-85/76 *Hoffmann LaRoche* [1979] ECR, paras 89, 125; Case T-219/99 *British Airways* [2003] ECR II-309, para 244.

²⁶ N Kroes, Speech "Preliminary Thoughts on Policy Review of Article 82", Fordham Corporate Law Institute, New York, September 23, 2005. See generally Guidelines on the application of Article 81 (3) of the EC Treaty, [2004] OJ C101/97.

²⁷ P Lowe, "The Design of Competition Policy Institutions for the 21st Century – The Experience of the European Commission and DG Competition" (2008) 3 *Competition Policy Newsletter*.

²⁸ *Supra* n 1, para 29. Vickers suggested that it is preferable to state theories of harm to competition and consumers than to condemn conduct for its form, see, eg J Vickers, Speaking Note 237, "A Reformed Approach to Article 82 and US Practice: An Overall Appreciation", in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82* (Oxford, Hart Publishing, 2008).

Both of them establish *a priori* assumptions and standards of proof that they apply to both consumer harm and efficiencies.

Competition authorities may therefore benefit from bringing the enforcement of the abuse of dominance in line with the area of merger control and restrictive agreements and apply consistent standards, but their implications for the dominant undertakings remain to be seen. Nonetheless, a danger of fragmentation might arise if the GP separates the enforcement of abuse-of-dominance policy from that of exclusionary abuses and concentrates exclusively upon the latter.

Economists therefore recognised the hardships of a rule-of-reason approach to abuse control. Although it is extremely difficult to designate a clear abstract principle and practical rules of general validity that allow the differentiation of a dominant undertaking's legitimate response to an anti-competitive exclusionary action,²⁹ having such a rule-of-reason approach should help to avoid further arbitrariness or a conflict with the rule of law.³⁰ The latter should, however, receive full consideration if a huge amount of complex rules would lead to legal uncertainty without providing better equity in individual cases. Introducing an efficiency-based defence to charges of abuse of dominance or designating the consumer as a standard apparently fails to introduce consistency.

Other issues questioning the consistency argument might also arise. From a German perspective, the efficiency-based approach of the Commission's merger-control policy fails to provide a rule of reason that could serve as a basis for justification, as Section 42 of the ARC does,³¹ of an efficiency-based defence. The condition that efficiency gains must benefit consumers is also questionable,³² as if such an approach is solely a provision for taking efficiency gains into account, pro-competitive effects could also not be regarded any differently than any other improvement of competitive conditions. This means that in cases involving dominance, if an undertaking's alleged conduct could lead to a significant impediment of effective competition a defence of efficiency could not save it. Finally, it should be reconsidered whether the recourse to claiming efficiencies has really been successful in the above areas.³³

²⁹ Briones, *supra* n 2, 35.

³⁰ D Schmidtchen, "Fehlurteile über den 'more economic approach' in der Wettbewerbspolitik" (2006) 7-8 *Wirtschaft und Wettbewerb*, 707.

³¹ For example, if in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole or if a concentration is justified by an overriding public interest.

³² M Kling and S Thomas, *Kartellrecht* (München, Franz Vahlen, 2007), para 296.

³³ Cf Kling/Thomas, *supra* n 32, para 294.

The German normative foundation, which somewhat favours a rejection of consumer welfare or efficiencies as an intended outcome, should therefore reconsider the extent to which policies favouring efficiencies need to take their pro-competitive effects upon consumers into account in order to be compatible with the Commission's effects-based approach. As already seen, the purpose for considering that efficiencies should not be the primary goal of competition law is to avoid arbitrariness, as it should not be competition policy's task to define the criteria for judging whether undertakings are efficient.

Schmidtchen advocated for an efficiencies-oriented policy based on the economic theory of second-best, and argued that it is possible for empirical market studies to measure variations in social welfare.³⁴ However, he was cautious about the relevance of such empirical results as the income effect in thousands of markets, and endorsed empiricism solely as a partial analytical concept. Even the GP recognised that predation is unlikely to create efficiencies.³⁵ In the past, the German advocates of workable competition accepted empirical evidence in regard to market structure and restrictive behaviour. For example, based on the structure-conduct-performance paradigm, Kantzenbach pleaded in favour of "loose" oligopolies as the optimal market structure, and, as already noted, the presumptions of market dominance are also the result of empirical observation.³⁶

In the absence of exhaustive data about the effects-based approach's pros and cons, the main friction between it and the traditional freedom-of-competition approach appears to result from the idea of sacrificing dynamic efficiency gains in order to achieve static short-run efficiencies.³⁷ A contradiction exists when policies use short-run sacrifice as an instrument of welfare economics, endangering the safeguarding of freedom of competition and its goal of achieving efficiency in the long run. It is also questionable how much effects-based policies should really be allowed, as neither too great a focus upon the order of free competition and its resulting dynamic competition processes nor more active and interventionist welfare-economics policies focused exclusively upon the static, efficient allocation of resources³⁸ solves the problem better.

The solution of this problem could be a compromise between the two divergent approaches based upon a functional criterion to be used when balancing. This criterion would be that if

³⁴ Schmidtchen, *supra* n 22 (2005), 12.

³⁵ *Supra* n 1, para 73.

³⁶ See, eg Section 19 para 3 ARC where three or fewer undertakings reaching a combined market share of 50%, respectively five or fewer, reaching a combined market share of 66% are presumed dominant.

³⁷ Schmidt, *supra* n 20, 225.

³⁸ Cf Van der Bergh, "The 'More Economic Approach' and the Pluralist Tradition of European Competition Law", in D Schmidtchen, M Albert and S Voigt (eds) *The More Economic Approach the European Competition Law* (Tübingen, Mohr Siebeck, 2007), 27-6.

welfare-economics policies balance efficiencies, they also need to ensure as a prerequisite that individual freedom of action does not include direct harm to consumers but indirect harm to society's welfare.³⁹ However, since no clear normative definition of the concept of "harm to consumer" exists, a balancing test could offer an invaluable consensus including both approaches and encourage better compliance with German enforcement priorities.

4. Anticompetitive Foreclosure

The Commission already stressed in the Discussion Paper⁴⁰ the need to demonstrate how any particular conduct might produce so-called market-distorting effects by pointing not only to the nature and form of the conduct, but also to its incidence in the market. This is clearly indicative of a shift from an intrinsic approach to identifying abuse to a more rule-of-reason standard. However, it provided little explanation about how these standards relate to one another or how they would be applied in any particular case.

The GP changed the terminology to "anticompetitive foreclosure", yet it also made clear that foreclosure itself is unproblematic except for cases of anticompetitive foreclosure leading to consumer harm. An example would be if higher price levels would have otherwise prevailed, which is similar to the German "as if" concept of competition that compares actual or likely future situations in the relevant market with such appropriate counterfactuals as the absence of the conduct in question. The corresponding German term for foreclosing rivals in an unfair manner is the hindrance or impairment of effective competition,⁴¹ which does not require proof of having an adverse impact on consumer welfare. If the GP is to be applied so that the two conditions need to be fulfilled cumulatively, with anticompetitive foreclosure needing to be likely to harm consumers, it then should be viewed as a more severe rule for finding an abuse rather than new terminology.

As with the Discussion Paper, the GP still offered poor guidance on how the pro-competitive and anticompetitive factors should then be incorporated into a unified assessment of anticompetitive effects. It did, however, present what general factors would be relevant for

³⁹ See, eg J Haucap, "Irrtümer über die Ökonomisierung des Wettbewerbsrechts" (2007) 114 *Orientierungen zur Wirtschafts- und Gesellschaftspolitik*, 12-6. Haucap reduces the frictions of an effects-based approach to the right *path* in establishing a *proper* balancing criterion. For evidence that the German antitrust law is also a compromise between contradicting approaches see, eg K Herdzina, *Wettbewerbspolitik* (Stuttgart, Lucius & Lucius, 5th edn, 1999), 125.

⁴⁰ EC Commission "DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses" (Brussels, December 2005), para 59.

⁴¹ Section 20 (4), respectively in Section 19 (4) 1 of ARC.

assessing the likelihood of anticompetitive foreclosure without mentioning any specific ones that might apply to consumer welfare or foreclosure alone.⁴² Nevertheless, nearly all of them,⁴³ such as the position of the dominant undertaking, its market share, barriers to entry and expansion and other relevant market conditions, the position of the dominant undertaking's competitors, the position of the customers or input suppliers, and the extent of the allegedly abusive conduct as assessed by the duration of the conduct and the percentage of total market sales it has affected, are primarily concerned with anticompetitive foreclosure and reminiscent of traditional market-structure analysis.

However, the likelihood of anticompetitive foreclosure is actually but one relevant factor for assessing dominance, and policy in regard to it intends to guarantee that access to supplies or markets is open to others in the market. Without having any privileged position, the corresponding German approach is to assess dominance by proving that an undertaking has a super-dominant market position in relation to its competitors.⁴⁴ Paragraph 19 of the GP relied solely upon one such factor, but it described the same situation, one in which "access of actual or potential competitors to supplies or markets" is hampered or eliminated.

Furthermore, in detailing its general factors, the Commission relied heavily on such presumptions as the stronger the dominant position, the higher the likelihood of anticompetitive foreclosure and the higher the percentage of total sales in the relevant market or the longer its duration, the greater the likely foreclosure effect,⁴⁵ basically following the same criteria as Section 19 of the ARC. The rationale behind this obviously focuses more on competitors than consumers, and it would be possible to justify the concept of super-dominance similarly. However, under German antitrust law, the concept of anticompetitive foreclosure is paramount for safeguarding market openness and maintaining rivalry as sources of competitive pressure in the market by preventing the hindering of smaller competitors from entering the market. Therefore, despite the criticism that the German market-structure focus alone has made dominant firms act as if they were in competitive markets,⁴⁶ the protection of competition

⁴² *Supra* n 1, para 20.

⁴³ See A Gutermuth, "Article 82 Guidance: A Closer Look at the Analytical Framework and the Paper's Likely Impact on European Enforcement Practice" (2009) 2 *Global Competition International*.

⁴⁴ See, eg Section 19 (2) 2 ARC. There are only two situations where such presumptions apply, namely when a dominant undertaking enjoys a superior market position in relation to its competitors, and the *super-dominance* when a dominant undertaking enjoys a paramount position but in relation to *all competition*.

⁴⁵ *Supra* n 1, para 20.

⁴⁶ DS Evans, "Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules", 15 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342797.

against anticompetitive-foreclosure effects should not be considered identical to the protection of the structure of the market.

In regard to the standard of proof, the Discussion Paper⁴⁷ considered both actual and likely anticompetitive effects in the market and both direct and indirect consumer harm in the absence of any proof of harm to consumers, since it made no assessment of such effects. It based this on the assumption that exclusionary behaviour by a dominant undertaking necessarily harms consumers and that the undertaking needs to prove the contrary as a defence. The GP followed the same line and did not require separate evidence that the conduct in question has led or is likely to lead to price increases, less consumer choice or less innovation. It noted that the Commission would address anticompetitive foreclosure “either at the intermediate level or at the level of final consumers, or at both levels”.⁴⁸

Therefore, as with German antitrust law, proof of actual harmful effects would not be required, but would be considered if evidence were available. This seems inappropriate for an effects-based approach. Establishing the existence of an abuse by showing the likelihood of the effect that smaller competitors might be driven out of the market lacks economic rigour because it fails to require that consumers experience any actual effects. For example, lower prices do not harm consumers directly, or at least not in the short run.⁴⁹ It is therefore reasonable to fear that Article 82 could become an instrument of ex-ante intervention, as it would imply finding an abuse without any abuse of power as such.⁵⁰

The GP lacked a convincing theory of harm throughout, and was therefore unable to show how the anticompetitive foreclosure of rivals is harmful for consumers, so the Commission justified it by resorting to general factors. Therefore, even if competition authorities would be reluctant to apply the above test, in practise it would still offer them significant flexibility to infer consumer harm from the conduct's negative impact on market structure alone. Overall, the test is regressive due to its circularity and its being identical to the German approach favouring the likelihood of harmful effects as prima facie evidence of abusive behaviour harming the structure of competition.

The German theory justifying such interventions is that driving competitors out of the market makes competitive pressures disappear, and that in the long run this is to the detriment of

⁴⁷ EC's Discussion Paper, para 54-5, 88.

⁴⁸ *Supra* n 1, para 19.

⁴⁹ See, for example, in the Lufthansa case, FCO B9-144/01 *Deutsche Lufthansa AG Köln v Germania* [2002], where it has been criticised that an economic analysis of the actual effects on consumers, which under German antitrust law need not be shown, might not offer any evidence for an intervention.

⁵⁰ Akman, *supra* n 11, 89.

consumers, as it creates no efficiencies.⁵¹ Relying on this, the likely effects of anticompetitive conduct can prove that harm to competitors affecting market structure is harm that negatively affects competition itself as a process. This theory turns out to be critical because harm to the competitive process⁵² is traditionally nothing but harm to third parties. This is the sum of harm to competitors and consumers, and means that anticompetitive effects could be inferred from their intrinsic features.

The opinion of Advocate General Kokott in *British Airways*⁵³ is illustrative of such inferences that the likely harm to consumers may be presumed to follow likely harm to competition, which is presumed to result from likely harm to competitors. Accordingly, for a finding of a “prejudice to consumers” under Article 82(b), proof that the conduct of the dominant undertaking has made it difficult or impossible for its competitors to compete with it would suffice. The CFI held that “Article 82 EC does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected”.⁵⁴

In line with this, the GP suggested that if it appears that “the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred”.⁵⁵ Therefore, in certain circumstances, the old approach would remain and the Commission would still not conduct a detailed assessment before concluding that the conduct in question would be likely to result in consumer harm.

In *Sot. Lelos*,⁵⁶ Advocate General Colomer recognised that certain types of conduct, such as restrictions of parallel trade, may create a presumption of negative effects on consumers, and therefore shift the burden of proof to the defendant without it being necessary for the claimant to bring additional evidence as to the causal link between the specific conduct and consumer

⁵¹ Chiriță, *supra* n 13, 440.

⁵² Confusion persists when *harm to competitive process*, as understood under German antitrust law, is referred to as *harm to competition*. Rightfully, the assumption that harm to competitors would mean harm to competition or consumers is not helpful because competition can and should harm competitors. See, eg R O'Donoghue and AJ Padilla, *The Law and Economics of Article 82 EC* (Oxford, Hart Publishing, 2006), 221.

⁵³ Opinion of Advocate General Kokott, Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, para 68.

⁵⁴ Case T-219/99 *British Airways v Commission* [2004] CMLR 1008, para 264.

⁵⁵ *Supra* n 1, para 21.

⁵⁶ Opinion of Advocate General Ruiz-Jarabo Colomer, Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia EE et.a. v GlaxoSmithKline AEVE* [2008] ECR I-0000, paras 56-7.

harm. The German approach to harm to consumers is also indirect and requires no proof. The exercise is one of balancing the respective competitive or economic interests against expected benefits to society's welfare.

In *Telefónica*, the Commission did not require that competitors actually had to exit from the market in order to establish anticompetitive foreclosure, considering it sufficient that the "rivals are disadvantaged and consequently led to compete less aggressively".⁵⁷ It further ruled that the margin squeeze involved affected Telefónica's competitors' ability to enter the market and exert a competitive constraint, in the absence of which "the retail market for broadband services would have been likely to have witnessed more vigorous competition and would have delivered greater benefits to consumers in the form of lower prices, increased choice and innovation".⁵⁸ This means that the margin squeeze restricted competition by imposing unsustainable losses on equally efficient competitors, forcing them to exit or constraining their ability to invest and grow, and that this was evidence of foreclosure effects with a detrimental impact for end users.⁵⁹

The Commission can rely on both qualitative and quantitative evidence for the identification of consumer harm. For example, in *Telefónica* it gathered empirical evidence of consumer harm in the form of supra-competitive retail prices on the ADSL market, as Spanish consumers paid about 20% more than the EU-15 average for broadband access.⁶⁰

The requirement of direct evidence of any exclusionary strategy is interesting, as a dominant undertaking is unlikely to escape a finding of abuse solely because the Commission has failed to establish with direct evidence that a negative price impact has resulted or is likely to result from the dominant undertaking's conduct. The GP noted that the Commission would normally intervene "on the basis of cogent and convincing evidence",⁶¹ but was more cautious by allowing quantitative evidence only "where it is possible and appropriate".⁶²

If consumer harm were to be the decisive criterion for identifying a restraint of competition under Article 82, undertakings would have to evaluate the extent to which their business strategies will affect consumer interests a priori. The doctrine of the likelihood of effects therefore makes it possible to substantiate an abuse based on its effects on the relevant market.

Finally, situations in which the Commission would need to carry out a causation analysis in order to show that the conduct in question would be likely to result in consumer harm would

⁵⁷ Commission Decision, Case COMP/38784 *Wanadoo España v Telefónica*, para 586.

⁵⁸ *Ibid*, 57, para 616.

⁵⁹ *Ibid*, 57, para 615.

⁶⁰ *Ibid*, 57, paras 564-608.

⁶¹ *Supra* n 1, para 20.

⁶² *Ibid*, para 19.

create another hurdle, which is nonexistent under German antitrust law, which would obviously need to be overcome if such proof were not merely an inference of consumer harm from harm to competition. Even if a coherent theory of harm were to sustain this analysis, a separate proof of harm to consumers would be a more severe test than the one under German antitrust law. Therefore, following the legal standards applicable under Article 81 and in mergers⁶³ would place the Commission under a more stringent standard of proof.

5. Efficiencies and the Final Balancing

The GP used the same methodology in regard to efficiencies as Article 81 (3) EC, and illustrated the similarities with the efficiency defence by applying similar cumulative conditions for the acceptance of the alleged efficiency gains in Article 82. For example, the so-called “minimalist efficiency test” is in principle acceptable under Article 82.⁶⁴ As the “rule of law” requires that courts apply efficiency standards consistently, the efficiency conditions in Article 82 should be the same as the conditions that the EC Treaty requires in the context of Article 81 (3).⁶⁵ The GP therefore required a dominant undertaking to demonstrate that the efficiencies have been, or are likely to be, realised as a result of its conduct, that its conduct is indispensable to the realisation of these efficiencies, that the likely efficiencies will outweigh any likely negative effects on competition and consumer welfare and that its conduct does not eliminate effective competition.⁶⁶ As noted above, the efficiency conditions in Article 81 (3) have to be read into Article 82, but the only dissimilar condition in the GP is that it does not explicitly require that efficiencies need to be passed on to the consumer to a discernable degree. Instead, the GP compensated for lacking this requirement by requiring that “the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets”.

However, introducing efficiencies would still not counteract the abuse-control policies unless a huge burden of proof were to be put on dominant undertakings. Article 2 of Regulation

⁶³ See Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101, 97-118, para 17; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C 31, 5-18, para 9.

⁶⁴ See eg, I Govaere, “In Pursuit of an Innovation Policy Rationale: Stakes and Limits under Article 82 TEC” (2008) 31 *World Competition* 4, 544.

⁶⁵ See, eg Kokott, *supra* n 53, para 59; WH Roth, “The ‘More Economic Approach’ and the Rule of Law”, in D Schmidtchen, M Albert and S Voigt (eds) *The More Economic Approach to European Competition Law* (Tübingen, Mohr Siebeck, 2007), 41.

⁶⁶ *Supra* n 1, para 29. The proof requirement is to be fulfilled with a sufficient degree of probability and on the basis of verifiable evidence.

1/2003⁶⁷ makes clear that the burden of proof for an infringement rests with the competition authority, whilst undertakings claiming the benefit of Article 81 (3) have the burden of proving that its conditions have been fulfilled.⁶⁸ The absence of any such equivalent provision in the context of Article 82 could be interpreted as indicating that it is the claimant's burden to prove that the conduct produces anticompetitive effects and that it cannot be justified by efficiency gains. However, Recital 5 of the above regulation shifts the burden of proof to the defendant not only in the context of Article 81(3), but for all circumstances in which justifications are advanced. In light of this, the dominant undertaking would bear the evidentiary burden of proof in regard to the existence of objective justifications, whilst the legal burden of proof of the existence of an abuse would fall on the Commission or the claimant. In *Microsoft*, the CFI held that:

“although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned ... to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted”.⁶⁹

The efficiency defence requires further examination of the concept of harm to consumers. A dominant undertaking may justify conduct leading to the foreclosure of competitors if the efficiencies gained by this “are sufficient to guarantee that no net harm to consumers is likely to arise”.⁷⁰ This resembles a German defence in which conduct may be considered abusive if it impedes the ability of competitors to compete, and if this cannot be justified by any resulting improvements in consumer welfare.⁷¹ However, accurately measuring in practise the true extent to which a particular alleged conduct could be justified by such improvements has been impossible and has significantly restricted the area of application of the abuse-of-dominance rule. Following a similar consumer-welfare-based defence, the GP allowed limited scope for efficiencies. As already argued, the efficiency defence narrows the area of conditional rebates, as

⁶⁷ [2003] OJ L1.

⁶⁸ Confirmed by *C-204/00 and Others Aalborg Portland* [2004] ECR I-124, para 78; EC Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council: Report on the functioning of Regulation 1/2003, SEC (2009) 574 final, 18.

⁶⁹ Case T-201/04 *Microsoft v Commission* [2007] 5 CMLR, para 1144.

⁷⁰ *Ibid.*

⁷¹ Chiriță, *supra* n 13, 419.

it relies on old case law from the Community's courts.⁷² Throughout the GP, the Commission opted for allowing different conditions for efficiencies and left a discretionary margin for the extent to which efficiencies are passed on to consumers for certain types of abuse. For example, a dominant undertaking may show that a rebate system has cost advantages that it passes on to consumers,⁷³ or that a refusal to supply is necessary in order to allow an adequate return on investment, thereby creating incentives for future investment.⁷⁴

The doctrine of net impact on consumer welfare may not always clarify whether a unilateral conduct is consistent with competition on its merits because the concept of abuse is not based solely on consumer harm. Although Article 81 (3) refers to agreements that distort competition, such as by gaining advantage but not necessarily market power, and that are on balance harmful to both the market and consumers, Article 82 refers to conduct that is power-creating but not market-servicing. Similarly, Section 19 of the German ARC has the purpose of preventing and controlling the accumulation and misuse of undue market power. Neither Article 82 nor Section 19 refers to productive or dynamic efficiencies. Therefore, in *Tetra Pak II* the CFI expressly rejected introducing efficiencies by way of analogy to Article 81.⁷⁵ Against a systematic interpretation of the EC Treaty, in *British Airways*, the ECJ found that the exclusionary effect may be counterbalanced or outweighed by advantages in terms of efficiency which also benefit consumers.⁷⁶

However, the net impact on consumer welfare should be distinguished from the net effects of the parties' capability to affect consumer welfare. Otherwise, an analysis of the first could reduce the scope of Article 81(1) if an actual price increase were to be necessary, leaving the other conditions of Article 81(3) remaining unquestioned.⁷⁷ Evaluating market power should not be equated to analysing the net effects on prices, as it is the net effect on market power that must be assessed and not the actual effect on prices. It is possible that an agreement, whilst conferring a certain degree of market power on the parties, may also generate sufficient efficiencies to outweigh the negative effects caused by that market power.

⁷² See, eg D Geradin, "A Proposed Test for Separating Pro-competitive Conditional Rebates from Anti-competitive Ones" (2009) 32 *World Competition* 1, 25.

⁷³ *Supra* n 1, para 45.

⁷⁴ *Ibid*, para 88.

⁷⁵ Case T-51/89 *Tetra Pak II* ECR 1990 II-309, para 25.

⁷⁶ Case C-95/04 P *British Airways v Commission* ECR [2007] I-2331, para 86.

⁷⁷ For evidence that Article 81 (1) would exclude agreements that affect market power but also bring about sufficient productive efficiencies, see, eg Irelli, *supra* n 16, 295.

In *T-Mobile Netherlands*, Advocate General Kokott reiterated the well-known “effective competition structure” paradigm by arguing that Article 81 was not primarily designed to protect the immediate interests of individual competitors or consumers, but to protect competition as an institution and thereby indirectly protect the consumer.⁷⁸ The CFI confirmed this finding in *France Télécom* (formerly Wanadoo), ruling that Article 82 “refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure.”⁷⁹

Advocate General Kokott referred further to *GlaxoSmithKline*,⁸⁰ in which the CFI held that the object of a practise must be established in regard to its specific legal and economic context, and that it is therefore necessary to take into account its effects on the relevant market. However, the assessment of the actual impact of a concerted practise need not be established, only its capability of having an anti-competitive impact.⁸¹ This means that not only must it be capable of having a direct impact on consumers or consumer welfare, but it also may at least indirectly have a negative impact on consumers.⁸² Otherwise, as already noted, narrowing the area of application of Article 81(1) EC would deprive the provision of much of its practical effect.

In *Sot. Lelos*,⁸³ Advocate General Colomer suggested that the Court should unambiguously declare the effect of Article 82 EC and therefore recognise the efficiency-based defence by applying an “analysis of the merits”, or a rule of reason. The Advocate General has strongly acknowledged the existence of the latter, but denied the existence of intrinsic rules under Article 82 because, “allowing preconceived and formalistic ideas on abuse of a dominant position to prevail would mask the fact that sometimes dominance can benefit consumers”.⁸⁴ A defence “based on economic results” would therefore be necessary because “Article 82 EC does not

⁷⁸ Opinion of Advocate General Kokott, 19 February 2009, Case C-8/08 *T-Mobile Netherlands BV and Others*, para 58 (not yet reported). For the finding that Article 82 is not only aimed at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, see Case C-95/04 *British Airways v Commission* 2007 ECR I-2332, 68.

⁷⁹ Case C-202/07 P, judgement of 2 April 2009, *France Télécom (formerly Wanadoo) v Commission*, para 105 (not yet reported); Case T-340/03 *France Télécom SA (formerly Wanadoo) v Commission* [2007] 4 CMLR 21, para 266.

⁸⁰ Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, para 147.

⁸¹ *Ibid*, 80, para 49.

⁸² *Ibid*, para 59.

⁸³ Colomer, *supra* n 56, para 76.

⁸⁴ *Ibid*, para 73.

include any provision whereby ... operators can successfully defend themselves against the accusation of abuse by demonstrating the economic efficiency of their conduct, an absence which has been justly criticised".⁸⁵

Accordingly, a "mere comparison", or a balancing of the positive and negative consequences for both consumers and other operators in the same relevant market, would suffice.⁸⁶ Such an efficiency defence requires consideration of an action's or practise's net positive economic effect and the non-existence of any positive aspect capable of tipping the balance in the defendant's favour, although in the case of pharmaceutical manufacturer GlaxoSmithKline, the "welfare of patients and the reduction of public health costs are deserving of special attention",⁸⁷ there was no need to examine the proportionality any further.

Potential anti-competitive effects should, however, not disregard potential efficiencies. In an asymmetric way, the GP mentioned that conduct may be justified solely on the grounds that it is objectively necessary, such as for health or safety reasons, but it makes no reference to the extent to which potentially abusive conduct may be justified because it is necessary to protect a dominant undertaking's commercial interests.⁸⁸ In *Syfait*, Advocate General Jacobs did not assess the pros and cons of the anti-competitive effects, but instead relied on the potential chilling effects of parallel trade on the ability of GlaxoSmithKline's ability to invest in research and development and, indirectly on its ability to compete with other pharmaceutical companies.⁸⁹ Both the Advocate General and the CFI relied on the reduction of the ability to invest in research and development as convincing evidence that intervention would have a negative impact on dynamic inter-brand competition.

In *Lelos*, therefore, Advocate General Colomer acknowledged that the undertaking could defend itself by proving that its conduct's purpose was to protect legitimate business interests, which do not include in casu any impact on incentives to innovate or the economic benefits of the conduct in question.⁹⁰ To the contrary, the ECJ refused to examine the economic arguments on innovation and held that a dominant pharmaceutical company may unilaterally restrict parallel trade to the extent to which it constitutes a "reasonable and proportionate measure in

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, 83, para 74.

⁸⁷ *Ibid.*, para 118.

⁸⁸ *Ibid.*, para 28.

⁸⁹ Case C-53/03 *Syfait and others v GlaxoSmithKline* [2005] ECR I-5609, para 93; Opinion of Advocate General Jacobs in Case C-53/03 *Syfait and Others v GlaxoSmithKline* [2005] ECR I-4609, paras 91-2.

⁹⁰ *Colomer, supra n 56*, para 121.

relation to the threat that those exports represent to its legitimate commercial interests.”⁹¹ In her opinion in *GlaxoSmithKline*,⁹² Advocate General Trstenjak also followed a negative stance towards conduct that restricts parallel trade because limitation of parallel trade is a “restriction of competition by object” despite the particular legal and economic characteristics of the pharmaceutical sector.

Finally, a dominant undertaking must justify pro-competitive conduct before the Commission performs the final balancing.⁹³ The Commission must weigh any apparent anticompetitive effects against any advanced and substantiated efficiencies. In *Microsoft*,⁹⁴ the Commission suggested a balancing of individual innovation incentives against each other. If the overall innovative effects of a compulsory licence are significantly higher than they would be without it, the owner of the intellectual property rights should then be allowed to licence them. Such a balancing test aims at promoting innovation and dynamic efficiency, and therefore needs to balance the difference between the dominant undertaking and its competitors in the incentives to innovate.⁹⁵ The final assessment is therefore not based upon a flexible balancing of the overall interests of the undertakings involved against major policy goals, as is the case with the German balancing test.

The ability of both the Commission and the CFI to make an ex post assessment of the effects of Microsoft's conduct on its competitors' incentives to innovate based on predictions facilitated their balancing of Microsoft's and its competitors' incentives to innovate. In contrast, in *GlaxoSmithKline*, the CFI ruled that identifying the concrete consumer interests involved is necessary for the ex ante assessment of any negative effects on innovation when predicting any potential anti-competitive effects on consumers. However, it also ruled that it does not suffice that such an agreement restrain the “freedom of action” of the contracting parties, but that such a limitation must also restrict “competition, to the detriment of the final consumer”.⁹⁶ This

⁹¹ Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others v GlaxoSmithKline* [2008] ECR I-0000, para 70.

⁹² Opinion of Advocate General Trstenjak in Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline* June 30 [2009], para 155.

⁹³ *Supra* n 1, para 30.

⁹⁴ Case T-201/04 *Microsoft v EC Commission* [2007] 5 CMLR.

⁹⁵ An objective justification of a refusal to licence would imply showing that the use of the IPR of a dominant undertaking is the efficient one. That Article 82 would then allow the Commission to limit the IPRs of the dominant undertaking, if the IPR is not optimally defined from an economic perspective: see, eg C Schmidt and W Kerber, “Microsoft, Refusal to Licence Intellectual Property Rights and the Incentives Balance Test of the EU Commission” available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297939.

⁹⁶ Case T-168/01 *GlaxoSmithKline v Commission* [2006] ECR II-2969, para 171, on appeal Cases C-501/06 P, C 513/06 P, C-515/06 P and C-519/06 P.

recognises that an agreement restrictive of competition in the sense of Article 81 harms consumers. The CFI also held that in regard to Article 81(3), the Commission has a margin of discretion in weighing up both the advantages and disadvantages which an agreement entails for the final consumer.⁹⁷

Following a complaint from Opera Software, the Commission launched another investigation of Microsoft and issued a Statement of Objections for the tying of Internet Explorer to its Windows operating system,⁹⁸ being concerned that such conduct could harm competition between web browsers, undermine product choice and ultimately reduce consumer choice.

In conclusion, for the purpose of the balancing test, establishing the presence of consumer harm would require knowing future preferences of consumers a priori, which may require a further balancing of the conflicting interests of different consumer groups. As the original German approach to intervention aimed to achieve “consumer sovereignty”, competition policy could then intervene despite consumers already having made their choices. In order to avoid arbitrariness, it maintains that consumers alone should not be left to decide which undertakings are efficient or inefficient.

Overall, the consideration of efficiencies leads to a high burden of proof for the dominant undertaking. The indispensability requirement also augments the margin of discretion that the Commission has in setting the determinative proportion and in including measures that are less restrictive alternatives capable of producing the same efficiencies.⁹⁹ However, objective justification also runs the risk of narrowing the area of application of Article 82, unless experimental economics can provide substantial evidence to justify an alleged conduct. Substantial empirical evidence must therefore be present to demonstrate that the potential for anticompetitive harm outweighs possible benefits.

Schmidtchen acknowledged that hard-core cartels or merely exclusionary or exploitative abusive conduct are unable to pass the efficiency defence because they can never prove that doing so increases consumer welfare,¹⁰⁰ as such behaviour can never benefit consumers and can

⁹⁷ Ibid, *GlaxoSmithKline*, para 244.

⁹⁸ EC, Press Release of January 17, 2009, Memo/09/15.

⁹⁹ Fox pleaded for the elimination of the indispensability condition unless a concept that efficiencies should “insulate” anticompetitive conduct that harms the market and consumers were to be introduced: see, eg EM Fox, Comments on the Discussion Paper of DG Competition on the Application of Article 82 of the Treaty to Exclusionary Acts, March 2006 available on <http://ec.europa.eu/competition/antitrust/art82/083.pdf>, accessed on 31 May 2009.

¹⁰⁰ Schmidtchen, *supra* n 22, 32.

only have a negative impact on their welfare.¹⁰¹ However, for the sake of consistency, efficiency pleas should be allowed for the other forms of conduct in other areas of competition law. A clear contradiction therefore exists with the potential of failure to deal with other types of abuse that could never stand the objective justification requirements, and which the GP did not prioritise. The problem, finally, is not efficiencies themselves but finding a suitable standard applicable to all types of abuse under Article 82.

B. SELECTED FORMS OF ABUSE: PREDATION AND TYING

1. Predation

In predatory pricing cases, the dominant undertaking's ability to benefit from economic sacrifice is the key to establishing consumer harm. The Commission therefore intervenes when a dominant undertaking sacrifices short-term revenues in order to drive competitors out of the market or to deter new ones from entering.¹⁰² It considers that pricing below average avoidable cost (AAC) is a clear indication of such a sacrifice. However, in order to show a predatory strategy the Commission may investigate whether short-term net revenues are lower than what could be expected from a reasonable alternative conduct.¹⁰³ It is sufficient to examine whether competitors could revert to their competitive behaviour once the predatory pricing ends. The Commission therefore does not endeavour to perform a mechanical calculation of profits and losses in order to prove consumer harm, but rather assesses the likely foreclosure effects of a dominant undertaking's conduct or such other factors as the existence of entry barriers.¹⁰⁴ Cross-subsidies may also qualify as predation, even if the undertaking is not dominant in the secondary market, such as a legal monopoly.¹⁰⁵

No proof of recoupment is therefore required. In *Wanadoo*,¹⁰⁶ the Commission questioned the feasibility of price-cost predation in a broader strategic context, but rejected recoupment when it applied the AKZO test. Defining the scope of how to measure sacrifice, such as by incurring

¹⁰¹ See, eg P Whelan and M Hutchings, "Consumer Interest in Competition Law Cases" (2006) 16 *Consumer Policy Review* 5, 184.

¹⁰² *Supra* n 1, para 62.

¹⁰³ *Ibid*, para 64.

¹⁰⁴ *Ibid*, 101, para 70.

¹⁰⁵ *Ibid*, footnote 39.

¹⁰⁶ Commission decision COMP/38233 *Wanadoo Interactive* [2003] upheld by the CFI, T-340/03 *France Télécom v Commission* [2007] ECR II-107 and confirmed by the ECJ, C-202/07P *France Télécom v Commission* April 2 [2009], para 113 (unreported). ECJ held that proof of recoupment of losses is not a "necessary precondition" for a finding of predatory prices.

losses or engaging in less-than-optimal competitive behaviour, is complex. An exclusive focus upon short-run losses is undesirable because the initial short-run lowering of prices to expand demand may well be perfectly competitive. Therefore, the initial sacrifice does not necessarily have to be recouped, but viewed within the broader strategic context.¹⁰⁷ Despite its criticism of Advocate General Mazák, the CFI upheld the Commission's decision.¹⁰⁸ The Advocate General argued that an analysis of the recoupment of losses requires a forward-looking appraisal of the market structure, similar to the analysis undertaken by the Commission in the area of merger control, and that if no such possibility exists consumers should in principle not be harmed.

A dominant undertaking could offer as a defence conclusive evidence showing that its pricing decision was made in good faith. When evidence of a predatory strategy is present, the Commission concludes that the dominant undertaking's conduct entails a sacrifice. In "some cases", direct evidence showing predatory intent would suffice. Examples of this would be a detailed plan to sacrifice profits in order to exclude a rival, to prevent entry and to pre-empt the emergence of a market, or evidence of concrete threats of predatory action.¹⁰⁹ A subjective evaluation of intent should therefore never be a substitute for a thorough analysis of the effects of a dominant undertaking's conduct on the market. For example, in the German *Lufthansa* case, the Bundeskartellamt presumed predatory intent from the indirect evidence, ruling that the circumstances of the case and pricing below ATC, including variable, fixed and sunk costs, was sufficient to denote abuse.¹¹⁰

The GP, however, remained silent on the meeting-competition defence. In *Wanadoo*, both the Commission and the CFI rejected the right of a dominant undertaking to align its prices on those of its competitors. However, the CFI left the door open for a "meeting competition" defence in predatory pricing cases,¹¹¹ even if such an alignment of prices is not in itself abusive.

2. Tying

The Commission requires that an undertaking be dominant in the tying market, but not necessary in the tied market, and that certain conditions be fulfilled. These are that the tying products must be distinct products and that the tying practise be likely to lead to

¹⁰⁷ See, eg *Briones*, *supra* n 2.

¹⁰⁸ Opinion of AG Mazák, C-202/07 P *France Télécom v Commission* [2008], para 73, not yet reported.

¹⁰⁹ *Supra* n 1, para 65.

¹¹⁰ FCO B9- 144/01 *Deutsche Lufthansa AG Köln v Germania* [2002].

¹¹¹ Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, para 187.

anticompetitive foreclosure.¹¹² Mixed bundling is included in the same category, but the Commission advances a different test for assessing the anticompetitive effects of multi-product rebates than for other forms of tying. It has instead introduced a safe harbour to cover bundled rebates when the incremental price that customers pay for each of the dominant undertaking's products in the bundle remains above the long-run average incremental cost (LRAIC) to the dominant undertaking for including the product in the bundle. The Commission does not normally intervene in such cases, "since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle".¹¹³ It did, however, recognise that in certain circumstances a less efficient competitor may also exert a constraint, which should be taken into account when considering whether a particular price-based conduct leads to anticompetitive foreclosure.¹¹⁴ It consequently suggested cost-price tests that would determine whether the conduct in question would be likely to foreclose even a hypothetical competitor that is as efficient as the dominant undertaking.¹¹⁵ However, the Commission has adopted the predatory standard for bundled rebates if the dominant undertaking's competitors are selling identical bundles, or could do so in a timely way, without being deterred by possible additional costs.¹¹⁶

This follows the same approach as in Germany, but relies heavily on such presumptions as the greater the number of products in a bundle the stronger the anticompetitive foreclosure. Nevertheless, it fails to make clear how mixed bundling is any different from technical or contractual tying, which results in having a cost-based test for mixed bundling whilst the same practise could also be analysed with the anticompetitive-foreclosure approach to tying. The existence of a thin conceptual line between mixed bundling and single-product rebates may therefore also require such an approach. The tying test may be inappropriate for innovative products or those involving technological integration for which customer demand is dynamic. As in the *Microsoft* case, the Commission considered that technological tying is worse than contractual tying, because it makes the "tying or bundling strategy a lasting one",¹¹⁷ without taking into account the benefits that it may bring about. It also takes into consideration any negative externality of technological tying that reduces the opportunities for the resale of

¹¹² *Ibid*, 108, para 49.

¹¹³ *Ibid*, 111, para 59.

¹¹⁴ *Ibid*, para 23. However, this possibility is not taken into account in the analysis of anticompetitive foreclosure.

¹¹⁵ *Ibid*, para 24.

¹¹⁶ *Ibid*, para 60.

¹¹⁷ *Ibid*, 115, para 52.

individual components.¹¹⁸ In determining the notion of “single product”, it uses the “market substantiality test” and relies upon industry practises.

The tying test ignores evidence that consumers may desire the bundled product solely, and thereby does not take efficiencies into account, as is also the case for predation. The refusal-to-supply test also does not require strict indispensability. As a result, a great range of business practises are likely to be subject to the Commission's ultimate decisions as to whether they are anticompetitive. Under the effects-based approach, this ultimate discretion may enhance the belief that the shift to a principled rule-of-reason approach may encounter some resistance from the perspective of ensuring legal certainty in the area of abuse of dominance.

C. THE GUIDANCE PAPER'S IMPACT

It is a great unknown whether the GP will be likely to impress the courts into introducing the effects-based approach, but if successful it is likely to have the effect of raising the bar and creating more severe rules rather than of ensuring a more predictable business environment for undertakings. The Commission's flexible framework of analysis has left discretionary leeway in regard to the evidentiary requirements and to the weight to be attributed to the appraisal factors. Therefore, the challenge may not result in a continuation of the debate about the introduction of efficiencies, but rather in the balancing of the pro-competitive effects that efficiencies bring about, with an emphasis on the consumers or, turning this even more sensitively for Germany, to consumer welfare. As Germany's experience has shown, the challenge is to make such balancing operational for enforcement whilst avoiding fragmentation in the area of abuse of dominance. So far, the Commission's analytical framework has failed to cover other types of abuse. Nevertheless, a higher burden of proof for allegedly dominant undertakings remains another concern, and if it is set too high the competition authorities would be likely to meet it but rarely. In particular, it is problematic to oblige national competition authorities to challenge their well-established case-law line in regard to the burden of proof.

Despite all the criticism, an effects-based approach cannot be followed in all cases under Article 82 in order to ensure legal certainty. It is therefore important to find an overall equilibrium between both the efficiencies and competitive-harm doctrines when enforcing Article 82. Therefore, replacing the consumer-harm doctrine with one of competitive harm,

¹¹⁸ *Ibid*, para 47.

and replacing the consideration of consumers solely for the purpose of the balancing test instead of a pure shift to consumer welfare as a standard, leaving a discretionary margin left for the EC Commission and national authorities, may be one compromise solution.