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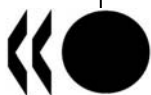
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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Guidance to Business on Monopolisation and Abuse of Dominance held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in June 2007.

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

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

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur l'Orientation des Entreprises en Matière de Monopolisation et d'Abus de Position Dominante qui s'est tenue en juin 2007 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

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

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

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EXECUTIVE SUMMARY

by the Secretariat

- (1) *In complex areas of law, such as the antitrust laws on unilateral conduct, some uncertainty is inevitable. Uncertainty, however, can be costly for businesses which may back away from investment decisions or from specific business conduct just to avoid the risk of an antitrust investigation and fines.*

Modern antitrust analysis is sophisticated, challenging and complex. This is particularly the case in the field of unilateral conduct law. Given the need for close factual analysis and the complex economic assessment of anti-competitive effects and possible efficiencies, some uncertainty over the reach of rules prohibiting anti-competitive unilateral conduct is inevitable. Some of the areas where the enforcement policy of unilateral conduct rules might benefit from some clarifications are rebates and discounts, the meeting competition defence and IP licensing. Jurisdictions have taken different approaches on these issues, which affects businesses, particularly those with cross-border activities.

Competition agencies should strive for increased convergence across jurisdictions, as businesses are operating on global markets and convergence of standards is critically important for them. Uncertainty over the reach of rules prohibiting anti-competitive unilateral conduct may induce companies to refrain from business practices which are lawful and competitively neutral (if not pro-competitive). Companies, and particularly companies with large market shares and with cross-border activities, need to know that their market strategy and their day-to-day business decisions are in line with the regulatory environment in which they operate.

- (2) *Competition authorities can greatly contribute to reducing legal uncertainty by increasing transparency on their enforcement practice through the use of guidelines. Drafting guidelines, however, is not an easy task as guidelines must be both workable and comprehensive to provide transparency and predictability.*

Antitrust authorities must strive to provide as much transparency as possible as to their enforcement practices so that businesses can plan and invest with some predictability, without abandoning potentially productive innovations because of uncertainties about the possible reach of competition rules. There are many ways in which agencies can enhance predictability, but the use of guidelines is among the instruments mostly used by competition authorities for this purpose.

Guidelines are very difficult to draft because to be effective they must be both workable and comprehensive. The difficulty in drafting effective guidelines lies in the fact that guidelines are inherently under- and over-inclusive. Striking the right balance and ensuring that guidelines are at the same time workable and comprehensive is the challenge faced by most competition authorities. In order to allow companies to understand better the legal framework applicable to them and to self-assess if their business practices comply with the legal standard, guidelines

should therefore focus on the objectives and the purpose of unilateral conduct laws rather than on the assessment of individual business practices.

- (3) *The use of market share based and conduct based safe harbours can play a very important role in guiding businesses in the area of unilateral conduct law.*

Safe harbours can play a significant role when it comes to providing businesses with reasonable degree of certainty and predictability. This is particularly the case when it comes to defining if a company has market power or is dominant. It is generally acknowledged that if a company has a low level of market share it is unlikely that it will be viewed as dominant. However, identifying the right threshold below which it is possible to presume that a company is not dominant is challenging.

If a market share safe harbour is established for dominance, it must be clear that there is no presumption of dominance above the floor but that agencies still have to look at all the factors that are relevant to determine if there really is a competition problem. For example, if a company is very successful, its market share can be significant for some time but if entry in that market is easy, then there ought to be no risk of monopolisation.

When it comes to the assessment of specific business practices, there are conduct-based safe harbours that could be usefully introduced. For example, in the case of single product rebates economic theory supports the notion that if the price is above average variable cost there is no harm to consumers and therefore no abuse. Similarly in the case of predation, in the absence of the possibility to recoup the short-term losses incurred by the dominant firm, the practice should not be viewed as harmful for consumers.

Although useful to businesses, safe harbours can never provide absolute legal certainty. For market share safe harbours, there would still be some unpredictability for companies as to the exact market definition that the agency will use. As for conduct-based safe harbours which rely on a measure of costs, one should take into account the difficulty of determining the actual costs of a company and the complexity of allocating common costs and shared costs in some very complex markets.

- (4) *The publication of the reasoning for not pursuing a case can be a very useful way to increase transparency on the enforcement actions of the competition authority.*

Most antitrust authorities recognise that the publication of the reasoning behind their decisions, particularly the reasoning behind decision not to pursue a unilateral conduct case, can be a very useful way to increase transparency of the enforcement policy of the agency. This can be done in various ways, for example publishing press releases or case notes. Such practice allows business to better understand the legal standard applied by the agency in specific cases and helps them self-assess if their business practices comply with the law.

SYNTHÈSE

par le Secrétariat

- (1) *Dans les domaines complexes du droit, comme le droit de la concurrence régissant les conduites unilatérales, une certaine incertitude est inévitable. Toutefois, l'incertitude peut être coûteuse pour les entreprises qui peuvent s'abstenir de prendre des décisions d'investissement ou d'engager certaines activités commerciales dans le seul souci d'éviter le risque d'enquête des autorités antitrust et d'amendes correspondantes.*

L'analyse contemporaine du droit de la concurrence est très élaborée, complexe et exigeante. C'est particulièrement vrai dans le domaine des conduites unilatérales. Compte tenu de la nécessité d'effectuer une analyse factuelle détaillée et de réaliser une évaluation économique complexe des effets anticoncurrentiels et des répercussions possibles sur l'efficacité, une certaine incertitude est inévitable en ce qui concerne la portée des règles interdisant les conduites unilatérales anticoncurrentielles. Les domaines dans lesquels l'application des règles relatives aux conduites unilatérales mériterait d'être clarifiée englobent les rabais et les remises, la défense d'intérêts légitimes et l'octroi de licences de propriété intellectuelle. Les approches de ces questions varient d'un pays à l'autre, ce qui a des incidences sur les entreprises, notamment sur celles qui exercent des activités transfrontalières.

Les autorités de la concurrence doivent s'efforcer d'améliorer la convergence entre pays, car les entreprises opèrent à une échelle mondiale et ont impérativement besoin de normes convergentes. L'incertitude quant à la portée des règles interdisant les conduites unilatérales anticoncurrentielles peut les inciter à s'abstenir de pratiques commerciales qui sont licites et neutres du point de vue de la concurrence (voire proconcurrentielles). Les entreprises, surtout celles qui détiennent d'importantes parts de marché et qui exercent des activités transfrontalières, ont besoin de savoir que leur stratégie commerciale et leurs décisions de gestion quotidiennes sont conformes à l'environnement réglementaire dans lequel elles opèrent.

- (2) *Les autorités de la concurrence peuvent contribuer grandement à réduire l'incertitude juridique en améliorant la transparence de leurs pratiques d'application du droit grâce aux directives. Toutefois, la rédaction de ces directives n'est pas chose facile, car elles doivent être à la fois fonctionnelles et complètes pour garantir transparence et prévisibilité.*

Les autorités antitrust doivent s'efforcer de faire toute la transparence possible sur leurs pratiques d'application du droit afin de permettre aux entreprises d'anticiper et d'investir avec une visibilité raisonnable, sans renoncer à des innovations potentiellement productives en raison d'incertitudes entourant la portée des règles de concurrence. Les autorités de la concurrence disposent de nombreux moyens pour améliorer la prévisibilité, mais les directives comptent parmi les instruments les plus couramment utilisés à cette fin.

Les directives sont très difficiles à rédiger, car pour être efficaces elles doivent être fonctionnelles et complètes. La difficulté tient au fait qu'elles sont par nature trop vagues ou au contraire trop précises. Trouver le juste équilibre et faire en sorte que les directives soient à la fois pratiques et complètes, tel est le défi que rencontrent la plupart des autorités de la concurrence. Pour

permettre aux entreprises de mieux comprendre le cadre juridique dans lequel elles évoluent et d'évaluer par elles-mêmes si leurs pratiques commerciales respectent le droit, les directives doivent donc se concentrer sur les objectifs et sur la finalité de la législation applicable aux conduites unilatérales, plutôt que sur l'évaluation des pratiques commerciales prises individuellement.

- (3) *L'utilisation de régimes de protection basés sur la part de marché et sur les pratiques peut être particulièrement utile pour orienter les entreprises dans le domaine du droit relatif aux conduites unilatérales.*

Les régimes de protection peuvent jouer un rôle significatif en offrant aux entreprises une certitude et une prévisibilité suffisantes, notamment lorsqu'il s'agit de déterminer si une entreprise occupe une position forte ou dominante sur le marché. Il est généralement admis que si une entreprise détient une part de marché réduite, elle ne sera pas considérée comme dominante. Toutefois, il est difficile de définir le seuil au-dessous duquel on peut supposer qu'une entreprise n'est pas dominante.

Si l'on fixe un seuil de part de marché en vue de définir une position dominante, il doit être clair qu'il n'y a pas présomption de position dominante au-delà de ce seuil, car les autorités de la concurrence doivent encore examiner tous les facteurs pertinents pour déterminer s'il y a réellement un problème de concurrence. Si par exemple une entreprise est très performante, sa part de marché peut être substantielle pendant un certain temps, mais dès lors que l'accès à ce marché est aisé, il ne devrait pas y avoir de risque de monopolisation.

Lorsqu'il s'agit d'évaluer des pratiques commerciales spécifiques, on peut utiliser avantageusement des régimes de protection fondés sur les pratiques. Par exemple, dans le cas de remises portant sur un produit unique, la théorie économique stipule que si le prix est supérieur au coût variable moyen, les consommateurs ne sont pas pénalisés et il n'y a donc pas d'abus. De la même manière, dans les cas d'éviction, lorsque les pertes à court terme subies par l'entreprise dominante ne sont pas récupérables, la pratique ne devrait pas être considérée comme préjudiciable aux consommateurs.

Bien qu'ils soient utiles aux entreprises, les régimes de protection ne sont pas le gage d'une certitude juridique absolue. S'agissant des régimes de protection fondés sur la part de marché, les entreprises seraient toujours confrontées à une certaine imprévisibilité quant à la définition exacte du marché appliquée par l'autorité de la concurrence. Pour les régimes de protection fondés sur les pratiques et qui s'appuient sur une mesure des coûts, il faudrait prendre en compte la difficulté du calcul des coûts effectifs d'une entreprise et la complexité de l'affectation des coûts communs et des coûts partagés sur certains marchés très complexes.

- (4) *La publication des motifs de la décision de ne pas intenter d'action peut être un moyen très efficace d'améliorer la transparence des mesures d'application prises par l'autorité de la concurrence.*

La plupart des autorités antitrust reconnaissent que la publication des motifs de leurs décisions, surtout de celle de ne pas intenter d'action dans le cas de conduites unilatérales, peut être un moyen très utile de rendre leurs mesures d'application plus transparentes. Il y a divers façons d'y parvenir, notamment la publication de communiqués de presse ou de commentaires de jurisprudence. Cette pratique permet aux entreprises de mieux comprendre la norme juridique appliquée par l'autorité dans des cas spécifiques et les aide à évaluer elles-mêmes si leurs pratiques commerciales sont licites.

CZECH REPUBLIC

1. Legal basis

The Czech Competition Act (hereinafter referred to as “Act”) covers the issues of dominant position and its abuse in Articles 10 and 11. According to the Act, it is not prohibited to have a dominant position in the market, but it is forbidden to misuse such a position to the detriment of other undertakings or consumers. Article 10 defines how to determine if a undertaking, or more undertakings, have a dominant position in the market. The key concept in the determination of a dominant position is market power. Article 11 Par. 1 gives a demonstrative list of actions that constitute the abuse of a dominant position. Article 11 Par. 2 through 6 describe the steps to be taken by the Office for Protection of Competition (hereinafter referred to as “Office”) when it finds that an undertaking has abused its dominant position.

2. Market threshold

The Act does not stipulate a market share threshold that would in itself mean the existence of dominant position; on the contrary, it stipulates a market share threshold whereby an undertaking with a market share lower than such threshold is deemed not to have a dominant position, unless proven otherwise. Such market share threshold was stipulated at 40%. Nevertheless, the very fact that an undertaking has a market share in excess of 40% does not in itself mean that such undertaking has a dominant position on the relevant market. A market share of more than 40% may be deemed to constitute a basis for further contemplations of dominant position existence. On the other hand, a situation may arise where an undertaking reaches a share of less than 40%, and yet it may be demonstrated using other criteria that such undertaking is dominant, or rather, the reputable legal presumption that an undertaking with a market share of less than 40% in the period under consideration is not dominant may be refuted.

3. Latest development

The amendment to the Competition Act, which came into force on 2 June 2004, following the adoption of the Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, introduced a new instrument enabling the Office to perform efficient solution of anticompetitive situations in an early stage of a case. The amendment established a possibility for the Office to issue a decision on imposition of commitments proposed by the parties to the proceeding. Such decision, conditioned by sufficiency of the commitments for elimination of the anticompetitive situation, enables ceasing the administrative proceeding without the need to issue a decision stating that a prohibited agreement had been concluded or that an abuse of dominant position had been committed. The Office adopted this instrument from the modernized EC competition law, as it held the opinion that such measure might enable faster remedy of a wrongful situation on the market and thus contribute to consumers’ welfare.

In order to put this idea in practice, the Office initiates dialogue with the companies on the verge of breaching the competition law, using regularly the statement of objections, and explains the advantages offered to the companies by the instrument of commitments, newly introduced to the Czech competition law. Fines and remedies are still available in cases, where the preventive approach is impossible and/or where the dialogue between the Office and companies in breach of competition law on the possibility of remedies failed.

4. Information activity

To increase competition law compliance, the Office informs the general public on legal regulations governing competition law, using mainly its web pages for the purpose. The Office regularly analyses key markets, submits its comments to statute drafts and publishes its opinions and decisions.

The Office has prepared and published the Compliance Program, describing and clarifying possible situations of competitors' behaviour which could result in sanctions by the Office, on its web site in order to assist the business sector to better understand the issue of protection of competition and to observe the legislation.

The activities of Office enjoy a growing deal of media attention. The Chairman of the Competition Office gave dozens of interviews to daily newspapers and magazines. Equally important was the increase in the number of reports on the activities of the Office, broadcast on the main news programs. The general public is thus informed about the work and content of the activities of the Office.

Information activities include press conferences and information provided to mass media or ordinary citizens. Various consultations, seminars or lectures are also an important source of information. During last years several seminars focusing on the protection of competition were held. A truly important event took place in November 2006 in Brno on the occasion of the 15th anniversary of the application of competition law in the Czech Republic – an international conference entitled Competition and Competitiveness.

5. Description of significant case

5.1 Abuse of dominant position in the gas industry

The Office has investigated the gas market since the late summer of 2005. In this period it obtained a number of incentives from the so-called eligible customers (at the time when the proceedings were instituted their number was 35 and they were so called „big customers“) who as of 1 January 2005, according to the law, had the possibility to select their own supplier of natural gas. The dominant natural gas supplier in the Czech Republic, RWE Transgas, has entered into contracts on supplying natural gas with eight regional distribution companies. At the time of preparations for opening the market RWE Transgas on its own initiative submitted a new portfolio of contracts, which responded to changes in legislation in association with the launching of the category of eligible customers for whom the price for the commodity and price for storage was not subjected to price regulations. RWE Transgas did not enable the unconsolidated regional distribution companies to enter into a contract concerning the purchase and sale of natural gas under conditions (namely specifying prices for the commodity and terms of trade), which would have in total enabled the operators of the distribution systems not belonging to the RWE holding compete effectively with operators of regional distribution systems that do belong to the RWE holding group. The Office termed the behaviour of RWE Transgas as abuse of dominant position on the market of natural gas supplies intended for the category of authorised customers to the detriment of other competitors.

Another case of RWE Transgas, which according to the Office was inconsistent with the rules of competition, was the refusal to supply the category of authorised customers with natural gas to whatever balance zone of the individual operators of regional distribution systems. This was an obstacle for the development of competition. In this way instead of gradually opening the market, prepared by legislation on a long-term basis, RWE Transgas created conditions making it very difficult to offer complex gas supplies to authorised customers by regional distribution systems other than those, in whose balance zone the point of supply of the authorised customer is located. The Office considers such behaviour as one of the

most serious violations of competition rules as RWE Transgas abused its dominant position on the market of natural gas intended for the category of authorised customers to the detriment of undertakings. No other regional distribution system has comparable conditions for submitting a competition offer to an authorised customer whose point of supply lies in its balance zone). RWE Transgas also abused its position to the detriment of consumers. The choice for authorised customers of natural gas supplier ensuring complex gas supplies was limited.

In the course of administrative procedure the Office conveyed its reservations to RWE and pointed out the possibility to adopt commitments eliminating the anti-competitive situation on the market and in this case also the chance of avoiding sanctions. However RWE did not respond sufficiently to this proposal and on the other hand filed a complaint to the Regional Court in Brno against illegal procedure of the Office (the court refused the complaint) and also a competence action to the Supreme Administrative Court. The Office imposed the highest ever fine on one company within one administrative procedure, i.e. a sanction of 370 million CZK (i.e. EUR 13,2 million) on RWE Transgas for abuse of the dominant position on the gas market. The behaviour of the dominant company in this case was very serious because it constitutes a very important barrier for gas traders in terms of the development of their business in the liberalising sector. According to the Office RWE Transgas acted with the intent to strengthen as much as possible the position of the regional distributors in the balance zones at variance with the intended and ongoing liberalisation in the gas industry. The authorised customers were also affected and due to the behaviour of RWE Transgas their choice of supplier was almost zero because the created conditions virtually ruled out the possibility of making fully competitive offers.

When specifying the level of the fine for RWE Transgas the Office took into account the fact that RWE did not terminate negotiations, for which the Office had reproved it, was added to its debit; they refused the necessary changes and insisted on conditions, which they themselves had unilaterally proposed. On the other hand as extenuating circumstances it should be stated that so far the Office has not conducted administrative procedure with this company for any other breach of competitive rules.

Participants in the proceedings filed an appeal against the first instance decision. The second-instance decision confirmed the principal items of the Office's first instance decision of August 2006. In comparison with the first-instance decision the final amount of the sanction was reduced by CZK 130 million (i.e. EUR 4,643 million). Taken into account was particularly the fact that after part of the company's management was changed the participant in the proceedings began to cooperate with the Office virtually immediately after the first-instance sanction was imposed. After discussions with the Office and with the Energy Regulatory Office the company submitted and later concluded agreements with its customers, which are now in accord with the rules of competition. The anti-competitive situation, because of which the administrative proceedings had been instituted and because of which this exceptionally high sanction had been imposed, has been eliminated and the gas market may open.

6. Conclusion

The Office now aims at eliminating the very roots of situations possibly resulting in distortion of competition. In line with this view, all the recent activities of the Czech Competition Office have been devoted to giving a clear positive signal to all qualified companies willing to cease their anticompetitive behaviour under favourable conditions. Factual and focused prevention followed, when necessary, by efficient, timely and sensible competition enforcement outline the new policy of the Office.

FINLAND

1. Introduction

It is important from the viewpoint of the companies' legal certainty that the competition authority provide them with appropriate guidance. However, when guidance is provided one should always take account of public worthiness and objectivity. Guidance given by the competition authority contains the risk of extending too far, which may in turn steer the companies' actions instead of the market mechanism and it may in the worst case scenario be detrimental to the markets.

In Finland, the Administrative Procedure Act determines the boundaries of the guidance given by the Finnish Competition Authority (FCA). Under the Administrative Procedure Act, which became effective in the beginning of 2004, an authority shall provide its customers the necessary advice, within its competence, for taking care of administrative matters, as well as respond to the questions and queries on its service. Civil servants shall not, however, turn guidance into assistance because this may jeopardize their impartiality and the civil servants may be found disqualified. Under the Administrative Procedure Act, civil servants may become liable for damages for false guidance.

According to the Finnish competition case law, the FCA's degree of familiarity with the case at hand also affects the FCA's obligation to provide guidance. The Competition Council (present Market Court) has found in its Neste Ltd/Seo Ltd decision (16/359/93, 24.10.1996) regarding abuse of dominance that the FCA had not properly and objectively steered and monitored Neste Oy in the enforcement of the former decision by the Council. According to the Competition Council, the FCA should, in a matter of which there exists a court's decision and of which the FCA has a sufficient amount of information, be able, as a special authority in the field, to clearly announce in a reasonable time and responsible manner whether the proposed conduct violates the Competition Act or not. It is the task of the FCA to take action to remove competition restraints and to monitor adherence to the Competition Act and the Competition Council's decisions. As the provisions of the Competition Act are wide and general by content, the FCA holds a key position in the interpretation of the provisions and in the application thereof to individual cases. However, it is not the FCA's task to fix prices or to develop pricing models on behalf of a business undertaking.

This paper describes the guidance provided by the FCA on abuse of dominance in two special occasions. The first one concerns the FCA's initial stages in the early 1990s when it was generally considered important to provide guidance on what a dominant position is and what its abuse consists of. In the second instance, the markets underwent a significant change when the broadband Internet market was in a state of major growth at the start of the 2000s.

2. Guidance during the early 1990s

The FCA was established in 1988. The present Competition Act, the Act on Competition Restrictions (480/92), which for the first time included the prohibition of abuse of dominant position entered into force on 1 October 1992. The Competition Act and the application thereof were hence a practically unknown field among the Finnish economy and the Bar in the early 1990s.

To illustrate the new Competition Act and the application thereof, the FCA published *guidelines* in 1992 entitled "The assessment and handling of competition restraints at the FCA". The purpose of the

guidelines was to provide business undertakings with information on the principles which the FCA adheres to when it assesses the harmfulness of competition restraints and handles prohibited competition restraints. The guidelines stated that they were not extensive or legally binding of the competition authorities. The guidelines contained 75 pages, of which one third was taken up by the assessment of a dominant position and the abuse thereof.

The guidelines did not attempt to create a formal *safe harbour* for the definition of a dominant position; instead, they sought to illuminate the economic principles – market structure, company conduct and the special features of the market – to which attention is paid when a dominant position is assessed. As for abuse of dominance, it was not found that certain practices were competition restrictions *per se*; even here the assessment of economic impacts was stressed. Hence, instead of a tight *per se* point of view, the FCA has, from an early stage, sought to examine the economic impacts of the companies' conduct. The guidelines did not provide explicit guidance on when a company occupies a dominant position and when it has abused its position. The guidelines clearly increased the legal certainty of the business undertakings, however, by illuminating in detail the principles based on which a dominant position and the abuse thereof are assessed. It was – as it is still – important to get the undertakings to understand the economic and dynamic concept of dominance and abuse.

There was also a public register held at the FCA on companies occupying a dominant position. The maintenance of the register supplied the business undertakings with guidance on what kind of companies were found to occupy dominance. The assessments were made on a case-by-case basis and *no safe harbour* was formed in this context either. In practice, all the companies in the register held a market share exceeding 50 per cent, however. The benefit of the register was considered to be that it was easier to intervene with abuse of dominance cases, when the position of the companies had been defined in advance. It was realized rapidly, however, that each suspected instance of abuse required case-by-case and up-to-date analysis and, in the end, the register was of no practical use. The maintenance thereof was gradually closed down in the mid-1990s.

In addition to securing the legal certainty of the companies in a dominant position, it was equally important to inform contender companies of potential instances of abuse. To this end, the FCA arranged so-called "competition clinic" events in association with the state provincial offices and federations of Finnish enterprises in 1995 and 1996, where the undertakings could receive direct guidance from the FCA. The FCA's decisions were also wider by content in the early stage and contained more descriptive elements aimed at securing legal certainty.

3. FCA's guidance in the broadband Internet market

The structure of the Finnish telecom markets is exceptional compared to many other countries in that, instead of one established fixed line incumbent, there are 43 local incumbents governing the local fixed network in Finland.

The FCA found it necessary to investigate the competitive situation in the broadband market in the beginning of the 2000s. This was because the broadband market began to rapidly expand in Finland at that time, and several complaints were lodged with the FCA. The situation was also affected by the fact that the national regulatory authority did not at the time have the powers to intervene with the competitive problems in the said market.

At the beginning of 2002, the FCA sent a questionnaire to the market operators and investigated potential competition problems. To prevent abuse of dominance, in June 2002, the FCA sent to all market operators a summary of the results of the questionnaire and its *advisory opinion*, in which the FCA reflected the findings against the Competition Act and previous case law, and gave interpretations and

guidance on the wholesale and retail provision of broadband connections by the local incumbents occupying a dominant position.

On the basis of the questionnaire, the major competition problem was considered to be the margin squeeze applied by the local incumbents. It later proved that the advisory opinion was not a sufficient measure, and that the only means to open up competition in the broadband market was the FCA's intervention with the terms of network lease by the local incumbents.

A separate competition law process with each 43 telecom operators would obviously have been an ineffective way to intervene with potential competition problems, so a solution was first sought through *negotiations*. In early 2003, the FCA combed through the terms of network wholesale access (LLU and bitstream access) of each local incumbent. The existence of a margin squeeze was quite clear in many instances. The wholesale access charges of vertically integrated operators could be clearly higher than the retail price.

In the context of the negotiations, the operators presented new price lists, of which the FCA made a rough assessment. With some companies, several rounds of negotiations were conducted. The FCA did not make a formal decision on whether the network charges complied with the law; after the negotiations, the responsibility for the lawfulness of the charges remained with the operators. Had it later become evident that the reduced network charges proposed at the meetings would have violated the Competition Act, the court would have probably considered the consultations with the FCA as a mitigating circumstance. In a strongly expanding market, however, it was important to reach quick results in opening up competition.

For guidance to succeed, the assessment on the margin squeeze had to be thorough and uniform, to prevent the dominant firms from controlling the negotiations and from obtaining regulatory capture. On the other hand, the situation also had to be avoided that market entrants would have achieved an unjustified advantage. Not every negotiation on the terms of the network lease ended up in a compromise; a proposal for a competition infringement fine had to be made on the conduct of one local incumbent. To increase transparency, the FCA issued a *press release* on the matter and delivered a public version of the proposal for the attention of all market operators.

The impacts of the negotiations on the market were highly positive: when the network charges of the local incumbents became reasonable in relation to the retail prices, competition and hence consumer choice in the broadband market increased significantly and retail prices came down. On the other hand, it also became a problem that the operators sought to follow the directions provided by the FCA in a subsequent market situation as well, and the pricing could then become distorted compared to the regular price dynamics in the market. It should be borne in mind here that, as mentioned above, there are 43 separate local broadband markets in Finland, so any assessment of prices shall consider the state of each local market. Some operators used the viewpoints presented by the FCA as a negotiation weapon in a market situation which did not correspond to the situation in which the FCA had formed its opinion. In late 2004, the market was still undergoing a forceful change, and the FCA saw it necessary to send the operators a *letter* in which it specified its opinions on the application of the Competition Act in the existing stage of development of the broadband market.

4. Conclusions

Under the Administrative Procedure Act, the FCA shall provide guidance. In practice, guidance takes place every day but it becomes particularly important in a situation where, in the context of a new Act or case law, there arises a need to secure the legal certainty of a business undertaking. Another important occasion for guidance is when a major change occurs in the market or when new markets arise, as it is important to define the ground rules at an early stage. Negotiations and adjustment are in such

circumstances clearly more effective than lengthy legal proceedings during which the market situation may become already distorted.

Both in the early 1990s situation and in the consultation provided on the broadband market it became clear that case law plays a major role in providing guidance. The quality of guidance and the companies' legal certainty clearly improve when it is possible to refer to the courts' decisions. The case law which had accumulated in Europe and the United States was typically used as a source in the FCA's early 1990s guidance. The first domestic competition law cases regarding the abuse of dominance obtained a major role in the mid-1990s. The situation in the broadband market was facilitated to a certain extent by the fact that the court had issued decisions obliging the parties to provide wholesale network access. These decisions assisted in the market definition and in the assessment of the market position and the abuse thereof. On the other hand the guidance was partially rendered problematic by the lack of domestic and foreign case law in the broadband market.

Competition authorities should be very careful when providing guidance. It is not the duty of the competition authority to fix prices or to develop pricing models. Market dynamics and incomplete and asymmetric information place major challenges on the provision of guidance. In the rapidly changing markets, a need arises for the FCA to specify and to adjust its guidance to the existing situation. As the provisions are loose, the setting of *safe harbours* and *per se* restrictions in abuse of dominance cases is often impossible. Effective consultation requires precedents from the courts and a sufficient amount of information on the suspected abuse and the state of the market.

IRELAND

1. Introduction

The Competition Act, 2002 empowers the Competition Authority to make official decisions in a number of areas. These can be divided into three categories:

- Enforcement Decisions
- Notices
- Declarations.

2. Enforcement decisions

Section 30(1)(g) of the Competition Act, 2002 gives the Competition Authority the function of “carrying on such activities as it considers appropriate” to inform the public about competition issues. Accordingly, the Competition Authority occasionally decides to publish its economic and legal reasoning concerning selected investigations it has decided to close either because it has found no breach of the Competition Act, 2002 or settled the case.

The Competition Authority selects investigations for its enforcement decisions that:

- Create a precedent;
- Demonstrate the Competition Authority’s approach to a particular competition issue on which it has not previously opined;
- Are of public interest (e.g., the investigation is in the public domain, the issue has been subject to considerable debate and discussion);
- Raise issues of interest or complexity.

During 2006, the Competition Authority published one Enforcement Decision which is available to download from the Competition Authority’s website www.tca.ie. This non-infringement decision note highlights the economic effects-based approach employed by the Competition Authority in analysing alleged breaches of competition law particularly with regard to:

- The definition of dominance; and,
- The analysis of certain abuses – exclusive agreements; excessive pricing.

2.1 *TicketMaster Ireland*

In March 2006, the Competition Authority published details of its investigation into alleged abuses of dominance by TicketMaster Ireland.

The Competition Authority's investigation focused on the market for outsourced ticketing services for events of national or international appeal in the island of Ireland. Following its investigation, which lasted over two years, the Competition Authority concluded that TicketMaster Ireland's conduct did not constitute an abuse of a dominant position (contrary to Section 5 of the Competition Act, 2002); nor do the agreements between TicketMaster Ireland and the two largest promoters prevent, restrict or distort competition (contrary to Section 4 of the Competition Act, 2002).

The Competition Authority's investigation did highlight one issue of potential concern relating to the degree of transparency in ticket price information. However, an absence of transparency in price information does not constitute a breach of competition law. Therefore the Competition Authority brought this issue to the attention of the Office of the Director of Consumer Affairs and the National Consumer Agency.

The Competition Authority's investigation was prompted by complaints from thousands of consumers (including a complaint petition signed by in excess of 8,000 individuals) concerning:

- The price or face value of tickets sold by TicketMaster Ireland;
- The level of TicketMaster Ireland's booking fees. These fees are payable by the end consumer when purchasing a ticket. The booking fee depends on the method of purchase (i.e., Internet/telephone, event venue box office, or retail agent). In 2004, for example, TicketMaster Ireland's booking fees varied from zero to a maximum of €5.95 per ticket; and
- The alleged exclusive agreements between TicketMaster Ireland and the two largest event promoters currently operating in the island of Ireland, MCD Productions Limited and Aiken Promotions.

The Competition Authority concluded that the promoter, in conjunction with the artist, sets the price or face value of the ticket sold by TicketMaster Ireland. High-profile artists perform only a limited number of concerts worldwide each year. Promoters in the island of Ireland compete aggressively with promoters in other countries to convince high-profile artists to perform in Ireland by offering them sufficiently attractive terms. Therefore, high-profile artists have strong bargaining power in their negotiations with promoters and can command substantial appearance fees, which, in turn, reflects the ticket price that end consumers pay.

TicketMaster Ireland currently accounts for 100% of the market for outsourced ticketing services for events of national or international appeal. However, TicketMaster Ireland is constrained from exploiting this position because:

- MCD Promotions and Aiken Promotions have the incentive to minimise the booking fee charged by TicketMaster Ireland to the end consumer. Outsourced ticketing services are like any other input purchased or contracted by the promoters for the concert or other event package they put together for sale to the consumer; and
- MCD Promotions and Aiken Promotions have strong countervailing buyer power vis-à-vis their ticketing service provider, TicketMaster Ireland. If TicketMaster Ireland will not agree to the

booking fees demanded by the two major promoters, they can credibly threaten to either switch to another ticketing service provider or set up their own ticketing facilities

Based on its investigation, the Competition Authority concluded that MCD Promotions and Aiken Promotions have both the incentive and the ability to minimise booking fees charged by TicketMaster Ireland to the end consumer. Therefore, TicketMaster Ireland does not appear to be able to exercise market power by behaving independently of its customers (i.e., the promoters) by charging higher booking fees to the end consumer.

3. Notices

Section 30(1)(d) of the Competition Act, 2002 gives the Competition Authority the function of publishing Notices containing practical guidance as to how to comply with the provisions of the Competition Act, 2002.

The purpose of a Notice is to give guidance to businesses and legal practitioners on the Competition Authority's views on how the Competition Act applies in particular circumstances. Notices have no legal effect and are for guidance purposes only. It is ultimately a matter for the courts to decide whether or not a breach of the Competition Act, 2002 has occurred.

3.1 *Guidance in respect of collective negotiations relating to the setting of medical fees*

In January 2007, the Competition Authority published a guidance note under Section 30(1) (d) of the Competition Act, 2002 in respect of collective negotiations relating to the setting of medical fees.

In September 2005, the Competition Authority concluded an investigation into the way in which fees for consultants' services are negotiated between consultants and private health insurers. The Competition Authority's view from that investigation was that the actions of the consultants' representative body, namely the Irish Hospital Consultants Association ("the IHCA"), in the context of those negotiations, amounted to price fixing in breach of Section 4(1)(a) of the Competition Act, 2002. The Competition Authority issued a letter of initiation outlining its view to the IHCA and a settlement was subsequently reached between the Competition Authority and the IHCA on 27th September 2005 ("the Agreement and Undertaking").

The Competition Authority published a consultation document in January 2006 to determine the scope of guidance that could be provided in respect of collective negotiations relating to the setting of medical fees. The consultation arose as a consequence of the Agreement and Undertaking furnished by the IHCA to the Competition Authority as the IHCA had requested additional guidance on compliance as part of the settlement. The aim of the Consultation Document was to get a better understanding of the way in which fees for consultants' services are negotiated between consultants and private health insurers.

The Competition Authority is concerned that within the discussions that take place between hospital consultants (and their representative bodies such as the IHCA and IMO) and private health insurers, there may be conduct amongst consultants which breaches the Competition Act, 2002. The objective of the Competition Authority issuing guidance is to ensure that consultants are aware of the prohibitions contained in the Competition Act, 2002 as they apply to them and to assist them in complying with the Competition Act, 2002.

4. Declarations

The Competition Act, 2002 permits the Competition Authority to declare in writing that a specified category of agreements, decisions or concerted practices complies with certain conditions, set out in

Section 4(5) of the Act. The effect of such a Declaration is that agreements within the category in question are not prohibited by Section 4 of the Act.

4.1 Declaration on the cylinder LPG market

In 2005, the Competition Authority published a Declaration concerning exclusive purchasing agreements for cylinder liquefied petroleum gas (LPG). Under the Competition Act, 2002, complying fully with the terms of the Declaration will give suppliers of cylinder LPG a safe harbour from prosecution under competition law. The Competition Authority's Declaration limits exclusive agreements in the cylinder LPG market to two years.

The Competition Authority has issued this Declaration following a review of how this market has worked over a ten-year period between 1994 and 2004. This review has highlighted a contrast between positive competition developments between 1994 & 1999 and an apparent decline in competition between 1999 and 2004.

The Declaration for the cylinder LPG market entered into force on 1st April 2005 and expires on 31st March 2015 (with a review after 5 years). A copy of the Declaration is available from the Competition Authority's website www.tca.ie.

JAPAN

1. Private monopolization

1.1 *Overview of the provision*

The Antimonopoly Act (“AMA”) prohibits as private monopolization “such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

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

As to “substantial restraint of competition” in this definition, the case law states “restraining competition substantially means bringing about a situation in which competition itself has significantly lessened and thereby a specific company or companies can control the market by determining freely, to some extent, prices, qualities, volumes, and various other terms on its or their own volition.” (Tokyo High Court, December 9, 1953)

1.2 *Private monopolization and unfair trade practices*

The AMA regulates anticompetitive unilateral conduct not only by the provision of Private Monopolization but also by the provision of Unfair Trade Practices.

Such unilateral conduct as transaction with a dominant firm’s trading partners on condition that the trading partners shall not deal with its competitors is prohibited as private monopolization if it uses this kind of conduct, excludes its competitors from a particular market, and causes substantial restraint of competition in the market. Even if the conduct does not cause substantial restraint of competition, such conduct would be illegal as an unfair trade practice when an influential firm in a market engages in such conduct and thereby tends to impede fair competition by reducing the business opportunities of its competitors and making it difficult for them to easily find alternative trading partners.

Specific acts are designated as unfair trade practices by the Japan Fair Trade Commission (“JFTC”) within certain conditions of the AMA. Unfair trade practices that could be used as a means of private monopolization include “interference with a competitor’s transaction” (Item 15 of the Designation of Unfair Trade Practices), “unjust dealings on restrictive terms” (Item 13), “unjust dealings on exclusive terms” (Item 11), “tie-in sales” (Item 10), “unjust low price sales” (Item 6), “discriminatory pricing” (Item 3).

1.3 *Criteria for private monopolization, including safe harbor*

A “market dominant position” is not a requirement for private monopolization in the AMA. Meanwhile, as mentioned above, the court said “restraining competition substantially means bringing

about a situation in which competition itself has significantly lessened and thereby a specific company or companies can control the market by determining freely, to some extent, prices, qualities, volumes, and various other terms on its or their own volition.” Thus, a company that can bring about such a situation is generally thought to be in a market dominant position.

In general, a situation in which competition is substantially restrained is determined by the following aspects to be comprehensively considered: the details of conduct by a company, the impact of the conduct on a market, an industry environment in which the company is doing business, a market share of the company in each field of trade, a supply and demand side environment, imports and substitutes, new entries, and so on.

Thus, in Japan, so-called safe harbor does not exist that warrants legality by certain criteria such as a market share.

Incidentally, legal measures were taken on companies that had a 70% or more market share in many private monopolization cases.

2. JFTC’s efforts to enhance predictability and transparency

2.1 Guidelines

With an aim to prevent the violation of the AMA by companies and trade associations and promote appropriate business activities by them, the JFTC has developed and publicized various guidelines, such as “Guidelines Concerning Distribution Systems and Business Practices” (July 1991), identifying specific business activities that could violate the AMA. Some of the recent guidelines are as follows:

- Guidelines for Proper Electric Power Trade (Developed in December 1999 and revised in July 2002, December 2005 and December 2006; in cooperation with METI.)
- Guidelines for Proper Gas Trade (Developed in March 2000 and revised in August 2004; in cooperation with METI.)
- Guidelines for Promotion of Competition in the Telecommunications Business Field (Developed in November 2001 and revised in December 2002 and June 2004; in cooperation with MIC.)
- Guidelines for the Use of Intellectual Property under the Antimonopoly Act (The draft version was released in April 2007, seeking public comments until June 7, 2007.)

2.2 Responses to consultations by businesses

In order to prevent violation of the AMA, the JFTC has provided explanations on the details of the AMA in response to consultations by companies and trade associations as to specific business activities they intend to conduct.

2.3 Law enforcement

Law enforcement by competition authorities yields the direct effects of eliminating acts that restrain competition and maintaining and promoting fair and free competition in the markets. It may also bring about the indirect effects of defining the scope of regulations and thus preventing infringements by other companies. Some of the recent cases of private monopolization are as follows:

- Intel Corporation compelled PC manufacturers not to buy CPUs manufactured by its competitors in the PC CPU sales market. (The recommendation decision was issued on April 13, 2005.)
- USEN Corporation and another company took customers away intensively from their competitor in the field of music broadcast services for business establishments. (The recommendation decision was issued on October 13, 2004.)
- Nippon Telegraph and Telephone East Corporation obstructed the entry of other telecommunications companies into the market of communication services using optical fiber facilities. (The hearing decision was issued on March 26, 2007.)

3. Conclusions

If competition authorities enforce competition laws without consideration to predictability and transparency for businesses, they may not be able to determine which acts would be in conflict with the laws and consequently refrain from performing even acts that would promote competition. They may also be involved in infringement without knowing that their acts are illegal. Therefore, it is important to secure predictability and transparency for businesses from the standpoint of maintaining and promoting sound competition.

As mentioned above, the JFTC has been making efforts to identify specific business activities that violate the AMA through responding to consultations by businesses as well as developing various guidelines and revising them as needed. Meanwhile, the scope of regulations on private monopolization has been defined through the JFTC's handling of individual cases.

The JFTC will continue its efforts to improve predictability and transparency concerning regulations on private monopolization restrictions by further accumulating specific cases.

KOREA

1. Introduction

The term "market dominant enterprise" means any enterprise holding market dominance who can determine, maintain or change the prices, quantity or quality of commodities or services or other terms and conditions of business as a supplier or customer in a particular business area individually or jointly with other enterprises (Article 27 of the Monopoly Regulation and Fair Trade Act (hereinafter, MRFTA)).

Previously, the Korea Fair Trade Commission (hereinafter, KFTC) annually designated market dominant enterprises in each market in advance, but since the abolition of the advanced designation system in 1999, the KFTC has been determining whether an enterprise is market dominant case by case. However, the KFTC presumes an enterprise to be a market dominant enterprise if its market share is 50 percent or more or if the total market share of less than three enterprises is 75 percent or more (Article 4 of the MRFTA).

Since a market dominant enterprise is in a position to have a decisive influence on determining price or quantity of goods and services and terms of transactions, its abuse of market dominance is more heavily sanctioned than other unfair trade practices. More specifically, an enterprise violating Article 23 of the MRFTA on "Prohibition of Unfair Business Practices (except for acts of assisting a person with a special interest or other companies through unfair means stipulated in Article 23 (1) 7)" is imposed with a surcharge not exceeding the amount equivalent to two percent of the turnover determined by Presidential Decree as stipulated in Article 24-2 of the MRFTA. Nevertheless, an enterprise engaged in abuse of market dominance in violation of Article 3-2 of the MRFTA is imposed with a surcharge not exceeding the amount equivalent to three percent of the turnover determined by Presidential Decree as provided by Article 6 of the MRFTA.

This report introduces how the KFTC is effectively providing guidelines on abuse of market dominance to businesses.

2. The KFTC's experience

2.1 Establishment of criteria for review of abuse of market dominance

The KFTC enacted criteria for review of abuse of market dominance in September 2000 (first amendment made in May 2002). According to the criteria, the relevant market is defined first taking into account the area, stage, partner of the suspicious transaction, and etc. Then whether an enterprise is market dominant is determined based on the market share, existence and degree of entry barrier, relative size of competitors, likelihood of cartel creation by competitors, existence of similar products and adjacent market, market foreclosure power, financial capacity, and etc. In addition, the criteria divide abuse of market dominance into different types with specific criteria for determination of the type of abuse.

A market dominant enterprise's abuse of market dominance includes a) an act determining, maintaining or changing unreasonably the price of commodities or services, b) an act unreasonably controlling the sale of commodities or provision of services, c) an act unreasonably interfering with the business activities of other enterprises, d) an act unreasonably impeding the participation of new

competitors and e) an act unfairly excluding competitive enterprises, or which might considerably harm the interests of consumers (Article 3-2 of the MRFTA).

2.2 *Application of legal safe harbor concerning dominant position*

The KFTC provides a safe harbor for acts that are thought to have little potential harm to competition. The enterprises who meet the conditions of the safe harbor are considered to have no anti-competitive influence and thus are free from the KFTC's review. The safe harbor is provided for in Article 2 (7) of the MRFTA, which excludes "an enterprise whose annual total sales or purchases are less than one billion won in a particular business area" from being a market dominant enterprise. The KFTC has proposed an amendment bill to raise the safe harbor to "an enterprise whose annual total sales or purchases are less than four billion won," which is currently in the public notification stage of legislation.

2.3 *Education of enterprises*

Effective regulation of market dominant enterprises' abuse of market dominance requires not only strict law enforcement on their illegal practices but also preventive efforts of inducing voluntary compliance of market dominant enterprises with the competition law.

With this in mind, the KFTC has been continuously educating executives and employees of concerned businesses on the criteria of a market dominant enterprise, types of abuse of market dominance and punishment. The KFTC's Chairman is leading this effort emphasizing this matter at various lectures and events, and the Vice Chairman and Director General-level executives are active as lecturers on these issues. Meanwhile, the Monopoly Regulation Team members, including the Director, are providing intensive education to corporate executives in a discussion format, sharing their experience of investigating and handling abuse of market dominance cases.

2.4 *Policy customer relationship management*

The KFTC operates policy customer relationship management system targeted at the executives of companies meeting the criteria of market dominant enterprises, in consideration of the provision on presumption of market dominant enterprise. The KFTC is strengthening its e-mail service to policy customers, in addition to various other forms of information provision including regular leaflets on major abuse of market dominance cases in Korea and abroad.

As a result of these efforts, there is now increasing interest of the concerned companies in the issue of abuse of market dominance with the policy customers' e-mail opening rate reaching more than 90 percent.

2.5 *Preliminary business review request system*

There are in fact many cases where market dominant enterprises violate the law due to their lack of understanding of the competition law or their misjudgment. In order to enhance predictability for companies and to prevent damages caused by abuse of market dominance, the KFTC introduced the Preliminary Business Review Request System in 2004. Under the system, a market dominant enterprise requests the KFTC's review of anti-competitiveness of a business practice (especially, whether it is considered abuse of market dominance) before it actually happens, upon which the KFTC reviews the practice and tells the enterprise whether the practice is lawful or not. The review results are an official view of the KFTC and, therefore, the KFTC will not take legal measures afterwards against the practice that was recognized to be legal in the preliminary review.

Since the system has a short history, no preliminary review request has been made yet. Nevertheless, the KFTC is actively promoting the system among enterprises and is receiving increasing number of

inquiries about this system. Once the system is actively put into use, it is expected to serve as one of the most effective guidance tools for abuse of market dominance.

2.6 *Issue of press release on major abuse of market dominance cases*

To raise awareness on the harms of abuse of market dominance and the need to regulate such practice, the KFTC issues press release on case summary, investigation process and imposed remedies through the KFTC webpage and media. Recent examples of the KFTC's press release on abuse of market dominance case include Microsoft's abuse of market dominance¹ and Hyundai Motors' abuse of market dominance².

2.7 *Promotion through various study groups*

There are many active study groups within the KFTC including Competition Forum, Study Group on Market Dominance and Study Group on Antitrust Cases. These study groups have lively discussions on the theories, precedents and overseas examples related to abuse of market dominance³. Executives of the concerned company and related experts are invited to the study group and participate actively in the discussion. The study groups provide a good opportunity for them to learn about the KFTC's commitment to eradication of abuse of market dominance and policy direction.

¹ Please refer to http://ftc.go.kr/data/hwp/micorsoft_case.pdf for more information.

² Hyundai Motors limited its sales agents' store moving, expansion and recruitment while forcefully imposing excessive sales targets. The KFTC decided this to be an abuse of market dominance and imposed corrective orders with a surcharge of 23 billion won (Jan. 2006)

³ In Sep. 2006, the KFTC held an international seminar on abuse of market dominance and EC DG COMP Phillip Lowe lectured on EC's regulation of abuse of market dominance. Many corporate executives, lawyers and other outside experts participated in the seminar and discussed the issue of abuse of market dominance.

NETHERLANDS

1. Introduction

In this paper some comments are offered on the issue of guidance regarding unilateral conduct. What follows is not an all-encompassing analysis, but a discussion of a few aspects that the Netherlands Competition Authority (hereafter: the NMa) considers to be relevant to the issue at hand.

2. General view of the NMa regarding dominance and abuse

With the introduction of the Dutch Competition Act of 1998, which is phrased in conformity with articles 81 and 82 of the EC-Treaty, the Dutch Parliament explicitly stated that Dutch competition law should neither be stricter, nor more lenient than European competition law. Hence, the NMa closely follows European case law and the Commission's decisions.

Article 24 of the Dutch Competition Act states that:

- Undertakings are prohibited from abusing a dominant position.
- The implementation of a concentration, as described in section 27, shall not be deemed to be an abuse of a dominant position.

The NMa has the opportunity to give priorities to cases that she deems the most important. These priorities will be in accordance with the NMa's points of view with regard to the application of article 24 of the Dutch Competition Act. For instance, the NMa supports the Commission's endeavour to 'modernize' the application of article 82; the NMa is convinced that a more 'effect oriented' approach is warranted.

The NMa considers the goal of unilateral conduct laws to be, generally speaking, the protection of the long term consumer interest through the protection of the competitive process. The protection of competitors is not seen as an end in itself.

Dominance is a prerequisite for the application of article 24. Conceptually, dominance is significant and durable market power. Dominance enables the firm to influence the market outcome by unilaterally being able to raise (market) prices and restrict (market) output, or, for that matter, reduce the quality, the range of products, or innovation.¹

¹ Basically it means that output and (hence) price decisions are taken with little or no respect for direct competitors, potential competitors or consumers, in the sense that market demand is a given for the firm and can be exploited as such. Consumers may leave the market, but up to a point, the dominant firm is not restricted in its choice of price and output by these consumers; in a case of non-dominance a firm could not have permitted this loss of consumers. We would like to note that also in a case where a firm has competitors it can still be dominant: it may still have (residual) demand, such that a profit-maximizing price has an impact on the whole market.

The NMa considers a wide range of evidence while determining whether or not a firm has a dominant position. The analysis of entry barriers is considered to be of great importance since entry barriers define the durability and extent of a dominant position and are crucial in identifying an abuse, e.g. with respect to ‘recoupment’-opportunities.

Dominance may be created by the competitive process itself. By superior competition, for instance, a firm may be, for the time being, the sole winner in the market, and be able to “reap the benefits” of this monopoly power.² Generally the competitive process will erode this position again, unless of course the dominant firm is able to extend its dominant position by hampering the competitive process by exclusionary conduct. Behaviour that allows the dominant firm to extend its dominant position in this way, such that ultimately consumers are harmed more or longer than otherwise would have been the case, amounts conceptually, in our view, to an abuse of dominance. When ‘high prices’ can not be interpreted as the rewards of superior competition and are likely not to be eroded by the competitive process itself - this might for example be the case for a non-regulated legal monopoly - they might be seen as a form of exploitative abuse.

3. Effects based approach

The NMa supports an effects based approach to unilateral conduct cases. This approach emphasises the importance of providing evidence of the (likely) anti-competitive effects of business conduct to determine whether the conduct is abusive. Anticompetitive harm can not be inferred merely on the basis of evidence regarding the form of the conduct. A theory of harm supported by the facts of the industry must be an essential part of a finding of abuse. Combined with the emphasis on long term consumer interest this approach thus emphasises the necessity of providing case specific evidence of likely consumer harm in the long run.

NMa’s support for an effects based approach to unilateral conduct law is underlined by among others the following considerations:

- There is little evidence - currently at least- that the categories of conduct that traditionally fall under the unilateral conduct laws generally produce anticompetitive results only.
- An effects based approach has a better chance of reducing errors in the form of false positives. False positives can stifle competition.³

This approach implies that case specific fact finding and complex case specific economic analysis may be needed in determining whether or not a particular conduct constitutes an abuse of a dominant position. This in return has implications about the type of guidance that could be provided.

The form based approach to unilateral conduct is often defended on the basis of the arguments referring to their simplicity and to their power of providing legal certainty. We wonder if these arguments are as strong as they might seem. The applications of form based rules involve serious uncertainties, leave room for different interpretations and are often financially costly. Yet even if one could assume that form based rules are superior from the viewpoint of legal certainty and simplicity, it is questionable that the

² Here we mean the benefits a dominant firm may realize for itself, without ‘abusing’ this position. A firm that has become dominant by risky investments and superior efficiency may reap the benefits by charging higher prices than would have been possible without this position.

³ False positives may stifle competition and, hence, erode the competitive process. It may turn out that dominant firms will no longer compete vigorously. Also, they may lose the incentives to innovate (which may also lead to less incentives to innovate or enter the market more generally).

benefits associated with the superior legal certainty would weigh against the possible dangers associated with the increased likelihood of false positives.

Guidance that is consistent with an effects based approach will be *general* in the sense that it will not define abuse based on (seemingly) simple and clear cut formalistic rules. This however does not have to mean that guidance regarding the question of the definition of abuse would be too empty of content to be of appreciable use. The authority's guidance can be helpful by defining what it understands under the objectives of unilateral conduct laws, the concept of dominance, the concept of abusive conduct and the relationships between these concepts. Suppose that abusive behaviour is defined as conduct which harms consumers in the long run by harming the competitive process. Explicating this statement is no trivial exercise since it involves answering the following questions: What is meant by the consumer? What is meant by consumer harm? What is the long run? How do we define the term competitive process? When is the competitive process harmed in a manner in which consumers are harmed? These questions could be answered in some detail in the authority's guidance. Guidance could also be in the form of providing example assessments fleshing out the effects based approach. Examples can be provided to show how the authority's general approach can be applied in particular cases.

In any case communicating the authority's vision regarding unilateral conduct laws can be important. For example, communicating the viewpoint that the protection of competitors is no end in itself, that the protection of competitors is only relevant when it contributes to the protection of the competitive process can be useful. Such communication signals that the competition authority would be sceptical of possible 'abuse' of the competition law by competitors that are being disadvantaged by the actions of a dominant firm when these actions are compatible with normal competition. Of course unilateral conduct cases are difficult exactly because it is difficult to distinguish competitive behaviour from non competitive behaviour. Nevertheless, such communication can benefit competition and consumers when it effectively conveys the commitment to the principle that dominant firms are also free to compete vigorously.

4. Guidance by competition authorities

The considerations underlining NMa's support for an effects based approach are also relevant for answering some hypothetical questions regarding possible guidance:

4.1 *Should guidance include safe harbours regarding dominance?*

The likelihood of a false negative seems to be limited in cases of a firm with low market share. The NMa would thus consider using a market share based safe harbour for unilateral conduct cases (30% market share) given the possible positive effects of such safe harbours in terms of legal certainty.

4.2 *Should guidance include per se rules of illegality based on forms of conduct?*

Per se rules of illegality based on forms of conduct would only be appropriate when there is theoretical and/or empirical evidence that the forms of conduct subject to the per se rule of illegality generally produce anticompetitive effects. As stated above the current state of evidence does not support such a conclusion. In the absence of such evidence the benefits of per se rules of illegality in terms of the costs of investigation and/or legal certainty might be undone by the harm caused by foregone competitive conduct.

4.3 *Should guidance include safe harbours for types of conduct?*

In principle, the use of such safe harbours would have to be motivated by empirical and/or theoretical evidence that the likelihood of false negatives would be small. An example of a safe harbour for price based predation cases might be a safe harbour for all pricing decisions satisfying a specific cost benchmark

test. $P > ATC$ would be a likely candidate. It seems a priori likely that many more inefficient firms might be protected in case of intervention by a competition authority if $P > ATC$ than in case of $P < ATC$). Given the practical problems involved in such investigations, it may be a matter of efficient allocation of an authority's resources not to intervene in case of $P > ATC$. Besides, starting investigations in case of $P > ATC$ might give the competitors of a (supposedly) dominant firm huge incentives to complain in order to 'raise this dominant rival's cost'. Of course the question remains if such safe harbours contribute to increased legal certainty given the many practical problems involved in their application.

4.4 *Can form based rules be used to formulate presumptions of abuse in order to shift the burden of proof from the competition authority to the firm under investigation?*

Given the difficulty form based tests have in identifying abuse, such a strategy might be risky from the viewpoint of foregone competitive conduct especially when 'presumptions' are interpreted to be anything more than genuinely refutable temporary hypotheses. This problem might be aggravated when the finding of abuse does not give sufficient weight to the analysis of entry barriers while determining the existence of dominance. As stated above this analysis is very important in identifying the possibility of 'recoupment'. The possibility of 'recoupment' in turn is important in the analysis of long term consumer harm. These points illustrate the importance of providing guidance regarding the concept of dominance, the role of 'recoupment' and the issue of burden of proof.⁴

As to the possible forms of guidance: Official guidelines can be useful in communicating the vision of the competition authorities regarding unilateral conduct, in explicating some of the theoretical discussions and in providing example assessments. These aspects could be repeated or emphasised in speeches and press releases. Of course the consistent application of the communicated line by the competition authority will be important in the long term effectiveness of any guidance. Such decision practice might be important in showing that the competition authority practices what it preaches.

5. Experience with guidelines

The NMa has not as yet published general guidelines on the application of article 24 of the Dutch Competition Act. The NMa is currently waiting for the results of the Commission's consultation process with regard to article 82, before separately producing guidelines on the application of article 24 of the Dutch Competition Act. The NMa is of the opinion that her points of view are in line with the Commission's. Besides, the NMa has to operate in line with European case law and the Commission's decisions.

In December 2004 the NMa published a study discussing its views regarding the issue of buyer power (Visiedocument Inkoopmacht). One of the topics addressed in this study is the issue of abuse of buyer power. This publication was preceded by a process of public consultation based on an earlier consultation document on buyer power published by the NMa in September 2004.

In the study published in 2004 the NMa deals with topics such as the concept of buyer power, the concept of dominance (when is a buyer dominant?) and the concepts of exploitative and exclusionary abuse. One of the issues addressed while discussing exploitative abuse is the difference between concepts such as 'unreasonableness'/'unfairness' and 'abuse'. This discussion was directed not only at the dominant firms (or their competitors) but also at the suppliers who might feel that they are being exploited.

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In the end the issue of burden of proof is of course exogenously determined by law/legislation.

6. End remark

It seems to us that the issue of effective guidance is intricately related to some substantive issues regarding the application of unilateral conduct laws. The substantive issues underlying the debate regarding the form based approach 'versus' the effects based approach are for example of direct relevance to how one would prefer to provide guidance.

TURKEY

Turkish Competition Authority (TCA) attaches great importance to transparency and its relations with the business world. Being a relatively new authority with a 10 year experience, it works hard to increase awareness of competition matters among business circles. To further encourage such awareness and to promote discussion on relevant matters, the TCA evaluates duly all the concerns and/or complaints of business.

1. Examples of complaints from business about uncertainty over the legality of certain conduct or practices of unilateral conduct rules:

In this part of the contribution, complaints/concerns based on access to the file and the rights of defense will be dealt with. Nevertheless, such complaints/concerns of business are not only specific to unilateral conduct rules but also relevant for rules on restrictive business practices in Turkey. Therefore, this contribution will focus on the procedural side of this issue without making any differentiation whether the concerns from business in this respect stem from a restrictive business practice (under article 4 of the Act on the Protection of Competition no 4054) or abuse of dominant position (under article 6 of the Act on the Protection of Competition no 4054).

In competition law enforcement in general, the actual parties are those undertakings that are subject to investigation and thus they are given certain rights of defense during the investigation process as part of procedural rules. Until now, the TCA is faced with the following concerns from the business world as to the procedural aspects. These will be elaborated under three headings:

- Whether the notification of the investigation report and the additional opinion to the complainant is needed or not,
- Whether the complainant has a right to access to the file like the undertakings subject to an investigation,
- Whether the undertakings could defend themselves properly because they haven't received enough information with regard to findings of the TCA during the investigation period.

To clarify the above mentioned issues, a short information as to the rights of complainants and the undertakings subject to investigation would be provided under each heading.

1.1 Whether the notification of the investigation report and the additional opinion to the complainant is needed or not:

This issue could be explained via referring the provisions found in the Act on the Protection of Competition no 4054 (Act no 4054). In this regard, Article 42 which regulates 'notification of applicants' foresees that:

"In case the Board deems the claims put forward in applications for informing or complaint serious and sufficient, informers or complainants are notified in writing that the claims put forward have been deemed serious and that an inquiry has been initiated.

In cases where the Board either expressly rejects applications, or is deemed to have rejected them by means of failure to notify within due period, anyone who documents to have a direct or indirect interest may resort to jurisdiction against the rejection decision of the Board.”

Accordingly, the TCA informs the informers or complainants about its decision to initiate an investigation. The idea of this provision is simply to inform the informers and complainants and to prevent them from applying to the administrative judiciary by reason of implicit refusal. This provision is different than the one in Article 43/2 which regulates ‘commencement of investigation’ as follows:

“The Board notifies the parties concerned of investigations initiated by it, within 15 days of issuing the decision for the initiation of investigation, and requests that the parties submit their first written pleas within 30 days. In order to enable the commencement of the first written reply period granted to the parties, it is required that the Board forwards to the parties concerned this notification letter, accompanied by adequate information as to the type and nature of the claims”.

This article refers to “parties” without making any differentiation between the informer/complainant and the party subject to an investigation. Thus, some of the legal advisors claim that the word “party” comprises both and therefore the same information should be notified to the informer/complainant likewise those undertakings that are subject to investigation. In fact, although it is clear that it is the commencement of the investigation that should be notified to the parties –; it is not possible to interpret the word “party” under article 43/2 as referring to both applicant and the undertaking subject to investigation as alleged by some private parties in business.

The main purpose of the Act no 4054 is to protect public interest via maintaining competition in the markets for goods and services. That’s why the primary concern of the TCA is to preserve public interest. Of course, the complainant has a right to benefit from this situation. But the complainant’s interest is at a secondary level compared to that of the interest expected from the preservation of the public interest. Nevertheless, there is no provision which prevents the TCA from consulting with the complainant/informer anytime it deems appropriate. For instance likewise in BIAK¹ case, the TCA referred to the complainant upon after making some notifications or via informal communications. This case is important as to the question of whether the investigation report and the additional report should be notified to the complainant or not. This was a special decision since there is no obligation in the Act no 4054 for the notification of the complainant of the relevant documents during the initiation period of the investigation. Moreover, there is a section that delineates the borders of the investigation procedure in the “Directive concerning the procedural rules that are applicable to Act no 4054” Despite the fact that this is an internal document, its application might be regarded as a sort of guidance for the business.. The relevant section of the Directive determines that the complainant/informer would be informed about the investigation decision but not the relevant information and/or documents. But given that there is no legal obligation, the TCA’s decision in BIAK case is an acceptable solution as it gives flexibility to the TCA to communicate with the complainant in case such necessity arises.

1.2 Whether the complainant has a right to access to the file like the undertakings subject to an investigation or not:

This is another issue which was raised by the undertakings under investigation. However, article 44/2 of the Act no 4054 openly states that access to file is acknowledged for “*those parties which are notified of the initiation of an investigation*” and they are entitled to “*ask for a copy of any paperwork drawn up within the (Competition) Authority in connection with them, and if possible, a copy of any evidence obtained.*” Thus, there is no statutory right of the complainant arising from the Act no 4054 in access to

¹ Competition Board decision dated 04.03.1999 and numbered 99-13/99-40

file. Nevertheless, under specific circumstances and whenever it deems necessary the Competition Board might let the complainant to have access to file in a limited way in the sense that complainant is not allowed to see confidential information inside the file as experienced in Renault Mais² investigation.

1.3 *Whether the undertakings could defend themselves properly because they haven't received enough information with regard to findings of the TCA during the investigation period.*

There are many cases in which parties subject to investigation go to the appeal court alleging that they are not provided sufficient information with regard to the findings of the TCA. Before elaborating on the decisions of Council of State, it would be necessary to mention about the provisions found in the Act no 4054 in this regard:

- First written plea via article 43/2: The Competition Board notifies those undertakings within 15 days by issuing its decision for the initiation of investigation and requests those undertakings subject to investigation to submit their first written pleas within 30 days. The Board has to inform them by adequate information as to the type and nature of the claims.
- Second written plea via article 45/1, 2: The report prepared at the end of the investigation period is notified to all the undertakings concerned.
- Those undertakings subject to investigation are required to submit their written pleas to the Competition Board within 30 days or in case they requested additional period the undertakings subject to investigation may submit their written pleas at most in 60 days.
- Third written plea via article 45/2: The investigation team declares an additional written opinion within 15 days against the pleas to be submitted by the undertakings concerned. Those undertakings subject to investigation are required to submit their written pleas to the Competition Board within 30 days or in case they requested additional period the undertakings subject to investigation may submit their written pleas at most in 60 days.

In addition to the above mentioned and very detailed defense rights of the undertakings, the Act no 4054 further supported this right in the following provisions:

- Last sentence of the Article 44/1: during the investigation period, those persons claimed to have infringed the Act no 4054 may, at all times, submit to the Competition Board any information and evidence likely to influence the decision.
- Article 44/3: The TCA may not base its decisions on issues about which the parties have not been informed and granted the right to defense.
- Article 44/2 on "access to file": Those parties which are notified of the initiation of an investigation against them may, until their request for enjoying the right to hearing, ask for a copy of any paperwork drawn up within the Competition Authority in connection with themselves, and if possible, a copy of any evidence obtained.

Furthermore, a 'Hearing' can be held upon the parties' declaration of their will to enjoy the right to hearing in their petition of reply or defense via article 46/1.

² Competition Board decision dated 09.05.2000 and numbered 00-17/163-83

In brief, rights of defense are designated in a very wide spectrum via detailed rules. Nevertheless, some of the undertakings applied to the Council of State alleging that they haven't received enough information and documents against the claims of the Competition Board to defend themselves sufficiently. In a recent case in cosmetics sector, the Council of State³ decided on behalf of the Competition Board, although the Competition Board refused to give those information and documents to those undertakings who were claiming to use them during their defences before the finalization of the investigation process. The Council of State's such approval is realized upon seeing that all the procedural steps (three written pleas and one hearing) are followed and completed duly by the Competition Board against the party subject to investigation. It is truism to argue that the Council of State approves the conduct of the Competition Board due to the fact that all procedural steps in rights of defense are accurately handled by the Competition Board including the notification of the investigation report prepared at the end of the investigation period (article 45/1) to all the undertakings concerned.

2. Experience with guidelines

The TCA has issued Block Exemption Communiqué regarding Vertical Agreements no 2002/2⁴ in year 2002. This secondary legislation was in harmony with that of the Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices except for the market share thresholds. In other words, this Communiqué was providing block exemption to all vertical agreements as long as they satisfy the relevant conditions without making any differentiation as to the size of the undertakings i.e. including undertakings in dominant position. In the same vein, the TCA prepared and published a "Guidelines on the Explanation of Block Exemption on Vertical Agreements"⁵. The purpose of issuing these Guidelines is to clarify to the extent possible the points to be taken into account by the Competition Board in the application of the Communiqué to the business, and thus to minimize the uncertainties likely to arise in the interpretation of the Communiqué by undertakings. In brief, it aims to ensure transparency for the business. However, the implementation of the block exemption and the guidelines shows that there is need for a market share threshold especially to provide a level playing field for those with relatively small market power or no market power at all and to provide certainty for the undertakings with market power. The four-year implementation of the said Communiqué and the guidelines also shows that automatically exempting those vertical agreements of undertakings with a relatively bigger market power is not satisfying the exemption conditions all the time. Meanwhile, the economic theory puts forward that the harmful foreclosure effect of vertical agreements on competition is larger when the undertakings possess a market power in the relevant market. In that respect, the TCA had to withdraw the benefit of the block exemption communiqué for vertical agreements in some of the sectors based on the fact that efficient competition is prevented such as in the beer market⁶ and in the packaged chips market⁷. Withdrawal of the benefit of block exemption from certain agreements is likely to lead to uncertainties among the business actors party to such agreements. Thus, with a recent amendment in the said Communiqué, a market share threshold of 40 % is adopted which clarifies that the undertakings with a market share below 40% will benefit from the block exemption

³ Decision of the Council of State Chamber 13, numbered 2006/1041, dated 30.5.2006

⁴ In English version of this communiqué can be found at <http://www.rekabet.gov.tr/etebilig.asp>

⁵ In English version of these guidelines can be found in English at <http://www.rekabet.gov.tr/ekilavuz.html>

⁶ *Competition Board decision, Efpa/Bimpaş dated 22.4.2005 and numbered 05-27/317-80: the Competition Board withdrew the benefit of the block exemption for those exclusive purchasing agreements concluded between the two leading breweries and/or their distributors on the one hand and retail sale outlets on the other, because such agreements prevented efficient competition in the market.*

⁷ Competition Board decision, Frito Lay dated 20.9.2004 and numbered 04-60/870-207: the Competition Board has withdrawn the benefit of the block exemption regarding agreements among Frito Lay and final points of sale in the packaged chips market.

automatically whereas those with a market share above 40 % will not benefit from an exemption automatically and will need an individual exemption in case such necessity arises.

Another “Guidelines” is issued concerning the “Block Exemption Communiqué on Vertical Agreements and Concerted Practices in Motor Vehicle Sector no 2005/4”⁸. The guidelines as to the explanation of this communiqué are welcomed by the business concerned. Those vertical agreements in which the market share of the provider in the relevant market where it provides motor vehicles or spare parts or maintenance and repair services does not exceed 30 %, or 40 % for agreements where quantitative selective distribution is preferred for the distribution of motor vehicles, can benefit from the block exemption. The competition experts in charge of the implementation of this secondary legislation are attending various conferences held by the chambers of commerce and/or symposiums held by the actors of the industry in order to explain the meaning and purpose of the said secondary legislation and the use of guidelines in this regard. Until now, no complaint/concern received from the undertakings that are not benefiting from this block exemption, i.e. the ones with a relatively bigger market power or in a dominant position.

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In English version of this communiqué can be found in English at <http://www.rekabet.gov.tr/etebliğ.asp>

UNITED KINGDOM

1. Introduction

After setting out the legal background and the benefits of, and potential threats to, legal certainty, this paper focuses on the following three issues concerning effective guidance to business, practitioners and courts:

- the role that principles-based guidelines on abuse of dominance could play in enhancing legal certainty;
- the need for consistency and whether the courts should be required to have regard to guidelines and decisions by competition authorities, and
- the role of advocacy.

2. Legal background

The principal statutory provision under UK law relating to abuse of dominance is section 18 of the Competition Act 1998¹ ('CA98'), referred to as 'the Chapter II prohibition'.

Section 60 of the CA98 ensures that questions arising in relation to the Chapter II prohibition are, so far as is possible and having regard to any relevant differences between the provisions concerned, dealt with in a manner consistent with the treatment of corresponding questions arising in relation to EC law (i.e. Article 82 EC Treaty, 'Article 82').

Following the entry into force of EC Regulation 1/2003 on 1 May 2004, the Office of Fair Trading (the 'OFT')² and UK courts are required to apply and enforce Article 82 as well as national competition law when national competition law is applied to an abuse prohibited by Article 82³.

3. The importance of legal certainty

3.1 *Certainty as an essential attribute of the law*

Legal certainty serves the following objectives:

¹ See <http://www.opsi.gov.uk/ACTS/acts1998/80041--c.htm#18>

² For a number of industries, the application and enforcement of Articles 81 and 82 in the United Kingdom (and of CA98) is carried out by designated sector regulators concurrently with the OFT. The OFT and the regulators with concurrent competition powers under the Competition Act are designated as NCAs with the power to apply Articles 81 and 82.

³ Article 82 prohibits an abuse of a dominant position in similar terms as the Chapter II prohibition except that it refers to an abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade between Member States.

- the application of the law is consistent and fair;
- compliance costs for business are kept to a minimum, and
- expensive enforcement proceedings and litigation are avoided whenever possible.

These objectives are important in abuse of dominance cases, where the law prohibits certain unilateral behaviour by dominant firms which may appear in many respects to have the characteristics of normal business practice used by both dominant and non-dominant firms in many different sectors and the assessment of which requires, in certain circumstances, complex factual and economic analysis.

Legal certainty may be affected by a number of factors. Two factors may potentially decrease legal certainty in the application of the Chapter II prohibition/Article 82: an effects-based approach to abuse of dominance and the decentralized application of competition law whereby competition authorities and courts throughout the EU apply the same prohibition. We will consider these two factors in turn before discussing the ways in which concerns relating to legal certainty may be addressed.

3.2 *Effects-based approach to abuse of dominance*

There is increasing consensus that competition law should be based on sound economic principles and that its ultimate aim should be to avoid consumer harm resulting from interferences with the competitive process. We believe that the objective of competition law is the prohibition of behaviour which caused harm in the form of a reduction of consumer welfare. This applies equally to both anti-competitive agreements and practices and to abuse of dominance. Therefore, the application of the Chapter II prohibition/Article 82 requires an analysis of the (likely) effects of allegedly abusive behaviour.

An effects-based approach means that abusive behaviour should only be prohibited after an examination of its (likely) impact on the market. There is no pre-determined and inflexible set of conditions against which the behaviour must be assessed. There is, instead, a clearly defined analytical framework for the assessment of the (likely) effects of abusive behaviour.

A form-based approach, on the other hand, establishes whether the relevant prohibition has been infringed by verifying the presence of a set of specified pre-determined conditions. When the conditions are met, the behaviour is prohibited. When they are not, the behaviour is allowed. Form-based rules may also pursue the objective of maximizing consumer welfare. They assume that consumer welfare is reduced if certain indicators are present. However, form-based rules are a potentially significant source of errors. They can be over-inclusive as they may apply to conduct which does not reduce consumer welfare although all the conditions for the prohibition are present. They can, on the other hand, be under-inclusive as they may not apply to conduct which does reduce consumer welfare but does not meet all the pre-determined conditions. Effects-based standards allow for a more accurate analysis of unilateral conduct and avoid the over-inclusion and under-inclusion problems. Of course, errors may still occur (for instance, because of imperfect knowledge). But one potentially significant source of error is removed.

A criticism levelled at the effects-based approach is that it reduces legal certainty and impairs business decisions. A complaint frequently made by business is that an effects-based analysis can be complex and costly. It can also require a lengthy analysis of complicated data which can be difficult to obtain while business decisions generally have to be taken very quickly on the basis of an assessment of readily available information. Furthermore, because the outcome of the case depends on complex evidence and, to a certain extent, economic theory, this generates uncertainty. It must be stressed, on the other hand, that business frequently complains about the form-based approach as, it is maintained, such an approach

can lead to the prohibition of efficient and pro-competitive behaviour and can impose a straight-jacket on business decision-making.

It is clear that a balance must be struck between the desirability of an effects-based approach and the need for a sufficient degree of legal certainty. We believe that it is possible to strike such a balance. An effects-based approach does not necessarily lead to an ad hoc application of the law. In order for this to be avoided, it is necessary for the objective of the prohibition to be clear and for the analytical framework for its application to be based on sound and clear principles. Furthermore, safe harbours can be used in order to exclude the application of the prohibition to conduct which is unlikely to reduce consumer welfare.

3.3 *Decentralized application of competition law*

Uncertainty may also arise from a plurality of competition authorities and courts having the power to apply competition law in abuse of dominance cases.

In the UK, the Office of Fair Trading (OFT) has power to apply the Chapter II prohibition and Article 82. In relation to the regulated sectors, the same provisions are applied and enforced, concurrently with the OFT, by the regulators for communications matters, gas, electricity, water and sewerage, railway and air traffic services (the Regulators). The Regulators and OFT are designated as National Competition Authorities ('NCAs') within the meaning of Regulation 1/2003. The following are the Regulators:

- the Office of Communications (OFCOM)
- the Gas and Electricity Markets Authority (OFGEM)
- the Northern Ireland Authority for Energy Regulation (OFREG NI)
- the Director General of Water Services (OFWAT)
- the Office of Rail Regulation (ORR), and
- the Civil Aviation Authority (CAA).

In the European Union, the European Commission, the designated NCAs of the Member States and national courts have the power to apply Article 82.

Currently, the enforcement of Article 82 is carried out mainly by the Commission and the NCAs. This significantly reduces the risk of inconsistent application of the law. The Commission and the NCAs are part of a network of public enforcers, the European Competition Network (the 'ECN').⁴ The ECN should ensure an effective and consistent application of Article 82. Within the UK, there are close working relationships between the OFT and the regulators which ensure that the Chapter II prohibition is applied consistently.

Article 82 and the Chapter II prohibition are not only applied by competition authorities but also by the courts. It is the policy of the UK Government and of the European Commission to address barriers to private actions in order to make them more effective. To this end, the OFT has recently published a discussion paper, *Private actions in competition law: effective redress for business and consumers*.⁵ With

⁴ See the Commission Notice on cooperation within the network of competition authorities OJ C 101, 27 April 2004, page 43.

⁵ See http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf

an increased number of cases likely to be heard by the courts, the need for consistency becomes more acute and mechanisms should be in place to ensure that competition policy and law develop in a consistent and coherent fashion.

The following four sections address the importance of guidelines, advocacy, safe harbours, and possible measures to ensure consistency.

4. Principles-Based Guidelines

4.1 *The benefits of Guidelines*

In order to increase legal certainty, non-binding guidelines may be used. Guidelines expand upon, and clarify the law, and may develop policy in particular areas.

In 2005, DG Competition published a paper advocating for a more economic approach to Article 82.⁶ Following the publication of the paper, there has been a wide debate on the scope of Article 82 and a broad consensus has emerged on the desirability of a more economics-based approach. On the other hand, in the absence of a clear policy initiative by the Commission in cooperation with the NCAs, the Community Courts have recently ruled on predation and rebates confirming certain principles established in the previous jurisprudence⁷.

In this context, EU-wide guidelines on Article 82 would appear to be desirable for two reasons. First, they would contribute to the development of the law towards a more economics-based approach. Competition authorities are entrusted with the primary policy-making function in this area subject to the review of the courts. The initiative must, therefore, lie with the Commission in cooperation with the NCAs to develop a coherent framework for the enforcement of Article 82, consistently with the objective of EC competition law.⁸ Secondly, guidelines on Article 82 would increase legal certainty and send a clear signal to business interests about conduct which is allowed and conduct which may be liable to constitute an abuse of dominance as well as providing the means by which self-assessment can be carried out by businesses and their advisers.

4.2 *Principles-based guidelines*

In relation to complex economic conduct such as that which may amount to an abuse of dominance, guidelines cannot prescribe in detail, by way of a checklist and a set of form-based rules, which conduct is prohibited and which conduct is allowed. If guidelines are drafted in prescriptive detail which is strictly applied, this would amount to a form-based approach with associated risks of over- and under-inclusion. If the prescriptive provisions of the guideline are applied with some flexibility, too much detail would provide misleading certainty. This is because if certain behaviour is not covered by the detailed provisions of the guidance, this could mean that the behaviour is therefore acceptable but equally, on the basis of more general principles, the behaviour in question might still constitute an abuse.

⁶ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005, available on the website of DG Competition.

⁷ Michelin II (Case T-203/01) [2003] ECR II-4071 & [2004] 4 CMLR 18 British Airways plc v European Commission, Virgin Atlantic Airways (Case C-95/04P), ECJ Judgement 15/03/07

⁸ This objective is ‘to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’: see Commission Guidelines on the application of Article 81(3) of the Treaty OJ C101, 27 April 2004, p 97.

It is clear, therefore, that a careful balance needs to be struck between workable standards and too much prescriptive detail. It is desirable to have sufficient guidance that can be applied by parties for self-assessment and competition authorities and courts for consistent enforcement. On the one hand, too much detail provides rigidity. On the other hand, too little detail may provide no guidance at all. Generally, in the assessment of complex economic conduct, principles-based guidance complemented by a workable analytical framework for the assessment of certain types of conduct is preferable to prescriptive provisions.

4.3 *OFT guidelines*

By way of example, the OFT has published a guideline regarding abuse of a dominant position (December 2004, OFT402⁹) (the ‘Abuse Guideline’) which explains how the OFT will operate its powers under CA98 and under Regulation 1/2003 in assessing the conduct of dominant undertakings. This provides certain guidance as to the objectives and general principles underpinning the Chapter II (and Article 82) prohibition. In particular:

- Paragraph 2.6 states that ‘the important issue is whether the dominant undertaking is using its dominant position in an abusive way [which] may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably’.
- Paragraph 5.2 states that ‘In general, the OFT considers that the likely effect of a dominant undertaking’s conduct on customers and on the process of competition is more important to the determination of an abuse than the specific form of the conduct in question. Conduct may be abusive when, through the effects of conduct on the competitive process, it adversely affects consumers directly (for example, through the prices charged) or indirectly (for example, conduct which reduces the intensity of existing competition or potential competition).’ (Emphasis in original.)

The OFT’s enforcement policy as regards the application of the Chapter II prohibition (and Article 82) is in line with these general principles. In particular, it focuses on *economic effect* and the *avoidance of consumer harm*.

As regards the assessment of abuse, in 2004 the OFT prepared a draft Guideline (April 2004, OFT414a) *Assessment of Conduct*.¹⁰ The work on the guideline was put on hold given the European Commission review of the Article 82 policy. The draft guideline should, therefore, not be taken as stating the current OFT policy. However, it may be illustrative of the style of guidance which may be appropriate for the assessment of abuse. The draft guideline does not describe, abuse by abuse, forms of behaviour which are prohibited and forms of behaviour which are allowed. On the contrary, it provides an analytical framework for the assessment of various types of abuses by defining the key concepts, describing the steps of the analysis, and listing the factors that may be taken into account in the assessment of conduct.¹¹

⁹ See <http://www.offt.gov.uk/NR/rdonlyres/0620258B-3006-4B1C-ADC6-5CC69E6EF4F1/0/OFT402.pdf>

¹⁰ See http://www.offt.gov.uk/shared_offt/business_leaflets/competition_law/oft414a.pdf

¹¹ See, for instance, chapter 4 of the draft Guideline (OFT414a) *Assessment of Conduct* (above n 7).

4.4 *Safe harbours*

In drafting competition law guidelines on abuse of dominance, safe harbours¹² have an important role to play in providing business with the required degree of legal certainty. In establishing a safe harbour, a balance must be struck between different factors, including the benefits of legal certainty¹³ and the costs of allowing anti-competitive behaviour. Generally, a safe harbour will be appropriate if the benefits in terms of increased certainty outweigh the likely harm resulting from anti-competitive behaviour being allowed. The less likely it is that certain behaviour is anti-competitive or the smaller the magnitude of consumer harm caused by anti-competitive behaviour being allowed under a safe harbour, the more appropriate the safe harbour is, all other things being equal.

Although market shares are no more than an indicator of dominance/substantial market power, it is unlikely that substantial market power exists at low market shares. Furthermore, the degree of market power affects both the likelihood and the extent of consumer harm. It is therefore appropriate to establish a safe harbour for firms with low market shares which are either unlikely to be dominant or unlikely to cause any appreciable consumer harm. This does not mean that firms with a market share below the safe harbour threshold can never be dominant or can never cause consumer harm. It means that such likelihood is so small that the increased benefits in terms of legal certainty outweigh the possible harm of allowing potentially abusive conduct to take place. The Abuse Guideline states at paragraph 4.18 that the OFT considers it unlikely that an undertaking will be individually dominant if its share of the relevant market is below 40 per cent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in the market and high entry barriers) provided strong evidence of dominance. This establishes a safe harbour for undertakings with a market share below 40 per cent.

Pricing behaviour which is not capable of excluding a competitor which is no less efficient than the dominant firm is unlikely to be abusive or to cause appreciable consumer harm. Again, this does not mean that such behaviour can never be abusive or can never cause consumer harm. It means the costs to the economy resulting from exclusionary pricing above-cost by dominant firms are such that they are likely to be outweighed by the benefits of a safe harbour for pricing above-cost. Such benefits include, in particular, avoiding deterring pro-competitive behaviour which would be abandoned if firms had to assess, on a case-by-case basis, whether their above-cost pricing structure is abusive. This strongly suggests that a safe harbour for pricing above-cost may be appropriate. There are, however, also potential problems with such a safe harbour. For instance, the entry of less efficient rivals may increase consumer welfare. Furthermore, the incumbent firm may have first mover advantages which cannot be replicated by the rival in the short term. It is possible, therefore, that such a safe harbour, if adopted, would have to account for the exceptional circumstances in which strong evidence shows that exclusion of a less efficient rival causes significant consumer harm.

¹² A safe harbour may establish that competition law intervention will never take place in respect of conduct within the safe harbour or may require particularly strong evidence or exceptional circumstances (essentially, a higher evidential threshold than would normally be the case) for intervention to take place. Safe harbours established in guidelines would often be in the form of requiring a higher evidential threshold for intervention to take place. Therefore, while the expectation is that such an intervention will be rare and occur only when there is very strong evidence of abuse, intervention cannot be ruled out automatically. Furthermore, safe harbours established in guidelines issued by competition authorities cannot bind the courts. Here, the term 'safe harbour' is used in the sense of a higher evidential threshold requirement.

¹³ The benefits of legal certainty include avoiding deterring pro-competitive conduct which a firm decides not to carry out because of the risk of (unwarranted) competition law intervention.

Two further points on safe harbours merit discussion. The first is that safe harbours in themselves may be difficult to apply. For instance, a market share safe harbour presupposes that the market has been correctly defined and this can be, in itself, a difficult exercise. The pricing-above-cost safe harbour presupposes that the appropriate measure of cost has been identified and that all relevant costs have been correctly identified, calculated and then allocated. Again, this may be far from straightforward in certain cases. The use of safe harbours must, therefore, be combined with clear guidelines as to the purpose of the law and the analytical framework to be applied to the assessment of abuse.

Secondly, safe harbours, if too prescriptive and form-based, may have the undesired effect of encouraging firms to adjust their conduct so as to fit in the safe harbour. This may in turn prevent firms experimenting and engaging in pro-competitive behaviour which would enhance consumer welfare. The solution may again be clarity as to the purpose of the law and a transparent framework for the assessment of abuse. For instance, the draft OFT Guideline *Assessment of Conduct*, at paragraphs 4.11 – 4.13, lists circumstances in which prices below average variable costs are not abusive because they do not cause consumer harm. This makes it clear that while pricing above-cost is in a safe harbour, pricing below-cost is not abusive per se and even prices below average variable cost can be justified in particular circumstances.

5. Need for consistency

Consistency is a key element of competition law enforcement in the UK and throughout the EU. In particular:

- section 60 of the CA98 ensures that questions arising in the application of the CA98 are dealt with in a manner that is consistent with the treatment of corresponding questions arising under EC competition law. Under section 60(2), any UK court or tribunal must act 'with a view to ensuring that there is no inconsistency' with EC law as applicable at that time. Furthermore, under section 60(3), any UK court or tribunal must 'have regard' to any relevant decision or statement of the Commission (that is, decisions or statements which have the authority of the Commission as a whole),¹⁴ and
- where an agreement/conduct may affect trade between Member States, the terms of Regulation 1/2003 also apply. Under Article 3, the OFT is also obliged to apply Articles 81 and 82 where it applies national competition law to agreements or practices which may affect trade between Member States. The application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) must not lead to the prohibition of such agreements, decisions or concerted practices if they are also not prohibited under Community competition law.

These provisions (and in the UK context, section 60 of the CA98 in particular) are intended to ensure the consistent application and development of UK and EC competition law. With a greater number of private actions and more cases decided by the courts, the need to ensure the consistent application of the Chapter II prohibition/Article 82 is likely to become more acute. Furthermore, there is a risk that the policy-making role of competition authorities could become less effective. As a consequence, the development of competition law could become more haphazard and less consistent, raising uncertainty and costs for business. In our view, appropriate safeguards are necessary to ensure that competition policy continues to develop in a coherent fashion and that business does not face increased uncertainty and costs.

¹⁴

OFT Guideline Modernisation (OFT442, December 2004), paragraph 4.11, available at http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of442.pdf

We would therefore suggest that the courts should be required to 'have regard' to the decisions of competition authorities and their guidelines when determining abuse of dominance issues (and, more generally, competition law issues) to ensure consistent and clear development of competition policy. The OFT interprets 'have regard to' to mean 'give serious consideration to' - 'have regard to' does not mean that the court is bound.

Interventions by competition authorities in court proceedings are also important to ensure consistent and coherent development of competition law and policy. In England and Wales, any party whose statement of case raises or deals with an issue relating to the application of Article 81 or 82, or Chapter I or II, must serve a copy of the statement of case on the OFT at the same time as it is served on the other parties to the claim.¹⁵ The purpose of these provisions is to ensure that the OFT is kept informed of private actions and it may be appropriate to extend these provisions to cover notices of appeal.

Under Regulation 1/2003, UK NCAs have the right to make written submissions to the courts and may apply for permission to make oral observations on issues relating to Articles 81 and 82.¹⁶ Equivalent provisions were introduced in England and Wales in respect of issues relating to Chapters I and II of the CA98.¹⁷ If the level of private competition law actions increases, it will become more important for the OFT to consider intervention in certain cases. However, the OFT will not intervene in support of individual claimants or defendants. We are likely to give priority to cases where appellate courts are hearing private actions and there is a risk that they may not otherwise be made aware of broader policy issues. The OFT has already used this power to intervene before the House of Lords¹⁸ but we will keep its approach under review in the light of developing experience.

6. Advocacy

Advocacy in terms of speeches, publications or workshops organized by the OFT play a role in clarifying the way in which the OFT interprets and applies the Chapter II prohibition/Article 82. Advocacy is a valuable complement to guidelines and formal decisions.

Some examples will suffice.

The OFT Chairman has commented on the *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* and endorsed the principle that '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' and that: 'it is competition, and not competitors as such, that is to be

¹⁵ Practice Direction - Competition law - Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998, paragraph 3.

¹⁶ See Article 15(3) of Regulation 1/2003 and Practice Direction - Competition law - Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998, paragraph 4.1.

¹⁷ Practice Direction - Competition law - Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998, paragraph 4.1A.

¹⁸ *Entrepreneur Pub Company (CPC) & Ors v. Crehan* [2006] UKHL 38; [2006] 3 WLR 148.

protected'.¹⁹ Speeches by senior officials inform stakeholders on ongoing thinking within the OFT and supplement published guidance and decisions.²⁰

The interaction with stakeholders is a two-way process. On 13 and 14 March 2006, the OFT organized a workshop on the Review of Article 82. The event provided an opportunity for the OFT to engage in a constructive dialogue with stakeholders and leading experts in the field with the aim of informing the OFT policy in the area.

Finally, OFT officials are often involved in the policy debate by giving speeches or writing articles in a personal capacity. This may help the wider legal and business community better to understand the point of view of enforcement officials on some of the issues currently being discussed in difficult areas of policy such as abuse of dominance.

7. Conclusion

Effective guidance to business in abuse of dominance cases can be provided in a number of ways which assist in providing legal certainty.

Legal certainty is an important attribute of the law as it achieves consistency, fairness, and reduces costs for business. Potential sources of uncertainty are an effects-based approach to abuse of dominance cases and the multiplicity of competition authorities and courts having the power to apply and enforce the relevant prohibitions.

Guidelines setting out workable standards have an important role to play both in developing policy and providing certainty.

In an area such as abuse of dominance which is concerned with complex economic conduct, certainty cannot be achieved through a set of prescriptive and detailed guidelines. If the prescriptive provisions of guidelines are applied strictly and rarely departed from, this would amount to a form-based approach to abuse of dominance, which would not be based on sound economics and increase the risk of erroneous intervention. If the prescriptive provisions are applied flexibly, they would not provide certainty because conduct covered by the provisions is not necessarily an infringement and conduct not covered by the provisions is not necessarily allowed.

Guidelines should therefore be principles-based. They should be clear as to the purpose of the law, which we believe should be to address conduct which reduces consumer welfare. This should be complemented by a transparent and workable analytical framework for the analysis of individual abuses. Instead of describing prohibited forms of conduct, a workable analytical framework would contain the key definitions, explain the steps of the analysis, and list the factors or evidence that may be relevant in the assessment of conduct.

Safe harbours should be a key element in competition law guidelines on abuse of dominance. They balance the benefits of legal certainty/costs of deterring efficient behaviour against the costs of allowing anti-competitive behaviour covered by the safe harbour. Generally, a safe harbour will be appropriate if the benefits in terms of increased certainty outweigh the likely harm resulting from anti-competitive behaviour being allowed. The less likely it is that certain behaviour is anti-competitive or the smaller the magnitude

¹⁹ In a speech given to the British Institute of International and Comparative Law on 24 February 2006 <http://www.of.gov.uk/NR/rdonlyres/9E94FB95-9260-4E15-B81C-489370A45B6E/0/spe0206.pdf>

²⁰ It must be remembered that speeches and articles by OFT officials are not a statement of OFT policy and do not necessarily reflect the views of the OFT.

of consumer harm caused by anti-competitive behaviour being allowed under a safe harbour, the more appropriate the safe harbour is, all other things being equal. A market share safe harbour for firms with a market share of the relevant market below 40 per cent is appropriate. We would also favour a safe harbour for above-cost pricing although there may be difficulties in applying it inflexibly.

Advocacy is an important mean of providing effective guidance. It can help clarify the scope of the prohibition, the way it is applied, and current thinking on key issues. Speeches by senior officials, workshops hosted by competition authorities, and publications in the form of books or articles are, with varying degrees, useful way of engaging in a constant dialogue with the business and legal community. This process helps bring about clarity in the way the law is applied. It complements official guidelines and formal decisions in individual cases.

With an increased number of private actions, appropriate safeguards should be in place to ensure that competition law and policy continue to develop in a coherent and consistent fashion. Courts should be required to have regard to decisions and guidelines of the competition authorities. Interventions by competition authorities also have a key role to play.

UNITED STATES

1. Policy guidance on single-firm exclusionary conduct

Single-firm conduct in the United States is governed by section 2 of the Sherman Act, which prohibits the acquisition or maintenance of monopoly power through the use of exclusionary conduct.¹ Providing useful guidance to business on the application of Section 2 presents a challenge “because ‘the means of illicit exclusion, like the means of legitimate competition, are myriad.’”²

Over more than a century of Section 2 enforcement, guidance has come from several sources. Most importantly, case law from enforcement actions has provided legal certainty on important points. The enforcement agencies in the United States aid in the process of case law development through their enforcement actions and through friend of the court briefs in private cases. The agencies also use speeches and reports to clarify the law and to inform the business community of the agencies’ enforcement policies. The agencies have not issued guidelines on the application of Section 2.

General principles for the application of Section 2 have the flexibility to adapt to the particular facts of each case. More precise rules, whether formulated in agency guidelines or by courts, can greatly reduce administrative costs and enhance business certainty. The latter effect clearly furthers the goals of competition policy to the extent that uncertainty chills procompetitive conduct. Of course, more precise rules also may explicitly prohibit some procompetitive conduct as well as explicitly permit some anticompetitive conduct. Striking the right balance presents a constant challenge.³

2. Courts in the United States and the development of safe harbors

Section 2 of the Sherman Act was written in very general language, to which the courts have given specific meaning through decisions in individual cases. Case law has made clear that the vast majority of competitors in the United States would not be found to possess monopoly power.⁴ Courts in the United States have consistently held that a market share below 50% cannot support the inference of monopoly power,⁵ and the leading treatise suggests that a share of at least 70–75% for five years is required to infer monopoly power.⁶ Modern case law also holds that “market share is only a starting point for determining

¹ See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

² *Id.* at 414, quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam).

³ See, e.g., William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST LAW JOURNAL 5 (2000).

⁴ Monopoly power has been defined as “the ability (1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion.” *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999).

⁵ See, e.g., *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) (“Fifty percent is below any accepted benchmark for inferring monopoly power from market share.”).

⁶ 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801a, at 319 (2d ed. 2002).

whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share.”⁷ Courts in the United States require proof that entry would not effectively discipline a competitor alleged to possess monopoly power, and firms with market shares well in excess of 50% have been found not to possess monopoly power because their power over price was insufficiently durable.⁸

Case law in the United States also has given even competitors with monopoly power substantial latitude in pricing aggressively. A successful challenge to price cutting under section 2 of the Sherman Act requires proof “that the prices complained of are below an appropriate measure of the rival’s costs” and that the alleged predator had “a dangerous probability . . . of recouping its investment in below-cost prices.”⁹ The courts have not fully specified the details of applying these principles but have established two critical principles: the test is demanding, and the relevant measure of cost is not average total cost, but rather marginal, average variable, or incremental cost.¹⁰

More generally, the case law has long held that Section 2 prohibits “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹¹ By explaining Section 2 in this way, “the courts have sought to draw a distinction between merits- and non-merits-based competition that excludes.”¹² The courts have consistently held that harm to a competitor is far from sufficient to make conduct anticompetitive.¹³ Indeed, a “monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits.”¹⁴ Moreover, courts have only rarely found that violations of Section 2 had been committed. The case law, however, has not yet fully defined the specific categories of conduct that constitute lawful competition on the merits.

⁷ American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999).

⁸ E.g., Western Parcel Express v. United Parcel Service of America, Inc., 190 F.3d 974, 975 (9th Cir. 1999); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99 (2d Cir. 1998); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683, 695–96 (10th Cir. 1989).

⁹ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

¹⁰ See, e.g., United States v. AMR Corp., 335 F.3d 1109, 1115–16 (10th Cir. 2003); Stearns Airport Equipment Co. v. FMC Corp., 170 F.3d 518, 532 (5th Cir. 1999); Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1198 (3d Cir. 1995).

¹¹ United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). The Supreme Court cited this statement as controlling authority in Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

¹² Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST LAW JOURNAL 3, 14 (2004).

¹³ See, e.g., Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (“The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”); Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) (“a practice is not ‘anticompetitive’ simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm’s fortunes at the expense of its competitors. Rather, a practice is ‘anticompetitive’ only if it harms the competitive process.”).

¹⁴ Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 375 (7th Cir. 1986).

3. Enforcement actions, friend of the court briefs, hearings, and reports

Agencies in the United States often seek to clarify the law through their enforcement actions. The Federal Trade Commission (FTC) is empowered to conduct administrative hearings and issue orders, which affords the opportunity to clarify the law in decisions rendered by the agency. In 2006 the FTC issued a decision explaining why it determined that the conduct of Rambus, in conjunction with standard-setting activities, was unlawfully exclusionary.¹⁵ The U.S. Department of Justice (Department) has no administrative powers, but rather enforces the Sherman Act in court. In recent years, the Department has explained, especially in its appellate briefs, why it believed that several forms of exclusionary conduct by American Airlines, Dentsply, and Microsoft were unlawfully exclusionary.¹⁶ Both agencies also use speeches by agency officials to clarify both enforcement policies in general and actions in specific cases.¹⁷

When a competition law case not involving the government as a party comes before the Supreme Court of the United States, the enforcement agencies typically file a friend of the court brief articulating legal principles that can clarify the law.¹⁸ In *Trinko*,¹⁹ the agencies argued that, when “the plaintiff asserts that the defendant was under a duty *to assist a rival*, . . . conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition.” Most recently, in *Weyerhaeuser*,²⁰ the agencies successfully argued that the price-cost test applied to predatory pricing by a seller also should be applied to predatory pricing by a buyer.

On April 17 of this year the enforcement agencies in the United States released a report on the relationship between antitrust law and intellectual property law.²¹ Among other things, the report addresses unilateral refusals to license. The report concludes that:

Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections. Antitrust liability for refusals to license competitors would compel firms to reach out and affirmatively assist their rivals, a result that is “in some tension with the underlying purpose of antitrust law.” Moreover, liability would restrict the patent holder’s ability to exercise a core part of the patent - the right to exclude.²²

¹⁵ The FTC’s decision and extensive additional materials are available at <http://www.ftc.gov/os/adjpro/d9302/index.htm>.

¹⁶ These briefs are available at <http://www.usdoj.gov/atr/public/appellate/appellate.htm>.

¹⁷ Speeches by officials of the agencies can be found at <http://www.usdoj.gov/atr/public/speeches/speeches.htm> and <http://ftc.gov/speeches/speech1.shtm>.

¹⁸ These briefs and others are available at <http://www.usdoj.gov/atr/public/appellate/appellate.htm>. The agencies also filed friend of the court briefs in the lower courts.

¹⁹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²⁰ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007).

²¹ U.S. Department of Justice & Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, available at www.usdoj.gov/atr/public/hearings/ip/222655.pdf; <http://ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>. The report was preceded by public hearings in which the agencies heard the views of more than 300 persons. The bulk of the report concerns issues arising in the licensing context and hence issues outside the scope of Section 2.

²² *Id.* at 6 (footnote and internal quotation omitted).

Over the past year, the enforcement agencies in the United States have conducted extensive public hearings on single-firm exclusionary conduct.²³ The primary goals of the hearings were to examine the competitive implications of all forms of potentially exclusionary conduct by individual competitors and to determine the appropriate treatment of such conduct under section 2 of the Sherman Act. In the hearings, the agencies heard the views of many academics, practitioners, and business persons. Because the agencies sought diverse points of view, participants in the hearings may not have been unanimous on any issue, but several important principles resonated throughout the hearings.

Single-firm conduct that undermines the competitive process to a degree that it creates or maintains monopoly power should be the subject of an enforcement action. Yet even competitors with monopoly power should be permitted to compete aggressively, and neither their success, nor injury to smaller rivals, by itself, demonstrates harm to the competitive process. Because it may be difficult to distinguish between lawful, aggressive conduct and exclusionary conduct,²⁴ businesses would find it helpful to have clear and objective rules that allow them to assess their practices and avoid chilling procompetitive conduct. It is also important that remedies be closely tailored to address the harm to the competitive process in each case and that remedies not distort the competitive process or discourage innovation.

4. Agency experience with competition policy guidelines

Enforcement agencies in the United States have not issued guidelines on single-firm exclusionary conduct, but they nevertheless have considerable experience with guidelines.²⁵ This experience has taught that competition policy guidelines are unlikely to substantially assist the business community if they merely set out factors considered in the agency's analysis and do not indicate when and why certain combinations of factors are apt to lead to an enforcement action.²⁶

Guidelines on single-firm exclusionary conduct could usefully enhance legal certainty by creating safe harbors. The rationale for most such safe harbors would not be that certain competitors or particular conduct pose no risk of harm to competition, but rather that certain competitors or particular conduct pose insufficient risk of harm to warrant further consideration in view of the administrative costs of proceeding, the potential social harm from erroneous condemnations of conduct, and the chilling effect on legitimate conduct of business uncertainty.

In particular, guidelines could set out a market share below which a competitor is conclusively presumed not to possess monopoly power (or not to be dominant). A safe harbor significantly enhances legal certainty only if the market-share threshold adopted is high enough that it affords safety to competitors that had perceived a non-trivial risk of being found to possess monopoly power. Indeed,

²³ Extensive materials relating to the hearings are available at http://www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm; <http://ftc.gov/os/sectiontwohearings/index.shtm>

²⁴ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (It is often "difficult to distinguish robust competition from conduct with long-term anticompetitive effects.").

²⁵ In 1992 the agencies jointly issued guidelines on horizontal mergers (revised in 1997); in 1994 they issued policy statements relating to health care (revised in 1996); in 1995 they issued guidelines on licensing intellectual property and guidelines on international operations; and in 2000 they issued guidelines on collaborations among competitors. In addition, the U.S. Department of Justice issued merger guidelines in 1968, 1982, and 1984; international operations guides or guidelines in 1972, 1977, and 1988; guidelines on vertical restraints in 1985 (withdrawn in 1993); and a guide on research joint ventures in 1980.

²⁶ This experience also has taught that competition policy guidelines are most useful when they provide new insight on the substantive analysis or establish bright lines demarcating either lawful or unlawful conduct. In addition, this experience has taught that crafting useful competition policy guidelines is quite difficult, but the attempt itself can be a valuable learning experience.

adopting a safe-harbor market share that is very low actually could increase business uncertainty by suggesting an increased likelihood that competitors just outside the safe harbor will be found to possess monopoly power. On the other hand, adopting a safe-harbor market share threshold that is too high creates substantial legal certainty at an unacceptably high cost in terms of consumer harm from exclusionary conduct by competitors that possess monopoly power but nevertheless fall within the safe harbor.

Guidelines on single-firm exclusionary conduct also could enhance legal certainty significantly by creating safe harbors in the form of categories of conduct considered lawful competition on the merits. For example, guidelines could state that a competitor, even a monopolist, engages in lawful competition on the merits when it prices aggressively but does not price below cost, when it makes investments that simply reduce its own costs, and when it introduces a new product. Stating such principles in a general manner could be useful, but greater business certainty would result from guidelines that defined these categories with sufficient clarity and detail that businesses normally would know with confidence whether they are in the safe harbors. For example, a guideline on predatory pricing could not only state that pricing above cost is lawful but also specify the appropriate measure of cost, the relevant units of output for which cost is measured, and the proper measure of associated revenues. Of course, crafting such detailed guidelines would require careful reflection and sensitive drafting. It is difficult to anticipate and address every scenario that may be presented by future cases.

Guidelines on single-firm exclusionary conduct might enhance legal certainty by articulating, for particular categories of conduct, either conditions necessary for the conduct to produce the sort of effect required to violate the law or conditions necessary for an agency even to investigate whether such an effect is likely. Finally, guidelines can mitigate uncertainty by declaring an agency's enforcement intentions, priorities, or presumptions.

Each competition agency must decide for itself which, if any, of the foregoing means of enhancing legal certainty would both promote the goals of competition policy and be useful to the business community. Each competition agency also must decide whether formal guidelines serve the interests of the agency and business community better than speeches or other less formal policy statements. Thus far, the enforcement agencies in the United States have employed other means for developing the law and stating their enforcement policies.

EUROPEAN COMMISSION

The European Commission has a well-established tradition of issuing guidelines on various issues relating to European competition law. The Commission has issued general guidelines (for example on market definition¹, vertical agreements², horizontal agreements³, and horizontal mergers⁴), as well as guidelines relating to specific sectors (for example postal services⁵ and telecommunications⁶). It recently issued draft guidelines on non-horizontal mergers for public consultation⁷.

The experience from issuing these guidelines has been very positive. Guidelines create certainty for business and provide useful information for competition law practitioners, including courts and national competition authorities, throughout the European Union.

So far the Commission has not issued guidelines on abuse of dominance, covered by Article 82 of the EC Treaty. However, it has been conducting a review of its policy in this area. The review "aims to set out in a clear and consistent manner theories of harm underlying the application of Article 82 based on sound economic assessment and to develop practical and workable rules, which take into account the reality on the market⁸." The importance attached by business to the Commission giving guidance on abuse of dominance in general – and in particular to issuing guidelines – can be inferred from replies to the public consultation on the Commission's December 2005 discussion paper on exclusionary abuses⁹.

The general thrust of the comments from business is that they welcome guidance from the Commission. And although it may not be said so directly, many seem to favour the Commission issuing guidelines. Thus UNICE, the Confederation of European Business, states that "UNICE is (...) pleased with

¹ Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, pp. 5-13.

² Commission Notice – Guidelines on vertical restraints, OJ C 291, 13.10.2000, pp. 1-44.

³ Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 06.01.2001, pp. 2-30.

⁴ Commission Notice – Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, pp. 5-18.

⁵ Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C 39, 06.02.1998, pp. 2-18

⁶ Notice on the application of competition rules to access agreements in the telecommunications sector – framework, relevant markets and principles, OJ C 265, 22.08.1998, pp. 2-28

⁷ Draft Commission Notice - Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (http://ec.europa.eu/comm/competition/mergers/legislation/merger_guidelines.html).

⁸ Quoted from the Commission's Article 82 Review website (<http://ec.europa.eu/comm/competition/antitrust/art82/index.html>).

⁹ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses. Both the discussion paper and the replies to the public consultation are available on DG Competition's Article 82 Review website (see link above).

the publication of the Discussion Paper as a first step in the review process. It is important that the Commission's policy is transparent and clear so that companies, national judges and competition authorities know how to establish whether certain behaviour is illegal or not. UNICE thus appreciates the Commission's willingness to give guidance on Article 82." The German Bundesverband der Deutschen Industrie (BDI) writes that it "welcomes the intention of the Commission to create greater legal certainty with regard to the application of Article 82. The BDI supports the stronger orientation towards a 'more economic approach'. On the one hand the Commission is given the opportunity to take greater account of the particularities of the individual case. On the other hand, it is more difficult for companies to assess the legality of their own conduct. Commission guidelines could be a valuable aid here." The Confederation of British Industry "would wish to see DG Competition continuing the project and producing Art 82 guidelines that describe an enforcement policy that reflects the economic objectives of competition law. In this way any intervention should be better aligned with the needs of business and predictability improved. The eventual guidelines will be of great value to companies and their advisers if they describe DG Competition's policy on enforcement as well as containing worked examples and safe harbours." Also several individual companies, law firm and law associations expressed the wish that the Commission would produce guidelines on abuse of dominance¹⁰.

Issuing guidelines would thus bring clarity to business in an area where many commentators feel that the Commission's policy is not sufficiently transparent. Clarifying the Commission's policy in this way would have a preventive effect and at the same time allow business to engage in pro-competitive activities without fearing to run afoul of competition law.

It can also be argued that it has become particularly important for the Commission to give guidance to national competition authorities and national courts on the application of Article 82. With Regulation 1/2003¹¹ Article 82 is increasingly applied not only by national competition authorities but also by national courts. Judges in national courts are typically not experts in competition law, and certainly not in Community competition law. To achieve a reasonably consistent application of Article 82 throughout the European Union, it is important that national judges easily can find authoritative guidance. Commission guidelines seem by far the most appropriate tool to achieve this.

Other methods may also be helpful to enhance transparency. For example, Commissioner's Kroes' 2005 Fordham speech¹² very effectively signalled her intention to ensure that the Commission's policy on abuse of dominance is assessed essentially on the basis of its effects in the market, consistent with the way the Commission applies Article 81 of the EC Treaty and with its approach to merger control. However, while giving indications of the Commission's thinking on various issues related to the application of Article 82, such a speech cannot substitute for the more complete and binding explanations contained in guidelines.

A "communication strategy" based only on speeches, articles and other "informal" methods would suffer from at least two major shortcomings compared to formal guidelines. First, anyone wanting to get an overview of the Commission's approach would need to consult a number speeches and articles, something that, for example, a national judge would not be likely to do. Second, informal communications methods

¹⁰ See, *inter alia*, the submissions by Centrica, Deutsche Telekom, France Télécom, the Antitrust Alliance, CMS, Vodafone, Freshfields Bruckhaus Deringer, Linklaters and White & Case.

¹¹ Council Regulation EC No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, pp. 1-25.

¹² "Preliminary Thoughts on Policy Review of Article 82", speech at the Fordham Corporate Law Institute, New York, 23rd September 2005. Available at DG Competition's Article 82 Review website (see link above).

are not binding on the Commission in the way guidelines are. They thus provide much less legal certainty to business.

The goal of providing legal certainty to business must be balanced by the necessity to avoid unduly tying the hands of the competition authority for the future. In particular, guidelines must not be so rigid that the authority cannot react in a proper way to situations that were unforeseen at the time of writing the guidelines. The right balance can be achieved by at the one hand providing safe harbours and at the other hand make reservations that allow the authority to deviate from these safe harbours in exceptional circumstances. Safe harbours can be based on market shares, for example for the dominance assessment. But safe harbours can also be conduct based. Certain types of conduct, for example creating a new product or lowering one's costs, may be declared to be completely within a safe harbour. Other types of conduct may be within a safe harbour if it fulfils certain conditions, for instance that prices are above a certain cost benchmark. Even the competition authority may choose not to make the safe harbours "absolute" so they can never be deviated from, they can still be very useful in giving guidance and legal certainty to business.

It is thus important to find the correct overall equilibrium between economics and law when issuing guidelines. They must reflect clear economic analysis but at the same time describe workable policy rules that can be legally enforced. This clearly means that the standard of proof should not be set so high that the competition authority can hardly ever be expected to meet it. This is particularly important if sophisticated economic analyses are involved. For example, a "beyond reasonable doubt" standard would in such a situation effectively kill all enforcement of abuse of dominance provisions. A "balance of probabilities" standard seems more suitable to reach the necessary overall equilibrium.

CHINESE TAIPEI

1. Background

As stated in Article 1 of the Fair Trade Act of Chinese Taipei (hereinafter “the Law”), to maintain trading order, protect consumers’ interests and to ensure fair competition so as to safeguard and enhance economic stability and prosperity are the legislative purposes of the Law. To be more specific, protecting and nurturing economic stability and prosperity is the policy goal, and the maintenance of market competition order is a kind of policy tool to achieve this goal. And, to achieve this policy goal, the Fair Trade Commission of Chinese Taipei (hereinafter “the Commission”) has relied more heavily on the so-called softer instruments than the imposition of stiff punishment to urge a specific person (or group) to engage in or refrain from certain conduct in its early stages. The Commission also strives to provide a transparent and predictable competition policy and to better educate businesses about the Law.

The Commission enacted the “Fair Trade Commission Guidelines on Cases Handled by Administrative Guidance” (hereinafter “the Guidance”) in 1996 to regulate the application of administrative guidance. The Guidance serves both the functions of assistance and admonishment to encourage correct conduct and/or dissuade misconduct. To protect the enforcement of the Law from indolence, the Guidance shall only be applied within the statutory power of the Commission, and that power may not be abused. Where business conduct is likely in violation of the Law, or where it may affect trading order even though it is not in violation of the Law, the Commission may issue a warning to the industry or firm(s) involved.

Administrative measures used in the application of the Guidance have no compulsory legal effect, and thus, any written suggestions or comments made by the Commission should avoid the use of compulsory or restrictive language that is typically used in laws or orders. Instead, it is required that such terminology as “it is suggested”, “please note”, “please be sure to” and “it is advisable” be used. All notifications with regard to the administrative guidance shall clearly state the requests, the reasons and the duration of such guidance. In addition, in order to understand the impact of implementing warnings (, or cautionary notes,) to an industry the Commission may ask the trade concerned association or members to provide reports to the Commission on a regular and voluntary basis summarizing the measures they have taken to cope with the Commission's administrative guidance. Furthermore, the Commission may not initiate any enforcement action simply because of a respondent’s rejection of the administrative guidance.

Administrative guidance has mostly been applied to cases involving distribution and advertising practices. Prime examples of the Commission’s use of administrative guidance involve large-scale distribution and banking firms, computer-training businesses, gas safety equipment firms, weight loss and body care businesses and real estate sales companies. In each case, guidance is created in a form appropriate to the targeted industry, with full, careful consideration given not only to the relevant law(s) applicable to such situations and practices, but also to the recommended corrective actions.

Although the Commission has made a great effort in cases relating to unfair competition through the application of the administrative guidance, it has remained highly concerned about how best to prevent monopolistic enterprises from abuse of dominance; in this regard, the Commission has taken the position that educating them is preferable to imposing direct punishment. To cite a few examples, the Commission meticulously relied on constructive discussions and negotiations to convince the water company to change

its rules about the liability of new customers for previous customers' unpaid bills and to stop monopolizing the meter installation business. It also adopted the same approach to have the stock exchange corporation open up its contracts to new data transmission providers and to have the telecommunications directorate improve its billing and call verification services.

The Commission has most often resorted to negotiations rather than confrontation, particularly because the Law is relatively new to business, direct and unwarned punishment may seem to be too harsh to violators. Before the Law was amended for the first time in 1999, in order to help monopolistic enterprises understand their market positions in the relevant market, the Commission would periodically announce to the public the names of such enterprises and in an effort to prevent them from violating the provisions of Article 10 which carries criminal punishment. In 1993, the Commission announced the names of 40 enterprises in 34 different markets that were considered to hold a monopolistic position. There is no question that the market is continuously changing and that the original roster of monopolistic enterprises based on 1993 statistical data might not reflect the real market position of present-day dominant firms. For these reasons and as a result of amendments to the Law in 1999, the Commission is no longer required to compile and publish a roster of monopolistic enterprises for the general public.

From the time of the 1993 announcement until the Law was first amended in 1999, none of the dominant enterprises previously announced was deemed to have violated the Law but instead the guidance was used. Thus, the first enforcement actions against a firm for its abuse of dominance only came in 2000.

2. Safe harbours related to the determination of monopoly power

A monopolistic enterprise as used in the Law refers to any enterprise that faces no competition or has a dominant position that enables it to exclude competition in the relevant market. Two or more enterprises shall be deemed monopolistic enterprises if they do not, in fact, engage in price competition with each other and they, as a whole, have the same status as a monopolistic enterprise.

The rules for defining a monopolistic position in Chinese Taipei are stipulated in Article 5-1 of the Law. They are as follows:

An enterprise shall not be deemed a monopolistic enterprise as defined in the preceding article if none of the following circumstances exists:

- The market share of the enterprise in a relevant market reaches one-half of the market;
- the combined market share of two enterprises in a relevant market reaches two-thirds of the market; and
- the combined market share of three enterprises in a relevant market reaches three-fourths of the market.

Under any of the circumstances set forth in the preceding paragraph, where the market share of any individual enterprise does not reach one-tenth of the relevant market or where its total sales in the preceding fiscal year are less than one billion New Taiwan Dollars, such enterprise shall not be deemed a monopolistic enterprise.

The market share criteria that define a safe harbor are in the statute. Under any of the abovementioned circumstances, when the market share of any individual enterprise does not reach one-tenth of the relevant market or when its total sales in the preceding fiscal year are less than NTD one billion, such enterprise shall not be deemed a monopolistic enterprise.

It is important to note that the Commission can ignore these statutory safe-harbors in the presence of regulatory entry barriers. An enterprise that falls into any of the abovementioned categories may still be deemed a monopolistic enterprise by the Commission if the establishment of such enterprise or any of the goods or services supplied by such enterprise to the relevant market is subject to legal or technological restraints or if there is any other circumstance under which supply and demand in the market are affected and the ability of others to compete is impeded.

Equally important, Article 10 of the Law prohibits monopolistic enterprises from abusing dominance by way of conduct that:

- directly or indirectly prevents any other enterprises from competing by unfair means;
- improperly sets, maintains or changes the prices of goods or the remuneration for services;
- forces a trading counterpart to give preferential treatment without justification; or
- otherwise abuses its market power.

There are no provisions of exemption to defer to other policies or to balance anti-competitive effects against claims of efficiency. Industrial policies cannot justify conduct that infringes upon the rights of others since statutory monopolies are no longer considered an acceptable vehicle for fostering development. However, only rarely has the Commission applied the general prohibition against abuse. In enforcement, it more often tends to use the rules about unfair conduct from Article 19 or the Guidance described above.

3. Case example

The Commission issued a warning instead of bringing a suit against an existing monopoly that was trying to enter into long-term contracts to supply retail service gas stations. This case involved a state-owned company, the Chinese Petroleum Corporation (hereinafter the “CPC”). It voluntarily wrote a letter requesting the Commission’s advice on its regular supply contracts with owners of gasoline stations that it wanted to renew and convert into long-term contracts. This was just before the market of imported petroleum gasoline was about to be opened up to competition in 1998. This indicated that the long-term contracts would be in effect at the very time the petroleum gasoline market was opened up.

The petroleum-related products industry had been highly regulated by the Ministry of Economic Affairs until June 1996 when it was opened up to applications for the establishment of new petroleum refineries; in fact, the privately owned petroleum refining company Formosa Petrochemical Corporation was authorized to enter the market. Before June 1996, however, there was only one state-owned company, the CPC that both produced and sold petrochemicals, diesel, petroleum gasoline and other related petroleum products in the petroleum-related products market. The petroleum gasoline market has been opened to imports and exports since January 1999, and there are currently 4 traders. After the promulgation of the Petroleum Management Law in October 2001, the restrictions on establishing a petroleum refinery with a minimum capacity of 15,000,000 litres per day were removed, and as a result, any potential competitor was free to enter the petroleum-related products market.

But it is worth noting that faced with the difficulty of acquiring land within urban areas, harsh opposition from residents and the rising costs of setting up new gas stations, potential entrants were becoming increasingly hard-pressed to build distribution networks. In addition to that, since the CPC had monopolized the petroleum-related products market for a long time, potential, new suppliers’ accessibility to the retail market without the termination of those supply contracts between the incumbent refineries and

gasoline stations would have been out of the question. Thus, the Commission's original thinking was that the long-term supply contracts between the CPC and gas stations would have unfairly made the situation even more painstakingly difficult and costly for new players to enter the market.

However, in view of the fact that the petroleum gasoline market had not yet been opened up to imports at the time of the decision making in this case, the Commission reconsidered its original position and determined that the long-term contracts would not have immediately disadvantaged the market. The Commission, therefore, finally decided to issue a letter of advice to the CPC to request that it and other petroleum refineries terminate or modify their long-term contracts with owners of gas stations as soon as the petroleum market was opened up to imports. For those who could not follow the above advisories would face the risk of being in violation of the abuse of dominant position clauses, and therefore would be in violation of Paragraph 1-1, Article 10 of the Law.

SOUTH AFRICA

1. Introduction

The South African economy is characterized by monopolies or dominant players in various markets. Abuse of dominance is generally regarded as the biggest competition problem bedeviling the South African economy. Deciding whether a company is dominant or not does not usually present problems in South Africa because there are statutory presumptions of dominance.¹ The problem usually arises in deciding on whether there has in fact been abuse of dominance. While cartels and other forms of contravention of competition laws normally entail some appreciation of wrongdoing by the parties involved, this may not always be so with abuse of dominance cases. This is particularly the case in South Africa because:

- competition law is a fairly new area for business people in South Africa, and some abuses may have been the ‘way of doing business’; and
- the provisions of the Competition Act on abuse of dominance require at least some basic understanding of competition law, especially provisions that require the conduct to be likely to result in substantial lessening or prevention of competition to be unlawful.

The South African Competition Act, No 89 of 1998, prohibits abuse of dominance, which includes excessive pricing, refusing to give a competitor access to an essential facility, exclusionary conduct and price discrimination. For some of these contraventions, the test is whether the conduct complained of is likely to have the effect of substantially preventing or lessening of competition.

The Competition Commission of South Africa (“the Commission”) promotes voluntary compliance with the Competition Act through various means, including through:

- providing advisory opinions to businesses on the interpretation of the Competition Act and the position likely to be taken by the Commission on a particular given set of facts;
- presentations and workshops for individual companies and organized business;
- publications, including a quarterly news letter containing articles on competition law;
- media reports and articles; and
- information contacts.

¹ The Act provides that a company is dominant in a market if it has at least 45% of that market; or it has at least 35%, but less than 45%, unless it can show that it does not have market power; or it has less than 35% of that market, but has market power.

2. Advisory opinions

The Commission issues advisory opinions based on facts submitted by the requester and should the facts change in any way, the opinion does not apply to such changed facts. The opinion is non-binding on the Commission and the party requesting it. Opinions can be requested on an anonymous basis, although it is uncommon for the requester not to reveal her identity. The opinions are largely based on South African jurisprudence. However, in circumstances where there are no South African decided cases on the issues raised in the request, the Commission will, more often than not, look at foreign jurisprudence for guidance.

The difficulty with advisory opinions is that they are issued without a prior investigation of the market, and are purely based on facts provided by the requesting party. However, the Commission is often able to draw on its knowledge of certain markets gained from the previous investigations of complaints, mergers or market studies.

Advisory opinions are also important in guiding firms that are victims or likely victims of abuse of dominance, especially small and medium enterprises. These firms can be advised on how to make a complaint and what information is required to make a case against firms that abuse their dominance.

Although the majority of enforcement cases handled by the Commission in the past, and certainly the most high profile enforcement cases, related to abuse of dominance, we have observed that advisory opinions requested on this point are very few, and often are required by a party that is not itself engaged in the conduct.

One of the cases where we have had to guide a party on possible abuse of dominance was given to a government department responsible for state owned enterprises. The request for an opinion concerned the national airline wholly owned by the state. The national airline had been in the past involved in various litigations with the Commission for abuse of dominance. The Competition Tribunal had in one instance found against the national airline and imposed a significant fine. The national airline subsequently settled all the cases with the Commission and paid a total fine of R100 million (about US \$ 70 million).

The airline was undergoing some restructuring and wanted to establish a subsidiary that would operate as a no frills or low cost airline on local routes. Before the government gave its approval for the plan, it sought an opinion from the Commission on what the risk of exposure to competition law litigation against the airline was.

In providing the opinion, the Commission cautioned that for a proper finding on abuse of dominance to be made, a thorough investigation and analysis of the market would need to be made, which would also address market definition. However, the Commission opined that in its view, based on publicly available information, the national airline was likely to be dominant in the local routes. Consequently, the airline faced a potential risk of prosecution should such dominance be abused. It was pointed out that the likely risk was that the subsidiary would engage in predatory pricing with the help of its parent company. The Commission did not conclude on whether or not there would be two separate markets for the low cost carriers and the full service carriers. This was considered an important issue because if there were two separate markets, the national airline (parent company) was unlikely to be dominant in the low cost carrier market. However, the Commission advised that even if these were separate markets, the national airline (parent company) was still exposed to risk of prosecution for abuse of dominance if it could be found that it leveraged its dominance in the full service carrier market in order to exercise market power in a related market, namely the low cost carrier market.

Subsequent to the advice, the national airline and the government ensured that there was an arms length relationship between the national carrier (parent) and its no frills or low cost subsidiary.

One of the difficulties in providing an advisory opinion on abuse of dominance cases is that a finding of abuse of dominance requires an in-depth analysis of the market, preceded by a carefully defined market and concluded by the effect of the conduct in the market. In these circumstances the Commission relies on the information presented by the parties, and does give advice on different scenarios if the facts are not so clear. Businesses do not seem to take advantage of the possibility of making anonymous requests so that they can check if their conduct is in contravention of the Competition Act without worrying that they may expose themselves to prosecution.

3. Workshops and presentations

In addition, the Commission assists companies by making presentations to the staff of the company on various competition compliance issues. We have received few requests mainly from companies that have previously been prosecuted and fined for abuse of dominance, as well as business associations.

The advantage of these presentations is that questions can be raised in general terms without referring to the conduct of a particular company.

4. Compliance programs

We also assist companies with developing compliance programs with the Competition Act. Companies are not coming forward to get assistance on this aspect, which reflects a culture of not viewing competition law as a serious compliance issue amongst businesses, although this is slowly changing.

5. Publications

The Commission has its own quarterly newsletter. Various competition law topics are researched and published in this newsletter. These include abuse of dominance issues. There is also commentary on recent topical decisions of the Competition Tribunal and the courts. The newsletter is distributed widely to business and practitioners of competition law.

6. Media

The Commission effectively uses the media, both print and electronic, to publicise important investigations and decisions. The aim of the media campaign is two-fold: one is to inform the public on the work of the Commission in ensuring a competitive economic environment; and the second to inform businesses of prohibited practices. Our media exposure is having the effect of educating firms about the types of cases we are pursuing and the fines that those who contravene the Act may be liable to pay. It is also a potential embarrassment to the contraveners of competition laws.

In addition, the Commission staff writes articles for various media on competition matters.

7. Information contacts

The aim of the Commission with this function is to facilitate resolution of competition law related disputes without the formal investigation and prosecution process. The Commission would use this function if the prospects of a successful prosecution are not good but the effect of the conduct is anti-competitive. This would usually be triggered by a complaint received by the Commission against a firm, in most cases a dominant firm. During this process the Commission explains the provisions and objectives of the Act and gives guidance on how the business can be done without the anti-competitive outcomes.

This intervention has worked for some small competitors. However, the intervention is not always successful where business resists the Commission's attempt to stop it from engaging in the relevant anti-competitive practices. The main reason for non-cooperation is that the company complained against is aware that the case against it is weak.

8. Conclusion

The Commission has various strategies in facilitating voluntary compliance with the Competition Act. These strategies include providing advice on abuse of dominance. Chief amongst these strategies is providing advisory opinions on the interpretation and application of the Competition Act. It is difficult to provide such advice without an investigation. In giving guidance, the Commission relies on the information it is provided with. There are a few cases where the Commission has been asked to provide advice on abuse of dominance cases, and in most instances these requests come from the victims or likely victims of abuse of dominance. The Commission uses various other means to assist companies to comply, including education through workshops, the media and other publications. The strategies have proved to be successful in overall. However, there are still challenges before there is a full culture of compliance in South Africa.

BIAC

1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Working Party No. 3 (WP3) for its roundtable on “How to Provide Effective Guidance to Business on Monopolisation/Abuse of Dominance.”

BIAC is particularly grateful that the Working Party has elected to focus on providing guidance to businesses with respect to abuse of dominance. This is an area of law that, at the fringes, is fairly unsettled and fraught with risk for businesses. Agency efforts to describe the parameters of their enforcement intentions, therefore, will allow businesses to compete more effectively in the marketplace and enhance overall consumer welfare.

The private sector relies on various sources of information in evaluating government enforcement policy. The most obvious source of influence is an examination of the actual enforcement actions brought by agencies and an analysis of the outcome of those cases. These actions, however, form only a small part of the overall assessment by businesses attempting to adapt their practices to comply with the law.. Thus, the use of informal guidance to businesses is an extremely influential means of increasing transparency of enforcement policy. Such measures are welcomed by the business community and can be an efficient means of encouraging compliance while also conserving agency resources. These “transparency initiatives” are particularly important where there are relatively few cases decided on a particular statutory provision or a particular issue,¹ or when legal precedents in private enforcement provide conflicting direction to businesses.²

Transparency initiatives can also facilitate more timely and efficient adherence to competition laws and should be desirable from the standpoint of competition authorities. Most competition laws define the general nature of an offence, but are appropriately circumspect in describing the bounds and limits of acceptable behaviour under various circumstances. In other words, the legislature defines the offense, without providing analysis of what constitutes an offense, which businesses ultimately require. For example, the Section 2 of U.S. Sherman Act is a mere ninety-two words long, the majority of which are dedicated to discussing the penalties associated with a violation. A century’s worth of interpretive jurisprudence in the U.S. has added a great deal of flesh to the bone, but still leaves certain gaps in the actual analysis, for example, in relation to new markets. By providing additional guidance to businesses outside the context of legal enforcement initiatives, a great deal of efficiency can be gained by generating adherence to the law without resort to expensive agency challenges on a case-by-case basis.

Transparency initiatives are desirable because they increase business certainty. Certainty is critical to business planning; uncertainty can have a serious chilling effect on potentially pro-competitive business activity. The possible economic consequences of uncertainty in enforcement policy may include:

- a reduction in the level of discounts offered to consumers;

¹ This is the prevalent situation in many jurisdictions regarding abuse of dominance.

² Such as occurs in some aspects of monopolisation law in the federal courts of appeals in the United States.

- a slowing of innovation;
- the retardation of potential efficiency gains;
- distortions in international investment;
- a failure to create or establish common standards that can reduce barriers to entry;
- the inhibition of technology transfers; and
- distortions of efficient structures used to carry on business.

By undertaking transparency initiatives, agencies can ensure consistent exercise of their prosecutorial discretion according to sound underlying principles, while still maintaining a flexible system that facilitates negotiated solutions to potential competition law problems.

BIAC encourages the use of a variety of transparency initiatives, each of which has benefits in terms of providing guidance to businesses and, ultimately, benefits to consumers. The most useful mechanisms for providing transparency include, among other options:

- *Guidelines*: Formal guidelines, which outline the analytical framework within which the agency will evaluate potential violations of the law (or the application of a law), are frequently the most useful transparency initiative in that they frequently provide the greatest degree of certainty. Typically, such guidelines are developed over a period of several years and build from the practical experience of the agency based on a broad array of enforcement initiatives. Guidelines, however, have certain drawbacks that may limit their utility in certain instances. They can be time-consuming to prepare, may not have a sufficient practical basis on which to draw, and – if they are not properly calibrated based on sound theoretical and practical experience – can be difficult to “fine tune” quickly. Thus, guidelines may not be well suited for areas of law and policy with disputed effects in which more experience is needed.
- *Policy statements*: Policy statements can have similar benefits to guidelines in providing guidance to businesses. They typically are more “executive” in nature, reflecting the enforcement intentions of the existing agency administration. Policy statements are often less sweeping than guidelines – i.e., they frequently do not attempt to address all potential offences under a particular law – but can be very useful in clarifying individual issues of concern. They are also easier to adjust as additional practical experience is gathered. Thus, what policy statements may lack in terms of permanence and breadth, they often make up in terms of timeliness and focus.
- *Hearings and Reports*: The gathering together of leading experts in the field of law – much like the assembly of the Working Party itself – can help to expand the knowledge base upon which the agency acts while, at the same time, disseminate important agency views on enforcement to the business and legal community. The reports generated from public hearings are typically rich with policy analysis, theoretical insight and historical perspective. Involvement of the private bar and business leaders, as well as government enforcers, academic economists and consumer advocates, should all be sought in order to gain the broadest input and greatest dissemination of information. Hearings and the reports they generate, in BIAC’s view, are an important and highly advisable precursor to the preparation of formal guidelines.

- *Roundtables*: Like hearings, roundtables provide the opportunity to gather and disseminate information from a broad range of interested parties, but on a less formal basis. Roundtables encourage the expression of new ideas, debate on the benefit of past enforcement initiatives, and a closer public-private interaction, which can assist in the future workings of the agency. They are often useful to agencies and businesses when controversial topics have arisen.
- *Speeches*: The delivery of public addresses by senior members of the agency can help to clarify topics and reduce chilling effects. Often times, and frequently because of absence of knowledge of the full background in a particular case, businesses misconstrue the agency's reasons behind an enforcement initiative or the decision taken by an enforcement agency in the course of an investigation. Similarly, businesses may misjudge the ramifications of an enforcement action and how that action may inform future enforcement intentions. Agencies can use speeches to indicate, for example, that it viewed a particular case as an extreme example that required action or – contrarily – that it will not hesitate to enforce on lesser grounds in the future. Each of these messages can guide businesses to better judgments about the legality of their conduct.
- *News releases*: Agencies can issue news releases as an effective means of informing parties about the results of an investigation, including the key facts that led the agency to act (or to refrain from acting) in a particular case. News releases also provide timely updates on the status of an investigation, the procedural posture of the case, the filing of briefs or other advocacy pieces, and announcements and promotion of other transparency initiatives. BIAC notes that most WP3 participant agencies have public websites that include news releases and encourages the further development and refinement of these sites, which businesses value as a key source of timely information.
- *Reasoned decisions*: In those jurisdictions, such as the EU, where the enforcement agencies act as the primary enforcer of the competition laws then the decisions of such agencies should be as fully reasoned and transparent as possible together with sufficient explanation of the underlying facts (subject to confidentiality restrictions) to enable third parties to adequately understand the basis of the decision and the potential implications for them in other situations.

The balance of this paper discusses the application of the law of monopolisation/abuse of dominance in various jurisdictions and opportunities for transparency initiatives that would be welcome by the business community.

2. Practice across jurisdictions

2.1 European Commission

In the European Union (EU), the use of guidelines that seek to clarify the European Commission's (EC) methodology of analysis with regard to specific types of business transactions or specific sectors, or, to a lesser extent, to explain its enforcement priorities, has over the past few years become a well-established practice. In fact, the EC has issued several sets of guidelines that cover a number of important areas of European competition and merger control law. These include *inter alia* guidelines on the application of Article 81(3),³ the definition of relevant markets,⁴ technology transfer agreements,⁵ vertical

³ Commission Notice, Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97.

⁴ Commission Notice on the definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5.

⁵ Commission Notice, Guidelines on the Application of Article 81 of the Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2.

agreements,⁶ and horizontal mergers.⁷ The EC has also announced that it intends to issue guidelines on the treatment of non-horizontal mergers⁸ and is currently undertaking a review of its policy under Article 82 EC that may culminate in policy guidelines in the area of abusive conduct under that provision.⁹ As a general matter, the EC seeks to supplement its policy as laid down in guidelines by publications,¹⁰ speeches by the Commissioner and DG COMP officials, press releases and other informal methods. These “informal” methods of supplementation are also useful, but may not have yet achieved a status of significant authoritative force in the EC. A pattern of continued and consistent reliance by the Commission on such informal guidance, embodied in its actual enforcement practices, may render them more useful as a means of communicating policy. Such appears to be the case, for example, with the informal guidance embodied in speeches delivered by the Department of Justice in the area of criminal cartel enforcement.

BIAC appreciates that the “formal” guidelines issued by the EC are generally highly authoritative and are frequently relied on in proceedings with the EC, national competition agencies in the EU, as well as in national court proceedings. We believe, as a matter of principle, that such guidelines can perform a valuable function in providing insights into the EC’s analysis and treatment of specific business transactions. Obviously, in order to meet that objective, guidelines must be clear, concise and comprehensible, especially when dealing with complex subjects, such as exclusionary conduct by dominant firms. BIAC supports the consultative approach that the EC has recently followed and invites the EC, as well as other agencies, to explore ways in which the use of consultation mechanisms can be made even more effective in the development of formal policy statements.

The use of policy guidelines by the EC displays, in BIAC’s view, a number of special features that distinguish the use of this type of policy instrument in the EU from other jurisdictions.

First, in contrast to, for example the United States, where the enforcement policy of the antitrust agencies is more directly scrutinized by the courts in large measure because private enforcement is a major driver of the enforcement of antitrust law, the EC in the EU plays a more prominent role as the dominant enforcer of antitrust law. In light of the nature of the EU Courts’ judicial review, this position provides the Commission with relatively broad discretion to lay out its enforcement views in policy guidelines. It is therefore crucially important that the EC adopt a balanced approach when adopting guidelines in order to minimize the chilling effect that such guidelines may have.

Second, the need to exercise a self-restraining approach is underscored by the fact that the EC’s guidelines not only serve as policy guidelines for the EC itself, but also have a profound influence on the application of EC competition law, and often national competition law, by national agencies and courts within the EU, as well as in the regimes of candidate EU member states. Perhaps paradoxically, detailed

⁶ Commission Notice, Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1.

⁷ Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 3.

⁸ See, Draft Commission Notice, Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings (Feb. 13, 2007), *available at* http://ec.europa.eu/comm/competition/mergers/legislation/merger_guidelines.html.

⁹ See, Staff Discussion Paper and replies to the public consultation, *available at* <http://ec.europa.eu/comm/competition/antitrust/art82/index.html>. The EC Commission’s guidelines either supplement its policy laid down in block exemptions, such as in the case of vertical and horizontal agreements, as well as technology transfer agreements, or seek to provide guidance in a more general manner, like the Notice on the application of Article 81(3).

¹⁰ See, e.g., the EC’s Competition Policy Newsletter, published three times per year, *available at* <http://ec.europa.eu/comm/competition/publications/cpn/>.

“prescriptions” in this respect may actually hamper the application of EC competition law by national agencies and courts.

Third, in an attempt to strike a balance between the need to conduct a detailed economic analysis and the desire to issue rules that are relatively easy to administer and apply, on occasion the EC has tended to resort to the use of structural assumptions and proxies, such as the somewhat vague notion of “anticompetitive foreclosure” and “the likelihood that prices will rise,” rather than an actual substantiation and quantification of consumer harm. While BIAC appreciates that the use of these types of “shortcuts” may in some cases be appropriate, it generally believes that the proper administration, and optimal consumer welfare, is not served by such a formulaic approach.

Fourth, perhaps in contrast to some other agencies, the EC is generally reluctant to provide “qualitative” guidance and to indicate which theories of harm it believes are “more” or “less” likely to occur in practice. BIAC believes that such guidance would be helpful, in particular in the area of abuse of dominance.

The EC, as is appropriate, generally seeks to ensure that its policy guidelines are consistent with judicial precedent and past practice in individual cases. As economic learning advances, however, BIAC believes that the EC, as well as other agencies, should not be reluctant to restate the direction of its policies, even if new policy guidelines would perhaps be difficult to reconcile with past practices and even court decisions purporting to respect EC precedents. This would include the need to re-evaluate and adjust, on a regular basis, policy guidelines and supplemental guidance.

2.2 *United States*

The United States has made a very position contribution to transparency through the issuance of guidelines covering a range of antitrust issues; including horizontal mergers, intellectual property licensing, health care and competitor collaboration, for example. The U.S. agencies also recently issued a joint report on intellectual property, “Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition,” following an extended series of hearings that assembled many of the leading legal and economic experts in the U.S and beyond.¹¹ The business community has welcomed the report as helping to clarify enforcement policy and reducing uncertainty.

Moreover, the U.S. agencies recently concluded public hearings as part of a major initiative to examine abuse of dominance. These hearings are expected to lead to another report in order to better guide businesses and, presumably, help the agencies to clarify their own enforcement priorities. Even in advance of the report, the discussion and debate from the hearings has adduced helpful information and convergence on the application of Section 2. In late 2005, the DOJ and FTC announced the joint hearings on single firm conduct, the specific goal of which is to “examine whether and when specific types of single firm conduct are pro-competitive or benign, and when they may harm consumers.” Assistant Attorney General Barnett, at the time of announcement of the hearings identified the chief benefit of the single firm conduct initiative: “Having clear standards help businesses comply with the antitrust laws and works to the advantage of consumers.”¹² BIAC is hopeful that the hearings will result in the issuance of, at a minimum,

¹¹ U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007), available at www.usdoj.gov/atr/public/hearings/ip/222655.pdf or <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

¹² See, U.S. Dept. of Justice, Press Release, “DOJ and FTC to Hold Joint Public Hearings on Competition Policy Related to Single Firm Conduct,” Nov. 28, 2005, available at http://www.usdoj.gov/atr/public/press_releases/2005/213369.htm.

a comprehensive report of the agencies' views on single firm conduct and, potentially, the development of guidelines to this effect. Timeliness is also an important factor in providing clarification to businesses. BIAC therefore hopes that the results of the single firm conduct hearings can be issued without undue delay.

BIAC believes the public hearings to review the existing economic and legal knowledge on the subject of monopolisation are a valuable method of determining the proper approach to enforcement and recommends this approach for consideration to other jurisdictions. As Chairman Majoras noted in connection with the hearings, "Over-enforcement of the monopolization laws leads to high false positives that chills pro-competitive behaviour that benefits consumers. Under-enforcement, however, may result in false negatives in which firms continue to engage in exclusionary conduct that harms consumers."¹³ Striking the proper pitch in this delicate balance can best be achieved by obtaining a broad range of input that joins sound theoretical foundation and extensive practical experience.

In the U.S., clarification particularly is required in the important area of multi-product bundled discounts in order to ensure that consumers enjoy all of the benefits of price reductions and competition that can be derived from the economy. In BIAC's view, firms with large market shares – even monopolies – should be free to discount goods and services to consumers, regardless of whether competitors are injured by such discounts, as long as a competition is not injured in the process. The U.S. Supreme Court has ruled that even a monopolist may charge low prices unless the prices are below (variable) cost and there is a dangerous probability that the monopolist later will be able to recoup revenues lost due to below-cost sales.¹⁴ It is especially important that monopolies not be deterred from offering discounts since, by definition, full market pressure for them to lower prices is lacking and many buyers therefore stand to benefit from their offering of a price cut.

Lower courts, however, have caused substantial confusion in interpreting Supreme Court precedent. A confounding decision by the Third Circuit in the *LePages v. 3M* case, for example, found that liability could extend to multi-product bundled discounts even in the absence of an objective standard of behaviour by the alleged monopolist.¹⁵ As a result of the confusion created at the circuit court level, numerous businesses, including BIAC members, have refrained from offering economically-rational multi-product discounts that would have ensured immediate and measurable benefits to consumers. The uncertainty and subjectivity of analysis to be applied and the sizable damage awards that accompany adverse antitrust judgments in the U.S., however, deterred such pro-competitive, consumer welfare-enhancing bundled discounts.

Agency guidelines in the U.S. can directly influence private litigation and positively impact the risk assessment conducted by firms in developing business strategies. For example, the market definition test established by the agencies in the Horizontal Merger Guidelines has gained traction both in judicial review of merger cases,¹⁶ as well as non-merger litigation.¹⁷ In this instance, an affirmative view expressed by the

¹³ *Id.*

¹⁴ *Brooke Group v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993).

¹⁵ *LePages, Inc. v. 3M*, 324 F.3d 141 (2003), cert. denied, 124 S. Ct. 2932 (2004).

¹⁶ *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076 n. 8 (D.D.C. 1997) (District Court explicitly adopted the 1992 Merger Guidelines' 5% price increase benchmark for establishing the relevance of an alleged market).

¹⁷ *See, e.g., United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 336 (S.D.N.Y. 2001) (court applied the 1992 Merger Guidelines' "critical loss analysis" to find that a 5% price increase by a hypothetical monopolist of "general purpose" credit cards would be profitable and that such cards therefore constitute a relevant product market).

agencies that an objective, cost-based standard is appropriate in the analysis of bundled discounts would, in BIAC's view, encourage pro-competitive discounting by influencing businesses and federal courts on the proper standard to be applied. This, in turn, would reduce the risk and uncertainty that has caused many businesses to forego such discounts to their customers' detriment. Such an approach would be even more welcome in those jurisdictions, such as the EU, where the enforcement agencies act as the primary enforcer of the competition laws.

An excellent example of the capability of agency guidelines to positively influence judicial outcomes regarding single firm conduct is the Supreme Court's decision in *Illinois Tool*.¹⁸ There, the Court was deciding whether a presumption of market power should apply to a patent holder. Citing the joint FTC/DOJ Antitrust Guidelines for the Licensing of Intellectual Property as a persuasive influence, the Court held that the proper analysis of a tying claim did not allow for a presumption of market power in the tying product based on the presence of a patent. The Guidelines state that "the Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the *specific* product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power."¹⁹

The U.S. agencies have also utilised press releases effectively to explain their position with respect to enforcement policy. For example, the agencies have effectively used press releases to explain their rationale for closing investigations, particularly in the merger area. The FTC's statement in the *Cruise Lines* case²⁰ and the DOJ's statements relating to *Whirlpool/Maytag* and *Verizon/MCI* are exemplary.²¹ BIAC believes that there is further scope for the effective use of press releases to explain enforcement decisions, including mergers, monopolisation cases and the imposition of remedies.

The U.S. agencies have for many years delivered and published speeches and participated on panels to illuminate the thrust of enforcement initiatives. For example, AAG Barnett's address at last fall's George Mason program illuminated the agency's views on the intersection between antitrust and intellectual property. FTC Chairman Deborah Majoras recently spoke about her views of the Commission's enforcement intentions with respect to pharmaceuticals.²²

¹⁸ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006)

¹⁹ FTC/DOJ Antitrust Guidelines for the Licensing of Intellectual Property, Apr. 6, 1995, *available at* <http://www.usdoj.gov/atr/public/guidelines/0558.htm#t22>.

²⁰ *See*, Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc (Oct. 4, 2002), *available at* <http://www.ftc.gov/os/2002/10/cruisestatement.htm>.

²¹ *See*, U.S. Dept. of Justice, Press Release, Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag, Mar. 29, 2006, *available at* http://www.usdoj.gov/atr/public/press_releases/2006/215326.pdf; and U.S. Dept. of Justice, Press Release, Justice Department Requires Divestitures in Verizon's Acquisition of MCI and SBC's Acquisition of AT&T, Oct. 27, 2005, *available at* http://www.usdoj.gov/atr/public/press_releases/2005/212407.pdf.

²² Deborah Majoras, "Remarks Before the American Conference Institute's Conference on Pharmaceutical Antitrust" (May 16, 2007), *available at* http://www.ftc.gov/speeches/majoras/051607ACI_Pharma.pdf. For an example of transparency initiatives in the merger sector, *see also*, Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch concerning the closing of the investigation into Transactions Involving Comcast, Time Warner Cable and Adelphia Communications (Jan. 31, 2006), *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphiamaajoras_kovacic_rosch.pdf.

The agencies have also exacted a significant influence on the direction of antitrust law through their participating as *amici* in private action. This role is particularly important in light of the extent to which private actions have been an important element of legal development in the U.S.²³ This function should be pursued more aggressively. Many businesses believe the DOJ and FTC missed an important opportunity to provide clarity in the monopolisation area by failing to recommend Supreme Court review of the *LePage's* bundled pricing case.

2.3 Japan

The case of *Nipro Corporation* is a typical exclusionary conduct case in Japan, relating to the private monopolization of glass pipe for small medicine bottles and a case from which observations concerning guidance can be made. The Japan Fair Trade Commission (JFTC) declared the conduct of a wholesaler illegal, because it pressured the bottle manufacturer, which was a regular customer of the wholesaler, not to import alternative glass pipes. The JFTC concluded the wholesaler's conduct to be illegal as private monopolization in violation of the Japanese competition law.²⁴

This JFTC ruling is frequently criticised by academics because the standard of violation is unclear. The Japanese Anti-Monopoly Act (AMA) identifies "exclusion of business" as an element of private monopolisation. However, the JFTC ruling did not clearly find that the bottle manufacturing business of the bottle maker (the alleged victim of the pressure) was excluded, but rather that there was a possibility that the bottle maker's business might be excluded. Evidence in fact reflected that the business of bottle maker was not materially damaged. Also, whether the foreign pipe manufacturers' business – i.e., the real victim of the alleged violation in the relevant market – was excluded was not clearly mentioned in the ruling. Furthermore, it appears from the context that the relevant market is pipe supply, but there is no market definition identified in the ruling.

In short, this case and its ability to positively influence the behaviour of other businesses in Japan would benefit from additional transparency designed to better describe the nature of the exclusion, the effect of the exclusion and the relevant market that was impacted by the exclusion. More discussion of the rationale of a decision and description of critical facts in JFTC decisions would greatly aid business in understanding and complying with the AMA.

In an effort to provide transparency, the JFTC recently issued draft guidelines for the use of intellectual property. These Guidelines are a revision of the Patent and Know-how Licensing Guidelines. They provide a welcome degree of clarification on a number of fundamental points, but are also confusing in several aspects. For example, although they establish a market share based safe harbour, the level of the safe harbour is unreasonably low (20%) and is not universally applied. Moreover, the Guidelines do not adequately clarify the situations in which the 20% market share safe harbour is available, and fail to describe "influential technologies" which assertedly could be a basis for market power. Because they are still draft form and were published for public comment recently, BIAC is optimistic that the JFTC will openly receive and evaluate comments and use these as a basis for improvement.

2.4 Korea

The Korean Fair Trade Commission (KFTC) was founded more than a quarter of a century ago to enforce the Monopoly Regulation and Fair Trade Act (MRFTA). The MRFTA proscribes "a market-

²³ See, *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); and *Bell Atlantic Corp. v. Twombly*, 2007 WL 141066 (U.S. May 21, 2007).

²⁴ The JFTC did not issue a cease and desist order because of the long period of time taken for the hearing procedures.

dominating enterpriser”²⁵ from engaging in several specific types of conduct, including determining, maintaining, or changing unreasonably the price of commodities or services; unreasonably controlling the sale of commodities or provision of services; unreasonably interfering with the business activities of other enterprisers; unreasonably impeding the participation of new competitors; unfairly excluding competitive enterprisers; and other acts that might considerably harm the interests of consumers.²⁶ An Enforcement Decree, which elaborates on the MRFTA, identifies certain types of conduct as an abuse of market dominance and provides examples. For instance, the Enforcement Decree explains that a dominant firm may unreasonably hinder the entry of a new competitor by “[e]ntering into, without justifiable reason, an exclusive contract with a transaction partner.”²⁷

The KFTC has recognized, however, that these existing materials provide insufficient guidance to businesses. Thus, the KFTC created the MFRTA Working Group, led by director level officials consulting with outside experts, to assess possible changes to the current legal framework. In 2006, the Working Group analyzed procedural and substantive issues, including abuse of dominance issues. The KFTC plans to use the Working Group’s findings to revise and update the competition laws and regulations in 2007. In addition, the KFTC maintains websites in Korean and English with information on statutes, regulations, speeches, reports, press releases, and other materials.²⁸ These initiatives, and further explication of the KFTC policies, have been useful to businesses, which welcome the progress to date and, at the same time, hope that additional clarification can be provided.

2.5 *New Zealand*

The Commerce Commission (Commission) of New Zealand enforces the Commerce Act, which was enacted in 1986. Section 36 of the Commerce Act prohibits a “person that has a substantial degree of power in a market” from restricting the entry of a person into that or any other market; preventing or deterring a person from engaging in competitive conduct in that or any other market; or eliminating a person from that or any other market.”²⁹ In 2002, the Commission published a guide to Part II of the Commerce Act, which covers restrictive trade practices including use of a dominant market position, with the express purpose of promoting greater understanding.³⁰ This twenty page guide provides an overview of Part II, and contains descriptions and examples of prohibited trade practices. At the time of its publication, however, there were no New Zealand court precedents that reflected a 2001 change from “dominance” to “substantial degree of market power” in Section 36. Thus, one of the three examples was based upon an Australian case, in which a similar standard was employed, and two examples were drawn from cases decided using the pre-2001 New Zealand standard. In addition to the guide, the Commission maintains a website with useful materials.³¹

²⁵ The MRFTA defines a “mark-dominating enterpriser” as either: “1. Market share of one enterpriser is 50/100 or more; or 2. The total market share of not less than three enterprisers is 75/100 or more; provided that those whose market share is less than 10/100 shall be excluded.” MRFTA Article 4.

²⁶ MRFTA Article 3-2.

²⁷ Enforcement Decree of the MRFTA Article 5(4).

²⁸ See, <http://www.ftc.go.kr/eng/>.

²⁹ Commerce Act 1986 Section 36.

³⁰ NEW ZEALAND COMMERCE COMMISSION, THE COMMERCE ACT: ANTI-COMPETITIVE PRACTICES UNDER PART II OF THE COMMERCE ACT, at 1 (“The purpose of this publication is to promote understanding of the anti-competitive practices (or restrictive trade practices) prohibited under Part II of the Commerce Act”).

³¹ See, <http://www.comcom.govt.nz/>.

2.6 *Australia*

Enacted in 1974, Section 46 of the Trade Practices Act (TPA) deals with anticompetitive conduct by a “corporation that has a substantial degree of power in a market.”³² The TPA and other useful materials are available on the Australian Competition and Consumer Commission’s (ACCC) website.³³

There have been two recent reviews of the TPA. The Dawson Committee review concluded that no amendments to Section 46 were necessary and that the courts were providing sufficient guidance in its application.³⁴ One month after the Dawson Committee reported to the Australian government, the High Court of Australia issued its decision in *Boral Besser Masonry Pty Ltd. v. ACCC*, which found that the defendant, charged with predatory pricing, had not violated the TPA.³⁵ After that decision, the Chairman of the Dawson Committee reaffirmed the report, despite potential issues raised by Boral.

In 2004, though, the Senate Economics References Committee concluded in its report³⁶ that changes were needed to clarify Section 46. The Senate Committee made several recommendations for refining the law, including amending the TPA to indicate that the threshold of “a substantial degree of power in a market” is lower than the former threshold of “substantial control”; to identify factors to consider when determining whether a company possesses “a substantial degree of power in a market”; and to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert (either explicitly or tacitly) with another company.³⁷ Although the Australian government accepted several of the committee’s recommendations, however, Section 46 remains unchanged.

2.7 *Canada*

There has been limited case law on the abuse of dominant position provisions in section 79 of the Competition Act over the last 20 years, with only five contested cases. Further, there is no right of private action for abuse of dominance – only the Commissioner of Competition can apply to the Competition Tribunal for remedial relief. Accordingly, guidelines, speeches, annual reports and other communications, including submissions to OECD roundtables and the Global Forum that set forth the Competition Bureau’s analytical and enforcement approach to applying the abuse of dominance provisions are welcome initiatives.

In that regard, the Competition Bureau has issued detailed general and sector-specific enforcement guidelines: Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act); and The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector. The Commissioner of Competition has also clarified the Bureau’s approach to applying the abuse of dominance provisions in the airline industry in a very concise communication that specifies the type of conduct that will raise issues and clarifies the application of the

³² TPA Section 46.

³³ See, <http://www.accc.gov.au/content/index.phtml/itemId/142>.

³⁴ DAWSON COMMITTEE, REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT (Jan. 2003).

³⁵ 195 ALR 609 (2003).

³⁶ SENATE ECONOMIC REFERENCES COMMITTEE, THE EFFECTIVENESS OF THE TRADE PRACTICES ACT 1974 IN PROTECTING SMALL BUSINESS (Mar. 2004).

³⁷ *Id.*

avoidable cost test.³⁸ The Intellectual Property Enforcement Guidelines also discuss abuse of dominance as applied to IP rights.³⁹

The Competition Bureau also issued on September 26, 2006 a draft Bulletin for public comment that describes its approach in reviewing abuse of dominance complaints in deregulated telecommunications markets. This consultative process followed on a report of Canada's Telecommunications Policy Review Panel that found competition has progressed in most telecommunications markets to the point where market forces can be relied upon to achieve many of Canada's telecommunications policy objectives. The Bureau developed the Bulletin "with a view to being more transparent and predictable". In drafting the Bulletin, the Bureau consulted with the Canadian Radio-Television Commission ("CRTC"), the sector specific regulator, to benefit from their expertise in the telecommunications sector. BIAC supports this approach, which is one that can be applied in other aspects of competition law to improve transparency and enforcement clarity to private sector stakeholders where there is sector specific regulation and overlapping jurisdiction between the sector specific regulator and the competition authority. For example, to provide greater clarity on the interface between the Competition Act, the Broadcasting Act and the Telecommunications Act, the Bureau and the CRTC developed an "interface agreement" describing their respective authority. The stated objective of that document was to provide "industry stakeholders, including the general public, with greater clarity and certainty about the overall regulatory and legal framework governing the telecommunications and broadcasting sectors which were undergoing rapid change and transition from detailed regulation to greater reliance on market forces."

The Competition Bureau's approach to abuse of dominance cases has also been explained and updated in speeches and other Bureau communications. Recently, Sheridan Scott, Commissioner of Competition, noted that the spirit of section 79 – err on the side of non-intervention – leads the Bureau to take a limited number of cases.

The Canadian abuse guidelines offer a useful template for other jurisdictions. However, there are areas for improvement. For example, the mere expression that the policy towards abusive conduct "should be governed by the economic effects" may be a useful starting point, but is, upon inspection, insufficient. Instead, the agency should preferably articulate how these economic effects are measured, have a clear view on how (dynamic) efficiencies enter into the analysis and express a more detailed analysis on diverse matters as the exclusion of "as efficient" competitors and barriers to entry.

In addition, BIAC notes that there seems to be a disconnect between the case law and the Bureau's guidelines, which provide that: "If a firm has a 35 percent or higher market share, the Bureau will normally continue its investigation." The abuse provisions in the Competition Act do not specify a market share threshold, requiring instead that the alleged dominant entity substantially control a class of business. The Competition Tribunal has held that "control" is synonymous with market power equating substantial or complete control of a business with market power in the economic sense, being the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. In the contested abuse of dominance cases heard to date by the Competition Tribunal, the market shares of the dominant firms has been well over 50%. While the Competition Tribunal has not clearly articulated a threshold level of dominance, it has provided the following framework for analyzing whether the alleged dominant entity has the requisite control:

³⁸ "Competition Bureau clarifies enforcement approach in the airline industry", Ottawa, September 23, 2004, available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=247&lg=e>.

³⁹ These guidelines are all available at <http://www.competitionbureau.gc.ca>.

- examine whether an entity has the ability to maintain prices above competitive levels for a considerable period; and
- determine the entity's market share – under 25% - unlikely to find dominance, but consider any evidence of an increasing trend; under 50% - no prima facie finding of dominance; or 100% - prima facie finding of dominance absent evidence that there are no barriers to entry.

Accordingly, given that the Competition Tribunal seems to look for a much a higher share, the meaningfulness of this particular guideline is uncertain.

The Competition Bureau also faces some significant enforcement issues which could be expanded upon in transparency initiatives. These include the use of presumptions of dominance, the standards under which such presumptions may apply,⁴⁰ and determining the least interventionist remedy. It has been suggested that behavioural remedies directed toward eliminating barriers to restore competition are clearly preferable to structural remedies,⁴¹ an approach which the Competition Tribunal and the Bureau have historically taken. There is also an ongoing debate in Canada about the merits of introducing administrative monetary penalties as part of the remedial order in abuse cases.⁴²

The *Conformity Continuum Information Bulletin*⁴³ discusses the Bureau's efforts at promoting and facilitating conformity through education and monitoring, and its responses to non-conformity. It establishes five principles that govern the Bureau's activities: (i) transparency; (ii) fairness; (iii) timeliness; (iv) predictability; and (v) confidentiality. Two of these principles are particularly relevant to the discussion in this submission and endorsed by BIAC given their importance to the business community: (i) transparency, which "means that the Bureau will be as open as the law and confidentiality requirements permit" and (ii) predictability, which "involves providing appropriate background material on Bureau positions and important issues to assist the business community in conducting its affairs in a manner that complies with the law."

Further, BIAC supports the current Commissioner's ongoing communications between the Bureau and its various stakeholders about the application and reform of the law.

3. Conclusion

BIAC advances the following principles to agencies that desire to expand transparency initiatives. As to the mechanisms for providing transparency:

⁴⁰ See, Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Working Party No. 3 on Cooperation and Enforcement Roundtable Discussion on Proof of Dominance/Monopoly Power (June 7, 2006).

⁴¹ See, Summary of Discussion Points, Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Roundtable Discussion on Remedies and Sanctions in Abuse of Dominance Cases (June 8, 2006).

⁴² See, e.g., Responses to the consultation: Competition Bureau Seeks Public Comments on its Bulletin on the Abuse of Dominance Provisions as applied to the Telecommunications Industry, National Competition Law Section Canadian Bar Association, available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2259&lg=e>.

⁴³ Available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1391&lg=e>.

- Agency statements, regardless of the form in which they are conveyed, should be fundamentally clear and thus capable not only of inducing compliance by businesses, but also of being applied in judicial as well as agency contexts.
- All guidance should be rooted in accepted legal and economic learning and objectives.
- The form of guidance utilised should be sufficiently flexible to accommodate advances in learning as well as industrial, technological and other factual developments.

With respect to providing useful guidance to businesses on the specific issue of abuse of dominance/monopolisation, BIAC notes as follows:

- *Consultative Approach:* Given the fairly limited practical enforcement history of most agencies and the continued evolution of economic learning with respect to the potential effects of abuse of dominance, BIAC endorses a public consultation process involving all stakeholders in the development of policy and in the preparation of transparency initiatives. Hearings, roundtables, conferences and opportunities for public comment are most helpful.
- *Consumer Welfare Focus:* The enforcement goal of transparency initiatives should be to maximise economic benefits rather than to control or contain dominant firms per se. Agency transparency initiatives and enforcement actions should make clear that the objective of enforcement will be the protection of competition rather than the protection of competitors.
- *Application of International Best Practices:* Enforcement should be exercised in such a way as to comport with international best practices to the fullest extent practicable consistent with the requirements of national law. Enforcement action based on an alleged abuse of dominance within one jurisdiction can often have broader consequences in terms of the business practices of a firm, especially when intellectual property is at stake. Thus, over-enforcement in one regime can lead to chilling effects in another.
- *Consistency with Current Learning:* Agencies should seek to ensure that its transparency initiatives are consistent with controlling judicial decisions and the agency's past practice in individual cases. However, BIAC believes that agencies should not be reluctant to develop new policy directions supported by more recent economic learning, even if new policies would perhaps be difficult to reconcile with existing practices and precedents. Guidelines should be sufficiently adaptable to new economic and institutional learning so as to preserve utility without a need for constant revision.
- *Focus on Analysis of Actual Effects:* The use of transparency initiatives – and particularly guidelines – in the recent years seems to coincide with a greater emphasis of the actual economic effects. Agency guidance should rest on a sound theoretical foundation and also reflect practical application of economics as witnessed in the marketplace.
- *Relevancy/Regular Review:* BIAC welcomes more regular initiatives from agencies to review their existing policy statements, including guidelines, to ascertain their practical use and their consistency with judicial precedents and advancements in economic learning. BIAC welcomes more regular initiatives from agencies to review their existing policy statements, including guidelines, *on an ongoing basis or fixed review schedule* to ascertain their practical use and their consistency with judicial precedents and advancements in economic learning.

- *Focus on Exclusionary Conduct:* In those jurisdictions where systems of exclusionary and exploitative abuses co-exist, such as the EU, it is essential to develop a coherent framework of analysis for both types of abuses in tandem. BIAC believes that priority must be given to a coherent and rational policy in the field of exclusionary conduct. Substantial focus on exploitative behaviour risks type one error and chilling of investment in innovation.

BIAC submits that transparency in the field of abusive conduct by dominant firms is of particular importance because an over-inclusive policy in this area is particularly likely to defeat efficiency-enhancing conduct. BIAC believes that, as a matter of principle, transparency initiatives regarding monopolisation and abuse of dominance, or similar other provisions could contribute to a more rational application of antitrust law in this area.

SUMMARY OF DISCUSSION

The Chair opened the 99th meeting of Working Party No. 3 and introduced the first roundtable topic on how to provide effective guidance to the business community on monopolisation/abuse of dominance issues. The roundtable discussion covered a number of sub-topics: (i) uncertainties in the application of the law on unilateral conduct; (ii) the role and benefits of safe harbours; and (iii) uncertainties in the substantive legal standard. Each topic was introduced by external speakers and then delegations were given the floor to comment.

Before opening the discussion, the Chair introduced the external speakers that had been invited to participate in the roundtable discussion: Prof. Margaret Bloom, visiting professor at King's College in London and Senior Consultant at Freshfields; Ms. Johanne Peyre, Head of Antitrust Europe in the Michelin Group and Mr. Hendrik Bourgeois, European Counsel for the General Electric Group. In addition to these three speakers, Mr. Alex Miller, Senior Vice President and Director of Product and Competition Policy at Visa USA, also provided his views on the roundtable topic from a business perspective, as part of the BIAC delegation.

1. Uncertainties in the application of the law on unilateral conduct

The Chair explained that in a complex area of law, such as antitrust, some uncertainty is inevitable. In order to understand how businesses deal with uncertainty in the area of competition law standards and enforcement, the Chair asked the speakers to briefly discuss whether there have been business initiatives in their company that they found difficult to provide advice on or that their company declined to pursue because of the uncertainty in the application of the law on unilateral conduct. In particular, the Chair asked to describe if there have been instances where an initiative which would have enhanced consumer welfare was not pursued because of the risks related to the uncertainty in the law.

Mr. Bourgeois explained that GE is a group which is active in a wide variety of industrial sectors and in a number of these sectors GE is quite successful. Therefore it is an important question for GE to understand whether there could be a risk that one of its businesses be perceived as being dominant or as having substantial market power. Unfortunately, Article 82 EC is not sufficiently specific as to the conditions that a company has to meet to be considered dominant on a market. Therefore, it does not allow companies to disregard its application as often as they would like to. The ambiguity on the definition of dominance is to a great extent due to the jurisprudence of the European courts, which held that high market shares constitute evidence, and not just an indication, of a dominant position. This, and the fact that courts have found firms to be dominant with market shares between 40% and 50%, forces many companies to take due account of unilateral conduct rules in their day-to-day business activities notwithstanding the fact that they do not really believe they enjoy a significant market power.

Mr. Bourgeois gave a practical illustration of this type of situations. As an hypothetical example, he referred to a GE business with a market share of approximately 40-50% which participated in a tender for the sale of gas turbines. The potential purchaser organised a "winner takes all" competition, whereby the winner of the tender was granted the opportunity to satisfy all the customer's requirements for that particular product. Because the GE business which won the tender in question already had high market shares, there was a serious risk that the contractual provisions could be qualified as exclusive purchasing agreements or in EU language "single branding provisions". Therefore, to avoid the risk of antitrust

liability, GE considered inviting the customer to appoint a second supplier depriving the customer of the advantages in terms of efficiencies and cost reductions due to a single supplier sourcing policy.

The Chair thanked Mr. Bourgeois and turned to Ms. Peyre and to Prof. Bloom to see if they had any remarks on this topic or if they wished to comment on what Mr. Bourgeois said.

Ms. Peyre said that, in contrast to the GE group, the Michelin group has already been found to be dominant on several occasions and Michelin's management was well aware that they have to carefully take into consideration the limitations imposed under Article 82 EC. In light of the antitrust history of the Michelin group, the top management is now seriously committed to avoid future infringements of unilateral conduct rules. For this reason, management asked the internal legal department and the sales force to launch a wide compliance program with the objective of avoiding future antitrust investigations. In practice, this means that Michelin has to refrain from many business practices whose antitrust exposure is uncertain. For example, Ms Peyre explained that Michelin refrains from dealing with problems of shortage of particular products by asking dealers for a commitment to a yearly volume because this could amount to an abuse of dominance, despite the objective justifications in terms of supply chain management. Similarly, Michelin decided not to intervene to prevent its competitors from piggy-backing on its research on recyclable track tyres, because it would risk infringing the rules on dominance. Michelin invests significantly in R&D to ensure good quality tyres that can be retreaded. Such investments help to reduce the overall price for truck tyres as retreaded tyres are less expensive. On the contrary, other manufacturers do not invest in terms of quality for their tyres, but benefit from Michelin's efforts as they retreaded Michelin tyres. Commenting on Mr Bourgeois' intervention, Ms. Peyre reported that Michelin's management in its compliance effort decided to behave on the market as if Michelin was dominant in any market where it reached 30% market share. In order to avoid risks, Michelin decided to lower the threshold for the application of unilateral conduct rules as far as its own business practices are concerned.

From a procedural point of view, Ms. Peyre wished that agencies would be more open to informal discussions with dominant firms on particular business conduct and that they would take more of an advisory role for companies which turned to them for specific advice. She also thought that in some cases, particularly when an agency wants to adopt a new interpretation of the law, it would be very useful if companies were given the possibility to enter into negotiations with the agency and were allowed to offer commitments. This may be more effective and efficient than an in-depth administrative investigation. Finally, Ms. Peyre stressed the importance of harmonisation of enforcement rules. Companies compete on a worldwide basis, but they are subject to different standards on dominance and on abuse of dominance across jurisdictions. For example, according to Ms. Peyre, standards and enforcement are currently much stricter in Europe than it is in Japan or in the US.

Prof. Bloom intervened saying that when she was a competition enforcer she always thought that uncertainty and different applications of the unilateral conduct law in different jurisdictions were a cost for consumer welfare. She had this confirmed by her experience as a consultant to Freshfields where some large companies are clients. In her view, the most problematic areas of unilateral conduct laws are the following.

- Rebates: rebates and price discrimination are an area where because of the uncertainty companies may decide not to offer discounts even if those rebates would be beneficial to consumer welfare.
- Meeting competition defence: it is still an open issue whether a dominant company has the right to meet competitors' prices. This is something that comes up quite frequently in practice and, at least in Europe the law is not clear.

- Intellectual property and refusal to supply: this is a difficult area particularly for international clients, which are subject to different standards in various jurisdictions.
- Aftermarkets: it is surprising how often it is alleged that there are relevant aftermarkets. Potentially every company with a branded product could be constrained by unilateral conduct rules in these, so-called, aftermarkets.

Prof. Bloom then turned to what agencies might do to help increase legal certainty. Acknowledging that there may be limits to what can be done, she suggested that agencies should consider publishing the decisions closing an investigation, particularly if no infringement was found. Any public statements on the substance of the case and as to why a certain case was closed could be valuable to clarify why the agency did not think that there would be significant harm for consumers from a particular conduct. Prof. Bloom then moved to discuss how agencies can use guidelines to provide more clarity on their enforcement practice. She said that guidelines could be very valuable as long as they are workable, not too complicated and based on sound economic principles. These are high standards to meet, but if agencies succeed in producing such guidelines that would be really beneficial for all market operators. Prof. Bloom wished that the US antitrust agencies, which have had significant experience in enforcing the US laws on unilateral conduct, would at some point provide guidelines from their experience. This may help spread the good practice of US agencies more widely outside the US and persuade more agencies to take an economics-based approach to unilateral conduct.

Prof. Bloom concluded her intervention with three suggestions for antitrust agencies:

- Agencies should clearly state that the objective of unilateral conduct law is to enhance consumer welfare and efficiency. While this is already the case in most jurisdictions, in others it is still not clear whether agencies are protecting the structure of competition rather than consumers.
- Agencies should have a plausible theory of consumer harm before deciding to pursue a case. For example, in the case of rebates, agencies should ask the beneficiaries of the rebates what effect it had upon their purchasing strategy. They would find in some cases it had remarkably little effect.
- Agencies should adopt a high standard for finding that a firm has abused its market power. The more discretion the enforcers have, the greater the uncertainty for businesses.

The Chair thanked the three panellists for this first excellent round of comments and turned to BIAC and to Mr Miller for their views.

Overall BIAC shared the panellists' observations on the difficulties faced by the business community in the area of unilateral conduct law. BIAC agreed with Prof. Bloom that there are serious issues with respect to rebates, to pricing competition generally and to IP licensing. According to BIAC there is a need to look carefully at the foundation for the enforcement policy on single firm conduct. It is interesting to note that the recent ICN questionnaire on the objectives of unilateral conduct laws has produced an overwhelming response from the countries considering that consumer welfare and efficiency should be underlying goals of a sound enforcement programme involving single firm conduct. The issue is however what is the meaning of those terms. It is extremely important to agree on what consumer welfare means, on what type of efficiency should be recognisable and most importantly agencies should consider the losses caused by over-enforcement in this area since they could be quite significant.

According to BIAC, all this leads to a request for more transparency, not only as to what constitutes a dominant firm but also as to the objectives of unilateral conduct laws. Guidelines could produce solid results but caution needs to be exercised in the development of guidelines in an area where the law is not

yet fully formulated in all its details. Guidelines should be based on principles such as clarity, sound economics and flexibility. In terms of process, the preparation of guidelines should include (i) a hearing process, which would provide agencies with a wealth of information and views; (ii) roundtable discussions among agencies, which would allow the expression of views from various jurisdictions as to the meaning of dominance and abuse of dominance; and finally (iii) a wide consultation process with the business community.

Mr. Miller explained that Visa is a global payment system that processes payment transactions between thousands of banks around the world and its business practices ultimately affect millions of consumers. It operates in a market in which, depending on how one defines it, it has a fairly large presence. It competes with other significant competitors who also have a large market presence and resources to compete. According to Mr Miller, one common concept emerged from the discussion so far and that is the notion that a core policy goal of antitrust enforcement against dominant firms should look at the long-term consumer welfare and efficiency. It is a remarkably sad result if a company refrains from adopting practices which could enhance consumer welfare only because of the uncertainty in the enforcement of unilateral conduct rules. According to Mr Miller, that seems to underscore that over-enforcement of antitrust laws against large firms can really inhibit consumer welfare. If one looks at the US system, there are two primary sources of enforcement. One is public enforcement by the US antitrust agencies and the other is private enforcement through civil damage actions. Recently, the DoJ has been very active in stating more clearly what are the policy objectives of public enforcement; a number of public statements on government positions in terms of enforcement were extremely helpful to industry. Private civil actions, which are far more common than public enforcement actions, are the source of the common law and generate a real wealth of case law which offers to companies more parameters around which to judge whether conduct is unlawful.

The Chair thanked BIAC and Mr Miller for their interventions and opened the floor for questions and comments from the delegates.

The representative of Canada followed up on a comment made by Ms Peyre about expanding the advisory role of competition agencies and noted that the Canadian Competition Bureau can issue binding advisory opinions. Companies can approach the Bureau with a statement of fact and, subject to the payment of a fee, are entitled to receive a written opinion indicating whether the Bureau would or would not take any action against the business conduct as described in the statement of facts. In practice, however, there have been very few requests for such binding opinions and the Canadian representative asked the panellists if they could explain why this is the case from the perspective of the private sector. Ms. Peyre said that confidentiality is certainly a very important issue for businesses, so if those opinions are published, that is probably the main reason why the Bureau did not receive many requests. Businesses would not want their competitors to know what practices they are planning to implement. The representative of Canada added that it is possible to publish those opinions in a confidential form. This would only be a brief summary of the business practice. According to Prof. Bloom, however, confidentiality concerns arise from the simple fact that it is made public that a request for advice has been lodged with the Bureau. In general, companies would be much happier with a confidential informal advice than with a public one. However, one has to admit that if the advice was unpublished it was of limited benefit for third parties.

The representative of the United Kingdom intervened on this issue and pointed out that advisory opinions belonged to the past. Today, there is extensive case law, much more transparency of thinking, more information in the public domain and much more external advice available than in the past. In other words, today companies are in a position to assess upfront and satisfactorily the legal risk associated with a specific business practice. According to the UK delegation, the time has come for authorities to have an obligation to publish guidance, to do so in a variety of different ways and then to let companies form their

own views based on the available information and on the expert advice available. It is, however, important that authorities disclose their priorities and the objectives of their enforcement action to facilitate companies which are dominant or on the borderline of being dominant to know whether it is likely or not that the authority would challenge certain business conduct. Finally, the UK agreed with Prof. Bloom that the reasons for case closure decisions should be made public. It is very important for the parties in the case and for the business community at large that when authorities decide to close a case that they explain why they have done so.

The Chair gave the floor to the French delegation to discuss the experience of the Conseil de la Concurrence with guidelines.

France agreed that agencies should pursue two main objectives. On the one hand, they should respond to the need for less uncertainty that has been clearly expressed by the representative of the business community and have to clarify what standards they apply, in order to increase the predictability of their enforcement policy. On the other hand, there is a need to increase convergence on the substantive standards applied, so that companies are not subject to divergent standards in different jurisdictions. The same conduct should be reviewed in a relatively homogeneous way across jurisdictions. The French delegation insisted on a number of points:

- Agencies should address dominance issues consistently and on the basis of the law to help create a sufficient body of jurisprudence in this complex area of antitrust law. However, in practice cases tend to be decided with pragmatism and are often closed with spontaneous commitments by the parties involved. While this facilitates the enforcement action of the agency, it prevents the formation of a solid case law on the lawfulness of certain business conduct.
- The motivations for closing decisions are very important. The French delegation agreed that the reasoning behind a case in which no infringement was found can be more useful to businesses than cases in which an infringement was found. As for France, the Competition Council is under a legal obligation to motivate all of its decisions, including those in which it decides not to pursue a case.
- On the use of guidelines, the French Competition Council supported the new approach proposed by the European Commission in its discussion paper on Article 82 EC. This approach considered necessary to reaffirm the objectives to be pursued by Article 82 EC, principally consumer welfare and efficiency. The Commission's draft guidelines also address the important question of the burden of proof, clarifying what has to be proven by the competition authority and what can be argued by the parties as a defence. A clear allocation of the burden of proof increases predictability.

Ms. Peyre intervened and agreed with the comment of the UK delegation that companies can now rely on a wide case law, but that unfortunately this is not the case for every area of unilateral conduct law. For example, in Europe the case law in the area of rebates is still uncertain and is subject to wide criticisms. That is the reason why she suggested that it would be very useful for companies to receive advice from the competition authorities. The use of guidelines to clarify the enforcement practice of an agency is also useful. This was the case, for instance, of the recent discussion paper of the European Commission on exclusionary abuses. The document looks very useful except for the section on fidelity rebates where it is difficult to see how the effect-based analysis can be applied *ex ante* when a dominant company has to decide its pricing policy.

The representative of the United States intervened to offer a few remarks on the potential downsides to issuing guidelines as well as on the potential snares that enforcement agencies could fall into when they

attempt to provide guidance but do not fulfil the expectations of the business community. Many of the US guidelines are well known to the business community. However, it is surprising to see how many guidelines have been issued over the years and are now largely forgotten. Many guidelines have been criticised by the business community and have not been as successful as one might have hoped. When thinking of guidelines in the area of dominance, there is an inherent tension between simplicity and completeness. To enhance certainty and predictability, guidelines have to be reasonably well specified but at the same time simple enough to be operational and flexible enough to deal with the range of circumstances that one may encounter in the business world. Some of the criticisms to which guidelines from US enforcement agencies have been subject include the fact that guidelines had too many generalisations and platitudes, that they were incomplete, ambiguous and not fully specified.

Another concern that was brought up by the US delegation was related to the tension between safeguarding agency discretion in its enforcement action and providing the business community with greater legal certainty. The drafters of guidelines have the tendency to build in the guidelines sufficient discretion to preserve the ability of the agency to intervene under circumstances that are not entirely foreseen or foreseeable at the moment when the guidelines are drafted, thus giving the enforcement agency some potential leeway to go beyond existing enforcement practices. This, however, creates uncertainty for the business community. In particular in the dominance area, where business practices evolve extremely rapidly, this is often an important consideration.

The Chair then asked the delegation from Korea to describe the special advisory tools which are available for managers in companies that are presumed to be dominant. These tools have been put in place by the Korean Federal Trade Commission (KFTC) to increase certainty related to the business conduct of companies meeting the statutory presumption of dominance under Korean competition law.

The representative from Korea explained that the Policy Customer Relation Management System was designed in 2005 to provide information to companies via e-mail. Through this system the KFTC has provided policy directions in the area of dominance and abuse of market dominance to approximately 1.700 applicants. Because the KFTC realised that many infringement cases were due to misunderstandings or misjudgements of the law on abuse of dominance, in 2004 it decided to introduce the Preliminary Business Review Request System, a system designed to enhance predictability and to prevent the damages caused by abuse of dominance cases. Under this system, a company can request the KFTC to review a business practice before it is implemented and inform the parties as to whether the practice is lawful. This system is viewed as enhancing productivity since companies can get a clear answer upfront on the legitimacy of their business practices.

The representative of Italy agreed in principle with the idea that guidelines have to be workable and practical, but noted that this may be a difficult exercise in practice. The drafting of guidelines, specially on matters such as unilateral conduct, is not easy since it entails the difficult task of identifying all possible violations of the law *ex ante*. In general, guidelines should have two main purposes: (i) to be practical and workable; but also (ii) to create safe harbours, especially when it comes to the question of dominance. There is a need for a clear definition of dominance so that companies can have a certain degree of certainty as to whether they are subject to the law or not. However, it is much more difficult to give guidance on potential abusive behaviour by companies. The best thing that agencies can do is try to identify the purposes and objectives of the law.

Prof. Bloom agreed with the last intervention on the usefulness of safe harbours when it comes to dominance. However, she pointed out that, in order to provide useful certainty to companies, safe harbours should be of an adequate size to leave out only a minority of companies. Only these companies would then have to do an effects-based analysis to assess the legality of their own business conduct.

The representative of the Czech Republic agreed that providing workable guidelines is a difficult task for competition authorities. Three years ago a new system of commitments was introduced in Czech competition law. However, the new regulation was short and open to various interpretations which created some uncertainty in the business community. The competition authority had two possibilities: to issue some general guidelines providing an *ex ante* support, or to clarify the new system on a case-by-case basis. There was a general consensus in the authority that issuing guidelines without any guidance from the case law would have been risky, since it was not possible to foresee all the instances in which a certain issue could arise in the future. Therefore, it was decided to publish a statement with general principles that could be applied in this areas and to wait for a broader body of decisions before issuing specific guidelines.

The representative of the European Commission first mentioned a point that was unique to the EU regarding guidance to companies, although outside the area of unilateral conduct. In the field of agreements between undertakings European Community law allows the European Commission to help bring about clarity and certainty for companies through the adoption of block exemption regulations. This means that if the European Commission has had experience with a category of agreements, it can provide binding legal certainty. Block exemption regulations are based on the philosophy that everything is exempted from the application of the competition rules except what is expressly prohibited by the block exemption regulation. This is a major contribution in terms of giving legal certainty to the business community. As for unilateral conduct, guidelines can pursue two objectives: (i) to clarify the law and consequently to provide the business community with increased legal certainty; and (ii) to prevent companies from engaging in behaviour that has anticompetitive effects. Concerning the creation of safe harbours, admittedly there is a tension between adopting specific rules which are helpful for the industry and leaving sufficient discretion to intervene in situations which are not foreseen in the guidelines in question. This tension could be somewhat resolved through the creation of overarching principles that would apply when addressing specific conduct. This way, it is possible then to have certain specific rules in relation to specific categories of conduct, such as rebates, and at the same time to set out in guidelines general principles, such as a consumer harm test, which would allow companies to assess situations which are not addressed in detail in guidelines.

In the European context, guidelines could play a special role. The reform introduced by Regulation 1/2003 gave to national courts and to national competition authorities the powers to apply EU competition rules. In such a context, guidelines could be a useful tool to ensure *ex ante* consistency in the application of the law by an important number of decision makers. This could be especially important at a time where there might be a request for a policy shift in the field of unilateral conduct. It is the role of competition authorities to come up with a policy framework which can then be tested in court. Judges should not be expected to formulate policies, as this is the role of competition authorities, as the European Court of Justice explicitly stated in the Masterfood judgement. Therefore, in Europe guidelines could also be a tool to ensure consistency in the approach of all European competition authorities and courts when they apply Articles 81 and 82 EC.

The representative of Ireland commented on the difficulties of developing meaningful guidelines which include more than very general principles in the area of unilateral conduct. With agencies around the world moving towards an effects-based approach to unilateral conduct, it becomes increasingly more difficult to provide guidance on specific business conduct because there is no limit to the number of business practices that could be developed. As soon as one moves away from a small category of infringements which are clearly abusive, such as tie-in or exclusive dealing, it becomes very difficult to provide precise guidance on business conduct which is sophisticated and whose effects can vary depending on the context. Despite the laudable efforts of institutions such as the ICN who try to promote international harmonisation, there is still a great diversity of opinions as to what constitutes a violation of unilateral conduct law in different jurisdictions.

Mr Bourgeois made a comment on the point raised by the US delegation on “escape clauses” built in guidelines. According to Mr. Bourgeois, the problem that most companies face today in connection with unilateral conduct rules derives to a great extent from the fact that agencies have far too much discretion in how they enforce the rules, meaning that companies face great uncertainty. Unilateral conduct laws contain ill defined terms or subjective criteria which allow agencies great discretion as to how they decide to apply them. For example, he mentioned expressions such as “competition on the merits” or “normal competition” whose precise meaning is not clear. Similarly, concepts such as “foreclosure” or “marginalisation” can be defined in various ways. All these concepts represent “escape clauses” for the enforcement agency. When companies face uncertainty regarding the legal standards applied, they tend to take a conservative approach on prospective business conduct. This could have a cost, since companies may decide not to engage in conduct which is ultimately pro-competitive and efficient. The question is whether the potential benefits of allowing discretion to agencies outweigh the harm that the legal uncertainty may cause.

According to Mr. Bourgeois, competition law and competition policy should focus mainly on the concept of dominance. He agreed that it is important to find the correct test for assessing specific conduct, such as loyalty rebates, but it is more important to define objective criteria to determine when the laws on unilateral conduct apply. In fact, the effectiveness of guidelines in this area of antitrust law would be greatly enhanced if companies, most of which are not dominant, would be able to exclude the application of unilateral conduct rules and regulations by having a robust framework for determining whether they are dominant.

2. The role and the benefits of safe harbours

The Chair moved to the second topic for discussion which several interventions already referred to: the use of safe harbours. To open the discussion, the Chair asked the speakers to comment on the importance of safe harbours and in particular on how safe harbours should be structured.

Ms. Peyre replied that in order for guidelines to be useful and effective, they must include some sort of safe harbour which is sufficiently clear for the companies to rely on. If one takes, for example, the treatment of fidelity rebates in the draft discussion paper of the Commission on exclusionary abuses, the “as efficient competitor test”, which is proposed in the draft, is a very complex test that relies on other complex concepts such as the required share and the commercially viable share. These concepts are not well defined in the draft discussion paper. Only a very clear definition of these concepts can facilitate in-house counsel of companies when advising their sales force.

Mr. Bourgeois thought that safe harbours can play a very important role, particularly in the area of dominance, although they cannot eliminate all uncertainty as to the enforcement of unilateral conduct rules. It is generally agreed that if a company does not have a certain level of market share it should not be viewed as dominant. However, there are wide discussions as where to set the market share threshold for dominance and, even if that issue would be settled, there would still be some insecurity or unpredictability for companies related to the exact market definition and to the exact calculation of market shares in a properly defined market. Therefore, even if safe harbours are beneficial it is even more useful if agencies would converge on key concepts and define objective enforcement standards, such as a consensus that enforcement against abuses of a collective dominant position should only take place on an exceptional basis.

Prof. Bloom agreed that a safe harbour for dominance can provide a great degree of certainty. She added, however, that it is important to set the threshold at a level where it is meaningful. She thought that if the threshold is set below 40% it would not really tell business much. She thought that, ideally, the threshold should be set at a 50% market share. It is much more useful to have a higher figure that is qualified (i.e. that allows agencies to intervene under certain circumstances against companies within the

safe harbour) than a low threshold. She added that there are conduct-based safe harbours that could be very usefully introduced. For example, in the case of single product rebates there should be a safe harbour if the price is above average avoidable cost or average variable cost. Similarly for predation, if there was no possibility for recoupment, then the practice should not be viewed as harmful for consumers. Lastly, aside from the straightforward safe harbour for dominance, aftermarkets are an area where safe harbours could be useful. The issue here is whether the price of the secondary product is constrained by competition for the primary product. There could be a safe harbour where there are sufficient constraints from whole life costing; and/or where customers are sufficiently willing and able to switch to alternative, primary and/or secondary products; and/or where the supplier clearly needs to protect its reputation in the secondary product in order to make sure that it can continue to sell in the primary product?

BIAC also agreed on the importance of safe harbours, especially in the area of dominance. If one reviews the various levels that have been set in different jurisdictions, they run down as low as 20% which does not give much safety. Agencies should continue to dialogue to achieve some level of convergence, possibly around the 50% threshold or higher. According to BIAC, it is also possible to develop conduct-based safe harbours, as has been done in the area of single product predatory pricing, where economic theory would support the notion of a safe harbour for a price that is above average variable costs. BIAC concluded calling for more convergence of approach across jurisdictions, since businesses are operating on global markets and convergence of standards is critically important.

With regard to safe harbours, the representative of Chinese Taipei discussed the experiences with safe harbours in the context of dominance. In Taipei, the Fair Trade Act, has a statutory safe harbour for companies which do not reach a market share of 50%. This provision offers many benefits to the enforcement of the law, as it reduces the potential workload of the agency and streamlines the administrative process while at the same time it offers predictability to businesses. The safe harbour proved useful also in private enforcement, as it reduced frivolous claims. Some of the drawbacks of statutory safe harbours are linked to the treatment of borderline cases, where the parties usually have a different view on the definition of the relevant market and disagree with the FTC on the calculation of their market share. In the past, Chinese Taipei had a monopoly registration system whereby, after an investigation by the FTC, companies which were found to be dominant would be listed in a special register. The system however, was abolished because this *ex ante* investigation into the market position of a company was considered as redundant. As a matter of fact, the system did not exempt the FTC from doing an in-depth analysis of the market power of the company involved, in case it decided to open an investigation against a company listed in the register.

The United States delegation intervened to say that, in principle, safe harbours are desirable. In order to provide certainty to companies and to allow them to make business decisions on a day-to-day basis, it is vital that the legal rules applicable to a certain conduct are clearly known at the time the decisions are to be made. It is therefore key that safe harbours and the applicable legal standards are known upfront. Concerning the role of guidelines, they should provide a clear framework for how the facts would be analysed by the agency. This should give businesses, who know the facts better than anyone else, the possibility to predict how the agency may approach a certain conduct. In particular, guidelines should spell out clear rules as to when firms would not be viewed as dominant at all. This would help companies to make business decisions about how to behave most efficiently or successfully in the market place and pay no attention to the antitrust risks. On the contrary, guidelines that pretend to spell out all the possible ways in which the law could be applied would not be useful.

In the US, most unilateral conduct cases are brought by private plaintiffs and in general courts have applied a very high standard for monopolisation. Even with a market share of 70%, there would still be a debate about whether a firm enjoys monopoly power or dominance. It is likely that courts would not find dominance or market power below 50%, which would make this a reliable safe harbour for companies. The

US experience equally shows the importance of the market structure and of the likelihood of entry. In certain situations, it may be easier for the agency to determine if entry is easy than to determine whether one's market share may or may not go above a certain threshold. If a company is very successful, its market share can be significant for some time but if entry in that market is easy, then there ought to be no risk of monopolisation. However, it is also important that when a safe harbour is established, it is also clear that there is no presumption of dominance above the floor but that there is still a need to look at all the factors that are relevant to determine if there really is a competitive problem.

According to the US delegation, the question of conduct-based safe harbours involves a harder set of issues, which supports the proposition of having a relatively high threshold for dominance. However, in US law there is room for conduct-based safe harbours. For example, in US predatory pricing law there are two alternative safe harbours: the pricing has to be below some measure of cost and there has to be a realistic possibility of recoupment of the losses incurred by the monopolist when engaging in the predatory scheme. The US case law also suggests that there is a very low antitrust risk for a patent holder that unilaterally refuses to licence and that there is essentially no antitrust risk for adopting a particular design for a new product that a firm decides to launch. The hearings on Section 2 of the Sherman Act that the US agencies conducted recently would hopefully allow them to offer additional guidance and suggest ways to advance the law on the forms of conduct that should not be viewed as posing significant risks.

The representative from Germany agreed with the proposition that safe harbours should be introduced in guidelines. However, he noted that it seems unlikely that a consensus would be reached on a threshold at around 40%, since many jurisdictions apply a presumption of dominance below that threshold. According to ICN surveys, jurisdictions had set safe harbours as low as 10% and as high as 50%. For this reason, Germany supported an effort in the direction of some international harmonisation. While the discussion so far has focussed on safe harbours, Germany pointed out that a presumption of dominance or market power is also very important for legal certainty, both for businesses and for the enforcement agencies.

Mr. Miller agreed that safe harbours could be helpful but stressed the need to have a flexible approach to unilateral conduct, given the dynamic nature of business. Even if antitrust agencies would agree on a common safe harbour for monopolisation, one still had to define the relevant market, a question that could be open to much debate and fact finding. Business is dynamic and ever changing whether one looks at IPRs, business methods, product design or pricing. Competition is dynamic and it is therefore hard for guidelines and safe harbours to keep up with pro-competitive developments in business. In the US, the closest thing there is to a safe harbour is in single product predatory pricing, where businesses are told that if they charge above a certain measure of cost and there is no reasonable chance of recoupment then they are on a safe ground. The basis for US policy on predatory pricing is that guidelines, standards, and case law are inherently both under-inclusive and over-inclusive. It is not possible to define every circumstance of a business and tell in advance what would and what would not be harmful.

The representative of the United Kingdom agreed that safe harbours should provide a reasonable degree of certainty. However, they cannot offer businesses absolute certainty on how the law may be applied in the future to particular business practices. The fact that markets are rapidly changing and evolving makes it very difficult to draft detailed guidelines. What agencies should aim at is to give businesses a series of principle-based guidelines defining clearly what is the purpose of the law and then setting out a clear analytical framework for its application. Commenting on the disadvantages of safe harbours, the United Kingdom agreed that market share-based safe harbours leave room for debating what is the relevant market and how it should be defined. As to safe harbours based on costs, one should take into account the difficulty of determining the actual costs and the complexity of allocating common costs and shared costs in some very complex markets. The UK thus concluded that one can never have a "water tight" safe harbour, which would be a contradiction in itself, but that a combination of clear principles and

policy objectives with a clear analytical framework for the application of abuse of dominance rules and some reasonable safe harbours could be extremely valuable for both companies and agencies.

The representative of Canada agreed that guidelines for unilateral conduct should be principle-based and provide general guidance. However, Canada thought that it is possible in some circumstances to provide very targeted advice to the business community to respond to a specific concern. For example, this happened in the context of the airline industry where there was great legal uncertainty as to the possibility for the dominant carrier to reduce its prices to meet competitors' prices. Faced with a number of complaints, the Canadian Competition Bureau issued a press release indicating that enforcement action would not be taken where the dominant carrier reduced its prices to match competing offers without undercutting the competitor and where the matching of prices was not accompanied by an expansion of the capacity of seats, which would look like an anticompetitive action. As a result of that advice, the Bureau was able to respond to a specific industry request and to provide clarity on its enforcement policy.

3. Uncertainties in the substantive legal standards

The Chair turned to the final topic of discussion for this roundtable, i.e. the substantive standards for unilateral conduct. The legal standards applicable to unilateral conduct may be in themselves clear, but the question is whether there are standards that the business community believe may impede pro-competitive activities and result in loss of consumer wealth. If so, what are these standards and how should they be modified?

Prof. Bloom took the example of dominance. In all the jurisdictions that have a safe harbour for dominance as low as 10%, the presumption of dominance may be clear but it should be modified. Similarly, some of the cost-based tests in some jurisdictions, such as the tests for single product rebates and for predation, are structured to facilitate the agency's enforcement action but risk harming consumer welfare. Both in single product rebates and in predation, the test should be benchmarked to average avoidable cost or to average variable cost. As to the subject of recoupment, if a company cannot recoup its short-term losses from a predatory strategy then the law should recognise that there is no harm to consumers. Today, this is not a requirement under EC law according to the courts.

She then turned to two areas that had not been discussed so far. The first one concerns a plea for agencies to avoid "abuse shopping". As an economist, she noticed that one can categorise various abuses under different legal terms that actually have the same economic effects. However, in some cases it is easier to satisfy the legal tests than in others. She gave the example of a margin squeeze, which can either be looked at as a margin price squeeze or as predation or as a refusal to supply. Both refusals to supply and predation require a higher standard for the agency to secure a case. It would be extremely beneficial for companies if agencies applied the same legal standard to the same economic effect/harm in the market. As a final point, Prof. Bloom mentioned the need to achieve more international convergence on the applicable standards, not only worldwide but also within the European Competition Network (ECN). Despite the laudable progress in this area of antitrust law more can be done. There are in fact some cases where individual agencies in the ECN have applied different standards from the EC standard.

According to Mr. Bourgeois, in European competition law, in the area of refusals to deal different standards are applied to similar situations. EC competition law distinguishes between the termination of an existing supply relationship and a refusal to start a new relationship. It is only in the second case that there is a requirement to demonstrate that the input product in question is indispensable. On the other hand, when an existing relationship is terminated, European competition law does not impose the obligation to demonstrate that the input product is indispensable. According to Mr. Bourgeois, this distinction is not justified and may have negative effects if dominant companies decide not to enter the market in the first

place. They may decide to do so if they know that they have less flexibility to exit the relationship because of the different legal standard applied once they have entered.

BIAC intervened to say that there are few clear standards in place and that the lack of clarity concerning a number of business practices leads to a risk of serious loss in consumer welfare. Mr. Bourgeois has pointed out the risks related to refusals to deal, particularly when IPRs are involved, but there are other open questions. In US antitrust law, there is still uncertainty on how multiproduct pricing, bundled pricing and loyalty discounts are to be handled. The uncertainty on the legal standard does not facilitate firms who may have a dominant position and wish to engage in such practices which are in most instances beneficial to consumers in the form of lower prices. Finally, another important area where there are still some questions is whether monopolists can charge a monopoly price.

Mr. Miller agreed with the list of areas with significant uncertainties made by Prof. Bloom and with BIAC's comments on the US jurisprudence concerning exclusive dealing, product design, bundled pricing and refusals to deal. As in-house lawyer, he wished that one day someone would clearly indicate what the applicable standards are so that he could properly advise his own company. In the meantime, activities such as the joint DoJ/FTC hearings were equally important contributions to increase clarity in the law. Mr. Miller reiterated the need to go back to the underlying goals of unilateral conduct laws to help in shaping clearer guidelines for the business community.

The Chair brought the roundtable to a close and thanked the delegates and the panellists for their active participation to the roundtable, which led to an excellent discussion on what is a very complex area of antitrust law.

COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la 99^e réunion du Groupe de travail n° 3 et présente le premier sujet de table ronde : comment donner aux milieux d'affaires des recommandations efficaces en matière de monopolisation et d'abus de position dominante. Cette discussion recouvre plusieurs questions : (i) les incertitudes qui entourent l'application des lois régissant les conduites unilatérales; (ii) le rôle et les avantages des régimes de protection ; et (iii) les incertitudes qui entourent la norme juridique de fond. Chaque thème est présenté par des intervenants externes puis commenté par les délégations.

Avant d'ouvrir la discussion, le Président présente les intervenants externes qui ont été invités à participer à la table ronde : Mme Margaret Bloom, professeur en visite au King's College de Londres et consultant principal chez Freshfields ; Mme Johanne Peyre, chef des activités antitrust Europe du Groupe Michelin et M. Hendrik Bourgeois, conseil en droit européen auprès du General Electric Group. Outre ces trois intervenants, M. Alex Miller, vice-président et directeur des produits et de la concurrence chez Visa USA, a également fait part de ses vues sur le thème de la table ronde, depuis la perspective de l'entreprise, dans le cadre de la délégation du BIAC.

1. Incertitudes entourant l'application des lois sur les conduites unilatérales

Le Président explique que dans un domaine complexe du droit tel que la législation antitrust, une certaine incertitude est inévitable. Afin de comprendre comment les entreprises traitent l'incertitude qui entoure les règles du droit de la concurrence et leur application, le Président demande aux intervenants d'expliquer brièvement s'il leur a semblé difficile de donner des conseils sur certaines initiatives de leur entreprise, ou si celle-ci a décidé de ne pas les mettre en œuvre, en raison d'incertitudes sur l'application des lois sur les conduites unilatérales. En particulier, le Président demande d'expliquer s'il existe des exemples où une initiative qui aurait amélioré le bien-être du consommateur n'a pas été engagée du fait d'incertitudes présentes dans la loi.

M. Bourgeois explique que General Electric est un groupe qui exerce ses activités dans un large éventail de secteurs, souvent avec succès. Il est donc important pour lui de comprendre s'il existe un risque que l'une de ses branches soit perçue comme dominante ou exerçant un pouvoir de marché substantiel. Malheureusement, l'article 82 CE n'explique pas de manière suffisamment précise les conditions qu'une société doit satisfaire pour qu'on la considère dominante sur un marché donné. Il ne permet donc pas aux sociétés de refuser son application aussi souvent qu'elles le souhaiteraient. L'ambiguïté de la définition de « position dominante » s'explique dans une large mesure par la jurisprudence des tribunaux européens, qui pose que des parts de marché importantes sont une preuve, et non une simple indication, de position dominante. Cela, ajouté au fait que les tribunaux ont considéré comme dominantes certaines entreprises aux parts de marché comprises entre 40 et 50 %, force de nombreuses sociétés à tenir compte des règles relatives aux conduites unilatérales dans leurs activités courantes, nonobstant le fait qu'elles n'estiment pas véritablement jouir d'un pouvoir de marché significatif.

M. Bourgeois donne un exemple pratique de ce type de situation. Il évoque ainsi une filiale de General Electric disposant d'une part de marché d'environ 40-50 %, qui a participé à un appel d'offres pour la vente de turbines à gaz. L'acheteur potentiel entendait attribuer la totalité du marché au vainqueur, qui avait ainsi l'opportunité de satisfaire à l'ensemble des besoins du client pour ce produit. Du fait que la société de General Electric qui avait remporté l'appel d'offres disposait déjà de parts de marché élevées, il

existait un risque sérieux que les dispositions contractuelles soient qualifiées de contrats d'achats exclusifs, ce que le droit de l'UE appelle « monomarquisme ». Par conséquent, afin d'éviter d'être poursuivie au titre des dispositions antitrust, General Electric a dû inviter le client à admettre un deuxième fournisseur, le privant ainsi des gains d'efficacité et des réductions de coûts associés à une politique du fournisseur unique.

Le Président remercie M. Bourgeois et se tourne vers Mme Peyre et Mme Bloom pour prendre connaissance de leurs éventuelles remarques sur le sujet ou sur l'exposé de M. Bourgeois.

Mme Peyre indique que, contrairement au groupe General Electric, le groupe Michelin a déjà été plusieurs fois jugé en position dominante et sa direction est bien consciente qu'elle doit prendre rigoureusement en considération les limites imposées par l'article 82 CE. Au vu des antécédents du groupe Michelin en matière de droit de la concurrence, la direction générale est aujourd'hui fermement engagée à éviter de futures violations des règles relatives aux conduites unilatérales. C'est pourquoi elle a demandé à son département juridique et à sa force de vente de lancer un vaste programme de mise en conformité afin de ne plus être visée à l'avenir par des enquêtes antitrust. En pratique, cela signifie que Michelin doit se refuser à de nombreuses pratiques commerciales ambiguës au regard du droit de la concurrence. Par exemple, Mme Peyre explique que Michelin ne demande pas à ses fournisseurs de s'engager sur un volume annuel en vue de pallier à d'éventuelles pénuries de certains produits. Cela pourrait en effet être considéré comme un abus de position dominante, en dépit des justifications objectives de cette démarche en termes de gestion de la chaîne de l'offre. De la même manière, Michelin a décidé de ne pas intervenir pour empêcher ses concurrents de tirer parti de ses recherches sur les pneus recyclables pour utilitaires, cela risquant de violer les règles sur la position dominante. Michelin investit fortement dans la R-D afin de produire des pneus de bonne qualité pouvant être rechapés. De tels investissements contribuent à réduire le prix global des pneus pour utilitaires, ceux rechapés étant moins onéreux. Au contraire, les autres fabricants n'investissent pas dans la qualité de leurs pneus, mais profitent des efforts de Michelin du fait qu'ils rechapent les pneus du groupe. Mme Peyre commente l'intervention de M. Bourgeois en indiquant que la direction de Michelin a décidé, dans le cadre de son programme de mise en conformité, que le groupe se comporte sur le marché comme s'il était en position dominante dès que sa part de marché atteint 30 %. Afin de se protéger, Michelin a décidé d'abaisser le seuil d'application des règles relatives aux conduites unilatérales s'agissant de ses propres pratiques commerciales.

Du point de vue des procédures, Mme Peyre souhaiterait que les autorités soient plus enclines à mener avec les sociétés en position dominante des discussions informelles sur certaines pratiques et qu'elles assument davantage un rôle de conseil lorsque les entreprises les sollicitent sur certains points. Elle pense également que dans certains cas, en particulier lorsqu'une instance veut adopter une nouvelle interprétation du droit, il serait très utile de permettre aux sociétés d'entrer en négociation avec ladite instance et de les autoriser à proposer des engagements. Cela pourrait être à la fois plus efficace et plus efficient qu'une enquête administrative approfondie. Enfin, Mme Peyre souligne combien il est important d'harmoniser les règles d'application. Les sociétés entrent en concurrence à l'échelle mondiale, mais les règles auxquelles elles sont soumises en matière de position dominante et d'abus de position dominante diffèrent selon les juridictions. Par exemple, selon Mme Peyre, les règles et leurs modalités d'application sont aujourd'hui bien plus strictes en Europe qu'au Japon et aux États-Unis.

Mme le Professeur Bloom explique que lorsqu'elle était chargée de l'application du droit de la concurrence, elle estimait déjà que l'incertitude et les différentes modalités d'application, selon les juridictions, de la législation applicable aux conduites unilatérales pesait sur le bien-être du consommateur. Son expérience de consultant chez Freshfields, dont certaines grandes entreprises sont clientes, l'a confortée dans cette opinion. Selon elle, les dimensions les plus problématiques de la législation applicable aux conduites unilatérales sont les suivantes :

- Rabais : du fait des incertitudes qui entourent la question des rabais et de la discrimination des prix, les sociétés pourraient décider de ne pas proposer de remises même lorsqu'elles profiteraient au bien-être des consommateurs.
- La défense d'intérêts légitimes : la question de savoir si une société en position dominante est en droit de pratiquer les mêmes prix que ses concurrents n'est pas encore tranchée. C'est un problème qui se pose assez fréquemment en pratique et la législation en la matière n'est pas claire, pour le moins en Europe.
- Propriété intellectuelle et refus de vente : il s'agit d'un domaine difficile, particulièrement pour les clients internationaux, qui sont soumis à différentes règles selon les juridictions.
- Marchés de produits secondaires : il est surprenant de constater avec quelle fréquence on allègue l'existence de marchés de produits secondaires pertinents. Chaque société commercialisant des produits de marque peut être soumise aux règles applicables à la conduite unilatérale sur ces marchés dits de « produits secondaires ».

Mme le Professeur Bloom aborde ensuite les actions que les autorités pourraient engager afin d'accroître la certitude juridique. Tout en reconnaissant que certaines limites pourraient s'appliquer en la matière, elle propose que les instances publient leurs décisions après enquête, en particulier lorsque aucune violation n'est constatée. Toute déclaration publique sur le fond d'une affaire, ou sur les raisons pour lesquelles elle a été close, peut aider à comprendre pourquoi l'autorité concernée n'a pas estimé qu'un comportement donné nuit sensiblement aux consommateurs. Mme le Professeur Bloom évoque ensuite la manière dont les autorités pourraient utiliser des lignes directrices pour éclaircir leurs pratiques d'application du droit. Selon elle, de telles orientations pourraient être utiles pour autant qu'elles soient applicables, ne souffrent pas d'une complexité excessive et se fondent sur des principes économiques solides. Il s'agit là de critères exigeants, mais si les instances parviennent à produire de telles directives, cela profiterait à l'ensemble des intervenants sur le marché. Mme le Professeur Bloom espère que les autorités de concurrence des États-Unis, qui disposent d'une grande expérience de l'application des lois américaines sur la conduite unilatérale, utiliseront un jour cet acquis pour formuler des lignes directrices. Cela permettrait de diffuser leurs bonnes pratiques à l'échelon international et de persuader davantage d'autorités d'adopter une approche économique aux conduites unilatérales.

Mme le Professeur Bloom conclut son intervention avec trois suggestions à l'intention des autorités de concurrence :

- Les autorités devraient énoncer clairement que l'objectif des conduites unilatérales est d'accroître le bien-être du consommateur et l'efficacité. Bien que cela soit déjà le cas dans la plupart des juridictions, dans d'autres, il est difficile de déterminer si ces instances protègent la structure de la concurrence ou les consommateurs.
- Les autorités devraient s'appuyer sur une hypothèse tangible de préjudice pour le consommateur avant de décider d'engager une procédure. Par exemple, s'agissant des rabais, elles devraient demander à ceux qui en bénéficient quel en a été l'effet sur leur stratégie d'achat. Elles constateraient ainsi que dans certains cas les remises n'ont eu qu'une faible incidence.
- Les autorités devraient adopter des critères rigoureux pour établir qu'une entreprise abuse de son pouvoir de marché. Plus les pouvoirs publics jouissent d'une discrétion importante, plus grandes sont les incertitudes pesant sur les entreprises.

Le Président remercie les trois membres du groupe d'experts pour cette excellente première série de commentaires, puis se tourne vers le BIAC et M. Miller pour connaître leurs vues.

Globalement, le BIAC partage les observations des membres du groupe sur les difficultés rencontrées par les milieux d'affaires dans le domaine du droit relatif aux conduites unilatérales. Le BIAC convient avec Mme le Professeur Bloom qu'il existe des problèmes importants s'agissant des rabais, de la concurrence en matière de prix de manière générale et des concessions de licence de propriété intellectuelle. Selon le BIAC, il faudrait examiner soigneusement les fondements de la politique de lutte contre les comportements unilatéraux. Il est intéressant de noter que les résultats du récent questionnaire du RIC (Réseau international de la concurrence) sur les objectifs de la législation applicable aux conduites unilatérales témoignent d'un large consensus entre les pays pour considérer que le bien-être du consommateur et l'efficacité doivent être les objectifs sous-jacents à tout programme d'application conduit en ce domaine. Il convient toutefois de préciser le sens de ces termes. Il est essentiel de s'accorder sur la signification de l'expression « bien-être du consommateur » ainsi que sur la nature des gains d'efficacité qui doivent être identifiés ; plus important encore, les autorités doivent tenir compte des pertes potentiellement sévères découlant d'un excès de sanctions.

Selon le BIAC, tout cela conduit à demander davantage de transparence, non seulement sur la définition d'une entreprise en position dominante, mais également sur les objectifs de la législation applicable aux conduites unilatérales. Des lignes directrices pourraient produire des résultats solides, mais il est nécessaire de faire preuve de prudence lorsqu'il s'agit d'élaborer des orientations dans un domaine où la législation est encore incomplète. Ces lignes directrices devraient s'appuyer sur des principes tels que la clarté, la solidité des fondements économiques et la flexibilité. Le processus de préparation des lignes directrices devrait inclure les étapes suivantes : (i) une première consultation, qui permettrait aux autorités de recueillir quantité d'informations et points de vues ; (ii) des tables rondes entre autorités, qui permettraient à diverses juridictions de faire part de leurs vues sur le sens des termes « position dominante » et « abus de position dominante » et enfin (iii) une large consultation avec les milieux d'affaires.

M. Miller explique que Visa est un système de paiement à l'échelle mondiale qui traite des transactions entre des milliers de banque à travers le monde et que ses pratiques commerciales affectent en dernière analyse des millions de consommateurs. Il apparaît que la société jouit d'une présence assez importante sur son marché, selon la manière dont on le définit. Elle a plusieurs concurrents importants, qui eux aussi bénéficient d'une forte présence et de ressources solides. M. Miller fait remarquer que, à ce stade de la discussion, un consensus se dessine selon lequel la politique menée envers les entreprises en position dominante au titre des règles antitrust devrait toujours considérer le bien-être du consommateur et l'efficacité, dans une perspective de long terme. Il serait très regrettable qu'une entreprise décide de ne pas adopter des pratiques susceptibles d'améliorer le bien-être du consommateur du simple fait des incertitudes entourant l'application des règles relatives aux conduites unilatérales. Selon M. Miller, il apparaît ainsi qu'un usage excessif de la législation antitrust à l'encontre des grandes entreprises peut véritablement peser sur le bien-être des consommateurs. Il existe dans le système américain deux principales sources d'application de la législation : des actions peuvent être engagées par les organismes antitrust (actions judiciaires publiques) et par des personnes privées (actions civiles en dommages et intérêts). Récemment, le ministère de la Justice a fait preuve de la ferme volonté d'éclaircir les objectifs politiques des actions judiciaires publiques. Plusieurs avis ont ainsi précisé la position des pouvoirs publics en la matière, très utiles au secteur privé. Les actions civiles de personnes privées, bien plus courantes que celles des instances publiques, sont une source du common law et produisent une jurisprudence abondante qui permet aux entreprises d'utiliser des paramètres plus nombreux pour évaluer si leur conduite est contraire à la loi.

Le Président remercie le BIAC et M. Miller de leurs interventions et propose aux délégués de poser leurs questions et soumettre leurs commentaires.

Le représentant du Canada fait suite à un commentaire de Mme Peyre sur l'extension du rôle de conseil des autorités de concurrence et note que le Bureau de la concurrence du Canada peut émettre des avis consultatifs ayant force obligatoire. Les sociétés peuvent faire part au Bureau des faits concernés et, contre paiement, recevoir un avis écrit indiquant si le Bureau entreprendrait ou non une action quelconque à l'encontre du comportement décrit dans l'exposé qui lui a été communiqué. En pratique toutefois, très peu de demandes ont été soumises et le représentant du Canada demande aux membres du groupe d'experts de l'expliquer du point de vue du secteur privé. Mme Peyre explique que la confidentialité revêt une importance fondamentale pour les entreprises ; si ces avis sont publiés, c'est probablement pour cela que le Bureau n'a pas reçu beaucoup de demandes. Les entreprises ne souhaiteraient pas que leurs concurrents sachent quelles pratiques ils prévoient de mettre en œuvre. Le représentant du Canada ajoute qu'il est possible de publier ces avis tout en respectant la confidentialité, sous la forme de brèves présentations de la pratique concernée. Selon Mme le Professeur Bloom cependant, des problèmes de confidentialité se posent simplement du fait qu'il est rendu public qu'une demande d'avis a été soumise au Bureau. En règle générale, les entreprises préféreraient recevoir un avis confidentiel informel plutôt qu'un avis qui soit rendu public. Toutefois, il convient de reconnaître que si l'avis n'est pas publié, il ne sera que de peu d'utilité aux tierces parties.

Le représentant du Royaume-Uni intervient sur ce point et souligne que les avis consultatifs appartiennent au passé. Il existe aujourd'hui une jurisprudence abondante, la transparence est accrue, davantage d'informations sont du domaine public et beaucoup plus de conseils externes peuvent être sollicités. En d'autres termes, les entreprises peuvent aujourd'hui évaluer en amont et de manière satisfaisante le risque juridique particulier associé à une pratique commerciale donnée. Selon la délégation du Royaume-Uni, le temps est venu d'obliger les autorités à publier des orientations, et ce selon plusieurs modalités, laissant ensuite les sociétés se faire leur propre opinion sur la base des informations et des avis d'expert disponibles. Il est toutefois important que les autorités divulguent leurs priorités et les objectifs de leur action en matière d'application de la loi afin d'aider les sociétés qui sont en position dominante ou quasi-dominante à déterminer s'il est probable ou non que l'autorité remette en cause certaines conduites commerciales. Enfin, le Royaume-Uni convient avec Mme le Professeur Bloom qu'il faut rendre publiques les raisons expliquant pourquoi une affaire a été close. Cela est très important pour toutes les parties concernées ainsi que pour les milieux d'affaires en règle générale.

Le Président donne la parole à la délégation française afin de discuter de l'expérience du Conseil de la concurrence en matière de principes directeurs.

La France reconnaît que les autorités doivent viser deux objectifs principaux. D'une part, elles doivent répondre au besoin d'atténuation de l'incertitude exprimé par le représentant des milieux d'affaires et établir clairement les règles qu'elles doivent appliquer pour augmenter la prévisibilité de leur politique d'application de la loi. D'autre part, il est nécessaire de faire davantage converger les règles de fond qui sont appliquées, de manière à ce que les sociétés ne souffrent pas de divergences législatives entre juridictions. Une même conduite doit être considérée de manière relativement homogène entre juridictions. La délégation française insiste sur plusieurs points :

- Les autorités doivent traiter les questions de position dominante de manière systématique et en s'appuyant sur la législation afin de contribuer à établir une jurisprudence suffisante dans ce domaine complexe du droit de la concurrence. Concrètement toutefois, les affaires tendent à être tranchées de manière pragmatique et se terminent souvent par des engagements spontanés des parties impliquées. Si elles facilitent l'action de l'autorité, ces pratiques empêchent la formation d'une jurisprudence solide sur la légitimité de certaines pratiques commerciales.
- Les motivations sous-tendant la décision de clore une affaire sont très importantes. La délégation française convient qu'il peut être plus utile aux entreprises de connaître le raisonnement sous-

jacent lorsque l'on conclut que la violation est inexistante que lorsqu'un manquement est admis. En France, le Conseil de la concurrence est légalement tenu de motiver toutes ses décisions, y compris celles de ne pas poursuivre la procédure.

- S'agissant de l'utilisation de lignes directrices, le Conseil de la concurrence souscrit à la nouvelle approche proposée par la Commission européenne dans son document de réflexion sur l'article 82 CE. Celle-ci considère nécessaire de réaffirmer les objectifs que doit viser l'article 82 CE, pour l'essentiel le bien-être du consommateur et l'efficacité. Le projet de lignes directrices de la Commission aborde également l'importante question de la charge de la preuve, explicitant ce que l'autorité de concurrence doit prouver et quels éléments les parties peuvent avancer pour se défendre. Une répartition claire de la charge de la preuve accroît la prévisibilité.

Mme Peyre s'accorde avec le commentaire de la délégation britannique selon lequel les entreprises disposent désormais d'une jurisprudence importante, notant toutefois que cela n'est pas le cas pour chaque domaine du droit relatif aux conduites unilatérales. Par exemple, en Europe, la jurisprudence dans le domaine des rabais est toujours entourée d'incertitudes et fait l'objet de nombreuses critiques. C'est pourquoi il serait selon elle très utile que les autorités de concurrence transmettent des avis aux sociétés. L'utilisation de lignes directrices pour clarifier les pratiques d'application constitue également une pratique précieuse. C'est ce que montre par exemple le récent document de réflexion de la Commission européenne sur les abus d'exclusion. Ce document apparaît très utile, exception faite de sa section sur les remises de fidélité. Pour cette dernière en effet, il semble difficile de comprendre comment une analyse axée sur les effets peut être appliquée *ex ante* lorsqu'une société en position dominante doit décider de sa politique de tarification.

Le représentant des États-Unis fait quelques remarques sur les inconvénients éventuels de l'élaboration de lignes directrices ainsi que sur les écueils que pourraient rencontrer les autorités lorsqu'elles cherchent à donner des orientations mais ne satisfont pas aux attentes des milieux d'affaires. De nombreuses lignes directrices américaines sont bien connues des entreprises. Il est toutefois surprenant de voir la quantité d'orientations qui a été produite et qui est aujourd'hui largement tombée dans l'oubli. Nombreuses sont celles qui ont subi les critiques du secteur privé et ne se sont pas avérées aussi efficaces qu'espéré. Il existe, s'agissant des lignes directrices sur les questions de position dominante, une tension inhérente entre simplicité et exhaustivité. Afin d'accroître la certitude et la prévisibilité, elles doivent être relativement précises mais en même temps assez simples pour être opérationnelles et assez flexibles pour traiter la vaste palette de situations que l'on peut rencontrer dans le monde des affaires. Différentes critiques ont été émises à l'encontre des lignes directrices élaborées par les autorités aux États-Unis : le trop grand nombre de généralisations et platitudes qui les entachent, leur caractère incomplet, leur ambiguïté et leur manque de précision.

Une autre préoccupation soulevée par la délégation des États-Unis concerne la tension entre la nécessité de protéger la confidentialité des actions des autorités en matière d'application de la législation et celle d'offrir au secteur public une plus grande certitude juridique. Les rédacteurs ont généralement tendance à intégrer à leurs lignes directrices une certaine latitude afin de permettre aux autorités d'intervenir dans des situations qui n'étaient ni totalement prévues ni prévisibles au moment de leur travail de rédaction, leur offrant ainsi une assez grande souplesse pour leur permettre d'aller au-delà des pratiques existantes en matière d'application de la loi. Cela crée cependant une certaine incertitude pour les entreprises. Concernant en particulier les questions de position dominante, domaine où les pratiques commerciales évoluent extrêmement rapidement, il s'agit là souvent d'une importante considération.

Le Président demande ensuite à la délégation coréenne de décrire les outils de conseil spéciaux dont disposent les sociétés que l'on présume en position dominante. Ces outils ont été mis en place par la KFTC

(Korean Federal Trade Commission) afin d'accroître la certitude associée à la conduite commerciale de sociétés sur lesquelles pèse une présomption de position dominante selon le droit de la concurrence coréen.

Le représentant de la Corée explique qu'en 2005 son pays a conçu un système de gestion des relations clients (Policy Customer Relation Management System) visant à communiquer des informations aux sociétés via courrier électronique. Par ce biais, la KFTC a fourni des orientations en matière de position dominante et d'abus de position dominante à environ 1700 demandeurs. Du fait que cet organisme s'est aperçu que de nombreuses affaires en ce domaine avaient pour origine une mauvaise compréhension ou interprétation de la juridiction sur les abus de position dominante, il a décidé en 2004 d'introduire un système de demande de revue préliminaire afin d'améliorer la prévisibilité et de prévenir les dommages que ces abus peuvent entraîner. Selon ce système, une société peut demander à la KFTC d'examiner une pratique commerciale avant sa mise en œuvre afin de renseigner les parties quant à sa légalité. On considère que ce système favorise la productivité du fait que les sociétés peuvent rapidement obtenir une réponse claire quant à la légitimité de leurs pratiques commerciales.

Le représentant de l'Italie indique son accord de principe avec l'idée selon laquelle ces lignes directrices doivent être applicables et pratiques, mais fait remarquer que, dans les faits, il peut s'agir là d'un exercice délicat. La rédaction de lignes directrices, en particulier dans le domaine de la conduite unilatérale, n'est pas aisée car elle implique la difficile tâche de définir *ex ante* toutes les violations possibles de la loi. De façon générale, elles doivent avoir deux principaux objectifs : (i) être pratiques et applicables ; mais également (ii) créer des régimes de protection, particulièrement lorsqu'il s'agit de la question de la position dominante. Il convient donc de donner une définition claire de ce terme de façon à ce que les sociétés puissent obtenir un certain degré de certitude et savoir si elles sont assujetties ou non à la législation. Il est cependant bien plus difficile de donner des orientations sur d'éventuels comportements illicites de la part des sociétés. Il conviendrait ainsi avant tout que les autorités définissent les finalités et les objectifs de la législation.

Mme le Professeur Bloom fait part de son approbation de la dernière intervention quant à l'utilité des régimes de protection en matière de position dominante. Elle souligne cependant le fait que, afin d'offrir aux sociétés une certitude qui leur soit utile, ces régimes doivent être assez généraux pour n'exclure qu'une minorité de sociétés. Seules ces dernières devraient être contraintes à effectuer une analyse fondée sur les effets afin d'apprécier la légalité de leur propre conduite commerciale.

Le représentant de la République tchèque considère également qu'il sera difficile aux autorités de la concurrence de fournir des lignes directrices applicables. Il y a trois ans, un nouveau système d'engagements a été introduit dans la loi de la concurrence tchèque. Cette nouvelle réglementation était cependant succincte et ouverte à diverses interprétations, provoquant une certaine incertitude au sein des milieux d'affaires. L'autorité de la concurrence avait deux possibilités : soit publier quelques lignes directrices générales offrant un soutien *ex ante*, soit clarifier le nouveau système au cas par cas. Les autorités étaient en général d'avis que le fait de publier des lignes directrices sans fournir d'orientations issues de la jurisprudence aurait comporté des risques car il était impossible de prévoir toutes les situations où tel ou tel problème pourrait se produire à l'avenir. Il a donc été décidé de publier un document contenant les principes généraux qu'il conviendrait d'appliquer dans ce domaine et d'attendre que se constitue un plus vaste corpus de décisions avant d'élaborer des lignes directrices précises.

Le représentant de la Commission européenne commence par évoquer une particularité propre à l'UE en ce qui concerne les recommandations aux sociétés, bien que cela soit hors du domaine du droit relatif aux conduites unilatérales. En effet, en ce qui concerne les accords entre entreprises, la législation de l'UE permet à la Commission européenne d'offrir aux sociétés une plus grande clarté et assurance par le biais des règlements d'exemption par catégorie, ce qui signifie que, si elle a déjà été confrontée à une certaine catégorie d'accords, elle pourra offrir une certitude juridique ayant force obligatoire. Les règlements

d'exemption par catégorie sont basés sur le principe selon lequel la réglementation de la concurrence ne pourra s'appliquer qu'à ce qu'ils interdisent expressément. Cela permet aux milieux d'affaires de bénéficier d'une certitude juridique bien plus importante. En ce qui concerne les conduites unilatérales, les lignes directrices peuvent viser deux objectifs : (i) clarifier la législation et donc offrir aux milieux d'affaires une certitude juridique accrue ; et (ii) empêcher que les sociétés ne s'engagent dans des comportements ayant des effets anticoncurrentiels. S'agissant de la création de régimes de protection, il existe effectivement une certaine tension entre d'une part l'adoption de règles spécifiques utiles au secteur privé et de l'autre, la nécessité d'une certaine marge de manœuvre afin d'intervenir dans des situations qui ne sont pas prévues dans les lignes directrices en question. On pourrait atténuer quelque peu cette tension en élaborant des principes généraux qui s'appliqueraient à certains comportements précis. Il serait ainsi possible d'avoir des règles s'appliquant spécifiquement à certains types de conduite, tels les remises, tout en fixant des principes généraux par le biais de lignes directrices, comme le test de préjudice immédiat aux consommateurs, qui permettraient aux sociétés d'évaluer les situations qui ne sont pas traitées de façon détaillée par celle-ci.

Dans le contexte européen, les lignes directrices pourraient jouer un rôle spécial. La réforme introduite par la Règlement 1/2003 a octroyé aux tribunaux et aux autorités de la concurrence nationaux le pouvoir d'appliquer les règles de la concurrence de l'UE. Dans un tel contexte, les lignes directrices pourraient constituer un outil pertinent permettant d'assurer ex ante une application cohérente de la législation par un grand nombre de décideurs. Cela s'avérerait particulièrement important chaque fois que pourrait être demandé un changement de politique dans le domaine des conduites unilatérales. Les autorités de la concurrence ont pour fonction de définir une structure juridique qui puisse par la suite être testée devant les tribunaux. L'on ne peut exiger des juges qu'ils formulent des politiques, ceci étant du ressort des autorités de la concurrence, comme l'a explicitement réaffirmé la Cour de justice européenne à l'occasion du jugement rendu dans l'affaire Masterfood. Ainsi, en Europe, les lignes directrices pourraient-elles également être un outil permettant d'assurer la cohérence de l'approche de l'ensemble des autorités de la concurrence et tribunaux européens chargés de l'application des articles 81 et 82 CE.

Le représentant de l'Irlande émet quelques commentaires sur les difficultés d'élaborer des lignes directrices cohérentes qui incluraient davantage que des principes très généraux du domaine des conduites unilatérales. Alors que les autorités de réglementation du monde entier optent de plus en plus pour une approche fondée sur les effets, il devient toujours plus difficile de fournir des recommandations sur telle ou telle conduite commerciale du fait que le nombre de pratiques commerciales possibles est illimité. Dès que l'on sort d'une catégorie relativement restreinte de comportements clairement illicites (tels que les contrats de vente liée ou les accords d'exclusivité), il devient très difficile de fournir des orientations précises pour des comportements commerciaux sophistiqués dont les effets peuvent varier en fonction du contexte. En dépit des efforts louables d'institutions comme le RIC qui s'efforcent d'encourager l'harmonisation internationale, les opinions des juridictions sont très différentes quant à savoir ce qui constitue une violation de la législation sur les conduites unilatérales.

M. Bourgeois émet un commentaire sur le point soulevé par la délégation des États-Unis au sujet des « clauses de sauvegarde » intégrées aux lignes directrices. Selon M. Bourgeois, les problèmes auxquels sont confrontées la plupart des sociétés s'agissant des règles applicables aux conduites unilatérales est en grande partie dû au fait que les autorités disposent de pouvoirs discrétionnaires excessifs quant à leur façon d'appliquer la loi, générant une grande incertitude pour les sociétés. La législation sur les conduites unilatérales comprend des termes mal définis ou des critères subjectifs qui offrent aux autorités une marge excessive dans leur façon de l'appliquer. M. Bourgeois mentionne ainsi des expressions telles que « concurrence fondée sur le mérite » ou « concurrence normale », dont le sens exact reste flou. De même, des concepts tels que « verrouillage du marché » ou « marginalisation » sont polysémiques. Tous constituent des « clauses de sauvegarde » pour les autorités. Lorsque les sociétés sont confrontées à une certaine incertitude du point de vue des normes juridiques appliquées, elles tendent à adopter une approche

prudente à leur conduite commerciale. Cela pourrait avoir un coût du fait qu'elles risqueraient ainsi de refuser de s'engager dans des conduites qui pourraient pourtant s'avérer efficaces et favorables à la concurrence. Reste ainsi à savoir si les avantages d'accorder aux autorités un important pouvoir discrétionnaire pourraient contrebalancer les inconvénients qui s'ensuivraient, c'est-à-dire une certaine incertitude juridique.

Selon M. Bourgeois, la législation et la politique de la concurrence devraient essentiellement se concentrer sur la notion de position dominante. Il reconnaît l'importance de trouver la meilleure méthode pour évaluer tel ou tel comportement précis (par exemple, les remises de fidélité) mais considère qu'il est plus important de définir des critères objectifs pour déterminer quand la législation sur les conduites unilatérales doit s'appliquer. En fait, l'efficacité des lignes directrices dans ce domaine de la législation antitrust se trouverait considérablement renforcée si les sociétés, dont la plupart ne sont pas dominantes, avaient la possibilité d'être dispensées de l'application des règles et réglementations de conduite unilatérale en disposant d'une structure robuste qui leur permette de déterminer si elles sont bien en situation de domination.

2. Rôle et avantages des régimes de protection

Le Président passe au second thème de discussion, thème que différentes interventions ont déjà abordé : le recours aux régimes de protection. Pour lancer le débat, il demande aux intervenants d'exprimer leur point de vue sur l'importance de ces régimes et en particulier leur structuration.

Mme Peyre répond que, pour que les lignes directrices soient utiles et efficaces, il conviendrait qu'elles comprennent des dispositions protectrices suffisamment claires auxquelles les sociétés puissent se fier. Si l'on considère par exemple la façon dont sont traitées les remises de fidélité dans le projet de document de réflexion de la Commission sur les abus d'exclusion, le test du « concurrent aussi efficace » qui y est proposé est extrêmement complexe et dépend lui-même d'autres notions tout aussi complexes telles que celle de « part requise » et de « part commercialement viable ». Ces concepts ne sont pas clairement définis dans le projet de document de réflexion. Seule leur définition très précise permettrait aux sociétés de conseiller correctement leur force de vente.

M. Bourgeois considère que l'utilisation de régimes de protection peut être particulièrement utile, particulièrement en matière de position dominante, bien qu'ils ne suffisent pas à éliminer toute incertitude du point de vue de l'application des règles applicables aux conduites unilatérales. L'on s'accorde généralement à penser que si une société ne dispose pas d'une certaine part de marché l'on ne doit pas la considérer comme dominante. Cependant, il n'existe pas de consensus quant à savoir à quel niveau fixer ce seuil ; même si cette question était résolue, les sociétés éprouverait certainement un certain embarras et incertitude relativement à la définition exacte du marché concerné ainsi que pour le calcul précis de la part de marché qu'elles y détiennent. Ainsi, même si les régimes de protection pourraient s'avérer avantageux, il serait encore plus utile que les autorités se focalisent sur des concepts clés et définissent des normes d'application objectives, par exemple en convenant de ne réprimer les abus de position dominante collective que de façon exceptionnelle.

Mme le Professeur Bloom est également d'avis qu'un régime de protection s'appliquant à la position dominante peut assurer un niveau de certitude élevé. Elle pense cependant également qu'il est important d'en fixer le seuil à un niveau qui soit judicieux. Elle considère en effet que s'il était inférieur à 40 % il ne serait pas très indicatif pour les sociétés. Selon elle, dans l'idéal, il conviendrait de le fixer à une part de marché de 50 %. Il serait bien plus utile de se baser sur un seuil supérieur à ce qui paraîtrait souhaitable (c'est-à-dire qui permette aux autorités d'intervenir dans certaines circonstances contre des sociétés se trouvant dans les marges de tolérance) plutôt que sur un seuil trop bas. Elle considère également que l'on peut utiliser avantageusement des régimes de protection fondés sur les pratiques. Dans le cas de remises

portant sur un produit unique, il devrait exister une marge de tolérance si le prix est supérieur au coût évitable (ou coût variable moyen). De même, en ce qui concerne les ventes à perte, s'il n'existe pas de possibilité de récupération, cette pratique ne devrait pas être considérée comme préjudiciable aux consommateurs. Enfin, hors les régimes de protection classiques du domaine de la domination, les marchés de produits secondaires constituent un domaine où ils pourraient s'avérer fort utiles. La question est ici de savoir si le prix du produit secondaire se trouve limité du fait de la concurrence du produit primaire. Pourrait-il y avoir régime de protection lorsque le coût global sur la durée de vie (coût global) imposerait des contraintes suffisantes et/ou lorsque les clients souhaiteraient et pourraient opter pour des produits primaires et/ou secondaires alternatifs ; et/ou lorsqu'il est évident que le fournisseur a besoin de protéger sa réputation via un produit secondaire afin de pouvoir continuer à vendre son produit primaire ?

Le BIAC reconnaît également l'importance des régimes de protection, particulièrement dans le domaine de la domination. Si l'on examine les niveaux fixés au sein des différentes juridictions, l'on constate qu'ils atteignent parfois les 20 % ce qui n'offre pas de grande sécurité aux sociétés. Les instances devraient ainsi poursuivre le dialogue afin de réaliser une certaine convergence et éventuellement fixer un seuil de 50 %, voire davantage. Selon le BIAC, il serait également possible de créer des régimes de protection fondés sur les conduites, ce qui a d'ailleurs déjà été fait dans le domaine des ventes à perte d'un produit unique, là où la théorie économique justifierait un régime de protection du fait d'un prix supérieur au coût variable moyen. Le BIAC conclut ainsi en appelant à une plus grande convergence des approches entre juridictions, car les entreprises opèrent à une échelle mondiale et ont impérativement besoin de normes convergentes.

En ce qui concerne les régimes de protection, le représentant du Taipei chinois évoque les différentes expériences de régimes de protection dans le contexte de la domination. À Taipei, le Fair Trade Act prévoit un régime de protection pour les sociétés dont la part de marché n'atteint pas les 50 %. Cette disposition offre de nombreux avantages du point de vue de l'application de la loi du fait qu'elle permet de réduire la charge de travail des autorités et de rationaliser les processus administratifs, et ce, tout en offrant aux entreprises une meilleure prévisibilité. Ce régime de protection a également démontré son utilité dans le cas d'actions engagées par des personnes privées du fait qu'il réduit le nombre de plaintes abusives. Certains inconvénients des régimes de protection contraignants concernent le traitement de cas limites où les parties ont généralement un point de vue différent quant à la définition du marché pertinent et ne sont pas du même avis que le FTC quant au calcul de leur part de marché. Autrefois, le Taipei chinois disposait d'un système d'enregistrement des monopoles en vertu duquel, après enquête du FTC, les sociétés considérées comme dominantes étaient inscrites sur un registre spécial. Ce système a cependant été aboli du fait que ces enquêtes ex ante sur la position de la société au sein du marché ont été considérées comme redondantes. En fait, il ne dispensait pas le FTC de mener une analyse approfondie du pouvoir de marché de la société concernée au cas où il décidait de lancer une investigation à l'encontre d'une société inscrite au registre.

La délégation des États-Unis intervient et indique que, selon elle et en principe, les régimes de protection sont tout à fait souhaitables. Pour qu'une société puisse bénéficier d'un niveau de certitude lui permettant de prendre des décisions commerciales au jour le jour, il est capital que les règles juridiques s'appliquant à certains types de conduites soient bien connues au moment où elles doivent être prises. Il est donc essentiel de pouvoir préalablement connaître lesdits régimes et exigences juridiques pertinentes. En ce qui concerne le rôle des lignes directrices, il conviendrait qu'elles proposent une structure claire indiquant comment les autorités doivent analyser les faits. Cela devrait permettre aux entreprises, qui les connaissent mieux quiconque, de savoir à l'avance comment les instances pourraient traiter telle ou telle conduite. Les lignes directrices pourraient en particulier édicter des règles claires précisant quand une entreprise ne peut absolument pas être considérée comme dominante. Cela permettrait aux entreprises de prendre les meilleures décisions quant aux conduites les plus efficaces à adopter sur le marché, sans avoir à

se préoccuper des risques relatifs à l'antitrust. À l'opposé, des lignes directrices qui énuméreraient toutes les modalités selon lesquelles la loi pourrait être appliquée ne seraient d'aucune utilité.

Aux États-Unis, la plupart des affaires de conduite unilatérale sont le fait de personnes privées et, en général, les tribunaux appliquent des seuils de monopolisation très élevés. Ainsi, même dans le cas d'une société disposant d'une part de marché de 70 %, l'on se poserait encore la question de savoir si elle bénéficie d'un pouvoir de monopole ou se trouve en position dominante. Généralement, les tribunaux ne considéreront pas qu'une entreprise est en position dominante ou de pouvoir de marché lorsque sa part est inférieure à 50 %, ce qui constitue un régime de protection fiable pour les entreprises. L'expérience des États-Unis démontre également l'importance de la structure du marché et de la probabilité d'y accéder. Dans certains cas, il sera plus facile aux autorités de déterminer si la part de marché de telle ou telle entreprise peut ou non dépasser un certain seuil. Si par exemple une entreprise est très performante, sa part de marché peut être substantielle pendant un certain temps, mais dès lors que l'accès à ce marché est aisé, il ne devrait plus y avoir de risque de monopolisation. Cependant, il est tout aussi important, lorsqu'un régime de protection est établi et qu'il est également clair qu'il n'y a pas présomption de position dominante au-delà de ce seuil, d'examiner tous les facteurs pertinents pour déterminer s'il y a réellement un problème de concurrence.

Selon la délégation des États-Unis, la question de régimes de protection fondés sur les conduites implique une problématique encore plus complexe, ce qui étaye la proposition visant à opter pour un seuil relativement élevé pour les positions dominantes. La législation de ce pays autorise cependant l'existence de tels régimes. La loi sur les ventes à perte autorise par exemple deux régimes de protection différents : le prix doit être inférieur au coût dans une certaine mesure et il doit exister une possibilité réelle de récupération des pertes subies par le monopoliste qui s'est lancé dans une telle stratégie. La jurisprudence confirme également qu'il n'existe que très peu de risques du point de vue de la législation antitrust pour un détenteur de brevet qui refuserait unilatéralement d'accorder une licence et qu'il n'y en a pratiquement aucun en cas d'adoption de telle ou telle conception pour un nouveau produit qu'une entreprise souhaiterait lancer. On espère que les auditions récemment menées par les autorités des États-Unis sur la section 2 de la Loi Sherman devraient leur permettre de fournir des orientations supplémentaires et d'indiquer des voies qui permettraient de faire avancer la législation sur les types de comportements qui devraient être considérés comme ne posant pas de risques significatifs.

Le représentant de l'Allemagne considère également que les régimes de protection devraient être inclus dans les lignes directrices. Il fait cependant remarquer qu'il est peu vraisemblable que l'on parvienne à un consensus sur un seuil d'environ 40 % du fait que de nombreuses juridictions considèrent qu'il y a présomption de position dominante en dessous de ce seuil. Selon les enquêtes de l'ICN, certaines juridictions ont fixé des seuils d'à peine 10 %, d'autres des seuils atteignant les 50 %. C'est pourquoi l'Allemagne soutient toute initiative visant à une harmonisation internationale. Si la discussion s'est jusqu'ici orientée sur les régimes de protection, l'Allemagne souligne que la présomption de domination ou de pouvoir de marché est également très importante du point de vue de la certitude juridique, tant pour les entreprises que pour les organismes chargés de l'application des lois.

M. Miller est également d'avis que les régimes de protection pourraient s'avérer utiles ; il met cependant l'accent sur la nécessité d'adopter une approche souple aux conduites unilatérales, étant donné la nature dynamique du monde des affaires. Même si les organismes antitrust s'entendaient sur un régime de protection commun relativement à la monopolisation, encore faudrait-il définir le marché pertinent, une question qui pourrait donner lieu à de nombreuses discussions et recherches. Le monde des affaires est dynamique et évolue sans cesse, qu'il s'agisse du droit de propriété intellectuelle, des méthodes commerciales et de la conception ou de la tarification des produits. La concurrence l'est tout autant et il est donc difficile de faire en sorte que les lignes directrices et les régimes de protection suivent le même rythme. Aux États-Unis, ce qui se rapproche le plus d'un régime de protection est la réglementation

s'appliquant à la fixation de prix d'éviction pour produit unique, qui stipule que les entreprises qui pratiquent un prix dépassant le coût dans une certaine mesure, sans réelle possibilité de récupération, ne seront exposées à aucune sanction. Le fondement de la politique de ce pays relativement aux ventes à perte est que, fondamentalement, les lignes directrices, les normes et la jurisprudence sont à la fois trop et insuffisamment exhaustives. Il est impossible de définir toutes les situations auxquelles une entreprise sera confrontée et de dire par avance ce qui serait néfaste et ce qui ne le serait pas.

Le représentant du Royaume-Uni est également d'avis qu'il conviendrait que les régimes de protection offrent une certitude suffisante. Ils ne pourront cependant pas offrir aux entreprises une certitude absolue sur la façon dont la loi sera appliquée à l'avenir quant à telle ou telle pratique commerciale. Comme les marchés évoluent rapidement, il est très difficile de rédiger des lignes directrices détaillées. Les autorités devraient plutôt s'efforcer de fournir aux entreprises une série de lignes directrices basées sur des principes établissant clairement la finalité de la loi et fixant une structure analytique claire pour son application. Du point de vue des inconvénients des régimes de protection, le représentant du Royaume-Uni est également d'avis que ceux qui sont fondés sur la part de marché laissent en suspens la question du marché pertinent et de sa définition. En ce qui concerne les régimes de protection basés sur les coûts, il faudrait prendre en compte la difficulté du calcul des coûts effectifs d'une entreprise et la complexité de l'affectation des coûts communs et des coûts partagés sur certains marchés très complexes. Le délégué du Royaume-Uni conclut qu'il est impossible d'avoir un régime de protection « parfaitement étanche », ce qui serait une contradiction en soi, mais qu'il serait extrêmement utile aux entreprises de pouvoir disposer d'un ensemble de principes et d'objectifs politiques précis, assortis d'une structure analytique claire pour l'application de la législation sur les abus de position dominante ainsi que de quelques régimes de protection raisonnables.

Le représentant du Canada considère également que les lignes directrices relatives aux conduites unilatérales doivent être fondées sur des principes et fournir des recommandations d'ordre général. Il considère cependant qu'il serait possible dans certains cas d'offrir au monde des affaires des recommandations extrêmement ciblées afin de répondre à certaines préoccupations plus particulières. Tel a par exemple été le cas du secteur de l'aviation qui pâtissait d'une forte incertitude juridique et qui se demandait s'il était possible à une compagnie dominante de réduire ses prix pour s'aligner sur ceux de la concurrence. Saisi d'un certain nombre de plaintes, le Bureau de la concurrence du Canada a publié un communiqué de presse indiquant qu'il n'envisageait aucune action en justice dans la mesure où le transporteur dominant réduisait ses prix pour s'aligner sur les offres concurrentes sans porter atteinte à ses concurrents et dans la mesure où cette stratégie n'était pas accompagnée d'une expansion de la capacité des sièges, ce qui apparaîtrait comme une mesure anticoncurrentielle. Du fait de cet avis, le Bureau a pu répondre à une demande précise du secteur et fournir des éclaircissements sur l'application de sa politique.

3. Incertitudes relatives aux normes juridiques de fond

Le Président passe enfin au dernier sujet de discussion de la table ronde : les normes juridiques de fond s'appliquant aux conduites unilatérales. En soi, elles peuvent effectivement sembler claires mais reste à savoir si le monde des affaires considère que certaines d'entre elles peuvent nuire à des activités pourtant favorables à la concurrence et appauvrir ainsi le consommateur. Si tel est le cas, desquelles s'agit-il et comment les modifier ?

Mme le Professeur Bloom donne comme exemple la position dominante. Dans toutes les juridictions où le seuil du régime de protection a été fixé à 10 %, ce qui est très bas, la présomption de domination est sans doute claire mais doit cependant être modifiée. De même, les tests fondés sur les coûts que pratiquent certaines juridictions (tests de remise portant sur un produit unique et tests de prix d'éviction) sont structurés de façon à faciliter les actions répressives des autorités mais risquent de nuire au bien-être des consommateurs. Dans ces deux cas, il conviendrait que les tests soient calés sur le coût moyen évitable ou

sur le coût variable moyen. Quant à la question de la récupération, si une société n'est pas en mesure de récupérer ses pertes à court terme du fait de sa stratégie d'éviction, la loi se doit de reconnaître que les consommateurs ne sont pas pénalisés. Aujourd'hui, selon les tribunaux, cela ne constitue pas une exigence de la législation de l'UE.

Elle aborde ensuite deux domaines qui jusqu'ici n'ont pas encore fait l'objet de discussions. Le premier concerne le « chalandage d'abus » ('abuse shopping') et demande explicitement aux autorités de ne pas s'y livrer. En tant qu'économiste, elle a remarqué qu'il était possible de classer plusieurs types d'abus sous différentes dénominations juridiques qui ont en réalité les mêmes effets économiques. Il est cependant plus facile de satisfaire à des tests juridiques dans certains cas que dans d'autres. Elle donne ainsi l'exemple de la compression des marges, qui peut être considérée soit comme une compression de l'écart de marge, soit comme une stratégie d'éviction, soit encore comme un refus de vente. Pour que l'administration puisse prouver ses allégations, elle devra disposer de normes plus strictes en ce qui concerne ces deux derniers cas. Il serait extrêmement bénéfique aux sociétés que les autorités appliquent les mêmes normes lorsque se produisent les mêmes effets/dommages au sein du marché. Enfin, le Professeur Bloom fait état de la nécessité d'évoluer vers une plus grande convergence sur les normes applicables, tant à l'échelle internationale qu'à celle du Réseau européen de la concurrence (REC). En dépit des progrès méritoires réalisés dans ce domaine précis de la législation antitrust, il convient d'aller encore plus loin. Parfois en effet certaines administrations faisant partie du REC ont appliqué des normes différentes de celles de la CE.

D'après M. Bourgeois, selon la législation européenne de la concurrence, différentes normes ont été appliquées à des situations pourtant similaires de refus d'entretenir des relations commerciales. La législation européenne de la concurrence établit une distinction entre la résiliation d'un contrat de vente existant et le refus d'établir une nouvelle relation. Ce n'est que dans ce second cas qu'il faut prouver que le produit en question est indispensable. Par contre, lorsqu'il est mis fin à une relation contractuelle, la législation européenne n'exige pas que soit démontré que le produit en question est indispensable. Selon M. Bourgeois, cette distinction ne se justifie pas et pourrait avoir des effets négatifs si les entreprises dominantes décidaient de toute façon de ne pas pénétrer ce marché, ce qui pourrait être le cas si elles considéraient ne pas disposer d'assez de flexibilité pour pouvoir mettre un terme à la relation du fait des différentes normes juridiques qui s'appliqueraient une fois celle-ci établie.

Le BIAC intervient pour signaler qu'il n'existe actuellement que peu de normes claires et que ce manque de clarté relativement à un certain nombre de pratiques commerciales peut gravement nuire au bien-être du consommateur. M. Bourgeois met l'accent sur les risques liés au refus d'entretenir des relations commerciales, particulièrement lorsque les droits de propriété intellectuelle sont concernés, tout en précisant qu'il existe d'autres questions en suspens. La législation antitrust des États-Unis contient encore des imprécisions sur la façon de traiter les tarifications multi-produits, les tarifications groupées et les remises de fidélité. Ces incertitudes relatives aux normes juridiques ne jouent pas en faveur des entreprises jouissant d'une position dominante et souhaitant s'engager dans de telles pratiques, pratiques qui, dans la plupart des cas, profitent aux consommateurs sous la forme de prix réduits. Enfin, une autre question lourde de sens est de savoir si les monopolistes peuvent imposer un prix de monopole.

M. Miller fait part de son accord avec la liste dressée le Professeur Bloom des domaines souffrant d'importantes incertitudes ainsi qu'avec les commentaires de la BIAC au sujet de la jurisprudence des États-Unis dans les domaines des accords d'exclusivité, de la conception des produits, des offres groupées et du refus d'entretenir des relations commerciales. En tant que juriste d'entreprise, il espère qu'un jour on saura lui indiquer précisément quelles sont les normes applicables, de façon à pouvoir correctement conseiller son entreprise. Dans cette attente, des activités telles que les auditions conjointes ministère de la Justice/FTC constituent de précieuses contributions pour rendre la législation plus claire. M. Miller réitère

la nécessité de revenir aux objectifs sous-jacents de la législation applicable aux conduites unilatérales afin de contribuer à définir des lignes directrices plus claires au bénéfice du monde des affaires.

Le Président clôture la table ronde en remerciant les délégués et les membres du groupe d'experts pour leur participation active qui a permis de mener d'excellentes discussions sur ce qui constitue un domaine très complexe de la législation antitrust.