

## ABUSE OF A DOMINANT POSITION – ARTICLE 82 EC & SECTION 5, IRISH COMPETITION ACT 2002.

### Scope

The aim of this lecture is to explore the scope and purpose of Article 82 EC as to what is meant by dominance and the limitations placed on a dominant firm by competition law. It is useful in considering Article 82 to note the similarities that section 5 of the Irish Competition Act shares with it.

### Reading

1. Read the **text of Article 82 EC** and compare it with section 5 Competition Act 2002.
2. For substantive content **read chapter 8, *Abuse of Dominance***, in KENNEDY, CAHILL & POWER, EUROPEAN LAW (2006). This chapter provides an excellent framework for discussing the constituent elements of Article 82.
3. **Caselaw:** There is just one case for consideration today unlike in relation to Article 81 yesterday. In advance of class **please read *UBC v Commission* [1978] 1 CMLR 429** – this case is really the desert island case when it comes to Article 82. It has a little bit of everything thrown in.

### Discussion Questions

1. What do we mean by a dominant position?
2. What elements are shared by Article 81 and 82? What new concepts does Article 82 introduce today?
3. What markets are crucial to the definition of dominance? Why?
4. What factors are taken into consideration in calculating dominance? How does the Court approach these different factors? Is there a hierarchy?
5. What is the effect of being classed as a dominant undertaking?
6. What constitutes an abuse of dominance?
7. Why is there no equivalent to Article 81(3) in Article 82? Is this defensible?
8. What is meant by the term “objective justification”?

9. What types of action on the part of a dominant undertaking would be acceptable on the grounds of objective justification?
10. What approach has the court taken to dominant undertakings' activities regarding:
- a) Refusals to supply;
  - b) Price discrimination;
  - c) Discount and rebate regimes;
  - d) Predatory pricing

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## **Article 82 of the EC Treaty (ex Article 86)**

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Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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**ABUSE OF A DOMINANT POSITION—ARTICLE 82**

**8.1 Introduction**

Article 82 of the EC Treaty provides as follows:

*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.*

**8.2 Articles 81 and 82 Compared**

**8.2.1 DIFFERENCES**

From the text of Art 82, it is apparent that it is designed to deal with very different behaviour to that proscribed by Art 81. Article 81 prohibits anti-competitive arrangements entered into between at least two undertakings, whereas Art 82 prohibits a very different type of behaviour: the abuse of a dominant position.

The implications of this distinction are best illustrated in three ways.

First, Art 82 requires that the accused undertaking must not only occupy a ‘dominant position’ in the relevant market, but furthermore, the undertaking must have abused that position. Article 81 on the other hand, does not require that a ‘dominant position’ be established or that an ‘abuse’ be established.

Secondly, Art 82 does not contain an analogous version of Art 81(3). Article 81(3) allows for arrangements that appear to be anti-competitive contrary to Art 81(1) to nevertheless be exempted from the application of the prohibition in Art 81(1), where it can be demonstrated that the beneficial aspects flowing from the undertakings’ arrangements outweigh the anti-competitive aspects. Article 82 has no such equivalent exemption provision: where an abuse of a dominant position is established, it is prohibited, with no possibility of exemption.

Thirdly, a single undertaking’s unilateral behaviour is sufficient to attract the attention of the prohibition in Art 82 (indeed this is almost invariably the position), whereas at least two undertakings are required to be involved before Art 81 can be applicable. In this regard, however, it is noteworthy that Art 82 does refer to the behaviour of ‘one or more undertakings’. In Cases T-68, 77 and 78/89 *Societa Italiana Vetro & Ors v Commission* [1992] ECR II-1403, the CFI accepted in principle the argument that the phrase ‘one or more undertakings’ in Art 82 implied that there could be more than one undertaking occupying a collective dominant position. The CFI indicated that in order for this to be established, it would have to be demonstrated that there were links existing between the accused undertakings, which allowed the undertakings to act independently of their competitors, customers or consumers. As an example it indicated that links could be constituted by economic links (eg, such as agreements or licences), which gave the undertakings involved a technological lead over their other competitors. However, this was not actually found in the judgment itself because the CFI found that the facts presented before it did not merit a finding of collective dominance. In this regard, the CFI made it clear that the Commission cannot use its findings in an Art 81 investigation of the undertakings in order to support a conclusion that collective dominance exists also. The CFI requires the Commission to carry out a full Art 82 analysis in order for collective dominance to be established. In a number of more recent judgments in 2000, the CFI and the ECJ have elaborated further on the notion of collective

dominance, and arguably have gone further than the CFI did in its 1992 judgment. This is considered further below when dominance arises for consideration.

### 8.2.2 SIMILARITIES

There are some similarities between the two articles.

First, both Art 81(1) and Art 82 are capable of being invoked in Member State courts, as they are capable of being directly effective. (It is not possible for a Member State court to grant an exemption under Art 81(3) but if there is an exemption in existence in respect of an arrangement, then a litigant may argue that the arrangement is exempted and, therefore, enforceable.)

Secondly, the legal consequences of breaching either article are similar: the proscribed behaviour is void (save where an Art 81(3) exemption is obtained in respect of Art 81(1) breaches).

Thirdly, both arts attach to the behaviour of ‘undertakings’, which the ECJ has defined to mean any entity, human or corporate, that is commercially active.

Fourthly, the non-exhaustive lists of different types of anti-competitive behaviour listed in both articles are remarkably similar (although the circumstances in which they will occur will be very different). For example, before an Art 81 action can be pursued against two (or more) undertakings accused of colluding to raise their product prices, it must first be shown that they agreed to collude in price-fixing whereas, under Art 82, the accused undertaking will have raised its prices of its own accord without colluding with any other party. Both types of behaviour have the same end result (prices rise), but the circumstances in which the price rises occur are very different. In the Art 81 situation, there has been collusion between at least two undertakings, whereas in the Art 82 situation there has only been unilateral action by a sole undertaking (unless, of course, a collective dominance scenario exists). Nevertheless, both types of behaviour can be very detrimental to the market for the products or services in question.

### 8.3 Essential Elements of Article 82

The critical elements of Art 82, therefore, are:

- (a) that the accused undertaking has been found to occupy a dominant position (in rare circumstances, the dominant position can be occupied by two or more undertakings, but this is not common);
- (b) that the accused undertaking has been found to have abused its dominant position;
- (c) in a market that has been defined as including certain products or services in a defined geographical area;
- (d) where such geographical area constitutes all of, or at least a substantial part of, the common market; and
- (e) the abuse has an adverse effect on trade between Member States.

### 8.4 Relevant Markets

In order for an undertaking to fall foul of the prohibition in Art 82, it must first be demonstrated that the undertaking occupies a dominant position in a defined product and geographic market. According to the ECJ in *Case 27/76 United Brands v European Commission* [1978] ECR 207, a dominant undertaking is an undertaking that can (because of its large market power in the relevant market) determine its course of action in the market for long periods of time largely free from any constraints that its competitors, customers or consumers might place on its freedom of action.

In order to determine whether an undertaking occupies a position of dominance, relevant markets must be correctly defined. Once the results of this analysis are known, those investigating (or resisting) the alleged Art 82 breach will have a fair idea of what is the extent of the market power of the accused undertaking. The two principal relevant markets that have to be assessed are: (a) the relevant product market and (b) the relevant geographical market. (This analysis set out in the context of Art 82 applies equally to Art 81.)

#### 8.4.1 RELEVANT PRODUCT MARKET

##### 8.4.1.1 Contrasting approaches

In defining the relevant product market, at issue is the ascertaining of what other products can be said to be substitutable with the accused undertaking’s product. Substitutability may be viewed from the

perspective of both demand (ie the consumer) and supply (ie could a supplier easily switch production from some other product to produce a product that would be substitutable with the accused undertaking's product?). In other words, do customers or consumers regard any other undertakings' products to be competing with the accused undertaking's product? Similarly, could a supplier easily switch production from one product to another because there is now a possible demand for it? Once this analysis is complete, a view will be formed on whether the accused undertaking dominates the market for a particular product, or alternatively whether the accused undertaking has substantial competitors whose products compete with the accused undertaking's products.

In attempting to establish the relevant product market definition, the strategy of (a) the Commission (or a private complainant taking an Art 82 action in a national court), and (b) that of the accused undertaking, will be diametrically opposed. The Commission will be attempting to exclude as many other products from the defined market as possible. The fewer other products that form the relevant product market, the greater the likelihood that the accused undertaking will be deemed dominant. Conversely, the accused undertaking will be seeking to have as many other products as possible included in the relevant product market definition, as that will reduce the likelihood that the accused undertaking will be found to be dominant.

The Commission's traditional general approach in defining relevant product markets appears to be based on primarily assessing demand-side factors in order to assess what products customers or consumers of the accused undertaking regard as being interchangeable with the accused undertaking's products. In general, the Commission does not devote as much attention to assessing supply-side factors as part of this analysis, though we will note below one or two notable situations where this was remarked upon by the ECJ.

In 1997, the Commission published a Notice on Market Definition (1997) OJ C 372/5 which heralded a change in its approach to relevant product market. In the Notice, the Commission indicated that, when called upon to define relevant product markets, it will no longer regard as being definitive considerations such as whether a product has similar objective characteristics or could be put to the same intended use as the dominant undertaking. The Commission has indicated that it regards such an approach as no longer sufficient by itself, and it has indicated that it will additionally look to see if there is harder evidence to identify or exclude possible demand substitutes. For example, it intends to assess items such as consumer surveys, barriers to substitution, evidence of demand switching in response to price changes in the recent past, etc. However, while this is all very commendable, it remains to be seen whether the Commission will be able to consistently adopt such an approach, as such evidence may neither exist, nor be easy to gather or quantify in many cases. In an attempt to further demonstrate that its approach is becoming more evidence based than principle driven, the Commission is striving to introduce a more economics-based approach when assessing demand- and supply-side factors. Particularly, it intends to use the 'small but significant non-transitory increase in prices' test in order to see if a hypothetical dominant player would find it profitable or unprofitable to increase prices slightly. If the answer is that the dominant player would not find a permanent price rise of between 5–10 per cent profitable because it would result in a loss of sales to competitors, then other substitutable products will have to be included in the relevant market definition.

Whether the Commission succeeds in changing its methodology for defining relevant product markets remains to be seen, particularly as the Commission Notice is not a legally binding document. Furthermore, the Commission cannot overturn the principles laid down by the ECJ over the years.

#### **8.4.1.2 Relevant product market definition: primarily a demand-side analysis**

##### ***Michelin (Netherlands) v Commission (1983)***

According to the ECJ in Case 6/72 *Europemballage Corporation & the Continental Can Company v Commission* [1973] ECR 215, if products are only interchangeable to a limited extent, then they are not part of the relevant product market. In Case 322/81 *Michelin (Netherlands) v Commission* [1983] ECR 3461 (para 48), the ECJ noted that a particular product is not to be included in the relevant product market just because a particular product is partially interchangeable with the accused undertaking's product (such that there is some competitive interaction between them). Here the ECJ was indicating that, merely because there is a limited measure of competition between a product and the accused undertaking's product, this is not sufficient to merit the inclusion of that product in the relevant product market definition. It must further be satisfied that the product's presence appreciably influences the accused undertaking in the way that it behaves. In practice, the ECJ and the Commission require a high degree of interchangeability before they will admit another undertaking's product into the relevant product market. Reference to the ECJ's judgments will bear out this conclusion.

In *Michelin*, the ECJ had to consider whether the Commission was correct in excluding three types of tyre product from the defined relevant product market: the market for heavy vehicle replacement tyres.

First, it had to be determined whether original equipment tyres (tyres Michelin sold to vehicle manufacturers to put on new cars on the factory assembly line) formed part of the relevant product market. The ECJ found that the Commission had correctly excluded the original equipment car tyres from the relevant product market definition as it found that 'the structure of demand for such tyres characterised by distinct orders from car manufacturers' meant that 'competition in this sphere is in fact governed by completely different factors and rules'.

Second, the ECJ had to consider whether replacement car tyres formed part of the relevant product market. It held that such tyres were excluded from the relevant market, as interchangeability between car tyres and truck tyres was non-existent, as obviously they cannot be put to the same use. Furthermore, the ECJ pointed out that the 'structure of demand' for each of these groups of products was different. Purchasers of heavy vehicle tyres are trade users who have an on-going and specialised relationship with the tyre dealer, whereas car tyre users purchase tyres only infrequently and do not require a specialised dedicated service from their dealer.

Third, the ECJ had to consider whether retreaded truck tyres (repaired tyres) formed part of the relevant product market. While the ECJ found that they present 'partial competition' as they were 'partially interchangeable' with replacement tyres, nevertheless it excluded them from the relevant product market definition because users and manufacturers do not regard retreads as interchangeable, as they do not regard them as an equivalent product to a new replacement truck tyre which is regarded as a superior and safer product, and the presence of retreads on the market did not affect the ability of the dominant undertaking (Michelin) to exercise its substantial market power in the new replacement truck tyre market.

*Michelin* is an interesting example of how a product can be excluded from the relevant product market definition either because the product has different objective characteristics, or because the requirements of the category of consumers who use the product are different to other consumer categories, or because the product (although similar) is not regarded by consumers as sufficiently interchangeable with the accused undertaking's product and, therefore, its presence on the market does not constrain the accused undertaking exercising its market power *vis-à-vis* its own product.

#### ***United Brands (1978)***

Another leading decision is Case 27/76 *United Brands v European Commission* [1978] ECR 207. Under consideration in this case was whether the relevant product market was the banana market or the wider fresh fruit market. In attempting to define the market as the wider fresh fruit market, United Brands argued that the price of bananas fell somewhat in the second half of the year when other fruits became seasonally available. According to United Brands, this indicated that there was a competitive market in operation between the banana and other fruits. However, both the ECJ and the Commission rejected this argument as they found that the price of bananas fell only marginally in response to the availability of seasonal fruits. The ECJ found that while banana sales did fall somewhat, this was 'only for a limited period of time and to a very limited extent from the point of view of substitutability'. While significant cross-price-elasticity is a classic indicator of whether a product forms part of the relevant product market or not (in other words, will the price of the accused undertaking's product be significantly affected should the price of another product on the market rise or fall?), the ECJ was not prepared to make such a finding in *United Brands* on the facts presented. Also, the ECJ pointed out that when the other fruits became seasonally available, volumes of banana imports could be adjusted by the accused undertaking, meaning that 'the conditions of competition are extremely limited and that its price adapts without any serious difficulties to the situation where supplies of fruit are plentiful'. Furthermore, the ECJ and the Commission found that there were distinct categories of consumer for whom the banana was the only fruit they could consume, and that consequently the presence of these captive consumer categories eliminated other fruits from the relevant product market. In this regard, it was found that very old, very young and very ill consumers did not readily accept other fruits as a substitute for bananas. Consequently, even though other fruits might be present on the market at all times, for such consumer groups interchangeability was not an option.

***Hoffman La Roche v Commission (1979)***

Another leading case on the issue of relevant product market definition is Case 81/76 *Hoffman La Roche v Commission* [1979] ECR 461, where the Commission defined the relevant product market as being composed of several different separate relevant product markets. Each vitamin produced by Roche fell into a separate individual relevant product market. This was because each vitamin is put to different uses, and therefore different vitamins were not to any significant extent capable of interchangeable use among each other. Another issue that arose was whether any of the distinct separate vitamin product markets could have non-vitamins included in them, such as anti-oxidising agents. As well as being used to improve health, vitamins can also be used as additives in food products as anti-oxidants. The Commission excluded synthetically produced anti-oxidants from inclusion in the individual separate vitamin product markets, even though in some instances some of the vitamins (eg vitamins C and E) were capable of being interchangeable with certain synthetic anti-oxidants or food product additives. The ECJ found the Commission was correct to exclude these synthetic agents from the relevant separate vitamin product markets as the ECJ found that while the vitamins were interchangeable with these agents for some uses, they were not for others, and hence they 'belong to separate markets which may present specific features' and this 'does not justify a finding ... that such a product along with all others ... which can replace it regarding various uses and with which it may compete, forms one single market'. The ECJ concluded by stating that the 'concept of relevant market implies there must be a sufficient degree of interchangeability'. Consequently, the synthetic agents were not deemed to be part of the relevant separate vitamin product markets, as they were only substitutable with certain vitamins, and even then, only to a limited degree.

**8.4.1.3 Relevant product market definition: supply-side analysis**

As noted above at the commencement of this section, the Commission, when determining relevant product markets, usually devotes most of its effort to carrying out a demand-side analysis (ie looking at what consumers regard as sufficiently interchangeable or substitutable with the accused undertaking's product) and does not usually assess relevant product markets from a supply-side perspective. However, two instances where this did arise were the *Michelin* investigation and the *Continental Can* investigation.

In *Michelin*, considered above, the Commission had considered whether a car tyre manufacturer could become an entrant (and therefore a competitor) in the truck tyre market. In other words, could a car tyre manufacturer be reasonably expected to adapt an existing plant to produce a truck tyre product and hence become a competitor against Michelin? The Commission found that this was not a possibility as totally different production techniques and plant requirements were involved in truck tyre production as well as considerable investment to modify an existing car tyre plant in order to use it for truck tyre production (or vice versa). Consequently, no supply-side substitution was likely from any tyre plant not already engaged in truck tyre production.

In Case 6/72 *Continental Can v Commission* [1973] ECR 215, the failure of the Commission to carry out a proper supply-side analysis was deemed fatal to the Commission's investigation. The ECJ annulled the Commission's definition of the relevant product market (defined as the market for manufacturing light metal containers for fish or meat products) because the Commission did not consider whether a meat or fish product producer could commence producing their own containers (and hence become a competitor in the market). Furthermore, the ECJ reprimanded the Commission for failing to consider whether manufacturers of tin containers for vegetable or fruit products could easily and inexpensively adapt their production processes in order to produce metal containers suitable for holding meat or fish products.

However, in general, the Commission does not engage in a supply-side analysis when defining relevant product markets in Art 82 investigations. The ECJ is prepared to overlook this provided that the Commission does consider the possibility of substitutes at some point in its overall analysis. In this regard, the ECJ will normally be satisfied as long as the Commission adverts to the possibility of substitutes at the later stage of its investigation when assessing the issue of dominance and market power. Economists, on the other hand, take a very different approach, arguing that it is impossible to define relevant product markets without first defining both demand- and supply-side elements.

**8.4.2 RELEVANT GEOGRAPHIC MARKET****8.4.2.1 Generally**

The second of the relevant markets, which has to be assessed, is the relevant geographical market.

In *United Brands*, the ECJ elaborated upon the concept of the relevant geographic market, stating that it is the area where the dominant undertaking, 'may be able to engage in abuses which hinder effective competition and this is an area where the objective conditions of competition applying to the product in question must be the same for all traders'.

Applying this somewhat theoretical explanation to the facts of the case before it, the ECJ determined that the Commission was correct in defining the relevant geographic market as including Germany, Denmark, Ireland and the three Benelux countries. The remaining three Member States, France, Italy and Britain, were excluded even though United Brands had substantial operations in these three latter jurisdictions (there were only nine Member States at the time and United Brands operated in all of them). The ECJ agreed with the Commission's assessment that the objective conditions of competition were not the same for all traders in those three States because those jurisdictions operated preferential tariff regimes for banana imports originating in their respective former colonies. Consequently, it could not be said that the objective conditions of competition were the same for all banana importers into those three countries. As for the remaining six Member States where United Brands operated, United Brands attempted to argue that because some of them operated different banana import tariff regimes (eg zero tariff on imports into Germany compared to 20 per cent tariff in the Benelux countries), the relevant geographic market could not include all six remaining States. However, this was rejected by the ECJ, which stated that the objective conditions of competition in each respective State were the same for all traders, and hence there was no valid reason to exclude any of them from the relevant geographic market definition.

It is not necessary that the relevant geographic market extend beyond the territory of a single Member State. *Michelin*, considered above, presents an example of a situation where the relevant geographic market was confined to the territory of just one State. Michelin had argued that as it operated on a global basis, the relevant geographic market should include more than just the Netherlands territory where its Dutch subsidiary, the subject of the Art 82 investigation, operated. Rejecting Michelin's argument, the Commission and the ECJ found that the relevant geographic market was confined to the Netherlands because the Dutch subsidiary only sold tyres to customers in the Netherlands and the customers did not seek supplies outside the Netherlands. Michelin's competitors operated on a similar basis.

#### 8.4.2.2 Substantial part of the common market

The relevant geographic market must constitute either the common market or at least a 'substantial part' of it. This jurisdictional requirement of Art 82 is based on the rationale that if the accused undertaking's behaviour affects no more than a purely local market with no inter-State consequences or effects, then it should not properly be the concern of Art 82. Article 82 is concerned only with abuses of dominance that affect trade in, at least, a substantial part of the common market. Abuses of dominance that merely affect a non-substantial part of the common market are best regulated by the application of local national competition laws.

Neither the ECJ nor the Commission have elucidated an elaborate test for defining what is a substantial part of the common market. This is probably due to the fact that there is a reluctance to elaborate a definitive test, which might have the unintended consequence of excluding from the jurisdiction of Art 82 the activities of an undertaking, which, although affecting a relatively small geographical area, might nevertheless have tremendous implications for inter-State trade. An analysis of the case law would tend to support this view.

For example, in *Michelin* (see above), the Commission found that the Netherlands constituted a substantial part of the common market. In Case 40/73 *Suiker-Unie v Commission* [1975] ECR 1663, the Commission found that the southern regions of Germany constituted a substantial part of the common market. In Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* [1991] ECR 5889, the ECJ held that the port of Genoa, even though a small area by itself, nevertheless constituted a substantial part of the common market, as it was the only main seaport serving the north of Italy and the south of Germany. In *B&I Line plc/Sealink* [1992] 5 CMLR 255, the Commission found the port of Holyhead to be a substantial part of the common market because it provides the main sealink between the capital city of one Member State (Ireland) and Great Britain.

### 8.5 Affect Trade Between Member States

Before Art 82 can apply, the activities of the accused undertaking must affect trade between Member States. It is clear from the case law that such an effect need not be proven as a matter of fact—the

fact that the behaviour has the potential to affect inter-State trade, will cause this criterion to be satisfied. In Cases C-241 & 242/91 *Radio Telefis Eireann & Independent Television Publications v Commission* [1995] ECR I-743, the ECJ stated:

‘In order to satisfy the condition that trade between Member States must be affected, it is not necessary that the conduct in question should in fact have substantially affected that trade. It is sufficient to establish that the conduct is capable of having such an effect.’

From analysing the Art 82 case law of the ECJ and the Commission, it can be observed that where the relevant geographic market extends to the territory of at least two Member States, then an effect on trade between Member States will be assumed without further analysis. However, in those cases where the relevant geographic market is confined to either the whole or part of the territory of a single Member State, then whether there is an effect on trade between Member States will deserve closer analysis. For example, in *Michelin*, considered at 8.4 above, the ECJ indicated that although the relevant geographic market was merely the Netherlands (as the trade in tyres was purely national only), nevertheless there was an effect on trade between Member States. Michelin’s Dutch subsidiary’s behaviour had the effect of partitioning the Netherlands off from penetration by tyre suppliers based in other Member States. Cases 6 & 7/73 *Commercial Solvents v Zoja* [1974] ECR 223 presents another example of the ECJ’s approach. In this judgment, Commercial Solvents was accused of abusing its dominant position in refusing to supply a customer, Zoja, with raw materials essential for the production of Zoja’s end product. Commercial Solvents argued that because Zoja exported most of its product to markets outside the common market area, there was no effect on trade between Member States. The ECJ did not accede to this argument because once the elimination of a competitor may result from the dominant undertaking’s abuse, the ECJ takes the view that the structure of competition in the common market will be affected and so it will not disclaim jurisdiction merely because there does not seem to be a significant effect on trade between Member States.

A rare example of where the ECJ disclaimed jurisdiction on the basis that the behaviour complained of did not affect trade between Member States is Case 22/78 *Hugin Kassaregister v Commission* [1979] ECR 1829. The ECJ held that although Hugin’s termination of supplies of essential spare parts to its customer Liptons might otherwise be abusive, Art 82 jurisdiction was not established, as there was no effect on trade between Member States, because Liptons only operated in the London area. This is an interesting decision, because while the Commission had held that London could constitute a ‘substantial part’ of the common market, the ECJ nevertheless annulled the Commission’s findings against Hugin, as the ECJ was not satisfied that there was any effect on trade between Member States.

## 8.6 Dominance

### 8.6.1 DEFINITION

The classic definition of dominance was given in *United Brands* where the ECJ stated that a dominant position is:

‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative’.

Thus, it is clear that the central hallmark of dominance is that the accused undertaking has the ability to act in a manner whereby its freedom of action is largely unrestrained by the activities of its competitors. It is also clear that it is not required that all competition be eliminated from the particular market before the accused undertaking will be deemed ‘dominant’. In *Hoffman La Roche* the ECJ indicated that dominance does not preclude some competition. The notion of dominance implies that the dominant undertaking either has the ability to determine, or at least have an appreciable influence over, the conditions under which the relevant market will develop. This had also been adverted to by the ECJ in *United Brands* where the ECJ stated ‘an undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position’.

### 8.6.2 COLLECTIVE DOMINANCE

In the first 35 years of EC Art 82 jurisprudence, the Court and Commission were presented with evaluating instances of single-firm dominance, even though Art 82 prohibits the abuse of dominance by ‘one or more undertakings.’ However, the ECJ has now recognised that two or more undertakings can be collectively dominant within the meaning of Art 82, and consequently their behaviour prohibited as an abuse of collective dominance.

When considering this recent Art 82 case law, it is interesting to consider the Commission, CFI and ECJ pronouncements on collective dominance in the context of the Merger Regulation, where the notion of collective dominance appears longer established, though the various pronouncements on it seem not entirely consistent from case to case. Notwithstanding, developments in the mergers area have undoubtedly had an influence on the ECJ's acceptance of the notion in the context of Art 82.

In the early 1990s the Commission had recognised the notion of collective dominance under the Merger Regulation in its Decision in Case IV/M 190 *Nestle/Perrier* (1992) OJ L356/1. Then, in Case T-102/96 *Gencor v Commission* [1999] ECR II-753, the CFI recognised it, and in Joined Cases C-68/94 and 30-95 *France & Ors v Commission* [1998] ECR I-1375, the ECJ acknowledged that the notion of collective dominance was within the contemplation of the Merger Regulation. The aforementioned three institutions' definitions of collective dominance are not consistent in every respect. They vary from the Commission view in *Nestle/Perrier* that where the structure of a market is oligopolistic in nature, there is a risk that following a merger, a small number of large players may act in a collectively dominant fashion; to the ECJ view in *France and Oths. v Commission*, which found that the oligopoly in that case was insufficiently close to suggest that the parties would act in a collectively dominant fashion, and the ECJ seemed to require that economic links or other factors so connect the parties before a conclusion of collective dominance could be made; to the CFI view set out in *Gencor v Commission*, which seems to require that interdependence between a small number of large players in an oligopolistic market can, without more, lead to the view that a collectively dominant position may exist.

In the Art 82 field itself, the first CFI judgment which accepted that there could be a collective dominant position under Art 82 was the judgment in the so-called *Italian Flat Glass* judgment (Case T-68, 77 and 78/89 *Societa Italiana Vetro* [1992] ECR II-1403) where the CFI intimated that independent undertakings, where united by economic links (such as licences), could hold a collective dominant position in a relevant market.

In 2000, in Case C-385 and 396/96P *Compagnie Maritime Belge Transports SA and Oths. v Commission* [2000] ECR II-1201 ('CEWAL'), the ECJ recognised that a position of collective dominance can arise under Art 82 where two or more independent undertakings present themselves as a collective entity on a particular market from an economic viewpoint, or act as such. The ECJ found that agreements or concerted practices between the undertakings are not necessary prerequisites to the making such a finding. However, where they do exist, then a finding of collective dominance can be made where the manner in which the undertakings implement the agreements or practices lead to a conclusion that, from an economic standpoint, they are acting as if they are a collective entity. Furthermore, the ECJ made it clear that, even where no agreements or concerted practices can be demonstrated to exist, nevertheless, a finding of collective dominance is not precluded if the economic result of the undertakings' behaviour is to act as a collectively dominant entity. The ECJ suggested that the structure of the market might lead to such a conclusion. In other words, the notion of an oligopolistic market, where the parties are necessarily interdependent, would be an example of a situation where a finding of collective dominance could be made in circumstances where it is the structure of the particular market that constitutes the connecting factor *inter partes* that induces them to act in a collectively dominant fashion. However, the Court also made it clear that an economic assessment of the relevant market has to support such a conclusion: it is not a *per se* presumption that undertakings will be found collectively dominant merely because a market is oligopolistic.

It is thought that this ECJ judgment goes much further than the CFI did in *Italian Flat Glass*, because it could include a finding of collective dominance not only where there are economic links, but furthermore, where there is an oligopoly market where the conditions of that market are such as to promote behaviour of a collectively dominant nature. The opinion of AG Fennelly in *CEWAL* would support this view, as he emphasised that a finding of collective dominance should be made where a group of undertakings perform as a single market entity. In other words, what is significant is behaviour in the market, rather than a qualitative assessment of the nature of the links, if any, between the parties.

On the facts of the *CEWAL* case itself, there were links between the members of a liner conference due to their being members of conference, so the view could be taken that, on its facts, this judgment is authority for the proposition that where there are economic or contractual links between the accused undertakings, then it is because of such links that they were bound to act in a collectively dominant fashion. However, both the Advocate General and the tenor of the Court's judgment goes further than

this, as both appear to emphasise that it is not the nature of the links that is determinative, but rather the end result, that is, do the undertakings present themselves on the market as a single collective entity?

Indeed, the ECJ emphasised that a finding of collective dominance is not dependant on the existence of an agreement or other links in law, but can be found where based on other connecting factors, and would depend on an economic assessment, in particular, an assessment of the market in question. A formalistic requirement of economic or structural links is not a prerequisite to a finding of collective dominance contrary to Art 82.

Another interesting feature of the *CEWAL* judgment was that although the liner conference was exempted from the prohibition in Art 81 by virtue of the application of a liner conference exemption (Reg 4056/86), this did not prevent the ECJ finding that the members of the liner conference had abused their dominant position contrary to Art 82. For example, it found that setting selective common freight rates, in a market where they had over 90% market share with a view to excluding a new competitor from the market, constituted an abuse of dominance.

The decision of the CFI in Case T-228/97 *Irish Sugar v Commission* [2000] ECR II-1998 has further developed the jurisprudence in this area. Irish Sugar, the main supplier of sugar in Ireland on both retail and industrial markets, was held to occupy a collective dominant position with another undertaking, Sugar Distributors Limited.

Irish Sugar held 51 per cent in SDL's parent company; appointed half of the parent's board; the managing director of Irish Sugar sat on SDL's board; and both undertakings regularly discussed Irish Sugar's pricing policies. SDL was committed to buying all of its sugar requirements from Irish Sugar. Both undertakings were accused of anti-competitive practices, some of which were concerted practices between them, and some of which were apparently unilateral behaviour.

The CFI held that both undertakings were independent undertakings of each other, with such links existing between them that they had the power to adopt a common economic policy, such that they were collectively dominant during a certain period in the late 1980s.

What is most interesting about this judgment was the Commission and CFI's finding that certain practices by one or other undertakings should be condemned as abuses of collective dominance, because they were designed to exploit and preserve the collective dominant position held by the undertakings collectively, even though such unilateral practices could not be deemed 'concerted practices' contrary to Art 81 (because there was no evidence to disprove a presumption of individual unilateral market behaviour), nor could they be an abuse of dominance by a sole undertaking that was not itself unilaterally dominant (eg SDL). Therefore, the significance of this judgment lies in the CFI's holding that the abuse by one or other member of a collectively dominant position was an abuse contrary to Art 82, where it is regarded as a manifestation of the member undertaking's desire to protect or exploit the collectively held dominant position.

Whether or not the ECJ will follow this line of reasoning remains to be seen, as potentially, it could expand the abuse of collective dominance concept significantly, in particular, so far as parties in a vertical relationship are concerned. For example, if they have close links, a non-dominant distributor who is linked to a dominant manufacturer could find, where they are held to be in a collective dominant position, that their unilateral actions, which could not be considered an abuse if only the distributor was challenged, could nevertheless be condemned as an abuse of the collective dominant position held by the undertakings collectively, as it could be deemed to be evidence of a desire to exploit or preserve that dominant position, contrary to Art 82.

### **8.6.3 INDICATORS OF DOMINANCE**

#### **8.6.3.1 Importance of ascertaining market share**

The market share attributed to the accused undertaking will be a key component of any Art 82 investigation. Once the relevant product market is defined, this assessment will be possible. Traditionally in Art 82 investigations, market share has assumed a key role in determining whether the accused entity will be found to be dominant or not. A few general observations may be helpful before the authorities are reviewed below.

In general, where an undertaking has a market share of 50 per cent or more, and its nearest rivals have significantly smaller market shares, that fact on its own will normally deem the accused undertaking to be dominant, unless the undertaking can point to other factors which (when cumulatively assessed) reduce rather than amplify the significance of its large market share. While the

ECJ in its judgments seems to indicate that each case will be looked at on its own merits, the practice has been to find as dominant, undertakings with market shares of 50 per cent or more, unless other factors can be put forward which reduce the significance of the large market share.

Where an undertaking has a market share in the 40–50 per cent range, market share on its own will generally be insufficient by itself to warrant a finding of dominance. Other factors must be present which, when cumulatively combined with the undertaking's market share, indicate that the accused undertaking is in a superior position overall when compared to its nearest competitors (ie that the undertaking's large market share, allied to additional factors, give the undertaking a significant measure of freedom from competitor-constraint). The *United Brands* case considered immediately below, illustrates this approach.

Finally, an undertaking with a market share of below 40 per cent is unlikely to be found to occupy a dominant position.

An analysis of some of the leading case law will usefully illustrate the foregoing observations. In *Hoffman La Roche* (for further background, see above), the ECJ stated that, 'The existence of a dominant position may derive from a variety of factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares'.

Consequently, Hoffman La Roche was found to have a dominant position in several separate vitamin markets purely on the basis of its high market shares (which often were in the 65 per cent, or greater, range). Although the ECJ did concede at para 40 that each market must be looked at on its own merits, stating that 'A substantial market share . . . is not a constant factor and its importance varies from market to market according to the structure of markets. . . .', nevertheless, the ECJ continued to add in para 41 that '... very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position'. The ECJ then continued to make a classic statement, which is worthy of full reproduction as it clearly espouses the ECJ's view of market share and its importance in Art 82 cases:

'An undertaking which has a very large market share and holds it for some time, by means of volume of production and the scale of the supply which it stands for—without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share—is by virtue of that share in a position of strength which makes it an unavoidable trading partner, and which has, already because of what this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.'

However, the ECJ did not indicate what minimum level of market share would be required before market share, purely on its own, would lead to a finding of dominance. In the more recent Case 62/82 *AKZO Chemie v Commission* [1991] ECR I–3359, the ECJ gave such guidance by stipulating that where an undertaking holds a 50 per cent market share or above, then it will be presumed to occupy a dominant position, unless the accused undertaking can indicate other factors which reduce the significance of the market power attaching to its significant share of the market.

### 8.6.3.2 Importance of other cumulative factors

*United Brands* (for further background, see above) is a prime example of how the ECJ approaches the issue when a cumulative analysis of various factors has to be undertaken in order to assess the accused undertaking's market power. In *United Brands*, the Commission ascertained that United Brands' share of the market was 45 per cent. Although it did fall to 41 per cent at certain times of the year, nevertheless it had a significantly larger market share than its nearest competitors. Consequently, the issue to be determined was whether there were other factors present in the structure of the banana market which, when cumulatively considered in conjunction with the significant market share, would accentuate, or alternatively diminish, the suspicion that United Brands was dominant in the banana market. The ECJ found United Brands to be dominant for the following reasons.

#### *Vertical integration*

United Brands was structurally a superior corporate animal than its competitors in that it was more highly vertically integrated. In this regard, the ECJ adverted to the fact that United Brands owned its own banana plantations, its own research and development facilities, and its own fleet of banana ships. Its competitors on the other hand, were not as highly vertically integrated. Their ability to develop similar structures was inhibited by huge exit-cost risks. Indeed, the ECJ stated that were a competitor to attempt so to invest, they would 'come up against almost insuperable practical and financial difficulties'. Implicit in the foregoing reasoning is the notion that where an accused undertaking is a

more highly developed company than its competitors, then this will amplify, rather than diminish, the suspicion that it may be dominant.

***Fragmented competitors***

The ECJ also found that United Brands' market share was significantly larger than that of its nearest competitor. This advantage, allied to the fragmented market shares of its competitors, was evidence of United Brands' 'preponderant strength' according to the ECJ. What the ECJ was demonstrating here was that as United Brands did not have any competitor who had similar market power, the presence of several smaller competitors was insufficient to act as a counter-balancing competitive force in the marketplace. Implicit in such reasoning is the converse notion that where an accused undertaking (the leading player) has another competitor of equivalent market share and size in the relevant market, it is less likely that the accused undertaking will be found dominant.

***Ability to preserve market share despite aggressive competition***

The ECJ also pointed out that the Commission had ascertained that United Brands was largely immune from competitive pressures. During the mid-1970s, United Brands' smaller competitors had launched aggressive advertising and price-cutting campaigns with only minimal adverse effect on United Brands' market share. United Brands was able to adopt a flexible strategy by adapting its prices and putting pressure on intermediaries in order to maintain its significant market share (which at no time fell below 40 per cent).

Significantly, United Brands continued to be able to sell its bananas at dearer prices than its competitors. The ECJ's reasoning can be criticised on this point as United Brands undoubtedly was operating in a competitive market, and it did lose some market share due to competition. However, on the other hand, it can be pointed out that the competitors did not take significant market share away from United Brands. It was still able to maintain its prime position in the market and prevent its smaller competitors from substantially increasing their 'slice of the cake'. The rationale underlying this approach in the ECJ's reasoning can best be explained by the views of the ECJ put forward in *Hoffman La Roche*, where the ECJ would not accept the Commission's argument that Hoffman La Roche's dominance was established merely because it was able to retain its significant market shares in the respective vitamin product markets, notwithstanding aggressive competition from its competitors. The ECJ indicated that the successful defence of market share could also occur where there was effective competition. Consequently, the ECJ explained that other factors would need to be identified in order to demonstrate that the retention of market share was due to the existence of a dominant position. In this regard, the ECJ pointed to such other factors identified by the Commission as supporting this conclusion, such as the fact that Hoffman La Roche produced a much wider range of vitamins than did its competitors; it had a huge technological lead over them and had massive resources at its disposal. All of these factors enabled it to defend its market share against attack from its competitors.

***Homogenous or innovational product market***

The ECJ also alluded to the fact that the product in question (bananas) were a mature product. In other words, the banana is a product, which is unlikely to be dramatically improved in quality or capability because it has reached its developmental potential. Consequently, smaller competitors could not hope to snatch away large amounts of market share through product innovation, as such a prospect appeared unlikely. Implicit in this reasoning is the notion that if a product is not mature, in the sense that new technological developments are continuously likely to improve the capabilities of the product, then a more benign view may be taken of the leading player's position in the market. This may be so, particularly where it seems that the leading undertaking will only be dominant for a relatively short period. For example, the computer industry provides a prime example of where this might occur. There are numerous examples of where an undertaking with high market share for a particular technology loses its leading player position after only a relatively short time.

This may be because its competitors, who quickly developed the ability to develop superior or vastly improved technology, have eclipsed it.

***Accused undertaking has strength to absorb losses competitors cannot sustain***

United Brands had also argued that it had actually been making losses for a number of years, and hence argued that it could not be dominant. The ECJ's response was typically curt. It stated that, 'An undertaking's economic strength is not measured by its profitability: a reduced profit margin or even

losses for a time are not incompatible with a dominant position, just as large profits may be comparable with a situation where there is effective competition?.

What the ECJ was indicating here is that a dominant undertaking has the financial muscle to absorb losses, even for long periods in its bid to outdo its smaller competitors. Consequently, that freedom of action may well be an accurate indicator of dominance.

### **8.6.3.3 Miscellaneous other factors which indicate dominance**

As the facts of each Art 82 complaint are unique, it is not possible to indicate exhaustively each and every factor that will contribute to a finding of dominance. Nevertheless, it is worthwhile pointing out a few factors, additional to those above, which merit comment.

#### ***Intellectual property rights***

Intellectual property rights are one such example. In Case 238/87 *Volvo AB v Erik Veng (UK) Ltd* [1988] ECR 6211, a national court requested the ECJ in an Art 234 reference to consider the following two issues. First, whether ownership of an intellectual property right confers a dominant position on the holder. Second, whether it is an abuse of such dominant position if the holder of the intellectual property right refuses to license others to reproduce the subject of the intellectual property right.

It is interesting to note how the ECJ avoided dealing with the first question, instead preferring to adopt the view that the existence of intellectual property right protection in national law is not in itself incompatible with Art 82. From this it may be inferred that the existence of such rights does not confer a dominant position status on the holder. In Case C-241 & 242/91 *Radio Telefis Eireann & Independent Television Publications v Commission* [1995] ECR I-743 the ECJ confirmed this by specifically stating that, 'So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position'.

However, as we shall see when 'Abuses of Dominance' are considered below (this involves the second question addressed to the ECJ), there will be some circumstances when the refusal of the owner of the intellectual property right to allow others to have a licence to reproduce the subject of the right will amount to abusive behaviour. Consequently, in such circumstances, the ECJ has no difficulty in finding that the intellectual property owner occupies a dominant position (as a prerequisite to finding that that position has been abused).

#### ***Monopsony***

Monopsony is another example of where an entity will be found dominant, though it is somewhat unusual. Normally, an Art 82 investigation will concern complaints against an allegedly dominant supplier. However, sometimes the undertaking allegedly dominant is not a supplier but, rather, a purchaser of products. Such an entity may be the sole, or major, purchaser of the relevant products such that it occupies a dominant position by virtue of the fact that it dictates how the relevant market develops due to its size and influence as the sole or major buyer in the market.

#### ***Ownership or control of an essential facility***

Ownership or control of an essential infrastructural facility can confer dominance and hence the undertaking operating the facility may be open to claims of abuse of dominance if it does not share the facility with its competitors in a fair fashion. The *B&I Line plc/Sealink* decision [1992] 5 CMLR 255 is a prime example of the application of the essential facilities doctrine. B&I complained that Sealink, its direct competitor on the Dublin/Holyhead sea route, had put B&I Line at a disadvantage by allocating sailing times to Sealink ferries that interfered unduly with the loading and unloading of B&I Line's ferry while in the port (Sealink also happened to own and operate the Holyhead port). The Commission found against Sealink on the basis that it held a dominant position as owner of the port facility, and that in reallocating its own ferries' sailing times, it placed its competitor B&I at a disadvantage, thereby abusing its dominant position on the grounds that it was using its dominance in one sector (port operation) to hinder competition in a related market (ferry operations). The Commission stated that:

'A dominant undertaking which both owns or controls and itself uses an essential facility, ie a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes article 82 if the other conditions of that article are met.'

A company in a dominant position may not discriminate in favour of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to strengthen its position in another related market, in particular by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Art 82 where a competitive disadvantage is imposed upon its competitor without objective justification. A more recent example of this kind of abuse was highlighted in Case T-1 39/98 *AAMS v Commission* [2001] ECR II-3413 where the CFI upheld a Commission finding to the effect that AAMS, which had a *de facto* 100 per cent monopoly in Italy in the cigarette distribution market, abused its dominant position by requiring foreign cigarette manufacturers to agree to less favourable distribution terms than it imposed on its own cigarette brands. AAMS was unable to objectively justify this difference in treatment.

It would appear that wherever use of an essential infrastructural facility is being hindered by the owner of the facility, the owner may well risk being found dominant by virtue of ownership and, consequently, an Art 82 complaint may well follow. However, this new development cannot be regarded as a *carte blanche* for competitors of undertakings who own their own facilities to be free to take advantage of infrastructural investments made by the competitor/owner (ie take a 'free-ride') in all cases. Clearly, owners of key facilities such as ports or airports are in a difficult position, as often there would be no competition against their carriers if they were not required to share their facilities, and share them fairly. Smaller competitors cannot be expected to build their own airport or port as the financial costs are simply too massive. However, owners of non-essential facilities may well be able to resist essential facility-type complaints as they may argue that the competitors should be required to obtain their own facilities for enabling them to access the relevant markets rather than forcing the owners of existing facilities to share them on favourable terms. This is further considered below under Abuses of Dominance (Refusal to Supply) where Case C-7/97 *Oscar Brunner v Mediaprint* is given consideration.

## 8.6.4 ABUSES OF DOMINANCE

Article 82 is not breached merely because an undertaking is found to be dominant. It must further be demonstrated that there has been an *abuse* of that dominant position. In other words, it must be shown that the dominant undertaking has taken unfair advantage of its market power in a manner which is regarded as objectionable by the ECJ or the Commission. While Art 82 itself lists four examples of abusive behaviour, this is not an exhaustive list, as dominant entities will always be willing to try novel ways of abusing their market power. It is instructive to examine some of these possibilities.

### 8.6.4.1 Refusal to supply

There can be many reasons why a dominant undertaking will either threaten or effect a refusal or reduction in supplies to a customer. Some of the most common circumstances likely to motivate such behaviour will now be examined. What is common in each case is that all indicate how difficult it is for the dominant undertaking to demonstrate that its reason for refusing to supply is an objective one. Furthermore, it will be seen how the ECJ and the Commission have signalled that while a dominant undertaking is entitled to take steps to protect its commercial interests, it must ensure that it acts in a manner that is proportionate to the threat presented.

As refusing to supply is a drastic response, it will normally be regarded as disproportionate and hence an abuse contrary to Art 82. The principles developed by the ECJ and the Commission have for the most part concerned refusal to supply in the context of the dominant supplier/existing customer relationship. However, the refusal to supply jurisprudence has been expanded to include the relationship between a dominant undertaking who has never had a previous commercial relationship with a customer, where it is refusing to supply that customer with a product the new customer wants (see *Radio Telefis Eireann & Independent Television Publications* discussed at 8.6.4.1.4 below).

#### ***Refusal to supply and attempted objective justification***

##### *To achieve vertical integration*

Cases 6 & 7/73 *Istituto Chemioterapico Italiano & Commercial Solvents v Commission* [1974] ECR 223 are classic examples of refusal to supply. Commercial Solvents produced key ingredients, which were purchased by another undertaking, Zoja, which used the ingredients to make ethambutol, a tuberculosis treatment. Commercial Solvents wished to make the end product itself. Consequently, it decided to end its relationship with Zoja. Zoja was unable to obtain satisfactory levels of supply of the ingredients required for ethambutol production from any other source. The survival of its ethambutol

business was threatened by Commercial Solvents' action. The ECJ held that where an undertaking is dominant in the production of a raw material, it cannot, merely because it wishes to enter a downstream market as a competitor itself, cut off supplies to an existing customer who operates in that downstream market in order to eliminate competition in that market from that customer. It will be an abuse of its dominant position where it cuts off supplies to its former customer in such circumstances, unless there is an objective justification. From this decision, it is quite clear that a dominant undertaking in one market cannot cut off supplies to its former customer merely because it wishes to compete in the customer's market. A desire by the dominant undertaking to vertically integrate its business would not be regarded as an objective justification in such circumstances.

However, *Commercial Solvents* should not be interpreted over-widely. It is not authority for the proposition that a dominant undertaking, which wishes to integrate vertically, can never cease supplying its downstream customers. If the customer could easily obtain sufficient supplies from another independent source, then the dominant undertaking might well be in a position to cut off supplies to the customer, provided that it was done in an orderly fashion to allow the customer to obtain supplies from another source, and provided that the other source could guarantee sufficient supplies. In such circumstances, the customer would not be at risk of being eliminated as a competitor, because it could obtain the supplies from another independent source.

#### *To strengthen presence in ancillary markets*

*Eurofix-Bauco v Hilti* (1988) OJL 65/19 provides another prime example of refusal to supply issues. Hilti manufactured a leading product, the Hilti nail gun. It also supplied nails and cartridges for the nails, to be used in the gun. However, Hilti would refuse to supply retailers with cartridges unless they also agreed to purchase Hilti nails for use in the cartridges. Furthermore, Hilti would refuse to honour nail gun consumer warranties if any other type of nail was used in the Hilti nail gun. The Commission condemned Hilti's actions as being an abuse of its dominant position. Its refusal to supply retailers who would not agree to its terms was an attempt by Hilti to corner the replacement nail market and its refusal to honour product guarantees was similarly motivated. The Commission rejected Hilti's objective justification plea, finding that non-Hilti nails neither posed a risk to the nail gun user nor to the operational integrity of the nail gun itself.

#### *Intimidate intermediaries not to co-operate with competitors*

*United Brands* demonstrates how difficult it is for the dominant undertaking to reduce or cut off supplies to a customer, even where the dominant entity has no desire to compete in the customer's market. Olesen was United Brands' banana distributor in Denmark. United Brands reduced supplies of the product after Olesen had started acting as a distributor for one of United Brands' competitors. According to United Brands, its reason for so doing was that Olesen was devoting a lot of its advertising budget to promoting the rival competitor's product; also, Olesen had been appointed as the sole Danish agent by the competitor and, therefore, might be expected to give that competitor's product more attention than United Brands'; and furthermore, United Brands alleged that Olesen was not ripening the product properly, thereby affecting its brand image.

The ECJ rejected all of these attempted justifications. It held that while a dominant undertaking can take steps to protect its legitimate commercial interests, that does not include reducing or cutting off supplies to long-standing customers who abide by regular commercial practice and whose orders are in no way out of the ordinary. In other words, the ECJ was taking the view that it is not abnormal commercial practice for a distributor to act for more than one supplier and yet do a competent job. Furthermore, there was no evidence that Olesen had downgraded its relationship with United Brands by placing significantly lower orders for United Brands' product. Finally, the ECJ found that there was no evidence to suggest that Olesen was not looking after the product properly so far as ripening was concerned. Having, therefore, rejected United Brands' attempts at objective justification, the ECJ found that the real aim of United Brands' behaviour was abusive: its aim was to dissuade Olesen or indeed any other intermediaries from acting on behalf of United Brands' competitors.

#### *Parameters on legitimate dominant undertaking response*

The question, therefore, arises as to what parameters govern the behaviour of a dominant undertaking, which finds it has a problem with a customer? In *United Brands*, the ECJ elaborated by indicating that where a dominant undertaking acts to protect its commercial interests, it must take 'reasonable steps' which are proportionate to the threat. It also indicated that refusing to supply a product will normally be regarded as a disproportionate response when the economic power of the dominant undertaking and

the affected undertaking is taken into account. Presumably, therefore, a more proportionate way to defend commercial interests would be for the dominant undertaking to bring to the attention of the customer the concerns of the dominant undertaking, in an attempt to reach an orderly resolution of the dispute. Where the threat to the dominant undertaking's interests is more severe, then legal action and a remedy in damages might be a proportionate response. However, actually refusing to continue supplies should be seen as a measure only to be adopted in extreme circumstances, such as where irreparable damage would be done to the brand image of the dominant undertaking's product, and where it could be demonstrated that the customer was making no bona fide attempt to rectify the situation.

The Commission has also elaborated upon the issue of proportionate response in the decision of *Boosey and Hawkes* (1987) OJ L282/36. Boosey and Hawkes cut off supplies to a good customer who had become associated with one of its competitors. The Commission held that while a dominant undertaking is entitled to take reasonable steps to protect its legitimate commercial interests, such steps must be fair and proportionate to the threat. Furthermore, the Commission indicated that merely because an undertaking becomes associated with a competitor of the dominant undertaking, that does not normally entitle the dominant undertaking to withdraw supplies immediately or take reprisals against the customer. The relationship could be terminated in an orderly fashion over a reasonable period, but not abruptly (para 19). This would constitute a proportionate response.

Another interesting example relating to legitimate response arose in the CFI judgment in Case T-5/97 *Industrie des Poudres Spheriques v Council* [2000] ECR II-3755, concerning allegations of abuse of dominance in the context of refusal to supply. In this case, IPS, a manufacturer of calcium metal products, complained that PEM, a leading calcium metal manufacturer who was also a supplier of calcium, refused to supply it with calcium on reasonable terms. In effect, IPS was seeking a higher quality of calcium from PEM than PEM's production processes normally produced. PEM tried to resolve these difficulties, but was not prepared to supply the product on the terms sought by IPS—IPS essentially was looking for the product at a lower price, so that it could price its high quality end product, calcium metal, competitively for its end customers. However, the CFI held that PEM had not acted unreasonably, because the price it quoted to IPS was not unreasonably high, given that additional technical specifications were involved; furthermore, IPS could seek alternative sources of supply from the US and Canada.

On the point that PEM was abusing its position by refusing to supply IPS at a certain price and on certain terms, IPS was essentially arguing that PEM was setting the price at which it was prepared to supply the calcium input to IPS at a level whereby, relative to the price at which PEM sold the end product (calcium metal), IPS's calcium metal (end product) would be uncompetitively priced. However, the CFI held that IPS had not established its case, and pointed out that IPS's own production costs, being higher, had more bearing on the ultimate price IPS had to seek, in order to profitably produce calcium metal, rather than the price quoted by PEM for the calcium input.

#### ***Refusal to supply intellectual property rights***

This issue has presented itself in an area fraught with tension between national and EC law. In Case 238/87 *Volvo AB v Erik Veng UK Ltd* [1988] ECR 6211, the ECJ had indicated that a refusal to grant a licence by the owner of an intellectual property right (a registered design for Volvo car door panels) to a third party who was willing to pay reasonable royalties, was not an abusive exercise of the intellectual property right. However, the ECJ also continued to hold that such refusal might become abusive where the holder of the right engaged in conduct such as arbitrarily refusing to supply spare parts to independent repairers; or where prices for the parts were fixed at an unfair level; or where a decision was taken to no longer produce spare parts for a particular model even though vehicles of that model were still in circulation. The clear implication of the ECJ's decision was that while on the one hand, a refusal to grant licences to others to exploit an intellectual property right is compatible with Art 82 (because it merely protects the substance of the intellectual property right), where that refusal might affect the structure of competition in markets affected by the refusal (such as the car repair market), then it might become abusive.

#### ***Refusal to supply where no prior commercial relationship***

In Case C-241 & 242/91 *Radio Telefis Eireann & Independent Television Publications v Commission* [1995] I-743, the ECJ held (affirming the CFI) that it was an abuse of a dominant position when the owners of copyright in television programme listings refused to make the copyright information available to a third party who wished to compile that information in a new innovative format which would constitute

a competing product. Magill, a publishing company, was willing to pay the copyright owners reasonable royalties in return for granting it the right to publish the listings information in a combined weekly television viewing guide containing all of the schedules of the TV stations broadcasting in the Republic of Ireland and Northern Ireland. This was an entirely new product because the respective TV stations of whom the request was made only published their own respective channels' schedules in their own respective weekly guides. The ECJ affirmed *Volvo v Veng*, holding that it is only in exceptional situations that the exercise (or refusal to exercise) of an intellectual property right will be abusive. Nevertheless, it went on to add a further example of abuse to the list of three examples already given in *Volvo v Veng*. The ECJ held that an abuse of a dominant position will occur where the holder of copyright refuses to allow a third party exploit the subject of the copyright in circumstances where the third party wishes to make a new innovative product which will compete with and be superior to the dominant undertaking's existing product. The implications of this judgment are far-reaching because clearly an undertaking dominant over the supply of a subject protected by national intellectual property law may no longer rely on such law to refuse to make a licence available to a third party who wishes to use the subject of the right to create a *superior* product. According to the ECJ's reasoning in this judgment, a refusal to supply the intellectual property right licence may well constitute an abuse in such circumstances.

What is also interesting is that the ECJ indicated that intellectual property rights will be used abusively contrary to Art 82 where the holder attempts to extend its monopoly given it by the intellectual property right (monopoly of the television schedules) to an ancillary market (market for television listings guide) without objective justification. As no objective justification existed, the ECJ held that the refusal to supply the listing information to Magill was abusive. In this context, the judgment of the ECJ is not that surprising as it reflects themes seen in earlier judgments. Indeed, it can be said to be similar to *Commercial Solvents v Zoja*, where the ECJ held that a desire on the part of an undertaking dominant in one market (supply of raw materials) to extend its dominance to a downstream market (manufacture of end product) did not constitute an objective justification, particularly where the dominant undertaking sought to achieve that objective by its refusal to supply.

However, *Magill* goes further in that it treats as being abusive a refusal to supply to a party who has never had a commercial relationship with the dominant entity. In this respect the judgment represents a novel development. The issue, therefore, arises whether it is also authority for the proposition that a dominant undertaking is now effectively obliged to contract with any party who wishes to do business with it? This would be an over-wide interpretation of the judgment. *Magill* presented very specific facts: Magill was going to produce an entirely new product not seen before in the market. This constrains the breadth of application of the judgment only to those situations where this element of innovation is present.

This view is borne out by the ECJ's decision in Case C-7/97 *Oscar Bronner GmbH v Mediaprint Zeitungs und Zeitschriftenverlag GmbH* [1998] ECR, where the ECJ was invited by the Austrian cartel tribunal, the Kartellgericht, to consider whether a newspaper undertaking could rely on the *Magill* judgment principles in order to require a competitor to provide access to a facility desired by the undertaking. Bronner, a publisher of an Austrian daily newspaper, sought access to Mediaprint's unique home delivery system in return for a reasonable fee. This delivery system ensures that Mediaprint's newspapers are delivered to Austrian homes early each day, such that over 70 per cent of the Austrian newspaper-reading population receive a Mediaprint newspaper daily.

Mediaprint would only agree to the Bronner request if Bronner agreed in return to avail of Mediaprint's printing and other services. Bronner refused, and issued proceedings against Mediaprint, the dominant newspaper publisher in the Austrian newspaper market, alleging that Mediaprint's refusal to allow Bronner's newspaper access to Mediaprint's early morning newspaper delivery system constituted an abuse of its dominant position contrary to Austrian competition law principles. The Kartellgericht made a reference to the ECJ requesting a preliminary ruling on whether Mediaprint's refusal constituted an abuse of a dominant position contrary to Art 82.

Bronner claimed that the *Magill* principles applied, such that Mediaprint should be obliged to grant access to its unique home delivery system which, Bronner submitted, was akin to an 'essential facility'. Mediaprint, in defence, submitted that *Magill* did not impose any such obligation and that a dominant player should only be forced to contract with other competitors in extreme or exceptional circumstances, and that save in such circumstances, it was not under any duty to subsidise its competitors.

The ECJ held that *Magill* was a very different situation from that of Bronner. In *Magill*, the owners of a copyright were abusing their dominance by refusing to make the subject of the copyright available in circumstances where such refusal prevented the emergence of a new product for which there was

potential consumer demand. Such behaviour was not objectively justifiable, and eliminated all competition in the television guide listings market in Ireland. However, in *Bronner*, it was quite different. It could not be suggested that if Mediaprint did not allow Bronner access, Bronner would be eliminated as a competitor. Furthermore, Bronner could set up its own distribution scheme, either alone, or in conjunction with others. According to the Court, Bronner's argument could only succeed if all competition would otherwise be eliminated if Mediaprint refused access, and if the Mediaprint delivery service was indispensable for Bronner to carry on its business.

#### 8.6.4.2 Abusive pricing

Article 82(a) lists as an abuse the setting of unfair purchase or selling prices. This may occur in a number of ways such as unfairly high pricing or unfairly low pricing.

##### *Unfairly high pricing*

In *United Brands*, the ECJ held that prices set by a dominant undertaking are excessively high where they bear no reasonable relation to the economic value of the product. In order to determine whether there is such a reasonable relationship between costs and price, the ECJ indicated that the production costs of the dominant undertaking must be established. However, there are several difficulties with the application of such a test. First, the ECJ did not indicate precisely what costs are allowable as production costs. Second, the ECJ did not indicate what level of profit margin constitutes an unreasonable (and hence abusive price). In any event, the ECJ annulled the Commission's finding that United Brands had charged excessive prices for its banana products as the Commission had failed to ascertain United Brands' production costs. Interestingly, about the only concrete point that the ECJ did make was that the fact that United Brands' banana product was selling for about 10 per cent more than its nearest branded rival did not indicate an excessive premium was being levied.

The ECJ has also suggested another way by which to assess whether a dominant undertaking's prices are excessive: a comparison of its prices with those charged by equivalent undertakings in other Member States. This issue arose in Case 110/88 *Lucazeau v Sacem* [1989] ECR 2521, where the national music royalty collection body in France was accused by French disco owners of charging excessive prices when compared to royalties charged in other Member States by equivalent bodies. In an Art 234 ruling, the ECJ held that where an undertaking consistently charges higher prices than those charged by similar operators in other Member States, then the price difference must be regarded as indicative of abuse of dominance unless it can be objectively justified. *Sacem* had argued that it charged higher prices than comparable bodies in other Member States because it had higher administration costs, as its staffing levels were higher. However, the ECJ, while not explicitly pronouncing on the issue, appeared to take a dim view of this attempt at 'objective justification' and the tenor of the judgment appears to suggest that if the accused undertaking's costs are out of line with similar operators in other Member States, then higher operating costs may not be a sufficient objective justification for charging higher prices or fees. Thus, the inefficient dominant undertaking may find its higher operating costs do not afford it protection from an allegation that its prices are excessive.

The CFI judgment in Case T-5/97 *Industrie des Poudres Spheriques v Council* (considered above at 8.6.4.1 from the perspective of refusal to supply), is also worthy of mention under the unfair pricing head, particularly as it concerns the issue of production costs and their significance when allegations of unfair pricing are at issue.

##### *Unfairly low pricing*

A dominant entity must take care to ensure that it does not charge unfairly low prices. While keen price competition may be welcomed by the consumer, it can have a deleterious effect on the competitive structure of the market in the longer term, in situations where a dominant undertaking is allowed to abuse its market power by selling its product at an unfairly low price—ie a predatory price. This is a price which does not allow an undertaking to recover its full costs. The danger in the context of competition law, is that the dominant undertaking may be able to sustain losses on sales for a significant period. At the very least, such a course of action may significantly increase the dominant undertaking's market share, because its smaller competitors will be unable to sustain similar below cost selling for long periods. At worst, such a strategy may succeed in driving smaller competitors from the market altogether. Inevitably, once the dominant company has outlasted its competitors, it will be free to raise prices in a market with weakened or non-existent competitive restraints on its behaviour.

Dominant undertakings may also engage in predatory pricing for other reasons, eg as a means of preventing a potential competitor entering the market. An example of this kind of behaviour was seen in *Case 62/82 AKZO Chemie v Commission* [1991] ECR 3359. AKZO supplied peroxides to the plastics manufacturing sector and ECS supplied peroxides to the flour-milling sector. When ECS began offering peroxides to plastics producers, AKZO threatened it with retaliatory action and indicated it would target ECS's flour milling customer base and offer them peroxides at lower prices. ECS refused to withdraw. AKZO went ahead and sold peroxides to ECS customers at very low prices. A complaint was made to the Commission and the Commission found that AKZO had breached Art 82 by engaging in predatory pricing. The Commission decision was appealed by AKZO to the ECJ where the ECJ largely confirmed the findings of the Commission. The ECJ used the opportunity to set out its views on predatory pricing. It provided that Art 82 prohibits a dominant undertaking from eliminating a competitor and thereby achieves a strengthening of its position by recourse to means other than those arising from competition based on merit. The ECJ went on to provide that, viewed from such a perspective, not all price competition can be considered to be legitimate competition. It continued:

'It follows that Article 82 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, however, not all competition by means of price can be regarded as legitimate.'

The ECJ then went on to elaborate how a dominant undertaking will be guilty of abusing its dominant position if it sells its product at a price that does not allow it recover its costs. It drew a distinction between below cost selling, where most, though not all, of the costs are recovered (ie sales below average total cost) and even lower selling prices where even less of the costs are recovered (ie sales below average variable cost). Sales below average total costs ('ATC') indicate a selling price whereby the dominant undertaking recovers a significant proportion (though not all) of its costs via the selling price. As sometimes it may be difficult to know whether a keenly priced product is being sold just above or a little below the level at which ATC are completely recovered, the ECJ will not automatically deem such a level of pricing to be abusive unless it can be shown it was part of a wider plan to eliminate a competitor. In *AKZO*, the Commission discovered such evidence and sales by AKZO below the ATC level were, therefore, deemed abusive.

However, where the selling price is at such a low level that the dominant undertaking does not even succeed in recovering all of its average variable costs ('AVC'), then such a price is deemed to be abusive automatically. There is no need for evidence to be adduced that such a level of pricing formed part of a plan to eliminate a competitor. As the ECJ explained:

'Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it to subsequently raise prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.'

The ECJ found that in certain instances, AKZO had indeed priced its products below AVC recovery level and so it was automatically deemed to have abused its dominant position.

In *United Parcel Service v Deutsche Post AG* (2001/354/EC, OJ L125/27, 5 May2001) Deutsche Post ('DP') was fined €24 m by the Commission for using a fidelity rebate system to facilitate market foreclosure. However, the case is primarily of interest because it also concerns predatory pricing issues.

In the mid-1990s, United Parcel Service ('UPS') complained to the Commission alleging that DP was using its monopoly profits in the postal sector in order to provide below-cost business parcel services, with the effect that DP was the only significant player in the business parcel and mail order parcel market in Germany. The essence of the allegation was that DP was using its profits made from its reserved area activity—national letter mail—to cross-subsidise its commercial activities that were in principle open to competition, such as mail order parcel and business parcel delivery services.

The Commission found that DP was using a combination of a system of fidelity rebates and predatory prices effectively to prevent customers switching to a competitor for parcel or mail order delivery services. This effected substantial market foreclosure to competitors. There are several significant aspects to this decision.

First, it shows how a former State monopoly will have to restructure its operations in order to ensure price transparency. Such undertakings will also have to separate their continuing reserved and non-reserved activities, to ensure that the non-reserved parts of the business are not benefiting from illegal cross-subsidisation by profits from the reserved activity.

Secondly, the Commission elaborated a test, whereby one can determine whether prices in the postal area involving subsidisation are predatory or not. So far as the predatory pricing issue was concerned, any service provided by the beneficiary of a monopoly in open competition had to cover at least the additional or incremental cost incurred in branching out into the competitive sector. Any cost element below such a level is predatory pricing contrary to Article 82 of the Treaty. DP had violated this test over a five-year period as it had not covered the incremental costs of providing a mail-order delivery service.

The Commission has distinguished between costs for network capacity and costs for network usage. Network capacity costs are the costs incurred for the provision of network capacity. In other words, DP incurs the costs in order for it to provide a universal parcel service as part of its universal service obligation. As it is necessary for the universal service provider to provide for excess capacity, in order to ensure that all who wish to use the universal service are accommodated, the Commission considers that the cost element of providing such a network, containing such capacity, constitutes a common fixed cost for Deutsche Post.

However, in so far as cost elements related to actual use of the network were concerned, the Commission considered that each particular service incurs incremental costs. In other words, these are a form of variable costs, which vary according to usage. Hence, according to the Commission, a price set by DP would have to cover this incremental cost element in order for it not to be deemed to be a predatory price. This is interesting because the Commission also observed how prices below the incremental level were objectionable because they actually jeopardise DP's ability to maintain its universal service obligation, as such loss making prices do not contribute in any way to the financing of the network capacity which is so essential in order to maintain provision of the universal service obligation.

The Commission did not fine DP for the predatory pricing because it took the view that the concepts used to set out the predatory pricing test had not, hitherto, been sufficiently developed by the Commission so as to clearly elaborate principles governing former State monopolies (who had to operate under universal service obligations for part of their overall activities). Also, the Commission was impressed by DP's plans to set up a new business parcels business which would be separate from the letter monopoly (the reserved activity). Under this plan, DP will set up an independent parcel service which will purchase services either from DP or third parties to service its business parcel business. Prices charged will be market prices, and such prices will be the same prices offered to the new company's competitors by DP.

On the fidelity rebate issue, the Commission took a less lenient approach. Fidelity rebate principles are well established in general Art 82 case law. DP was using fidelity rebates (which effect market foreclosure, as they prevent customers switching to a competing supplier as the rebate thereby forfeited will negate their freedom of will), as a mechanism to ensure that in the mail order parcel delivery business it dominated the market. From the 1970s onwards, DP offered rebates that gave it a constant 85 per cent of the mail order parcel delivery market. Accordingly, the Commission fined it €24 m.

### ***Discriminatory pricing***

A dominant undertaking cannot engage in discriminatory pricing without objective justification. In other words, a dominant undertaking cannot legally sell the same product to two separate customers, charging each a different price, unless it can objectively justify the price difference. The dominant undertaking may well be able to demonstrate such justification, for example, by proving that it costs more to deliver the product to customer A than customer B. Such an objective difference permits the undertaking to charge one customer more than the other. Often the dominant undertaking will, however, be charging discriminatory prices without objective justification. For example, in *AKZO Chemie*, the ECJ found that AKZO had no objective justification for charging flour millers who purchased peroxides a far lower price than the price it charged plastics producers for the same product. AKZO's motivation was far from objective. Its real aim in charging flour millers lower prices was to coerce a competitor (who had begun selling peroxides to the plastics market) to leave the plastics market and remain in the flour milling market where it had previously operated.

*United Brands* presents an even more infamous example. On this occasion the price discrimination was based on geographical location. United Brands would land its bananas at either Rotterdam or Bremerhaven. National buyers would come to the ports from each Member State and purchase the product. Although the buyer was responsible for transporting the bananas back to the respective Member States, United Brands sold the product to different buyers at different prices. United Brands' explanation for this behaviour was that the price set for each national buyer was determined by the

price United Brands calculated the bananas would be sold at in retail outlets in the following weeks in the respective buyer's State. In order to make such a calculation, United Brands would place emphasis on whether, in any given Member State, a number of factors were likely to affect future retail sales, such as bank holidays, weather forecasts, availability of other seasonal fruits etc. The ECJ held that these factors could not provide objective justification for the charging of different prices to the national buyers, because the factors alluded to were relevant only at the retail level, not relevant to the United Brands/national buyer relationship. Consequently, the ECJ upheld the Commission's finding that United Brands had engaged in discriminatory pricing because it had sold the same product at varying prices, at the same point of sale, and under otherwise similar terms of sale in circumstances where it could not present an objective justification for the varying prices charged.

Clearly, therefore, a dominant undertaking must exercise caution when selling a product to customers at different prices. It must be in a position to demonstrate that objectively justifiable reasons exist for the price disparity; otherwise it may fall foul of Art 82. The reasoning of the ECJ can be criticised on the basis that dominant undertakings will no longer be able to price products according to what they think they can extract from the market in any one particular Member State, with the result that prices may rise in poorer Member States. As against this, it can be argued that as the single market process intensifies, the ease with which products may be moved from one Member State to the next, allied to improved price transparency following the introduction of the euro, may act as a countervailing force to significant price disparities.

A more recent example of abusive selective pricing was found in *Hays/La Poste Belge* (2002/180/EC, OJ L61/32, 2 March 2002) where the Commission condemned the Belgian national postal service for abusing its dominant position by making preferential tariffs for the delivery of business-to-private customer mail available to companies provided they also availed of its business-to-business mail service. Hays, a business-to-business document exchange provider, complained that La Poste was abusing its dominant position (effecting market foreclosure) because La Poste was tying two distinct services together without objective justification. The Commission agreed, finding that the two services had no connection with one another. Hence, it was abusive for La Poste to use pricing to effectively tie them together, to the detriment of their competitors in the business-to-business sector.

### 8.6.4.3 Illegal rebates

#### *Introduction*

When considering whether or not a rebate (ie discount) system offered by a dominant undertaking offends Art 82, a clear distinction must be drawn between a rebate that is predicated upon passing on benefits of economies of scale and volume of business transacted between dominant supplier and customer, and a rebate that has other designs. Rebates are a perfectly acceptable and legitimate means of rewarding customers who do business with the dominant undertaking. They are compatible with Art 82, provided they are transparent and genuinely linked to the particular transactions entered into between the parties.

However, if a rebate system is predicated upon other motivations, then it may well violate Art 82. There are two ways in which this abuse can be achieved by the dominant undertaking.

First, the rebate may be so structured that it removes the customer's freedom of action to obtain product from another competing source. Such a rebate is said to effect *market foreclosure* because the customer will effectively be prevented by the rebate's terms from sourcing product from the dominant company's competitors. Were the customer to do so, it might risk losing substantial amounts of rebate on its purchases already made from the dominant undertaking. Hence, the customer's freedom to contract with the dominant undertaking's competitors, even for some of the customer's product requirement, may effectively have been eliminated by the terms of the rebate system. In this regard it should be noted that the rebate's terms may not be abusive at first sight, because the rebate may not expressly prohibit the customer from sourcing product elsewhere. However, the manner in which the rebate is structured may well achieve that effect because, if the customer fails to satisfy the rebate scheme's terms, the customer will fail to earn maximum rebate.

The second way in which the rebate system may offend Art 82 is where the rebate is structured such that customers who purchase similar amounts of the dominant undertaking's product may be effectively charged different prices for the very same product, depending on whether they agree to deal exclusively with (or perhaps alternatively, obtain most of their requirements from) the dominant undertaking. This may constitute a breach of Art 82(c) as it may amount to setting *discriminatory* prices without objective justification.

***Fidelity rebates***

A rebate which is predicated upon the customer buying either all or a substantial amount of its requirements from the dominant supplier is known as a fidelity (or loyalty) rebate. Such a rebate becomes problematic from an Art 82 perspective if it has the effect of promoting market foreclosure. Typically, under the rebate's terms, the customer will only be able to obtain the most generous rebate on offer if it continues to obtain all (or a certain substantial percentage, eg 80 per cent) of its requirements for a particular product from the dominant undertaking only. This might breach Art 82 in two ways.

First, the customer will effectively be prevented from switching to a competitor of the dominant undertaking for supplies of substantial amounts of product. Should the customer do so, it risks losing rebate calculated on all purchases made from the dominant undertaking since the beginning of the rebate calculation period. Such a disincentive will remove the customer's freedom of action and effectively force it to stay loyal to the dominant undertaking, thereby enhancing its dominance.

Secondly, the arrangements may also breach Art 82 in that they amount to discriminatory pricing, because customers who adhere to the rebate system are purchasing the product cheaper than customers who do not adhere to the rebate system's loyalty terms. Effectively, the customer who adheres to the rebate scheme's terms gets a larger discount than the customer who does not. It may be difficult to objectively justify such a difference in treatment when its real objective is to prevent the customer switching to the dominant undertaking's competitors for supplies of product.

Case 40/73 *Suiker-Unie v Commission* [1975] ECR 1663 is an example of an ECJ decision where both of these fears were realised. Dominant sugar producers in the south of Germany offered a relatively modest discount of 0.3 DM per every 100 kilos of sugar purchased, provided that the customer purchased exclusively from Suiker-Unie. The ECJ upheld the Commission's finding that this amounted to discriminatory pricing without objective justification. Also, the ECJ found that the rebate effected market foreclosure because the overall value of the rebate on a customer's entire purchases from Suiker-Unie was sufficiently attractive to prevent them switching to a smaller competitor for even a fraction of their requirements. Put simply, the loss of 0.3 DM on every 100 kilos purchased was a loss that customers could not afford to bear.

Dominant undertakings may also employ a number of techniques to exacerbate the market foreclosing effect of their fidelity rebate schemes. One such example is the device of the 'English clause' used in Case 81/76 *Hoffman La Roche* [1979] ECR 461 in customers' contracts. At first glance, such a clause appeared to ameliorate the effects of a 'substantial requirements' fidelity rebate scheme. The clause provided that if the customer found cheaper supplies elsewhere from another source, it was free to purchase from that alternative supplier without risking losing its rebate on its purchases already made from Hoffman La Roche. The only pre-condition attaching to this arrangement was that the customer would first have to inform Hoffman La Roche, to give it the option of bettering the competing supplier's cheaper price. However, upon closer examination, the ECJ found the clause to be objectionable, as it in fact aggravated the abuse already effected by the substantial requirements fidelity rebate. The ECJ took the view that the real effect of the clause was to allow Hoffman La Roche to further undermine the structure of competition in the market, as it was using its customers as an army of spies to bring information to it regarding competitors' price lists, thereby enabling it to be in a position to react quickly to competitive price cuts by competitors and hence further strengthen its dominance on the market.

Another example of a device employed to further the market foreclosing impact brought about by a fidelity rebate can be seen in *Napier Brown/British Sugar* (1988) OJ L284/41 where British Sugar imposed a fidelity scheme as follows. Customers who agreed to buy their sugar requirements exclusively from British Sugar earned a generous rebate. However, if any company in the Napier Brown corporate group of sister companies decided to buy sugar from any other supplier, then all of the 'offending' company's sister companies would lose rebate on their purchases from British Sugar even though they had not breached the rebate scheme's terms!

***Target rebates***

The fidelity rebate is based on whether the customer buys all or most of its requirements from the dominant supplier. The target rebate is based on whether the customer meets sales targets of the dominant supplier's product. Notwithstanding the difference in structure, the target rebate may be incompatible with Art 82 in much the same way as the fidelity rebate. In other words, the target rebate may promote the objective of market foreclosure and/or effect discriminatory pricing between customers without objective justification. The reason why target rebates will invariably be different from

legitimate simple volume discounts is because they achieve either, or both, of the foregoing illegal objectives.

The classic judgment on this area is Case 322/81 *Michelin (Netherlands) v Commission* [1983] ECR 3461, where the ECJ condemned a target rebate scheme put in place by Michelin for its retail customers. Each January, Michelin would impose a slightly higher sales target for the garage dealer. The sales target had to be achieved by the following December. A dealer who met the annual sales target would obtain the most generous rebate on offer. The ECJ found the rebate scheme incompatible with Art 82 on several grounds. First, the rebate terms were often not committed to writing. Consequently, the garage dealer was often forced to exceed the target agreed orally with Michelin in order to be sure of staying in favour when it came to the awarding of rebate at year-end. As a consequence, dealers were inclined to abandon selling competing tyres in the latter half of the year in order to ensure they surpassed their Michelin sales targets. This effected market foreclosure on Michelin's competitors.

Furthermore, the Court found the reference period for rebate calculation (sales of Michelin tyres over an entire calendar year) was abusive. It exacerbated the foreclosing effects of the rebate scheme because the dealer who failed to reach the sales target would lose the right to earn the most generous rebate on offer, which was calculated over an entire year's sales. Consequently, as the sums involved would be substantial, dealers were effectively being 'forced' to abandon selling competitors' tyres for much of the trading year (even though offered on more favourable trade terms), as they could not risk failing to meet the sales target set by Michelin.

In 2002 (2002/405/EC, OJ L143/1, 31 May 2002) the Commission fined Michelin €19m for putting an even more sophisticated version of its rebate scheme (condemned in 1983, above) into effect in France. As well as being condemned for again using a rebate calculation period that was too long (one year), Michelin was also condemned for partitioning national markets from one another as only Michelin tyres purchased from Michelin (France) were reckonable for rebate calculation purposes (thereby dissuading French tyre dealers from importing Michelin tyres from other jurisdictions); also Michelin delayed paying rebate until the trading year was well over, thereby inhibiting dealers from knowing whether it would be worth their while switching to another tyre producer for supplies because the delay disabled the dealer from being able to compare prices effectively during the relevant trading year.

In Commission decision *Virgin/British Airways* (2000) OJ L30/1, the Commission fined British Airways nearly €7 m for operating an incentive scheme for travel agents who sold BA tickets. Under the scheme, BA paid agents extra commission if they sold more tickets than they sold in the previous year. Commission per ticket sold was reduced from previous levels, but the travel agents had the opportunity to claim a substantial increase in commission provided they succeeded in exceeding their sales made on the previous year. Virgin Airways challenged the scheme, on the basis that its operation was preventing travel agents from promoting competitors' products to the same extent as British Airways products. The Commission took a particularly serious view of Virgin Airways' complaint against British Airways, as Virgin argued that it was trying to enter the liberalised air transport market, whereas practices such as British Airways rebate scheme was making it difficult for it to do so.

The Commission emphasised that rebate schemes become abusive if practised by a dominant undertaking in circumstances where their terms cannot be objectively justified. In other words, where the rebate's rationale is not genuinely linked to volumes of sales made by the customer, nor predicated on the basis that extra services are provided by the customer, nor awarded on the basis that the customer assists the dominant undertaking in achieving certain efficiencies, then it cannot be objectively justified. Instead, the objective of a rebate scheme in the Commission's view is the foreclosure of smaller competitors from getting access to customers (in this case, retail outlets, the travel agents).

The Commission indicated that Art 82 objections do not arise where rebates offered to agents are differentiated by reason of customers achieving distribution costs savings, or perhaps where the value of services provided by the agent to the airline vary. In this regard, it made it clear that it is perfectly legitimate for rebates to increase where the dominant undertaking's customers assist it in achieving savings in distribution costs, or that it obtains added services from customers. On the other hand, rebates that are granted merely on the basis that the customer merely sells more than it sold in a preceding period run the risk of being found to be incompatible with Art 82 in the absence of some objective justification being evident. In other words, the absence of an objective justification presents the risk that market foreclosure objectives underpin the rebates' rationale. The Commission was also of the view, that in the airline ticket sector, a reference period for rebate calculation purposes should not exceed six months, and that agents should be free to have the ability to earn rebates even where they sell competing airlines' tickets.

***Rebates allied to product ties***

Dominant undertakings can also use rebates in conjunction with ties or claimed consumer/product protection concerns. Once again, unless the tie or the claim is objectively justifiable, the rebate scheme runs the risk of being suspected of having a market foreclosure objective, exacerbated by the complementary use of the rebate scheme as part of the dominant undertaking's strategy.

In the case where a dominant undertaking uses a rebate in conjunction with a 'tie', it can run into problems under Art 82(d). This prohibits making the conclusion of a contract subject to the acceptance of other obligations that have nothing to do with the subject matter of the contract. An example can be seen in *Hoffman La Roche* where it offered a more generous rebate to customers if they agreed to purchase several different types of vitamin. This was found to be abusive because the Commission, having first defined each vitamin market as being a separate distinct relevant product market, then went on to find that Hoffman La Roche, in offering more generous rebates to those who bought several types of vitamin from it, was using the rebate scheme's terms to tie sales of one vitamin to sales of another. Given that the vitamins were found to occupy distinct relevant product markets, this meant that Hoffman La Roche was using a rebate scheme to try to effect market foreclosure, as it would be attractive to a customer to obtain all of their vitamins from Hoffman La Roche rather than say, obtaining vitamin A from Hoffman La Roche and vitamin B from a competitor.

An example of where consumer safety and product protection concerns were allied to a rebate scheme can be found in *Hilti* (1988) OJ L65/19. The Commission found Hilti could not objectively justify its claims and, therefore, it had abused its dominant position because it offered more generous rebates to retailers who agreed to fit only Hilti nails in Hilti nail guns at point of sale, rather than non-Hilti nails. Hilti had claimed that if non-Hilti nails were used in the nail gun, the nail gun would be damaged, and Hilti would have to bear the cost of repairing it where the product was still under warranty. The Commission condemned this scheme as an abusive rebate because Hilti was unable to satisfy the Commission that its objective justification claims were provable. Non-Hilti nails would not damage the gun according to the Commission. Furthermore, it found that using non-Hilti nails in the Hilti nail gun did not pose a danger to consumers. Consequently, in the view of the Commission, Hilti was attempting to effect market foreclosure because it was using the rebate scheme, without objective justification, to tie sales of the nail gun to sales of its own nails. Hilti was also found, therefore, to be engaging in discriminatory pricing without objective justification contrary to Art 82.

**8.6.4.4 Unusual abuses**

Under this heading, a few more recent examples of abuses that do not fit into the previous categories will be considered.

***Exclusivity arrangements effecting market foreclosure***

In *Van den Bergh Foods Ltd* (1998) OJ L246/1, the Commission condemned Van den Bergh Foods' (Unilever) ice-cream freezer exclusivity arrangements with Irish retailers. Under the arrangements, retailers would be offered a freezer cabinet but only on condition that it would only be used to store Unilever's brand of 'HB' ice cream products. Other undertakings complained that this effectively meant that they were excluded from the impulse ice cream retail market as, in reality, retailers tended not to require more than one freezer cabinet for reasons of economy and space. The Commission condemned these arrangements as being contrary to Art 81 on the grounds that they promoted market foreclosure. Also, the arrangements violated Art 82, as being an abuse of dominant position as Unilever was determined to have an 85 per cent market share of the impulse ice-cream market in Ireland, and its freezer exclusivity practices were considered to contribute to market foreclosure.

This 1998 Commission decision is now being appealed to the CFI by Van den Bergh Foods Ltd. It is part of a long running litigation in the Irish impulse ice cream market. The 1998 Commission decision conflicts with a High Court decision delivered earlier in the 1990s whereby the High Court found that Unilever were entitled to refuse to share their freezers with competitors. However, following the Commission's 1998 decision, the High Court decision was subsequently appealed to the Supreme Court. In the course of this appeal, *Masterfoods v HB Ice Cream Ltd*, the Supreme Court stayed the appeal as it deemed it necessary to make an Art 234 reference to the ECJ seeking guidance from the ECJ as to what a national court should do when faced with a legal dispute which is already the subject of a Commission Decision, which is itself being challenged in the CFI. At the time of writing, while the ECJ has given its Art 234 ruling in response to the Supreme Court's request (shortly to be described below), the outcome of the Supreme Court appeal (*Masterfoods v HB Ice Cream Ltd*) has been stayed

by the Supreme Court pending the outcome of the appeal against the Commission's 1998 decision to the CFI by Van den Bergh (pending).

As this may be somewhat confusing for the reader—with parallel sets of proceedings in train in both the national and Community courts—it may be helpful to describe the ECJ's Art 234 response (*Case C-344/98 Masterfoods v HB Ice Cream Ltd* [2000] ECR I-11369) in some detail. The issue before the ECJ concerned an Irish High Court (1992) ruling that had held in favour of HB (since owned by Van Den Bergh/Unilever), an ice cream company which used distribution agreements with retailers to effectively cause other competing ice cream manufacturer's products not to be sold in a wide range of retail outlets. The Irish High Court had held that the distribution agreements were valid and enforceable, and did not restrict competition (essentially, HB would supply a retailer with a freezer cabinet, and only HB products could be stored therein—due to the small size of many retail outlets, retailers were not inclined to have a second freezer for other companies products, and when Masterfoods sought access for their ice cream products to the HB freezers, the High Court ruled that HB's arrangements with retailers was not anti-competitive).

However, in 1998 (*Van den Bergh Food Ltd* OJ L246/1), the Commission had found that the HB arrangements did violate both Articles 81 and 82. The agreements that the Commission objected to had been the arrangements that the Irish High Court had found not to be incompatible with Articles 81 and 82.

HB appealed the Commission Decision to the CFI, seeking its annulment, and Masterfoods appealed the High Court Decision to the Irish Supreme Court, seeking its reversal (in light of the Commission Decision).

In June 1998, the Supreme Court requested the ECJ to give it guidance on the role of a national court when faced with a legal dispute which is already the subject of a Commission Decision, which is itself being challenged in the CFI.

The ECJ took the opportunity to restate some essential principles that govern a harmonious relationship of co-operation between the Community and National Courts.

First, national courts should not make rulings that conflict with existing Commission Decisions (not really relevant in the instant case as the High Court ruling had preceded the Commission Decision, though there were other Commission Decisions in related areas emanating from other parts of the EU that the national court should have had regard to).

Second, national courts should avoid making rulings on matters that are likely to be at variance with an eventual decision that the Commission may make in relation to the same matter. In other words, where it is apparent to a national court that a matter before it is likely to be the subject of a Commission Decision, then the national court is obliged not to make a ruling that might run counter to the eventual Commission Decision.

Third, in a case such as the instant case, where the national court was hearing an appeal, it should stay the outcome of the hearing of the appeal pending the CFI's decision on the annulment (of the Commission Decision) action, in order to ensure that it does not make a ruling that will ultimately be at variance with the CFI judgment. However, the Court did add, that the national court was free to make a preliminary reference to the ECJ on the validity of the Commission's Decision if it considered this was necessary.

At the time of writing the current state of this saga is that the Supreme Court has stayed the appeal before it, and the CFI has by interlocutory order (*Case T-65/98R*, 7 July 1998) stayed the Commission's 1998 decision, all pending the outcome of the CFI's hearing of the appeal against the 1998 Commission Decision.

### ***Vexatious litigation***

In *Case T-111/96 ITT Promedia v EC Commission* [1998] ECR II-2937, the CFI delivered an interesting judgment on the issue of whether litigation by a competitor can constitute an abuse under Art 82. It held that litigation which is vexatious in nature may constitute an abuse of a dominant position if both of the following criteria are met:

- (a) the legal action cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned, and thus its only purpose must be to intimidate; and
- (b) the legal action must form part of a plan to eliminate competition.

The CFI emphasised that both criteria must be satisfied before litigation can be termed abusive. In the case itself, ITT was in dispute with Belgacom and had made complaints against Belgacom (the dominant telecom operator in Belgium) to the Commission. ITT was also suing Belgacom in the

Belgian courts where Belgacom had counterclaimed against ITT in various legal actions. ITT alleged that Belgacom's counterclaims were abusive in nature as they were not genuinely concerned with the legal issues involved. The Commission rejected ITT's complaints and ITT appealed to the CFI seeking review of the Commission's stance. The CFI took the view that Belgacom's counterclaims were not vexatious in nature as Belgacom claims were based on reasonable grounds, which were its desire to ascertain its rights in the dispute.

Another issue, which arose in this Decision, was whether a claim for performance of a contractual right could ever amount to an abuse under Art 82. In this regard, what was at issue was whether Belgacom, which was claiming that it was contractually entitled to have certain intellectual property rights transferred to it, was abusing its dominant position. Again, the CFI found that Belgacom had a reasonable ground for demanding performance of this contractual right, and thus its demand was not abusive. However, it did add that a claim for performance of a legal right under a contract could constitute an abuse in extreme circumstances, such as where a claim exceeds what a party could reasonably expect to be entitled to under the contract, or where the undertakings' circumstances have changed dramatically since the conclusion of the contract, such that performance of the contractual obligations would no longer be reasonably expected or possible.

#### 8.6.4.5 Structural abuse

Even a cursory glance at the text of Art 82 will reveal that primarily it is intended to prohibit behavioural abuses—market practice abuses. However, in *Continental Can*, the ECJ conceded that Art 82 could also be used to prohibit, as an abuse of dominance, behaviour which effected a permanent change in the structure of the market. In *Continental Can*, the ECJ held that where a dominant undertaking acquired control over a competitor, thereby eliminating the competitor as an independent player in the market and strengthening its own dominance in the process, such structural behaviour would constitute an abuse of dominance contrary to Art 82. However, Art 82 is not the most suitable legal tool for merger control. For example, it cannot be used to prohibit the creation of dominance flowing from a merger between two non-dominant competitors, as its jurisdiction is predicated upon at least one player being dominant before the merger takes place. In 1989 the EC adopted the Merger Regulation 4064/89, effectively disapplying Art 82 from being invoked by the EC Commission against mergers above a certain financial threshold. However, it would seem that it may still be open to private parties to invoke Art 82 in national courts against a merger brought about by an already dominant undertaking, because the direct effectiveness capability of Art 82 would not appear to be disabled by the enactment of the Merger Regulation.

## 8.7 Fines for Breach of Article 82

In recent years, the Commission has levied large fines on undertakings found to be in breach of Art 82. A few will be briefly considered.

In several of the airport cases discussed in the chapter on Art 86 (which will not be referred to in this chapter), no fines were imposed because the Commission took the view that the competition rules had only just begun to (or were about to) apply in the areas concerned for the first time. Also, the airport authorities concerned indicated that they were already preparing for the new competitive regime.

However, operators in other sectors were not as fortunate. In a decision concerning the *Trans Atlantic Conference Agreement (TACA)* (1999) L95/1, the Commission refused to grant Art 81(3) exemptions in respect of notified arrangements, and imposed massive fines totalling €273 m against the members of the TACA shipping conference for abuse of joint dominant position contrary to Art 82.

The arrangements concerned agreements between the conference members to fix prices for shipping freight and for inland forwarding services; to fix terms for entering into service contracts with shippers and to fix prices paid to freight forwarders. Most of these arrangements fell outside shipping conference block exemption reg 4056/86 and did not qualify for individual exemption.

The Commission then went on to levy massive fines for breach of Art 82. It found that the members of the conference occupied a joint dominant position, and that they had abused this position in two respects. First, members could not enter into service contracts with shippers on an individual basis, and very restrictive conditions were attached. Secondly, the conference used unfair methods to encourage non-members to join the conference. For example, they allowed non-members to charge

lower prices than members if they agreed to join the conference, and also conference members did not compete for contracts that non-members would normally compete for. Both of these measures were designed to entice non-members into the conference and thereby further weaken the structure of competition in the market.

In the *Deutsche Post AG* decision, the Commission did not fine Deutsche Post for predatory pricing (see under Predatory Pricing above), on the ground that the concepts employed by the Commission to determine predatory pricing on the part of former semi-State monopolies who still have universal service obligations were not then sufficiently developed. However, it saw no obstacle to fining Deutsche Post AG €24 m on the ground that it used fidelity rebates to effect market foreclosure by using these rebates as a mechanism to ensure that it continued to dominate the mail order parcel business in Germany. In this context, the principles concerning the identification of fidelity rebates were well established.

In Case C-333/94P *Tetra Pak International SA v Commission* [1996] ECR I-5951, the ECJ upheld the Commission's decision fining Tetra Pak €75 m in respect of various abuses, including predatory pricing. Specifically on the predatory pricing issue, Tetra Pak was found to have abused its dominant position by using its overwhelming dominance in one market (aseptic packaging) to cross-subsidise very low pricing in another market (non-aseptic packaging).

In May 2002, the Commission fined Michelin €19 m for abusing its dominant position on the French tyre market (see Target Rebates above).

Finally, in a new development, s 7 of the Competition Act 2002 makes any breach of Art 82 a criminal offence on the part of an undertaking, and indeed on the part of officers of the undertaking who authorised or consented to the conduct constituting the abuse of dominance. Heavy penalties can be imposed, ranging from €3,000 on summary conviction, to a maximum fine not exceeding the greater of up to €4,000,000 or 10% of the undertaking's turnover. The Act also provides that a good defence is established where it can be proved that the abuse of dominance arose pursuant to a determination made, or a direction given, by a statutory body (such bodies being the Broadcasting Commission of Ireland, the Commission for Electricity Regulation, the Commission for Aviation Regulation, or the Director of Telecommunications Regulation).

## **8.8 Review of Article 82**

The Commission is currently seeking submissions on how Article 82 can be reformed. At the time of writing, this process is at too early a stage to indicate the significance of what aspects of Article 82 will be reformed.