CHAPTER 1

Cowboys or Gentlemen? -

Approaches of the US and EC to Unilateral Conduct

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§ 1.01. Introduction

The approaches of the US and EC antitrust authorities to regulating the unilateral conduct[3] of firms with significant market power is an area of divergence between the US and EC regimes and reflects the fundamental philosophical differences underpinning those regimes.[4]

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[3] This paper does not deal with multilateral conduct or with the EC concept of collective dominance.

[4] The European Union ("EU") was established under that name in 1992 by the Treaty on European Union (the Maastricht Treaty). The EU is an intergovernmental and supranational union of twenty-five Member States. The competition rules (Articles 81 and 82) are embodied in the Treaty Establishing the European Communities (the EC Treaty), and are therefore referred to as the EC competition rules.

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It is often tempting to try to distil the different approaches of the US and EC to regulating the conduct of firms with significant market power – with the US approach variously described as representing "cowboy capitalism"[5] or "Darwinian competition",[6] versus the EC approach which is said to represent "gentlemanly competition",[7] or "Darwinian competition on the merits".[8] Although these descriptions hold some truth, they do not fully capture the essences of the US and EC approaches, which in many respects are surprisingly similar, and in other respects remarkably different.

These similarities and differences are extremely important to the ever increasing number of firms with activities in both the US and EC, and is reflected in the considerable amount that has been written on the subject. This paper is intended to provide a summary of the two regimes and to highlight some of the differences and similarities between them.

The first part of the paper will provide a brief description of the legislative tools used by the US and EC authorities to address the unilateral conduct of firms holding significant market power – in the US, section 2 of the Sherman Act of

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[5] See Olaf Gersemann, *Cowboy Capitalism: European Myths, American Reality*, Cato Institute 2004.

[6] See the speech given by Hewitt Pate, the then Assistant Attorney General for Antitrust, to the "Antitrust in a Transatlantic context" conference, Brussels 7 June 2004.

[7] *Ibid*.

[8] See for example the comments made by Mario Monti, former Commissioner for Competition, in response to the speech given by Hewitt Pate at the Conference "Antitrust in a Transatlantic context" conference, Brussels 7 June 2004.

1890 (Section 2), and in the EC, Article 82 of the EC Treaty (Article 82) – and then to analyze the main differences between these provisions. The second part of the paper will take three courses of conduct – predatory pricing, monopoly or excessive pricing, and refusal to deal / essential facilities – and will briefly analyze the approaches taken to these courses of conduct on both sides of the Atlantic.

The final section of this paper will analyze the potential for reform to approaches in both the US and EC. In the US, the issues being examined by the Antitrust Monopolization Commission include single firm and exclusionary conduct, and in the EC the European Commission is in the process of considering reforms to its approach to Article 82. This paper briefly addresses the issue of whether these reforms will serve to bring the two approaches closer together.

The paper concludes that, despite certain fundamental differences between the US and EC regimes, the practical enforcement of the relevant provisions is closer than appears at first sight, and that possible reforms could narrow the gap further. However, as long as the philosophies underpinning the relevant legislation continue to differ, complete congruity is not likely to be achieved.

§ 1.02. The Legislation

Although Section 2 and Article 82 can be described as roughly equivalent, the texts of the two provisions – set out briefly below – reflect their contrasting aims and objectives.

[1] ***Section 2 of the Sherman Act 1890***

Section 2 of the Sherman Act provides that: *"Every person who shall monopolize, or attempt to monopolize… shall be deemed guilty of a felony, and… shall be punished by fine or by imprisonment".*

The courts in the US have clarified that, for a finding of monopolization, it is necessary to show that: (1) there has been a willful acquisition or maintenance of monopoly power; and (2) the relevant firm has engaged in exclusionary conduct.[9]

As regards attempts to monopolize, courts in the US have further clarified that for a finding of an attempt to monopolize it is necessary to prove *"(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."*[10]

The main objective of Section 2 is therefore clear: it is to prevent exclusionary conduct that creates or strengthens a monopoly position.

[2] ***Article 82 EC Treaty***

Article 82 of the EC Treaty provides that: "*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*".

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[9] See *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, 540 US 398 (2004).

[10] See *Spectrum Sports Inc. v. McQuillan*, 506 US 447, 456 (1993).

Therefore, in contrast to Section 2, Article 82 is aimed at regulating the conduct of firms already holding a dominant position. The fundamental difference between the two provisions is accordingly clear: Section 2 is concerned with creation or maintenance of monopoly power, whereas Article 82 provides a control on the conduct of firms that have achieved that power.

§ 1.03. Who and what is caught?

To further explain the fundamental difference described between Section 2 and Article 82, it is instructive to compare, even in the broadest terms, those firms caught by, and the conduct that falls foul of, the two regimes. Such a comparison makes clear that, although certain conduct is prohibited on both sides of the Atlantic, Article 82 is generally of a wider application than Section 2.

[1] *Monopoly Power versus Dominance*

As stated above, Section 2 is concerned with creation or maintenance of monopoly power, whereas Article 82 provides a control on the conduct of dominant firms. Put even more simply, Section 2 is aimed at stopping firms from becoming more powerful through exclusionary conduct, whilst Article 82 is aimed at stopping firms from abusing market power once it has been achieved.

It would be reasonable to assume that a firm is more likely to be caught by Section 2 than Article 82, given that Section 2 applies to firms trying to become more powerful in the market rather than firms that are already powerful. However in practice the very opposite position is the case.

[a] Section 2 – "Monopoly Power"

Under Section 2, only the conduct of those firms that have monopoly power, or whose predatory or anticompetitive conduct gives rise to a dangerous probability of achieving monopoly power, is under scrutiny. "Monopoly power" has been stated as the power to control prices or exclude competition.[11] Determining whether or not a firm can be described as having "monopoly power" is not a simple exercise, and the assessment can depend on the interplay of a number of factors and, in particular, the strength of barriers to entry or expansion. However, the market share of a firm often will be very significant to an assessment of whether it holds monopoly power and provides a convenient "rule of thumb" to guide firms and those advising them.

Although there is no scientific approach to determining the market share that a firm must have before being regarded as holding monopoly power, in *United States v Aluminum Co of America*[12] it was stated that it was "doubtful" that a market share of 60 per cent would be sufficient for a finding of monopoly power. Whilst hard to generalize, typically a market share below 50 per cent will not suffice to infer a monopoly while a market share above 70 per cent will permit such an inference. Although monopoly power could be found to exist where market shares are between 50 per cent and 70 per cent, the law is uncertain.

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[11] See *United States v EI du Pont de Nemours & Co*, 351 US 377, 391 (1956); *United States v Paramount Pictures*, 334 US 131, 174 (1948); *Pepsico Inc v Coca Cola Co*, 315 F3d 101, 107-08 (2nd Circuit) (2002).

[12] *United States v Aluminum Co of America*, 148 F2d 416, 424 (2nd Circuit) (1945).

[b] EC – "Dominance"

In contrast, Article 82 applies to all firms that have a "dominant position". A firm will be regarded as having a dominant position if it is in a position to "*prevent effective competition being maintained*" and to behave "*to an appreciable extent independently of its competitors and customers and ultimately of its consumers*".[13]

As with monopoly power, assessing whether a firm has a dominant position involves the assessment of the interplay of a number of factors, although (again as with monopoly power) the market share of a firm plays an important role. However, the similarities with US findings of monopoly power end there: the European Commission has stated that a market share of 40 per cent or more will generally indicate dominance and that dominance may even be found with market shares of between 20-40 per cent.[14] The European Courts[15] have held that

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[13] Case 27/76 *United Brands v Commission* [1978] ECR 207.

[14] European Commission's Xth *Report on Competition Policy* (1980), point 50. Note that the Commission has made only one finding of dominance where market shares were below 40 per cent – *Virgin/British Airways* OJ [2000] L 30/1 – British Airways' market share was found to be 39.7 per cent.

[15] The Court of Justice of the European Communities ("ECJ") and the Court of First Instance ("CFI"). Appeals from competition decisions of the European Commission are heard by the CFI. All cases heard at first instance by the CFI may be subject to a right of appeal to the ECJ on points of law.

a position of dominance can be presumed where a firm has a market share of over 50 per cent.[16]

[c] Conclusion

The degree of market power that must be held by a firm before being found to have "monopoly power" under Section 2 is clearly greater than that necessary to make a finding of "dominance" under Article 82.

It is often said that Section 2 is, in at least one sense, of broader application than Article 82 to the extent that Section 2, but not Article 82, can be used to "nip monopolies in the bud", applying as it does both to firms holding monopoly power and to firms engaged in conduct intended to create monopoly power (i.e. attempt to monopolize). However in practice, as the threshold for a finding of dominance is much lower than the threshold for a finding of monopoly power, Article 82 can be as effective in this regard as Section 2. Although steps taken by a non-dominant firm to achieve a position of dominance will not be caught, exclusionary conduct on the part of a dominant firm intended to strengthen a dominant position, or create a position of monopoly power within the meaning of Section 2, or even to reinforce a dominant position, is likely to be considered to be abusive under Article 82.

[2] *Exclusionary Conduct versus Abuse*

In neither the US or the EC is the possession of market power, or even a monopoly position, in and of itself, prohibited.[17] In both regimes it is the conduct

[16] Case C-62/86 *AKZO v Commission* [1991] ECR I-3359.

of firms with market power, and not the possession of market power in itself, which comes under scrutiny.

This focus on conduct rather than market power requires a difficult balancing exercise between what can be described as acceptable competitive conduct, and conduct designed to reinforce market power or to abuse a dominant position – this balancing exercise can be contentious in both the US and EC as authorities try to avoid both "false negatives" (i.e. punishing legitimate competitive conduct) and "false positives" (i.e. permitting anticompetitive conduct). The nature of the debate, or rather the line drawn between what is legitimate versus illegitimate competitive conduct, differs between the US and EC regimes: not least because Section 2 focuses on exclusionary conduct whereas Article 82 covers both exclusionary and exploitative conduct (see below). However, certain conduct will fall foul of both Section 2 and Article 82.

What follows is a brief outline of the different approaches to the types of conduct caught by Section 2 and/or Article 82, followed by a discussion of the philosophical differences that underpin these approaches. Later sections of this paper contain a review of the different approaches to three particular categories of conduct: predation, excessive or monopoly pricing, and refusal to deal / essential facilities.

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[17] As regards the US, see for example *Standard Oil Co v United States*, 221 US 1, 62 (1911), and *United States v United States v Grinnel Corp*, 384 US 563, 570-71 (1966).

[a] US Approach

As the Supreme Court recognized in *Trinko*, in addition to the possession of monopoly power in the relevant market (or dangerous probability of obtaining a monopoly in the case of an attempted monopolization claim) a Section 2 offense requires, *"'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident' . . . accompanied by an element of anticompetitive conduct."*[18]

In practice, it is often not necessary to consider in depth the issue of whether conduct constitutes the willful acquisition or maintenance of monopoly power, as modern cases generally conclude that *"evidence of intent . . . [is] relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory.'"* [19] For example, it has been held that 'willful' intent will be found to exist where the conduct complained of would be economically irrational but for the adverse effect on competition, i.e. if the conduct would have an exclusionary effect.[20]

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[18] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, 540 US 398 (2004), *citing, United States v. Grinnell Corp.,* 384 US 563, 570-71 (1966).

[19] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 US 585, 602 (1985); *Ocean State Physicians v Blue Cross*, 883 F2d 1101, 1112 (1st Circuit) (1989).

[20] See in particular *Advanced Health-Care Services v Radford Community Hospital*, 910 F2d 139, 148 (4th Circuit) (1990), and *Gen Indus Corp v. Hartz Mountain Corp*, 810 F2d 795, 804 (8th Circuit) (1987).

The main issue is therefore whether the conduct in question can be described as exclusionary. It has been stated that, for conduct to be considered to be exclusionary, it must "*not only (1) tend[s] to impair the opportunities of rivals, but also (2) either ... not further competition on the merits or [do] so in an unnecessarily restrictive way*".[21] What is clear from the various judgments on this issue is that conduct will violate Section 2 when it only makes economic sense to engage in that conduct on the basis that it excludes competition. The US Supreme Court has clarified (most recently in *Trinko*) that exclusionary conduct is conduct that makes no economic sense save for the elimination or softening of competition, or conduct that excludes rivals from the market on a basis other than efficiency[22]: this again emphasizes the close relationship between nature of the alleged conduct and the issue of whether the conduct could be described as 'willful'.

[b] EC Approach

Article 82 prohibits conduct that constitutes an "abuse" of a dominant position. The European Court of Justice stated in *Hoffman La-Roche v. Commission* that: *"The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the*

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[21] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 605 (1985).

[22] See also *Matsushita Elec. Indus. Co v Zenith Radio Corp.*, 475 US 574, 588-89 (1986). This is not to suggest that no other conduct can form the basis for a Section 2 claim. Indeed, false advertising and baseless litigation have been found to support Section 2 liability.

undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[23]

In its judgment in *Michelin v Commission*[24], the European Court of Justice sought to define the concept of abuse in terms of the obligations of a dominant firm: "*irrespective of the reasons for which it has… a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".* Dominant firms are therefore, by virtue of this "special responsibility" – the scope of which can vary depending on *inter alia* the market share of the dominant firm – unable to follow courses of conduct which would not be objectionable if followed by a non-dominant firm.[25]

Put briefly, dominant undertakings are prohibited from courses of conduct that would strengthen a dominant position, eliminate a competitor, or cause harm to customers or consumers, unless that course of conduct can be objectively justified.[26] A significant difference between the US and EC approaches is that

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[23] Case 85/76, *Hoffman La-Roche v Commission* [1979] ECR 461.

[24] Case 322/81 *Michelin v Commission* [1983] ECR 3451 at paragraph 57.

[25] See for example Case 65/98 *Van den Bergh Foods Limited v Commission* [1998] ECR II-2641.

[26] The use of "objective justification" as a tool to assist in distinguishing between legitimate commercial conduct and abuse of a dominant position has been developed by the European Courts. The concept has been invoked on a number of occasions (see for example Case 27/76

under Article 82 it is not necessary to show that the conduct is 'willful' – the concept of abuse is an objective one,[27] and it is generally irrelevant as to whether the dominant firm in question subjectively intended to act anti-competitively.[28]

[c] Philosophical Differences

As indicated, the main divergence between the US and EC regimes is that the concept of abuse in the EC includes not only conduct that is exclusionary (as per *Hoffman La-Roche)*, but also includes conduct that is exploitative, i.e. abuses aimed directly at customers or consumers (for example, excessive prices). This reflects particular philosophical differences between the two regimes.

The US approach is best illustrated by the much quoted comment of Judge Learned Hand in *United States v Aluminum Co. of America*[29] that "*[t]he successful competitor, having been urged to compete, must not be turned upon*

United Brands Co. et al v Commission [1978] ECR 204, and Case T-30/89 *Hilti AG v Commission* [1991] ECR-II-1439). To date, such arguments have rarely been successful, although the European Commission in its *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (19 December 2005) suggests that the adoption of a more economic based approach to Article 82 could herald a greater role for "objective justification" in the future – see below.

[27] See Case T-65/89 *BPB Industries v Commission* [1993] ECR II-389 at paragraphs 65 –77.

[28] There are exceptions to this general position. For example, as discussed below, the subjective intention of the dominant firm can be significant in determining whether a dominant firm is engaged in predatory conduct when setting prices below average total costs but above average variable costs.

[29] *United States v Aluminum Co of America*, 148 F2d 416 (2nd Circuit) (1945).

when he wins". In short, market power is a reward of enterprise, and the prize of monopoly profits provides an incentive to firms to compete against each other to gain comparative advantage. The essence of this policy is unapologetically capitalistic and places emphasis on the effectiveness of market forces – monopolies are a result of the market mechanism, and therefore the "*natural behavior of the monopoly*" should not be penalized.[30] More recently, Justice Scalia in *Trinko* wrote, *"[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful, it is an important element of the free-market system."*[31]

By contrast, the position under EC law is based on the broad and conflicting aims of the European Union itself: these aims include promoting free market economics and economic efficiency, but also include broader political and social goals, which include the establishment of a single European market alongside consumer welfare.

The difference in approach reflects different levels of trust in the operation of market forces – whereas the US approach places emphasis on the ability of market forces to deal with monopolies (briefly put, if a monopolist increases its price, this will stimulate new entry and erode the monopoly), the EC position reflects both a degree of distrust in the ability of market forces to deal effectively with monopolies and a greater degree of trust in the value of regulatory

[30] *Ibid.*

[31] See *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, 540 US 398 (2004).

intervention,[32] leading to the view that dominant firms should be made to act as if they were constrained by competition.

Although the fact that exploitative conduct can be caught by Article 82, but not by Section 2, reflects certain philosophical differences, the extent to which this difference is felt in practice is limited, and could become even more so. First, Article 82 is not used to combat exploitative abuses with anything like the same frequency as it is used to prevent exclusionary conduct: as stated by Philip Lowe (Director General of the European Commission Competition Directorate General), "*In practice, most of our enforcement focuses… as in the US on exclusionary abuses*".[33]

Secondly, in proposing reforms to the way in which Article 82 is applied, the European Commission has indicated that priority will be given to exclusionary abuses. As the single European market becomes a reality, and market forces can more freely be felt across Member States, therefore increasing the ability of market forces to erode monopolies, the issue of whether conduct is exclusionary could gain further prominence.

Thirdly, and most significantly, the proposed reforms to the application of Article 82 are intended to result in greater emphasis being placed on economic analysis. The European Commission's *Discussion Paper on the Application of*

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[32] This may in part reflect the concerns on the part of the European Commission as to the actual or perceived unwillingness or inability of Member States to constrain the behavior of state-owned monopolies or national champions.

[33] Philip Lowe, *How different is EU anti-trust? – A route map for advisors*, presented to the American Bar Association, 2003.

Article 82 of the Treaty to Exclusionary Abuses (the Discussion Paper)[34] in particular suggests that the European Commission will adopt a more economic approach to the question of whether conduct can be described as having exclusionary effects. The Discussion Paper also places a greater emphasis on the ability of dominant firms to justify their conduct, thereby escaping liability under Article 82[35] – in particular, the Discussion Paper introduces the concepts of "objective necessity"[36], "meeting competition"[37] and "efficiency"[38] defenses.

The apparent willingness to develop the role of the "efficiency defense" is particularly significant, as the European Commission states that dominant firms can justify their conduct where it results in the realization of efficiencies that benefit consumers, provided that the conduct is indispensable to the achievement of those efficiencies and competition is not eliminated.[39]

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[34] European Commission DG Competition *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, 19 December 2005.

[35] *Ibid*, paragraphs 77 *et seq*.

[36] *Ibid*, paragraph 80.

[37] *Ibid*, paragraph 81 *et seq*.

[38] *Ibid*, paragraph 84 *et seq*.

[39] *Ibid*, paragraph 84. Note that the "efficiency defense" is in this respect identical to the derogation provided by Article 81(3) EC Treaty to Article 81(1) EC Treaty (the EC equivalent to section 1 of the Sherman Act of 1890) which otherwise prohibits agreements or concerted practices that have the object or effect of preventing, restricting or distorting competition.

§ 1.04. Prohibited Conduct

There remains inevitable divergence between practices that constitute a violation of Section 2 and practices that constitute an infringement of Article 82.

In some instances, conduct perfectly acceptable in the US could fall foul of Article 82 in the EC. The application of Section 2 and Article 82 in the context of particular conduct is therefore a significant issue for firms with market power who have activities on both sides of the Atlantic – such firms may well have to follow different commercial policies in the US and EC. However, there is some significant congruity – some conduct will constitute both a violation of Section 2 and an infringement of Article 82 – although the way in which such conduct is identified and analyzed may differ in practice.

A full comparison of the approaches of the US and EC regimes to all types of conduct is beyond the scope of this paper. However, the following sections contain a brief comparison of the US and EC approaches to three types of conduct: predatory pricing; monopoly or excessive pricing; and refusal to deal / essential facilities.

§ 1.05. Predatory Pricing

The practice of predatory pricing has been found to be a violation of both Section 2[40] and Article 82.[41] The European Commission has usefully defined predatory pricing as "*A (deliberate) strategy… of driving competitors out of the market by setting prices below production costs. If the predator succeeds in*

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[40] See for example *Atlantic Richfield Co v USA Petroleum Co*, 495 US 328, 332 (1990).

[41] See for example Case C62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

driving existing competitors out of the market and in deterring future entry of new firms, [the predator] can subsequently raise and earn higher profits".[42]

It can often be difficult to distinguish between predatory pricing and legitimate price competition, the latter being conduct that authorities on both sides of the Atlantic naturally seek to encourage. The main issue is therefore the point at which a price becomes predatory – an issue on which there is significant consistency between the US and EC approaches. An area of difference, however, is the notion of recoupment, which is an important requirement in the US, but not in the EC.

[1] ***When do prices become predatory?***

It is accepted in both the US and EC that prices can only be described as being "predatory" when prices are set below cost.[43] This would appear to be a simple enough test, although it is in fact fairly complex in practice owing to the difficulties in determining what is the most appropriate measure of costs for this purpose and in the gathering of evidence to show that prices were in fact set below that benchmark. However, in both the US and EC, the approach has been to presume predation when prices are set below average variable costs, although the approaches differ in other respects.

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[42] See the European Commission's *Glossary of Terms used in Competition Related Matters*, 2003.

[43] As regards the US, see *United States v. AMR Corp.* 335 F3d 1109 (10th Circuit) (2003) and *Brooke Group, Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993), and as regards the EC see Case C62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

[a] US Approach

As the US Supreme Court has yet to give direction as to the appropriate cost measurement to be used to determine whether prices are below cost, the US Circuits have adopted a number of tests.

However, the position adopted by the US Circuits has generally been that the appropriate measure is marginal cost (with average variable cost acting as a surrogate).[44] The presumption that prices below average variable costs are predatory is predicated on the fact that such conduct would be economically irrational if competition were not eliminated: indeed, in such circumstances it would be more rational for a firm to cease production.

In addition, pricing above marginal cost / average variable cost gives rise to a rebuttable presumption that the price is non-predatory. The Seventh Circuit has also on occasion adopted a further test: a finding of predation is precluded if prices are set above long run incremental costs.[45]

In order to demonstrate predation, plaintiffs are also required to show that the firm with monopoly power "*had a dangerous probability of recouping its investment in below-cost prices*"[46] – this is discussed in more detail below.

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[44] *Ibid*, and see also *Stearns Airport Equip Co v FMC Corp*, 170 F3d 518, 532 (5th Circuit) (1999), and *Kelco Disposal, Inc v Browning-Ferris Indus*, 845 F2d 404 (2nd Circuit) (1988) – in reaching this view, the Circuits have been guided by the test set out in Areeda & Turner's seminal article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv L Rev 697 (1975).

[45] *MCI Communications Corp v AT&T*, 708 F2b 1081, 1122-23 (7th Circuit) (1983).

[46] *Brooke Group, Ltd v Brown & Williamson Tobacco Corp*, 509 US 209, 223 (1993).

[b] EC Approach

The basic position in the EC is very similar to that followed in the US. In an often quoted judgment, the European Court of Justice in *AKZO Chemie BV v Commission*[47] gave the following formulation:

- pricing below average variable cost is presumed to be predatory, although this presumption can be rebutted;
- where pricing is above average variable cost, but below average total cost, conduct is regarded as being predatory if the intention behind the conduct was to eliminate a competitor.[48]

Exceptionally in the EC, in relation to predatory pricing evidence of the dominant firm's subjective intent can be relevant to the assessment of whether a pricing strategy is predatory.

The European Commission has also indicated that prices below long run incremental cost may be a more suitable benchmark in certain industries[49], including the telecommunications industry.

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[47] Case C62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

[48] Note that the European Commission's Discussion Paper adopts average avoidable costs, not average variable costs, as a benchmark. However, this does not represent a significant change in policy: as the Commission states at paragraph 108 of the Discussion Paper that "*Often the AAC benchmark will be the same as the AVC benchmark as in many cases only variable costs can be avoided*".

[49] See the European Commission's *Notice on the Application of Competition Rules to Access Agreements*, OJ [1998] C 265/2.

[c] Conclusion

Although in both the US and EC there is a rebuttable presumption of predation where prices are below average variable cost, differences appear where costs are above average variable cost: both in the US and EC, there is a rebuttable presumption that there is no predation, although in the EC the subjective intention of the alleged predator is important to assessing whether conduct was predatory. However, this difference is not significant in practice, and conduct considered predatory in the US is likely to be considered predatory in the EC.

[2] *Recoupment*

The main difference between the US and EC approaches to predation concerns the issue of recoupment – i.e. whether a predator would be able to recoup losses incurred when engaged in the predatory conduct.

[a] US Position

The US position is that plaintiffs are required to show that the firm with monopoly power "*had a dangerous probability of recouping its investment in below-cost prices*".[50] This requires the plaintiff to show *inter alia* that the alleged predatory conduct: (1) would have driven competitors from the market; and (2) that once competition has been eliminated the alleged predator would have been able to raise its prices to above competitive levels and so recoup its earlier losses.

The reason why the ability to recoup is deemed necessary is clear – if the predator would be unable to increase its prices to supra-competitive levels, this

[50] *Brooke Group, Ltd v Brown & Williamson Tobacco Corp*, 509 US 209, 223 (1993).

assumes that the predator still faces competition from existing or potential competition, and therefore the conduct could not be described as truly exclusionary.

[b] EC Approach

The basic position in the EC towards recoupment has been exactly the opposite to the US position – the European Court of Justice has held that, if there is a ***risk*** that competitors will be eliminated as a result of the alleged predatory conduct, it is unnecessary also to demonstrate the possibility that the dominant firm will recoup the earlier losses.[51]

However, there is some speculation that this position is not absolute, and that the issue of recoupment could become more important.[52] The European Court of Justice in *AKZO* noted that pricing below average variable cost would only be rational if it has the effect of "*eliminating competition so as to enable [the dominant firm to] subsequently raise its prices* ***by taking advantage of its monopolistic position***"[53] (emphasis added). Also, in *Tetra Pak II*[54], the European Court of Justice stated that "*it would not be appropriate,* ***in the circumstances of the present case****, to require... proof that Tetra Pak had a realistic chance of recouping its losses*" (emphasis added). The emphasis of the European Court of Justice on the large market shares present in both cases suggests that the issue of

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[51] Case-333/94P *Tetra Pak v Commission* [1996] ECR I-5951.

[52] See Whish, *Competition Law*, 5th Edition, pages 707-708.

[53] Case C62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, at paragraph 71.

[54] C-334/94 P *Tetra-Pak v Commission* [1996] ECR I-5951, at paragraphs 76-78.

recoupment was not relevant in those cases because the dominant firms arguably had positions of quasi-monopoly or super-dominance. This leaves open the issue of whether the issue of recoupment could become more significant in cases where the finding of dominance is based on lower market shares, particularly where it is necessary to demonstrate that the dominant firm had predatory intent.

Significantly, the European Commission's Discussion Paper also suggests that recoupment could play a greater role in the analysis of predatory conduct in the future.[55] However, the Commission states that proving recoupment "*does not require that the dominant company will be able to increase its prices above the level persisting in the market before the predation… it is sufficient that the predation avoids or delays a decline in prices that would otherwise occur*", and that "*it will in general be sufficient to show the likelihood of recoupment by investigating the entry barriers to the market… As dominance is already established this normally means that entry barriers are sufficiently high to presume the possibility to recoup*".[56] Although the European Commission's Discussion Paper does not represent a complete reversal of the current position on recoupment adopted in the EC, it does suggest a greater willingness on the part of the European Commission to consider the issue when conducting its analysis.[57]

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[55] European Commission's Discussion Paper, paragraph 122.

[56] *Ibid.*

[57] Of course, any position taken by the European Commission is without prejudice to any future judgment of the European Courts.

[c] Conclusion

Although the approaches may differ in other respects, the essential principle behind the approach to predatory conduct in both the US and EC is the same: pricing below cost, specifically average variable cost, is presumed to be predatory. As regards the issue of recoupment, although the positions of the two regimes differ, proposed reforms to the application of Article 82 suggest that the approaches of the US and EC authorities to predation may converge more closely in the future.

§ 1.06. Monopoly and Excessive Prices

In considering the difference between the US and EC approaches to monopoly and excessive prices, it is important to remember one of the basic differences between the two regimes – whilst Section 2 is violated by exclusionary conduct, Article 81 is infringed by both exclusionary and exploitative conduct. The approach to monopoly pricing is a clear illustration of this difference, and perhaps constitutes one of the starkest divergences between the two regimes. In short, monopoly pricing, as essentially exploitative conduct, is not prohibited in the US but is prohibited in the EC in circumstances where it can be considered to be excessive.[58]

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[58] For a detailed comparison of the two approaches to monopoly pricing, see Gal, *Monopoly pricing as an antitrust offence in the US and the EC: Two systems of belief about monopoly?*, Antitrust Bulletin, Volume 49, page 343-384, Spring 2004.

[1] ***US Approach***

Section 2 does not prevent firms holding monopoly power from charging their customers monopoly or excessive prices, i.e. prices above the competitive level.

The philosophy behind the US position is clear – monopoly profits provide an incentive for competition, and to prevent a firm which has achieved monopoly by legitimate means from exploiting that monopoly position would be to distort the economic forces driving competition.[59]

However, there may be circumstances in which monopoly or excessive prices could have an exclusionary effect, and therefore could be caught by Section 2. For example, it might be argued that conduct whereby a firm with monopoly power charges excessive or monopoly prices could be caught by Section 2 to the extent that the firm's conduct constitutes a constructive refusal to supply with no legitimate economic rationale other than the intent to exclude a competitor.

[2] ***EC Approach***

The EC position is that some forms of monopoly pricing are prohibited, i.e. where a dominant firm's prices can be described as being excessive. Indeed, the non-exclusive list of abuses of dominance contained in Article 82 includes a prohibition on dominant firms "*directly or indirectly imposing unfair purchase or*

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[59] As stated by Judge Learned Hand that "*[t]he successful competitor, having been urged to compete, must not be turned upon when he wins*" - *United States v Aluminum Co of America*, 148 F2d 416 (2nd Circuit) (1945).

selling prices". This in part reflects the broader political and social goals of the European Union (see above), which include consumer welfare.

In *General Motors v Commission*[60] the European Court of Justice stated that, in principle, "*the imposition of a price which is excessive in relation to the economic value of the service provided*" could constitute an abuse of a dominant position. Although this principle, which has been given the label "excessive pricing", has been upheld and applied in a number of cases[61] it is by no means the case that dominant firms' prices are always closely regulated. In particular it should be noted that findings of excessive pricing by the European Commission are rare, albeit that one of the reasons for this is the practical difficulty in identifying whether a price is actually excessive.[62]

What is an excessive price? The European Court of Justice has identified two possible methods of determining whether a price is excessive. In *United*

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[60] Case 26/75 *General Motors v Commission* [1975] ECR 1367 – although note that, in the event, the European Court of Justice concluded that there was insufficient evidence on which to base an infringement in this case.

[61] See, for example, Case 226/84 *British Leyland Plc v Commission* [1986] ECR 3263, .

[62] There have, nevertheless, been some controversial excessive pricing decisions made by the European Commission – see *Deutsche Telekom* OJ 2003 L263/9 and *Deutsche Post AG – Interception of cross border mail* OJ 2001 L331/40. It should also be noted that in applying national competition rules, Member States have dealt with allegations of excessive pricing. For example, findings by the UK competition authority of excessive pricing in the pharmaceuticals sector have been upheld by the UK Competition Appeal Tribunal – *Napp Pharmaceutical Holdings Ltd v. Director General of Fair Trading* [2002] CAT 1.

Brands v Commission[63], it was indicated that one possible way in which to determine whether a price is excessive would be to compare "*the selling price of the product in question and its cost of production*"[64] – i.e. are prices persistently and significantly in excess of the costs of production? An alternative formulation, first put forward in *Corinne Bodson v Pompes Funèbres*[65], is to compare the allegedly excessive prices with the prices of equivalent products on competitive markets. With no clear approach having been adopted, and with only a few extant cases concerning alleged excessive pricing, there is limited guidance as to when a price will be regarded as being excessive.

[3] ***Conclusion***

There is apparent divergence between the approaches of the US and EC to monopoly pricing. In practice, however, the difference between the two regimes is not as great as may at first appear – the European Commission does not regard itself as a price regulator[66] and rarely makes a finding of excessive pricing.

§ 1.07. Refusals to Deal and Essential Facilities

The question of whether, and if so when, a monopolist or dominant firm should be compelled to deal with its competitors is a controversial one on both sides of the Atlantic, not least because the impact of forcing firms to deal with other firms could have the effect of "chilling" innovation and investment. As

[63] Case 27/76 *United Brands Co. et al v Commission* [1978] 1 CMLR 429.

[64] *Ibid*, paragraph 251.

[65] Case 30/87 *Corinne Bodson v Pompes Funèbres* [1988] ECR 2479.

[66] See, for example, the Commission's *XXVIIth Report on Competition Policy* (1997), point 77.

stated by Hewitt Pate in his submission to the Antitrust Modernization Commission: "*dreams of monopoly drive innovation while the availability of forced access to the source of a monopolist's advantage dampens it*."[67]

The basic approach to refusals to deal is the same in both the US and EC. First, the general approach taken in both regimes is based on the principle that firms should generally be free to supply to whomsoever they choose. As a corollary of this, firms should also generally be free to refuse to deal with whomsoever they wish. However, it is also accepted on both sides of the Atlantic that in certain circumstances a refusal to deal can be regarded as being anticompetitive, and in those circumstances the general right of a firm to deal with whomsoever it chooses should be circumscribed: as stated by the European Commission in its Discussion Paper: "*Dominant companies are… not entitled to use refusals to supply or threats of refusals to supply for anticompetitive purposes*".[68]

Secondly, in both the US and EC cautious approaches have been taken to imposing limitations on the basic freedom to deal, although perhaps the approach taken in the US is less generous to competitors than that adopted in the EC. The following paragraphs will detail the US and EC approaches to refusal to supply and the particularly controversial doctrine of essential facilities, a form of refusal to deal where the owner of a facility or infrastructure, access to which is

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[67] Testimony of R. Hewitt Pate before the Antritrust Modernization Commission Hearing Panel, Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts, 29 September 2005.

[68] European Commission's Discussion Paper, paragraph 204.

necessary for competitors to reach customers or conduct their business, refuses to allow competitors to access that facility.

Despite similarities in the basic approaches taken in both the US and EC, there are significant differences. Indeed, the decision of the European Commission to require Microsoft to license, on reasonable and non-discriminatory terms, interoperability data allowing interoperability between Microsoft's server and those of competitors, formed part of a high profile dispute between the US and EC authorities.[69] Although in that case the ultimate position taken by the EC did not go much further than the settlement reached in the US (where a "client-to-server", not "server-to-server", remedy was obtained), it provided clear evidence that the EC approach on this issue is more restrictive than that taken in the US.

[1] ***US Approach***

The Supreme Court recognized that the right of a firm to decide with whom it will deal is not absolute as early as 1919. The Supreme Court stated in its *United States v Colgate & Co*[70] "*[i]n the absence of any purpose to create or maintain a monopoly . . . [Section 2] does not restrict the long recognized right of a trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal.*"

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[69] Case COMP/C-37/37.792, *Microsoft*, decision of 24 March 2004. Note that the differences expressed were even more pronounced on the issue of tying or bundling.

[70] *United States v Colgate & Co*, 250 US 300 (1919).

Although this position has been followed in a number of cases before both the Supreme Court and other courts in the US, there is still some uncertainty as to the scope of the limitation on the freedom to deal. However, two judgments of the Supreme Court, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[71] and (more recently) *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*[72] have provided some clarification.

[a] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*

The defendant owned three out of four of the snow skiing areas in Aspen, the fourth being owned by the plaintiff. Both parties had for many years sold joint all-area ski tickets, but this arrangement came to an end when, following failed negotiations in which the defendant demanded a greater proportion of the joint proceeds, the defendant canceled the joint ticket. Facing the prospect of skiers bypassing its skiing area altogether, the plaintiff offered to buy ski-passes from the defendant at retail prices, an offer which the defendant refused. A jury found that this constituted a violation of Section 2, and the Supreme Court agreed.

In reaching its decision, the Supreme Court stated that, in certain circumstances, a monopolist has a duty to cooperate with its smaller competitors. Although the Supreme Court did not provide detailed guidance as to the circumstances in which a monopolist does not have freedom to refuse to deal, it did provide some general guidance by stating that the conduct in question made "*an important change in the character of the market*" that limited the ability of

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[71] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585 (1985).

[72] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, 540 US 398 (2004).

the plaintiff to compete, and that the conduct could not be justified by any "*normal business purposes*".[73]

The judgment in *Aspen* has been narrowly construed in subsequent judgments, and the duty to cooperate with smaller competitors has been limited to circumstances where cooperation is indispensable to enable effective competition, and where the monopolist offers no legitimate business justification for its conduct.[74] The position taken in *Aspen* has been further limited by the Supreme Court's judgment in *Trinko*, the most recent, and perhaps most significant, judgment on this issue since the Supreme Court's judgment in *Aspen*.

[b] *Verizon Communications, Inc. v Trinko*

The facts behind *Trinko* are less straightforward. Trinko, a customer of AT&T's local telephone service, filed a class action against Verizon, a firm that historically had a monopoly on local telephone services in New York State, alleging that Verizon had thwarted access to its local exchange network in violation of FCC regulations, as part of an attempt to prevent competitors from encroaching on its historic monopoly. Although initially rejected, the US Court of Appeals for the Second Circuit allowed the antitrust claim, which was finally reversed by the Supreme Court.

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[73] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585, (1985).

[74] See, for example, *Data Cent Corp v. Grumman Sys Support Corp*, 36 F3d 1147, 1188 (1st Circuit) (1994); *High Tech Careers v San Jose Mercury News*, 996 F2d 987, 990 (9th Circuit) (1993); and *Abcor Corp v AM Intl, Inc*, 196 F2d 924, 929-30 (4th Circuit) (1990).

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The Supreme Court stated that *Aspen* is a case that is "*at or near the outer boundary of [Section] 2 liability*".[75] In doing so, the Supreme Court signaled that the important aspect of the *Aspen* judgment was that the monopolist's "*termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end*", and held *inter alia* that as there was no evidence of "*anticompetitive malice*" on the part of Verizon, its conduct did not constitute "*a recognized antitrust claim under [the Supreme Court's] existing refusal-to-deal precedents*" relying heavily on the fact that Verizon had not previously sold access to its local phone network and did so only after the FCC mandated the sale. From this the following test can be distilled: if the termination of voluntary and profitable conduct has an exclusionary impact, it may constitute a violation of Section 2.

It is widely accepted that the Supreme Court's judgment has made it more difficult to make a successful claim against a monopolist's unilateral refusal to deal, indeed the Supreme Court itself stated that it has "*been very cautious in recognizing… exceptions [to the right to deal], because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm*".

[c] Essential Facilities

The US position as regards the doctrine of essential facilities – whereby a firm controlling an asset essential for other firms to compete in a given market may be required to share the asset with its competitors - is unclear.

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[75] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, 540 US 398, 409 (2004).

The Supreme Court's judgment in *United States v Terminal Railroad Association*[76] has been cited and applied by a number of lower courts in requiring the owners of essential facilities to make such facilities available to other competitors on nondiscriminatory terms. In that case, a group of competitors controlling access to the only railroad terminal in St Louis, who denied access to other competitors on reasonable terms, were found to have violated Section 2. In particular, the judgment of the Seventh Circuit in *MCI Communications Corp v AT&T* [77] clarified that the four elements necessary to determine the existence of an essential facility are: (1) control of the facility; (2) the inability of a competitor to reasonably duplicate the facility; (3) a denial of the use of the facility to the competitor; and (4) the grant of access to the essential facility is feasible.

However, despite this line of jurisprudence, the scope of the doctrine remains unclear. The Supreme Court has never itself endorsed the essential facilities doctrine, although it has appeared to apply the doctrine[78] and, significantly, the Supreme Court declined the opportunity to recognize the doctrine in *Trinko*, stating that it is a doctrine "*crafted by lower courts*" and that "*[w]e have never recognized such a doctrine… and we find no need either to recognize it or repudiate it here*".[79] The Supreme Court went even further and

[76] *United States v Terminal Railroad Association*, 224 US 383 (1912).

[77] *MCI Communications Corp v AT&T* 708 F2d 1081.

[78] See *Otter Tail Power Co v United States*, 410 US 366 (1973), and *Associated Press v United States*, 326 US 1 (1945).

[79] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, 540 US 398 (2004).

distinguished its judgment in the *Terminal Railroad* case on the basis that the conduct complained of in that case involved concerted, not unilateral, action.

Although it remains to be seen whether this apparent lack of enthusiasm for the doctrine on the part of the Supreme Court will have an impact on the way in which the doctrine will be applied in the future, the Supreme Court's attitude has not yet killed the doctrine.

[2] *EC Approach*

As indicated, the EC approach to refusal to deal is much more favorable to the smaller competitor than the position taken in the US, although there has yet to be decisive guidance as to the circumstances in which a refusal to supply, or a refusal to allow access to an essential facility, will be considered to be abusive.

[a] Refusal to Deal

That a refusal to deal could constitute an abuse of a dominant position was recognized by the European Court of Justice in *Commercial Solvents v Commission*[80], which stated that "*an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and* ***therefore risks eliminating all competition****… is abusing its dominant position*" (emphasis added).[81] This formulation has been followed in a number of other cases.[82]

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[80] Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223.

[81] *Ibid*, paragraph 25.

On an initial view, the EC position would appear to reflect the US position, particularly in the apparent requirement that the refusal to supply must have an exclusionary effect before it is considered to be abusive. However, the extent of the required effect on competition is not clear. In its judgment in *United Brands v Commission*,[83] the European Court of Justice stated that, even if competition is not eliminated, a refusal to supply could constitute an abuse of a dominant position where it results in substantial harm to competition.[84] The position may be even further eroded as a consequence of the proposed reforms to the application of Article 82 – the European Commission in its Discussion Paper states that one of the conditions of a finding of an abusive refusal to supply is that "*the refusal to supply is* ***likely to have a negative effect*** *on competition*" (emphasis added).[85] In broadening the scope of abusive refusal to deal in this way, the EC may be moving further away from the US approach.

[b] Essential Facilities

The doctrine of essential facilities has been explicitly recognized by the European Court of Justice, and has become an established, albeit controversial,

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[82] See for example Case 311/84 *Centre Belge d'Etudes de Marché-Telemarketing v. CLT* [1985] ECR 3261, and Case C-18-88 *GB Inno* [1991] ECR I-5941.

[83] Case 27/76 *United Brands co and United Brands Continental BV v Commission* [1978] ECR 207.

[84] *Ibid*, paragraphs 182-194.

[85] European Commission's Discussion Paper, paragraphs 218 and 222 *et seq*.

area of law. Despite this recognition, the position in the EC is fairly close to the approach taken in the US.[86]

Although there have been a number of cases concerning access to essential facilities in the EC,[87] two more recent cases, *Oscar Bronner v Mediaprint*[88] and *IMS Health v NDC Health,*[89] have been important in setting out when refusal to allow access to an essential facility will constitute an abuse of a dominant position.

[i] *Oscar Bronner v Mediaprint*

In this case, the defendant published two newspapers in Austria, serving approximately half of the market. The plaintiff, a newcomer to the market, wanted access to the defendants' home delivery system (the only home delivery system in Austria). The defendant refused to allow the plaintiff access to the system, even though reasonable remuneration had been offered – the plaintiff alleged that this constituted an abuse of a dominant position. However, the European Court of Justice disagreed.

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[86] See for example paragraph 205 of the European Commission's Discussion Paper.

[87] See, for example, the European Commission's decision in *Sealink/B&I – Holyhead* [1992] 5 CMLR 255, and the European Court of First Instance's judgment in Case T-504/93 *Tierce Ladbroke v. Commission* [1997] ECR II-923.

[88] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791.

[89] Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-743.

In the course of its judgment, the European Court of Justice closely followed the Opinion of Advocate General Jacobs,[90] and set out its view that a refusal to allow access to an alleged essential facility constitutes an abuse of a dominant position only if:

- the alleged essential facility is indispensable to competitors of the owner of the facility;
- a refusal to allow access to the facility would eliminate competition; and
- the refusal could not be objectively justified.

Further, in considering the question of indispensability, the European Court of Justice emphasized that it would have to be established that it would not be economically viable for an alternative to be created.

The approach taken in *Bronner* brought the EC position closer to that adopted by the Supreme Court in the US, and this trend was reinforced by the European Court of Justice's judgment in *IMS Health*.

[ii] *IMS Health v NDC Health*

The parties in this case were competitors engaged in the collection, processing and interpretation of regional pharmaceutical sales data in Germany. IMS had developed and copyrighted a "brick" structure, which divided Germany into research segments. Customers began to rely on the "brick" structure when

[90] Opinion of Advocate General Jacobs, Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791.

evaluating research data, which prompted competitors of IMS to challenge the decision of IMS to refuse to license the structure to its competitors.

In its judgment, the European Court of Justice reinforced and expanded upon the three conditions set out in its *Bronner* judgment stating that, although a refusal to allow access to an essential facility will only exceptionally be considered as an abuse of dominance, it would be so considered if the refusal to allow access: (1) prevents the emergence of a new product for which there is potential demand; (2) cannot be objectively justified; and (3) eliminates all competition.

Both *Bronner* and *IMS Health*, particularly the latter, substantially restrict the scope of the limitation on the freedom to deal. However, the practical scope of the doctrine of essential facilities remains unclear: in particular, it is unclear how novel a "new product" must be in order to meet the criteria set out in *IMS Health*.

[3] ***Conclusion***

Although both the US and EC follow a restrictive approach as regards limitations on the general right of freedom to deal, whether in the context of a refusal to supply or a refusal to allow access to an essential facility, the US approach is clearly more restrictive than the EC approach. However, the European Commission's Discussion Paper, in suggesting that only a "negative effect" on, rather than the elimination of, competition is sufficient to make a finding of an abusive refusal to supply, would appear to drive a further wedge between the US and EC positions.

§ 1.08. Proposed Reforms – Narrowing the gap?

Approaches to the control of the conduct of firms with market power are under review on both sides of the Atlantic. In the US, the issues being examined by the Antitrust Monopolization Commission include single firm and exclusionary conduct. In the EC the European Commission is in the process of considering reforms to its approach to Article 82, and it is widely anticipated that this reform will lead to a more economics based approach to the application of Article 82. The result of these reforms, and in particular the proposed reforms to the application of Article 82, could be greater convergence as regards the application of Section 2 and Article 82.

[1] *Reforms to Section 2*

In the US, reforms to Section 2 are being considered by the Antitrust Modernization Commission, which was created pursuant to the Antitrust Modernization Commission Act of 2002. One of the Commission's functions is to "*examine whether the need exists to modernize the antitrust laws and to identify and study related issues*", and in exercising this function the Commission has announced that it will be studying, among other things:

- the circumstances in which a firm's refusal to deal with rivals in adjacent markets violates Section 2 and, in particular the issue of whether the Supreme Court's decision in *Trinko* states an appropriate legal standard in this respect;
- whether the essential facilities doctrine constitutes an independent basis of liability for single-firm conduct under Section 2; and

- how the standards for exclusionary conduct should be determined (e.g., through legislation, judicial development, or *amicus* briefs from the Department of Justice and Federal Trade Commission).

The Commission is currently taking views from a variety of sources, including industry, on these subjects and will propose any reforms it deems advisable to Congress, which must enact laws to implement any proposed changes. As the Commission is still at the relative early stages of its deliberations, and is approaching the issue of reform in this context with an open mind, it is not clear as to what shape any reform of Section 2 will take, or indeed whether Section 2 will be reformed at all. However, the indications are that any reforms will not be revolutionary. Whatever the outcome, it is highly unlikely that US practice in regulating the conduct of firms with market power will move closer to the European model: it is more likely that potential reforms to the application of Article 82 will move the EC approach closer to that of the US.

[2] ***Reforms to Article 82***

Over the past few years, the European Commission has conducted reforms of its approach to anti-competitive agreements and merger control, reforms that have heralded a greater role for economic analysis in both areas. The European Commission has now focused its reforming eye on its approach to Article 82, and the indications are that the reforms will also bring about a greater role for economic analysis in the application of Article 82.

Calls for a more economics based approach to Article 82 have been made for some time[91], the main criticism of the current approach being that the application of Article 82 has been to protect competitors rather than competition. Other criticisms of the current approach are the apparent lack of analytical consistency, with individual principles being developed in the context of each category of abuse, and the tendency to formulate what are effectively *per se* rules by regarding certain forms of conduct as being abusive irrespective of the effect of the conduct in question on competition.

In reforming its approach to Article 82, the Commission had two options: either to create a *per se* system by setting out a list of rules to be strictly followed, or to adopt an approach which introduces more rigorous economic analysis into the assessment. The reforms envisaged by the European Commission's Discussion Paper are a clear attempt to introduce a more economics based approach: the Discussion Paper emphasizes the fact that Article 82 should be used to protect competition and not competitors, and seeks to introduce a more economics based analytical framework to the application of ***all*** aspects of Article 82, including the issue of dominance and categories of abusive conduct.

In doing so, the European Commission has attempted to strike the difficult balance between providing business with the legal certainty provided by *per se* rules, and maintaining flexibility to ensure that the system catches only anti-competitive conduct, and that all anti-competitive conduct is caught (avoiding so-

[91] John Vickers, *Abuse of Market Power*, Speech to the 31st Conference of the European Association for Research in Industrial Economics, 3 September 2004.

called "false positives" and "false negatives"). The Discussion Paper seeks to achieve this by setting out the general economic framework within which the conduct of dominant firms will be assessed, with more detailed guidance as regards particular courses of conduct.

The Discussion Paper is currently subject to consultation, and it remains to be seen how the approach proposed by the Commission – in either its general direction or its detail – will survive that process. In any event, the fact that the European Commission appears willing to inject more rigorous economic analysis into its assessment under Article 82 is a welcome development, not least because it aligns EC policy more closely with that of the US.

§ 1.09. Conclusion

Without root and branch reforms on either side of the Atlantic, encompassing both legislative and philosophical changes, there will always be significant differences in the way the US and EC approach the regulation of unilateral conduct of firms with market power. As stated by Philip Lowe, Director General of the European Commission's Competition Directorate General: "*In some fields both US and EU antitrust have the same approach. In others the approaches differ, but outcomes in individual cases may not differ… **divergences are mostly the consequence of the different legal frameworks which enforcers on both sides of the Atlantic have to apply***" (emphasis added).[92]

[92] Philip Lowe, *How different is EU anti-trust? – A route map for advisors*, presented to the American Bar Association, 2003.

As Philip Lowe indicates, in many instances the apparent differences between the two regimes are not as great as would first appear, and there is much congruity. Whether this congruity increases or decreases over time remains to be seen. Although one of the benefits of the proposed reforms to the way in which Article 82 is to be applied, should they materialize in practice, will be to lessen the gap between the approach taken by the US and EC authorities on some issues (for example, predatory conduct and objective justification), the proposed reforms may also widen the gap as regards other issues (for example, refusal to supply and essential facilities).

However, two basic features of the reforms augur well for future congruity in practice, if not in principle. First, as stated by Neelie Kroes (European Commissioner for Competition) when announcing the intention to reform the application of Article 82, "*it is sound for our enforcement policy to give priority to so-called exclusionary abuses*" – it is clear that the European Commission will focus its enforcement activities on conduct which could also violate Section 2 of the Sherman Act, although it is also clear that exploitative abuses have not yet been abandoned. Secondly, by adopting a more economics based approach to the application of Article 82, the European Commission is seeking to bring its analytical framework closer to that adopted in the US.

Whatever the results of the EC reforms, the regulation of the conduct of firms with monopoly power will always remain contentious, and gentlemen and cowboys – on both sides of the Atlantic – will always form part of the debate.