ANALYSIS SECTION

Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC

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This article considers a dominant firm's duty to deal with existing customers, and in particular whether, and in what circumstances, it is lawful under Art.82 EC to reduce or cease supplies to an existing customer or refuse to sell additional quantities requested by an existing customer. The case law in this area has not had a clear or consistent rationale; in particular, it is unclear how a dominant firm's duty in respect of parties with whom it already has a supply relationship differ, if at all, from its duty to supply new customers with whom it has no previous dealings under the "essential facilities" doctrine and analogous principles. These issues will come to the fore in an important pending case before the Court of Justice: Case C–53/03 *SIFAIT v GlaxoSmithKline*. Our conclusion is that EC competition law carefully circumscribes the instances in which the fundamental freedom to contract (and for which products and precise quantities) can be interfered with for existing customers. If a duty to deal is, exceptionally, to be imposed, it must be clear that there are substantial benefits to competition in interfering with freedom of contract.

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Introduction

As a general matter, it is clear that any firm—dominant or otherwise—has no duty to contract with third parties with whom it does not wish to have dealings. This follows from several elementary principles.

In the first place, freedom of contract is a fundamental principle enshrined in EC competition law and the laws of the Member States. For example, in *Demo-Studio Schmidt*—a case decided under Art.81 EC—Advocate General Rozes indicated that "the applicant cannot [. . .] claim a right [. . .] to be supplied by the intervener" and that "the applicant fails to appreciate that the prohibition of agreements which restrict competition provides, as such, no legal basis for intervening in the contractual freedom of traders".[1] Any contrary rule would effectively require a dominant firm to sell to any and all available buyers. This would be an onerous and unjustified interference with a company's freedom to organise its commercial activities in the manner it best sees fit. This fundamental right also applies under Art.82 EC as the Court of First Instance made clear in *Bayer*[2]:

> [U]nder Article 8[2], refusal to supply, even where it is total, is prohibited only if it constitutes an abuse. The case-law of the Court of Justice indirectly recognizes the importance of safeguarding free enterprise when applying the competition rules of the Treaty where it expressly acknowledges that even an undertaking in a dominant position may, in certain cases, refuse to sell or change its supply or delivery policy without falling under the prohibition laid down in Article 8[2].

Secondly, a dominant firm is generally entitled to pursue legitimate, profit-maximising strategies, including by deciding with whom it wishes to establish business relationships, concerning what product, and in deciding what quantities, if any, it wishes to sell to third parties. As the European Court of Justice ("ECJ") held in *United Brands*, "the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests".[3] Thus, at its most basic, a dominant firm can, in general, alter the terms on which it deals with buyers if it thinks that greater profits can be

1 [1983] E.C.R. 3045 at 3072.
2 Case T–41/96 *Bayer AG v Commission* [2000] E.C.R. II–3383, para.180.
3 Case 27/76 *United Brands v Commission* [1978] E.C.R. 207, para.189.

reaped by selling different quantities to different buyers, or not selling at all to certain buyers.

Thirdly, competition law protects competition and consumers, not particular competitors. Unless it is clear that there are substantial benefits to competition in interfering with contractual freedom, rather than benefits to the profits of a particular third party, competition law should not order intervention. In *Bronner*, Advocate General Jacobs confirmed this when he stated that "in assessing this issue [*i.e.* compulsory access claims] it is important not to lose sight of the fact that the primary purpose of Article 8[2] is to prevent distortion of competition—and in particular to safeguard the interests of consumers rather than to protect the position of particular competitors".[4]

Fourthly, at least as far as existing customers are concerned, relations between the dominant firm and a counterparty are primarily the province of contract law, not competition law. Although the existence of dominance may mean that the parties' relative negotiating strength is unequal, the customer will in many cases be able to rely on its contract to obtain injunctive relief against a refusal to deal, compel specific performance, or obtain damages for loss caused by the dominant firm's refusal to deal. It may also mean that, even in the absence of a specific notice period, industry practice would result in a certain minimum notice period being implied into the terms of the contract. Contract law may also impose certain duties on the customer—in particular the duty to mitigate losses and make alternative arrangements with other sellers if possible. Thus, in the case of existing customers, contract law is the customer's primary recourse and competition law is not generally intended to compensate firms for making bad bargains or unfavourable contracts.

Finally, any limitation on the freedom of contract runs a significant risk of chilling legitimate competition and further innovation. This is true of both the duty to supply new customers and any restrictions on a dominant firm's right to deal with existing customers. This basic tension was summarised by Advocate General Jacobs in *Bronner* as follows[5]:

> [The] . . . justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.

The case law

Applicable precedent

The earliest precedent dealing with a dominant firm's duty in respect of existing customers is *Commercial Solvents*.[6] The ECJ held that Commercial Solvents abused its dominant position by refusing to continue to supply aminobutanol and nitropropane, essential raw materials for the production of ethambutol (and for which Commercial Solvents held unique know how), to Zoja. The basis for the refusal to supply was that Commercial Solvents was planning to vertically integrate into competition with Zoja in the downstream market for the supply of the derived product, ethambutol. Commercial Solvents' actions were thus intended to exclude Zoja from the downstream market by cutting off essential raw materials. The ECJ noted in this connection that Commercial Solvents had supplied Zoja with aminobutanol for some years and only terminated supplies when Zoja started competing directly with it. In these circumstances, the ECJ held that there was an abuse:

> [I]t follows 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 on the part of this customer, is abusing its dominant position within the meaning of Article 8[2] EC.

Several important facts should be noted in connection with *Commercial Solvents*. First, the dominant company was the only source of the raw materials in

4 Case C–7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs – und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* (hereinafter "*Bronner*") [1998] E.C.R. I–7791, Opinion, ¶58.

5 *Bronner*, Advocate General Jacob's Opinion, ¶58.

6 Joined Cases 6/73 and 7/73 [1974] E.C.R. 223. See also *Hugin/Liptons* [1978] O.J. L22/23 where the Commission found that the refusal to continue to supply a customer with spare parts on the ground that the customer had established a business in servicing and the supply of spare parts in competition with the dominant supplier was abusive.

question in the EU and the ECJ specifically rejected claims that other nascent technologies in the trial stage were a substitute for Commercial Solvents' raw materials. Secondly, and following on from this, the refusal to deal risked "eliminating all competition on the part of th[e] customer". Finally, it seems that Commercial Solvents had, after a period of several years of previous supply to Zoja, completely and suddenly ceased supplies. In these circumstances, *Commercial Solvents* might more accurately be seen as a pre-cursor to subsequent "essential facilities" type cases in EC competition law, rather than a general statement of law on the duty to deal with customers in respect of non-essential inputs.[7]

In a series of cases arising out of the reduction of supplies during the global oil crisis in the early 1970s, the Commission appeared to adopt a more expansive approach to the principle established in *Commercial Solvents*. In the *ABG/Oil Companies* decision,[8] the Commission seemed to indicate that dominant firms were subject to a strict non-discrimination principle when deciding which customers they could deal with[9]:

> Abuse within the meaning of Article 8[2] of the Treaty may be defined as any action of an undertaking in a dominant position which reduces supplies to comparable purchasers in different ways without objective justification, and thereby puts certain of them at a competitive disadvantage to others, particularly where such action can result in changes in the structures of the particular market. If it is to be safe from the accusation of abuse under Article 8[2], a dominant undertaking must allocate any available quantities to its several buyers on an equitable basis.

On appeal, the ECJ substantially limited the broad principle enunciated by the Commission.[10] First, it indicated that, for there to be an abuse, there must be "an obvious, immediate and substantial competitive disadvantage" and that the behaviour may need to jeopardise the customers' continued existence (para.20). Secondly, the ECJ made it clear that it may be objectively justified for a dominant firm to terminate supplies where this is the consequence of internal reorganisation of the company (para.28). Finally, a dominant firm can prioritise long-standing customers over occasional customers (para.32).

In *United Brands*, the ECJ held that it was abusive for a dominant supplier to terminate supplies to a distributor on the grounds that the distributor had participated in an advertising campaign for a competitor of the supplier. The ECJ seemed to elaborate a more general principle to the effect that a dominant firm "cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary" (para.182). However, it later tempered that statement considerably by stating that the refusal should have a possible consequence that "it might in the end eliminate a trading party from the relevant market" (para.183) and that the dominant firm can always take reasonable steps to protect its commercial interests (para.189).

Two subsequent cases limit considerably the broad statements in earlier case law with respect to dominant firms' duty to continue dealings with existing customers. The first—*Filtrona/Tabacalera*—concerned the rejection by the Commission of a complaint by Filtrona that Tabacalera had abused its dominant position as a purchaser of cigarette filters in the Spanish cigarette market by increasing its own production of ordinary cigarette filters from 44 per cent to 100 per cent of its own requirements, thereby discontinuing its purchases from Filtrona.[11] The Commission held that (i) a company's production of its own requirements is not in itself an abnormal act of competition (production by cigarette manufacturers of their own filters is common practice in the industry), (ii) Tabacalera's decision was justified on economic grounds, in particular because it enabled it to achieve economies of scale and generally to reduce production costs, and (iii) no special circumstances suggested that Tabacalera's decision was part of an abusive behaviour or strategy. The case thus confirms that vertical integration without anti-competitive purpose is not abusive even if the effect is that a dominant firm ends a previous course of dealings with an existing customer.

Secondly, in *Boosey & Hawkes*,[12] the Commission clarified further the circumstances in which a dominant firm is entitled to refuse to continue to deal with existing

7 This is confirmed to some extent by Case 311/84 *Centre Belge D'études De Marché Télémarketing v SA Compagnie Luxembourgeoise De Télédiffusion And Information Publicité Benelux* [1985] E.C.R. 3261, where the ECJ held interpreted *Commercial Solvents* as limited to situations in which an undertaking holds a dominant position on the market in respect of an input that is "indispensable for the activities of another undertaking on another market" (para.26).

8 Case IV/28.841 *ABG/Oil Companies* [1977] O.J. L 117/1.

9 Another earlier case which seems, at first sight, to indicate a very broad non-discrimination principle is Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission* [1983] E.C.R. 483. However, in that case, the refusal to deal was based on discrimination on the grounds of nationality, which is a serious and *per se* violation of community law. Accordingly, GVL does not stand for a much broader non-discrimination principle that a dominant company must deal with all buyers for all reasonable quantities requested.

10 Case 77/77 *Benzine Petroleum Handelmaatschappij BV v Commission* [1978] E.C.R. 1513.

11 XIVVth Report on Competition Policy (1989), point 61.

12 *BBI/Boosey & Hawkes* [1987] O.J. L286/36.

customers. In that case, Boosey & Hawkes refused all further supplies to a customer who had transferred its central activity to the promotion of a competing brand of musical instruments. An important evidentiary point in this connection was that Boosey & Hawkes had embarked on a plan to exclude the competitive threat from that rival and that the refusal to supply the customer was part of that plan (para.19). While the Commission found that the sudden and complete termination of supplies was, on the facts, disproportionate, it confirmed that a dominant firm can lawfully terminate relations with reasonable notice and that there is no obligation on a dominant firm to subsidise competition to itself:

> There is no obligation placed on a dominant producer to subsidize competition to itself. In the case where a customer transfers its central activity to the promotion of a competing brand it may be that even a dominant producer is entitled to review its commercial relations with that customer and on giving adequate notice terminate any special relationship. (para.19)

Understanding the case law

The duty of dominant firms to deal with third parties does not have a clear or consistent rationale in EC competition law. In the course of the above-mentioned cases, the Commission and Community courts have elaborated a seemingly broad duty to deal, while at the same time being careful to limit that duty on the particular facts of the case. The analysis of a dominant firm's duty to deal with existing customers is complicated by the fact that it is not clear how, if at all, this relates to duties to deal with new customers under the "essential facilities" analogue in EC competition law, as discussed in *Volvo*,[13] *Renault*,[14] *Magill*,[15] *Ladbroke*,[16] *IMS Health*,[17] and other precedents.[18] The analysis is complicated further by the fact that there are a number of decisions in the area of airline interlining and computer reservation systems where the Commission imposed duties on dominant airlines to deal with competing airlines with whom they had not dealt previously, and notwithstanding the absence of an express finding that the input in question was essential for the competitor.[19]

A subsidiary problem is that the apparent distinction in EC competition law between dominant firms' duties towards new and existing customers seems arbitrary in circumstances where, in economic terms, the effect of the refusal may be similar. It seems arbitrary that a dominant firm (i) could refuse to deal at all if it never supplied any third party; (ii) may have a duty to deal if it supplied a third party in the past, but since ceased to; and (iii) may have a duty to deal with a new customer if it continues to supply an existing customer in the same position (*i.e.* discrimination). Thus, conduct with equally anti-competitive effects may be lawful or unlawful depending on whether there was an earlier course of dealings, which seems an arbitrary way of framing clear legal duties.

While detailed discussion of essential facilities issues is beyond the scope of this article,[20] it seems useful to attempt to clarify the relationship between a dominant

13 Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] E.C.R. 6211.
14 Case 53/87 *Consorzio italiano della componentistica di ricambio per autoveicoli and Another v Renault* [1988] E.C.R. 6039.
15 Case IV/31.851 *Magill TV Guide/ITP, BBC and RTE* [1989] O.J. L78/43; Case T–69/89 *Radio Telefis Eireann (RTE) v Commission* [1991] E.C.R. II–485; Case 70/89 *The British Broadcasting Corporation and BBC Enterprises Ltd (BBC) v Commission* [1991] E.C.R. II–535; and Case T–76/89 *Independent Television Publications Limited (ITP) v Commission* [1991] E.C.R. II–575, affirmed on appeal in Joined Cases C–241/91 P and C–242/91 P *Radio Telefis Eireann and Independent Television Publications Ltd (RTE & ITP) v Commission* [1995] E.C.R. I–743.
16 Case T–504/93 *Tiercé Ladbroke SA v Commission* [1997] E.C.R. II–923.
17 [2002] O.J. L59/18. The precedential value of this decision now seems questionable. First, the Interim Decision has, in an unprecedented move, recently been withdrawn by the Commission: see Commission Press Release IP/03/1159 of August 13, 2003. Further, the Interim Decision was immediately suspended by the Court of First Instance on the grounds, *inter alia*, that there were "strong *prima facie* grounds" to doubt the correctness of its legal analysis: see Case T–184/01 R *IMS Health Inc v Commission*, Order of the President of the Court of First Instance of October 26, 2001, [2001] E.C.R. II–3193, ¶106.
18 *Port of Rødby* [1994] O.J. L55/52; *ACI Channel Tunnel* [1994] O.J. L224/28; *European Night Services* [1994] O.J. L259/20; *Eurotunnel* [1994] O.J. L354/66; *Ijsselcentrale* [1991] O.J. L28/32; *Irish Continental Group CCI Morlaix-Port of Roscoff*, XXVth Competition Policy Report (1996), para.43, *Port of Elsinore*, Commission Press Release, IP/96/456.
19 See *e.g. British Midland/Aer Lingus* [1992] O.J. L96/34; and *London European/Sabena* [1988] O.J. L317/47. However, the correct result was probably reached in those cases, since it is clear that the benefits to consumers of interlining and standardised computer reservation networking far outweigh any inconvenience to the airlines in having to deal with rivals for these limited purposes. Indeed, this was and is standard IATA practice.
20 Copious amounts have been written on this topic. Among the better articles are R. Subiotto, "The Right to Deal with Whom One Pleases under EEC Competition Law: A Small Contribution to a Necessary Debate" [1992] 6 E.C.L.R. 234; Kenneth L. Glazer and Abbott B. Lipsky, Jr, "Unilateral Refusals to Deal Under Section 2 of the Sherman Act" [1995] 63 *Antitrust Law Journal* 749; Temple Lang, "The Principle of Essential Facilities in European Community Competition Law—The Position Since Bronner" [2000] *J. of Network Industries* I 375; Temple Lang, "Defining Legitimate Competition: Companies' Duties to Supply

firm's duties in respect of new customers and existing customers to some extent.

Duties in respect of new customers

If the dominant firm has never dealt with any third party, but has only supplied the product in question for internal purposes, it seems clear following *Bronner* that a duty to deal can only arise if all the conditions set out in that judgment for a duty to deal are satisfied.[21] This reflects the consideration, outlined by Advocate General Jacobs in his opinion in the same case, that "it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business". The extent to which duties in respect of essential facilities apply to a refusal to supply intellectual property rights is unclear and controversial following the (subsequently withdrawn) decision in *IMS Health*. This issue will most likely be resolved in the ECJ's ruling in the preliminary reference in Case C–418/01 *IMS Health v NDC Health*, judgment in which is expected early next year.[22]

Duties in respect of existing customers

If the dominant firm has in the past supplied a third party, but then ceases, several different situations should be distinguished.

The first situation is where the dominant firm competes on the same level as the third party. In this case, the issue is foreclosure under Art.82(b), which prevents a dominant firm from unlawfully limiting the output of rivals, as well as its own. Although the issue is unresolved, there are reasonable arguments that foreclosure of competitors is only possible if the input supplied by the dominant firm is essential and the refusal therefore threatens the continued commercial viability of the competitor. There is no general obligation on a dominant firm to subsidise competition to itself and it is entitled to rely on legitimately-acquired advantages for its own use even if the effect of excluding competitors' access to them means that they can compete less effectively or even not at all. This is, after all, what competition involves. Where, however, the dominant firm owns or control an "essential facility," this is not considered competition on the merits and an exception may be justified. However, if the input is not essential, the competitor can purchase from other suppliers and no foreclosure should ordinarily arise. There is some support for this view in the case law:

- First, a decisive part of the reasoning in *Commercial Solvents* and *Télémarketing* was that the product purchased from the dominant firm was "indispensable" for the customer.
- Secondly, in the context of a margin squeeze abuse, the Court of First Instance has confirmed in *Industrie des Poudres Spheriques* that an abuse cannot occur if the customer has alternative sources of supply.[23] In other words, if the customer can avoid the effects of the alleged abuse by purchasing elsewhere, no abuse arises. There is no reason why this rationale should not be transposed to the case of refusal to deal, since, in both cases, the theory of competitive harm is foreclosure.
- Finally, the case of *Filtrona/Tabacalera* arguably confirms that the reservation by a dominant firm of capacity for internal purposes, or a decision by it to stop sourcing inputs from third parties on the merchant market, is not abusive if this vertical

Competitors, and Access to Essential Facilities" [1994] *Fordham Law Institute* 245; Robert Pitofsky, Donna Patterson and Jonathan Hooks, "The Essential Facilities Doctrine under U.S. Antitrust Law" [2002] 70 *Antitrust Law Journal* 443; Paul Marquardt and Mark Leddy, "The Essential Facilities Doctrine And Intellectual Property Rights: A Response To Pitofsky, Patterson and Hooks" [2003] 70 *Antitrust Law Journal* 847; J. Venit and J. Kallaugher, "Essential Facilities: A Comparative Law Approach," [1994] *Fordham Law Institute* 315; and Valentine Korah, "The Interface Between Intellectual Property and Antitrust: The European Experience" [2002] 69 *Antitrust Law Journal* 801.

21 In *Bronner,* the ECJ held that the criteria for the establishment of abuse under Art.82 in cases relating to the exercise of a property right are whether (i) the refusal of access to the facility is likely to eliminate all competition in the relevant market; (ii) such refusal is not capable of being objectively justified; and (iii) the facility itself is indispensable to carrying on business, inasmuch as there is no actual or potential substitute in existence for that facility (para.41).

22 If pursued to a final decision, the pending Microsoft case will also have important implications in this area. One of the abuses alleged by the Commission is Microsoft's leveraging its dominant position from PC operating systems into low-end servers. The allegation is that Microsoft's non-disclosure of interface information leads consumers to artificially alter their choice in favour of Microsoft's server products. By way of remedy, the Commission has provisionally identified core disclosure obligations that would be indispensable for Microsoft's competitors in low-end servers to achieve full interoperability with Windows PCs and servers. This case is interesting because it does not seem to concern "essential facilities" as such—the other server competitors are already present on the market without access—but seem more tied up with improving interoperability and establishing "a level playing-field": see Commission Press Release IP/03/1150 of August 6, 2003.

23 Case T–5/97 *Industrie des Poudres Spheriques SA v Commission* [2000] E.C.R. II–755. An important reason for the Court of First Instance's rejection of the price squeeze allegation was that Industrie des Poudres Spheriques had access to alternative sources of primary calcium metal from Russian and Chinese producers (notwithstanding the existence of anti-dumping duties) (paras 50–59).

integration is efficient and other supply or sales outlets exist.

The effect of the refusal in this situation, and its qualification as an abuse, may, to some extent, depend on how sudden the termination is and the degree of reliance that the customer has developed on the dominant firm. In *Commercial Solvents* and other cases, the refusal was sudden and absolute and, therefore, more serious in terms of effects. Where there is an existing contract, rules of contract law will allow for periods of notice to be express or, in some cases, implied. However, where, for some reason, no notice period applies, the dominant firm may still be required to serve reasonable notice, consistent with the industry practice and the particular situation of the customer in question, so as to allow the customer to establish relations with alternative sources of supply. Evidence of specific exclusionary intent by the dominant firm may also be relevant.

The second situation is where the dominant firm terminates supplies to one third party while continuing to supply another party in the same situation. Assuming the contracts between the two sets of buyers are comparable, the dominant firm then has a duty not to discriminate under Art.82(c) by "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". It is not clear what degree of "competitive disadvantage" is required, but there are good arguments to suggest that a showing of material competitive harm is necessary. Most obviously, competition law is about preventing consumer harm: if discrimination causes no material competitive harm, there is no reason for competition law to prohibit it. Moreover, many forms of discrimination may in fact increase total output and so increase consumer welfare.[24] On a more practical level, the notion that a dominant firm should deal with any and all similarly situated buyers (capacity limitations permitting), even in the absence of any adverse competitive effects, seems onerous in the extreme. This means that, for a discrimination charge to succeed, the disadvantaged party must show the refusal has substantial effects on competition or, to use the words of the ECJ in *BP v Commission*, creates "an obvious, immediate and substantial competitive disadvantage." Thus, where, *e.g.*, there are already a large number of customers, not supplying another customer is unlikely to result in any material harm to consumers.

A history of past dealings may be relevant to assessing the effects of the refusal on competition. The fact that the dominant firm has in the past dealt with the third party may create an inference that a duty to deal is appropriate. Most obviously, it may indicate that the refusal is a pretext for abusive behaviour because it terminates past co-operation that the dominant firm presumably found sufficiently welfare-enhancing to justify selling in the past. Further, in many cases, a past history of dealing may involve the buyer investing sunk costs in operations exclusively linked to the dominant seller, as occurred to some extent in *Commercial Solvents*. Finally, a history of past dealings will confirm *in concreto* that a duty to deal can work and that there are likely to be benefits to competition in imposing such duties.

The final situation is something of a hybrid of the first two; where the dominant firm does not compete with the customer, but the refusal to supply *indirectly* has the object or effect of foreclosing a rival of the dominant firm. (Whether the product sold by the dominant firm is essential or not is irrelevant in this scenario.) This was the situation in *United Brands* and *Boosey & Hawkes*. In both of those cases, the dominant firm only refused to deal because the customer had either started selling a competing brand (*Boosey & Hawkes*) or was engaged in promotional activities for a competitor (*United Brands*). In other words, although the contract between the dominant firm and the customer was not exclusive in nature, the dominant firm could, in effect, insist on exclusivity by threatening the withdrawal of supplies in the event that the customer dealt with a competitor. Thus, by insisting that customers should only deal with the dominant firm, this "might in the end eliminate a [competitor] from the relevant market" (*United Brands*). However, in *Boosey & Hawkes*, the Commission confirmed that, at the same time, it may, with reasonable notice, be legitimate for the dominant firm to terminate relations with a customer who transfers its main activity to dealing in competing products.[25]

The precise parameters of these principles are not entirely clear and will be discussed further in the pending case of *SIFAIT v GlaxoSmithKline*. In particular, it will need to be clarified whether, and in what circumstances, it is lawful under Art.82 EC for a

24 See *e.g.* Armstrong and Vickers, "Competitive Price Discrimination" [2001] *Rand Journal of Economics*, Vol.32 No.4 (Winter), 579–605; and Varian, "Price Discrimination and Social Welfare" [1985] 75 *Amer. Economic Review* 870.

25 An obligation to deal may also be imposed where it is the most effective and proportionate *remedy* for another abuse. Thus, even if the abuse does not concern a refusal to deal, it may be that a compulsory dealing obligation is, exceptionally, the correct remedy. In the *Volvo* and *Renault* cases (*ibid.*), the ECJ confirmed that a compulsory licence may be the appropriate remedy where, *e.g.*, a car manufacturer engages in abusive excessive pricing of spare parts or no longer produces spare parts for car models still in circulation.

dominant firm to refuse to sell the same historical quantities to an existing customer or to refuse to supply additional quantities requested by that customer. With the above principles in mind, the following section suggests the framework that could be employed by the ECJ in responding to these questions.

Case C–53/03 *SIFAIT v GlaxoSmithKline*

Background

Details of the case are sparse under the Order for Reference dated February 5, 2003,[26] but the essential facts seem to be as follows. In a case before the Greek *Epitropi Antagonismou* (Competition Commission), it is assumed that GlaxoSmithKline ("GSK") holds a dominant position on certain relevant Greek pharmaceutical products markets. The allegation of abuse is that, in respect of certain Greek pharmaceutical wholesalers, GSK has reduced supplies, and/or refused to meet their requests for additional orders, on the ground that the supplies in question are being re-exported by the wholesalers from Greece to the United Kingdom and other Member States where prices of the same medicines are higher, and, therefore, more profitable for the wholesaler. An important finding of fact by the Competition Commission is that the export activities of the relevant Greek wholesalers do not result in lower-proceed medicines for either Greek consumers or the consumers in the Member State for which the exports are destined. The Order for Reference states that "the ultimate consumer/patient derives limited financial advantage from the parallel trade". It is not clear whether the wholesalers' apparent inability to offer lower prices to consumers in the exporting state is the result of Member State price regulation or simply the wholesalers' unwillingness to lower their prices. However, it appears from the Order for Reference that the only, or principal, benefit of the export activity is that the wholesalers in question can increase their profits.

Uncertain as to whether the facts described above constitute an abuse under Art.82 EC, the Competition Commission has referred the following questions to the ECJ:

> (1) Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute *per se* an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?
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> (2) If the Court holds that limitation of parallel trade, for the reasons set out above, does not constitute an abusive practice in every case where it is engaged in by an undertaking holding a dominant position, how is possible abuse to be assessed? In particular:
>
> — Do the percentage by which normal domestic consumption is exceeded and/or the loss suffered by an undertaking holding a dominant position compared with its total turnover and total profits constitute appropriate criteria? If so, how are the level of that percentage and the level of that loss determined (the latter as a percentage of turnover and total profits), above which the conduct in question may be abusive?
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> — Is an approach entailing the balancing of interests appropriate, and, if so, what are the interests to be compared? In particular: (a) is the answer affected by the fact that the ultimate consumer/patient derives limited financial advantage from the parallel trade and (b) is account to be taken, and to what extent, of the interests of social insurance bodies in cheaper medicinal products?
>
> (3) What other criteria and approaches are considered appropriate in the present case?

Analysis

As a preliminary matter, it seems clear that this is not an "essential facilities" case. GSK is not reserving the products in question for internal use and is seemingly content to deal with wholesalers for any and all quantities that they wish to sell on the domestic Greek market. The extent to which it is refusing to deal only concerns products exported from Greece to other higher-priced markets. Moreover, the wholesalers deal in multiple brands and there is no suggestion that the

26 [2003] O.J. C101/32.

refusal in respect of exports of GSK products would result in their exiting the market.

General remarks

Although *SIFAIT v GlaxoSmithKline* has some facial similarities to previous cases in which a duty to deal has been imposed, there are several reasons why no abuse would seem to arise in this case.

In the first place, precedents in which a refusal to supply has been found abusive do not, on the facts, seem to apply here. Analogies with *Commercial Solvents*, *Hugin/Liptons* and *Télémarketing* are not in point since, in those cases, it was clear that the refusal to supply was, first, absolute, and, second, exclusionary in object and effect because the customers in question were actual or potential downstream competitors to the dominant supplier's vertically-integrated business. Likewise, it was also clear in *Boosey & Hawkes* that the refusal to deal was exclusionary in order to prevent a rival musical instrument supplier from gaining a foothold in the market.

In *SIFAIT v GlaxoSmithKline*, no exclusionary abuse seems to arise because GSK does not compete at the same level as its wholesalers. Nor is there any suggestion from the Order for Reference that the refusal to meet these orders is intended to exclude GSK's rivals. Indeed, GSK's refusal may well benefit its rivals by creating additional export opportunities for substitute medicines.

Secondly, the conduct complained of in *SIFAIT v GlaxoSmithKline* does not seem to have the necessary features or exclusionary effects present in cases where a refusal to supply was considered unlawful. In each of *Commercial Solvents*, *Hugin/Liptons*, *United Brands*, *Télémarketing* and *Boosey & Hawkes*, the refusal to deal was sudden, absolute, and involved an input that was indispensable to the customers' continued survival as a business. In other words, it was reasonably clear that the refusal would have the likely and immediate consequence that the customer would be forced out of business. An aggravating element in many of the cases was that the refusal to deal was indirectly intended to exclude rivals from opportunities to seek out new buyers. For example, in *Boosey & Hawkes*, the Commission noted as follows:

> On the facts of the present case, the dependence of GHH and RCN on B&H products is such that there was a substantial likelihood of their going out of business as a result of the withholding of supplies. The injury to competition would be aggravated where (as is alleged here) the stated purpose of the action is indirectly to prevent the entry into the market of a potential competitor to the dominant producer.

In *SIFAIT v GlaxoSmithKline*, the dominant firm has not it seems terminated supplies at all, but merely refused to meet quantities requested for export orders. There is accordingly no suggestion that the refusal threatens the livelihood of the wholesalers, since they can presumably continue to serve the domestic market as before. The wholesalers do not seem to depend on GSK unduly either, since they are non-exclusive and typically deal in a wide range of products from multiple suppliers.

Finally, the basic justification for an obligation to deal—that there would be substantial benefits to competition in imposing such a duty—does not seem present in the case of *SIFAIT v GlaxoSmithKline*. Article 82 only prevents the dominant firm "limiting production [. . .] to the prejudice of consumers" (Art.82(b)). The Order for Reference suggests that no material consumer benefits would arise in the present case. It states that the reason for the refusal to supply the extra quantities is that the wholesalers intend to export them, at a profit, to wholesalers or retailers in other Member States where the prices for the products in question are higher, either because they are unregulated or because they are regulated at a level which is in practice higher than the level at which they are regulated in Greece. (As indicated, it is not clear why the wholesalers do not, apparently, offer lower prices to consumers in the importing state.) On the other hand, the dominant company does not consider that it should supply extra quantities of its products for this purpose, since it would, presumably, reduce its profitability in the higher price Member States (and perhaps that of its wholesalers and retailers in the importing Member State). In other words, the issue in the case seems to be whether the wholesalers or the dominant firm should be allowed to keep the profits resulting from the export to the higher-priced Member State(s). On the face of it, this is not a concern of competition law: competition law protects competition and consumers; it does not entitle a company to insist on a duty to deal simply because that would increase its profits. In short, it does not appear that there are discernible benefits to consumers through the export activities of the wholesalers, and, assuming this circumstance is correct, no reason under competition law to compel the dominant firm to sell.

Refusal to supply additional quantities

There is also precedent which suggests that the refusal to supply additional quantities may not be abusive. It must be legitimate for a dominant producer to safeguard its profitability (and indirectly that of its wholesalers

and retailers in the importing state) provided that it does so by legitimate means.[27]

A hypothetical example may be useful. Suppose the producer of a component sells it to a wholesaler in one Member State which re-sells it in that State for inclusion in high-price, high-quality products. The producer is not obliged to sell the component to another wholesaler who the producer knows will sell it for inclusion in low-price, low-quality, products. The producer is entitled to choose its sales policy in its own interests, and to take into account the interests of its existing wholesaler. Provided that they do not agree that the producer will boycott any other buyer, the producer may decide its own policy. The only competition law restrictions on what a dominant enterprise can do in this respect (apart from the exceptional duty to sell under essential facilities summarised above) result from Art.81, which prohibits minimum resale price maintenance, and which limits the freedom of producers to set up unduly restrictive selective distribution systems.

If this is legitimate in the context of a single Member State, it must also be legitimate for even a dominant producer to limit its sales in one State to protect its distribution network in another State. It may not, of course, by contract restrict the freedom of its wholesalers to export. But this does not mean that it has a legal duty to supply them with extra quantities required for the purpose of export. It should not be obliged, in other words, to enable a wholesaler in one Member State to convert itself into an exporter selling primarily or exclusively into another State.

The ECJ's judgment in *Ford*—although decided under Art.81 EC—indirectly confirms that EC competition law does not require undertakings to make *additional* quantities available to any buyer willing to purchase them.[28] Ford's refusal to continue supplying right-hand drive automobiles to its selected distributors in Germany amounted to a restriction on competition because the sole object and effect of this measure was to protect Ford's selected distributors in the United Kingdom by restricting parallel imports from Germany into the United Kingdom. However, this finding was limited solely to a manufacturer's unilateral termination of *existing* supplies, since the Commission stated expressly that it was merely concluding in the decision that Ford's unilateral termination of supplies had practical effects similar to an export ban and that it was not deciding whether and, if so, how far Ford was under an obligation to make available products which were not manufactured or sold in the Member State in question, or the full range of products it manufactured in the Community.[29] Likewise, in response to Ford's argument that the Commission's decision would be tantamount to obliging Ford to *produce* cars, Advocate General Slynn stated that "[t]he Decision is concerned not with production but with the supply of (*right-hand drive*) cars actually manufactured, a supply cut off in Germany so as to prevent purchasers from other Member States obtaining them in Germany" (emphasis added). These dicta suggest that the Commission and the ECJ did not intend to force undertakings to increase production in order to satisfy *new or additional* demand in a certain market. They were simply concerned with the termination of *existing* supplies clearly aimed at preventing parallel exports of these products.

Reduction in existing quantities supplied

The situation in regard to the reduction in existing quantities is more complicated, but there is also good reason to believe that this too is lawful under Art.82 EC. It is not clear from the Order for Reference how material the reduction of supplies was, but it seems reasonable to infer from the background provided that the wholesalers continue to receive sufficient quantities to serve the domestic Greek market, and that the reduction therefore only concerns relatively minor quantities intended for export. This is, however, an important point of fact, since there is a point at which a substantial reduction in supplies is, in effect, a refusal to deal. From the Order for Reference, this does, however, not appear to be the case.

The principal argument in favour of the reduction in supplies being potentially abusive is that it could be regarded as effectively amounting to an export ban. It might be argued that the fact that the dominant firm is unilaterally refusing to sell additional quantities to wholesalers who wish to export has the same effect as an export ban. However, that seems incorrect, and would be irrelevant even if it was correct, for the following reasons.

First, the dominant company does not seem to be preventing the wholesalers from exporting. If the wholesaler so chose, it could presumably reduce sales to domestic retailers and divert them to (more profitable) export trade, subject to any applicable public service obligations in Greece.

Secondly, the fact that, in some general sense, the practical effect of the refusal to supply *resembles* a violation of Art.81 does not mean that there has been a violation of Art.82. A dominant manufacturer can take many different forms of unilateral action that may affect

27 See *Filtrona/Tabacalera*, XVIVth Report on Competition Policy (1989), point 61.

28 Joined Cases 25 and 26/84 [1985] E.C.R. 2725.

29 See [1983] O.J. L327/31.

the pattern of trade without any of them being unlawful under Art.82 for that reason alone. Most obviously, it could entirely withdraw from a particular national market because the returns it was making were insufficient, which the ECJ has confirmed would be legal.[30] It might also apply a uniform pricing policy across Member States. This would inevitably mean that there would be less parallel imports than before in certain Member States. It has never been suggested that this circumstance *alone* would render its unilateral behaviour unlawful.

The issue is, then, where to draw the line between legal and illegal behaviour and, indeed, whether such a line can be drawn. A dominant company must be able to take decisions about how to run its business, and, provided that those decisions are taken unilaterally, the fact that some of those decisions produce effects which it could not bring about by agreements, and which might be contrary to Art.81 if they were agreed between two undertakings, is irrelevant as a matter of law. At most, such conduct might, together with other elements, evidence an unlawful agreement under Art.81. As the Commission has stated:

> [T]here is no general obligation on a manufacturer under Community competition law to contract with another party, irrespective of the latter's place of residence. There may be valid business considerations for not supplying a particular dealer [. . .]. Where, however, a manufacturer refuses custom because the ultimate destination of the goods is in another Member State, the Commission would regard such a policy as pointing to the existence of agreements or concerted practices, whose purpose was the protection of exclusive distributors against bona fide parallel imports.[31]

This also confirms another important point: a unilateral decision to reduce supplies to a particular customer is normally legitimate behaviour even if the effect of that decision is that the customer has less products to sell than before, whether for export or otherwise. The situation would be different only where it is clear that supplies were materially reduced as direct "punishment" for export activity by the customer, or to drive the customer out of the market.[32] No such suggestion appears in the Order for Reference.

Practical difficulties and legal certainty

Any principle of law which held that it would be abusive for a dominant firm to refuse to supply customers with additional quantities, or to reduce existing quantities supplied, on the basis that the customer intended to export them, could also raise implementation difficulties and perhaps lead to surprising results. The effect may be that the legality of the same act would depend on whether the customer intended to export or not. A rule of law based on such a statement of intention would likely be precarious. All customers could declare an intention to export, regardless of their true intention, so as to have a claim to all quantities ordered. The fulfillment of their declaration could not be guaranteed. Customers having failed to express such an intention would open themselves to the possibility of not receiving all the quantities ordered. In short, it is questionable whether such a rule would be compatible with principles of legal certainty.

It might also lead to unjustified discrimination: in the absence of an essential facility, it would be lawful to refuse to supply a company supplying products only in country A, but unlawful to refuse to supply the exact same products and quantities to a company from country B that wished to export to country A.[33] Both transactions would be identical in terms of competition effects, but, once the company has declared an intention to export the products supplied, this declaration would place it in a better position than companies who had not.

None of this is to say that Art.82 EC could not be infringed by unilateral measures designed to limit exports. However, the only clear situation in which

30 See Case C–249/88 *Commission v Belgium* [1991] E.C.R. I–1275, where the ECJ held that community law does not require a pharmaceuticals manufacturer to continue supplying its products in a Member State: "As the Belgian Government rightly observes, differences in the price of the same product, from one Member State to another, may be accounted for by the commercial strategy of the manufacturing undertaking, and a hindrance to imports may not be inferred from the mere fact that an undertaking abandons the marketing of a given product on the market of a Member State on the ground that the maximum price imposed on it is inadequate. It may be observed, for example, that, in order to avoid parallel exports, an undertaking may have an interest in not marketing its products in a Member State at a price which it considers to be insufficient."(para.20)

31 XVIIIth Report on Competition Policy (1988), point 21.

32 The Commission has relied in the past on clear evidence of threats to reduce quantities supplied to punish export activity and, in some cases, on actual implementation of threats. See *e.g. Tipp-Ex* [1987] O.J. L222/1—evidence and implementation of threats; *John Deere* [1985] O.J. L35/38—evidence of threats; *Sperry New Holland* [1985] O.J. L376/21—reduction and termination of supplies; *Konica* [1988] O.J. L78/34—evidence of threats; and *Johnson and Johnson* [1980] O.J. L377/16—evidence of threats.

33 *Polaroid/SSI Europe* (XIIIth Competition Report) suggests that it may be an abuse for a dominant firm only to supply a customer on condition that it has control over its further processing and marketing (point 157). The scope of this statement is not clear since the case was settled before any formal proceedings were opened by the Commission. However, the statement is plainly too broad in certain respects, *e.g.* it would in many cases be lawful for a dominant firm to license a customer subject to certain field-of-use, product market, or site license restrictions. In these circumstances, the precedential value of this case seems questionable.

selling less than ordered might be found to be a violation of Art.82 concerns reductions of quantities sold as a clear punishment against export activity,[34] or where the limitation of exports was a means of reinforcing some other abusive behaviour.[35]

In *SIFAIT v GlaxoSmithKline*, the only act complained of is the refusal to supply. No additional abusive act is alleged: as noted, the fact that the quantities requested are intended for export does not make an otherwise lawful unilateral act unlawful.

The relevance of Member State regulation of prices

None of the other considerations raised by the Order for Reference would seem to justify a different conclusion under Art.82 EC. State measures unlawfully limiting the free movement of goods between Member States may of course themselves be unlawful.[36] However, the fact that the price in the lower-price Member State is regulated by official measures there or, *e.g.*, is low because of high rates of sales taxes there, is irrelevant to Art.82 EC. Assuming that the official measures restricting prices are themselves compatible with Community law, the fact that the products are pharmaceutical products or that the prices are regulated or influenced by taxes or by *e.g.* the purchasing policy of the state health insurance service, is not relevant. As the ECJ has stated on numerous occasions, "it is a matter of no significance that there exist, as between the exporting and importing Member State, price differences resulting from governmental measures adopted in the exporting state with a view to controlling the price of the product".[37]

A violation of Art.82 EC clearly cannot depend on estimates of how much money the dominant company would lose if it had to supply a given extra quantity, or even by comparing that quantity to the normal domestic consumption in the Member State in question. The concept of an abuse is objective: it does not depend on a subjective assessment of whether a particular seller would make more or less money in its unilateral decisions to sell to third parties. Furthermore, it would be bad competition policy to make competition law interfere with unilateral conduct, depending on whether that conduct would result in more or less profit for the seller.

A violation of Art.82 EC should also clearly not depend on a national court's balancing the interests of consumers or of the social insurance bodies in another Member State. A national court or authority applying Art.82 is not a regulatory authority which can impose new legal duties on the basis of policy considerations: it can only apply existing legal rules. Furthermore, consumers and social insurance bodies in another Member State are outside that national court's jurisdiction, and the parties to the case before it could not have access to the figures involved. There may be other situations under Art.82 which it is useful to describe as "balancing" the anti-competitive effects of particular behaviour by a dominant enterprise against the efficiency benefits to the enterprise itself or to users, but those situations are entirely different, and are irrelevant in *SIFAIT v GlaxoSmithKline*.

Conclusion

From the foregoing, it does not appear that the pending reference in *SIFAIT v GlaxoSmithKline* discloses a clear reason why the principles in regard to abusive refusal to deal would apply on the facts. Nor do the facts appear to justify the ECJ's creating a new exception. The only alleged harm seems to concern the inability of the wholesalers concerned to obtain higher profits by

34 *Ibid.*, n.32.

35 See *e.g. Hilti* [1988] O.J. L65/19, on appeal Case T–30/89 *Hilti AG v Commission* [1991] E.C.R. II–1439, where Hilti's policy of not fulfilling export orders, and forcing its distributors to do likewise, was designed to maintain its unlawful policy of tying the sale of Hilti nail guns with Hilti-compatible consumables. Eurofix purchased cartridges via a third party from Hilti Netherlands at approximately half the then current UK list price, but its subsequent attempts to obtain supplies were refused, when Hilti UK became aware of the source of such cartridges on the UK market. The Commission made it clear that this was objectionable because it was an "an attempt to reinforce [Hilti's] tying policy in the UK where it was under attack from independent nail makers; Hilti, once it realized their source, induced its Dutch distributor to stop the supply of cartridge strips" (Commission Decision, para.76). Hilti further refused supplies of cartridges to its long-standing customers because it objected to their possible resale to independent nail makers. All of these practices were condemned by the Commission and the Community courts. One other instance where an abuse might be committed in connection with exports might be where the dominant firm charges excessive prices—which are unlawful in themselves under Art.82(a)—for products intended for export: see *e.g.* Case 226/84 *British Leyland plc v Commission* [1986] E.C.R. 3263.

36 See *e.g.* Cases IV/36.957/F3, IV/36.997/F3, IV/37.121/F3, IV/37.138/F3, and IV/37.380/F3 *Glaxo Wellcome*, Commission Decision of May 8, 2001, where the Commission held that "in applying Article 28 of the Treaty on free movement of goods, the Court of Justice has consistently condemned State measures which restrict parallel imports of medicines from countries where prices are lower and which provided less (or no) incentives for pharmaceutical companies to undertake R&D." (para.127)

37 Joined Cases C–267/95 and C–268/95 *Merck v Primecrown* [1996] E.C.R. I–6285, para.47. See also Case C–436/93 *Bristol Myers Squibb v Paranova A/S* [1996] E.C.R. I–3457, para.46; and Case 16/74 *Centrafarm BV and De Peijper v Winthrop BV* [1974] E.C.R. 1183, paras 15, 16 and 17.

engaging in export activity from Greece to other (higher-priced) Member States. Given the apparent absence of any discernible benefits from this activity to consumers in Greece or the importing Member State(s), it seems doubtful that there would be any benefit to competition in imposing a duty to deal and, accordingly, no reason to invoke competition law in aid of the requesting parties in this case. A contrary conclusion would be open to the objection that competition law was protecting the profitability of particular companies in situations where there appear to be no tangible benefits to consumers.