RECEIVED
FEB - 2 2006
BY:

MAYER BROWN ROWE & MAW

February 1, 2006

Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrownrowe.com

Robert E. Bloch
Direct Tel (202) 263-3203
Direct Fax (202) 263-5203
rbloch@mayerbrownrowe.com

Andrew J. Heimert, Esq.
Executive Director & General Counsel
Antitrust Modernization Commission
1 120 G Street, NW
Suite 810
Washington, DC 20005

Dear Mr. Heimert:

I know the Antitrust Modernization Commission has heard testimony about various aspects of single firm conduct and is considering whether any recommendations should be made to the Congress about this subject and Section 2 of the Sherman Act. Some of my colleagues and I have had occasion to analyze and compare single firm conduct under Article 82 of the EC Treaty and Section 2 of the Sherman Act with respect to enforcement by government authorities and the courts in Europe and the United States. We have written an article about the subject which was recently published by a leading law journal in Germany. I thought it might be of interest to members of the Commission and to your staff in evaluating this subject. I have enclosed 15 copies of the article. I would appreciate it if you would make this part of the Commission's record.

If I can be of any further assistance to the Commission or the staff, please feel free to call or write.

Sincerely,

Bob Bloch

Robert E. Bloch

Encs.

Zeitschrift für
Wettbewerbsrecht

Journal of Competition Law

ZWeR

3. Jahrgang
Heft 4
9. Dezember
2005

Sonderdruck

Robert E. Bloch/Hans-Georg Kamann/Jay S. Brown/Jens Peter Schmidt

A Comparative Analysis of Art. 82 of the EC Treaty and Sec. 2 of the Sherman Act

ZWeR 2005, 325

RWS

RWS Verlag
Kommunikationsforum GmbH
Köln

Aufsätze

*Robert E. Bloch/Hans-Georg Kamann/Jay S. Brown/Jens Peter Schmidt**)*

A Comparative Analysis of Art. 82 of the EC Treaty and Sec. 2 of the Sherman Act**)

The European Commission is very soon expected to publish its long-awaited draft guidelines on Art. 82 EC Treaty. These draft guidelines will discuss controversial issues on the interpretation and application of the ban of abusing a dominant position. This article discusses the interpretation of Art. 82 EC Treaty in the light of the evolution of monopolization law under Sec. 2 of the Sherman Act in the US, and analysis the differences in analytical and judicial treatment of certain business conduct under both regimes.

Contents

---

*) *Mr. Bloch is a partner in the Washington, D.C., office of Mayer, Brown, Rowe & Maw LLP, where he practices in the areas of antitrust litigation and counselling. Prior to joining Mayer, Brown, he was Chief, Professions and Intellectual Property Sec., Antitrust Division, US Department of Justice. Mr. Kamann is a partner in the Frankfurt/M. office of Mayer, Brown, Rowe & Maw LLP and his practice focuses on EC antitrust, state aid and regulation. Mr. Brown is an associate in the Washington, D.C., office of Mayer, Brown, Rowe & Maw LLP, where he practices in the areas of antitrust counselling and litigation. Mr. Schmidt is an associate in the Brussels office of Mayer, Brown, Rowe & Maw LLP and his practice focuses on EC antitrust, state aid and regulation.*

**) *Mr. Bloch discussed parts of this paper at The International Bar Association 9th Annual Competition Conference, October 21 – 22, 2005, European University Institute, Fiesole, Italy.*

I. Introduction

In recent years, competition law and policy within the European Union (EU) has undergone a process of modernization, applying a more economics-based analysis to business conduct and to evaluating the competitive effects of that conduct. The process, initiated by the European Commission (Commission) under former President *Romano Prodi*, was led mainly by former Competition Commissioner *Mario Monti*.

Until now, efforts to modernize European competition law focused primarily on coordinated conduct as regulated by Art. 81 of the EC Treaty[1] and by the European Community's Merger Regulation (ECMR). As to the former, the Commission issued a series of regulations and guidelines[2] which have put more emphasis on economic effects and less importance on the form of certain bilateral and multilateral conduct. As to the latter, following an intensive discussion, the Council adopted the new ECMR (Council Regulation (EC) No. 139/2004[3]) in January 2004 which introduced a new standard for the competitive assessment of mergers – known as the "significant impediment of competition" (SIEC) test. As an extension of the previous abuse of dominance test, the SIEC test is intended to cover certain anticompetitive effects of a concentration resulting from unilateral behaviour of firms that do not attain a dominant position.[4] Shortly thereafter, the Commission issued new guidelines for assessing horizontal mergers,[5] incorporating more sound economic concepts (such as the distinction between unilateral effects and coordinated effects) and analytic tools (such as the HHI analysis used in the US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines).

This shift towards a more economics-based approach was also illustrated by institutional changes within the Commission, such as the appointment of a chief economist within Directorate General Competition, and the increased involvement of economic experts in the analysis of mergers and other antitrust cases. Commentators generally agree that these reforms have brought EU competition policy on restrictive agreements and mergers more into line with recent economic thinking and have led to a convergence of standards in the EU and the United States (US).

In contrast, EU policy concerning unilateral conduct of dominant firms under Art. 82 has not yet made a similar shift towards an analysis based on economic principles. Rather, when assessing single firm conduct, the Commission and the Community courts consistently have applied a largely formal assessment to the challenged conduct. This was most apparent in the recent decisions of the Commission and the European Court of First Instance (CFI) in the British Airways and Michelin II cases,[6] both of which condemned certain rebate schemes as abusive without analyzing their specific competitive effects in the markets involved in those cases. In Michelin II, the CFI held that the Commission was not required to examine such effects, and asserted that the mere intent to achieve a restriction of competition was sufficient to consider the challenged conduct to be abusive, because "establishing the anticompetitive object and the anticompetitive effect are one and the same thing".[7]

Current policy on single firm conduct in Europe has been criticized for lacking clarity and consistency. The Commission and Community courts generally have analyzed unilateral conduct on a case-by-case basis without providing a comprehensive and consistent test for distinguishing legitimate behaviour from abusive conduct. The European Court of Justice (ECJ) and the CFI have provided little guidance on the topic, defining abusive conduct as behaviour which is not within the scope of "normal competition"[8] or "competition on the merits".[9] Unfortunately, these definitions are vague and lack the clarity needed by businesses to differentiate between permissible and impermissible conduct. It is therefore no surprise that the interpretation and application of Art. 82 has remained a major area of discussion between enforcement officials, judges, private practitioners and in-house counsels in the EU and US. In addition, there are still significant differences in the modes of analysis used to examine unilateral conduct in the EU and US.

It is against this background that DG Competition under new Commissioner *Neelie Kroes* is currently drafting guidelines concerning the application of Art. 82. These guidelines aim to provide clear and economically sound guidance on what constitutes unilateral, anticompetitive, "exclusionary" conduct in contrast to desirable "competition on the merits". In addition to clarifying the definition of anticompetitive conduct, these guidelines may promote convergence of the Art. 82 "standard" with the legal standards and economic analysis being applied to various practices in the US.

Of course, the fundamental question that modernization of Art. 82 needs to address is whether there is an objective, economically sound standard to differentiate between anticompetitive, procompetitive or competitively neutral conduct. In the past, EU courts and enforcement agencies have struggled to distinguish anticompetitive or exclusionary practices of dominant firms from legitimate "normal competition" or "competition on the merits". As a recent OECD paper correctly points out, the phrase "competition on the merits" has not been satisfactorily defined yet.[10]

A similar struggle has been taking place in the US. Jurisprudence interpreting Sec. 2 of the Sherman Act has developed substantially, from an approach that condemned monopolies for engaging in conduct that had the tendency to exclude rivals – without assessing whether competition itself was harmed – to a more economics-based approach that recognizes legitimate monopolists should be able to engage in efficiency-enhancing conduct without violating Sec. 2. As with cases under

1) Articles without explicit mention of the statute are those of the EC Treaty.
2) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the Application of Art. 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, [1999] OJ L 336, at p. 21; Commission Notice – Guidelines on Vertical Restraints, [2000] OJ C 291, at p. 1; Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the Application of Art. 81 (3) of the Treaty to Categories of Specialization Agreements [2000] OJ L 304, at p. 3; Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the Application of Art. 81 (3) of the Treaty to Categories of Research and Development Agreements [2000] OJ L 304, at p. 7; Commission Regulation (EC) No 772/2004 of 27 April 2004 on the Application of Art. 81 (3) of the Treaty to Categories of Technology Transfer Agreements [2004] OJ L 123, at p. 11; Commission Notice – Guidelines on the Application of Art. 81 of the EC Treaty to Technology Transfer Agreements [2004] OJ C 101, at p. 2.
3) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24, at p. 1.
4) Recital 25 of the ECMR.
5) Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C 31, at p. 5.

6) CFI – Case T-219/99, [2003] ECR II-5917 – British Airways v. Commission, cf. also EWiR 2004, 377 *(Beeser-Wiesmann)*; CFI – Case T-203/01, [2003] ECR II-4071 – Michelin v. Commission (Michelin II).
7) CFI [2003] ECR II-4071, at p. 241 – Michelin v. Commission.
8) ECJ – Case 85/76, [1979] ECR 461, at p. 91 – Hoffman-La Roche v. Commission.
9) CFI [2003] ECR II-4071, at p. 110 – Michelin v. Commission.
10) OECD, "Competition on the merits," background note, 9 May 2005, DAF/COMP(2005) 17. For a US perspective, see *Herbert Hovenkamp*, Exclusion and the Sherman Act, 72 U. Chi. L.Rev. 147, 150 (2005) ("competition on the merits" includes "non-exploitative pricing, higher output, improved quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like"; such a standard "may do an adequate job of characterizing past decisions. But it is not always very helpful in evaluating novel practices").

Art. 82, the question of what constitutes anticompetitive conduct under Sec. 2 has been answered primarily on a case-by-case basis, and there still is no general agreement on a single standard by which to measure whether conduct is anticompetitive in violation of Sec. 2.

This is not surprising since distinguishing legitimate business behaviour from anticompetitive behaviour can be difficult. One problem is that competitive and abusive conduct often are similar in appearance. For instance, low prices are the very essence of competition, and in certain circumstances even prices below cost may, for some period, constitute "normal" pricing. But low prices – even prices above cost – may have an exclusionary effect.[11] The difficult task for practitioners and enforcers is to correctly identify and prohibit only that conduct which is likely to have an anticompetitive effect without discouraging businesses from engaging in conduct that benefits consumers.

This paper discusses the modernization of Art. 82 in the light of the evolution of monopolization law under Sec. 2 of the Sherman Act in the US. Part II outlines the main principles of unilateral conduct in the EU and in the US. Part III discusses and compares the law and enforcement in the EU and in the US. Part IV focuses on the approaches taken by the EU and US toward certain business conduct, and offers insights into economic tests used to evaluate that conduct. Finally, Part V provides some conclusions highlighting the differences in analytical and judicial treatment of certain business conduct under Art. 82 and Sec. 2 and provides practical suggestions on how to draft antitrust enforcement guidelines that can be used by enforcers, the courts and the business community to evaluate the competitive effects of conduct without discouraging vigorous, procompetitive activity.

II. Policy Objectives in the EU and US

The goal of protecting "competition" underlies the antitrust laws that prohibit monopolization, in the US, or abuse of a dominant position, in the EU, and determines which conduct is deemed procompetitive or anticompetitive. But any antitrust scheme must answer the basic question of what it means to protect competition. Does it mean protecting smaller, weaker firms against dominant firms? Or does it mean protecting the competitive process, productive efficiency, or consumer welfare?[12] The answer to these questions have evolved over the years in both the EU and the US, and in recent years, lawmakers, courts and enforcement agencies in both jurisdictions have taken different approaches.

1. Art. 82 of the EC Treaty

Art. 82 prohibits abusive behavior by one or more dominant firm(s).[13] The general goal of Art. 3 (1) (g) requires the European Community to institute a "system ensuring that competition in the internal market is not distorted".[14]

It has been assumed from the foundation of the Treaties in 1957 that European competition law, and in particular Art. 82 (formerly Art. 86), primarily guarantees the *institution of competition as such*, i.e., it protects the *competitive process*. Although Art. 82 lit. b also identifies "technical development" (i.e., productive efficiency) and "consumers" (i.e., consumer welfare) as objectives for competition policy, the focus in enforcing Art. 82 consistently has been on the preservation of the *market structure*.[15]

The foundational policy of Art. 82 finds its inspiration in ordo-liberal thinking, going back to the works of *von Hayek* and other representatives of the so-called German Freiburger Schule.[16] According to ordo-liberal philosophy, the competitive process is not only a means to achieve economic efficiency but an end in itself. It considers individual freedom as the primary objective of competition policy, and views dominant firms as tending to weaken the competitive process and the economic freedom of other market participants. Under this economic approach, competition law, in cases where market power can not be eliminated, is designed to constrain the exercise of both private and state market power, ensuring that dominant firms act as if they are constrained by competition. Thus, the concept of "competition on the merits" is an essential element of this policy – only where competition on the merits occurs can alternate sources of competition survive in a market controlled by a dominant firm. Another extension of ordo-liberal thinking is that dominant firms should not be allowed to act in the same way as other market participants (i.e., that some conduct is unlawful for a monopolist even though it might not be unlawful for a firm in a competitive market).

As reflected by decisions of European courts, these ordo-liberal principles have been incorporated into Art. 82 jurisprudence in different ways. For instance, in Continental Can, one of the first cases to address the prohibitions on abuse of a dominant position, the ECJ followed an approach incorporating all the policy elements mentioned in Art. 82:

"Articles 85 [now 81] and 86 [now 82] seek to achieve the same aim on different levels, i.e., the maintenance of effective competition within the Common Market. [...] the provision [Art. 82] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Art. 3 (f) [now 3 (g)] of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e., that only undertakings remain in the market whose behaviour depends on the dominant one."[17]

By 1979, the ECJ already was following a "structural approach," holding in Hoffmann-La Roche that:

"abuse is an objective concept relating to the behaviour 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 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

11) See, e.g., 324 F.3d 141 (3d Cir. 2003) – LePage's Inc. v. 3M (bundled rebates considered a basis for Sherman Act Sec. 2 liability even though the price on any one product was not below cost).

12) OECD, "Competition on the merits", background note, 9 May 2005, DAF/COMP (2005) 17, at p. 5.

13) Art. 82 reads: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

14) ECJ – Case 6/72, [1973] ECR 215 – Europemballage and Continental Can v. Commission.

15) Art. 82 also serves the related non-competition objective of internal market integration, that is the creation of an open single European market, and it was also invoked to promote liberalization. Thus, conduct by dominant firms that segment the EU market along national boundaries or discrimination of a dominant firm on the basis of nationality is caught by the Art. 82 prohibition. For example, in the 1999 decision concerning the 1998 Football World Cup, the Commission stated that discrimination by a dominant firm concerning ticket sales on the basis of nationality is within the scope of Art. 82, notwithstanding the absence of any effect on the structure of competition. See Commission decision of 20 July 1999, Case IV/36.888, O.J. L 5/55, at p. 100 – 1998 Football World Cup.

16) The most important representative was *Walter Eucken*. See *John Vickers*, Chairman OFT, Speech before the 31st Conference of the European Association for Research in Industrial Economics (3 September 2004), and *Fritz Bolkestein*, former Commissioner for Internal Market and Taxation, Speech before the Walter Eucken Institute (10 July 2000), for examples of the influence of this school on European competition policy.

17) ECJ [1973] ECR 215, at p. 25 - 26 – Europemballage and Continental Can v. Commission.

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."[18]

In the 1983 case of Michelin, the ECJ further refined the law under Art. 82, focusing on the "abuse" requirement:

"[a] finding that an undertaking has a dominant position is not in itself a recrimination but simply means that [...] the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."[19]

Since that time, the ECJ and the CFI have further incorporated ordo-liberal philosophy into Art. 82 law. For example, the courts consistently have relied on the notion that dominant firms have a "special responsibility" and stress that these firms, by virtue of Art. 82, should not have the right to engage in conduct that would be unobjectionable if adopted by non-dominant undertakings. The courts also have found that certain restrictive agreements entered into by dominant firms that could have been justified for their efficiencies under Art. 81 (3), would be proscribed by Art. 82. For instance, in Compagnie Maritime Belge, involving certain exclusivity agreements by a shipping liner conference, the ECJ held:

"the fact that operators subject to effective competition have a practice which is authorized [under Art. 81 (3)] does not mean that adoption of the same practice by an undertaking in a dominant position can never constitute an abuse of that position."[20]

The frequently criticized decisions in AKZO,[21] British Airways, and Michelin II, which declared certain forms of unilateral conduct like predatory pricing or fidelity (loyalty) per se unlawful under Art. 82, also have been influenced largely by ordo-liberal thinking.

Until recently, the Commission defined the primary objective of competition policy as "the maintenance of competitive markets".[22] There are signs, however, of a shift towards an approach emphasizing the goals of consumer welfare and efficiency as the basis of EU competition policy rather than focusing solely on protecting the competitive process. Last year, in its statement of "A Pro-Active Competition Policy for a Competitive Europe", the Commission stated:

"Vigorous competition in a supportive business environment is a key driver of productivity growth and competitiveness. However, competition is not an end in itself. It is a vital market process which rewards firms offering lower prices, better quality, new products and greater choice. [...] A system of well functioning markets – both in upstream and downstream markets – is an effective mechanism for achieving an efficient allocation of resources."[23]

2. Sec. 2 of the Sherman Act

Sec. 2 of the Sherman Act prohibits monopolies, attempts to monopolize, and conspiracies to monopolize.[24] The offence of monopolization most closely parallels the offence of abuse of dominance under Art. 82 and has two well-established, basic elements: 1) the possession of monopoly power in the relevant market; and 2) the wilful acquisition or maintenance of that power

18) ECJ [1979] ECR 461 – Hoffmann-La Roche v. Commission.

19) ECJ – Case 322/81, [1983] ECR 3461, at p. 70 – Michelin v. Commission.

20) ECJ – Case C-396/96 P, [2000] ECR I-1365, at p. 131 – Compagnie Maritime Belge Transports SA v. Commission.

21) ECJ – Case C-62/86, [1991] ECR I-3359 – AKZO v. Commission, cf. also EWiR 1991, 989 *(Schroeder)*.

22) See XXIX. Report on Competition Policy (2000), at p. 6.

23) Communication from the Commission, "A pro-active Competition Policy for a Competitive Europe," 20 April 2004, COM(2004) 293 final, at p. 3, available at http://www.eu.int/comm/competition/publications/.

24) Sec. 2 of the Sherman Act, 15 USC. § 2, reads "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize ... shall be deemed guilty of a felony ..."

as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.[25]

From the earliest cases construing the provision, the US courts have recognized that Sec. 2 "does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offence, when unaccompanied by unlawful conduct in the exercise of its power".[26] But exactly what "unlawful conduct" is necessary to trigger Sec. 2 liability has been a question with which courts and antitrust enforcers have grappled over the last century of Sec. 2 litigation.

At one end of the spectrum are cases that protected competition for its own sake. These cases have focused primarily on whether the conduct in question had an exclusionary effect, and not whether the conduct was efficiency enhancing. For instance, in US v. Aluminum Co. of America,[27] Alcoa was found to have violated Sec. 2 based on the conclusion that its efforts to expand output to meet new demand had the effect of preventing new entry into the manufacture of aluminium ingot. In considering these actions, the Alcoa court stated that,

"we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. *Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary'*. So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent."[28]

The logic of Alcoa was followed almost a decade later in US v. United Shoe Machinery Corp., where the court declared that the prohibitions of Sec. 2

"reach any enterprise that has exercised power to control a defined market, if that power is to any substantial extent the result of barriers erected by its own business methods (even though not predatory, immoral, or restraining trade in violation of Sec. 1 of the Sherman Act ...)".[29]

Since that time, the law has shifted substantially. The infusion of economic thought into modern antitrust law has focused Sec. 2 analysis on the effects the conduct at issue has on the ultimate goal of antitrust – the protection of consumer welfare. Today, it is generally accepted that the aim of the US antitrust laws, including Sec. 2 of the Sherman Act, is not only to protect consumer welfare, but also to enhance economic efficiency.[30] This accords with the generally well-recognized axiom that the US antitrust laws are meant to protect competition, not competitors.[31] The competitive process is considered valuable because it is a means to achieve economic efficiency; it is not the ultimate end the antitrust laws serve to protect. Therefore, "modern" Sec. 2 analysis attempts to look not only at the effect(s) certain conduct has on competition, but also on how that conduct affects the economic efficiency of markets. Therefore, behaviour that enhances economic efficiency –

25) US v. Grinnell Corp., 384 US 563, 570 - 571 (1966).

26) US v. Int'l Harvester Co., 274 US 693, 708 (1927), citing US v. United States Steel Corp., 251 US 417, 451 (1920).

27) 148 F.2d 416, 430 - 431 (2d Cir. 1945).

28) Id. at 431 (emphasis added).

29) 110 F. Supp. 295, 297 (D. Mass. 1953), aff'd 347 US 521 (1954).

30) See, e.g., *Timothy J. Muris*, Principles for a Successful Competition Agency, 72 U. Chi. L.Rev. 165, 169 (2005) ("Antitrust's goal is to protect consumers. Antitrust law should care intensely about sustaining the effectiveness of competition and display indifference about the identities or fortunes of individual market participants"); *Joel I. Klein*, Assist. Atty. Gen., Antitrust Div., US Dep't of Justice, Hearing on Antitrust Issues in Agricultural Business, Senate Committee on Agriculture (27 July 1999) ("The primary beneficiary of antitrust enforcement is the consumer, who receives better quality, increased innovation, and lower prices when competition is not interfered with").

31) Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 US 477, 488 (1977).

thereby benefiting consumers – should not be prohibited by Sec. 2, even when that behaviour has the incidental effect of excluding competition.

An example of this principle arises in the context of market share discounts. In Concord Boat Corp. v. Brunswick Corp., the Eighth Circuit Court of Appeals reversed a lower court's finding that Brunswick's market share discounts violated Sec. 2.[32)] The conduct included a program by which Brunswick offered increasing levels of discounts for a purchaser's commitment that it would buy a certain percentage of the purchaser's requirements of stern drive marine engines from Brunswick.[33)] The discount increased as the purchaser's commitment increased. If the boat builder did not buy at the specified level, the discount was lost.

The Concord Boat plaintiffs argued that Brunswick's discount program was "part of a deliberate plan to exclude competitors from the stern drive engine market".[34)] But the court quickly dispensed with this claim both on the notion that the discounts did not drive the price of the engines below cost and that the program, which was completely voluntary, did not prevent customers from buying competing products.[35)] In doing so, the Brunswick court based its decision in part on the proposition that "cutting prices in order to increase business often is the very essence of competition, which antitrust laws were designed to encourage".[36)] This conclusion stands in sharp contrast to Alcoa, which condemned as exclusionary Alcoa's practice of expanding output to meet new demand. As a general matter, increasing output is recognized as a procompetitive act.[37)] Insofar as the Alcoa court found this practice to violate Sec. 2, that decision seems to have arrived at the precise "perverse result" that the Concord Boat court tried to avoid.

Decisions like Concord Boat are consistent with the longstanding principle that Sec. 2 proscribes the wrongful exercise of monopoly power, not the existence of monopolies themselves. Indeed, it is often the very prospect of becoming a monopoly that entices market participants to engage in the kind of aggressive competitive conduct – which requires the expenditure of capital to innovate, expand output, lower prices or improve product quality or service – that the antitrust laws aim to foster.

The US Supreme Court emphasized this notion in its recent decision in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP.[38)] In ruling that the incumbent local telephone company (a "local exchange company" or "LEC") did not violate Sec. 2 merely because it failed to meet its obligations imposed by the Telecommunications Act of 1996 to provide network access to competing telephone companies, the court stressed that,

"the 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. The opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth".[39)]

32) 207 F.3d 1039, 1063 (8th Cir. 2000).

33) For instance, if the boat builder purchased 80 percent of its needs from Brunswick, it received a 3 percent discount on all its purchases; if it bought 70 percent of its needs from Brunswick, the boat builder received a 2 percent discount; and the purchaser received a 1 percent discount if it bought 60 percent of its engine requirements from Brunswick. Id. at 1044.

34) Id. at 1060.

35) Id. at 1062.

36) Id. at 1061.

37) See generally, United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003) (government's challenge to American Airlines' practice of meeting competition from low cost carriers by expanding capacity was deemed not anticompetitive where the government failed to prove that the incremental capacity expansions drove prices below cost).

38) 540 US 398 (2004).

39) Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398, 405 (2004).

That a monopolist may act in efficiency-enhancing ways has given rise to a growing recognition by US courts that – barring conduct that is clearly and objectively anticompetitive – a firm should not be stripped of its ability to engage in aggressive competition despite the fact that the conduct may drive competitors from the market.[40)] The recognition and acceptance of this principle is very important if the antitrust laws are to allow firms to strive for the "ultimate prize" of achieving a lawful dominant position through procompetitive conduct. To do otherwise would destroy the incentives of any dominant firm to innovate, which in the end could harm consumers.[41)]

This in turn gives rise to another basic issue when analyzing conduct under Sec. 2, namely, that courts should be circumspect when imposing Sec. 2 liability and should be judicious in their assessment of what conduct is truly anticompetitive.[42)] This analysis is particularly appropriate in the Sec. 2 context in order to differentiate between efficiency-enhancing, procompetitive conduct and anticompetitive conduct; this analysis can be very difficult for a fact finder, especially a jury, and courts analyzing conduct under Sec. 2 should be concerned not to chill competition through mistaken condemnation of ambiguous conduct (referred to as "false positives"). It is this concern which underlies many recent US courts' decisions on Sec. 2.[43)]

III. Law and Enforcement Practice in the EU and US

At a basic level, the elements for finding a violation of Art. 82 and Sec. 2 look quite similar. Art. 82 prohibits any abuse by one or more firms with a dominant position in the common market and identifies specific types of conduct that constitute an abuse. Under Sec. 2, the offence of monopolization requires the possession of monopoly power in the relevant market and the wilful acquisition or maintenance of that power by anticompetitive means.[44)] Comparing the basic elements required by each statute highlights their commonality. Each require:

(1) the possession of "monopoly power" or a "dominant position" in a relevant market; and

(2) the maintenance of monopoly power by anticompetitive conduct or an "abuse" of the dominant position.[45)]

Yet, many of the similarities between the two laws end here. Because of different policy approaches, Art. 82 and Sec. 2 of the Sherman Act have been interpreted in different ways in the

40) Virgin Atlantic Airways Limited v. British Airways PLC, 257 F.3d 256, 266 (2d Cir. 2001) ("we must note first that even with monopoly power, a business entity is not guilty of predatory conduct through excluding its competitors from the market when it is simply exploiting competitive advantages legitimately available to it"); Advanced Health-Care Serv., Inc. v. Radford Comty. Hosp., 910 F.2d 139, 147 n.14 (4th Cir. 1990) ("A firm, even one with monopoly power, is not guilty of predatory exclusionary conduct when it is simply exploiting the competitive advantages legitimately available to it").

41) See *J. Bruce McDonald*, Deputy Assist. Atty. Gen., Antitrust Div., US Dep't of Justice, "Antitrust Division Update: Trinko and Microsoft", Remarks Before the Houston Bar Ass'n, Antitrust and Trade Reg. Sec. (8 April 2004) ("If you believe that antitrust can protect competitive markets, but may not be so good at creating them, then to safeguard innovation, even dominant firms must be allowed to compete aggressively"). See also, *Richard A. Epstein*, "Monopoly Dominance or Level Playing Field? The New Antitrust Paradox", 72 U. Chi. L.Rev. 49, 49 (2005) ("Once certain practices used by others are denied to the dominant firm, the law introduces two unwanted sources of inefficiency. First, the efficient practice is now denied to that firm, whose operations must suffer in consequence of that restriction. Second, limiting that prohibition to the dominant firm has the further detriment of distorting competition between it and its rivals, by giving them an undeserved leg up").

42) At least one commentator has suggested that antitrust liability under Sec. 2 for unilateral conduct should be done away with altogether, or in the alternative, that the use of Sec. 2 be scaled back. See *Epstein*, 72 U. Chi. L.Rev. at 49.

43) See, e.g., Trinko, 540 US at 414 ("Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad'"); Concord Boat, 207 F.3d at 1061 (noting the inability of "a judicial tribunal to control [above cost discounting] without courting intolerable risks of chilling legitimate price cutting"); US v. AMR Corp., 335 F.3d 1109, 1114 (10th Cir. 2003) ("caution in predatory pricing cases is the watchword as 'the costs of an erroneous finding are high'"), quoting Brooke Group v. Brown & Williamson Tobacco, 509 US 209, 227 (1993).

44) United States v. Grinnell Corp., 384 US 563, 570 - 571 (1966).

EU and the US. Where strong similarities may be found regarding the concepts of "dominance" and "monopoly power", what actually constitutes "anticompetitive conduct" or "abuse" have diverged significantly.

1. "Dominance" and "Monopoly Power"

Neither Sec. 2 nor Art. 82 define the terms "monopoly power" or "dominance". Courts in the EU and US, however, have defined these terms in similar ways.

1.1 The Basic Concepts in the EU and the US

The ECJ has defined dominance as a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.[46]

While this definition appears to consist of two elements – (i) the ability to behave to an appreciable extent independently of competitors, customers and consumers, and (ii) the ability to prevent effective competition in a relevant market – commentators have noted that, in practice, these two elements are really one.[47]

Recently, the Commission has defined dominance by stating that a firm should be considered dominant if it has substantial market power. This is consistent not only with the ECJ definition of dominance, which explicitly refers to independence "to an appreciable extent", but also with more recent industry-specific legislation and antitrust guidelines where "significant market power" and "dominance" are used synonymously.[48]

The US Supreme Court has provided a more specific definition of monopoly power – the "power to control prices or exclude competition".[49] Lower courts have refined the definition further by incorporating more economic principles and holding that "a firm is a monopolist if it can profitably raise prices substantially above the competitive level".[50]

1.2 Establishing Dominance and Monopoly Power

The analytical framework used to identify market power in Europe and the US is similar. According to well established case law under Art. 82, a determination of dominance requires (i) defining the relevant market, (ii) analyzing market shares, and (iii) assessing other competitive con-

45) To violate Art. 82, the abusive conduct in addition must have an actual or potential effect on trade between the member states, a condition which is fulfilled in virtually all cases and therefore is of minor practical importance. Likewise, the Sherman Act has a jurisdictional requirement that the conduct in question affect interstate commerce.

46) ECJ – Case 27/76, [1978] ECR 207 – United Brands v. Commission; ECJ [1979] ECR 461 – Hoffmann-La Roche v. Commission; ECJ [1983] ECR 3461, at p. 30 – Michelin v. Commission.

47) *Geradin/Hofer/Louis/Petit/Walker*, The Concept of Dominance, Research Paper on the Modernization of Art. 82 EC, College of Europe, 10 June 2005.

48) See, for example, Art. 14 (2) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L 108: "An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers", or the Commission's Guidelines on the application of Art. 81 (3) of the Treaty [2004] OJ C 101, p. 97 at p. 25: "Market power is a question of degree. The degree of market power normally required for the finding of an infringement under Art. 81 (1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Art. 82."

49) United States v. E.I. du Pont de Nemours & Co., 351 US 377, 391 (1956).

50) See for instance United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001).

straints.[51] US courts have applied a similar test. For example, in US v. Microsoft, the court analyzed the question of whether Microsoft had market power by first defining the relevant market – in that case, "the licensing of all Intel-compatible PC operating systems worldwide" – then measuring the firm's share of the relevant market (Microsoft had a more than 95 percent share of the relevant market), and finally, assessing whether there was any "possibility of competition from new entrants".[52] In many instances, this last factor – barriers to entry – is the most crucial because even a monopolist cannot sustain its market power if new firms can freely enter the market. The ability to raise prices above competitive levels will be constrained if a monopolist knows that by raising prices, it will attract new competitors into the market that can undercut supracompetitive prices.

Analyzing monopoly power or dominance first requires an identification of the relevant product and geographic markets. This process and the criteria used for the market analysis are similar in the US and the European Union.[53] In the US, courts look to that set of products that are "reasonably interchangeable by consumers for the same purposes".[54] While the US courts have not provided a more precise definition, the US antitrust enforcement agencies rely on the "hypothetical monopolist" test.[55] Under this test, the agencies will look at the narrowest market definition and, assuming production of the product in question is under the control of one supplier, will determine if the hypothetical monopolist could raise the price of the product 5 to 10 percent without inducing a sufficient number of customers to switch to another product which would render the price increase unprofitable. If this test is not met, then the market definition is expanded to include the alternate product. This process is repeated until the hypothetical monopolist test is met, i.e., there are no other products to which customers would switch in sufficient volume so as to render a 5 to 10 percent price increase unprofitable. While the hypothetical monopolist test is commonly used in the context of merger and rule of reason cases generally, US courts, in the context of Sec. 2, generally employ the "reasonably interchangeable" standard.

Despite the considerable convergence in defining the relevant market, significant differences remain in measuring market power. Market shares required for finding dominance in the European Union are generally lower than those necessary to establish market power in the US. For instance, under Art. 82, the ECJ held in Hoffmann-La Roche that generally very large shares, absent exceptional circumstances, are sufficient evidence of the existence of a dominant position.[56] On that basis, the ECJ held in AKZO that 50 percent is "a very large market share", and when accompanied by the fact that Akzo's 50 percent share remained stable over a period of three years, this was sufficient proof of a dominant position.[57] A market share of 50 percent therefore creates a rebuttable presumption of market dominance in the EU, which can be overcome only by showing "exceptional circumstances". Based on ECJ precedent, it is difficult to imagine what "exceptional circum-

51) ECJ [1973] ECR 215 – Europemballage and Continental Can v. Commission.

52) US v. Microsoft Corp., 253 F. 3d 34, 53 - 55 (D.C. Cir. 2001). See also United States v. Grinnell Corp., 384 US 563 (1966).

53) See Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, O.J. [1997] C 372/5, and The US Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, at § 1 (1992).

54) Du Pont, 351 US at 395; Microsoft, 253 F.3d at 53.

55) The US Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, at § 1.1 (1992).

56) ECJ [1979] ECR 461 – Hoffmann-La Roche v. Commission. The ECJ argued that "[...] an undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for – without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share – is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position."

57) ECJ [1991] ECR I-3359 – AKZO v. Commission.

stances" would rebut a finding of dominance in cases where a firm's market share is above 70 percent.

In contrast, US courts tend to require higher levels of market share in order to find monopoly power. A 70 percent market share generally is the dividing line above which a firm may be found to have monopoly power; below this, courts typically do not find monopoly power to exist absent particular market structures that are likely to confer the ability to raise prices or exclude competitors.[58] Historically, US courts considered a predominant share of the market to give rise to an inference of monopoly power.[59] This approach more recently has been discarded in favour of an analysis that considers other market conditions in conjunction with market share, the most important of which is the existence or lack of barriers to entry.[60] Thus, US courts have held that a market share of 100 percent does not necessarily establish monopoly power absent a showing that the market is protected by entry barriers.[61] In this respect, US law under Sec. 2 seems less restrictive than Art. 82 abuse of dominance standards.

Thus, one of the shortcomings of the current interpretation of Art. 82 is that the threshold of what constitutes market dominance is set too low, i.e., 50 percent market share, and meeting this threshold, without more, immediately suggests dominance. This has significant ramifications from a policy standpoint in terms of discouraging efficiency-enhancing conduct that is not unlawful. Unlike Sec. 2 law in the US, a firm in the EU is subject to legal constraints on competitive actions in which it may engage based on much lower thresholds of defining what constitutes a dominant position. Moreover, under an Art. 82 analysis, there is no substantial analysis of barriers to entry as to whether the firm's market share actually confers market power. Companies that are found to be "dominant" are prohibited from engaging in business conduct that non-dominant firms are permitted and encouraged to pursue. Thus, when compared to US law under Sec. 2, Art. 82 can impede firms with a large market share in an otherwise competitive market from engaging in the very procompetitive conduct that the law seeks to promote.

1.3 Collective Dominance in the EU

One major difference between the concepts of dominance and market power is the recognition of "collective unilateral conduct".

The European concept of dominance includes the notion that dominance or market power can be held by an individual company or by two or more companies jointly. If more than one company exercises market power by agreement or a concerted practice, i.e., by forming a cartel, such behaviour is caught by Art. 81. However, as the ECJ recognized in Compagnie Maritime Belge,[62]

58) See, e.g., Alcoa, 148 F.2d 424 (noting that a market share over 90 percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not"). See also Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70 % and 80 %"), cert. denied, 498 US 972 (1990); Intergraph Corp. v. Intel Corp., 3 F. Supp.2d 1255 (N.D. Ala. 1998) (brand loyalty and large installed base combined with a 60 – 65 % market share were sufficient to establish market power).

59) See, e.g., Grinnell Corp., 384 US at 571.

60) Microsoft, 253 F.3d 54 ("we agree with Microsoft that because of the possibility of competition from new entrants ... looking to current market share alone can be 'misleading'"), quoting Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980).

61) See, e.g., Los Angeles Land Co. v. Brunswick Corp, 6 F. 3d 1422, 1425 - 1426 (9th Cir. 1993), cert. denied 510 US 1197 (1994) (100 percent market share does not show monopoly power where the plaintiff has failed to show the existence of entry barriers); Anti-Monopoly v. Hasbro, 958 F. Supp. 855 (S.D.N.Y), aff'd, 130 F.3d 1101 (2d Cir. 1997), cert. denied 119 S. Ct 48 (1998); Handikomp, Inc. v. United States Golf Association, 2000–1 Trade Cas. P 72 879 (3d Cir. 2000), cert. denied 121 S. Ct. 307 (2000).

62) ECJ [2000] ECR I-1365 – Compagnie Maritime Belge Transports SA v. Commission.

even in cases where no agreement or concerted practices exist, market conditions may be such as to induce companies to jointly exercise their market power. This situation is reflected by the wording of Art. 82, which explicitly recognizes that an abuse of a dominant position can be exercised "by one or more undertakings".[63] The European courts specified the criteria for collective dominance by establishing that, first, each member of the dominant oligopoly must have the ability to know how the other members are behaving (monitoring); second, there must be an incentive not to depart from the common policy in the market (tacit coordination must be sustainable); and third, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardize the results expected from the common policy.[64]

2. Identifying "Abusive" and "Anticompetitive" conduct

Generally speaking, European Community courts appear to have a broader notion of what constitutes unlawful behaviour of dominant firms, and impose tighter restrictions on the conduct of such firms than do US courts. Inspired by ordo-liberal thinking, which embraces the concept of a state guaranteeing and providing for an economic framework in which competition is protected in order to enhance individual freedom, European antitrust authorities tend to stress the costs of "false negatives," i.e., the danger of treating the conduct of dominant firms too leniently. Art. 82 also aims at protecting consumers and business partners from the negative short-term effects of market power. That is why Art. 82 also prohibits exploitative behaviour of dominant firms, e.g., the charging of monopoly prices, something that is not, in and of itself, a violation of Sec. 2.

US antitrust agencies and courts, on the other hand, are more reluctant to impose restrictions on the business conduct of dominant firms and stress that firms should compete aggressively. This maxim is reflected in the statement of Judge *Learned Hand* in the Alcoa case that "[t]he successful competitor, having been urged to compete, must not be turned upon, when he wins".[65] Accordingly, US courts – and to an increasing extent the US antitrust enforcement agencies – generally have a narrower conception of what constitutes anticompetitive conduct and are more reluctant to find Sec. 2 liability. This approach, which emphasizes the costs associated with "false positives", is contrary to the EU approach and is a caution against too much government intervention in competitive markets.

2.1 The European Concept of Abuse

The EC Treaty does not define "abuse", and the examples given in Art. 82 are illustrative. Consequently, the interpretation and application of the notion of abuse under Art. 82 is a creation of the Community courts which have distinguished between two forms of abuse – exploitative and exclusionary abuse.

2.1.1 Exploitative Conduct

Exploitative abuse involves conduct in which a dominant firm exploits its commercial position, and the resulting dependence of other trading partners, and therefore achieves business advantages which it could not have achieved if effective competition existed. Art. 82 (a) deals with exploitative abuses and prohibits dominant firms from imposing "unfair" purchase or selling prices or other

63) Also Art. 14(2) of Directive 2002/21/EC explicitly provides that an undertaking shall be deemed to have significant market power if it enjoys a position equivalent to dominance either individually or jointly with others.

64) CFI – Case T-193/02, Judgement of 26 January 2005, not yet reported in the ECR – Piau v. Commission. This test was first articulated by the Community courts, when reviewing mergers, in the cases of Kali & Salz, Gencor and Airtours. In later decisions, such as TACA and Piau, the CFI imported this test into Art. 82.

65) Alcoa, 148 F.2d at 430.

"unfair" trading conditions. Therefore, it is within the scope of Art. 82 to attack "excessive" pricing by monopolists. For instance, in United Brands, the ECJ stated that, "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is [...] an abuse".[66]

Despite the ECJ's jurisprudence, in the last decade, the Commission has not pursued excessive pricing cases. The Commission signalled that it will not focus on the level of prices, but on combating exclusionary conduct designed to maintain a dominant status against competitors or entrants whose presence would normally bring about effective competition and competitive prices.[67]

2.1.2 Exclusionary Conduct

Abusive conduct concerns behaviour of a dominant firm that is directed against competitors either in the market in which the dominant firm participates or in related markets. All but a few EC cases on abuse of dominance have concerned exclusionary conduct. Art. 82 (b) (limiting production, markets or technical development to the prejudice of consumers) deals with such conduct. According to the ECJ, abusive conduct not only encompasses the exploitation of a dominant firm's monopoly power, but also covers all practices which affect the competitive structure of a market. The ECJ's first and fundamental holding in Continental Can was that "abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e., that only undertakings remain in the market whose behaviour depends on the dominant one".[68]

The European Community courts have not developed a clear test for analyzing exclusionary conduct. Rather, their analyses and decisions seem to be closely linked to the specific facts and circumstances of particular cases, and no attempt has been made to develop general legal and/or economic principles defining exclusionary conduct.

The starting point for the Community courts' analyses has been to establish as exclusionary any conduct explicitly mentioned in Art. 82. In particular, the EU courts have focused on conduct that limited rivals' production or technical development (Art. 82 (b)), or other conduct aimed at excluding competitors from the market by means other than competition on the merits.

Community courts then focused their analysis of a dominant firm's practices on the potential for anticompetitive effects, without going the additional step of requiring evidence of actual anticompetitive effects. In Michelin I, for instance, the ECJ held that "it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect [...]".[69] In some cases, such as Michelin II, the Community courts went even further, holding that the "intent to exclude" is sufficient to show that the conduct actually had such an effect, an approach inconsistent with the "objective concept" of abuse discussed by the ECJ in Hoffman-La Roche. Intent should have a much more circumscribed role in such cases or be irrelevant in the "objective concept" analysis of

66) ECJ [1978] ECR 207, at p. 250 – United Brands v. Commission. The court also introduced a two-stage test for the analysis of excessive pricing cases and held that, "the questions therefore to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to this question is affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products". United Brands, supra, at p. 252. The ECJ applied this test in other cases dealing with excessive pricing. See ECJ – Case 26/75, [1975] ECR 1367 – General Motors v. Commission, and ECJ – Case 226/84, [1986] ECR 3263 – British Leyland v. Commission, cf. also EWiR 1987, 475 *(Schroeder)*.

67) Commission, XXIV. Report on Competition Policy (1994), at p. 207.

68) ECJ [1973] ECR 215 – Europemballage and Continental Can v. Commission.

69) ECJ [1983] ECR 3461, at p. 73 – Michelin v. Commission.

abuse, since all successful competitive conduct can exclude rivals. In fact, such a result is driven by the intent to succeed and is the very essence of competition.

2.1.3 The Role of Efficiencies

The role of efficiencies as a defence to a claim of abuse of dominance has received less acceptance under Art. 82 than Sec. 2. Efficiencies generated by the conduct in question may serve as a justification under Art. 82, but only to a limited extent. For example, in United Brands,[70] the ECJ held that "the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests [...], and [...] such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests [...]. Even if the possibility of a counterattack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other."[71]

Similarly, in Michelin II and British Airways, the CFI indicated that economic efficiencies may theoretically justify exclusionary conduct. Nevertheless, the CFI in those cases never assessed whether the rebates at issue could be defended on efficiency grounds. In the Microsoft decision, however, the Commission considered in detail the justifications put forward by Microsoft and stated with respect to the tying of the Windows Media Player (WMP) to the Windows operating system that "Microsoft has not submitted adequate evidence to the effect that tying WMP is objectively justified by procompetitive effects which would outweigh the distortion of competition caused by it".[72]

2.1.4 Consumer Harm

Finally, the question of whether a showing of consumer harm is a necessary requirement under Art. 82 remains unanswered. It does, however, appear that the effect that exclusionary conduct may have on consumers is gaining more importance in case law. Art. 82 (b) states that conduct that harms consumers is abusive, and makes it clear that a dominant company may take actions limiting its rivals' competitiveness if consumers are not harmed. The ECJ relied on this provision in one of its first statements with respect to Art. 82 in Continental Can.[73] Other cases implicitly reflect this concern for consumer welfare. For instance, in the Magill and IMS Health cases, concerning compulsory licensing, the ECJ ruled that the dominant company, by refusing to license certain intellectual property rights, prevented the emergence of a new product for which there was a potential consumer demand.[74] In Microsoft, the Commission stressed that Microsoft's refusal to supply information with respect to interoperability limited technical development to the prejudice of consumers, i.e., had a negative effect on consumer welfare.[75]

70) United Brands held a dominant position in the market for bananas, which it sold under the trade name "Chiquita". United Brands cut off supplies to a ripener/distributor when the latter, following a disagreement with United Brands, began promoting a rival producer's bananas while at the same time lowering the quality used to ripen United Brands' bananas. The court considered it "advisable to assert positively from the outset that an undertaking in a dominant position for the purpose of marketing a product – which cashes in on the reputation of a brand name known to and valued by the consumers – 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."

71) ECJ [1978] ECR 207, at p. 189 - 190 – United Brands v. Commission.

72) Case COMP/C-3/37.792, Commission Decision of 24 March 2004 – Microsoft, at p. 970.

73) ECJ [1973] ECR 215, at p. 25 - 26 – Europemballage and Continental Can v. Commission.

74) ECJ – Case C-418/01, decision of 29 April 2004, at p. 49 (not yet reported in ECR) – IMS Health, cf. also EWiR 2005, 211 *(Hirte/Roth)*.

75) Case COMP/C-3/37.792, Commission Decision of 24 March 2004 – Microsoft, at p. 693.

2.2 The US Concept of Anticompetitive Conduct

While the basic elements of a Sec. 2 offence have long been defined, the standard by which to measure whether conduct is anticompetitive under US law is inexact. What is evident from Sec. 2 cases is that over the years, US courts have moved from condemning conduct that has the effect of excluding competition, without more, toward a more economics-based approach that requires proof that the conduct in question lacks the requisite efficiency-enhancing benefits that the antitrust laws seek to promote.[76] Adding to the difficulty of discerning one standard from the case law, courts and antitrust enforcers still use language referring to "exclusionary" conduct,[77] although the US Supreme Court's recent opinion in Trinko strongly signals a rejection of the Alcoa approach by making clear that Sec. 2 proscribes conduct shown to be anticompetitive.[78]

Moreover, because there are many ways in which a monopolist can act to acquire or maintain its monopoly, just as there are many ways in which a monopolist can act legitimately to increase market efficiency, it is difficult to articulate one overall standard by which to measure anticompetitive conduct.[79] US courts – constrained by the fear of creating a rule that will catch "false positives" – are reluctant to pronounce a static standard by which to analyze the continuously evolving practices of dominant firms or monopolists.

Courts and commentators have provided many different standards by which to measure anticompetitive conduct. In Aspen Skiing, for instance, the Supreme Court had already started to move away from the standard of "exclusionary" and toward a standard of "predatory", defined as conduct by which a monopolist attempts "to exclude rivals on some basis other than efficiency".[80] The Court, however, lapsed into the context of "exclusionary" behaviour when it explained further in a footnote that "'exclusionary' comprehends at the most behaviour that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way".[81]

Some courts have relied on more objectively identifiable methods of establishing anticompetitive conduct. Under this approach, violations of Sec. 2 have been found where the conduct complained of was itself a violation of the antitrust laws.[82] Along related lines, obtaining a patent by means of fraud upon the US Patent and Trademark Office has been deemed anticompetitive conduct for Sec. 2 purposes.[83] And, at what seems to be at the outer bounds of Sec. 2 liability, the US District Court for the Western District of Kentucky found Sec. 2 liability where the defendant repeatedly removed and destroyed the plaintiff's product racks and advertising displays in retail stores.[84]

76) Compare Alcoa, 148 F.2d at 430 - 431 ("Only in case we interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary'"), with Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 US 585, 605 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory").

77) See, e.g., LePage's, 324 F.3d at 152; Microsoft, 253 F.3d at 58. See also *McDonald*, supra footnote 41 ("Antitrust enforcement cannot be suspicious of the conduct of any firm, until there is exclusionary conduct").

78) Trinko, 540 US at 407 ("the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*") (emphasis in original).

79) Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998) ("'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties").

80) 472 US at 605.

81) Id. at 605 n.32, citing *Phillip Areeda & Donald Turner*, Antitrust Law 78 (1978). See also Advanced Health-Care Srv., 910 F.2d at 147 ("the key to distinguishing legal exclusion from improper, or predatory, exclusion is whether the exclusion was based on superior efficiency").

82) See, e.g., Brooke Group, 509 US 209.

83) See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 US 172 (1965).

84) Conwood Co., L.P. v. United States Tobacco Co., 2000-2 Trade Cas. 73,077 (W.D. Ky. 2000).

More recent Sec. 2 litigation has given rise to some additional standards. For instance, some courts have followed a "sacrifice test" in which courts examine the willingness of a defendant to sacrifice short-term profits for the benefit of monopoly profits in the long run.[85] The Third Circuit Court of Appeals in LePage's at least nominally endorsed a test of "equally efficient rivals", citing to the theory in a bundled discount context that "even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce".[86] Finally, the Department of Justice and Federal Trade Commission, in their brief to the Supreme Court in Trinko argued for a "but for" analysis – pursuant to which conduct would be deemed anticompetitive if it would not make economic sense but for the tendency to impair competition.[87]

Even before the recent cases of Trinko, LePage's and AMR Corp., the Microsoft court attempted to clarify the debate by laying out five principles for establishing anticompetitive conduct in a Sec. 2 case. First, the court stated "to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect'".[88] This first prong is meant to focus the analysis on the economic effect of the alleged conduct and not just its exclusionary effect. Thus, the court emphasized that the conduct "must harm the competitive *process* and thereby harm consumers".[89] Second, the plaintiff has the burden of proving the requisite anticompetitive effect.[90] Third, if the first two principles are met – establishing a prima facie claim under Sec. 2 – the defendant must present a procompetitive justification for the conduct.[91] At this stage, plaintiff and defendant engage in a debate of competitive effects – with the defendant offering a procompetitive rationale for its conduct and the plaintiff attempting to rebut the claim. Fourth, if the defendant's procompetitive justification stands unrebutted, then the plaintiff must show that the asserted procompetitive effects are outweighed by the anticompetitive effects – an analysis that is similar to that under a Sec. 1 "rule of reason" claim.[92] Finally, the fifth principle is that the focus of inquiry "is upon the effect of that conduct, not upon the intent behind it".[93]

That the intent of the monopolist does not determine the legality of the conduct for purposes of a monopolization claim makes sense in light of the focus on the economic effects of the conduct in question as opposed to its purely exclusionary effects.[94] Again, the goal of Sec. 2 monopolization law is not to strip a monopolist of the means by which it can effectively and efficiently compete in the market. Accordingly, the monopolist should not be penalized for striving to compete as aggressively as possible, even if the consequence is to drive less efficient firms from the market, so long as the aim of the monopolist is to compete in the most efficient manner possible. On the other hand, a monopolist's activities that drive competitors out of the market through economically wasteful means, even if not intended, should not be sanctioned under Sec. 2.

Nevertheless, intent has crept into Sec. 2 monopolization law. The Alcoa court made clear that intent was not an element of a monopolization claim,[95] but in doing so, only lowered the hurdle for proving monopolization by presuming that "no monopolist monopolizes unconscious of what

85) See, e.g., US v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003) (relying on the Robinson-Patman Act analysis of Brooke Group and requiring that a plaintiff prove a "dangerous probability of recouping" the investment in below-cost pricing in order to succeed in a predatory pricing claim).

86) 324 F.3d at 155, quoting *Phillip E. Areeda & Herbert Hovenkamp*, Antitrust Law 794, at 83 (Supp. 2002).

87) Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, at 14.

88) Microsoft, 253 F.3d at 58.

89) Id. (emphasis in original).

90) Id. at 58 – 59.

91) Id. at 59.

92) Id.

93) Id.

94) Note, however, that a specific intent to monopolize is a basic element of an attempt to monopolize claim under Sec. 2. See Spectrum Sports, Inc. v. McQuillan, 506 US 447, 456 (1993).

95) Alcoa, 148 F.2d 431 - 432.

he is doing".[96] Even the Microsoft court, immediately after declaring that the focus of the Sec. 2 monopolization inquiry is not on the intent of the conduct, provided that "the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct".[97] Consequently, Sec. 2 litigants are likely to spend much time and money attempting to reveal the intent behind every action taken by a monopolist even though such evidence is not dispositive of the underlying claim.

What is evident from the foregoing line of cases is that there is no general consensus around one standard for determining anticompetitive conduct. This should not be surprising, however, given the often recognized reality in Sec. 2 cases that the conduct at issue can and does arise in many different contexts, and what may be an appropriate measure of anticompetitive conduct in one scenario may not by useful in another. Indeed, the Supreme Court in Trinko did not even attempt to define a standard, notwithstanding the Department of Justice's suggestion that it adopt the "but for" standard.[98] Thus, the assessment of anticompetitive conduct remains highly dependent upon the context of the business practice in question.

IV. Determining Anticompetitive Conduct in Specific Contexts

The following examples demonstrate how certain practices have been treated in different ways in the EU and the US. There has been extensive discussion about whether a single "test" can be developed to detect and assess the competitive impact of business conduct. In addition to discussing the treatment of certain conduct under Art. 82 and Sec. 2 below, there are descriptions of various tests that have been suggested to assess these practices.

1. Predatory Pricing

1.1 The EU Approach

In the EU, the assessment of predatory pricing differs in some important aspects from the US. Notably, Community courts do not apply the recoupment test; that is, they do not require evidence that the alleged predator will be able to recoup its losses through monopoly pricing after competition has been excluded.[99] Rather, Community courts focus primarily on the relationship between prices charged and costs, combined with an element of intent.

In the leading case on predatory pricing, AKZO, the ECJ held that prices below average variable cost must be considered abusive. This is based on the concept that every sale below marginal cost necessarily generates a loss for the dominant firm and can only be motivated by an intention to eliminate competitors. In other words, a dominant firm does not have an interest in pricing below cost except when the elimination of competitors enables it subsequently to raise its prices, thereby taking advantage of its monopolistic position. If a dominant firm charges prices above average variable costs but below average total cost, such conduct may be abusive if it is part of a plan to eliminate a competitor. Where prices are above average variable costs, evidence of an intent to exclude a competitor is required. This makes sense since Art. 82 should not prevent a firm from setting low prices, as long as they are above average variable cost and are not intended to exclude competition. In AKZO, however, the ECJ may have gone too far, finding such an exclusionary intent from the fact that there was no objective justification for the low prices charged over a long

96) Id. at 432.
97) Microsoft, 253 F.3d at 59, citing Chicago Bd. of Trade v. United States, 246 US 231, 238 (1918).
98) See Trinko, 540 US 398; Hovenkamp, 72 U. Chi. L.Rev. at 151 ("the Trinko decision said very little about the conduct requirement generally").
99) ECJ – Case C-333/94 P, [1996] ECR I-5951 – Tetra Pak International SA v. Commission.

period where there were no competing price quotes. This reasoning ignores or downplays the significance of potential entry, which may be forcing the dominant firm to keep prices low to discourage entry; this example highlights the difference between the EU and US approaches toward predatory pricing. Barring other evidence of exclusionary conduct, competition law should be indifferent to whether prices are low because a firm with a high market share fears entry or because it faces actual competition from other firms. As long as entry barriers are low and there is little prospect that a dominant firm will be able to recoup monopoly profits in the long run, the result will be the same – low prices for consumers.

1.2 The US Approach

US courts apply a much narrower test for predatory pricing claims and view such allegations with scepticism. Indeed, in the opinion of the US Supreme Court, "predatory pricing schemes are rarely tried, and even more rarely successful".[100] To price below cost in an attempt to drive a competitor from the market is a rational strategy for the monopolist only if it is certain to recoup those losses once the rival is forced to exit the market. Thus, a Sec. 2 claim of predatory pricing requires proof not only of pricing below an appropriate measure of cost – that measure is the same in the US as in the EU, average variable cost – but also a dangerous probability of recouping the investment in below-cost prices.[101]

This approach to predatory pricing is consistent with the overall policy of avoiding "false positives" when analyzing conduct under Sec. 2. The fact that a firm's pricing practices are being called into question heightens sensitivity to "false positives" and counsels against the type of "per se" condemnation of below-cost pricing schemes that appears to exist under EU law. As the AMR Corp. court stated, "caution in predatory pricing cases is the watchword as 'the costs of an erroneous finding are high'".[102] This is true because "the mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition".[103] It would be ironic if the freedom of a firm to lower its prices – the touchstone of competition – was inhibited by the antitrust laws. Avoiding this possibility led the Supreme Court to declare in Brooke Group that,

"[e]ven if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy."[104]

Not surprisingly, the courts in two of the more important cases concerning predatory pricing – AMR Corp. and Brooke Group – found in favour of the defendant, though each claim failed different parts of the two-pronged test. In AMR Corp., the Department of Justice based its case on American Airlines' strategy for meeting competition from new low-cost carriers (LCCs) by lowering prices on the routes on which American and the LCCs competed, adding capacity on those routes, and altering its yield management for those routes.[105] In assessing the capacity additions in terms of their effect on price and costs, the AMR Corp. court upheld the lower court's finding that

100) Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 US 574, 589 (1986); Brooke Group, 509 US at 226. See also AMR Corp., 335 F.3d at 1114.
101) AMR Corp., 335 F.3d at 1115, citing Brooke Group, 509 US at 223 - 224. It should be noted that Brooke Group involved a claim of primary line price discrimination under the Robison-Patman Act, 15 USC. § 13a, and not predatory pricing under Sec. 2 of the Sherman Act. Because it was a primary line case, i.e., it involved a claim of price discrimination by a plaintiff at the same level of distribution as the defendant, the Supreme Court analogized it to a predatory pricing claim under Sec. 2.
102) AMR Corp., 335 F.3d at 1115, citing Brooke Group, 509 US at 227.
103) Cargill Inc. v. Monfort of Colo., 479 US 104, 122 (1986).
104) 509 US at 224.
105) AMR Corp., 335 F.3d at 1113.

the government failed to prove that American's prices on the routes in question were below average variable cost and therefore did not meet the first test of Brooke Group."[106]

In Brooke Group, the plaintiff failed the second prong – a dangerous probability that the investment in below-cost prices could be recouped. Not only was there a lack of evidence of supracompetitive prices,[107] but there was little to no likelihood that supracompetitive prices could be maintained. This was so, the Court reasoned, because to do so would depend on a complicated scheme of tacit collusion between the remaining market participants. Since market conditions were such that tacit collusion was unlikely – declining demand, excess capacity, the entry of generic product, inability to engage in parallel pricing given the large number of products and pricing variables – there was "no reasonable prospect" that the defendant would recoup its losses.[108]

Of course, Brooke Group was a Robinson-Patman Act claim and not a Sec. 2 claim. Accordingly, there was no required showing that the defendant, Brown & Williamson, had monopoly power in a relevant market. In fact, the evidence showed that Brown & Williamson's market share never exceeded 12 percent.[109] R.J. Reynolds and Philip Morris, on the other hand, were the market leaders with market shares of 28 percent and 40 percent, respectively.[110] It seems unlikely that a Sec. 2 claim of predatory pricing would hinge, like the claim in Brooke Group, on tacit collusion among market participants – often the only significant market participant in a Sec. 2 case is the defendant monopolist. Nonetheless, the basic principle remains true in a Sec. 2 context: where market conditions are such that the monopolist has little or no prospect of recouping its investment from below-cost pricing, Sec. 2 liability will not be imposed.

1.3 Implications for a Test of Anticompetitive Conduct

When analyzing predatory pricing cases, US courts employ, even if implicitly, a "profit sacrifice" test. According to this test of anticompetitive conduct, business behaviour is considered unlawful when it involves a short run profit sacrifice that would be irrational absent its tendency to eliminate or reduce competition in the long run. The DOJ advocated use of the profit sacrifice test in its case against American Airlines.[111] In Aspen Skiing, a case involving a monopolist's refusal to deal, the Supreme Court also attached importance to the defendant's willingness to forego short-run profits as a fact that suggested the "distinctly anticompetitive bend" of the defendant's conduct.[112]

Certain aspects of the profit sacrifice test make it unlikely that it could be adopted in all circumstances. The main shortcoming of this test is that it can be both under- and over-inclusive. On the one hand, it is under-inclusive because some business strategies do not entail a profit sacrifice, but still are exclusionary and harmful to competition, such as conduct aimed at raising a rival's costs.[113] On the other hand, the test may be over-inclusive because certain conduct can increase consumer welfare even though it also excludes competitors. This may be the case when a valuable product innovation is only profitable if it excludes competitors while at the same time conveys

106) Id. at 1120.
107) Brooke Group, 509 US at 238.
108) Id. at 243.
109) Id. at 213.
110) Id.
111) The DOJ applied the Test in the American Airlines case, United States v. AMR Corp., 335 F. 3d 1109 (10th Cir. 2003).
112) Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 US 585 (1985). In Trinko, the Supreme Court reiterated this criterion by stating that in Aspen Skiing the defendant had a "willingness to forsake short-term profits to achieve an anticompetitive end", Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398, 407 - 408 (2004).
113) See *Einer Elhauge*, Defining Better Monopolization Standards, 56 Stanford Law Review 253, 278 - 279 (2003).

market power.[114] Furthermore, this test may not be well-suited for cases where the business behaviour has both beneficial and harmful effects.[115]

2. Rebates/Bundled Discounts

2.1 The EU Approach

Rebates are one of the most timely issues being discussed within the abuse of dominance debate. Rebates granted by dominant firms in return for securing all or a substantial proportion of the business of customers may infringe Art. 82 in the absence of an objective justification. Fidelity rebates by dominant firms are essentially illegal in the EU.

The divergence between the EU and US in assessing unilateral conduct concerning such behaviour is best reflected by the British Airways case which concerned a rebate scheme implemented by British Airways. BA awarded rebates to travel agents for the sale of its tickets. The final annual rebate was calculated as a percentage of the agent's sales for the entire year and when the sales exceeded that of the previous year, the agent received a higher discount on all the sales made that year (performance reward rebate). Virgin Atlantic Airways, a competitor of British Airways, filed a complaint with the European Commission about the rebate scheme alleging a violation of Art. 82, and in addition, sued British Airways about the very same rebate system in a US district court claming a violation of Sec. 2. The outcome of the cases, however, was very different in Europe and the US.

The Commission issued a decision against BA. The CFI[116] later upheld the decision and determined that BA's performance reward schemes constituted an abuse of BA's dominant position in the UK market for air travel agency services, as they produced exclusionary and discriminatory effects within the network of travel agents. As to the exclusionary effects, the CFI relied on the principle of "normal competition" and found that the granted rebates did not constitute competition on the merits. The CFI also rejected BA's objective justification for the rebate system and concluded that BA's actual intent was to exclude competitors. The court, without discussing actual harm to customers, found that the rebates discriminated against certain travel agents.

By relying on the principle of "normal competition" in combination with BA's intent, the CFI appeared to apply a standard usually used in predatory pricing cases. In addition, the objective justification standard was applied without a concomitant analysis of the actual effects on competition. As in Michelin II, the CFI held that the rebate scheme tended to restrict competition, or "is capable of having, or likely to have such an effect".

2.2 The US Approach

The US courts – applying Sec. 2 – came to the opposite conclusion when considering the very same BA rebate system. In 2001, the Court of Appeals for the Second Circuit affirmed summary judgment in favour of British Airways and held that it had not violated Sec. 2 of the Sherman Act by implementing this system of financial incentives for travel agents.[117] In doing so, the court analyzed BA's rebate system along the lines of a predatory pricing claim and found that Virgin had failed

114) OECD paper, supra, at p. 38.
115) For a criticism of the profit sacrifice test see also *Steven Salop*, Sec. 2 Paradigms and the flawed Profit-sacrifice standard, Antitrust Law Journal (forthcoming 2005).
116) CFI [2003] ECR II-5917 – British Airways v. Commission.
117) Virgin Atlantic Airways Ltd. v. British Airways PLC, 69 F. Supp. 2d 571 (S.D.N.Y. 1999), aff'd, 257 F.3d 256 (2d Cir. 2001).

to establish that BA was pricing below cost.[118] Nor did Virgin offer persuasive proof that BA had recouped its lost profits by a system of bundling the alleged below-cost routes with monopoly priced routes.[119] Consequently, Virgin's Sec. 2 claim failed.

It stands to reason that above-cost rebates, without more, should not be condemned under Sec. 2. A rebate that does not drive prices below cost is not, in and of itself, a basis for declaring that conduct "predatory" or "anticompetitive".[120] Consistent with this reasoning, the opinion in Concord Boat laid out the general rule that above-cost discounting, even by a monopolist, is not anticompetitive.[121]

The Concord Boat court was careful to point out, however, that the case before it involved above-cost discounts on one product and there were no allegations of tying or bundling.[122] The discount programs at issue in Concord Boat – applied to a single product – could be fairly characterized as an attempt by Brunswick to increase market share by cutting prices, a legitimate goal accomplished by procompetitive means and one that the antitrust laws should encourage, even for a monopolist. But, the Eighth Circuit recognized that there may be circumstances in which above-cost discounting might create a basis for Sec. 2 liability.[123]

Such circumstances can arise in cases of multi-product, or bundled discounts. Under such programs, rebates are offered for multiple products on the condition that the customer buys the prescribed bundle. There may even be commitment levels pursuant to which the customer agrees to buy a certain percentage of its requirements of the bundled package in order to earn the discount. Usually, failure to buy the requisite bundle or meet the commitment results in forfeiture of the discount.

The first case to consider above-cost bundled discounts was SmithKline Corp. v. Eli Lilly & Co.[124] There, Lilly was accused of bundling together rebates for its monopoly products – Keflin and Keflex – with rebates for a product that faced competition from a new entrant, SmithKline. The Third Circuit, without any significant discussion of the competitive effects of the practice, upheld a district court's finding that such a bundling practice violated Sec. 2.[125]

It was almost twenty years before this issue came up again in Ortho Diagnostic Sys., Inc. v. Abbott Laboratories, Inc.[126] In Ortho, the alleged anticompetitive conduct involved the provision by Abbott of rebates when a customer purchased a bundle of four or five different blood assays; Abbott was deemed to have monopoly power with respect to some of the blood assay products. The Ortho court gave more reasoned consideration to the competitive effects of the conduct than did the SmithKline court, drawing a distinction between pricing that was predatory and pricing that was simply competitive.[127] Notably, the Ortho court distinguished the case before it from Brooke Group – noting that "the pricing at issue here involves the bundled pricing of a package of complementary products, in some of which the defendant has market power, as well as the unbundled prices of components of the package" – and declined to require that plaintiffs show below-cost

118) Id. at 269.
119) Id. at 269 - 272.
120) See Atlantic Richfield Co. v. USA Petroleum Co., 495 US 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition").
121) Concord Boat, 207 F.3d at 1061.
122) Id. at 1062.
123) Id. at 1061 ("If a firm has discounted prices to a level that remains above the firm's average variable cost, 'the plaintiff must overcome a strong presumption of legality by showing other factors indicating that the price charged is anticompetitive'") (citation omitted).
124) 575 F.2d 1056 (3d Cir. 1978).
125) Id. at 1065.
126) 920 F. Supp. 455 (S.D.N.Y. 1996).
127) Id. at 466.

pricing.[128] Yet drawing from Brooke Group and the notion that below-cost pricing is necessary for a claim of predatory pricing because it runs the risk of driving an equally efficient competitor from the market, the Ortho court held that bundled rebates can violate Sec. 2 under two conditions: 1) where the monopolist has priced below average variable cost; or 2) where the plaintiff is at least as efficient a producer as the monopolist, but the rebate program of the monopolist makes it unprofitable for the plaintiff to continue to produce.[129] The court nevertheless granted summary judgment for Abbott because Ortho had conceded that the rebates were not below cost and was unable to convince the court that it could not sell its products at a profit, although it did offer evidence that its profitability was harmed.[130]

The Third Circuit again took up the issue of bundled rebates in the LePage's case.[131] In that case, 3M, the dominant producer of transparent tape, bundled rebates relating to the purchase of its private label tape – the product which faced the most competition from LePage's – with a requirement that customers purchase other products from 3M that LePage's did not offer (e.g., health care, home care, home improvement, retail auto and leisure time products). Moreover, the size of the rebate depended on achieving specified sales goals. The court found that the bundled rebates at issue were anticompetitive because "when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer".[132]

While the LePage's court found that the bundled rebate program of 3M violated Sec. 2, the decision itself did not shed much light on the search for a standard of anticompetitive conduct. As noted earlier, the court did seem to approve of the "equally efficient firm" standard,[133] but it appears not to have made its decision based on this standard alone. In fact, the court, in its analysis of the bundled rebates, did not acknowledge or cite to the Ortho decision, much less discuss the second prong of Ortho. LePage's did make an evidentiary showing that its efficiency, and therefore its profitability, had been damaged by 3M's conduct, but there does not appear to have been a showing by LePage's that it was equally efficient as 3M, and the majority did not require such a showing. Highlighting this was the fact that, as the dissent pointed out, LePage's economic expert conceded that LePage's was not as efficient a tape producer as 3M.[134]

What LePage's does make clear is that Brooke Group does not stand for the proposition that above-cost pricing, in a Sec. 2 context, is per se lawful. This is so, the Third Circuit explained, because under Sec. 2, the conduct in question is that of a monopolist. The court in Brooke Group faced a materially different circumstance; as noted earlier, Brooke Group was a price discrimination case under the Robinson-Patman Act, and the defendant there, with only a 12 percent market share, was most certainly not a monopolist. Moreover, the Third Circuit had before it more than just bundled rebates – LePage's had also alleged that 3M engaged in exclusive dealing in violation of Sec. 2. In determining whether 3M's conduct was anticompetitive, the court stated that it was required to look to "the monopolist's conduct taken as a whole rather than considering each aspect in isolation".[135] The court went on to state,

"[t]he effect of 3M's conduct in strengthening its monopoly position by destroying competition by LePage's in second-tier tape is most apparent when 3M's various activities are considered as a

128) Id.
129) Id. at 469.
130) Id. at 470.
131) LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).
132) LePage's, 324 F.3d at 155.
133) Id.
134) Id. at 177 (*Greenberg, J.*, dissenting).
135) Id. at 162.

whole. The anticompetitive effect of 3M's exclusive dealing arrangements, whether explicit or inferred, cannot be separated from the effect of its bundled rebates. 3M's bundling of its products via its rebate programs reinforces the exclusionary effect of those programs."[136)]

With no valid business justification for its actions, the court upheld the finding that 3M's conduct was anticompetitive and violated Sec. 2.[137)]

2.3 Implications for a Test of Anticompetitive Conduct

The line of cases concerning bundled rebates and discounts cannot be adequately explained using the profit sacrifice test since, typically, these cases do not involve below-cost pricing. Following the policy of avoiding "false positives," US courts and antitrust enforcers exercise caution before condemning business practices that lead to low prices for consumers. Using the profit sacrifice test in cases where the alleged anticompetitive conduct is discounting and net prices are *above cost* creates a significant potential for declaring unlawful conduct which in fact is procompetitive. Consequently, cases analyzing bundled rebates seem to rely on the "equally efficient firm" test. Originally proposed by Judge *Richard A. Posner*,[138)] this test declares unlawful unilateral conduct that is likely to exclude rivals which are at least as efficient as the dominant firm. The "equally efficient firm" test has the benefit of avoiding the protection of individual competitors rather than competition. Under competitive conditions a market should be served only by the most efficient firms.

This test has been criticized, however, for treating dominant firms too leniently because it seems to permit the elimination of new entrants from a market that would eventually become as efficient or more efficient than the incumbent. Firms often enhance their efficiency by increasing the scale and scope of their operations and the equally efficient firm criterion fails to account for this important fact. Additionally, this test would require a comparison of the costs of the competing firms, which may be very difficult to do. Moreover, this test refers to any equally efficient firm, regardless of whether the plaintiff is in fact equally efficient. To that extent, the "equally efficient firm" test may be purely hypothetical, which diminishes its practical value.[139)]

3. Refusals to Supply

3.1 The EU Approach

Companies are generally free to choose the parties with whom they want to deal. However, a refusal to supply by a dominant firm may, under certain circumstances, constitute an abuse under Art. 82.

Under the Community case law, a refusal to supply by a dominant firm does not constitute a per se abuse. Advocate General *Jacobs* recently stated in Syfait that "any obligation to deal pursuant to Art. 82 EC can be established only after a close scrutiny of the factual and economic context, and even then only within somewhat narrow limits".[140)] Advocate General *Jacobs* went on to summarize the case law as follows:

"First, it is evident that a dominant undertaking will on occasion have an obligation to supply its products or services. Such is the case, for example, where an interruption of supply would seriously disrupt competition between the undertaking and the customer on a downstream market or between the undertaking and its actual or potential competitors on the market of supply. There is also a narrow range of circumstances in which a dominant undertaking will be obliged to open up its facilities or license its intellectual property rights to a third party for the first time. For such to be the case, some exceptional harm to competition must be shown.

136) Id.

137) Id. at 164.

138) *Richard A. Posner*, Antitrust Law, 2d edition, at p. 194 – 195.

139) See *Andrew Gavil*, Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance, 72 Antitrust Law Journal 3, 59 – 60 (2004).

140) Opinion of Advocate General *Jacobs* in Case C-53/03, 28 October 2004, not yet reported in the ECR – Syfait v. Glaxosmithkline AEVE.

Secondly, however, it is also clear that a dominant undertaking's obligations to supply under Art. 82 EC are in various respects circumscribed. As the Court held in United Brands, a dominant undertaking is not obliged to meet orders which are out of the ordinary, and is entitled to take such steps as are reasonable in order to defend its commercial interests. Similarly, [...] a dominant undertaking [may] successfully [...] defend before the Court a commercial policy which differentiated between customers in the allocation of scarce supplies. The Court has also consistently limited the obligation upon dominant undertakings by reference to the possibility of objective justification.

Thirdly, the factors which go to demonstrate that an undertaking's conduct in refusing to supply is either abusive or otherwise are highly dependent on the specific economic and regulatory context in which the case arises."[141)]

3.2 The US Approach

US antitrust law recognizes the right of a firm, even a monopolist, to refuse to deal with another firm.[142)] This proposition is known as the Colgate doctrine, which declared that a firm "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently".[143)] This right is not unqualified, however, and there may be instances where a monopolist's refusal to deal forms the basis of anticompetitive conduct in violation of Sec. 2.[144)]

Such an instance may arise where the monopolist controls an essential facility, as recognized in the US Supreme Court's early decision in US v. Terminal Railroad Ass'n of St. Louis.[145)] Decades later, the court further developed this doctrine in its decision in Aspen Skiing. That case involved allegations that a monopolist ski resort – which owned three of the four ski resorts in Aspen, Colorado – refused to continue a joint marketing program with the plaintiff, owner of a fourth Aspen ski resort. To capitalize on Aspen's attraction as a "destination ski resort," both plaintiff, Highland, and defendant, Ski Co., had offered for several years a four-mountain ski pass that enabled a skier to buy one pass granting access to the four mountains owned by Highland and Ski Co.[146)] After fourteen years, and after Highland refused to lower its percentage split of the revenues from the all-Aspen pass, Ski Co. decided to stop offering a pass in conjunction with Highland.[147)] In addition, Ski Co. refused to sell lift tickets to Highland, even at retail price, or to accept vouchers that Highland gave its customers to exchange for Ski Co. lift tickets (either of which would have enabled Highland to replicate the four-mountain pass).[148)] Without the four-mountain pass, Highland became "a day ski area in a destination resort", and saw its market share fall drastically – from 20.5 percent in the 1976/77 season to 11 percent in the 1980/81 season.[149)]

141) Id.

142) Aspen Skiing, 472 US at 600 ("even a firm with monopoly power has no general duty to engage in a joint market program with a competitor").

143) Monsanto Co v. Spray-Rite Service Corp., 465 US 752, 761 (1984); United States v. Colgate & Co., 250 US 300, 307 (1919).

144) Aspen Skiing, 472 US at 601.

145) 224 US 383 (1912) (association of railroads owned all the terminal and connecting facilities in St. Louis, access to which was necessary to serve St. Louis).

146) Id. at 591.

147) Id. at 593.

148) Id. at 593 - 594.

149) Id. at 594 - 595.

The case was tried to a jury, which found in favour of Highland, and the district court, Court of Appeals, and Supreme Court refused to upset that verdict. Rejecting the notion that the right to refuse to deal is unqualified, the court articulated the standard that such a right would not be upheld where a monopolist engages in exclusionary conduct.[150)] The court also recognized that exclusionary conduct should not be defined solely in terms of the effect the conduct has on the plaintiff, but also the impact it has "on consumers and whether it has impaired competition in an unnecessarily restrictive way".[151)] Predatory conduct, therefore, was defined as conduct that excluded rivals "on some basis other than efficiency".[152)]

The court then described in detail the facts that established the "predatory" nature of Ski Co.'s actions. First, in the court's opinion, Ski Co.'s conduct reflected the exercise of market power. The four-mountain pass had been offered for 14 years. By refusing to continue the pass, the court noted that Ski Co. "did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor".[153)] Instead, it tried to force Highland to give Ski Co. a larger percentage split of the total four-mountain pass revenues, and when Highland refused, Ski Co. discontinued the all-Aspen pass. The court characterized this as "a decision by a monopolist to make an important change in the character of the market".[154)]

Second, the court found Ski Co.'s action not to be efficiency enhancing because its refusal to participate in the four-mountain pass removed from the market a product that was preferred by consumers – a fact that was clearly established by the evidence.[155)] Third, since Highland was the only other competitor in the market, the fact that Ski Co.'s conduct harmed Highland (evident from the dramatic fall in market share) meant that competition was harmed.[156)] Finally, forming the foundation of the "sacrifice" test of anticompetitive conduct, the court found Ski Co.'s refusal to supply Highland its lift tickets at retail price and to accept vouchers from Highland customers as evidence that "Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor".[157)] Ski Co. was unable to offer a legitimate business justification for its conduct.

In contrast to its decision in Aspen Skiing, the Supreme Court, in Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP,[158)] handed down its most recent pronouncement on Sec. 2, curtailing to some degree the trend toward expanding the scope of that provision.[159)] Again, the court was confronted with a claim that a monopolist's refusal to deal amounted to anticompetitive conduct, but this time, the Supreme Court refused to extend Sec. 2 liability to that conduct.

Trinko was fairly straightforward from a factual standpoint.[160)] Verizon, the incumbent local telephone company (ILEC), was alleged to have violated its obligations under the Telecommunications

150) Id. at 604 - 605.
151) Id. at 605.
152) Id.
153) Id. at 603.
154) Id. at 604.
155) Id. at 605 - 607.
156) Id. at 607 - 608.
157) Id. at 608.
158) 540 US 398 (2004).
159) *McDonald,* supra footnote 41 ("Trinko v. Verizon is important because it prunes Sec. 2, which has grown to be a little unruly").
160) Trinko was before the Supreme Court on a motion to dismiss that had been granted in whole by the district court and reversed in part, including the Sec. 2 claim, by the Second Circuit Court of Appeals. Trinko, 540 US at 405. Since this was a motion to dismiss, the facts alleged by the plaintiff – namely, that Verizon had violated its obligations under the Telecommunications Act of 1996 – were assumed as true. Thus, the issue squarely before the court was whether Verizon's violation of its regulatory requirements alone was sufficient to state a claim under Sec. 2 of the Sherman Act.

Act of 1996 to provide, on a non-discriminatory basis, operations support services (OSS) to competitive local telephone companies (CLECs) that wanted access to Verizon's network and to compete with Verizon.[161)] Prior to the filing of the complaint, Verizon had entered into a consent decree with the Federal Communications Commission (FCC) based on complaints by CLECs that Verizon was not meeting its obligations to provide OSS on non-discriminatory terms.[162)] Subsequently, the Trinko plaintiff filed a Sec. 2 complaint alleging that Verizon's discrimination in providing OSS was "part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LEC's ability to enter and compete in the market for local telephone service".[163)]

Unlike the court in Aspen Skiing, the Trinko Court refused to apply Sec. 2 liability to Verizon's alleged refusal to deal. The court made clear that Sec. 2 liability should not be imposed on a firm, even a monopolist, when it refuses to deal with a competitor, except in certain narrow exceptions, "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm".[164)]

While the Trinko Court declined the Justice Department's invitation to define a more precise standard of anticompetitive conduct, it did illuminate the parameters of such a claim in the refusal to deal context by declaring that "Aspen Skiing is at or near the outer boundary of § 2 liability".[165)] The court quickly distinguished this case from the "limited exception recognized in Aspen Skiing"[166)] because the factors considered important to its finding of predatory conduct in that case were not present here. Significantly, Verizon had not ended a longstanding course of dealing like Ski Co. had done to Highland. Rather, the Telecommunications Act compelled Verizon to create something new – "the wholesale market for leasing network elements" – something that was complicated and expensive to design, implement and maintain.[167)] Thus, as the court found, "the defendant's prior conduct sheds no light upon the motivation of its refusal to deal – upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice".[168)] Further to the point, the requirements of the Telecommunications Act force Verizon to sell its network elements to its competitors at negotiated, and sometimes litigated, wholesale rates. Unlike Ski Co., Verizon was not foregoing retail sales that "suggested a willingness to forsake short-term profits to achieve an anticompetitive end".[169)]

It is important to bear in mind that the Trinko decision cannot be taken out of its context of a monopolist that failed to comply with its regulatory obligations. By upholding the motion to dismiss, the Supreme Court signalled its unwillingness to make the Sherman Act an enforcement device for regulatory schemes, even when those schemes regulate the conduct of a monopolist.[170)] As Justice *Scalia* noted, the existence of an antitrust savings clause in the Telecommunications Act meant that the Sherman Act might still apply in appropriate circumstances, but it did not expand, or in any way alter, the reach of Sec. 2 liability. The aim of the former is to "eliminate the monopolies" of local telephone companies, while the aim of the latter is to "prevent *unlawful monopoli-*

161) Trinko, 540 US at 404 - 405.
162) Id. at 403 - 404.
163) Id. at 404.
164) Id. at 408.
165) Id. at 409.
166) Id.
167) Id. at 410.
168) Id. at 409.
169) Id.
170) See id. at 406 ("That Congress created these duties [under the Telecommunications Act], however, does not automatically lead to the conclusion that they can be enforced by means of the antitrust laws").

zation".[171] These are fundamentally two different goals, and the Sherman Act "does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition".[172] Reinforcing this conclusion is the recognition that antitrust courts are ill-equipped to conduct the type of regulatory oversight that would be required if an opposite approach were taken.[173]

3.3 Implications for a Test of Anticompetitive Conduct

The US cases of Aspen Skiing and Trinko utilized the "but for" test, which focuses on conduct that would not make economic sense but for a tendency to eliminate or lessen competition. Although this test is similar to the profit sacrifice test, it avoids under-inclusiveness because it does not require profit sacrifice. Even without such profit sacrifice, there may still be harm to competition and the "but for" test analyzes why the conduct is still profitable for the dominant firm. The Justice Department has endorsed the "but for" criterion in two recent Sec. 2 cases.[174]

However, as with the profit sacrifice analysis, the "but for" test may be over-inclusive because certain welfare-enhancing innovative conduct may be prohibited. Furthermore, the test ignores the issue of how to deal with practices that have mixed effects, i.e., are likely to be both beneficial (by increasing the dominant firm's efficiency) and harmful (by reducing competition). In such cases, a "balancing of effects" is required which entails the basic difficulty of measuring the expected gains to a firm from the elimination of competition and those resulting from increased efficiency.[175]

4. Exclusive Dealing

4.1 The EU Approach

In Europe, long-term exclusive supply agreements have been consistently regarded as an abuse under Art. 82 for several reasons: 1) they create customer dependence on a single supplier; 2) they deny opportunities to competitive rivals of the exclusive supplier; and 3) they deter new entry because sources of potential business are "locked up". In 1978, the European Commission declared that exclusive dealing (purchasing) arrangements are generally abusive.[176] Community courts have confirmed this position. They have held such arrangements violate Art. 82 regardless of whether a customer wanted to enter such an agreement, or whether the arrangement was the result of a contract or other circumstance (e.g., a de facto exclusive dealing arrangement).[177] Nor, in general, can such arrangements be defended based on "objective justifications".[178]

In assessing the anticompetitive effects of exclusive dealing arrangements, the Commission and the courts first looked at the market power of the supplier and then the duration of the exclusive arrangement.[179] In the most recent landmark case, Van den Bergh Foods, the Commission held that

171) Id. at 415 (emphasis in original).
172) Id. at 415 - 416.
173) See id. at 415. The relief requested by Trinko was to "'[p]reliminarily and permanently enjoi[n] [Verizon] from providing access to the local loop market ... to [rivals] on terms and conditions that are not as favorable' as those that Verizon enjoys." Id.
174) See, e.g., Brief for the United States at p. 26 (redacted version), United States v. Dentsply International, Inc., 399 F. 3d 181 (3d Cir. 2005), available at http://www.usdoj.gov/atr/cases/f202100/202141.htm; Brief for the United States as amicus curiae, Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP.
175) For a thorough discussion, see OECD paper, supra, at pp. 14 – 16.
176) See VII. Report on Competition Policy (1978), at paras 11, 12.
177) See, e.g., ECJ [1979] ECR 461, at p. 89 – Hoffmann-La Roche v. Commission; ECJ [1983] ECR 3461, at p. 73 – Michelin v. Commission; CFI – Case T-65/89, [1993] ECR II-389, at p. 68 – BPB Industries and British Gypsum v. Commission.
178) See Commission Guidelines on Vertical Restraints [2000] OJ C 291, p. 1, at p. 141.
179) In case ICI/Solvay the Commission accepted a 2-year-period. See XI. Report on Competition Policy 1981 (1982), at p. 73.

exclusive arrangements that restricted the purchases of 40 percent of customers was sufficient to establish abuse.

Van den Bergh Foods involved a dominant ice cream manufacturer, owned by Unilever, that created an exclusive network of retail outlets through the use of exclusivity agreements. The manufacturer provided retailers with freezer cabinets free of charge if they would purchase 100 percent of their ice cream requirements from Van den Bergh. The Commission found that these agreements violated Art. 82 and held that while this was a normal business practice for non-dominant firms, it constituted an abuse for dominant producers because it prevented retailers from dealing with competing suppliers.[180]

The CFI confirmed the Commission's view holding that,
"[T]he fact that an undertaking in a dominant position on a market ties de facto [...] 40 % of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position [...] The exclusivity clause has the effect of preventing the retailers concerned from selling other brands of ice cream (or of reducing the opportunity for them to do so), even though there is a demand for such brands, and of preventing competing manufacturers from gaining access to the relevant market".[181]

The CFI's statement in Van den Bergh Foods shows that when assessing exclusive dealing arrangements, the Community courts look closely at the actual effects of a particular arrangement in the relevant market and its impact on consumers.

4.2 The US Approach

Exclusive dealing arrangements can be challenged under three separate US antitrust laws – Sec. 3 of the Clayton Act, which specifically prohibits exclusive dealing;[182] Sec. 1 of the Sherman Act, as an unreasonable restraint of trade; and Sec. 2 of the Sherman Act, as the anticompetitive conduct upon which a monopolization claim can be based. Contrary to the European approach, exclusive dealing arrangements are generally considered in the US to be procompetitive and historically have been upheld by US courts. The fact that a firm entering into an exclusive dealing arrangement is a monopolist, does not, in and of itself, make the arrangement unlawful under Sec. 2.[183] However, where an exclusive arrangement is part of a course of conduct to acquire or maintain a monopoly, Sec. 2 liability can arise.

In Microsoft, for instance, the United States challenged Microsoft's exclusive arrangements with "all the leading" Internet access providers, which allegedly had the effect of excluding Netscape from "the most efficient channels for [Netscape's] Navigator to achieve browser usage share".[184] The court found that Microsoft's exclusive deals to keep its Internet Explorer as the default browser for a large majority of all Internet access subscriptions effectively protected Microsoft's monopoly.[185] Because Microsoft was unable to offer a persuasive procompetitive justification for its

180) Case Nos IV/34.073, IV/34.395 and IV/35.436, [1998] OJ L 246, at p. 1 – Van den Bergh Foods Ltd.
181) CFI – Case T-65/98, [2003] ECR II-4653, at p. 160 – Van den Bergh Foods v. Commission.
182) Clayton Act Sec. 3 provides that "[i]t shall be unlawful for any person ... to lease or make a sale or contract for sale of goods ... on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods ... of a competitor or competitors of the lessor or seller, where the effect ... may be to substantially lessen competition or tend to create a monopoly ..." 15 USC. § 14 Sec. 3 applies only to the sale of goods.
183) See Microsoft, 253 F.3d 34, 70 ("imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm").
184) Id. at 68 - 70.
185) Id. at 70 - 71.

exclusive contracts, the court upheld the district court's finding that the exclusive contracts were "exclusionary devices" in violation of Sec. 2.[186)]

One significant aspect of the Microsoft decision is that it makes clear that a claim of unlawful exclusive dealing can be maintained under Sec. 2 even if such a claim can not be supported under Sec. 3 of the Clayton Act or Sec. 1 of the Sherman Act.[187)] The Justice Department also had challenged these exclusive deals under Sec. 1, but because they did not foreclose more than about 40 percent of the relevant market, the court concluded there was no violation. On appeal of the Sec. 2 claim, Microsoft argued – relying on language in the Supreme Court's decision in Tampa Electric Co. v. Nashville Coal Co.[188)] – that Sec. 2 liability could not be found where the requirements of a Sec. 1 claim have not been met. Without any significant discussion of the issue, the District of Columbia Circuit ruled that "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40 % or 50 % share usually required in order to establish a § 1 violation".

This conclusion was reiterated by the Third Circuit Court of Appeals in US v. Dentsply Int'l Inc.[189)] In Dentsply, the government challenged exclusive dealing arrangements under Sec. 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. Dentsply is the largest producer of artificial teeth, with a market share in the US of about 75 to 80 percent. While there are other producers of artificial teeth in the US, Dentsply is 15 times larger than its next significant competitor. In the US, artificial teeth are largely sold through dealers.

Dentsply instituted a condition to its dealer contracts, called "Dealer Criterion 6", which prohibited dealers from adding the tooth lines of other manufacturers to their present offerings. Dealer Criterion 6 was rigorously enforced by Dentsply – it threatened to drop any dealer that attempted to add competing lines – and it had the overwhelming effect of disciplining dealers and keeping them from adding competing lines of artificial teeth. Moreover, the district court found that Dentsply's reason for establishing Deal Criterion 6 was pretextual and designed expressly to exclude competitors from access to dealers.

In reversing the district court's finding in favour of Dentsply, the Third Circuit relied on several factors. First, Dealer Criterion 6 was intended to exclude rivals from access to dealers. Second, the provision was successful in accomplishing its anticompetitive goal. Dealers did not drop Dentsply in order to distribute competing brands, and Dentsply aggressively enforced the provision to prevent dealers from distributing competing products. Third, the court found that alternate channels of sale (e.g., direct sales) were not practical or feasible. Finally, the court found that Dealer Criterion 6 had the effect of limiting consumer choice – dealers tended to carry Dentsply and no other competing brands. Based on these findings, the Third Circuit reversed the district court and found a violation of Sec. 2.

4.3 Implications for a Test of Anticompetitive Conduct

Cases like Microsoft and Dentsply appear to base liability on the notion that the alleged monopolist engaged in conduct that impaired the efficiency of their rivals. Closely related to the "equally efficient firm" test, the "impairment of rival's efficiency" test was developed by Harvard Professor *Einer Elhauge* and analyzes whether rivals are being excluded because the dominant firm is improving its own efficiency or because it is impairing the efficiency of its rivals.[190)] Under *Elhauge's* test, where the conduct causes both of those effects, the conduct is still permissible as long as some of the exclusionary effect is offset by improvements in the dominant firm's efficiency.

This test suffers from the same measurement problem as the "equally efficient firm" test, however – i.e., how to identify the existence and magnitude of efficiency gains/losses at the dominant firm and its rivals.[191)]

5. One Additional Test – the "Consumer Welfare" Test

In a recent paper commissioned by DG Competition, a group of European economists advocated a "consumer welfare" test for identifying anticompetitive behaviour under Art. 82. Under this test, conduct would be unlawful only if it has the tendency to reduce consumer welfare.[192)] The authors argue consumer welfare should be the ultimate yardstick and competition authorities should focus on anticompetitive effects that harm consumers on a case-by-case basis and after a close analysis based on sound economic reasoning. The authors further argue that such an analysis of such competitive harm should supersede the traditional dominance test. Thus, an Art. 82 violation would only require a showing of significant competitive harm in the form of a reduction of consumer welfare; a separate assessment of dominance would be superfluous under this test because verifiable competitive harm would be proof of dominance.[193)]

A test based on the effects on consumer welfare is appealing because it is directly linked to promoting consumer welfare. But, it may not be well-suited for cases where a firm's conduct has the potential both to reduce consumer welfare and to enhance the dominant firm's efficiency. The task of sorting out the source of each "effect" and balancing both effects may be beyond the capabilities of competition agencies and courts, especially since it presupposes that empirical data on the welfare effects of the conduct in question would be both available and accessible. The proponents of this test argue that it is feasible to estimate such effects on consumer welfare.[194)] However, such approximations and trade-offs may make the outcome less predictable and allow more subjective criteria to creep into analyses that lack empirical data. In addition, defining "consumer welfare" presents several problems, not the least of which is how to weigh the short-term effects against long-term effects of certain conduct.

V. Conclusion and a Modest Proposal

The focus of this paper has been on comparing and contrasting how the analyses of unilateral conduct of dominant firms and monopolists have evolved under Art. 82 of the EC Treaty and Sec. 2 of the Sherman Act. In doing so, several significant differences have been highlighted in the approach taken toward the conduct of dominant firms and monopolists by the EU and US courts and antitrust authorities.

- While EU courts focus on the effects of a business practice on competitors when assessing whether the practice is an abuse of dominance, US courts follow a more economics-based analysis focused on harm to competition and consumer welfare.
- The threshold for finding monopoly power in the US is substantially higher – generally 70 percent – than required under Art. 82, i.e., 50 percent.

186) Id. at 71.
187) Id. at 70.
188) 365 US 320, 335 (1961) ("If [the contract] does not fall within the broader prescription of § 3 of the Clayton Act it follows that it is not forbidden by those of the [Sherman Act]").
189) 399 F.3d, 181 (3d Cir. 2005).

190) *Einer Elhauge*, Defining Better Monopolization Standards, 56 Stanford Law Review 253 (2003).
191) For further discussion, see OECD paper, supra, p. 21 – 24.
192) Report by the Economic Advisory Group for Competition Policy (EAGCP), "An economic approach to Art. 82", July 2005, available at http://www.eu.int/comm/ competition/publications/publications/.
193) EAGCP report, cited above, at p. 4.
194) See, e.g., EAGCP report, at p. 11 – 12.

- Sec. 2 requires more than just a large market share to establish monopoly power. The competitive dynamics of the market must also enable the monopolist to effectively exercise its market power (for example, as a result of high barriers to entry). Art. 82 does not necessarily require such an analysis before declaring that a firm has a dominant position.
- Once found to be dominant under Art. 82, a firm may be prohibited from engaging in procompetitive conduct in which non-dominant firms can engage. Sec. 2, with its focus on enhancing consumer welfare, does not prohibit monopolists from engaging in procompetitive conduct, even if that conduct has the incidental effect of excluding rivals from the market.
- US courts and antitrust agencies are cautious in their approach to analyzing unilateral conduct and imposing Sec. 2 liability to avoid chilling legitimate procompetitive conduct whereas EU courts and regulators are more concerned with failing to deter anticompetitive conduct.
- Art. 82 protects consumers from the short-term effects of anticompetitive conduct, for example, the charging of monopoly or "excessive" prices, while Sec. 2 does not prohibit such conduct per se.
- EU courts place much more emphasis on the exclusionary intent of a dominant firm, holding that the intent to exclude a competitor is sufficient to show that the conduct actually had such an effect. In the US, intent is relevant only as an aid to help understand the likely effect of the conduct in question. Effects on competition from a particular practice must still be demonstrated.
- In the US, efficiencies play an important role in determining whether certain conduct should be condemned under Sec. 2. In contrast, efficiencies traditionally have not had a significant role in assessing whether a particular practice constitutes an abuse of a dominant position under Art. 82. However, the shift in EU merger control law toward recognizing efficiencies may also lead to a similar recognition of the importance of efficiencies in analyzing business practices under Art. 82.
- In predatory pricing cases, Art. 82 does not require a showing of likelihood of recoupment of lost profits from below-cost pricing. Recoupment is an essential element of a predatory pricing claim in the US.
- Fidelity or bundled discounts are effectively per se unlawful under Art. 82, but under Sec. 2, they are subject to the same competitive effects analysis as other business conduct.
- Likewise, exclusive dealing arrangements are by their nature unlawful under Art. 82, but are not under Sec. 2.

The approach to unilateral conduct under Art. 82 is continuing to evolve. In a recent speech, Commissioner *Neelie Kroes* suggested several changes to the way in which unilateral conduct is analyzed under Art. 82, including engaging in a market analysis before determining dominance, focusing on the consumer welfare effect of conduct and including efficiencies as part of the Art. 82 analysis.[195]
As the evolution of Art. 82 takes place, there is one important fact that the courts and antitrust regulators must keep in mind – that there is not a single test to analyze the competitive effects of unilateral conduct. This may have the unintended effect of creating some degree of uncertainty in the law which, in turn, runs the risk of chilling procompetitive conduct. However, a carefully crafted analytical framework for evaluating a broad range of conduct that is within the scope of Art. 82 is essential to ensure consistent analysis from case-to-case by courts and regulators if sound, economically rational decisions are to be made that do not discourage procompetitive conduct by dominant firms.

195) See *Neelie Kroes*, "Preliminary Thoughts on Policy Review of Art. 82", Speech at the Fordham Corporate Law Institute (23 September 2005).

To avoid the undesirable outcome of creating uncertainty in enforcement of Art. 82, antitrust regulators should consider developing guidelines to assist courts and the business community in identifying conduct that would be viewed as an abuse of dominant position or unlawful monopolization. Such guidelines have proven to be very helpful in other contexts. For example, in 1996, the US Department of Justice and Federal Trade Commission issued the Statements of Antitrust Enforcement Policy in Health Care, which provide the US antitrust agencies' enforcement views on and modes of analyses used to analyze nine specific business practices (i.e., competitor joint ventures, high-tech joint ventures, small mergers, information exchanges, price surveys of competitors and purchasing arrangements) within the enormous and highly diverse US health care industry.[196]
The Health Care Guidelines also provide "safe harbors" – objective thresholds based on practical experience and years of judicial and law enforcement experience in analyzing these different types of business practices (most of which also occur outside the health care industry) – below which the agencies will presume that the conduct in question will not raise competitive concerns, absent extraordinary circumstances.

Using the Health Care Guidelines as a model, guidelines on abuse of dominance ideally would address specific types of behaviours, and, at a minimum, would deal with the treatment under Art. 82 of conduct most often confronted by courts and antitrust authorities – i.e., predatory pricing; fidelity and bundled rebates; refusals to deal; and exclusive dealing. The guidelines would examine the underlying economic rationale for each practice and provide hypothetical examples that would illustrate situations in which each practice was lawful and where it may be anticompetitive; the guidelines would provide safe harbours based on practical experience and cases (drawing on US cases and enforcement actions as a resource that address similar behaviours as well as economic literature) to help determine what conduct is almost always procompetitive and, therefore, should be lawful; and the guidelines would provide a mode of analysis for conduct that falls outside the safe harbours. For example, conduct outside the safe harbours would not be automatically unlawful, but would be subject to closer scrutiny under an economically-based framework like the type of rule of reason analysis used for non-per se conduct under Art. 81 of the EC Treaty and Sec. 1 of the Sherman Act.

This approach and the analyses that would be part of these guidelines would have several complementary effects and benefits: 1) they would provide flexibility by allowing for a case-by-case consideration of different types of conduct without setting rigid per se rules; 2) they would provide a public explanation, grounded in economically-based principles, of what "rules of the road" antitrust enforcement authorities are using to evaluate business conduct and enforce Art. 82; 3) they would force DG Competition to develop guidelines and enforcement policies that reflect an internally consistent application of economic principles that it believes are correct in analyzing the actual or potential competitive effects of various practices, thereby reducing the likelihood of a more ad hoc development of conflicting modes of analysis; 4) they would result in more consistent enforcement from one EC administration to the next because the modes of analysis and the underlying principles would become institutionalized subject to being updated based on new learning and experience; 5) they would provide a clearer and better understanding within the business community about how certain business practices will be analyzed; and 6) they would provide much greater transparency, predictability and certainty in the EC's overall enforcement program which, in turn, should have a similar effect throughout Member States, thereby promoting more internal

196) See 1996 Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care, available at http://www.usdoj.gov/atr/public/guidelines/1791.htm.

Community consistency in applying Art. 82 to similar business practices. Such transparency, consistency and relative predictability is essential to any successful enforcement program.

This proposal does not call for a radical shift in enforcement policy or law. It is grounded in the belief that in today's quickly-evolving global economy, sound, economically-based principles that are transparent, consistent and predictable are a cornerstone for sound enforcement. This is especially true where both the US and EU have shared values to promote and protect competition and consumer welfare. As Commissioner *Kroes* has acknowledged, the enforcement agencies should be cautious about intervening in markets unless there is clear evidence that they are not functioning well. This is the first principle toward building a workable enforcement approach to Art. 82. Where the EC goes from here is the open question.

Abstract

In recent years, competition law and policy within the European Union (EU) have undergone a process of modernization, applying a more economics-based approach to analyses of business conduct and their competitive effects. However, EU policy concerning unilateral conduct of dominant firms under Art. 82 has not yet made a similar shift toward an analytical approach based on economic principles. Rather, when assessing single firm conduct, the Commission and the Community courts have tended to make formalistic assessments of various types of business conduct. These assessments have often found certain types of business conduct to be per se unlawful without a detailed economic analysis of the competitive effects of the practice.

In contrast, jurisprudence interpreting Sec. 2 of the Sherman Act has developed substantially, from an approach that condemned monopolies for engaging in conduct that had the tendency to exclude rivals – without assessing whether competition itself was harmed – to a more economics-based approach that recognizes that there are legitimate monopolists that engage in efficiency-enhancing conduct without violating Sec. 2. While the business practices in the United States are similar to those being evaluated in Europe under Art. 82, the question of what constitutes anticompetitive conduct under Sec. 2 has been answered primarily on a case-by-case basis; yet there is no general consensus on a single standard by which to measure whether conduct is anticompetitive in violation of Sec. 2.

The article discusses the policy and legal differences between Art. 82 and Sec. 2 of the Sherman Act, which are considerable. It outlines the legal principles underlying the statutes that address unilateral conduct in the EU and US; it discusses and compares the law and enforcement decisions in the EU and US concerning certain business practices that have been challenged under Art. 82 and Sec. 2; and offers insights into economic tests used to evaluate those practices. Finally, it summarizes some of the analytical and judicial differences in analyzing certain business practices under Art. 82 and Sec. 2 and provides suggestions on how the Commission can draft practical antitrust enforcement guidelines that can be used by enforcers, the courts and the business community in Europe to evaluate the competitive effects of those practices without discouraging vigorous, procompetitive activity.