The European Commission's Guidance Communication on Article 82.[1]

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John Vickers opened a recent paper on enforcement of competition law thus: [2]

"When contemplating competition law and policy, many economists, I suspect, are somewhere in the Atlantic Ocean. That is to say, they feel uncomfortable with aspects of EC competition law on the grounds that it is too interventionist, and with aspects of US antitrust on the grounds that it is too *laissez faire*."

There is no doubt that the area of competition law where economists are most dissatisfied with is that of exclusionary conduct. Recent case law on both sides of the Atlantic has not signalled any significant change, with the US Courts making the task of plaintiffs extremely difficult (reinforced by the Department of Justice's document on monopolisation practices), and the Community Courts' judgments on *Michelin II, British Airways* and *Microsoft* being at the other end of the spectrum.

However, the long-awaited guidance document on exclusionary abuses by the European Commission – although appeared in the form of a Communication on enforcement priorities, rather than of Guidelines - *may* represent a turning-point in the enforcement of exclusionary conduct in Europe, opening the way for a more economics-, effects-based approach to article 82.

In this note, I will first briefly summarise economic thinking on exclusionary practices, then illustrate the basic rules of law that such thinking suggests, and finally briefly comment on the extent to which the EC's guidance document is consistent with those economics-based rules.

Economics of exclusionary abuses

Traditionally, economists have been very sceptical about the possibility that dominant firms may engage in exclusionary practices. The Chicago School's doctrine – with contributions by Bork, Easterbrook, Posner, and others - provides the foundation of such scepticism, by stressing how excluding a competitor may be feasible, but not profitable. For instance, McGee famously criticised the idea that predatory prices may occur by stressing that if a dominant firm wanted to get rid of a competitor, it would be more rational to buy it, rather than engaging into a price war which would

[1] This paper builds on presentations made at the Meeting of the European Association of Competition Law Judges (Malta, June 2008) and the Conference on "Economic Developments in European Competition Policy" (Brussels, December 2008). Comments from participants, and especially those made on an earlier version by Claudio Calcagno, Vincenzo Denicolò, Chiara Fumagalli, and Mel Marquis, are gratefully acknowledged.

[2] John Vickers (2007). "Competition Law and Economics: A Mid-Atlantic Viewpoint", Burrell Lecture.

destroy industry profits. As for exclusive dealing, the Chicago School argued that it would be impossible for an incumbent firm to profitably induce a buyer to sign an exclusive contract if this deprives the buyer from the possibility to buy from a more efficient entrant. Furthermore, the 'single-profit monopoly theory' stated that a vertically integrated firm which has the monopoly of an input is already able to extract all the monopoly profits from the industry, and therefore will not have any incentive to exclude downstream rivals (by price squeeze, refusal to supply, etc.), as it could only decrease its profits in this way (excluding the downstream rivals will prevent the input monopolist from serving some customers who have a preference for the rivals' products).

The Chicago School arguments, which have influenced the enforcement of competition law all over the world, are well-known and have the merit of stressing the role of incumbent firms' *incentives* to exclude. However, they are based on a number of strong assumptions that – once replaced by more realistic assumptions – result in much milder teachings. Industrial economics (the branch of economics which analyses the behaviour of firms and markets) has evolved dramatically in the last thirty years, and by now offers a well established and solid paradigm which recognises the possibility that dominant firms profitably engage in exclusionary practices, to the detriment of both rivals and consumers, and indicates the circumstances under which such practices are more or less likely. (It is important to note that recent theories are not in contradiction with the Chicago School's theories, but rather go *beyond* them, by offering a more general game-theoretic framework and more general assumptions which in some cases results in different conclusions.)

This is not the place to survey the existing literature, and so I will limit myself to summarise the main mechanisms whereby exclusion can take place.

(i) First of all, consider cases where an incumbent firm may want to exclude a competitor, through rebates, selective price discrimination, exclusive dealing, or predatory pricing. Despite taking a somewhat different form, there is often the following *common mechanism* behind such practices: In industries where scale economies matter,[3] if an incumbent manages to deprive an as-efficient (or more efficient) entrant of some key buyers (or markets, or profits), then the entrant will not be able to operate profitably.

Imagine for instance that there are two groups of buyers which appear in the market in a sequence, and that the entrant needs to secure both of them in order to operate at a profit. A dominant incumbent – although less cost-efficient than the entrant - may be able to exclude the rival by offering attractive conditions (i.e., pricing below marginal costs) to the first group of buyers.

[3] Scale economies may be either on the supply side or the demand side. In the former case, a firm may have to produce at a minimum efficient scale to be profitable (for instance because of fixed costs). In the latter case, scale economies occur because consumers' conduct depends on what other consumers will do. It is the case, for instance, of network industries, where firms need a certain customer base to be able to attract new consumers.

Since the entrant needs both groups of customers, it will have to exit after failing to serve the first group, and will not be able to contest the incumbent with the second group of buyers, allowing the incumbent to recoup the losses made on the first group of buyers.[4] More generally, selective price cuts and rebates operate by discriminating across customers: the incumbent offers good deals to the minimum number of buyers it needs to make sure the rival will not operate profitably. Exclusive dealing works in a similar way: the incumbent can induce some buyers to sign exclusivity clauses, depriving the entrant of orders it would need, and thereby obliging it to exit.

Note that the Chicago School critique assumed that there was only a buyer, and showed that the incumbent could not profitably induce it to accept an exclusive contract, because the compensation requested by the buyer to sign exclusivity would be higher than the monopolistic profit made by the incumbent when selling to that buyer without the competition of a rival; but when there are multiple buyers (and scale economies), the incumbent needs to compensate only *some* buyers, but will have monopolistic profits on *all* of them. This is therefore an example of how more general assumptions may lead to different results.

(ii) Consider now another group of potentially exclusionary practices, those which involve a vertically integrated firm with a monopoly position on an input to exclude a downstream rival, via refusal to supply, price squeeze, excessive price of the input, or tying. The Chicago School's "single profit monopoly theory" is based on the ability of the input monopolist to extract all the rents from the vertical chain. For instance, if the downstream affiliate of the vertically integrated firm and a downstream rival are competing for final consumers, the upstream monopolist will be able to set a wholesale price (possibly, a non-linear one) which allows it to absorb all of the gains made by the downstream rivals. However, saying that the input monopolist will be able to use whatever types of contracts necessary to obtain all the profits is a strong assumption. In many cases, the contracts necessary to absorb all downstream profits may be too sophisticated to be used in practice.

For instance, under asymmetric information a downstream firm will have to be left with some rents. Risk aversion, or credit constraints (or limited liability) may limit the ability of an input monopolist to use the contracts which would allow it to transfer to itself the future profits of the downstream rival. Asymmetric information, risk aversion, credit constraints are all 'market imperfections' that found no room in Chicago School thinking, but that are inevitably present in reality. In all these cases, it is possible that the vertically integrated firm would make a higher profit by excluding the downstream rival than by supplying it (since not all the profits made by the rival can be extracted). More generally, imperfect competition in the downstream market generates externalities: the quantity sold by one retailer in the final market affects its own revenues but also

[4] See Massimo Motta (2008). "Take few to take all. Exclusion of a more efficient rival", Keynote Lecture, EARIE, Toulouse, September 2008.

the revenues of the rival retailer. Present such externalities, it is not easy for the upstream monopolist to write contracts which allow it to attain the vertical industry monopoly profits.[5]

Theory stresses a number of other situations where the input monopolist would resort to practices aimed at excluding downstream rivals, for instance when the inability to observe prices gives rise to opportunistic behaviour,[6] or when the exclusion of a downstream rival today will prevent the ability of a new upstream rival to develop successfully tomorrow, thereby defending the upstream monopolistic position.[7]

Policy implications from recent economic models

Of course, to say that theory has identified a number of situations where exclusion *might* profitably happen is not the same as to say that exclusion will always happen. Indeed, theory allows us to identify a number of circumstances where exclusion is more likely. For instance, as we have seen above, exclusive dealing, rebates, or selective price cuts are more likely to lead to anticompetitive foreclosure in industries characterised by scale economies and where buyers are fragmented. Likewise, theory suggests that anticompetitive refusal to supply or price-squeeze will be less likely to occur when downstream firms are differentiated and tend to serve different groups of consumers (because it would be more costly for the incumbent to exclude a downstream rival), or where particular circumstances apply (for instance, dynamic markets, or significant market imperfections).

Furthermore, exclusionary models typically require monopoly power by the ‘excluding’ incumbent, thereby stressing the importance of market power as a necessary condition for anticompetitive foreclosure.

Finally, economists always stress that even if certain practices may have an exclusionary rationale, they can be motivated by efficiency reasons too. For instance, exclusive dealing may be used to protect investments in the relationship between a manufacturer and a retailer, rebates may be used to induce retailers to make more effort in selling the product, and refusing access to a downstream firm may allow an operator to recover the expected benefits from investing in the input.

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[5] See for instance Patrick Rey, Jeanine Thal and Thibaud Vergé (2006), “Slotting Allowances and Conditional Payments”, INSEE-CREST, Document de Travail 2006-23.

[6] See Oliver Hart and Jean Tirole (1990), “Vertical Integration and Market Foreclosure”, *Brookings Papers on Economic Activity: Microeconomics*, pp.205-286;, and more generally Patrick Rey and Jean Tirole (2007), “A Primer on Foreclosure”, in *Handbook of Industrial Organization* (Vol.III), Mark Armstrong and Robert Porter (eds.).

[7] See Dennis W. Carlton & Michael Waldman (2002), "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries," RAND Journal of Economics, vol. 33(2), pages 194-220, whose model stresses tying of complementary products as the abusive practice (but similar considerations apply for refusal to supply an input).

In short, it is fair to summarise recent economic theory by saying that it does not support the US view that exclusionary abuses are very rare if they exist at all, but nor does it support the EU view (as it emerges from the case law) that dominant firms' use of, say, tying, rebates, and exclusive dealing should be considered as abusive and punished accordingly. Rather, economics suggests that exclusionary practices may indeed be used, but: first, they will be used only in certain market situations; second, they will not always harm consumers.

The need for economics-based rules of law

At this point, I can imagine the reader will be ready to voice an oft-heard criticism: "Another economist telling us that 'it all depends', and that we should rely on economists to tell us when a practice is good and when it is bad, by using a case-by-case approach." The critical reader would continue by saying that it is too difficult, and legally uncertain, to use economics for the enforcement of Article 82, and it would then be better to continue with the present regime which de facto forbids dominant firms from using certain practices.

This possible criticism deserves a three-fold reply.

First of all, one should observe that very much the same argument, that is, of the necessity to rely on easy-to-administer rules, is invoked in the US to justify not a very interventionist approach like in Europe, but on the contrary, a fully non-interventionist approach. Indeed, as Bill Kovacic has extensively and convincingly argued in a recent paper,[8] the US *laissez-faire* approach is the child of the Chicago School's abovementioned arguments and of the Harvard School's stress on administrability, that is, on the need for simple, clear-cut rules that any judge can administer without having to enter into complex economic analyses.

Second, in some circumstances it may make sense to use a simple rule which admits no (or very rare) exception, but this should be done when there is a clear indication that the exceptions are unlikely. For instance, one could probably contrive examples where price-fixing among rival firms could be beneficial to consumers, but this would be such a rare occurrence that it is much less costly for society to adopt a simple rule which *per se* prohibits price-fixing among competitors. In the case of exclusionary practices, theory does not provide us with similar useful indications about whether we are more likely to find firms guilty of abuse when they are not (false positives, or errors of type I) or to find them innocent when they are not (false negatives, or errors of type II). Indeed, the fact that in Europe the case-law on Article 82 has evolved as if errors of type I were unlikely, while in the US it has evolved as if errors of type II were unlikely, might already be an indication that neither of the two approaches stands on solid grounds.

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[8] William Kovacic (2007), "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Behavior: The Chicago/Harvard Double Helix", *Columbia Business Law Review*, 1.

What is worse, this approach has not allowed us to learn from real cases (in other words, there is no empirical support for either stance), since in the US exclusionary allegations are readily dismissed, and in Europe efficiency claims by the defendant, as well as claims that consumers have not been hurt, have not been taken seriously.

Third, and perhaps more important answer to the criticism above, is that it is true that legal certainty should be sought, but it is equally true that economics can be used to provide simple and easy-to-administer rules.

On the importance of rules for the enforcement of article 82, I am certainly not the only economist who underlines them. To quote again John Vickers: [9]

"To say that the law on abuse of dominance should develop a stronger economic foundation is not to say that rules of law should be replaced by discretionary decision making based on whatever is thought to be desirable in economic terms case by case. There must be rules of law in this area of competition policy, not least for reasons of predictability and accountability. So the issue is not rules versus discretion, but how well the rules are grounded in economics."

In what follows, building on the knowledge of recent economic theories on exclusionary practices, I describe a set of economics-based rules which should be followed by an antitrust authority when enforcing competition law, and discuss to what extent the Commission's guidance document is consistent with them.

Economics-based rules, and the Commission's guidance document

<u>1. Safe harbour for sufficiently low market shares.</u>

As discussed above, theory has identified situations where a firm is able to profitably exclude rivals to the detriment of consumers, but in all the exclusionary models, the incumbent is endowed with monopoly power. Conceivably, one might imagine situations where an incumbent firm excludes one rival even if – after the latter exits the industry – there are other competitors in the market, but it is clear that the presence of other competitors strongly reduces the incentives to exclude. Furthermore, in sectors where a firm is not 'strongly' dominant but it faces other strong rivals, it is likely that aggressive market behaviour will likely benefit consumers. Accordingly, economics suggests that unless a firm enjoys a very considerable degree of market power it will unlikely be able to exclude rivals. To the extent that market power can be proxied by market shares, the lower the market share enjoyed by a firm the less likely it is a perpetrator. Of course, economics does not provide guidance on what threshold of market share should be used, but it would be

[9] John Vickers, 'Abuse of market power', *Economic Journal*, 2005.

difficult to imagine a firm with, say, less than half of the market which can profitably exclude rivals.

Since EC competition law requires a firm to be found dominant as a first step of an article 82 investigation, there is alignment between economics-based rules and the Treaty. However, the considerations above may lead to a safe harbour above the usual threshold, suggesting for instance that unless a firm has at least 50% market share it will not be investigated for abusive conduct. (Of course, this does not mean that above that threshold the firm is necessarily dominant: recall that markets shares are just one element in the determination of dominance.) This would have the additional advantages of providing firms with legal certainty (they know that they should not fear antitrust interventions under article 82) and reserving the authority's priority (and scarce resources) to cases where anticompetitive exclusion is more likely to occur.

Finally, an additional merit of this approach would be to render a recoupment test redundant. If a firm is strongly dominant, one can presume that its position is sufficiently sheltered from entry and buyer power that it will be able to recover whatever losses it will incur when engaging in exclusionary abuses.[10]

In its Communication, the Commission suggests that "dominance is not likely if the undertaking's market share is below 40% in the relevant market. However, there may be specific cases below this threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission."[11]

In a document setting enforcement priorities, one would have hoped for a clear 'safe harbour' for firms and for a commitment not to investigate cases where exclusionary practices are less likely, and therefore less worth of the Commission's scarce resources. Hopefully, though, the statement above might be interpreted as giving the Commission a high burden of proving dominance whenever the firm has less than 40% market share, and accordingly will make it less likely to see an exclusionary abuse when such a market share is observed.

On the positive side, though, we should note that the DG-COMP's Discussion Paper had mentioned a 25% market share as a threshold below which dominance is unlikely (a suggestion which dismayed many). In this light, the adoption of the 40% threshold is a huge improvement.

[10] Therefore, I do not share the view that a separate recoupment test should be carried out in predatory pricing cases, also because it gives too high a burden of proof on the plaintiffs. Note that in the US this has de facto eliminated predatory cases from antitrust law. However, to the extent that barely dominant firms may be investigated, the recoupment test may offer the possibility to check that it is indeed possible for the firm to recover losses. Finally, let me note that the recoupment test is inevitably based on the assumption that firms are perfectly rational and do not make mistakes. In reality, though, managers with their own private motivations (which may not coincide with firms' profits) are behind decisions: in some cases, they may well decide to exclude rivals even if not profitable, or they may make the wrong calculations about long-run profits. A recoupment test would exclude predation in such cases.

[11] *Communication*, at para. 14.

As for the recoupment test, the Commission states that it is not required, in line with the Community Court's case-law.[12] However, to the extent that it will try to identify consumer harm (as stated in para. 70), an indirect check that there is a rationale for a pricing abuse will be made.

2. Price-costs tests in pricing abuses

When pricing abuses are at issue, a price-cost based test is a crucial instrument. Indeed, an exclusionary strategy will differ from a 'competitive' one in that the dominant firm will sacrifice profits on some buyers (or some markets), with the expectation to recover those losses from other buyers (or markets). As I have discussed above, strong rebates to some buyers may allow the dominant firm to deprive an entrant of key orders, thereby obliging it to exit (or relegating it to some niche) and allowing the incumbent to enjoy monopolistic profits on the remaining buyers. If those rebates to some buyers involve losses, then they will not be compatible with a normal competitive strategy.[13] Likewise, a predatory strategy will entail some losses during the predatory war, but more than compensating profits after the prey has exited the market. The standard arguments for an Areeda-Turner test can therefore be made: if the price made to some consumers or markets is below AVC (Average Variable Costs), then the firm is not even able to cover variable costs for those consumers or markets, and one should presume that the firm is acting in an exclusionary way; if the price is above ATC (Average Total Cost), then the firm is making profits on all consumers or markets, and exclusion should be dismissed. If the price is between AVC and ATC, we are in a grey area where opinions would differ. Personally, since the firm is meeting at least some of its fixed costs, I would presume its behaviour to be lawful, and would assign the burden of proving otherwise to the plaintiff or the antitrust authority.

It is fair to add, at this point, that economics does not exclude the possibility that there may be predation without the 'predator' incurring losses, but simply make fewer profits than it would under a competitive strategy. This occurs, for instance, in signalling models of predation, where entrants are characterised by asymmetric information and the predator sets low (but not necessarily lower than costs) prices in order to manipulate the rival's belief, and induce it too think that the incumbent is too efficient for entry to be profitable. A priori, therefore, an Areeda-Turner type of test may lead to false negatives, namely to situations where predation is not found although it is there. Respectable in theory as it is, renouncing to a price-cost test to accommodate the possibility that

[12] But for a different view, see the Opinion of the Advocate General in the *France Telecom v. Commission* (Wanadoo) case.

[13] Note that by summing up the losses on some buyers (those needed to exclude the entrant) with the monopoly profits made on the remaining buyers (those who will not have the opportunity to buy from the entrant any longer), it may appear that the dominant firm is making positive profits overall. But the profit sacrifice test should be done on *each* market or consumer group.

predation without losses exists would be a mistake. First of all, it is not clear whether there have ever been real-world cases where predation has taken the form indicated by 'signalling' models. Second, because I cannot see how judges (but also agencies, and even econometricians) could administer a rule where one should compare actual profits with counterfactual profits arising from a completely hypothetical situation which would presumably entail complex simulations of economic models. It is already difficult as it is to compare actual prices with actual (measures of) costs!

The Commission adopts a price-cost test (the measures used being AAC - Average Avoidable Costs – and LRAIC - Long-Run Average Incremental Costs -, similar to AVC and ATC) for pricing abuses in its Communication, and for the reasons above I think this is a useful test. However, the Communication does not provide guidance on what the Commission will do when prices are in the 'grey area' between AAC and LRAIC. On the negative side, this does not clarify what will happen in such cases. On the positive side, though, the fact that the Commission omits to say that it will use evidence of 'intent' to identify predation in such a grey area (as *AKZO* would suggest) is good news. Indeed, the Commission seems to rightly downplay the role of the intent to exclude. Economists have always warned against the use of internal documents showing that managers wanted to 'get rid of' rivals in exclusionary cases, because similar documents would also be found in the counterfactual situation in which the incumbent is competing 'normally'. Rather, they have indicated the importance of looking for internal documents witnessing of a coherent strategy of exclusion.[14] In other words, it is not a generic statement of the wish to eliminate competitors, but the existence of a well-detailed business plan aimed at excluding them (and the verification that it coincides with the theory of harm), that the Commission should look for. The Communication seems to acknowledge the importance of this type of evidence, and this is certainly a positive development.

3. Empirical analysis of the effects of the practice on rivals and consumers

Precisely because a given practice might have very different effects according to the market situation where it is used, economics suggests it is important to gather data so as to be able to identify the impact of the practices at issue. For instance, to understand whether a certain rebate scheme has been (or may be) exclusionary, one should proceed with a careful analysis of the impact of the rebate over the rival firms. This calls, among other things, for the definition of the appropriate counterfactual (what would have happened to rival firms if the rebate scheme had not been in place?). Similarly, evidence should be gathered about the likely effects of the practice on consumers.

[14] See Jordi Gual et al. (2005) "Report by the EAGCP Report. An economic approach to article 82".

The Communication explicitly refers to such counterfactual exercises, a welcome departure from the past practice where effects were presumed by the existence of the practice, rather than verified against the data. Hopefully, this will determine a change in attitude for the Community Courts as well. The Courts' attitude so far was well exemplified by *Michelin II*, where the firm's claims that its rebates schemes could not be exclusionary because rivals' market shares had increased over time, were quickly dismissed by saying that rivals' shares *might* have increased even more had Michelin not been used rebates. Certainly, this might have been the case, but it is singular that neither the Commission nor the Court had tried to build a plausible counterfactual establishing what would have happened to rivals and consumers if Michelin had followed a different pricing policy.

Empirical evidence should also be used by the Commission in another sense, namely to verify whether the theory of harm is consistent with the facts. For instance, it would be hard to argue that rebates or exclusive clauses may be anti-competitive unless buyers were fragmented and (demand- or supply-side) scale economies were necessary for success in the industry at issue.

4. Efficiency defence, and the balancing of anti- and pro-competitive effects

As mentioned above, most practices which have exclusionary potential have also possible pro-competitive effects. For instance, exclusive clauses might serve the purpose of protecting investments in the manufacturer-retailer relationship, or of giving incentives to retailers to devote more efforts to the sale of the brand. However, efficiency claims should be substantiated, and do not always apply.[15]

Again, case-law in Europe has so far disregarded efficiency defences in abuse of dominance cases. The principle of 'objective justification' of practices has been implemented in a very narrow way, so that dominant firms have not had the chance of persuading the Commission and the Courts of the efficiency-enhancing property of their practices. In *Michelin II*, for instance, some of the rebate schemes offered to retailers were associated with investments and financial aid provided by Michelin. It seems natural that a firm would want to make sure that the retailer guarantees a certain turnover in exchange of such investments, but this simple fact was not acknowledged by the Commission (nor by the Court).

The Communication recognises the importance of efficiency claims (whose burden of proof is rightly assigned to the firms), and Section III.D spells out the cumulative conditions necessary for efficiencies to outweigh the possible harm of the exclusionary practice: (i) Efficiencies should be likely, (ii) the conduct must be indispensable for obtaining them, and above all (iii) it should not

[15] See for instance Segal and Whinston (2000) for an attempt to analyse under what circumstances efficiency claims are likely to be real or not.

eliminate effective competition. The last requirement echoes article 81(3), but it is difficult to understand its logic if applied to practices such as refusal to supply, which would inherently eliminate competition without necessarily creating harm to consumers.[16]

But my main perplexity on the role assigned by the Commission to efficiency defences deals with the balancing test proposed by the Communication. In principle, the Commission's allocation of the burden of proof is the right one:

"It is incumbent upon the dominant firm to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct being examined is not objectively necessary and, based on a weighing-up of any apparent anticompetitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm."[17]

However, when reading carefully how the Commission would deal with particular practices, doubts arise. For instance, when analysing tying, the Commission would find it to lead to anti-competitive exclusion when (i) the products are distinct, and (ii) rivals are foreclosed. At this point, it would be upon the dominant firm to prove the efficiency gains created by tying, and to show they outweigh the anti-competitive effects. But in practice, the onus of proving efficiencies will be shifted too soon to the firms. Consider for instance a firm incorporating some components in the main product (a car manufacturer – assuming of course that there is a dominant one - may bundle a GPS navigator into all its cars, Microsoft may bundle an anti-spam software into Windows). Such (technological) tying is one of the main ways in which product innovations are introduced in markets, and I think that most economists (and not only economists, see for instance the Appeals Court judgment on the US case involving Microsoft) would be against intervention in such cases. Yet, in practice – if it followed the Communication's approach - the Commission may render the life of a dominant firm which wants to innovate in this way very difficult. Given that the products are distinct and rivals will likely be foreclosed, it will be upon the firm to show that efficiencies exist, and outweigh the anticompetitive effects. But how can they prove that the consumers will benefit sufficiently from the innovation? And if enough rivals are being foreclosed, efficiency claims may be excluded by the paragraph III.D requirement that 'effective competition should not be eliminated'. It seems that a tough hurdle may await dominant firms which consider tying as a way to innovate.

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[16] More generally, an economics-based approach to competition law should aim at distinguishing efficient from inefficient exclusion: in this perspective, the requirement that effective competition should not be eliminated does not make much sense.

[17] Para. 30.

Likewise, consider refusal to supply, which – I stress - includes refusal to license a technology protected by intellectual property rights. According to the Commission, refusal to supply consists of an anti-competitive exclusionary practice if (i) the input denied is indispensable, (ii) the refusal is likely to eliminate effective competition downstream and (iii) there is an adverse effect on consumers, consisting of consumers being deprived of a new product (echoing the Court's 'new product' test used in *Magill*, *IMS Health*, and *Microsoft*). If such (cumulative) conditions are verified, then it is the firm which has the burden of proving efficiencies which outweigh the anti-competitive effects. But again, the burden of proof is shifted too early to the firm. Consider for instance a firm which has some knowledge or technology protected by a patent, for instance a pharmaceutical firm which has found a new important component. It does not take much imagination to think of cases where such an 'input' is indispensable and where refusing to license it would eliminate competition, and prevent new products from being developed. It will then be upon the patent-holding firm to justify its refusal to supply, and it may not be easy given that a condition for efficiencies is that they do not eliminate effective competition...

Although it seems difficult to 'balance' anti-competitive and efficiency effects (but this is something that the Commission has to do in the fields of Article 81 and merger control), I believe that in most cases if the analysis of an exclusionary case was properly done one would not even arrive at this final 'balancing' stage, either because the anti-competitive effects are unlikely, or – at the other extreme - because efficiency claims are far-fetched. However, I am afraid that, if it followed literally the Communication in its treatment of efficiencies, the Commission may end up establishing abuses even when the practices at issue are pro-competitive. Hopefully, though, the effects-based approach which is in the spirit of the Communication might be followed also in the treatment of efficiencies.

Conclusions

The Commission's Communication on enforcement priorities of article 82 sets the stage for an economics-based approach in the enforcement of exclusionary practices. In this Article, I have briefly reviewed the Communication, and argued that it could have been bolder and should have avoided shifting the burden of proving efficiencies to defendants 'too soon'. There is no doubt, though, that if its 'effects-based spirit' was followed in practice, this document may signal a radical change in the enforcement of exclusionary abuses. It is difficult to anticipate whether it will eventually run aground back on the Portuguese coast, or instead reach the Azores, but it is clear that the Commission is at the moment sailing West.