Article 82 and EU Rules on National Measures Restricting Competition During a Recession

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PART I

It is not difficult to understand why there has been popular and political pressure on the European Commission to modify the rules and practices in connection with State aids in times of economic hardship or recession. State aid is obviously the first potential reaction under competition law to a recession. Mergers, and agreements to reduce capacity, are regarded as further responses if the recession is severe or lasting. The Commission has recognised the possibility of a "failing company" defence under the Merger Regulation, and it has been suggested that it should go further, perhaps on the basis of "dynamic competition". The question arises, therefore, whether any corresponding or similar modifications should be made in the application of Article 82 EC, or in the application of the important but insufficiently known principles of EU law limiting national measures restricting competition. These two topics are the subject of this paper. I chose to discuss these subjects because Article 82 is still the most unsatisfactory area of European competition law, and because although many national measures restricting competition have important economic effects, the EU law rules applying to them are the least known and the least enforced of those areas.

The overall conclusion suggested here is that there is no need or justification for modifying the legal principles or the standards of proof in a recession, but that as a result of the changed circumstances, the conclusions drawn from those principles may often be different from those in normal circumstances (unless the situation is changing so fast that no economic conclusions can be drawn). This overall conclusion is helpful, because it means that there is no need to define a recession for competition law purposes, or to say when a recession begins or when it ends, and no need for new or revised principles. There can be a spectrum of recessions of different nature, severity, scope and length, and with different consequences. However, I also suggest that in a recession there is a risk that some incorrect interpretations of Article 82 might be adopted, in particular in connection with discrimination and the duty to contract.

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In fact, in a recession the EU principles on Article 82 and national measures that restrict competition should be applied more strictly, to ensure that practices which increase prices are ended. The rules on State aids and mergers should be applied rather less strictly. This is because the latter rules spread the costs of reduced competition more widely (onto all taxpayers in the case of State aids, onto future consumers in the case of mergers), and in a recession it is desirable to spread the costs as widely as possible.

These overall conclusions are relevant both to the European Commission and to national competition authorities.

The more general conclusion suggested here is that the Commission needs to do more to integrate and harmonise its policies on Article 81, State aid, mergers, and Article 82, and especially to harmonise them with the EU rules on national measures restricting competition. In particular in a recession, a comprehensive and effective policy is needed. There should be one unified policy, not five separate policies, and all five aspects of this policy should be consistent, based on the same principles and priorities, and should be equally vigorously enforced, in accordance with the same set of priorities. The policies are mostly dealt with by the same Directorate General. [2] The Commission has traditionally claimed (when a separate European cartel authority was discussed) that this is an important advantage of the existing institutional arrangements, but the benefits of it have not been fully obtained.

This paper is concerned with competition law, not with measures adopted for regulatory purposes, such as telecommunications measures. The distinction is important, and is not always understood. Competition law is concerned with maintaining and, when necessary, restoring competition, by preventing companies from restricting it by anticompetitive agreements or conduct, or by acquiring competitors and thereby suppressing competition. Competition law is not concerned with, and should not be used for, making changes in lawfully constituted markets even if the changes are intended to make them more competitive. Such changes, if they are to be made, must be made under other bodies of law, which it is convenient to refer to generally as "regulatory". These changes may be made by national measures that restrict competition, provided that they are justified under the European law rules discussed below. The importance of this distinction will become clear.

[2] Freedom of establishment and freedom to provide services are the responsibility of the Internal Market DG, and national measures under Article 86 EC and all other aspects of EU competition law discussed here are the responsibility of the Competition DG. See Hofmann & Turk, EU Administrative Governance (Elgar, 2006); Sand, Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions, 4(3) European Law Journal 1998) 271.

1.1 SOME RELEVANT ECONOMIC EFFECTS OF RECESSIONS

A recession may have a variety of effects that are relevant for competition cases. Companies' profits and revenues fall. Investment and innovation are likely to be delayed. Markets are less likely to alter or to expand. Demand is reduced, and price competition is likely to intensify. Costs per unit sold are likely to rise, as capacity is underutilised and economies of scale are lost. The cost of capital rises. Re-financing becomes more difficult. Excessive prices that might lead to market entry and so to be self-correcting in normal times and less likely. Finance that might normally be available for start-up or expansion may not be available.

In general, in a recession companies are having difficulties, and if they are the victims of anticompetitive practices they may become insolvent and leave the market more quickly than they would in normal conditions. A dominant company is always less vulnerable in a recession than its rivals. So prompt action by competition authorities is more necessary in a recession than under normal conditions. In a recession, firms may not be able to wait.

On the other hand:

"*... a recession can be a fantastic time to launch innovations. For one thing, tougher times can make consumers reconsider many of their purchasing decisions, leaving them open to trying something new. For another, a less crowded market place makes it easier – and cheaper - to create awareness of a new offering* " [3]

Insofar as this proves to be true, it would be important to prevent innovation being suppressed by anticompetitive methods.

1.2 STATIC AND DYNAMIC COMPETITION IN A RECESSION

In a recession, a competition authority's views on the relative importance of static and dynamic competition may be modified. This may work in various ways. If competition is already static, and the recession makes innovation still less likely, the situation is unchanged. If the competition authority would normally be satisfied to allow exclusionary conduct temporarily, because it believed that the market would become more competitive, but the recession made that less likely, the authority might feel obliged to act against the conduct in question. If the authority considered that the conduct was likely to delay or prevent the market becoming competitive in the future, it should take

[3] The Economist, November 22nd, 2008, p.76; also Lynda Gratton, Recessions give space for new ideas to flourish, Financial Times, December 10, 2008.

action now, because the recession would presumably delay the time at which effective competition would arise. [4]

In a recession, economic conditions may change rapidly, and that may make it difficult or impossible to assess *e.g.*, whether a company is genuinely unconstrained by effective competition in circumstances that have arisen recently and that may not continue.

The Commission apparently considers that to assess the effects of the conduct in question, it is useful to consider a counterfactual situation, what the market would be like without the conduct. Any such situation, of course, will be different in a recession from what it would be in normal conditions.

1.3 ARTICLE 82 - DOMINANCE

In a recession, application of the traditional concept of dominance may lead to conclusions different from those appropriate in normal circumstances. This is most obvious when a company is regarded as likely to lose dominance as a result of foreseeable changes in the market, such as the roll out of new technology or the expiration of important patents. If as a result of the recession the changes are postponed substantially, or are unlikely to occur, the company will be regarded as dominant after all. If market entry that would otherwise occur is delayed or prevented, dominance is likely to be reinforced. Broad portfolios and international l activities may be more important contributions to dominance during a recession than they would be in normal circumstances.

1.4 ARTICLE 82 - THE CONCEPT OF ABUSE

There is no obvious reason why, in times of economic hardship, changes should be made in the concepts of exploitative abuse (taking advantage of market power to impose unduly onerous terms or excessive prices), exclusionary abuse (foreclosure of competitors by means other than offering better bargains), discrimination (mentioned explicitly in Article 82(c)), or reprisal abuse (warning or punishing a customer, supplier or competitor for competing vigorously or complaining to a competition authority). [5]

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[4] This would make it particularly inappropriate and unwise for the Commission to take any action designed to provide protection against competition to a not-yet-as-efficient competitor, (envisaged by the Guidance on the Commission's Enforcement Priorities in applying Article 82 EC, December 2008 para. 23), as that would lead to consumers subsidizing the competitor for longer than in normal conditions.

[5] Temple Lang, Reprisals and Over-reaction by Dominant Companies as an Anti-Competitive Abuse under Article 82, 29 European Competition Law Review (2008) 11-15.

It may be suggested that the tests for excessive prices [6] should be made stricter in times of hardship (that is, the maximum permissible price should be lower), as a measure of price control. But even in a recession, competition law is not suitable for this purpose, and should not be used to regulate prices, or for regulatory purposes. In fact buyers are less likely to pay excessive prices in a recession than at other times, unless demand is inelastic. A price that was legal before a recession begins does not become illegal merely because the economic cycle has altered or demand has fallen. Prices charged during a recession should not be compared with prices charged in normal conditions. However, the judgment in Kanal 5 [7] shows that if circumstances change, an estimate of the price that would be reasonable may need to be revised if a more precise estimate becomes possible and shows that the first estimate has become inaccurate.

Foreclosure or exclusion of competitors may be more harmful for consumers, and is certainly more likely to result, during a recession, but the nature of exclusionary conduct is not altered. Correspondingly, there is no obvious or identifiable reason to modify the concepts of illegal discrimination or reprisals. However, it must be admitted that the concept of abuse, in particular of exclusionary abuse, is not clear, in spite of the Commission's efforts to explain the officials' understanding of it, most recently in the Commission's Guidance Paper of December 2008. [8] This lack of clarity makes the concept open to misunderstanding or manipulation by competition authorities.

It will certainly be argued that even if competition law is normally intended to protect competition and consumers, and not competitors, it should be used to protect competitors during a recession. If this superficially appealing argument were accepted, it would certainly imply a change in the concept of foreclosure or exclusionary abuse. Since the concept of exclusionary abuse has been said to include some rules that would protect competitors <u>from</u> competition, it seems useful to consider what the effect would be of adopting the modified approach expressly, rather than discussing how much of a change would be involved.

1.5 A MODIFIED SUBSTANTIVE RULE ON EXCLUSIONARY ABUSE FOR RECESSIONS?

If it was seriously suggested that the Commission should deliberately reinterpret the concept of exclusionary abuse during a recession so as explicitly

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[6] Temple Lang, The requirements for a Commission Notice on the concept of abuse under Article 82 EC, in 2007 Finnish Competition Law Yearbook (2008) 271-305 at pp. 280-284, and Centre for European Policy Studies Special Report (2008).
[7] Case C-52/07, *Kanal 5*, [2008] ECR I - dated December 11, 2008.
[8] Commission, Guidance on the Commission's enforcement priorities in applying Article 82 (2008), hereafter referred to as "Guidance" or "Guidance Paper".

to protect competitors, it would raise a number of very difficult and serious issues:

- Has the Commission what would in effect be a regulatory power, without a legal basis, to adopt a significantly different interpretation of competition law from that traditionally (if not always entirely consistently) adopted?

- Competition tends to reduce prices, and that benefit to consumers seems especially desirable in a recession. So how should a recession be defined for this purpose? Would it be a recession in the sector in question, or would a widespread recession lead to modifying the obligations of all dominant companies in all sectors of industry? Would it be appropriate to protect retailers from price competition, but not e.g., producers of raw materials (because if raw material prices were uncompetitive, that would increase the prices of all products based on them)? How would the end of the period of recession be defined?

- How should the pricing and other obligations of a dominant company be modified? Should competitors be protected against all price competition (which would mean that the Commission would be effectively fixing the minimum price for all the producers in the industry in question) or only against certain price reductions, and if so, how should those price reductions be defined? Any change on these lines would involve protecting competitors <u>at the expense of consumers</u>, which would be particularly inappropriate in a recession, when consumers are likely to be suffering anyway.

- How, if at all, would the interests of consumers be protected?

- In what way would putting up prices to consumers be preferable to giving targeted State aid to companies genuinely in difficulty (assuming that such State aids would be justified) at the expense of taxpayers generally? In a recession, it would seem undesirable to prevent even already dominant companies from competing on price, since the effect of such a measure would be to increase price levels, and so make the recession worse.

Because the objections to such a policy seem to be overwhelming, they are not further discussed here. However, it must be admitted that the Commission in its 2008 Guidance Paper [9] envisaged rules under which dominant companies

[9] Para. 23 says that "in certain circumstances a less efficient competitor may also exercise a constraint which should be taken into account when considering whether a particular price-based conduct leads to anticompetitive foreclosure. The Commission will take a dynamic view of this constraint, given that in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency". This is not clear, but it seems to mean that a dominant company's price might be considered illegal only because it delayed or prevented the less efficient company from obtaining network and learning advantages, (or presumably other economies of scale). This appears to be a circular argument which confuses anticompetitive and legitimate pricing, and is almost certainly

would be required to provide price umbrellas for competitors that are not yet as efficient as the dominant companies. The measures suggested by the Commission were not fully considered, and appear wholly impractical, even if they were considered compatible with competition law, but the Paper shows that the Commission believes that it could suggest rules to protect some competitors (never clearly described or defined) from price competition. If this idea has not been abandoned, it might be revised, and if it was possible to convert it into a workable policy, it might be used in a recession.

It seems likely, because of the objections to an open and explicit change in policy, that instead there might be a less obvious use of Article 82 to protect competitors from competition, without saying so. It can be expected that competitors will make complaints on these lines, and some competition authorities may be tempted to act on them. This concealed misuse of competition law, if it occurred, would be thoroughly undesirable, because the implications would not be fully considered, and the law would be made even less clear.

The Commission sometimes accepts that it should reduce the amount of a fine if the company to be fined is in financial difficulties. Since companies are more likely to be in financial difficulties during a recession, fines under Article 82 might be reduced while the recession continues.

1.6 MODIFIED PROCEDURES FOR ARTICLE 82 CASES DURING RECESSIONS?

In a recession, competitors suffering from exclusionary abuses are likely also to be suffering from the effects of the recession, and the combined effect might put a company out of business that might have survived the exclusionary conduct if it had not occurred during a recession. Prompt action against exclusionary abuses is therefore particularly necessary in a recession, especially if the effect of the foreclosure is to reduce the competitor’s cash flow or access to the market. This suggests another approach that would be entirely consistent with competition law, and that would benefit consumers rather than putting up prices. This approach would be to make much more frequent use of interim measures decisions under Article 8 of Regulation 1/2003, when there is sufficient prima facie evidence of infringement. The justification for this would be that in a recession the risk of "serious and irreparable harm to competition", in particular from the insolvency of some firms, is much greater and more immediate than in normal economic conditions. Unfortunately the Commission's internal procedures, even for interim measures decisions, are now so slow and cumbersome that the

unworkable in practice. Competition law would not justify imposing an obligation on a dominant company to provide a price umbrella, above the dominant company’s own costs, to help a less efficient competitor.

Commission rarely adopts interim measures. The Commission has had power to adopt interim measures since 1980, and has rarely used it, although the power was confirmed in Reg. 1/2003. But there is no obvious reason why the Commission could not adopt some efficient procedures, at least for use in urgent cases. In one interim measures decision, the entire Commission procedure took only seven days (*National Carbonising*, in 1975). [10] Some national competition authorities can act more quickly and decisively than the Commission.

If the Commission decided to adopt efficient internal procedures for interim measures cases, it seems clear that one result would be that dominant companies would give commitments to solve, temporarily or permanently, whatever competition issues were thought to arise. The combination of interim measures and commitments would provide a much quicker and more effective solution in at least some Article 82 cases than the Commission's present practices, in which Article 82 cases sometimes go on for years (not only in the *Microsoft* case, in which some of the delay has been due to Microsoft's tactics). [11] Another advantage of commitments is that they can provide a practical way of ensuring that an adequate share of efficiencies are passed on to consumers, which is not always easy to arrange in contentious cases.

This procedural approach would have another important advantage. In a recession, all kinds of abuse of dominance, not only exclusionary abuses, are likely to be more serious than they would be in normal conditions. Therefore it is especially important, during a recession, to bring all kinds of abuses to an end as quickly as possible, because the economy and the public interest cannot afford delays.

However, there is a serious difficulty. As long as the Commission has no clear concept of exclusionary abuse, it is likely to make mistakes in interim measures decisions. One of the most obviously incorrect decisions of the Commission in recent years was an interim measures decision. [12] For example, the concept of the "relevant range" (the quantity that a buyer is likely to buy from a competitor rather than from the dominant company) as described in the Commission's Guidance on Article 82 is much too subjective and difficult to apply to be used in interim measures, if indeed it can ever be used at all.

Another consequence of the need for prompt and effective action by the Commission in a recession is that it should be more willing to submit written observations in national courts, as envisaged by Article 15 of Regulation 1/2003, than it has been in the past. In a recession it is not appropriate for the

[10] Commission decision *National Carbonising*, OJ No. L-35/6, (1976); Case 109/75R, *National Carbonising v. Commission*, [1975] ECR 1193.
[11] Case T-201/04, *Microsoft*, [2007] ECR II - Sept. 17.
[12] *IMS Health* OJ No. L-59/18, Feb. 28 2002; withdrawn OJ No. L-268/69, 2003; see Case T-184/01R, *IMS Health v. Commission* [2001] ECR II-3193.

Commission to wait until the national court has referred a question of European law to the Court of Justice under Article 234, since that takes too long. Also, in Article 234 cases the Court and the Commission are concerned only with the questions of law asked by the national court, but in the national court the Commission could give its opinion on how the law should be applied to the facts, which is often the greatest difficulty for the national court. [13] The Commission should intervene to make competition law more effective, and not only in the rare cases when institutional issues arise, as they did in the *Hasselblad v. Orbison* case. [14]

1.7 MODIFIED PRIORITIES FOR COMPETITION LAW ENFORCEMENT IN A RECESSION?

Since Reg. 1/2003 ended the Commission's obligations to deal with notifications of agreements, the Commission has been free to choose its priorities. In Article 81 cases it has rightly chosen to concentrate on price fixing and market allocation. Under Article 82 its priorities since the *Continental Can* case [15] have been less obvious.

In a recession, it can be expected that the Commission (and national competition authorities) should concentrate on cases with the largest economic effects. One obvious priority area is energy. It is not yet clear whether the Commission's investigation of the pharmaceutical industry will have significant economic effects (and if there are cases, they may be under Article 81): the amounts of money involved in the industry are very large, but it is not yet clear what proportion of the profits, if any, could be thought to have been obtained illegally. Abuses that suppress production or innovation are especially harmful during a recession.

However, if the Commission chose to give priority to cases of great economic significance, it should look at national measures restricting competition, where the law has been under-enforced. The Commission should not keep Article 81, Article 82 and restrictive legislation in separate compartments when choosing its priorities.

Another possible priority for competition authorities during a recession would be to choose cases where exclusionary conduct seems likely to push competitors out of the market. The law on exclusionary abuses should be applied more strictly, not less strictly, during a recession. The difficulty with

[13] See generally Ortiz Blanco (ed.), EC Competition Procedure (2nd ed., 2006, Oxford) pp. 84-99. The Commission recently intervened in Case C-429/07 (on the question whether Commission fines are deductible for national company tax).
[14] *Hasselblad v. Orbison*, [1984] 3 Common Market Law Reports 540, 679. See also Case C-429/07 (a case in which the Commission intervened in a Dutch tax court to argue that Commission fines should not be deductible against Member State company tax).
[15] Case 6/72, *Continental Can* [1973] ECR 215.

this is that the Commission has not yet developed a clear test of anticompetitive foreclosure, and is therefore unable to distinguish with confidence between anticompetitive foreclosure and foreclosure due to legitimate competition. Both can push competitors out of the market, whether or not there is a recession. So this possible priority, though attractive at first sight, is not at present workable because of the unsatisfactory state of the law. Enforcing the existing law without clarification or correction would discourage price competition and would tend to maintain prices instead of reducing them, the opposite of what is needed during a recession.

The Commission has consistently underestimated the need to make it clear that it will punish dominant companies that commit reprisals against customers or competitors that compete aggressively, or that complain to a competition authority. The Commission's failure to make this clear might be particularly serious in a recession. Since the Commission could solve this problem by adopting a Notice, which could be done more quickly than adopting a decision, that is another obvious priority.

1.8 NECESSITY, JUSTIFICATIONS AND THE COMMISSION'S VIEWS ON EFFICIENCIES IN GENERAL [16]

Article 82 contains no provisions corresponding to Article 81(3), but the Commission has accepted, rather cautiously, that it may be a defence for what would otherwise be illegal conduct that it produces or is sufficiently likely to produce "efficiencies" (sometimes apparently regarded as equivalent to "objective justifications" or to the application of a proportionality test). The Commission's 2008 Guidance Paper uses the four conditions under Article 81(3) to clarify the concept of "efficiencies" that would justify otherwise unlawful conduct under Article 82. The first two conditions are that the conduct must produce benefits, and that these must not benefit only the dominant company. The Paper says that the benefits to consumers must outweigh or at least compensate for the exclusionary effects of the conduct. This principle is not necessarily easy to apply, but it does not need reconsideration in time of recession. If, in a recession, the benefits resulting from the conduct were more limited than they would be in normal circumstances, the benefits to consumers would presumably also be less, but the proportion of the total benefits obtained by consumers should not change.

The third condition is that the conduct must be indispensable to obtain the efficiencies, that is, that there are no other economically practicable and less anticompetitive alternatives, or no realistic and attainable alternatives. The range of "economically practicable" alternatives might be more limited in time

[16] Temple Lang, Efficiencies in European Competition Law, in Baudenbacher (ed.), Current Developments in European and International Competition Law, 14th St. Gallen International Competition Law Forum 2007 (2008) 45-76.

of hardship, but again there is no obvious reason to modify the rule proposed by the Commission. However, it is much more difficult in Article 82 cases for a competition authority such as the Commission to judge whether possible alternatives were, when the conduct began, "economically practicable" than it is in Article 81(3) cases, in which two or more companies are involved, and the alternatives to the agreement, for both parties, can be assessed more objectively. The dominant enterprise knows much more than the Commission can know about the merits of the alternatives, what the opportunity costs were for it, how easy or difficult it would be to get finance, and how the alternatives might fit into its other strategies. The approach suggested by the Commission also raises a timing issue: if other "economically practicable" conduct was possible when the conduct began, would it be a defence if the conduct has become impracticable as a result of an economic downturn? In the uncertain conditions of a recession, the Commission should be particularly slow to rely on hindsight to say that the dominant company had possibilities that were not apparent at the relevant time.

The fourth condition under Article 81(3), which the Commission proposes to use under Article 82, would say in effect that competition may not be eliminated, no matter how great the benefits of the conduct may be. It is not clear that this would be a satisfactory rule, because it would imply for example that the benefits for consumers could never justify bundling if the effect was to eliminate competition and to create a monopoly for one of the products bundled. Competition is not an objective in itself, it is only a means to promote welfare and prosperity. It could not be right or wise to say that no efficiency, however great, can be enough to justify a loss of competition, even if it is complete. That is not the position under the Community law rules on national measures restricting competition, discussed below, and there is no obvious reason why the analogy with Article 81(3) necessarily means that it must be the legal position under Article 82. [17] It seems better, although undoubtedly difficult, to say that the degree of reduction of competition must be balanced against the benefits to consumers. However, whatever the best approach to the issue may be, there is no clear reason why there should be a modified rule in times of recession or economic hardship.

It is assumed in the Guidance Paper that efficiencies, even if they contribute to total welfare, may or may not be passed on to consumers, so may or may not contribute to consumer welfare. A key question may therefore be how certain

[17] The Commission in the Guidance Paper and the earlier Discussion Paper on Art. 82 (2005) chose to use Art. 81(3) to interpret Art. 82, but shows no signs of having considered the EU rules on national measures creating dominant or privileged positions, which seem at least as relevant to the interpretation of Art. 82, and which allow complete elimination of competition if there is sufficient justification. One possible explanation is that it is generally assumed that measures restricting competition and creating privileged or monopoly positions are for non-economic purposes or in the general economic interest, and that it is not the role of dominant companies to pursue these aims; see Mortelmans, Towards Convergence in the Application of the Rules on Free Movement and on Competition? 38 Common Market Law Review (2001) 613.

it is that the efficiencies claimed, if indeed they are certain to arise, will be passed on, and if so what proportion of them will be passed on. It is not easy to see whether in a recession efficiencies are more likely to be passed on (because there is more price competition) or less likely (because the dominant company will be trying to retain as much as possible of the benefit for itself). Presumably both influences may occur. As already mentioned, commitments under Article 9 of Reg. 1/2003 may provide the necessary guarantees, in particular because they can provide a degree of flexibility that would be useful in a recession as conditions change. In any case, in a recession it may be necessary to wait longer for efficiencies to be obtained than would be necessary in normal conditions.

1.9 JUSTIFICATIONS AND EFFICIENCIES IN SPECIFIC CASES

For rebates, the Guidance Paper [18] says that "cost or other advantages which are passed on to customers" will be considered. Incremental rebates are in general said to be more likely to give resellers an incentive than retroactive rebates. It is not clear whether this is true, and the paragraphs in the *Michelin II* judgment cited by the Commission do not confirm this. In a recession, one would suppose that any incentive to increase output is desirable. But the Commission's comment, even if it is correct, does not make clear whether the Commission regards the additional incentive as procompetitive or anticompetitive. If an exclusive agreement is necessary to justify the dominant company making a specific new investment to supply the customer, that is more likely to be necessary in a recession, when there will be fewer other customers or lower demand.

The Commission's Guidance Paper says that it is unlikely that predatory prices would create efficiencies. [19] However, it is not hard to visualise situations in which a company has invested substantially in facilities to produce products for which the demand has fallen as a result of a recession, and the company would need to lower its prices below pre-recession levels in order to launch the products on the market. The resulting prices might well be below the dominant company's LRAIC, but might be justified by ensuring the success of the launch, which would be procompetitive.

In connection with refusals to supply, the Guidance Paper [20] says the dominant company may show that the refusal is "necessary" to allow it to realise an "adequate" return on its investments. The Guidance Paper seems to imply that if there is harm to consumers, there can be a duty to contract merely to promote competition in the short term even when no other abuse has been

[18] Para. 45.
[19] Guidance, para. 71.
[20] Paras. 88-89.

committed, which must be incorrect. [21] But in a recession it is clear that the justification for a refusal would be greater, since the dominant company is less likely to be able to get an adequate return if it is obliged to share the benefit of its investments with others, and it is more likely to need incentives to invest in the future. A dominant company in a recession would be unwise to share its downstream market with competitors if it could meet the demand itself. In short, if it is appropriate to take into account a dominant company's return on its investment, [22] a refusal to supply may be <u>more</u> likely to be justified during a recession.

1.10 PRICES BELOW COSTS AND LOSS-MINIMISING POLICIES

In time of economic hardship, both the dominant enterprise and its competitors may be led or obliged to charge prices that are below some measure of their costs. For both companies, that might be loss-minimising. A company whose unit costs have risen because its sales have fallen in a recession has not deliberately adopted a policy having this effect, and may have little choice. But it is suggested here that no change in the substantive rules is necessary in a recession.

Another rather similar problem arises in the start up period of a dominant company in the launch of a new product or service. The start up may involve very large initial fixed capital expenditure on *e.g.*, the construction of a new airport or a new telecommunications network. The fixed costs may not be covered by income for several years, but during that time it would be impossible simply to minimise variable or avoidable costs, since they may be needed to expand the activities and make the infrastructure, in due course, profitable. The company may need to spend substantial sums on operating costs, and to offer low prices, in order to persuade users to contract with it, so

[21] The Commission (para.80, Guidance Paper) says that it is contrary to Article 82 to refuse to supply a product or service necessary for competing effectively in a downstream market, if the refusal is likely to lead to elimination of effective competition in that market, and if the refusal is likely to lead to consumer harm. There is sufficient harm to consumers if competitors are "prevented from bringing to market innovative goods or services and/or where follow-on innovation is likely to be stifled" (para. 86). This ignores intellectual property rights, and seems to disregard the possibility that the dominant company may itself produce the innovative goods or develop follow-on innovation. A more satisfactory rule is that refusal is illegal only if it prevents the marketing of a new (not merely improved) kind of goods or services for which there is a clear and unsatisfied demand that the dominant company does not plan to meet. It can hardly be an abuse only to refuse to facilitate a competitor producing the same product. Temple Lang, European Competition Law and Compulsory Licensing of Intellectual Property Rights: A Comprehensive Principle, 4 Europarättslig Tidskrift (2004) 558-588.

[22] A dominant company should not necessarily be considered to have a right to obtain an "adequate" return on its investment. For example, if the patent to be compulsorily licensed was the only valuable patent resulting from a big research and development budget, as can happen in the pharmaceutical industry where much R&D produces no profitable products, the dominant Company could not try to get the licensee to provide it with an "adequate" return on its entire investment. The Commission in the *IMS Health* decision avoided the task of determining what the correct royalty should be: OJ No. 59/18, Feb. 28 2002: withdrawn OJ No. L-268/69, 2003

that it can reach the necessary scale of operations overall. This is so in particular in two-sided markets, or where there are important network effects. A retailer might be willing to rent a shop in a new airport, but it would not pay a substantial rent until there were enough flights to generate a substantial number of passengers. In this situation a loss-minimising policy means loss-minimising in the long term, not in the short term. Unavoidably the company may be selling services or goods below any appropriate measure of current costs, until the activities expand and reach an economic level. All this is well known, and hardly controversial. However, if a recession occurs after the initial fixed investment has been made, the loss-making period may be much longer than it would otherwise have been. Once again, the correct solution is not to introduce a new substantive test (it is hard to see what it would be) but to recognise that applying the normal rules will lead to a longer period during which the prices will be below the average total costs and even also below the average variable or avoidable costs. In this case, the average avoidable costs cannot be reduced, (because that would merely prolong the loss making period).

In a recession, it should always be a defence to accusations of below-cost selling that the company is following a loss-minimising policy. This defence should apply both when sales or revenues fall and unit costs rise, when start-up situations are prolonged by the effects of the recession, and when the recession has led to a big fall in demand. The principle that loss-minimising is a valid defence would apply in both margin squeeze cases and cases of possible predation.

One other possibility concerns companies that alter their wholesale prices in line with fluctuations in retail prices, to ensure that their distributors always have a profit margin. In a recession, this policy might lead the company to sell below its costs, to maintain its distribution system until the economic situation improves. Such a policy seems legitimate and justified by the long-term efficiencies.

Under the existing law as decided by the Court of Justice in *AKZO*, [23] it is illegal to charge prices below average variable cost, and it is illegal to charge prices above average variable cost but below average total cost if there is evidence of a plan to force a competitor out of the market. However, the Commission in its Guidance document [24] is trying to change the law to introduce a new stricter test of "deliberately foregoing profits, to foreclose a competitor", or conduct "leading to net revenues lower than could have been expected from a reasonable alternative conduct, *i.e.*, whether the dominant undertaking incurred a loss that it could have avoided." This suggestion is

[23] Case C-62/86, *AKZO v. Commission* [1991] ECR I-3359.
[24] Paras. 62-64. The Guidance is unsatisfactory because it would be impossible to decide when or how often a company might be obliged to alter its pricing policy to avoid an unnecessary loss of revenue.

clearly not intended merely to describe a possible strategy of the kind subject to the second *AKZO* test. Even if this suggestion is legally permissible (the Commission has no power to alter the law as decided by the Court), the suggestion is almost completely unworkable in a recession, when many courses of action might lead to lessened profits. If the suggestion were ever adopted, defences would have to be recognised for excess capacity in a recession, for promotional expenses, for obtaining economies of scale in network industries, and for start-up of big investments.

1.11 MEETING COMPETITORS' PRICES AND MARGIN SQUEEZES

If the dominant company seeks to defend its conduct on the grounds that it is meeting the price of a rival, and therefore charging a price below the relevant measure of its costs, the price that results, in time of hardship, might be very low. The relevant legal principle appears (from the judgment of the Court of First Instance in *France Télécom*) [25] to be that a dominant company is allowed to protect its own interests, but not to strengthen its dominance (except presumably by legitimate competition), and that there is no absolute right to meet competitors' prices. It is not easy to see what this distinction means in practical terms, and it may mean merely the *AKZO* principles that prices below average variable costs are illegal, and prices below average total costs may be illegal if there is evidence of exclusionary intent.

If the test is based on the dominant company's costs, its minimum lawful price is presumably the same in a recession (subject to the effect of reduced prices for its inputs). However, as already mentioned, in a recession the number of units sold will go down and the cost per unit is likely to rise, and the question will arise whether this situation will continue and therefore whether the production costs need to be re-calculated on this basis. *France Télécom* is on appeal to the Court of Justice.

The *Deutsche Telekom* margin squeeze case [26] concerned what was regarded as a margin squeeze, and an apparently serious one because the wholesale price was higher than the retail price. If this is the correct way to analyse the facts, the difference between the two ways of calculating a margin squeeze seems irrelevant. The two ways of calculating a squeeze are to ask if the dominant company's downstream operations could make a profit if they had to pay the wholesale price, or to ask if a hypothetical "reasonably efficient" competitor

[25] Case T-340/03, *France Télécom* [2007] ECR II-___ (January 30). See however Joined Cases T-191/98 and others, *Atlantic Container Lines* [2003] ECR II-3275 at para. 1120 (" … the onus is on the dominant undertakings to behave in a way that is proportionate to the objectives they seek to achieve". It seems that the Commission regards this as a general rule and not merely a comment on the specific circumstances of the *Atlantic Container* case). This is not the only part of the Guidance Paper where a statement is taken out of its context and expressed as if it was an unqualified general rule.

[26] Case T-271/03, *Deutsche Telekom*, [2008] ECR II-___ (April 10).

could do so. The result, whatever it should be in this particular case (which is now subject to appeal to the Court of Justice) does not seem to be affected by a recession (except for the difficulty of estimating any "average" costs in rapidly changing circumstances).

1.12 THE "EQUALLY EFFICIENT COMPETITOR" TEST

Calculating production costs may be important for the purposes of applying the "equally efficient competitor" test. This test suggests that conduct is exclusionary when (some authors say only when) it tends to foreclose, handicap or create difficulties for a competitor that is as efficient as the dominant company. This test has several advantages.

First, if applied consistently it should avoid "false positives" (unjustified findings of illegal foreclosure). Second, it is capable of being applied by the dominant company, because it can analyse the costs of its own relevant operations. If the competitor's costs (which the dominant company cannot know with confidence) are higher, it is by definition less efficient (provided however that they are not higher because of some illegal conduct of the dominant company). [27] If the competitor's costs are lower, it is unlikely to be foreclosed by the dominant company's price.

But this test obliges the competition authority to know which costs to look at. The *AKZO* judgment [28] said that the first question was whether the price was below average variable costs. But if a recession occurs and the number of units sold goes down, the average variable costs per unit of the dominant company may increase, because it may be impossible or at least unwise for the dominant company immediately to reduce its workforce and its other costs that are, in theory, variable. (In a recession, it may not be feasible for the dominant company immediately to switch the workers in question to other lines of production, as they may also be affected by the recession). The Guidance Paper does not consider the effects of a recession, but it discusses (paras. 63-64) different measures of cost, and finally uses Average Avoidable Cost, which the Paper says (footnote 40), is normally the same as Average Variable Cost. But Average Avoidable Cost does not deal with the issue of a recession any better than Average Variable Cost.

The conclusion suggested here is not that a different substantive test should be used in a recession. It is merely that as circumstances change at the start of a recession, it may be impossible to apply either test of costs until the situation

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[27] The Guidance Paper does not clearly explain whether the Commission accepts that a competitor which has less favourable economies of scale than the dominant company is less efficient in economic terms, as most economists would believe. It also suggests that the Commission might, in undisclosed situations, consider that conduct that would only harm a less efficient or a not-yet-as-efficient competitor might be unlawful.
[28] Case C-62/86, *AKZO* [1991] ECR I-3359.

has stabilised itself enough to calculate a meaningful average cost. Only then can the dominant company know to what extent it should lay off or re-assign workers or otherwise reduce or "avoid" production costs. If the recession seems likely to be brief, or in a volatile situation, it would be unreasonable to suggest that the dominant company should dismiss workers.

1.13 THE DUTY TO CONTRACT IN RECESSIONS

The Commission's Guidance Paper on Article 82 discusses refusal to supply as a type of abuse, and says that one question is whether competitors could duplicate the input produced by the dominant company in the foreseeable future (para.82). The ability of competitors to duplicate the input must be looked at realistically, and it must depend on economic and financial considerations as well as technical possibilities. Even if competitors could duplicate an input or a facility in normal conditions, in a recession they might be unable to do so, and if this was clearly the position, the dominant company might have a duty to supply or contract during a recession that would not otherwise arise. This would presumably mean that its duty to supply would come to an end after the recession was over, after a period sufficient to allow the competitors to develop their own input. There are practical difficulties involved in the idea of a temporary legal duty to supply[29] and the idea should be approached with caution, but it probably cannot be excluded.

Clearly prompted by the *Microsoft* judgment, [30] the Guidance Paper says that it may be necessary to weigh the dominant company's incentives to invest, if compulsory access is ordered, against the benefits of ordering it. This approach is subjective and difficult to apply, but if it is appropriate to use it at all, the result might be different in a recession, when as already mentioned the incentive to invest is anyway likely to be less.

As already mentioned, the Guidance Paper does not make it clear that there can only be a duty to contract if the refusal constitutes or is linked to an identifiable separate abuse. This is important because in a recession a competition authority might be tempted to order a dominant company to contract merely because, in the short term, that would facilitate downstream competition. That was one of the mistakes made by the Commission in its *IMS Health* interim measures decision. [31]

[29] Temple Lang, Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities, in Hawk (ed.), 1994 Fordham Corporate Law Institute (1995) 245-313 at pp. 297-298).
[30] Case T-201/04, *Microsoft* [2007] ECR II-___, Sept. 17, para. 659.
[31] *IMS Health,* OJ No. L-59/18, Feb. 28, 2002; withdrawn OJ No. L-268/69, 2003; see Case T-184/01R, *IMS Health v. Commission* [2001] ECR II-3193; Temple Lang, European Competition Law and Compulsory Licensing of Intellectual Property Rights – A Comprehensive Principle, in 4 Europarättslig Tidskrift (2004) 558-588.

Article 81 applies to certain joint ventures, patent pools, and agreements to adopt technical standards, where the effect of the agreements is not only to eliminate competition between the parties, but also to create a handicap for non-parties. If this handicap would be serious enough, in order to comply with Article 81(3) the parties are obliged to give access to non-parties on reasonable and non-discriminatory terms. [32] If Article 82 also applies, the substantive obligations under that Article seem to be the same as under Article 81. In the case of patent pools and standard-setting agreements, "reasonable" terms mean the terms which the patent owner would have been able to obtain for a licence of the patent to a willing licensee in arms'-length negotiations before the agreement was made. Any terms more favourable to the patent owner would be taking unjustified advantage of the restriction of competition resulting from the agreement.

If that is the "reasonable" royalty for a patent in a pool or a standard, the question arises whether the maximum permissible royalty should go down if a recession occurs after the patent pool or standard agreement is entered into. The answer seems clear: the maximum lawful rate does not decline, even if (as may be the case) it is no longer economic for licensees to pay it during the recession. The patent owner is not obliged to reduce its royalty so as to guarantee the user a profit when circumstances change. In a recession, it is inevitable that some projects or activities become uneconomic. The parties may of course agree on a lower rate, but that would not be required by competition law.

1.14 SHORT-TERM PROMOTION OF COMPETITION IN RECESSIONS

It has often been pointed out that imposing a duty to contract on dominant companies owning important assets would in the short term increase competition between companies using the assets, but would lessen competition in the longer term. This is for at least two reasons. First, the companies using the assets would no longer have an incentive to develop their own, and would have the same cost for what would presumably be an important input. Second, imposing a duty to contract would discourage all companies in similar situations (and not merely the individual company in question) from investing in similar assets in future, because the potential duty to contract would make all such investments less profitable. It would therefore be a serious mistake for a competition authority to impose a duty to contract during a recession in any situation in which there would be no such duty in normal circumstances. [33]

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[32] See *Salora-IGR Stereo Television*, Eleventh Competition Policy Report (1981) pp. 63-64. Temple Lang, International Joint Ventures under Community Law, in Hawk (ed.), 1999 Fordham Corporate Law Institute (2000) 381-464 at pp. 447-450.

[33] Temple Lang, Defining Legitimate Competition: Companies' duties to supply competitors, and access to essential facilities, in Hawk (ed.), 1994 Fordham Corporate Law Institute (1995) 245-313.

1.15 LONG-TERM CONTRACTS IN RECESSIONS

The Court of Justice has confirmed in the *BP-ABG* case [34] that during a shortage or recession a dominant company is entitled to give preference to customers with long-term contracts over even traditional customers that no longer have such contracts. The *National Carbonising* case shows that a dominant firm has no duty to modify its prices or its existing long-term contracts, even if its competitor is suffering more during a recession from having no similar contracts. [35] Recessions do not affect all companies equally, and the legal obligations of a dominant company do not alter as a result of this fact.

A less obvious point is that in a recession it may be in the interests of both parties to make large relationship-specific investments on the basis of long-term contracts which might be unnecessary and even anticompetitive in normal circumstances. In other words, in a recession the efficiencies resulting from enabling or facilitating such contracts are more likely to outweigh the advantages of competition than they would be if there was no recession.

1.16 JOINT DOMINANT POSITIONS IN RECESSIONS

It seems clear that a single jointly dominant company may commit an exclusionary abuse even if the other jointly dominant companies do not behave in the same way, but that exploitative abuses are unlikely in practice to be committed unless the companies all do the same thing. [36] This means, for example, that one jointly dominant company may infringe Article 82 by making exclusive agreements with its customers, even if it is the only oligopolist to do so.

In a recession, when the total demand for the product or services in question had fallen, exclusive agreements that previously had no significant foreclosure effects might come to have serious effects, in particular if the purchases by the customers bound by the exclusive contracts fall by less than those of other buyers.

1.17 DISCRIMINATION IN RECESSIONS

Though the law is surprisingly unclear, and the Commission's Guidance paper on exclusionary abuse unfortunately says nothing about discrimination, it seems that discrimination is illegal under Article 82(c) only if there is harm to

[34] Case 77/77, *BP v. Commission* [1978] ECR 1513.
[35] Commission decision *National Carbonising* OJ No. L-35/6, (1976); Case 109/75R, *National Carbonising v. Commission*, [1975] ECR 1193.
[36] Case T-228/97, *Irish Sugar* [1999] ECR II-2969, para. 66; Temple Lang, Oligopolies and Joint Dominance in Community Antitrust Law, in Hawk (ed.), 2001 Fordham Corporate Law Institute (2002) 269-359, 335-338.

consumers. This is important, because it means that quantity discounts are not illegal even though only large buyers can benefit from them, because they do not harm consumers. It also seems clear that a dominant company can give different treatment to parties contracting with it even though the transactions, from its side, are the same. [37] That means that the existing substantive law rules allow a dominant company to behave as a "discriminating monopolist", because it increases both consumer welfare and general welfare if the dominant company can charge higher prices to buyers which are willing and able to pay more, or give lower prices to *e.g.*, new entrants, which would be procompetitive during a recession. If this is correct, discrimination in practice is likely to be illegal only when it is based on nationality, [38] or is exclusionary and contrary to Article 82(b), or facilitates or increases the ill-effects of other conduct that is unlawful under Article 82.

Article 82(c) prohibits only conduct that causes a "competitive disadvantage". It is possible that in a recession conduct that would not normally cause a competitive disadvantage might do so, for example because alternative sources of supply were no longer available or adequate for the requirements of the companies less favourably treated.[39] But otherwise it seems that applying the non-discrimination principle would lead to the same results during a recession as in normal circumstances.

However, if in a recession the view was adopted that quantity discounts were illegal because they harm small and medium sized enterprises, even though they benefit consumers, that change would be a very radical one.

1.18 TEMPORARY REMEDIES IN RECESSIONS

It will be seen that in various situations during a recession it might be appropriate to decide that an abuse was being committed, although in normal circumstances there would be no abuse. In such cases, the competition authorities concerned should be ready to withdraw their decisions *ex nunc* (even when the earlier decision was a definitive decision, and not an interim measure) when the circumstances have changed sufficiently. Again, it would be important for withdrawal decisions to be taken promptly as soon as appropriate.

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[37] Though the point was not specifically discussed, the judgment in Case C-52/07, *Kanal 5* [2008] ECR I-___ seems to confirm this. In that case the Court held that a performing rights society may make the royalty rate charged depend on the mixture of music broadcast by different licensees, but that the rates may need to be revised when better information becomes available.

[38] Temple Lang, Anticompetitive non-pricing abuses under European and national antitrust law, in Hawk (ed.), 2003 Fordham Corporate Law Institute (2004) 235-340, 245-258; Temple Lang, The requirements for a Commission Notice on the concept of abuse under Article 82 EC, 2007 Finnish Competition Law Yearbook 271-305 and Centre for European Policy Studies Special Report (2008); O'Donoghue and Padilla, The Law and Economics of Article 82 EC (2006, Hart) ch. 11.

[39] Case C-163/99, *Commission v. Portugal* (airport landing charges), [2001] ECR I-2613.

1.19 THE VALUE OF A CLEAR CONCEPT OF EXCLUSIONARY ABUSE DURING A RECESSION

The Commission's Guidance Paper suggests no comprehensive definition or concept of exclusionary abuse or anticompetitive foreclosure, although it uses both phrases. However, the Treaty itself suggests a definition. Article 82(b) says that it is an abuse if the dominant firm is "*limiting production, marketing or technical development to the prejudice of consumers*" and the Court of Justice has confirmed in several judgments that this prohibits limiting the possibilities of the competitors of the dominant firm. [40] If the Community Courts have to choose between an economic theory, however fashionable, suggested by the Commission, and the words of Article 82(b) of the Treaty and a line of judgments, the Courts are likely to rely on Article 82(b). This means that any conduct that limits innovation, marketing or production of competitors is likely to be an abuse. In a recession, it is desirable for competition authorities to be ready to apply such a comprehensive definition of exclusionary abuse to any new kinds of behaviour that restrict the output of competitors of the dominant company, since any restriction on output is particularly harmful in a recession. Since the Guidance only discusses a few well-recognised types of potential abuse, it does nothing to deal with other kinds of behaviour that do not fit clearly into the categories considered. A clear definition of exclusionary abuse is essential for resolving the issues outlined here, although these issues are mostly concerned with applying established

[40] Joined Cases 40/73 and others, *Sugar Cartel – SZV*, [1975] ECR 1663, paras. 399, 482-83, 523-527 ("*the system complained of was likely to limit markets to the prejudice of consumers within the measure of Article [82](b) because it gave other producers ... no chance or restricted their opportunities of competing with sugar sold by SZV*": para. 526); Case 41/83 *Italy v. Commission* (*British Telecommunications*), [1985] ECR 873; Case 311/84, *Telemarketing CBEM*, [1985] ECR 3261, para. 26; Case 53/87, *CICR v. Renault*, [1988] ECR 6039; Case 238/87, *Volvo v. Veng*, [1988] 6211; Joined Cases C-241/91P, *RTE* and *ITP* ("*Magill*"), [1995] ECR I-743 at para. 54 ("*The applicants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the applicants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article [82] of the Treaty.*"); Case C-41/90, *Höfner and Elsner*, [1991] ECR I-1979 at 2017-2018 ("*Pursuant to Article [82](b), such an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail of it*": para. 30; Case C-55/96, *Job Centre*, [1997] ECR I-7119 at 7149-7150; Case C-258/98 *Carra*, [2000] ECR I- 4217; Case T-201/04, *Microsoft*, [2007] ECR I-___ Sept. 17 para. 643-648 ("The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health* … cannot be the only parameter which determines whether a refusal to licence an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may also arise where there is a limitation not only of production or markets, but also of technical development": para. 647). Bellamy & Child, European Community Law of Competition (6th ed., 2008) pp. 1025-1026; Commission Decision, *P&I Clubs*, OJ No. L-125/12, May 19, 1999, paras. 128-133; Temple Lang, The requirements for a Commission Notice on the concept of abuse under Article 82 EC, 2007 Finnish Competition Law Yearbook 271-305 and Centre for European Policy Studies Special Report (2008); Temple Lang and O'Donoghue, The Concept of Exclusionary Abuse under Article 82, Global Competition Law Centre research papers on Article 82 (2005).

rules to the special circumstances of a recession, because even in the Commission's Guidance document the rules are not clear or satisfactory in all respects, in particular on the crucial question of pricing practices. [41] But in any case competition authorities work faster and with more confidence, and are less likely to make mistakes, if they are applying clear and already well-understood principles. In particular a clear definition of exclusionary abuse would make it less likely that the Commission would try to impose obligations, with the benefit of hindsight, that dominant companies could not have foreseen.

A vague or imprecise concept of exclusionary abuse may lead to both prohibition of procompetitive practices and failure to prohibit what are in reality anticompetitive practices. In a recession, the former kind of error is more likely to be committed by competition authorities.

1.20 DIFFERENT RESULTS IN DIFFERENT MEMBER STATES

It is often assumed, without consideration, that national courts and national competition authorities ought always to reach the same conclusion in all Member States, and that something is wrong when they do not. That assumption is wrong, because national authorities and courts have jurisdiction only over the economies of their own States (and over conduct affecting those economies). The economic situations in different Member States may be different, and different conclusions may all be correct. This is true (even if it often forgotten) in normal circumstances, and it may well be true in a recession. Member States are not all affected in the same way by even a global recession. The European Competition Network should try to ensure that the same rules are applied everywhere, but should not try to reach the same results if the economic facts are different.

PART II

Before considering the possible effects of a recession or period of economic difficulty on the European law rules on national measures restricting competition, it is necessary to summarise them briefly, since there seem to be seven distinct principles involved.

[41] Temple Lang, Commission's New Guidance on Article 82 is Flawed, Competition Law Insight (February 2009).

2.1 NATIONAL LEGISLATIVE AND EXECUTIVE MEASURES RESTRICTING COMPETITION [42]

Member States adopt legislative and other measures that create monopolies, give special rights to a limited number of companies, restrict market entry or competitive behaviour, grant licences or concessions, or otherwise restrict competition. The economic effect of such State measures may be much greater than the effect of abuse of a dominant position, or even price fixing by all or most of the companies in the industry concerned. The legal principles that limit the powers of Member States to adopt measures of these kinds are therefore important. These principles have not been widely understood or fully utilised. The case law is more extensive than is generally realised.

These principles were not all stated in the Treaties. They have developed in separate lines of judgments, although the principles may not be distinct from one another. Like Article 82 cases, each case depends very much on special circumstances and requires a good deal of investigation, so the Commission has not vigorously enforced these principles. Some of the judgments were answers to questions under what is now Article 234, in which the Court answered only the questions asked by the national courts when, in retrospect, some additional questions might have led to much greater clarification. Because the Commission was cautious, apparently for political reasons, the Court has been cautious also. Although it has been suggested that the Commission should summarise these principles comprehensively, this has never been done officially, and it does not seem likely that the Courts will need to do so.

The first principle prohibits discrimination, whether based on nationality or residence, or *de facto* discrimination that indirectly handicaps companies from other Member States, or which is contrary to the principle of "equality of opportunity" for all competitors. [43]

The second principle is that any national measure restricting freedom of establishment, freedom to provide services, or free movement of capital must be for a legitimate (*i.e.*, non-protectionist) purpose in the public interest, and must be no more restrictive than is necessary and appropriate for that purpose.

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[42] Temple Lang, State Measures Restricting Competition under European Union Law, in Collins (ed.), Issues in Competition Law and Policy (2008, American Bar Association), Vol. I, 221-248; Blum and Prior-Logue, State Monopolies under EC Law (1998, Wiley); Buendia Sierra, Exclusive Rights and State Monopolies under EC Law (1999, Oxford); Szyszczak, The Regulation of the State in Competitive Markets in the EU (2007, Hart); Geradin (ed.), The Liberalization of State Monopolies in the European Union and Beyond (2000, Kluwer); Amato, Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market (1997, Hart).

[43] Case C-462/99, *Connect Austria*, [2003] ECR I-5197, paras. 82-83; see also Case T-410/03, *Hoechst*, [2008] ECR II-___ June 18, para. 128-144 (leniency applicants must get equal treatment from the Commission).

[44] Legitimate purposes are usually non-economic. Such measures must be non-discriminatory, so they must not give any companies a privileged position. This principle applies to freedom of competition.

The third principle is that EU competition law must not be made ineffective, for example by measures ordering, encouraging, or approving infringements of Articles 81-82, or creating situations in which it is probable that infringements will be committed. [45] This principle prohibits measures creating situations in

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[44] Freedom of establishment, the freedom of services and the freedom to compete are not absolute principles, and may be subject to national regulation, see, *e.g.*, the following judgments, which concern a wide variety of different kinds of measures: Case 33/74, *van Binsbergen*, 1974 ECR 1299; Case C- 96/81, *Commission v. Netherlands*, 1982 ECR 1791; Case C-159/94, *Commission v. France*, 1977 ECR I-5815, 101-102; Case 352/85, *Bond von Adverteerders*, 1988 ECR 2055; Case C-353/89, *Commission v. Netherlands*, 1991 ECR I-4069; Case C-288/89, *Antenne de Gouda*, 1991 ECR I-4007; Case C-76/90, *Säger v. Dennemeyer*, 1991 ECR I-4221; Case C-320/91, *Corbeau*, 1993 ECR I-2533; Case C-275/92, *Schindler*, 1994 ECR I-1039; Case C-323/93, *Crespelle*, 1994 ECR I-5077; Case C- 384/93, *Alpine Invs.*, 1995 ECR I-1141; Case C-189/95, *Franzén*, 1997 ECR I-1509, 5976-5977; Case C-3/95, *Reisebüro Broede*, 1996 I-6511, 31; Case C-398/95, *SETTG*, 1997 ECR I-3091, 21; Case C- 264/96, *I.C.I. v. Colmer*, 1998 ECR I-4695, 28-29; Case C-222/95, *Parodi v. Banque Bary*, 1997 ECR I-3899; Case C-167/97, *Seymour Smith*, 1999 ECR I-623; Case C-212/97, *Centros*, 1999 ECR I- 1459; Case T-266/97, *Vlaamse Televisie*, 1999 ECR II-2329 (television advertising); Advocate General La Pergola, in Case C-124/97, *Läärä*, 1999 ECR I-6067 (gambling); Case C-67/98, *Zenatti*, 1999 ECR I-7289; Case C-58/99, *Commission v. Italy*, 2000 ECR I-3811 ("special powers" over certain companies); Joined Cases C-49/98 & others, *Finalarte*, 2001 ECR I-7831 (paid leave for construction workers); Case C-164/99, *Portugaia Construcoes*, 2002 ECR I-787; Case C-205/99, *Empresas Navieras*, 2001 ECR I-1271; Case C-108/96, *MacQuen*, 2001 ECR I-837; Case C-390/99, *Canal Satellite*, 2002 ECR I-607; Case C-439/99, *Commission v. Italy*, 2002 ECR I-305; Joined Cases C- 430/99 & C-431/99, *Sea-land Serv.*, 2002 ECR I-5235; Case C-243/01, *Gambelli*, 2003 ECR I-13031 (gambling); Case C-6/01, *Anomar*, 2003 ECR I-8621; Case C-42/02, *Lindman*, 2003 ECR I-13519; Case C-334/02, *Commission v. France*, 2004 ECR I-2229, 27-29 (administrative difficulties of dealing with tax evasion do not justify restrictions on freedom to provide services); Case C-262/02, *Commission v. France*, 2004 ECR I-6569, 31 (advertising of alcohol on television); Case C-451/03, *Servizi Ausiliari*, [2006] ECR I-2941, 41-43; Joined Cases C-338/04 & others, *Placanica*, [2007] ECR I-1891 (gambling); Joined Cases C-261/07 and C-299/07, *VTB-VAB v. Total Belgium*, Opinion of Advocate General Trstenjak dated 21st October 2008; Opinion of Advocate General Bot in Case C- 531/06 and Joined Cases C-171/07 and C-172/07 (ownership of pharmacies), dated December 16, 2008. *See* Emiliou, The Principle of Proportionality in European Law: A Comparative Study 23 (1996); Tridimas, The General Principles of EU Law (2nd ed., 2006, Oxford) ch. 5. These principles are not usually considered to be part of EU competition law, but that is a purely formal legal point without any economic significance, since restrictions on freedom of establishment and services have very great effects on competition in the industries in question.

[45] There are a surprisingly large number of cases stating or applying the duty not to interfere with the effectiveness of Community competition law. Case 13/77, *INNO v. ATAB*, 1977 ECR 2115, 31, 1 C.M.L.R. 283 (1978); Case 229/83, *Leclerc*, 1985 ECR 1; Case C-260/89, ERT, 1991 ECR I-2925, 35; Case 267/86, *Van Eycke v. ASPA*, 1988 ECR 4769, 16, 4 C.M.L.R. 330 (1990); the cases reviewed by Advocate General Van Gerven in Joined Cases C-48/90 & C-66/90, *PTT Netherlands v. Comisión*, 1992 ECR I-565, 615 ff., 5 C.M.L.R. 316 (1993); Ca se C-320/91, *Corbeau*, 1993 ECR I-2533; Case C-41/90, *Höfner and Elsner*, 1991 ECR I-1979, 4 C.M.L.R. 306 (1993); Case C-60/91, *Batista Morais*, 1992 ECR I-2085, 2 C.M.L.R. 533 (1992); Case C-2/91, *Meng*, 1993 ECR I-5751, 14; Case C-185/91, *Reiff*, 1993 ECR I-5801, 14, 5 C.M.L.R. 145 (1995); Case C-245/91, *Ohra*, 1993 ECR I-5851, 10; Case C-153/93, *Delta*, 1994 ECR I-2517, 12, 4 C.M.L.R. 21 (1996); Case C-55/93, *van Schaik*, 1994 ECR I-4837, 25; Case C-379/92, *Peralta*, 1994 ECR I-3453, 21; Joined Cases C-401/92 & C-402/92, *Heukske* and *Boermans*, 1994 ECR I-

which a dominant enterprise can exercise regulatory powers over or supply essential services to its competitors, and therefore has a conflict of interest. It also prohibits measures creating a monopoly if the enterprise in question is unable to meet the demand for the goods or services in question. In that situation the monopoly restricts output, contrary to Article 82(b), when its monopoly rights are exercised to constrain competitors, and the monopoly is not justified.

The fourth principle is that national measures must not create or strengthen a dominant or privileged position unless there is a legitimate, non-protectionist, justification. This is illegal even if there is no evidence that it will lead to abuses of the dominant position by the company concerned.[46] This principle allows Member States to restrict competition differentially and even to create monopolies, special rights, and privileged positions, provided that there is sufficient justification. In other words, if efficiencies are sufficiently great, they can justify the creation of statutory monopolies, and privileged positions. This principle is more flexible than that suggested by the Commission in the Guidance Paper as the fourth requirement for assessing efficiencies under Article 82. Admittedly, a more flexible rule may be appropriate where the restriction of competition results from a measure adopted by a democratically appointed body (especially if it is for a non-economic purpose) than in the case of unilateral conduct of a commercial enterprise. But if efficiencies outweigh the restrictive effects, the public or private nature of the body responsible for them is not obviously relevant to the economic effects involved.

A fifth principle, apparently distinct from those already mentioned, is that national measures may grant exemptions from the rules of the Treaty, including the rules on competition, for services of general economic interest, insofar as those rules would obstruct the performance of the tasks given to the

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2199, 16; Case C-96/94, *Centro Servizi Spediporto*, 1995 ECR I-2883, 20, 4 C.M.L.R. 613 (1996); Case C-134/94, *Esso Española*, 1995 ECR I-4223, 5 C.M.L.R. 154 (1996); Joined Cases C-140-142/94, C-141/94 & C-142/94, *DIP v. Comune di Bassano*, 1995 ECR I-3257, 14, 4 C.M.L.R. 157 (1996); See also Case C-250/95, *Futura Participations*, 1997 ECR I-2471; Case C-38/97, *Librandi v. Cuttica*, 1998 ECR I-5955; more recently see Case C-67/96, *Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie,* 1999 ECR I 5751; Joined Cases C-115/97 to C-117/97, *Brentjens'*, 1999 ECR I-6025; and Case C-219/97, *Drijvende Bokken*, 1999 ECR I-5751, 6025, 6121; Joined Cases 46/87 & 227/88, *Hoechst*, 1989 ECR 2859, 33; Case T-228/97, *Irish Sugar*, 1999 ECR II-2629, 130; Case C-38/97, *Librandi*, 1998 ECR I-5955; Case C-35/96, *Commission v. Italy*, 1998 ECR I-3831; Case T-513/93, *CNSD v. Commission*, 2000 ECR II-1807; Case C-35/99, *Arduino*, 2002 ECR I-1529, 34, Advocate General Léger, 83- 91; Cases C-180-184/98, *Pavlov*, 2000 ECR I-6451, Advocate General Jacobs, 163-165; Case C- 198/01, *Fiammiferi*, 2003 ECR I-8055, 45; Case C-250/03, *Mauri*, 2005 ECR I-1267; Joined Cases C-94/04 & C-202/04, *Cipolla v. Fazari* and *Capodarte v. Meloni*, 2006 ECR I-11,421; see also Case C- 429/07, not yet decided (whether fines paid to the Commission may be deducted against national company taxes, and whether the Commission may intervene in national courts to argue that they should not be deductible).

[46] Case C-18/88, *GB-INNO BM*, [1991] ECR I-5941 at pp. 5980, 5981; Case T-266/97, *Vlaamse Televisie* [1999] II-2329; Case C-475/99, *Ambulanz Glöckner* [2001] ECR I-8089; Case C-147/97, *Deutsche Post v. Citicorp*, [2000] ECR I-825, paras. 50-52.

enterprises concerned (Article 86(2)). This means, for example, that a postal monopoly or a public ambulance service monopoly can be justified if it is unavoidably obliged to cross-subsidise inherently unprofitable services with the revenue from profitable operations. It also may mean that a waste disposal company may be given a monopoly for a period considered long enough to enable it to make a return on its investment if it is reasonably efficient.[47] Article 86(2) allows Member States to grant exemptions from EU competition rules, so it is strictly interpreted.

A sixth, procedural principle is that a national competition authority applying EU competition law has a duty to disregard national measures that purport to require or authorize infringements of EU law, and not to accept the national measures as a defence for the companies involved. [48] This principle enables a national competition authority indirectly to challenge national legislation restricting competition, if it leads companies to infringe Community competition law. National measures can be indirectly challenged in this way if they lead to abuse of a dominant position, but not if they merely create such a position.

Lastly, under Article 86(3) the Commission has a power to adopt decisions binding on Member States in cases of measures concerning State-owned enterprises and companies that have been given special rights (*i.e.*, rights limited to a specified number of companies) or exclusive rights. It seems, although the question has not been decided, that the Commission has power to order interim measures under Article 86(3). This power would certainly be useful, and the Commission should exercise it, in particular during a recession.

In many cases it is difficult for the Commission, unless helped by a detailed and well-written complaint, to identify the real reasons for a given national measure, and to assess whether it is unnecessarily restrictive for its purpose. The reasons are different in different industries, and in different Member States. Such cases are therefore difficult and resource-intensive. In the few cases in which the Commission and the EFTA Surveillance Authority have brought their own proceedings, they have relied heavily on complaints. [49] When these issues come before national courts, there are limits on how far the Court of Justice can help under Article 234 EC, since the main difficulty

[47] Case C-203/96 *Dusseldorp* [1998] ECR I-4075; Case C-209/98 *Sydhavens Sten & Grus*, [2000] ECR I-3743. See generally Giorgio Monti, EC Competition Law (Cambridge, 2007) ch. 12. The difference between Article 86(2) and the fourth principle appears to be that, under the fourth principle, a monopoly is legal provided that it is justified and that it is not led to infringe competition law. Under Article 86 competition law may be infringed if otherwise the tasks given would be obstructed.
[48] Case C-198/01, *Fiammiferi* [2003] ECR I-8055.
[49] See for example Case E-1/06, *EFTA Surveillance Authority v. Norway*, EFTA Court judgment dated 14 March 2007. Undue reliance on complaints would be unfortunate, because in some Member States companies may be reluctant to offend or annoy State authorities by making complaints, for fear of being at a disadvantage later in other matters.

usually is to apply the legal principles to the facts, in order to apply the proportionality principle. But the Court is gradually being obliged to look more critically and in more detail at national measures.

The Commission has never adopted a procedural Regulation for Article 86 cases. This is an underdeveloped area of EU competition law, both in the sense that the Commission has not tried actively to develop or enforce the legal rules, and in the sense that companies have been slow to make complaints in order to open up national markets. [50] All of these principles have been under-enforced.

In particular, not enough effort has been made to measure the economic costs of monopolies and special rights of these kinds, and to compare them with the intended benefits. In other words, the *Altmark* principle,[51] that over-compensation for inherently loss-making operations is unjustified State aid, has not yet been applied to measures granting special and exclusive rights, which have been looked at in most cases in a relatively superficial and unsophisticated way. Member States rarely try to estimate the economic costs of new or existing regulation. Monopolies may, of course, be needed for other reasons, not connected with ensuring that they break even. In such cases the issues may be less suited to detailed economic analysis, and the State may have a wider discretion.

Even in a recession, the need to have a legitimate economic purpose in the general interest is not a valid excuse for protectionism.

In the light of these seven principles, several questions arise:

- Should the operation of any of these principles be modified in a period of recession?

- Are Member States free to choose between granting State aid and adopting measures restricting competition?

- What new kinds of measures are likely to be adopted in a period of recession, and what questions will arise?

- Should the enforcement of these principles be moderated or modified during a recession?

[50] Temple Lang, The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC, 31 Fordham International Law Journal (2008) 1483-1532; General Report: The duties of cooperation of national authorities and courts and the Community institutions under Article 10 EC, in XIX F.I.D.E. Congress, (eds. Sundström and Kauppi, 2000, Helsinki), Vol. I 373-426 and Vol. II 65-72.
[51] Case C-280/00, *Altmark* [2003] ECR I-7747.

- Are there likely to be problems with individual national decisions during a recession?

2.2 SHOULD THESE PRINCIPLES BE MODIFIED DURING A RECESSION?

The application of these principles during a recession may be different, simply because the economic situation is different.

For example, under these principles, in order to ensure that a service of general economic interest is provided, a monopoly may be justified for as long as seems necessary to enable a reasonable profit to be made ultimately on a very large initial investment. [52] In a recession, the number of years necessary for the investors to break even may be substantially greater than would be needed in normal conditions. If this was shown to be the position, a longer period of monopoly would presumably be justified, if the formula used in the initial contracts did not deal adequately with the changed situation. Similarly, a monopoly may be justified because some operations that are unavoidably unprofitable cannot be clearly identified and managed separately with the benefit of a State subsidy in accordance with the *Altmark* principle. [53] In a recession, the profitable operations that were intended to cross-subsidise the unavoidably unprofitable activities might be seriously reduced, or the unprofitable operations might increase, and it might therefore perhaps be appropriate to broaden the scope of the monopoly, or to increase the amount of the State aid, to take this change into account.

In theory, it might perhaps be justified to create a new monopoly, in order to ensure that important services would continue to be provided, even if they would not need protection against competition in normal circumstances. It is however difficult to think of a convincing example.

In a recession, acting on the third principle set out above, Member States are likely to adopt measures obliging producers to reduce their production capacities, to reduce costs. This might be preferable to State aid, if the over-capacity was thought likely to be permanent, or might be accompanied by State aid. Such measures might be justified under the principles considered here even if an agreement to reduce capacity between the companies involved would be contrary to Article 81. [54] If such a measure was needed to reduce lasting loss-making over-capacity, it could be justified without any

[52] Case C-209/98, *Sydhavens Sten & Grus*, [2000] ECR I-3743.
[53] Case C-280/00 *Altmark* [2003] ECR I-7747.
[54] Case C-209/07, *Competition Authority v. Beef Industry Development Society* [2008] ECR I-___ Nov. 20; see the Commission decisions *Synthetic Fibres*, OJ No. L-207/17, 1984; *BPCL/ICI*, OJ No. L- 212/1, 1984; *Stichting Baksteen*, OJ No. L-131/15, 1994. It is not clear how far, if at all, the Commission would use the four conditions of Art. 81(3) in assessing whether a State measure ordering reduction of over-capacity is justified. The Commission does not seem to consider that Article 81(3)(b) applies by analogy to State measures restricting competition.

modification of the existing principles. Good reasons for regarding such a measure as legitimate are that it would distribute the losses evenly among those involved, an important objective in a recession, and reduce costs without increasing prices to consumers, while competition, on the basis of the reduced capacities, would continue without any other restraint.

Similarly, a Member State (in particular if it has provided finance to banks in difficulties) may regulate the terms on which they can lend, or require them to lend to small and medium sized enterprises, on the basis of the same principles.

The regulatory measures that might be adopted in a recession could *e.g.*, impose obligations on major energy users to buy at least minimum quantities at fixed prices from sustainable energy sources. [55] Such measures might impose extra costs in the short term, but might be fully justified by the risk of future increased costs of conventional energy, and by longer-term environmental considerations, and the EU's obligations under the Kyoto Protocol. Member States that choose to take a long-term view are entitled to do so.

2.3 ARE MEMBER STATES COMPLETELY FREE TO CHOOSE BETWEEN STATE AID AND MEASURES RESTRICTING COMPETITION?

More generally, in a recession the restrictive effects of a given measure may be difficult to assess, and to distinguish from the effects of the recession itself. That might be a strong reason for dealing with the problem by means of a State subsidy or compensation rather than by restrictive legislation (limited to compensating for unavoidable losses, and so not a State aid requiring notification, under the *Altmark* principle). The effect of State subsidy on consumers is likely to be more satisfactory, the effect on competitors likely to be less, and the economic effects of subsidy can be measured more easily than those of a monopoly. A State subsidy is in principle temporary, but restrictive measures are likely to be addictive, and to last longer than the recession would justify.

This raises an important question that the Court of Justice has not yet had to consider. Is it a valid argument against a national measure restricting competition to show that a legitimate State subsidy would have been a less restrictive way of achieving the same objective? Or has a Member State an unrestricted discretion to choose between State subsidy and regulatory measures, even though each of the two possibilities are subject to certain principles of Community law? It has traditionally been assumed, without much analysis, that because both State aids and measures restricting competition are initiated by the Member States, the States can choose freely, but it does not

[55] See Case C-379/98, *PreussenElektra v. Schleswag* [2001] ECR I-2099.

seem that this view is correct. The fact that the Member State might prefer, for fiscal reasons, the cost to be borne by consumers rather than taxpayers is not in itself a sufficient justification for a restrictive measure. Neither is the fact that the Member State, by adopting measures restricting competition, can avoid the need to notify and obtain approval of a State aid, and in effect put the burden of proof on the Commission to prove that the measure is unjustified. Under Article 10 EC Member States have a duty not to make Community competition law ineffective, and therefore it would be contrary to Article 10 for a State deliberately to avoid the State aid rules by adopting measures giving the company in question a privileged position or a monopoly to achieve the same purpose. The Court has said in various contexts that different Community policies must be made consistent with one another as far as possible, and has required *e.g.*, in a Merger Regulation case, the effect of a State aid to be taken into consideration. [56] Because it is much easier to assess and to limit the economic effect of a State subsidy or aid than that of a measure restricting competition, there are strong reasons for saying that Member States need to justify restrictive measures by showing that State aid could not have been effective. Member States may also be tempted to set up or maintain monopolies because the resulting costs are concealed from consumers, while the costs of a State subsidy are visible. Clearly this is not a justification for choosing a monopoly either.

The effect of the *Altmark* judgment [57] is that a Member State is free to impose obligations in the general economic interest on particular companies, and to compensate the companies involved insofar as fulfilling those obligations necessarily involves losses. If the compensation is limited so that it fulfils this condition, it can be given on a continuing basis without being considered as a State aid. Where it is considered in the general interest to provide services some or all of which are necessarily uneconomic, on the basis of a public contract or a concession, it seems very much better to impose obligations and to finance them by State compensation, duly supervised, rather than granting a monopoly or special rights, in particular if the monopoly would be essentially unregulated in practice, as many monopolies are. The effects of a monopoly or of special rights cannot be limited to the minimum needed to cross-subsidise inherently unprofitable arrangements. Indeed, the difficulty of foreseeing or measuring the economic effects of monopolies is a reason for replacing them with State compensation. The obligations imposed on statutory monopolies are not always precisely defined or officially enforced. A recession might not be the most convenient time to replace a statutory monopoly with a State aid, but such a reform might contribute significantly to consumer welfare, and should

[56] Case T-156/98, *RJB Mining* [2001] ECR II-337.

[57] Case C-280/00, *Altmark*, [2003] ECR I-7747. It is not suggested here that a monopoly, which involves cross-subsidies and therefore transfers of revenue from consumers to the monopoly, involves State aid: see Case C-379/98, *PreussenElektra v. Schleswag* [2001] ECR I-2099. The argument is that since a State aid would be better adapted to achieve the desired result, the monopoly is unlikely to be justified.

be considered even during a recession. Member States are not sufficiently aware of the cost to consumers of monopolies and special rights.

It is anomalous that the Commission has never made the argument that State compensation should be used rather than monopolies to ensure that companies providing important services can break even. Monopolies provide services at the expense of consumers, so one would expect the Commission to object to them whenever possible. The Commission claims to protect consumers in other areas of competition law, but does not claim to ensure that excessive State aid is not given or that taxpayers get value for their money. At least when the choice is between a targeted State subsidy and a statutory monopoly, the Commission should argue for State subsidy, since the cost to taxpayers of a well designed and monitored State subsidy is likely to be less than the cost to consumers of an unregulated monopoly.

2.4 WHAT NEW KINDS OF MEASURES ARE LIKELY TO BE ADOPTED IN A SERIOUS RECESSION?

A variety of regulatory or restrictive measures are likely to be considered or adopted in a recession, that would be unlikely to be adopted otherwise. The most obvious examples of such measures concern the financial institutions whose unwise conduct has led to the present financial crisis. Almost all measures of these kinds are subject to the principles outlined above.

In a recession, pressure is likely on national politicians to protect small enterprises and retailers from competition, in many cases at the expense of consumers. Lobbyists will urge protection for enterprises that, like everyone else, are suffering economic hardship. Politicians are more likely to try to preserve jobs than to protect consumers. Some Member States already have legislation that can be used to protect small enterprises against competition, and that legislation is likely to be more vigorously enforced.

Examples of specific measures that have been or will probably be adopted are:

- Credit rating agencies may be regulated, in particular to minimise their conflicts of interest.

- Financial institutions may be directed to merge or to agree to be taken into State ownership, or to increase their equity capital.

- The conduct of financial institutions may be regulated, by directing them to lend to small companies or owners of houses, or to limit the interest rates that they can charge, or the remuneration that they can pay to their executives, or prohibiting them from setting up "off balance sheet" operations, or to stop them taking undue advantage of State guarantees by *e.g.*, aggressive

advertising, or to prevent them from paying dividends or buying back their shares.

- Financial institutions may be required to report more often and to submit to closer supervision, to ensure that the unprofessional conduct that led to the current financial crisis is not repeated.

- Measures may be taken to minimise the risk of "moral hazard", that is, situations in which managers take risks to obtain higher profits, relying on the State and taxpayers to pay if they make losses, or otherwise to take unreasonable advantage of measures taken to safeguard the institutions in question.

- Financial institutions developing and selling derivatives may be required to retain a certain minimum percentage of each class of derivative that they sell, to prevent or discourage them from irresponsibly selling packages of bad debts.

- Financial institutions may be directed how much to lend to specific sectors of the economy.

Some of these measures may not be formally imposed on the companies concerned, but may be conditions on which financial or similar assistance is made available to them by the State. If these requirements are optional in this sense, they do not necessarily involve restrictions on freedom of establishment, services, capital, or competition, but they are likely to come under State aid rules.

In the case of almost all such measures, there would be a legitimate public interest to justify them. One possible exception would be sovereign funds for State ownership of equity in important companies, which might be equivalent to "golden shares", some of which have been held by the Court of Justice to be contrary to Community law, because they restrict free movement of capital. "Governments may hold ordinary shares, but they will never be ordinary shareholders". [58]

It is obvious, however, that the principal difficulty of applying Community law principles to measures of these kinds is the difficulty of deciding whether the measure in question is proportional, that is, appropriate and well-designed for the objective for which it is intended, and no more restrictive than is necessary to achieve that objective. Since by definition a recession is an unusual and changing situation, it may be difficult to answer this question with confidence, and courts will be reluctant to interfere.

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[58] Financial Times leader article, 16th Oct. 2008.

This difficulty would be particularly important in situations in which, if the measure was not justified, it would be urgent to prohibit or suspend it as soon as possible. In practice, of course, it is likely that the discretion normally given to the choices made by Member States about how best to achieve legitimate purposes would protect such measures from challenge. If the measures were the result of European or international coordination, as distinct from purely national initiatives, they would be unlikely to be considered as too restrictive, if the extent as well as the nature of the measures had been agreed collectively.

Apart from Commission decisions about State aid, a number of EU measures have been considered in order to harmonise the reactions of Member States to the 2008 financial crisis.

2.5 SHOULD ENFORCEMENT OF THESE PRINCIPLES BE REDUCED IN A RECESSION?

In practice, it is clear that enforcement of these seven principles is likely to be less vigorous during a recession, if it occurs at all. These principles are not fully or vigorously enforced by the Commission even in normal conditions. The Commission is not likely to challenge any national measures that are claimed to be necessary to counteract a recession, unless they are plainly discriminatory or obviously unjustified or inappropriate. The Commission moves slowly against national measures restricting competition in normal circumstances, when it moves at all. In a recession, if the Commission took action, it would be unlikely to take action in time to be effective. The Commission has been advised years ago that it has power to adopt interim decisions under what is now Article 86(3) EC, but it has never used this power. However, as already explained, cases involving national measures restricting competition are sometimes inherently difficult, even in normal economic circumstances, and might be unsuitable for interim measures against the Member State concerned.

But in fact it is in a recession that it is particularly important for the Commission to enforce the principles that prevent competition being restricted unjustifiably. The Commission ought to be particularly vigilant in a recession to make sure that national measures do not make the economic situation worse. National measures restricting competition, like unjustified State aids, may throw economic ill-effects onto companies in other Member States, and the Commission should be particularly active to prevent this. The fact that the Commission cannot deal quickly with some such cases, by interim measures decisions, does not mean that the Commission should not deal with them at all. Excessive costs for consumers resulting from an unnecessary, unregulated and unjustifiable monopoly, which might be tolerable in normal conditions, could become unreasonably onerous in a recession.

It now seems clear that a number of Member States will finally become major shareholders in important banks, and that the effect will probably be that Article 86 will apply to the banks in question. Article 86(3) would therefore apply to national measures concerning those banks. In these circumstances there may be significant conflicts of interest between the role of governments as shareholders and their role as regulators of the banks, and it will almost certainly become necessary for the Commission to apply Article 86 more fully and more often than in the past. It is likely that governments will directly or indirectly give banks instructions or "advice" that would constitute "measures" under Article 86(1) and that might be politically motivated or discriminatory or otherwise contrary to competition rules. Interim measures under Article 86(3) would probably be appropriate.

The *Fiammiferi* judgment [59] (the sixth principle listed above) resulted from the initiative of the Italian competition authority. It gives national competition authorities a means of challenging national measures that limit competition. But very little use seems to have been made of the possibilities given by the judgment. In a recession, using these possibilities might require political courage, but would certainly be justified in the interests of consumers.

National competition authorities, like the Commission, have not sufficiently integrated their policies on measures restricting competition (insofar as they have developed them on the basis of the *Fiammiferi* principle) with the rest of their competition policies. However, the Commission is often better placed than a national competition authority to challenge national legislation, because it does not need to find a case in which the legislation is used as a defence, and because it is politically more independent of the national government. That may be a reason why the Commission should give such cases priority, and leave Article 81-82 cases to national authorities whenever they can deal with them.

2.6 MISUSE OF NATIONAL REGULATORY POWERS AND COMPETITION LAW IN INDIVIDUAL CASES IN A RECESSION

Under Article 10 EC the principle that national measures may not be used for purposes that are not in the general interest, and must not be unnecessarily restrictive, applies in individual cases, as well as to legislative measures. Therefore decisions by national regulators and national competition authorities in individual cases must comply with this principle. In a recession a national authority is likely to be tempted to use its powers to protect competitors against competitive pressures that are more severe in their effects than they would be in normal circumstances.

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[59] Case C-198/01 *Fiammiferi* [2003] ECR I-8055.

This risk arises in particular because Article 3 of Reg. 1/2003 allows Member States to have national laws on unilateral conduct (substantially, on possible abuse of dominant positions) that are stricter than European law. This allows Member States and national competition authorities to impose obligations on dominant or near-dominant companies that go further than the obligations imposed by European law. Insofar as these additional obligations concern exploitative behaviour or reprisal abuses, European law does not seem in practice to limit the obligations that could be imposed. However, if the extra obligations concern supposed exclusionary behaviour or discrimination, the obligations might go so far that they interfered with competition unjustifiably, and so were contrary to Article 10 and the Treaty provisions on competition generally.[60] A strict rule against selective pricing might be used to protect small customers against price competition. A strict rule against any form of discrimination, for example, might be used to prevent manufacturers giving quantity discounts to large-scale buyers. The national law principles limiting the obligations that may be imposed under national competition laws seem even less clearly defined than the limiting principles applying in Article 82 cases. It would be understandable if a national authority or court felt that it was appropriate to make an order on the basis of national law in favour of, perhaps, a small domestic firm which was in difficulties as a result of a recession, even if the order clearly went further than could be justified on the basis of Article 82.

2.7 LIKELIHOOD OF LITIGATION

The changed circumstances of a recession, and the need for companies to seek money from any available source, may lead to an increased number of claims for compensation for breach of Article 82, even without previous decisions of the Commission (which take too long), perhaps in the hope that the dominant company being sued will settle the claim. A successful challenge of a national measure restricting competition would also give the company challenging it a right to compensation, if it could prove how much loss it had suffered. However, governments do not usually settle challenges to existing legislation, and cases of this kind would take a long time.

2.8 CONCLUSIONS

It is suggested here that no changes in the substantive law rules or the burden of proof under Article 82 or on national measures restricting competition are needed in a recession. However, applying the same rules in the special economic circumstances of a recession may certainly lead to conclusions and

[60] Temple Lang, Anticompetitive Non-Pricing Abuses under European and National Antitrust Law, in Hawk (ed.), 2003 Fordham Corporate Law Institute (2004) 235-340 at pp. 327-338. It has sometimes been suggested that aggressive enforcement of Art. 82(a) against excessive prices might unduly reduce the incentives to compete, but it is hard to imagine this going so far as to be contrary to the Treaty principles.

results different from those appropriate in normal conditions. During a recession, prompt action by competition authorities is even more necessary than usual, and competition authorities and in particular the Commission should make more use of interim measures. But until the Commission adopts a clear concept of exclusionary abuse, interim measures decisions in particular may be wrong and may even discourage legitimate competition. The unsatisfactory state of the law under Article 82 is a serious problem even in a recession. The Commission will not be able to apply the rules on exclusionary abuse with confidence until the rules are clarified. In addition, in a recession competition authorities should reconsider their priorities, to concentrate on cases with the greatest potential economic impact, whether Article 82 cases or cases of national restrictions on competition.

The EU law principles that limit national measures restricting competition are already under-enforced, and in a recession this is unfortunately unlikely to change greatly. However, this paper has pointed to the strong reasons for saying that targeted State compensation is preferable to measures granting special or exclusive rights that are intended to subsidise or to cross-subsidise particular services. National measures that restrict competition need to be analysed in more detail to measure their economic effects. This should not be the only area of European competition law in which no effort is made to quantify economic effects, in particular where the reasons for the measures are said to be economic reasons.

The more general conclusion is that the Commission needs to integrate its policies and priorities under Article 82 and on national measures restricting competition with its policies on Article 81, State aids, and mergers. Because States are likely to be particularly active during the recession, the need for a unified policy is particularly great at present. It should not have needed a recession to convince us of this.[61] The fact that national measures creating privileged enterprises (to which Article 86 may apply) and national measures restricting freedom of establishment on a non-discriminatory basis are dealt with by different parts of the Commission may explain, but does not justify, the failure to have a unified and harmonised policy on all these issues. Also, it is not enough to have a unified policy. Enforcement activity should also be evenly spread: in practice the Commission's enforcement activities have always been uneven, and too dependent on the activities of complainants and the energy of individual officials.

The next Commission is unlikely to be a strong Commission, and so is probably not likely to challenge national statutory monopolies systematically. But there is no reason why the Commission should not challenge monopolies

[61] It has been well known for years that the Commission's antidumping policy and its competition policy were inconsistent and uncoordinated: Temple Lang, Reconciling European Community Antitrust and Antidumping, Transport and Trade Safeguard Measures – Practical Problems, in Hawk (ed.), 1988 Fordham Corporate Law Institute (1984) ch. 7.

on the specific grounds that a targeted State subsidy would be less economically costly. Nor is there any reason why a new Commission should not make a clear statement about reprisal abuses, or adopt the clear definition of exclusionary abuse suggested by the words of the Treaty and the judgments of the Community Courts. A clear definition, though not essential, would facilitate solutions to many of the competition problems of a recession discussed here.

There is a more general problem, which should be mentioned frankly. It is that decisions taken in what is felt, rightly or wrongly, to be an emergency, may be taken too quickly. Some national merger decisions, taken very quickly in what was considered a crisis, may have been wrong. The Commission and other competition authorities are not immune to this. But having a firm grasp of the basic legal principles is the best way to ensure that the correct decisions are taken.