

## Unilateral Conduct Working Group Questionnaire\*

31 October 2006

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to [ekraus@ftc.gov](mailto:ekraus@ftc.gov) and [arno.rasek@bundeskartellamt.bund.de](mailto:arno.rasek@bundeskartellamt.bund.de), and provide a contact person who can answer possible questions on your response.

### A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law
- f. Other (please identify)

Article 82 of the EC Treaty supports all of the objectives suggested and European market integration.

*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.*

*Such abuse may, in particular, consist in:*

*(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

*(b) limiting production, markets or technical development to the prejudice of consumers;*

*(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

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The “placing them at a competitive disadvantage” requirement in Article 82(c) has sometimes been disregarded (*Corsica Ferries*). DG Competition’s Discussion Paper on the application of Article 82 to exclusionary abuses (“The Discussion Paper”) emphasizes that Article 82’s primary purpose is “the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources” (paragraph 4).

In one of the most recent statements on the objectives of Article 82, Advocate General Kokott stated that its goal was “to protect the *structure of the market* and thus *competition as such (as an institution)*” (*British Airways*, emphasis in original).

As noted, the EU also has an overriding goal of achieving market integration between the economies of the EU Member States.

The sources are: The EC Treaty, as interpreted by the European Courts and agencies (European Commission/European Competition Network of National Competition Authorities) and national court enforcement practice.

**2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.**

Promotion of industrial policy is not incorporated in these objectives. Distributive welfare does play a role (e.g. the prohibition against “unfair” prices). As mentioned above in the answer to Question 1, market integration is an important factor and there is often a context of liberalizing former State monopolies.

**3. If there are multiple objectives, how are these balanced or reconciled?**

See answer to Question 1 above (with an increased tendency towards greater economic grounding for decisions).

**4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?**

This is a difficult question. On the one hand, the Commission brings relatively few Article 82 cases. On the other, it has imposed some of its highest fines for infringements of Article 82 (*Microsoft, Tetra Pak II*). Substantively, the European Courts have adopted a strict, i.e. narrow, interpretation of the essential facility doctrine (*Oscar Bronner*), but at the same time have been fairly broad as regards, for example, dominant firms’ rebates policies (*British Airways, Michelin II*).

**5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain**

**whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.**

No general sectoral exemptions exist.

Article 86 EC contains a limited exemption from competition rules for “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly”. These are not subject to, *inter alia*, Article 82 EC if the application of Article 82 would “obstruct the performance, in law or in fact, of the particular tasks assigned [to these undertakings]”. However, Article 86 adds that “the development of trade must not be affected to such an extent as would be contrary to the interests of the Community”. The Commission and European courts have interpreted this exemption from the competition rules narrowly.

A government entity performing a commercial activity is subject to Article 82 in the same way as a private undertaking.

Where an undertaking demonstrates that its conduct was imposed by a Member State, this conduct is not subject to Article 82 as it was not the exercise of the company’s independent will.

The Commission and European courts have emphasized that caution must be exercised where it is claimed that a company is using intellectual property rights to infringe Article 82. However, in exceptional circumstances the use of intellectual property rights can infringe Article 82.

**6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.**

Not applicable.

**7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.**

Not applicable. The European Commission is discussing Article 82 enforcement at present.

**8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency’s ability to achieve the objectives of the unilateral conduct rules? If so, please explain.**

A ministry cannot overrule a Commission decision.

The Commission acting as a collegial body (i.e. the 25 Commissioners nominated by the Member States) must take all decisions finding infringements of Article 82. However, the Commission is independent from Member State Governments. Before taking a decision

finding an infringement of Article 82, the Commission must consult an “advisory committee” consisting of representatives of Member States’ National Competition Authorities.

**9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?**

The Commission’s enforcement practice under Article 82 is currently under review. The Discussion Paper suggests that the Commission will adopt a more economic approach to Article 82 and emphasizes the need to study the likely effect of conduct on a market (which the Commission has done openly in recent cases, e.g. *Wanadoo* and *Tomra*).

## **B. Assessment of Dominance/Substantial Market Power**

**1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction’s general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., “super dominance”).**

The European Court of Justice (“ECJ”) has often defined dominance as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”. The Discussion Paper equates dominance to “a position of economic strength on a market” (paragraph 11) and to “substantial market power” (paragraph 23).

In a number of cases the Commission has alluded to entities not only being dominant but also having positions of actual or quasi monopoly. In *Compagnie Maritime Belge* Advocate General Fennelly used the term “super-dominant” in relation to collectively dominant companies. In the Discussion Paper, the Commission states that the “degree of dominance” is a factor in assessing whether conduct is abusive (paragraph 59). The “special responsibility” incumbent on all dominant companies (*Michelin*) may be even higher for “super-dominant” companies entities. The Discussion Paper also would make it very difficult for companies with a market share exceeding 75% to rely on an efficiency defence to justify their conduct (see paragraph 92, which also states that the absence of actual competition in the market and the existence of entry barriers are relevant in this context).

**2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?**

**If dominance/substantial market power is present**

YES - Dominance is a prerequisite for any finding of an Article 82 infringement.

- **Acquisition or creation of dominance/substantial market power**

NO - Article 82 EC only applies to undertakings that are already dominant at the time of the conduct in question. (However, EU law requires notification of mergers/acquisitions having a “Community dimension”. The Commission can prohibit a transaction, *inter alia*, if it leads to acquisition of a dominant position.)

- **Attempt to acquire or create dominance/substantial market power**

NO - In general, Article 82 EC only applies to undertakings that are already dominant at the time of the conduct in question. However, Article 82 also prevents companies from leveraging dominance on one market to commit abuses on other related markets.

- **Other (please identify)** NONE

**Why did your jurisdiction choose these stages?**

The wording of Article 82 limits the Commission’s powers. The reasons for choosing these stages have not been made clear. Generally it is considered that only a company with significant market power has the ability appreciably to restrict competition on a market through unilateral conduct.

**3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/ or as a “safe harbour”?**

While such a presumption does not exist in statutory law, case-law considers that high market shares are strong *prima facie* evidence of a dominant position.

**If so, please respond as applicable:**

- **What is the market share level of the dominance presumption?**

Above 70-80% market shares have been held in themselves to be evidence of a dominant position (*Hoffmann-La Roche*, *Hilti* and *Tetra Pak II*). In our experience, the most difficult assessments are for firms having a market share of between 40 and 50% (see *AKZO*, *Hoffmann-La Roche*). In such cases other factors such as barriers to entry, access to financial resources, economics of scale, vertical integration etc. have to be considered carefully in the evaluation.

In *AKZO* the ECJ summarized as follows:

*With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (judgment in Case 85/76 Hoffmann-La Roche v. Commission [1979] ECR 461, paragraph 41). That is the situation where there is a market share of 50% such as that found to exist in this case.*

In *Microsoft* the Commission reiterated that very large market shares in excess of 50% are considered in themselves and, but for exceptional circumstances, evidence of the existence of a dominant position.

**- Is the dominance presumption rebuttable?**

YES - If there are, for example, only low entry costs or if there is a financially strong competitor, even a high market share can be rebutted.

**- What is the market share level of the safe harbour?**

The Commission's 10<sup>th</sup> Report on Competition Policy stated that it had not ruled out the possibility of finding dominance at a market share of 20-40%. British Airways was found dominant with a market share of 39.7%.

A firm with a market share of below 25 % is not likely to be dominant (Discussion Paper, paragraph 31).

**- Is the safe harbour absolute (i.e., dominance/substantial market power cannot be found below the specified percentage level)?**

NO

**- What is the legal basis of the presumption?**

The presumption is based on case law and Commission decisions.

**- What is the legal basis for the safe harbor?**

Again, the presumption is based on case law and Commission decisions.

**4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold?**

NO - Dominance is the basic prerequisite for an Article 82 infringement.

**If so, please explain why and in which circumstances.**

**5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined?**

YES

**6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?<sup>1</sup>**

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<sup>1</sup> The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

- **Market share of the firm and its competitors**

YES

- **Market position and market behavior of competitors**

YES

- **Durability of market power**

YES - In *Hoffmann-La Roche* the Court held that the shares should be held “for some time”. See also the Commission’s decision in *Microsoft*.

- **Barriers to entry or expansion**

YES - The following have been considered to be barriers to entry: exclusive rights granted by the State (e.g. airport slots in *British Midland/Aer Lingus*), IP rights and high capital requirements for market entry (*United Brands*).

- **Economies of scale and scope/network effects**

YES - In its *United Brands* judgment, the ECJ recognized that economies of scale operate as a barrier to entry. The Commission established network effects as a barrier to entry in *Microsoft* by pointing to the fact that is extremely risky, time consuming and expensive to develop an alternative operating system.

- **Buyer power**

YES – See the European Court’s classic definition of dominance in the answer to B.1.

- **Access to upstream markets/vertical integration**

YES - In *United Brands* the vertical integration of the supplier was an important factor in the finding of dominance, because it made it easier for the undertaking to market its products.

- **Access to essential facilities**

YES - The essential facilities doctrine has been invoked in quite a number of cases. However, in *Oscar Bronner*, the ECJ made it clear that an obligation to grant access to a facility will only arise in very exceptional cases.

- **Market maturity/vitality**

YES

- **Financial resources of the firm and its competitors**

YES - In *Hoffmann-La Roche* and *United Brands* the ECJ considered the need for large capital investments as a barrier to entry. In *Continental Can* the Commission appeared to consider the undertaking's access to capital as an indicator of its dominance.

- **Profits of the firm**

NO

- **High prices (at absolute or comparative level)**

YES - In *United Brands* the Court ruled that UBC's geographical price discrimination was evidence of its dominance. However, high prices are usually covered in conduct, i.e. after dominance has already been established.

**Please specify any other criteria that you use to assess single-firm dominance/substantial market power:**

The superior technology of an undertaking has often been found to be a factor indicating dominance (e.g. *Hilti*, *Michelin*, *United Brands*, *Hoffmann-La Roche*). Although size is not *per se* an indicator of dominance on a particular market, the competition authorities have found it to be relevant in some situations – for example in *Michelin* where the ECJ took into account the advantages Michelin NV derived from belonging to a concern which operated throughout the world. Interestingly, the authorities have sometimes relied on an undertaking's own internal documentation as indicating its dominance (e.g. in *AKZO* where the entity regarded itself the “world market leader”).

**7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?**

The Discussion Paper emphasizes that market shares, barriers to entry and expansion and countervailing buyer power are the most relevant factors in assessing dominance.

**8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.**

See the answer to Question 1 above. The usual starting point has been market shares. Depending on how high this market share is, the other factors are of different importance. Thus, if the market share is say 80%, the other factors appear to be only of secondary importance. However, Commissioner Kroes has recently pointed out that market shares are only one (albeit strong) indicator of dominance and entry barriers and countervailing buyer power also have their role in the investigation.

**9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?**

The ECJ has ruled in a number of cases (e.g. *Magill*, *IMS*) that ownership of an intellectual property right is not in itself proof of a dominant position. The legal monopoly may not equate to an economic monopoly if the relevant product market has been found to be wider than the protected product. However, courts have considered intellectual property rights as a relevant factor indicating dominance (e.g. *Hilti*, *Hugin*, *Tetra Pak II*).

**Is intellectual property presumed to create dominance/substantial market power in your jurisdiction?**

No, but it can be a relevant factor indicating dominance.

**10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]**

Not applicable.

**11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.**

Article 82 covers both exploitative and exclusionary abuses. Thus it has been found to protect consumers, competition as a process and also fairness in trading conditions. While EU law does not prohibit dominance as such, it considers that the “very presence” of a dominant company on a market means that “competition has already been weakened” in that market (*Michelin*, *Hoffmann-La Roche*; Advocate General Kokott in *British Airways*). Thus, a dominant company is prohibited from engaging in conduct that would be perfectly lawful if carried out by a non-dominant company (e.g. rebate practices).

**C. State-created Monopolies**

**Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms*, *energy*, *water*, and *railways* sectors.**

General Introductory Comment: We consider that many of the issues raised by the rest of the questions apply more to the Member States of the EU and not to the EU itself. Therefore, our remaining answers are brief.

## I. State-created Monopolies

**1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned<sup>2</sup>, state-controlled<sup>3</sup>, state-enabled or facilitated<sup>4</sup>, recently privatized and/or liberalized, regional monopolies,<sup>5</sup> etc.**

The question is better answered by the Member States. However, in addition to the natural monopolies mentioned above, certain postal services are a state-controlled monopoly in many EU countries. Other activities are regulated in certain Member States by having licensing requirements, e.g. sale of alcohol, operation of taxi services, running the lottery.

The Treaty establishing the European Community refers to State monopolies in Article 31, Article 86 and to regimes of property ownership in Member States in Article 295.

**2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.<sup>6</sup>**

See General Introductory Comment.

**3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:**

- **Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?**
- **Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.**

See the reference to Article 86 above in the answer to Question 5 of Section A.

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<sup>2</sup> Those undertakings that are 100% owned by the State.

<sup>3</sup> The control belongs to the State, without taking into consideration the amount of the % of the State share.

<sup>4</sup> E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

<sup>5</sup> Includes public/private undertakings that are granted exclusive rights within a certain region.

<sup>6</sup> The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

**4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?**

The assessment does not differ.

**II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies**

**5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law) ?**

See General Introductory Comment. The EU does not engage in privatization projects (see Article 295 EC). Privatization is, however, encouraged in the context of the Commission's approval of rescue and restructuring aid to State-owned companies.

The Commission has been active in liberalization of certain sectors: e.g. energy; postal services; telecommunications; and transport.

**6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?**

The Commission's main objectives in promoting liberalization have been increasing competition, raising consumer welfare and market integration between Member States' economies.

**7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?**

Yes, in so far as the transaction is a "concentration" with a "Community dimension", which must therefore be notified to the Commission under the EU laws on merger control.

**8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:**

- **What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?**
- **To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.**

The Commission has a broad role and operates in many different sectors, not just competition. Thus it has acted as a regulator, a legislator and an advocate in promoting liberalization.

**D. General**

1. From among the following, how would you characterize your jurisdiction:  
developed / developing / transitioning?

Developed.

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.
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## References

### Cases

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## Books

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Bellamy, C., and Child, G., *European Community Law of Competition* (5<sup>th</sup> ed., Sweet & Maxwell, 2001) – Chapters 8, 9, 13.

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Jones, A., Sufrin, B., *EC Competition Law* (2<sup>nd</sup> edn., Oxford University Press, 2004) – Chapters 5, 6, 7, 8, 10 and 14.