Munich, 31 October 2006

ICN Unilateral Conduct Working Group: Responses to the Questionnaire

Dear Members of the Unilateral Conduct Working Group,

I would like to thank you for inviting me as an NGA to the Working Group. I hereby submit my responses to the questionnaire.

As suggested by you, the questions are not answered from the perspective of a given competition agency. Existing law will generally be taken into account from a comparative and international perspective. In line with the vocation of the institution I represent, specific attention will be given to the concept of dynamic competition and the interface with intellectual property. From an expert perspective, the answers aim at a most adequate framework for the control of unilateral conduct, nevertheless giving credit to the possible need for different solutions in different jurisdictions.

I also apologize for limiting citations to a minimum due to the little time available for the drafting of these responses.
A. Objectives of unilateral conduct laws

1. Nature of the rules that fix the objectives

Constitutions, especially younger ones, may contain rules specifically dealing with competition. Such rules normally provide for a duty of the state to “protect competition” without, however, spelling out more concrete objectives of competition policy. This is a wise decision that leaves substantial and very much-needed flexibility to the legislature, competition agencies and courts to develop and define their competition policy in the light of changing economic learning, and of economic and social developments. If one takes the EC Treaty as the “Constitution” of the European Community, one should cite Art. 3(1)(g) EC, listing protection of competition against distortions in the internal market among the purposes of Community law.

Some national competition law statutes list of more specific objectives of competition law. For instance, the preamble and s. 2 of the Competition Act of South Africa contain a multi-faceted list of objectives that go beyond the conventional focus on promoting efficiency. This list has the purpose of guiding the interpretation and application of the whole Act. Regarding unilateral conduct, in particular, an important objective of the Act is to ensure competitive prices and product choices to consumers. Hence, competition law may also be deployed to control excessive pricing by a dominant firm, even though such conduct may not entail any additional harm to competition. At this stage already, South African law makes a decision on the fundamental issue of whether rules on unilateral conduct should only address exclusionary practices or also cases of mere exploitation. The first approach would have to be considered as a clear efficiency approach, whereas the latter includes social objectives.

1 Such a provision is known, for instance, from the Russian Constitution.
In contrast to the U.S., where the monopolization rule of Sec. 2 Sherman Act leaves total flexibility to the agencies and the courts in defining the Act’s objectives, the laws of other countries reflect a decision on the before-mentioned issue by including clear-cut cases of exploitation in an explanatory list of illegal unilateral conduct. This is true in the EC, where Art. 82 EC, second subparagraph, lists instances of exploitation, with “imposing unfair purchase and selling prices and other unfair trading conditions” (lit. a), right at the beginning, and with a prohibition on discrimination (lit c). The more modern Sec. 19(4) of the German Act against Restraints of Competition, a provision of 1998, starts with a formula on exclusionary practices, followed by the (exploitative) conduct of demanding “payment or other business terms which differ from those that would very likely arise if effective competition existed”. Just the other way round, s. 8 of the South African Competition Act starts with a ban on excessive pricing to the detriment of consumers (lit a), followed by a list of explicitly “exclusionary” practices (lit. c and d).

From this, we can deduce: First, more recent legislation is, for historical reasons, more explicit about different cases of illegal conduct. Secondly, even the law of industrial economies does not limit itself to a pure efficiency approach. Thirdly, for social reasons, exploitation is a much greater concern in developing and emerging markets, where large parts of the population may be more easily and directly affected by supra-competitive pricing. Another example is the recent Draft of the Chinese Anti-Monopoly Law, which mentions monopoly pricing at the top of its list of abuses of market dominance.  

To the extent that statutory provisions clearly prohibit exploitation, competition law enforcers must abide by this decision. They cannot reduce the objectives of the legal

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2 For the English translation of the Act prepared by the Bundeskartellamt, see http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7__Novelle_e.pdf.

3 Art. 15(a) of the Draft. In a first reading, the draft was approved of by the State Council of the People’s Republic in June 2006; the second reading is not expected before 2007. The Draft is available with the author.
rules to a mere efficiency approach. This is also true for the EC, where the ECJ has expressly held that “by virtue of the very terms of [Art. 82 EC], the imposition of any unfair trading conditions by an undertaking holding a dominant position constitutes an abuse of that position.”

As far as exclusionary practices are concerned, statutory provisions usually leave it to practice whether a more economics-based efficiency approach or protection of the competitive process by keeping markets open is to be the preferred option.

2. Inclusion of non-competition influences as objectives

The question mentions two non-competition influences by way of example, namely “promotion of industrial policy” and “distributive welfare”. Nevertheless, from the perspective of competition policy these two cases raise fundamentally different issues.

From a vantage point of competition policy alone, competition laws should never be applied so as to promote industrial policies. However, at least in developing and emerging economies, policy-makers may well be tempted to apply rules on unilateral conduct with a view to protecting local, often smaller and economically weaker companies against multinational companies based abroad. Statutory provisions in developing countries may therefore emphasize rules on the control of market dominance rather than those on restrictive agreements. The general rules on exclusionary conduct should, however, sufficiently protect competition. By being especially hard on big competitors from abroad, competition authorities might well save local firms for some time, but will reduce their competitiveness in the long run.

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See Case 395/87, Tournier [1989] ECR 2521, para. 34. In this case, the ECJ was ready to control the level of copyright royalty fees imposed by the French collecting society on music club operators under Art. 82 EC by comparing them with the fees of other European societies.
As to “distributive welfare”, the questionnaire implies a conflict with the objective of protecting competition. Yet, as European law shows, this is not a foregone conclusion. In its Discussion Paper of December 2005 on reforming the application of Art. 82 EC, the Commission suggests transposing, in the framework of a so-called efficiency defense, the exemption provision of Art. 81(3) EC from the field of restrictive agreements to the abuse of market dominance. Art. 81(3) EC departs from the “aggregate” consumer welfare standard insofar as efficiency gains can only justify a restraint of competition if the conduct “allow[s] consumers a fair share of the benefit” (so-called “consumer surplus standard”). This differing standard may be seen by some as a purely social criterion. In the context of this “European rule”, the use of the term of a “non-competition influence” would however be misplaced. Competition and monopolies inherently distribute wealth in a different way. Therefore, an approach that does not look at the distributive effect in the framework of assessing the pro and anticompetitive effects is not at all neutral but blind in this sense. In disregard of the general virtues of competition, such a policy accepts the danger of transferring wealth away from consumers. In contrast, the European consumer surplus standard integrates the argument of distributive justice in a consistent and sound policy protecting competition. This is not to say that jurisdiction accepting an aggregate welfare standard act without legitimacy. The argument made here is only that both approaches are competition-oriented, and by choosing one of the two standards jurisdictions make an unavoidable value judgment on the social dimension of their competition policy.

The question remains whether pure exploitation (without any exclusion) is within the ambit of protecting competition. According to many economists, mere exploitation by a dominant firm, as in the case of excessive prices, should not be included. It does not harm competition but rather creates incentives for other undertakings to enter the market as new competitors. Such entry will however not be possible where

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entry barriers are high. This is especially true in the case of natural monopolies. Such monopolies have economic advantages. Therefore, they should not (and cannot) be, as such, proscribed by competition policy. Still, the question remains whether the monopolist should be allowed to exploit consumers by charging supra-competitive prices.\(^6\) Even though excessive pricing does not cause additional harm to competition, the negative distributive effects are caused by the absence of competition. Therefore, banning pure exploitation should not be branded as pursuing “non-competition” objectives. It should, however, be borne in mind that pure exploitation as unilateral conduct does not make competition deteriorate. This is where a line has to be drawn between a concept of protecting competition only against additional restraints, and a regulation of markets that do not work. There is no cogent economic argument against implementing such regulation in the context of rules on unilateral conduct.

3. **Balancing multiple objectives**

The analysis to question 2 has shown that there is a conflict between protecting competition and industrial policy. However, there is no inherent conflict between sound competition policy and achieving positive distributive effects. Of course combating pure exploitation may reduce incentives to enter into the monopolized market. It might thereby even reduce the level of potential competition. If, however, one takes into account that considerable entry barriers are required for rules on market dominance and exploitation to apply in the first place, this risk will be non-existent. In fact, there is a direct link between market dominance and excessive pricing on the one hand, and entry barriers on the other. Where entry barriers are low, market dominance, even of an undertaking holding a large market share, is unlikely. The prices charged by such an undertaking will hardly be considered ex-

\(^6\) The above-mentioned ECJ decision in *Tournier* (supra n. 4) illustrates this problem. The ECJ accepts the natural monopoly of collecting societies but still controls their pricing policy.
cessive. Conversely, where entry barriers are high, banning exploitation, including excessive prices, will not significantly threaten potential competition.

It has to be added that entry barriers are much higher in less-developed countries. Since consumers’ average ability to pay is considerably lower here than in developed economies, exploitation will be much less likely to attract new competitors, including those from abroad. This is why the U.S., as a large, traditionally very open and economically strong country, can even afford rather lenient rules on exclusionary practices, and may not be in terrible need of rules on exploitation, and still the country will not run a great risk that consumer will be significantly exploited. For developing countries, by contrast, it is much more important to have laws against exploitation.

4. Balancing over-deterrence with the risk of under-deterrence

The need to balance the risk of over-deterrence with the risk of under-deterrence is very much discussed when it comes to applying rules on unilateral conduct to holders of intellectual property. Particularly vexing is the problem of a duty to license. The argument goes that by intervening in such cases, competition law enforcers will gain little in price competition (equated with allocative efficiency), but will lose a lot by creating adverse effects regarding the incentives to invest in innovation (equated with dynamic efficiency). Nobody knows how much is lost by not investing in innovation in a specific case, as we do not know what particular innovations would have occurred otherwise. Some economists would, therefore, rather compare different costs of errors, namely the cost of false intervention with the cost of false non-intervention. By asserting that dynamic competition is much more important
than price competition for the growth of economies, such economists strongly argue against intervention where IP rights are concerned.  

This is not the place to decide whether such assumptions are correct. For the purpose of defining the objectives of competition policy, there is no doubt that effects on both price competition and dynamic competition should be taken into account in applying competition law to unilateral conduct. It is also true that both “types” of competition (or “efficiencies” – allocative and dynamic) can be in conflict. Still, the risk of over-deterrence should not be overestimated for a simple reason: in comparison with the true number of cases in which unilateral conduct harms competition, only few trespassers get caught. Procedures are usually lengthy. For victims of such conduct, the risk of losing private actions is considerable. Sanctions might not be severe enough to deter dominant undertakings that do not have to fear being caught in the first place. Even in the famous Magill case, in which the ECJ held that the IP holder had a duty to license, the decision came too late to allow the would-be licensee to survive economically.

5. Exemptions and exceptions

In contrast to the U.S. and the EC, some countries have adopted statutory provisions exempting the exercise of intellectual property rights from the application of competition law. Yet, to the extent that such countries have practice in this field, they usually try to strike an appropriate balance by not excluding application of competition law altogether. This is particularly true for the law in Japan, where Art. 21 of

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the Antimonopoly Act\(^9\) generally exempts conduct recognizable as the exercise of rights under intellectual property laws from the application of the act. Japan has nevertheless developed its own active policy on controlling patent and know-how licensing agreements. The Japanese Guidelines on Patent and Know-how Licensing Agreements state that Art. 21 does not bar application of the Act to the extent that a certain conduct “deviates from or runs counter to the purposes of the IPR system”.\(^{10}\) This rule alludes to the former German inherency theory, laid down explicitly in a former version of the Act against Restraints of Competition. The pertinent provision on licensing agreements was deleted from the Act as a consequence of the most recent reform in 2005, aiming at harmonizing German law with Art. 81 EC. The old provision stipulated control of licensing agreements only to the extent that the agreement contained restraints beyond the scope of protection of the IP right. Article 55 of the recent Chinese Draft for an Anti-Monopoly Law stipulates that the law is not applicable to intellectual property. However, it also states that the Act applies to the abuse of such rights. The Indian Competition Act (2002) exempts imposing conditions that are necessary for the protection of IPRs only to the extent that such conditions are “reasonable”.\(^{11}\)

Such provisions on intellectual property mirror the need to balance protection of competition with safeguarding incentives for innovation. The modern approach of competition authorities to this balancing, most clearly represented by transfer of

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\(^{11}\) s. 3(5)(i) of the Act. The provision only relates to restrictive agreements. No such exemption formula is found in the provision on abuse of dominant position.
technology guidelines in the U.S.\textsuperscript{12} and the EC,\textsuperscript{13} is guided by the general idea that competition policy and IP laws share the common goal of promoting dynamic competition (so-called theory of complementarity). For instance, the European TT Guidelines state: “Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition, by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.”\textsuperscript{14}

The same theory should be applied to the application of rules on unilateral conduct of undertakings whose market dominance is related to IPRs. Here, the issue of whether the mere refusal to license may constitute an act of monopolization or an abuse of market dominance is most difficult to answer.\textsuperscript{15} We do not have to evaluate the case-law on refusal to license in different jurisdictions here.\textsuperscript{16} It suffices here to point out that a general exemption from the application of the rules on unilateral conduct or even a refusal to license are not justified as such by the

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\textsuperscript{14} Id.

\textsuperscript{15} In contrast, no special treatment is mandated in cases in which additional abusive behavior can be identified. Such a case was decided by the Commission in 2005 in which the patent holder for a pharmaceutical invention engaged in abusive behavior aiming at excluding competition by generic drug producers after the expiry of the patent term; see Case COMP/A.37.507/F3, AstraZenica, \url{http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37507/en.pdf}.

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logic of IP policy. Rather, competition law and practice have to look at the effects of such refusal on competition, including price and dynamic competition.17

6. The role of the nature of the economy

It has been pointed out (above 3), that due to different market conditions economies with lower average income have to be more concerned about exploitation than countries with higher income.

In addition, when it comes to the application of competition law to IP rights, emerging markets that are strong importers of technology should not refrain from applying their rules on unilateral conduct to abuses related to IP rights. However, they have to develop sound competition policies in this regard that take account of possible adverse effects on incentives to innovate. In South Africa, such a policy is made possible by s. 10(4) of the Competition Act empowering the Competition Commission to exempt from the application of the Act an agreement or (unilateral) practice, or categories of agreements or of (unilateral) practices, that relate to the exercise of intellectual property rights.

7. Review and revision of the rules on unilateral conduct

The most important review of the application of rules on unilateral conduct is currently taking place in the EC.18 This review aims at drafting guidelines for the ap-
plication of Art. 82 EC by the Commission. Such application has to respect the objectives expressed by Art. 82 EC and the case law of the ECJ. Accordingly, the Commission’s Discussion Paper of December 2005 clearly states that it only deals with exclusionary practices as the only set of cases covered by Art. 82 EC and that it does not question the applicability of that provision to cases of discrimination and exploitation.19

8. Possibility of a ministry to overrule the agencies’ decision

A fundamental question for all countries is how much political discretion should be maintained so as to prefer diverging public-interest arguments to clear-cut competition policy. Given the difficulties to assess and evaluate “public interest” legally, it matters more which institution has the power to make the decision. This is why, in merger law, for instance, some jurisdictions allocate the decision-making power to the ministry and not to the politically (more) independent competition agency. A more sophisticated approach to bringing more transparency to the decision-making process consists in separating the decision based on competition policy arguments on the one hand from the public-interest decision on the other. The first decision may be attributed to the competition agency, whereas a more political institution decides on the second issue. This latter institutional design is known from Germany, where the Minister for the Economy still today has power to authorize a concentration prohibited by the Bundeskartellamt if the concentration is justified by an overriding public interest.20

Up until the last reform of 2005, the German Act against Restraints of Competition also included a provision that empowered the Minister to grant an exemption from

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18 See above n. 5.
19 Para. 3 Discussion Paper (supra n. 5).
20 § 42 German Act against Restraints of Competition (supra n. 2).
the cartel prohibition for public policy reasons.21 The provision was deleted in the process of harmonizing German law with the standards of Art. 81 EC and the new decentralized European enforcement system under Reg. 1/2003.22 Yet, the Minister, in contrast to the situation in merger cases, never used this power. Relating to the rules on unilateral conduct, the Minister never had similar power; and nobody in Germany felt that such a rule was missing.

The reasons for this seem obvious: in contrast to merger cases, a ministerial waiver in the field of restrictive agreements and unilateral conduct would legalize behavior that immediately and directly harms competition and consumers. Such effects can never be in the public interest. It should therefore be for the competition agency to decide conclusively on unilateral conduct by pursuing clear-cut competition-oriented objectives.

9. **Difficulties experienced with the objectives for unilateral conduct rules**

An answer to Question 9 does not seem necessary. A sound approach to the objectives of unilateral conduct rules has been sketched above with the answers to Questions 1 through 8.

**B. Assessment of dominance/substantial market power**

_Preliminary remark:_ The questions of this section refer to “single-firm” dominance/substantial market power only, whereas some jurisdictions also control “col

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21 § 8 of the former version of the Act against Restraints of Competition (supra n. 2).

lective” dominance. Whether ICN should also look at “collective” dominance is essentially a matter of policy. In any instance, it should be made clear that nothing can be inferred from the work of ICN on “single-firm” dominance to the effect that agencies should not control collective dominance.

1. Definition of dominance/substantial market power

Right at the outset, it has to be emphasized that the concept of dominance, in particular, is not of an economic nature only, but involves a normative judgment. From an economic perspective, undertakings regularly have “some” market power. From a legal perspective, the question is the following: how much market power is needed for crossing the line to market dominance?

The right to harm competitors by unilateral conduct belongs to the very essence of a workable and competition-oriented market economy. Hence, the law should only intervene insofar as undertakings are strong enough to harm competition and consumers by unilateral conduct. Economists usually define as the ability to raise prices and lower output, which definition thereby alludes to the economic concept of a monopoly. The European Court of Justice prefers a more normative approach. It defines market dominance as the power of an undertaking to behave to an appreciable extent independently of its competitors, its customers and, ultimately, of the consumers.\textsuperscript{23} Of course, this capacity of acting independently relates to the parameters of competition, most importantly market prices, output, innovation, variety and quality of the goods and services.\textsuperscript{24}

Some other laws may differentiate within the concept of market dominance and even intervene below that threshold. Again, German law can be cited as an exam-


\textsuperscript{24} See Discussion Paper (supra n. 5), para. 24.
ple: Within the category of market-dominant firms, it distinguishes between undertakings that do not have any competitors or are not exposed to substantial competition in the relevant market on the one hand, and those holding a paramount market position in relation to their competitors on the other.25

The German concept of paramount market position must not be mixed up with forms of market power that lie below the threshold of market dominance. German law also intervenes, under certain conditions, in situations of “vertical dependence” of suppliers or purchasers26 and “superior market power” in relation to competitors.27 The first case, especially, has considerable practical importance. Vertical dependence is defined by the absence of sufficient and reasonable possibilities of resorting to other undertakings as suppliers or buyers. One very important example is the dependence of dealers on trademark owners (so-called brand dependence). Trademark owners may well compete vigorously in a given product market; still brand dependence may exist. The two concepts of vertical dependence and of superior market power in relation to competitors share the common feature of relating to bilateral relationships, whereas market dominance, including that of paramount market position, is defined in relation to all competitors. Hence, the first two concepts are also described as cases of “relative market power” in contrast to – absolute – market dominance.

This idea of “relative” market power also explains why the pertinent rules of German law only protect “small and medium-sized enterprises”. Seen in the light of the objectives of competition law, these rules may be considered as problematic, at least as far as the case of “superior market power in relation to competitors” is concerned. However, by stipulating that undertakings with superior market power must

25 See § 19(2) of the Act against Restraints of Competition (supra n. 2).
26 See § 20(2) of the Act against Restraints of Competition (supra n. 2).
27 See § 20(4) of the Act against Restraints of Competition (supra n. 2).
not hinder small and medium-sized competitors “in an unfair manner”, the German legislature has implemented a rule of competition law which, in other jurisdictions, may well be found in the body of unfair competition or trade practicing law.

2. **Stage of intervention**

Question 2 alludes to the fundamental difference between the wording of Sec. 2 of the U.S. Sherman Act, prohibiting any monopolization or attempt at monopolization, and the European-style prohibition on abuse of market dominance (Art. 82 EC).

According to the wording of Sec. 2 Sherman Act, U.S. antitrust law seems to intervene at an earlier stage than EC law. However, since U.S. practice regularly requires market power as a prerequisite for a convincing theory on monopolization, standards on both sides of the Atlantic do not have to be substantially different. Practice and interpretation of the provisions are more important than the mere wording of the statutory provisions.

3. **Presumption of market dominance/substantial market power at certain market share thresholds and safe-harbor thresholds**

One of the characteristics of German law is its rebuttable presumption of market dominance at a market share of at least one-third. The Chinese Draft Anti-Monopoly Law is obviously inspired by the German example by proposing a pre-

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28 § 20(4) Act against Restraints of Competition.

29 § 19(3) Act against Restraints of Competition (supra n. 2).
sumption at a market share of more than a half. In contrast to German law, the Chinese Draft also adopts a safe harbor at a market-share threshold, namely up to a market share of 10%. South African competition law has implemented a three-step presumption of dominance. Below a market share of 35%, a firm is only held to be dominant if market power can be proven. At a market share of at least 45%, a firm is always considered to be dominant. Within the 10% margin – between 35 and 45% - the law provides for a rebuttable presumption of dominance. Hence, only below a market share of 45% is the firm allowed to show that it has no market power.

Since market shares can only provide an indication of market dominance, presumptions are not unproblematic. This is the more so in highly dynamic technology-based markets. The market share of a large competitor may well be the result of already outdated technology, while another undertaking still holding a small (or no) market share has already developed superior technology that will confer on it considerable market power. In addition, market shares in dynamic markets can be extremely volatile. Still, market share presumptions are not as such to be condemned. They can be helpful, for younger competition law agencies, in particular, in successfully defending their decisions in court. Still, market shares should be rebuttable. As explained above, this is not the case, for instance, in South Africa. However, South African law, in contrast to other jurisdictions, provides for the possibility of an exemption to be accorded by the Competition Commission also with regard to unilateral conduct. Thereby, South African law maintains better control over po-

30 Art. 14(1)(i) of the Draft. The provision does not make clear whether the presumption is rebuttable or not.

31 Art. 14(2) of the Draft which, in its official English translation, reads as a non-rebuttable presumption (“shall not be concluded”).

32 See s. 7 of the Competition Act.

33 See s. 10 of the Competition Act.
tentially problematic cases, without being forced to ban overwhelmingly pro-
competitive behavior only because of a large market share.

EC law neither stipulates market share presumptions for dominance nor market
shares as safe harbors in the field of unilateral conduct. Still, case law has always
referred to market shares as a strong indication of a dominant position.34 Thereby,
market shares are used in practice for assessing the likelihood of dominance.35
Above 50% market share, it is held to be very likely that the undertaking is domi-
nant, provided that competitors hold a much smaller share. Below 25%, it is thought
that dominance is very unlikely. Above 40%, existence of dominance is more likely
than not. In EC law, market shares only work as a “proxy” for market power, the
only decisive factor.36

4. Intervention below the level of market dominance/substantial market power

As explained (above 2), German law provides an example of a national law that
also intervenes below the level of market dominance, namely in cases of so-called
relative market power.

It has to be added here that, in the framework of the reformed EC enforcement sys-
tem under Reg. 1/2003,37 the agencies and courts in the EU Member States are not
hindered in adopting and applying domestic rules on unilateral conduct that are
 stricter than Art. 82 EC. Whereas the Commission had initially proposed that stric-
ter domestic rules may not be applied within the scope of application of Art. 82 EC,
the final text of the Regulation reacts to resistance of Member States, not least of

35 See also Discussion Paper (supra n. 5), para. 31.
36 Discussion Paper (supra n. 5), para. 32.
37 Supra n. 22.
Germany, who want to continue to apply their laws. This decision is well justified, since domestic rules intervening below the threshold of market dominance, as the German example on vertical dependence in particular demonstrates (supra at 2.), address scenarios substantially different from those captured by Art. 82 EC.

5. Where does the market share assessment enter into the analysis?

Given that market shares work as an indicator of market power, identifying the market share will often constitute the first step in assessing market dominance. In its Discussion Paper on Art. 82 EC, the European Commission also calls the assessment of the market shares of the competitors in a market and their development over time the “starting point” of testing market dominance.

Still, statutory law will usually not require that the market share be measured first, although some laws listing the criteria for assessing market dominance may well mention the market share criterion first. Sometimes, the assessment of market shares can be extremely difficult, whereas other factors are more readily available. As explained (above 3), this has to be kept in mind in the case of highly dynamic and technology-based markets, in which changes of market shares are highly unpredictable and actual market shares are less reliable as indicators of market power.

6. What are the criteria for assessing market power?

Some of the criteria listed by the questionnaire are not unproblematic. Having “access” to the upstream market and to essential facilities does not prove anything. The question will rather be, according at least to some laws, whether the undertaking has “control”, for instance, over essential facilities, allowing them to “exclude

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38 See § 19(2) No. 2 German Act against Restraints of Competition; Art. 13(i) Chinese Draft Anti-Monopoly Law.
access” to the detriment of competitors. High prices may be an indicator of exploitation as one group of abuse, but not an indicator of market dominance. Conversely, high prices do not have to be the result of market dominance. For instance, higher prices in comparable markets may be caused by different cost structures. Higher relative profits may be explained by a higher degree of productive efficiency of the undertaking considered.

The questionnaire does not list intellectual property rights, although Question 9 directly relates to their role for assessing market power. In fact, even statutes that list criteria for the assessment of market power quite rightly do not mention IPRs. This is a well-justified approach, as will be explained in the comments on Question 9.

7. Most important criteria

The criteria listed under Question 6 are rather diverse in nature. Some of them, like the relative market share, are mere indicators of market power, but not a cause of it, whereas others, like the existence of barriers to entry, typically favor the development of market dominance. To sum up: Even an undertaking holding a very high market share cannot be considered dominant if smaller competitors can easily raise production or if new competitors will be able to readily enter the market as a reaction to high prices charged by the larger undertaking. This is why, ultimately, those criteria that address the causes of market dominance are more important, namely barriers to entry or expansion, network effects, control over essential facilities, and relative financial strength. Among these criteria, that of “barriers to entry and expansion” is to be held most important. The other ones only describe scenarios in which barriers to entry exist.

8. Evaluation and weighing of different factors by the authority
This is a question to be answered by the authorities only.

9. Competitive significance of IPRs – presumption of market power

IPRs are often described as “legal monopolies”. Such terminology, however, is highly misleading for the purposes of competition law and policy. IPRs share the common feature of granting “exclusivity”, enabling the right holder to exclude third parties from the use of the subject matter of protection. Exclusivity, in this sense, must not be equated with substantial market power or market dominance. Holders of different rights may well compete in the same product market; or different technologies may compete as an input for the production of the same good. This is not to say that in some instances IPRs are not highly relevant for the assessment of market power. Yet, assessing the effect of an IPR on market dominance will always require a thorough analysis of the individual case.

The interface of IPRs and competition is usually discussed in the light of the patent paradigm, with the patent as a right to promote innovation and protect technology. Other IPRs, like copyrights and trademarks, are however quite different and affect markets differently. This is why, right at the outset, a distinction has to be made between different rights.

Trademarks are probably the least problematic IPRs when it comes to competition. Trademarks aim at enabling the consumer to distinguish certain goods and services according to their source. This is why the trademark system as such enhances competition and does not restrain it. By allowing the consumer to punish the trade-

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39 Legislatures may reduce the exclusive right to a mere remuneration right in some instances. Some authors, especially in English writing, call this a “liability rule”.

40 In principle, modern trademark law also allows trademarks for mere colors and three-dimensional forms. However, trademark offices and courts in the EU, including the ECJ, in particular, have become very reluctant to accept applications for such trademarks. Humans can only distin-
mark owner for poor quality, the trademark system also gives incentives for innovation.

Copyrights seem much less problematic than patents. Copyrighted works are “original” by definition. Still, this does not mean that different works do not compete in the same market. For instance, film producers compete fiercely. They try to convince spectators to prefer their movies, although their movies are not the same. Not being able to read all the novels that he may like, also the most fervent lover of literature has to make a choice. Whereas many copyright-related markets are competitive in this sense, some copyrighted markets are extremely monopolized. The latter is true in the field of scientific and academic publishing. Young researchers sometimes have to publish in specific journals in order to build a career. Research institutions have no choice as to the considerable number of publications they need to order. The example of academic publishing shows that copyright may well give rise to market dominance when it protects access to indispensable information.41

From a competition policy perspective, patents clearly constitute the most problematic type of IPRs. Still, controlling the subject matter of patent protection does not necessarily result in controlling the market. Several pharmaceutical companies holding different patents for drugs that cure the same disease compete in the same market. In contrast, a company finding a revolutionary drug against a yet uncurable disease would win the whole market.

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41 This was exactly the situation in the famous *Magill* case, in which the ECJ held for the first time that refusal to license a copyright, under certain conditions, may constitute an abuse of market dominance in the sense of Art. 82 EC; see Joint Cases C-241 und 242/91 P, *RTE v Commission*, [1995] ECR I-743.
For the purposes of assessing market dominance, it seems wise to distinguish three different types of IPRs: (1.) “competing” rights, (2.) merely “successful” rights, and (3.) “indispensable” rights.

(1.) “Competing” rights protect competing subject matter (for instance, so-called substitution patents for technology, copyrights in movies, music and novels, and, of course, trademarks) and therefore do not give rise to market dominance.

(2.) Merely “successful” rights, just like “indispensable” rights, lead to market dominance and substantial market power. But in the case of merely “successful” rights, the relevant market remains contestable during the term of protection. An example would be the patent for a drug that, for the first time, is capable of curing a rare, so-called orphan disease. The patent will allocate the whole market to the patent holder. The market, however, remains contestable, since even the day after a competitor may enter the market with another effective substance, possibly protected by another patent. The exclusivity of the patent only excludes competition by imitation, but does not hinder the competitor to enter the market by substitution. However, in the example of an orphan disease, entry barriers are extremely high as pharmaceutical companies will not target diseases that only affect a small number of patients. Even beyond the case of orphan diseases, pharmaceutical companies with “successful” patents act rationally by charging monopoly prices as long as they can.

(3.) “Exclusionary” rights differ from merely “successful” rights. Exclusionary rights not only exclude imitation, but also substitution. The market is no longer contestable. There are two possible reasons for this effect. In the first scenario, the IP system itself excludes substitution. This was so in the Ma-

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42 On the distinction between these two rights, see Comments by the Max Planck Institute for Intellectual Property (supra n. 17), para. 22.
gill case decided by the ECJ. In this case, UK and Irish law, in its interpretation by the courts, granted copyright protection for mere TV listings. This gave total control to broadcasting companies over the information needed by independent publishers for the printing of comprehensive TV guides. As a consequence, independent publishers were excluded from the market for TV guides. In the second scenario, the IP system is not deficient as such. However, market circumstances outside the IP system, like standardization and network effects, exclude the use of different subject matter from the market. The potential competitor can only enter the market by using the incumbent’s IP right.

For the assessment of market dominance or substantial market power it is immaterial whether a right is merely successful or exclusionary, though the difference may be relevant for the question of whether refusal to license constitutes abusive behavior. In general, the preceding analysis shows that IPRs do not necessarily cause market power. Even in the context of IPRs, one is best advised, for the assessment of market power, to rely on the general criteria, most importantly by looking at the market share as an indicator and the existence of barriers to entry. IPRs may then be relevant for the existence of substantial barriers to entry.

In the light of the case law of the ECJ, there is also the question of whether there is a distinct market for the IPR or whether, for assessing market power, one has to refer to the product market only. In IMS Health, the last case decided so far on refusal to license, the ECJ distinguished a “potential” upstream market for the IP li-

43 Supra n. 8.

44 For an example, see the decision of 13 July 2004, [2005] IIC 742 – Standard Tight-Head Drum (English translation). In this decision, the court decided in the sense of a duty to license a patent under German competition law. At about the time of the grant of the patent, the German chemical industry had accepted the patented invention as an industry standard.

45 In this regard, see the Comments by the Max Planck Institute for Intellectual Property (supra n. 17), para. 22.
cence from the downstream service market and concluded that the rightholder held a market-dominating position in the market for the IP right.\(^\text{46}\) In its Discussion Paper on Art. 82 EC, the Commission seems to follow this approach.\(^\text{47}\) Still, this approach is not beyond doubt. It is true that in all situations of an “indispensable” right, the potential competitor needs to have access to the IPR as an essential input on the downstream product or service market. However, in a scenario in which market dominance arises from factors outside the IPR, like in cases of de jure standardization and network effects, market dominance is generated on the level of the product or service market, whereas the affirmation of an upstream IP market does not contribute anything to explaining why market dominance exists. Therefore, it is better to concentrate on the product or service market, which is actually the market in which competition is in need of protection.

The foregoing comments seem to argue against a presumption that IPRs create market dominance or substantial market power. From an economic perspective, rejection of such a presumption seems definitely correct. Accordingly, the U.S. Supreme Court has recently – on 1 March 2006 – repealed its former jurisprudence according to which patents were presumed to create market power.\(^\text{48}\) Whereas former jurisprudence had affirmed a per-se rule on tying with a patented product as the tying product, the Supreme Court now also rejects even a rebuttable presumption, based on the idea that many patents create no market power at all. Whereas this approach is well justified from an economic perspective, one should also take into account that presumptions have the purpose of making the administration of competition law more effective, based on a reasonable distribution of the burden of proof. Given


\(^{47}\) Discussion Paper (supra n. 5), para. 227.

the fact that the patent system in the U.S. has expanded considerably in recent years and is nowadays increasingly used as a weapon to foreclose markets, which consequently causes more and more public criticism, the decision of the U.S. Supreme Court may well be more problematic than it seems in the light of pure economic theory. In addition, in the field of private enforcement, the plaintiff may well have considerable difficulty to produce the necessary evidence for inferring market power from the patent. To sum up: Although economic theory shows that patents do not necessarily lead to market dominance or substantial market power, jurisdictions may find good arguments justifying a rebuttable presumption to this effect.

10. Assessment of dominance/substantial market power in small and isolated economies

In principle, there are no reasons why the assessment of dominance/substantial market power should follow different rules in small and isolated economies. The fact of having a small and isolated economy, however, is relevant, at least at different stages of the assessment.

First, if economies are small and isolated, it will be more likely that the relevant geographic market will also be relatively small. Consequently, it will be more likely that those economies have to cope more with the problem of market dominance. Free trade agreements may partially solve the problem insofar as they help to extend the relevant market of supply beyond national borders.49

49 National competition authorities should not limit the definition of the relevant geographic market to their domestic territory. In contrast to this view, the German Federal Supreme Court had previously held that the relevant geographic market may not extend beyond national borders; see [131] BGHZ 107, at 113 (1995) - Backofenmarkt. This decision was repealed recently; see Decision of 5 April 2004 - Staubsaugerbeutel, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2004-10&nr=30706&linked=bes&Blank=1&file=dokument.pdf. Similarly, even the German legislature
Secondly, the fact that an economy is isolated may be taken into account in the framework of assessing barriers to entry. Potential competition may be less likely in remote regions of the world, even more so if they are relatively small and economically weak.

Thirdly, in smaller economies undertakings are usually much smaller and financially weaker. This is why foreign (multinational) firms entering the markets of such countries pose a specific threat. They may easily exclude weaker domestic competitors from the market. Therefore, smaller economies should put a special emphasis on the control of market dominance. Whether there is the need to apply more lenient standards to smaller, though dominant, domestic firms with a view to increasing their competitiveness, is less clear. Such an approach would replace sound competition policy by industrial policy and harm domestic consumers. In addition, a strategy of insulating domestic firms from competition runs the risk of making them less efficient and, consequently, will reduce their competitiveness at least in the long run.

11. **Link between the definition and assessment of market dominance/substantial market power and the objectives of unilateral conduct laws**

As the preceding comments show, the assessment of market dominance/substantial market power has to focus on the existence of barriers to entry in particular. Such barriers promise durable success of a business strategy relying on exclusionary conduct. By relying on such an assessment of market dominance, competition authorities are best advised to implement a policy aiming at keeping markets open and pro-

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50 Note, for instance, that s. 6 of the South African Competition Act mandates the Minister to set a certain annual turnover threshold below which the rules on unilateral conduct do not apply.
tecting the competitive process. Simultaneously, open markets also tend to raise the level of innovation. Open markets guarantee that new competitors with new product ideas can enter the market and that innovation is not only entrusted to single dominant undertakings.

C. State-created monopolies

Since domestic legislatures maintain state monopolies in very different sectors of the economy, it is not possible to give any opinion on the questions without detailed analysis of the situation in individual countries. This is why the questions of this section are completely left to the agencies.

D. General

The two questions of this section, directly referring to individual countries, should also be answered by the agencies.

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