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***Can We Finally Say Farewell to the
“Special Responsibility”
of Dominant Companies?***

European University Institute
Robert Schuman Centre for Advanced Studies
2007 EU Competition Law and Policy Workshop/Proceedings



To be published in the following volume:
Claus-Dieter Ehlermann and Mel Marquis (eds.),
*European Competition Law Annual 2007:
A Reformed Approach to Article 82 EC*,
Hart Publishing, Oxford/Portland, Oregon (in preparation).

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12th Annual Competition Law and Policy Workshop
Robert Schuman Centre, 8-9 June 2007
EUI, Florence

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Can we finally say farewell to the “special responsibility” of dominant companies?
8 June 2007

Of all the stimulating questions included by Professor Ehlermann in his background paper, I was particularly attracted by one of the topics he raised, i.e., the concept of a “special responsibility” imposed on dominant companies not to allow their conduct to impair genuine undistorted competition in the market. The specific question Professor Ehlermann asks in this respect is: *What is the guidance provided by the concept of “special responsibility” of the dominant company, in order to identify anti-competitive behaviour?*

Reading the background paper, I was initially surprised by the fact that Professor Ehlermann had included this question under the heading of “dominance”, whereas I would normally have thought of “special responsibility” as a notion related rather to the second tier in the application of Article 82 EC, i.e., the concept of abuse.

But when going through the precedents to prepare this paper, I was even more surprised to see that the first time the Court of Justice referred to this special responsibility of dominant firms, in its famous *Michelin I* judgement of 1983,¹ it had done so while analyzing whether Michelin was in a dominant position, and rejecting the company’s argument, supported by the French Government, that it was being penalized for the quality of its products and services.

Notwithstanding this first judgment, in subsequent cases the special responsibility of dominant companies has been mentioned when analyzing the abusive nature of the commercial practices at question, rather than in the context of dominance.

Should we draw any practical consequence from this different use of the concept of special responsibility? I’m not sure. But it could be argued that the application of the concept of “special responsibility” would be less controversial if it were restricted to indicating when a company should be aware that, given its market power (or to use legal terminology, due to its dominant position), its commercial practices could have an exclusionary effect, rather than applying this concept as a normative example of abuse. In other words, a company would be subject to this special responsibility whenever it has an unconstrained degree of market power enabling it to adopt unilateral commercial practices capable of producing anticompetitive effects.

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¹ Case 322/81, *Michelin v Commission* [1983] ECR 3461, para. 57.

This interpretation would have the advantage bridging the concepts of dominance and abuse by linking the degree of dominance with the capability of engaging in conduct that restricts competition, in what the Commission's Discussion Paper on Article 82 describes as sliding scales:² the degree of special responsibility of the company would depend on the higher or lower degree of its market power and on the higher or lower capability of the specific conduct to produce anticompetitive effects.

There is a downside to this interpretation. Once the focus is set on the effects of a firm's conduct, it is (at least theoretically) possible that unilateral conduct by a *non*-dominant company will restrict competition.³ In sliding scale terms, this would occur when the conduct is highly likely to produce exclusionary effects, even though it is pursued by companies with a low degree of market power. This damaging conduct would not be prohibited by Article 81, due to its unilateral nature, nor by Article 82, which of course only applies to dominant companies. Yet this criticism seems more theoretical than practical: it is difficult to imagine a company successfully adopting and maintaining unilateral abusive conduct if it does not enjoy a high degree of market power, i.e., if it is not dominant.

We come, then, to the question raised by Professor Ehlermann: does the concept of "special responsibility" provide any real and useful guidance to the dominant company in order to identify which kinds of behaviour can be considered anticompetitive and which are merely "normal competition" (whatever this expression may mean)?

The answer is clearly no. The concept of "special responsibility" neither helps to recognize when conduct will be considered abusive nor explains why it will be prohibited. For example, it does not allow a company to know, when establishing its discount systems, whether its reference periods will be considered "relatively long" within the meaning of *Michelin I*,⁴ or to predict when offering bundled rebates for its different brands may lead to considering such rebates as loyalty-enhancing and therefore abusive.⁵

² *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (Dec. 2005), <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>, para. 59.

³ The group of experts that commented on Article 82 referred to this possibility:

"Our proposed effect-based approach also allows us to capture in a balanced and meaningful way the notion of special responsibility of a dominant firm. The reference to such responsibility is often intended to prohibit some practices when exerted by a dominant firm, while considering them lawful if practiced by smaller competitors. Once we focus on the exclusionary effects of market practices, the notion of special responsibility naturally emerges from the analysis, in that certain practices are to be prohibited when they determine exclusionary effects, while they are lawful as long as no competitive harm is involved. Since in this analysis we do not need to assess the existence of dominance separately, the special responsibility implicitly applies to any conduct and firm that (is able to) interfere and distort the competitive process of entry into the market."

Report by the EAGCP, "An economic approach to Article 82", p. 15. The report is available at: http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.

⁴ In the *Michelin I* case (cited *supra* note 2), one year was considered too long whereas this same duration was accepted in the *British Gypsum* case. See Notice pursuant to Article 19 (3) of Council Regulation No 17

The essence of this special responsibility is to prohibit some practices when exerted by a dominant firm while considering them lawful if practiced by smaller competitors.

Coming back to the first appearance of this “special responsibility” in *Michelin I*, the Court there stated that:

“A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position,⁶ the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market.”⁷

The Commission, supported by the Community Courts, has repeatedly broadened the scope of the special responsibility with almost every new Article 82 decision, depriving this concept of any role it may have had in providing guidance as to when and why a specific unilateral practice should be considered anticompetitive.

The concept of special responsibility has thus become a mere litany chanted by the Commission and the Courts to conclude that certain kinds of conduct that are ubiquitous in the market place will nonetheless be prohibited when practiced by dominant companies and will give rise to immense fines. In other words, in the traditional form-based approach to Article 82, the Commission and the Courts have relied on the doctrine of special responsibility to sanction perfectly sound commercial practices that are otherwise considered pro-competitive, without having to prove the anticompetitive effects of such practices.

For instance, in the *British Gypsum*⁸ and the *Atlantic Container Liner*⁹ judgments, the ECJ stated that the special responsibility prevents dominant companies from using commercial practices that are perfectly standard in the market, “notwithstanding the fact that they are adopted by most, if not all, of their competitors”. But it can be argued that, by

concerning an application for negative clearance or exemption pursuant to Article 85 (3) of the EEC Treaty - Case No IV / 32.929 - *British Gypsum* - ‘Super Stockist Scheme’. 1992 OJ C321/9. In *British Airways*, six months was considered an acceptable reference period (see Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty, IV/D-2/34.780 - *Virgin/British Airways*, 2000 OJ L30/1), whereas in *Coca-Cola Export*, the permitted reference period was three months. See Commission Press release IP/90/7 of 9 January 1990.

⁵ The Coca-Cola Company, for instance, has been obliged to apply separate stocking commitment and rebates schemes for regular Cola, Light Cola and orange carbonated soft drinks. See Commission Decision of 22 June 2005 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Case COMP/A.39.116/B2 – *Coca-Cola*.

⁶ The fact that this doctrine is applicable irrespective of the reason for which the company has reached its dominant position clearly indicates that it applies not only to former legal monopolies but also to companies that have acquired a dominant position by competing in the market. There are strong reasons, however, suggesting that residual monopolies left over from the age of State-granted exclusive rights should be subject to tougher limitations.

⁷ *Michelin*, *supra* note 2, para. 57.

⁸ Case C-310/93 P, *BPB Industries and British Gypsum v Commission* [1995] ECR I-865.

⁹ Joined cases T-191/98, T-212/98, T-213/98 and T-214/98, *Atlantic Container Line v Commission* [2003] ECR II-3275.

imposing this limitation, the Court compels the dominant companies to behave precisely as a dominant company, i.e., to act to an appreciable extent independently of its competitors.

The same can be said of the duty imposed on the dominant company to refrain from applying commercial practices even where they have been specifically requested by its clients. By having to refuse its client's request, paradoxically the company is again forced to exert its market power *vis-à-vis* its customers.

Following the *Ice-cream cabinet* case,¹⁰ we also know that dominant companies may even have to refrain from business activities that “contribute to an improvement in production or distribution of goods”. But wouldn't such conduct normally regarded as efficient, for instance in the context of Article 81(3)? Isn't this obligation somehow at odds with the efficiency defence explicitly recognized in the Discussion Paper, and somehow also in the latest *British Airways*¹¹ judgment?

Furthermore, the special responsibility imposed on dominant companies has also required them to ignore the basic economic and commercial logic of discounts, by making it abusive to offer specific discounts only to marginal clients instead of extending them across the board, as in *Irish Sugar*,¹² or by stating the general principle that rebates can be abusive if they are not related to any specific cost savings or efficiency gains (*British Airways*).

As a last example of this expanding interpretation of the notion of special responsibility doctrine, the recent *Wannadoo*¹³ judgment reminds us that this doctrine may even preclude a dominant company from aligning its promotional prices with those of its non-dominant competitors, that is, it may preclude them from using the so-called “meeting competition defence”, which had at least theoretically been recognized in previous case law.

It is therefore safe to conclude that the concept of special responsibility does not provide any guidance either for determining when a company can be subject to Article 82 or for identifying or explaining why sound commercial practices that are totally common in the marketplace become abusive when applied by companies burdened with such a special responsibility.

The consequence of such an unrestrained application of the concept of special responsibility is that, ultimately, proof of dominance is almost sufficient to establish an abuse. This has even been recognized by members of the Chief Economist's office.^{14, 15}

¹⁰ Case C-344/98, *Masterfoods v Ice Cream*, [2000] ECR I-11369.

¹¹ Case C-95/04 P, *British Airways v Commission*, not yet reported.

¹² Case T-228/97, *Irish Sugar v Commission*, [1999], ECR II-2969.

¹³ Case T- 339/04, *Wanadoo v. Commission*, not yet reported.

¹⁴ Miguel de la Mano, “The dominance concept: new wine in old bottles”, FTC/DOJ Hearings on single-firm conduct, Washington DC, 7 March 2007.

This problem is reinforced by the fact that neither the Commission's decisional practice nor the case law of the Community Courts provides an alternative consistent definition of abuse, particularly with respect to exclusionary abuses. On the contrary, the application of Article 82 has been driven by vague slogans such as "special responsibility", "competition on the merits", "normal competition", and "level playing field", the exact meanings of which have never been defined.

The diagnosis offered by Einer Elhauge in the context of US monopolization law ("monopolization doctrine currently uses vacuous standards and conclusory labels that provide no meaningful guidance about which conduct will be condemned as exclusionary"¹⁶) is perfectly applicable to the traditional practice of the Commission and the Community Courts in Article 82 cases.

A couple of years ago, the OECD's paper "Competition on the Merits"¹⁷ pointed out that the days in which competition authorities can rely such slogans without drawing bitter criticism are dwindling. And Professor Joskow has explained that "antitrust policy needs to evolve in a way that firms receive clear signs from these enforcement institutions, so that they are able to determine where to draw the line between behaviour and market structures that are likely to be legal and those that are illegal."¹⁸

The Commission's Discussion Paper on Article 82, or at least the general principles set out in its initial sections, can be regarded as a first step towards this desirable goal. The fact that the Paper patently ignores the concept of special responsibility is in itself noticeable, even though it still has recourse to some of the other slogans mentioned above such as "normal competition" and "competition of the merits". Furthermore, the most recent judgments also seem to show that the CFI and the ECJ are also trying to avoid relying on the concept of special responsibility. The disappointing and poorly argued *Wannadoo* judgment¹⁹ does mention it, but only by quoting the contested decision of the Commission and not by including the concept in its own reasoning.

The Discussion Paper clearly opts for the "equally efficient firm" test to distinguish exclusionary conduct from healthy competition. This is certainly a first step in the right direction, although it is unfortunate that the Paper does not explain why it has opted for this specific test and under which circumstances it believes that it is superior to other tests such as the no economic sense test, the profit sacrifice test, the consumer welfare test or Professor Elhauge's efficiency test.

¹⁵ It is worth noting that, while under the traditional formalistic approach to Article 82 the special responsibility implies that dominance is pivotal to the application of this provision, to a point that little or no attention is given to the anticompetitive effects of the conduct, under a purely economic approach the same special responsibility would imply that any anticompetitive conduct should be prohibited, regardless of whether the company involved is dominant or not. See the EACGP's report, *supra* note 4.

¹⁶ Einer Elhauge, "Defining better monopolisation Standards", 56 *Stanford Law Review* 253 (2003).

¹⁷ Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875360.

¹⁸ Paul Joskow, *Transaction Costs Economics, Antitrust Rules and Remedies*, Oxford University Press, 2002.

¹⁹ *Supra* note 15.

However, this initial optimism waters down when reading the second part of the Discussion Paper, where the analysis of several specific exclusionary practices is kept within the stringent orthodoxy of the existing case law.

This conflict between the new economic approach to Article 82 and the way it has traditionally been applied is clearly reflected in the Opinion by Advocate General Kokott in the Court's *British Airways* case, where she stated that any reorientation by the Commission in the application of Article 82 will have to remain within the framework prescribed for it by the provision itself as interpreted by the ECJ.²⁰

This proves that, if the application of Article 82 is to be reoriented towards a new economic approach, a goal I believe is now unanimously accepted, it will have to be done by applying a great deal of amnesia as regards most of its precedents and as regards the case law of the Community Courts. But it is impossible to make an omelette without breaking eggs. Furthermore, if the Commission wants to follow this path, it should plunge into it as soon as possible, making its position explicit and clear, using watertight arguments that can overcome the traditional approach embedded in its own former decisional practice and in the judgments of the ECJ and the CFI. If the Commission does not act decisively, then, given the increasingly decentralized application of EC competition law, national courts and national authorities will probably feel obliged by Article 16 of Regulation 1/2003 to refer to the traditional formalistic approach to Article 82, instead of applying the new, and for some time, judicially untested economic approach.

To this extent it is important for the Commission to change not only the way it has been applying Article 82 in terms of substance, but also the way it handles its administrative practice. As previously mentioned, enforcement institutions should endeavour to provide firms with clear signs of which kinds of conduct are likely to be legal and which kinds are likely to be condemned, a policy objective that is even more vital when an authority has publicly undertaken a new approach to certain practices. Presently the Commission only publishes decisions declaring the existence of abusive practices. No publicity (or only very limited publicity) is ever given to decisions in which it rejects complaints. Therefore, the precedents provide all sorts of examples of conduct that has been considered abusive. It is about time to start identifying clearly which ubiquitous practices should *not* be treated as anticompetitive and to create safe harbours in which all companies, whether dominant or not, will be able to compete. The best practical way the

²⁰ See paragraph 28 of the Opinion of Advocate General, in *British Airways*, *supra* note 13:

“In this context it is immaterial how the Commission intends to define its competition policy with regard to Article 82 EC for the future. Any reorientation in the application of Article 82 EC can be of relevance only for future decisions of the Commission, not for the legal assessment of a decision already taken. Moreover, even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by Article 82 EC as interpreted by the Court of Justice.” (footnote omitted)

Commission can do so is by publishing decisions repelling complaints based on Article 82.²¹

Given the Courts' record in sustaining all the Commission's decisions applying Article 82, it could be hoped that, if the new approach is clearly and substantially reasoned, the Courts will set aside many of their own judgments and endorse a reoriented approach to Article 82; an approach whereby the concept of special responsibility will finally disappear, or at least lose the major role it has played in the application of Article 82 in the last decade.

²¹ The Commission should also speed up the publication of its sanctioning decisions, which recently have dragged on for many months. Thus, it has not yet published any decision adopted under the "new approach" to Article 82. An appalling example is the *Tomra* decision (Case COMP/E-1/38.113 – *Prokent/Tomra*) adopted almost a year and a half ago (29 March 2006) and as of September 2007 is still unreported. If, as mentioned by a DG COMP official, this decision "can be considered an important step towards the envisaged reform of the application of Article 82 EC Treaty" (Frank Maier-Rigaud and Dovile Vaigauskaite. *Prokent/Tomra, a textbook case? Abuse of dominance under perfect information.*; Competition Policy Newsletter n° 2 (2006)], such an important decision should be immediately published to allow companies, practitioners and other enforcement authorities to grasp the extent and depth of the reformed application of article 82. This present excessive delays in publishing these decisions cannot be explained either by reasons of confidentiality (many other competition authorities are perfectly able to deliver public versions of their decisions immediately) or by difficulties of translation (hundreds of other Community acts are published every day in the OJ in 23 languages).