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Barriers to market entry and EC Competition law

Teresia Almgren

LINKÖPINGS UNIVERSITET

Avdelning, Institution
Division, Department

Ekonomiska institutionen
581 83 LINKÖPING

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Title

Författare Teresia Almgren
Author

Sammanfattning
Abstract

Barriers to entry are important from many aspects. For a firm entering a market it is important to know which barriers it is facing. From a competition authority's perspective it is necessary to know the extent of entry barriers to determine for example if a firm enjoys a dominant position. It is also necessary to know the entry barriers in order to create provisions to ensure free market entry.

However, there is not one generally accepted definition of entry barriers. This makes it difficult for players in the market to assess when they are conducting a prohibited action. The lack of a standard definition and a clear opinion of what constitutes a prohibited barrier according to competition law also result in a more complicated and time-consuming judicial process.

I provide the reader with different definitions in order to clarify the matter. I also present an overview of barriers to entry. I also discuss which barriers are interesting from a competition law perspective and why they are of interest.

I conclude that, from a competition law perspective, it is not the definition of entry barriers that is of most interest. The most important question is without doubt whether the individual barrier constitutes an infringement to EC competition policy. That assessment must be done on an individual basis and it is an assessment that is dependant on many factors, such as the relevant market, the type of barrier, the affect the barrier have on the market, any pro-competitive effects etc.

Nyckelord
Keyword
barriers to entry, market entry, barrier, competition law

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Hinder för marknadstillträde är viktigt i många avseenden. För ett företag som slår sig in på en ny marknad är det viktigt att veta vilka hinder det möter. För konkurrensrättsliga myndigheter är det nödvändigt att veta vilka hinder för marknadstillträde som existerar för att exempelvis kunna avgöra om ett företag har en dominerande ställning. Det är också nödvändigt att känna till hindren för att säkerställa en fri tillgång till marknaden.

Det saknas dock en generellt accepterad definition av hinder för marknadstillträde. Detta gör det svårare för de olika parterna på marknaden att veta om de begår en otillåten handling. Saknaden av en generellt accepterad definition och en klar åsikt om vad anses vara otillåtet enligt konkurrensrättsliga regler leder också till komplicerade och tidskrävande rättsliga processer.

Jag presenterar en rad olika definitioner samt en översikt över olika hinder för att klargöra ämnet. Jag diskuterar vilka hinder som är av intresse från ett konkurrensrättsligt perspektiv samt varför de är av intresse.

Jag kommer till slutsatsen att från ett konkurrensrättsligt perspektiv så är det inte definitionen i sig som är viktigast, utan man måste avgöra om ett hinder är otillåtet på en individuell basis. Vid avgörande måste hänsyn tas till en rad olika faktorer, expempelvis den relevanta marknaden, vilken sorts hinder det gäller, hindrets effekt på marknaden, om hindret genererar några positiva effekter mm.

Nyckelord
Keyword
barriers to entry, market entry, barrier, competition law, hinder för marknadstillträde

BARRIERS TO MARKET ENTRY AND EC COMPETITION LAW FEL! BOKMÄRKET ÄR INTE DEFINIERAT.

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Table of abbreviations
ESCS - European Coal and Steel Community
EEC - European Economic Community
EC - European Community
Euratom - European Atomic Energy Community
ECJ – European Court of Justice
CFI – Court of First Instance

Definitions

Sunk cost: Expenditure that has been made and that cannot be recovered[1]

Economies of scale: Per unit cost savings that increase as the number of items produced increases. As the number of units produced increases, fixed costs remain the same; therefore, the currency amount added to each unit to recover fixed costs is reduced.[2]

Market power: Strength of a firm on a particular market.[3]

Tying: the commercial practice of conditioning the sale of one product to the purchase of another product.[4]

Essential facility: A facility or infrastructure that is necessary for reaching customers and/or enabling competitors to carry on their business. A facility is essential if its duplication is impossible or extremely difficult due to physical, geographical, legal or economic constraints.[5] Examples of essential facilities are power lines, ports, airports, railway tracks, electricity networks, telephone networks and banking systems enabling electronic transfers of funds.[6]

Predatory pricing: Practice of pricing to drive current competitors out of business and to discourage new entrants in a market so that a firm can enjoy higher future profits. [7]

Incumbent: The term incumbent refers to any undertaking that is active on a market.

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[1] Pindyck, Rubinfeld, p. 673
[2] http://www.hjventures.com/glossary-economies-of-scale.html, 2004-01-11
[3] European Commission, On-line glossary, 2004-01-11
[4] European Commission, On-line glossary, 2004-01-11
[5] European Commission, On-line glossary, 2004-01-11
6 For a comprehensive account on essential facilities, see El-Tohami; The Application of the Essential Facilities Doctrine in European Community Competition Law, 2001
[7] Pindyck, Rubinfeld, p. 671

1. INTRODUCTION

1.1 Background[8]

The first significant step toward European integration going beyond intergovernmentalism was the setting-up of the European Coal and Steel Community. The Euratom and the European Economic Community (EEC) followed only a few years later. The EEC concentrated on economic integration by establishing the common market. Some 30 years later the Single European Act enhanced the creation of an internal market within the community. The internal market is characterised by the four freedoms: freedom of movement for people, capital, services and goods.

In order to maintain the internal market and to achieve the aims and objective of the EC it was essential to have a common competition policy. An important tool to ensure the creation of the single market and the integration process of the EC is its competition policy. The most important competition rules are Article 81 and 82 of the EC Treaty. These two articles contain two prohibitions, one regarding agreements distorting competition and the other regarding abuse of a dominating market position. Article 81 and 82 are general articles. They do not explicitly mention entry barriers but both the Commission and the ECJ have stated that barriers to entry can hinder market entry in a way that may be prohibited.

In spite of this recognition, there is not one generally accepted definition of barriers to entry. An overview of barriers to market entry has also not been presented. This makes it difficult for players in the market to assess when they are conducting a prohibited action. The lack of a standard definition and a clear opinion of what constitutes a prohibited barrier according to competition law also result in a more complicated and time-consuming judicial process.

The assessment of entry barriers is important from many aspects. For a firm entering a market it is important to know which barriers it is facing. From a competition authority's perspective it is necessary to know the extent of entry

[8] Craig, de Búrca, chapter 1

barriers to determine for example if a firm enjoys a dominant position. It is also necessary to know the entry barriers in order to create provisions to ensure free market entry.

The assessment of entry barriers involves a great deal of economics. For an economist it is natural to use economic tools to assess the extent of entry barriers. However, it is not a matter of course for a lawyer to rely on economic tools.

1.2 Problem

What is a barrier to entry? Which barriers to entry are of importance from a competition law perspective? Which barriers are unlawful? To what extent should economics be considered?

1.3 Aims

My ambition is to give the reader a clear overview of barriers to entry. I will do this by describing and classifying the barriers, with emphasis on the competition law classification. I will then discuss which barriers are interesting from a competition law perspective and why they are of interest. I will also discuss to what extent economic tools should be used in order to assess barriers to entry when competition law is applied.

1.4 Method

I will study relevant legal and economic material to explain the legal as well as the economic aspects of barriers to entry. I will then use that knowledge in my discussions and conclusions.

1.5 Sources

I will study the EC Treaty, and other relevant regulations to the EC competition policy. I will also study European case law in order to get a better understanding to what extent entry barriers pose competition problems. I will also study legal and economic doctrine that relates to market entry and barriers to entry.

1.6 Scope

I will not discuss such barriers to entry that are a result of a lack of a common standard.

2. EC COMPETITION LAW

2.1 Introduction[9]

The first significant step towards European integration going beyond intergovernmentalism was the setting-up of the ECSC, the European Coal and Steel Community. The ECSC Treaty was signed in 1951 and its purpose was to establish a common market in coal and steel. With the ECSC, a supranational authority whose independent institutions had the power to bind its constituent member States was established. In 1957 two other important steps towards integration were taken. The European Atomic Energy Community (Euratom) and the European Economic Community (EEC) were established. Treaties signed in Rome regulate both communities.

The EEC concentrated on economic integration, setting out its aims in the Preamble and in Article 2 of the Treaty. Its aims is to establish a common market, progressively to approximate the economic policies of the Member States, to promote harmonious development of economic activities throughout the Community, to increase stability and raise the standard of living, and to promote closer relations between the Member States. Barriers to trade were to be abolished and a common customs tariff was to be set up, undistorted competition was to be ensured, national economic and monetary policies were to be progressively co-ordinated and fiscal and social policies gradually harmonised.

The first large change to the EC (the term commonly used to describe the entity compromising the ECSC, EEC and Euratom) was the Single European Act, which came in to force in 1987.[10] The Single European Act (SEA) expressed a commitment "to adopt measures with the aim of progressively establishing the internal market". The internal market is characterised by the four freedoms: freedom of movement for people, capital, services and goods. Other changes introduced by SEA were the alteration of some voting procedures under the Treaty. The Maastricht (1993) and Amsterdam (1997) Treaties brought further changes to

[9] Craig, de Burca, chapter 1

[10] Weatherhill, Beaumont, p. 9

the constitutional structure of the original Community. The EC became the "European Union" and area of integration was expanded, but the initial objectives and aims were not changed.

In order to maintain the internal market and to achieve the aims and objective of the EC, it was essential to have a common competition policy.

2.2 EC competition law

Competition law has always played an important role in Community law. A number of differing objectives lie at the heart of competition policy, not all of which are mutually compatible.

One objective is to enhance efficiency, in the sense of maximising consumer welfare and achieving optimal allocation of resources. Traditional economic theory indicates that goods and services will be produced in the most efficient manner in circumstances of perfect competition or, more realistically, in circumstances of workable competition.[11]

A second objective of EC competition law is to protect consumers and smaller undertakings from large aggregations of economic power, whether in the form of the monopolistic dominance of a single undertaking or of agreements whereby rival undertakings co-ordinate their activity so as to act as one unit. Advocates of this approach may support it for different reasons. Some may be concerned with the threat that aggregations of economic power can constitute for the democratic process, others may favour it because it gives greater opportunities for small and medium-sized undertakings to enter the market.[12]

A third objective is to help in the creation of a Single European market and to prevent this intention from being disturbed by the activities of private undertakings. Certain aspects of community law are concerned with the creation of a single European market and therefore, as mentioned above, prohibits devices such as tariffs, quotas and the like which can impede the attainment of this goal. The

[11] Craig, de Burca, p.891
[12] Craig, de Burca, p.891

effectiveness of such Community norms would, however, be radically undermined if private undertakings could themselves partition the Community market along national lines.[13] The goal of the creation of the single market is not only to prevent undertakings from creating trade barriers between Member States, it is also enhanced by encouraging the economic players to operate on a Community-wide scale; to consider the entirety of the Community as their domestic market.[14]

Accordingly, for the EU competition authorities to become active, the restrictive practice or abuse must have a community dimension and hence be potentially incompatible with the Common market. The community dimension is reached when there is an effect on trade between Member States. The effect should have a direct or indirect, actual or potential influence on the flow or pattern of trade between at least two Member States of the community. An effect on trade exists in particular where national markets are partitioned or the structure of competition within the common market is affected. Anti-competitive agreements or conduct that have no effect on trade, therefore, fall outside the scope of EU competition rules and may only be dealt with by national legislation.[15]

A closer look of the essential features of European competition policy will be taken in chapter 5.

[13] Craig, de Burca, p.892
[14] Craig, de Burca, p. 892
[15] European Commission, On-line glossary, 2004-01-11

3. MARKET ENTRY

Article 2 of the Rome Treaty states that the community shall create a common market. There is no definition to the common market, but as it is expressed in the preamble, economic and social progress should be secured by setting aside the barriers that divides Europe.[16] The preamble states "the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition".

The barriers mentioned above are reasonably those that hinder the common market to function as a national market.[17] National markets are normally regulated so as to ensure free movement for goods, people, capital and services. In addition there is a competition policy.

Free market entry is crucial to a community wishing to obtain a single, national-like market. Within the EU several statements and rules ensure the free market entry. Article 1 of the Rome Treaty states that:
"By this Treaty, the high contracting parties establish among themselves a EUROPEAN COMMUNITY"

Article 2 then sets out the function and task of the community:
"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

[16] Droege, Lysén, p. 181
[17] Droege, Lysén, p. 181

Article 3 then describes some activities that the Community shall include. Some of the activities mentioned are:

- *"the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect" (Article 3.1.a)*

- *"a common commercial policy" (Article 3.1.b)*

- *"an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital" (Article 3.1.c)*

- *"a system ensuring that competition in the internal market is not distorted" (Article 3.1.g)*

In addition to the provisions in the first part of the Treaty the EC competition policy also ensures that free market entry is provided. The competition is assured not only by Articles 81 and 82 but also by various Regulations, Notices, block exemptions and so on. The subject will be discussed more in detail in chapter 5.

4. BARRIERS TO ENTRY

4.1 Introduction

Ensuring free entry to markets does not only mean assuring a common market but it also means assuring a better playground for competing firms. In industries in which no undertaking enjoys market power, there is a presumption that competitive market forces will lead to allocative and productive efficiency.[18] By ensuring free market entry and good conditions within the market, the EC can build a productive and effective commercial environment. In cases where barriers to market entry exist or where undertakings enjoy market power there is a risk that competition is abused. Intervention by competition authorities is needed to avoid those cases.

In order to assess market power and market efficiency, the analysis of barriers to entry and exit is fundamental. High barriers to entry make it difficult for new undertakings to establish themselves, and undertakings already existing on the market are helped to keep market power. Thus in determining the competitive conditions on a market analysis of entry conditions is of primary importance. Economic analysis is often used to establish the effect of a barrier to market entry.

4.2 Definitions

There is no single accepted definition of entry barriers. Entry barriers are dependant of a variety of factors and can be present at different levels. A very wide definition could be "*anything that makes the entry of new firms into a market more difficult*". We will first take a look at some examples of economic definitions and then take a look at a legal definition.

4.2.1 Economic definition

As mentioned above, there is not one generally accepted definition. There are many opinions on the definition, especially in economics. Two well-known schools in the economic world, the Harvard School and the Chicago School have different opinions as to the definition of barriers to entry.

[18] This assumes that other market failures, such as externalities, are absent.

Bain, of the so-called "Harvard School", focuses on the ability of established undertakings to earn above-normal profits. He proposes to define the height of entry barriers by

"... the extent to which, in the long run, established firms can elevate their selling prices above minimal average costs of production and distribution… without inducing potential entrants to enter the industry". [19]

Stigler, of the "Chicago school", emphasizes the existence of relative cost advantages of established undertakings over potential entrants. According to Stigler,

" A barrier to entry may be defined as a cost of producing (at some or every rate of output) that must be borne by a firm which seeks to enter the industry but is not borne by firms already in the industry". [20]

Another definition in line with Stigler's is the one of Baumol and Willig, who defined an entry barrier as

" *Anything that requires expenditure by a new entrant into an industry but that imposes no equivalent cost upon an incumbent".* [21]

Followers of the Harvard School qualify many things as barriers to entry. Bain laid the foundations of what became known as the Harvard school of industrial organisation and wrote a famous book titled "Barriers to new competition" in 1956. In this book Bain mentions economies of scale, product differentiation, cost advantages and capital requirements as examples of barriers to entry. [22]

Conversely, the Chicago School argue that most factors qualified by Harvard scholars as barriers to entry are, in fact, *natural barriers* and that antitrust law should be concerned only with artificial barriers to entry.[23] Natural barriers to entry are barriers that represent normal economic rent on particular scarce resources, such as sunk cost, goodwill and reputation.[24]

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[19] Harbord, Hoehn, p. 413
[20] Harbord, Hoehn, p. 413
[21] Harbord, Hoehn, p. 413
[22] van den Bergh, Camesasca, p. 118
[23] van den Bergh, Camesasca, p. 118
[24] Gilbert, R. "Mobility Barriers and the Value of Incumbency" referred to in "Handbook of Industrial Organisation", R Schmalensee & R. Willig (eds), Amsterdam (1989)

I agree with the Chicago school on this matter. My reasons are two, first, if competition law should be concerned with all kinds of entry barriers competition law needs to be very extensive and its implementation will be difficult. Secondly, I believe that the so-called natural entry barriers are merely part of market economy and have not the object to distort or prevent competition. However, as we will see in chapter 4, the EC competition policy sees not only to the object, but also to the effect. Natural barriers seldom have the object to distort or prevent competition but they sometimes have that effect. The intervention of competition authorities may therefore be needed also when it comes to natural barriers to entry. In other words, natural barriers are not barriers in the strict sense, but we must recognise their possible effect on competition.

4.2.2 Legal definition

The definition of an entry barrier from a competition law perspective may be somewhat different from the economic definition. From a legal perspective, the kinds of barriers that are of interest are first and foremost those that are abusive according to the EC competition policy. The Commission defines barriers to entry the following way:

"Barriers to entry are factors which prevent or hinder companies from entering a specific market. Entry barriers may result for instance from a particular market structure (e.g. sunk cost industry, brand loyalty of consumers to existing products) or the behaviour of incumbent undertakings. It is important to add that governments can also be a source of entry barriers (e.g. through licensing requirements and other regulations)." [25]

4.3 Classifications of barriers to entry

In order to clarify the phenomenon of entry barriers I will present a classification of the barriers. Since the definitions of barriers to entry differs, especially from an

[25] European Commission, On-line glossary, 2003-12-12

economic and a law point of view, I have chosen to present two different classifications. These two classifications have different fields of application, but they can give us an idea of how barriers to entry are seen.

4.3.1 Economic classification

Harbord and Hoehn have made an economic classification.[26] They suggest a fivefold classification of entry barriers in accordance with modern opinion of industrial organisation theory. The classification looks as follows:

1. Entry barriers arising from *absolute cost advantages*
2. Entry barriers arising from *strategic first-mover advantages*
3. Entry barriers arising from *vertical integration* and *refusal to supply*
4. Entry barriers arising from *predatory behaviour*
5. Entry impediments

1. Entry barriers arising from absolute cost advantages

Absolute cost advantages are costs that must be borne by the entrant but that are not borne by incumbents and that persist post-entry. Examples of such absolute cost advantages include exclusive or superior access by an incumbent undertaking to particular necessary inputs such as patents, airport slots, copyrights, exclusive contracts with input suppliers, ownership of a network, etc. Most legal and regulatory barriers to entry come under this heading. Cost asymmetries due to superior efficiency of incumbents should not be included.

2. Entry barriers arising from strategic first-mover advantages

Strategic (first-mover) advantages are incumbent advantages that derive from the asymmetry of timing between incumbent and entrant. Harbord and Hoehn organises strategic entry barriers of this type into three main groups:

- Economies of scale and sunk costs
- Product differentiation, advertising and goodwill

[26] Harbord, Hoehn, p. 415

- Capital requirements

The example below illustrates how economies of scale can create an entry barrier when fixed costs are sunk or partially sunk.

Example[27]
Consider a market with two potential entrants, each of which face a sunk cost of entry F and constant variable cost per unit of production c. If a single undertaking enters, it will charge the monopoly price Pm and earn monopoly profits. The second firm will then enter if and only if the expected price post-entry, Pe, exceeds c+F/q where q is the firm's expected post-entry output. Note that in order to stay in the market the first firm only requires a post-entry price of Pe>c. Thus, the second firm will never enter, and the market will be a monopoly.

Product advertising, brand proliferation and reputation is said to be sources of entry barriers mainly in heterogeneous product industries. It is argued that there can be economies of scale in advertising that may give rise to entry barriers.[28] Reputation and goodwill is more debated. Not everyone agrees that goodwill and reputation can create entry barriers. Schmalensee argues that pioneering brands, e.g. the first in the market, enjoys a first-mover advantage. According to this model, the new brand faces greater competition than the pioneer brand did when it entered the market, and the pioneering brand enjoys a corresponding strategic advantage.[29]

Also whether or not capital requirements can constitute a barrier to entry has been a long-disputed topic. Bork's view gives us an idea about the difficulty in establishing if capital requirements should be considered a barrier:
"Capital requirements exists and certainly inhibit entry – just as talent requirements for playing professional football exist and inhibit entry. Neither barrier is in any sense artificial or the proper subject of special concern for antitrust policy".[30]

[27] Harbord, Hoehn, p. 414
[28] Spence, "Investment strategy and Growth in a New Market", Bell Journal of Economics, 10, 19, 1979
[29] Schmalensee, R. "Product Differentiation Advantages of Pioneering Brands" American Economic Review, 72, 349-365, 1981, cited in Harbord, Hoehn, p. 417
[30] Bork, R. "The Antitrust Paradox", New York, Basic Books, 1978

3. Entry barriers arising from vertical integration and refusal to supply

Some of the most controversial barriers to entry in antitrust policy are concerned with vertical foreclosure and exclusion of competitors by incumbent undertakings. We can distinguish three main groups:[31]

- Refusal to supply and tying
- Exclusive contracts
- Vertical integration

4. Entry barriers arising from predatory behaviour

There are different kinds of predatory behaviour; the most common is predatory pricing. Other forms of predatory behaviour are expansion of capacity, excessive advertising, or the introduction of new products for strategic purposes.[32]

5. Entry impediments

Entry impediments are any factors that delay the process of entry into a market without increasing the costs of entry at the same time. Examples of entry impediments are licensing, certification and product registration requirements that involve little or no actual costs but take significant amounts of time to satisfy.

An entry impediment does not create any asymmetry between incumbents and entrants, but is able to give incumbents the opportunity to enjoy monopoly benefits for a certain period of time, corresponding to the time of attaining for example a license.

Entry impediments are not entry barriers in the strict sense but they may be important from a competition point of view because they influence the amount of time that incumbents may exercise market power before entry occurs.

[31] The barriers will be further discussed in chapter 5

[32] P.E. Areeda & D. Turner, *"Predatory Pricing and related practices under section 2 of the Sherman Act"*, 88 Harvard L. Rev. 164, 1975, cited in Harbord, Hoehn p. 421

4.3.2 Legal classification

The legal interest in barriers to entry differs from the economic interest. From a legal perspective the most important question is not whether or not a certain action actually constitutes a barrier, but if they are such as that they can be abused in a prohibited way. The classification I am presenting has competition law in mind and, in my view, captures the essential features of barriers to entry in a competition law context.

The classification looks as follows.[33]

1. Absolute barriers to entry
2. Fighting-barriers to entry
3. Cost-oriented barriers to entry

Category 1 consists of *absolute* barriers to entry. An example of such absolute barriers is intellectual property rights. Most legal and regulatory barriers are also to be considered as absolute.

Category 2 consists of such barriers that are produced by incumbents in order to keep new entrants off the market. The name of the group thus refers to the fighting by incumbents to keep new entrants away. Examples of such fighting- barriers are predatory behaviour, refusal to supply, essential facilities and tying.

Finally, category 3 consists mostly of entry barriers of economical art. Sunk costs, economies of scale and capital requirement are some examples. Other examples are product differentiation, goodwill and reputation. So-called impediments to entry also fall under category 3.[34]

[33] The outline of the classification was suggested by Prof. Stenberg, but I have interpreted it and used it according to my own thoughts.
[34] See the economic classification for more information (4.3.1)

What is rather special about this category is that most of the barriers are a natural part of market economy. They can therefore be defined as *natural* barriers to entry. As mentioned above, natural barriers to entry are not barriers in the strict sense, but they can certainly have impact and effect on the market and on the ability of firms to compete on the market. If the natural barriers can be used in any way to prevent or distort competition they could be considered illegal in accordance to EC competition law.

Chapter 6 presents different types of barriers.

5. BARRIERS TO ENTRY AND THE EC COMPETITION POLICY

5.1 Introduction

Competition policy in the EU has developed over the past 30 years on the basis of two key articles 81 and 82 (formerly articles 85 and 86). Article 81 and 82 are an application of the general objective of the activities of the Community laid down by Article 3.1 (f) of the Treaty*: the institution of a system ensuring that competition in the common market is not distorted.*[35] Apart from the articles in the Treaty, the EC competition policy also includes numerous other regulations. This chapter will take a closer look at those rules that can be used against barriers to entry.

5.2 Article 81

One of the key articles of European Competition Law is Article 81, formerly Article 85.

Article 81

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

a) *directly or indirectly fix purchase or selling prices or any other trading conditions;*

b) *limit or control production, markets, technical development, or investment;*

c) *share markets or sources of supply;*

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

e) *make 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.*

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

[35] Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission 1978, Paragraph 63

- *any agreement or category of agreements between undertakings,*

- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a) *impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
b) *afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

The Article states that it applies to *all agreements, decisions and concerted practices* between *undertakings*, which may *affect the trade between member states*. The reason why different terms are used to describe the agreement is that the rule will be more effective if it applies to all kinds agreements, formal or not. Businessmen could otherwise easily escape the competition rules by forming a kind of agreement that is not covered by the article. The term undertaking refers to any entity that is engaged in commercial activity.[36]

The article further states that the agreement or concerted practice should not have as its object or effect to *prevent, restrict* or *distort* competition. When considering this, one should however bear in mind that it is the very essence of a contract concerning trade to impose restraints in some manner.

Article 81(3) contains an exemption. In order to facilitate the work of the Commission, some block exemptions have been created. The block exemptions are based on Article 81(3). If an agreement is of a type covered by a block exemption regulation, the firms can consult the regulation right away, without having to seek the very time-consuming and individual exemption. The block exemption has already, in effect, translated the general criteria into specific acceptable and unacceptable clauses.[37] There are several block exemption Regulations. The Regulations plays an important role, not only by the gains in efficiency for the work

[36] ECJ in the *Prolypropylene* case (CaseT-7/89 SA Hercules Chemicals NV *v.* Commission 1991).
[37] Weatherhill, Beaumont, p. 836

of the Commission, but by stating which clauses are acceptable and which are not (generally known as white and black clauses) it gives an indication to which kind of contracts are acceptable. A firm can adjust their own contracts in accordance to the Regulations in order to ensure that the contract is lawful. In this sense, the Block Exemption Regulations work in a preventive way.

It is common that a contract may have features that both enhances and restricts competition. There is no one answer to how the pro- and anticompetitive effects of an agreement should be balanced when it is determined whether an agreement is caught within Article 81. The ECJ has said that the fact that the requirements of Article 81 are alternative and not cumulative *"leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied."*[38] The ECJ further stated *"the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute"*.

To my understanding this gives room for rationality in the determination whether an agreement is prohibited by Article 81 or not. As long as all requirements are fulfilled, the final decision if the agreement is damaging competition and the result of the pro-competitive effects is left to reason and rationality.

However, the ECJ adopted a stricter approach in the Consten Grundig case.[39] The case regarded an exclusive contract; the right to sell Grundig televisions (under the name GINT) was given to Consten. Consten was only allowed to sell within the French territory and all national distributors within Grundig's network were prohibited to sell outside its country territory. When a company called UNEF bought Grundig goods and sold them in France, Grundig brought an action towards UNEF claiming that they were infringing Grundig's trademark. UNEF contended that the whole agreement between Grundig and Consten was violating Article 85 (now Article 81).

[38] Case 56/65 Société Technique Minière v. Maschinenbau Ulm GmbH, 1966
[39] Case 56 & 57/64, Consten SARL & Grundig-Verkaufs GmbH v. Commission, 1966

When the case reached the ECJ the applicants maintained that, since the Commission restricted its examination solely to Grundig products, the decision was based upon a false concept of competition. Article 85(1) applies particularly to competition between similar products of different makes. The applicants maintained that the Commission, before declaring Article 85(1) to be applicable, should, by basing itself upon the "rule of reason", have considered the economic effects of the disputed contract upon competition between different makes.

The ECJ said the following regarding the case at hand:

"The principle of freedom of competition concerns the various stages of and manifestations of competition. Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85(1) merely because it might increase the former."

The ECJ came to the conclusion that the agreement was prohibited. In short, the agreement was found to have established a system of absolute territorial protection. The French market had thus been isolated and through the agreement, Grundig was maintaining artificially separate national markets within the Community. Hence, the agreement was such as to distort the competition.

5.3 Article 82

The second key article prohibits abuse by an undertaking in a dominant position.

Article 82

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.*

The essence of Article 82 is the control of market power.[40] In basic economic terms, market power is the ability of firms to price above marginal cost and for this to be profitable. In competition analysis, market power is determined with the help of a structural analysis of the market, notably the calculation of market shares, an assessment of barriers to entry or growth and of the rate of innovation. Furthermore, it may involve qualitative criteria, such as the financial resources, the vertical integration or the product range of the undertaking concerned.[41]

A typical abuse of a dominant undertaking is to charge unfair selling prices. As can be seen above, the Article itself states some examples. It is important to note that they are just examples, the list is not exhaustive. The Article applies to undertakings in a dominant position, hence it requires an establishment whether an undertaking is dominant or not. To establish if an undertaking is dominant, an economic analysis must be done. Chapter 5.3.1 will deal further with the assessment of dominant undertakings.

It should also be noted, that Article 82 does not prohibit market power or monopoly per se. It prohibits the *abuse* of market power. Market power may well be a result of being more efficient than other competitors. Prohibiting market power in itself would therefore be strange. The competition policy therefore aims at the behaviour of undertakings in dominant positions rather than the power itself.

5.3.1 Dominant position

The application of Article 82 involves several steps. One must first establish if the undertaking in question enjoys a dominant position. However, in order to establish

[40] Craig, de Burca, p. 940
[41] European Commission, On-line glossary, 2004-01-11

its dominance it is also necessary to determine the relevant market. Determining the relevant market is one of the many difficulties in establishing whether an undertaking is in fact dominant. Article 82 states that the undertaking must hold a dominant position within the common market or in a substantial part of it.

The ECJ has made the following statement in regard to the dominant position:

"The dominant position… relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[42]

Three factors must be taken into account when assessing the relevant market: the product market, the geographical market and the temporal factor.[43]

The determination of the relevant product market is the most important. The narrower product market, the easier it is to conclude that an undertaking has the requisite dominance for the purposes of Article 82.

The general approach taken by the Commission and the ECJ regarding the product market is *interchangeability.* Interchangeability is often measured by using the economic tool cross-elasticity. The basic idea of cross-elasticity is simple: cross-elasticity is high where an increase in the price of one product, for example beef, will lead buyers to switch in significant numbers to lamb or pork. The existence of cross-elasticity indicates that the products are in reality part of the same market. However, cross-elasticity is not the only tool relevant to the determination of the product market. The United Brands case was an important case in this regard.

United brands produced bananas and were accused of having infringed Article 82. One of the initial concerns in the process was whether bananas was part of the large

[42] Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission 1978, paragraph 65
[43] Craig, de Burca p.942

fruit market or if bananas constitutes its own market section. Cross-elasticity investigations were made and showed that cross-elasticity was low, i.e. there was low interchangeability. The ECJ noted further that the prices of bananas were only affected by prices of other fruits to a low extent and that the banana has certain characteristics (softness, seadlessness etc) that satisfied the constant needs of the population consisting of the very young, the old and the sick. The ECJ concluded:

"It follows from all these considerations that a very large number of consumers having a constant need for bananas are not noticeably or even appreciably enticed away from the consumption of this product by the arrival of fresh fruit on the market and that even the seasonal peak periods only affect it for a limited period of time from the point of view of substitutability. Consequently the banana market is a market, which is sufficiently distinct from the other fresh fruit market".[44]

It is also necessary to take the geographical market into account when assessing the dominant position. Some types of goods or services can easily be supplied without differentiation within the whole Community while others cannot. Transport costs and transport damages are two examples of importance to this regard.

The temporal element is also of importance. It is important on the one hand because an undertaking may possess market power at a particular time of year, affected by seasonal change. On the other hand, the very definition of the product market may have a temporal dimension, in the sense that technological progress and changes in consumer habits will shift boundaries between markets.[45]

In 1997, the Commission published a Notice on the Definition of the Relevant Market for the Purposes of Community Law. The object of the Notice is to provide firms with guidance on how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of community competition law.[46] In accordance with the United Brands case the notice speaks of

[44] Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission 1978, Paragraphs 34-35
[45] Dec. 92/163 Elopak Italia Srl v. Tetra Pak (No. 2) 1992
[46] Commission Notice 97/C 372/03

interchangeability, or substitutability as it is called in the Notice. The Notice defines the relevant product market as follows:

"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use".[47]

Under Article 82, the assessment of market power must also include a study of the contestable market, which involves recognition of latent competition. One must not only assess whether the producer is unchallenged, but also whether it is unchallengeable.

Once the relevant market has been established it is possible to estimate the firm's market share and clarify if the firm meets the requirement of article 82; a dominant position. The dominant position is often investigated by judging certain indicators of dominance. One can for example ask if firms can behave independently of competitive pressures.[48] Only if it has been established that the firm is dominant can the firm be judged under article 82.

[47] Commission Notice 97/C 372/03 Section 7
[48] Weatherhill, Beaumont, p.864

6. EC COMPETITION LAW AND BARRIERS TO MARKET ENTRY

6.1 Introduction

In this chapter we will take a closer look at the different types of barriers that are interesting from a competition perspective. I will present the barriers according to the legal classification suggested in 4.3.2:

1. Absolute barriers
2. Fighting-barriers
3. Cost-oriented barriers

6.2 Absolute barriers

The barriers in the first category are such that we like to call absolute. Most regulatory and legal barriers are absolute. Examples of such absolute barriers are different intellectual properties, licensing and special regulation provided by governments. The examples given are not exhaustive but are meant to give an idea.

6.2.1 Intellectual property rights

Intellectual property is a generic term that covers both industrial and artistic forms of property right. Intellectual property rights (IPR) provide an incentive for the creation of an investment in new work (music, films, print media, software, performances, broadcasts, etc.). The most common species of IPRs are patents, trademarks, copyright, trade names and indications of origin.

IPRs can sometime pose problems from a competition perspective. IPRs deliberately restrict competition at the level of production in order to promote competition in innovation. The IPRs are however not immune from competition law. The ECJ holds that the existence of intellectual property rights cannot be said to infringe the competition rules, but the exercise of these rights may in certain circumstances do so.[49]

[49] Craig, de Burca, p. 1047

6.2.2. Legal and regulatory barriers

Every country has regulations and licensing requirements for various products and services.[50] Article 28 and 30 of the EC Treaty are two of the major instruments to ensure that Member States do not impede intra-Community trade through tariffs, quotas etc. Work is also being done to harmonise the various requirements throughout Europe. The single market and the harmonisation process are however not always enough to ensure that competition works freely within the market. Therefore competition law is of use also in this area.

6.3 Fighting-barriers

Category 2 consists of such barriers that are produced by incumbents in order to harm its competitors' competitive position or to exclude the competitors altogether. The name of the group thus refers to the fighting by incumbents to keep competitors away. Examples of such fighting- barriers are exclusive contracts, vertical agreements and predatory behaviour. Also refusal to supply and tying are fighting-barriers. We will take a closer look at some of the examples below.

6.3.1 Predatory Behaviour

One kind of predatory behaviour is predatory pricing. Predatory pricing is a deliberate strategy, usually by a dominant undertaking, of driving competitors out of the market by setting prices below production costs. If the predator succeeds in driving existing competitors out of the market and in deterring future entry of new undertakings, he can subsequently raise prices and earn higher profits. Predatory pricing by dominant undertakings is considered as an abuse of dominant position.[51]

Other forms of predatory behaviour are expansion of capacity, excessive advertising, or the introduction of new products for strategic purposes.[52] Predatory pricing is the most common form of predatory behaviour and I will therefore concentrate on predatory pricing.

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[50] Examples of such national legislation are the Swedish alcohol laws. Also the laws in the Cassis de Dijon case were of the same type of national legislation.

[51] Definition and statement from the European Commission's on-line glossary, 2003-12-10

[52] P.E. Areeda & D. Turner, *"Predatory Pricing and related practices under section 2 of the Sherman Act"*, 88 Harvard L. Rev. 164, 1975, cited in Harbord, Hoehn, p. 420

The leading case when it comes to predatory pricing is AKZO.[53] AKZO and ECS both made organic peroxides. Organic peroxides are used in both the flour and the plastics markets. AKZO was engaged in both and ECS was initially only active on the flour market. When ECS moved into the plastics market AKZO had a meeting with ECS where AKZO threatened that it would take aggressive action on the flour market unless ECS withdrew from the plastics market. ECS ignored the threats and AKZO put the threats into force. The company targeted certain ECS customers and offered them prices, which were well below previous rates and below average total cost. AKZO subsidised the low prices by money drawn from the plastics sector.

The Commission concluded in favour of predation and on the basis of internal AKZO documents that indicated that AKZO's strategy was indeed to eliminate ECS. Internal management documents showed that AKZO's prices for selected customers were less-than-average variable or marginal cost. The Commission argued that AKZO's predatory behaviour was creating a barrier to entry. On appeal the ECJ supported the main findings of the Commission. It reasoned as follows:
" Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive… Moreover, prices below average total cost, that is to say, fixed cost plus variable costs, but above average costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor."

The AKZO case has been much commented and also criticised. It is important to note that applying a rule against predatory pricing presents some difficulties for competition law. First, there is not one generally accepted definition of predation in economic terms. Secondly, the line between enthusiastic price competition and illegal predation may be very fine. A dominant firm may not wish to pursue a price competition as vigorously as it would otherwise, knowing that it may risk allegations of predatory abuse.

[53] Case C-62/86, Commission v. AKZO Chemie BV, 1991

Critics of the AKZO case sustain that predatory pricing is just one of several possible explanations. Another explanation could be the breakdown of a cooperative oligopoly. To conclude in favour of predation, the ECJ relied heavily on the proven intent of AKZO to eliminate ECS. Critics mean that it is somewhat risky to base a rule upon such proven intent since firms with executive sensitive to antitrust problems will not leave any documentary trail of predatory intent.[54]

Economics mean that the decision in the AKZO case is not entirely consistent with economic theory. The weakest point in both the Commission's reasoning and that of the ECJ is that it was not adequately demonstrated that AKZO's so called predatory pricing could have succeeded. An essential condition for considering predatory pricing is, according to economists, that the price undercutter can recoup his losses after driving the target out of the market. In this case it was never considered if AKZO could have recouped its losses.

The same approach as in the AKZO case was taken in the Tetra Pak case.[55] Also in this case it was argued that the Commission and, in this case, the Court of First Instance (CFI) should have taken into account whether Tetra Pak had any realistic chance of recouping its losses.

6.3.2 Vertical agreements

A vertical agreement is entered into between two or more undertakings, which operates at a different level of the production or distribution chain. The agreement itself relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

In the United Brands case[56], the Commission identified vertical integration as the major barrier to entry for potential competitors into the market. However, exactly how potential competitors were being excluded or prevented from entering the market was never made clear.

[54] van den Bergh, Camesasca, p.301
[55] Case C-333/94P, Tetra Pak International SA v. Commission, 1997
[56] Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission 1978

In the more recent merger case, Tetra Pak/Alfa Laval,[57] the Commission restricted its investigation largely to the question of whether the acquisition of an upstream supplier by a dominant firm in the downstream market would negatively affect competition. In particular, whether the merger would raise entry barriers. The Commission concluded that the merger would result in no significant increase in the existing dominant position, and barriers to entry were therefore not estimated to rise.

6.3.3 Refusal to supply

Refusal to supply occurs when a firm refuses to supply goods or services to other firms which has for effect that competition is in some way distorted. Refusal to supply can be abusive in accordance to the regulation in Article 82 and therefore prohibited.

Important cases regarding refusal to supply are Commercial Solvents[58], Hugin[59] and Hilti[60]. In Commercial Solvents the ECJ stated the following:

"… an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customer) act in such a way as to eliminate their competition…" [61]

The Commission and the ECJ have followed the case law developed in Commercial Solvents, and they have condemned refusals to supply existing customers unless there is some objective justification.

[57] OJ (1991) L 290/3
[58] Joined cases 6/73 and 7/73 Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v. Commission E.C.R., 1974
[59] Case 22/78, Hugin Kassaregister AB and Hugin Cash Registers Ltd v. Commission, 1979
[60] Case T-30/89, Hilti AG v. Commission, 1991
[61] Joined cases 6/73 and 7/73 Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v. Commission E.C.R., 1974, paragraph 25

6.3.4 Essential Facilities

Essential facilities could be defined as a subcategory to the notion of refusal to deal. The main difference between the two is that in the former, the object of the refusal is a so-called essential facility. The Commission defines an essential facility as follows:

"An essential facility is a facility or infrastructure that is necessary for reaching customers and/or enabling competitors to carry on their business. Examples of essential facilities are power lines, ports, airports, railway tracks, electricity networks, telephone networks and banking systems enabling electronic transfers of funds.[62] *A facility is essential if its duplication is impossible or extremely difficult due to physical, geographical, legal or economic constraints. Denying access to an essential facility may be considered an abuse of a dominant position by the entity controlling it, in particular where it prevents competition in a downstream market."*[63]

It can be argued that essential facilities should fall under the first category, being an absolute barrier. I have however chosen to include essential facilities in the fighting barriers, partly because its vicinity to the barrier refusal to supply, and partly because essential facilities are not entirely absolute if access should be granted under some circumstances.

The notion of essential facilities developed with the Commercial Solvents case.[64] The ECJ held that refusing to supply a downstream competitor in order to restrict competition in the market for the final product must be considered an abuse within the meaning of Article 82. The essential facilities doctrine has had a rather extensive role, especially during the years of the various liberalisation programmes throughout Europe. Liberalisation programmes were most common within network industries such as telecommunications, gas, electricity and transport.

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[62] Monheim, El-Tohami; p. 5

[63] Definition and statement from the European Commission's on-line glossary

[64] Joined cases 6/73 and 7/73 Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v. Commission E.C.R., 1974

In case law following the Commercial Solvent, the Commission created a broad principle holding that firms in a dominant position must not refuse to supply their goods or services to either competitors or customers if the refusal would have a significant effect on competitors or competition, which cannot be legitimately justified. This principle and the essential facilities tool were however used somewhat haphazardly. Frequently, the factual analysis (starting with the definition of the relevant market) was not done accurately, resulting in a visibly summary appraisal of the essential facility at hand. [65]

In the more recent Bronner case[66], the ECJ took a more restrictive approach.[67] The ECJ adopted a test (the Bronner test), which has substantially limited the scope of essential facilities under European Competition law. A facility is essential and Article 82 can be infringed if the following conditions are met:

1. the facility is owned by a monopolist
2. the facility is considered essential because it is indispensable in order to compete on the market with the controller of the facility
3. access is denied or granted on unreasonable terms
4. no legitimate business reason is given for objectively justifying the denied access (as to the feasibility of providing the facility)
5. a competitor is unable (practically or reasonably) to duplicate the essential facility.

This test sets the standards for the use of the essential facilities doctrine. The restrictive use of the doctrine is welcomed as it now distinguishes the essential facilities clearly from the notion of refusal to supply. This is also a type of fighting barrier. The barrier is not open to everyone to use – only those who possess an essential facility are able to do so – but it can still be used as a mean to fight competitors.

[65] Van den Bergh, Camesasca, p.275
[66] C-7/97 1997
[67] Van den Bergh, Camesasca, p.276

The restrictive use of the essential facilities doctrine is welcomed since caution is justified when access to essential facilities is claimed. There are two reasons for this: First, competition law protects competition and not competitors. Advocat General Jacobs noted in his opinion of the Bronner case that a generous application of the essential facilities doctrine will lead to unsatisfactory results. It would aid only competitors in catching up on their more efficient counterparts, instead of them investing to develop competing facilities themselves and truly benefit consumers.[68] Second, it has been argued that granting access through essential facilities should be limited only to natural monopolies. In other industries the application of the essential facilities doctrine will undermine the incentives for dynamic efficiency.[69]

6.3.4 Tying

Tying is the commercial practice of conditioning the sale of one product to the purchase of another product.

Tying is often used by a firm that enjoy market power in one market (the tying market) to leverage this market position or dominance into another market (the tied market), in order to squeeze competitors out of this second market and then raise prices above the competitive level. Tying has traditionally been seen as anti-competitive, both by European and American competition authorities. If tying is not objectively justified by the nature of the products or their commercial usage, such practice may restrict competition. The main negative effect of tying on competition is the possible foreclosure on the market of the tied product. In addition, tying may lead to higher prices for both the tying and the tied product.[70]

By the wordings of the EC Treaty tying can be qualified both as a prohibited cartel agreement (Article 81) and as an abuse of dominant position (Article 82).

[68] Van den Bergh, Camesasca, p.267
[69] Werden, p. 433
[70] Definition and statement from the European Commission's on-line glossary

6.4 Cost-oriented barriers

Category 3 consists of entry barriers that are a natural part of market economy. They are mostly of economical art, such as sunk costs, economies of scale and capital requirement. Some economists do however argue that also such things as product differentiation, goodwill and reputation can constitute entry barriers. In the United Brands case, the ECJ made a statement, which can exemplify the so-called natural barriers to entry:

"The particular barriers to entry to competitors entering the market are the exceptionally large capital investments required for the creation and running of a banana plantation… and the actual cost of entry made up inter alia of all the general expenses incurred in penetrating a market such as the setting up of an adequate commercial network, the mounting of very large scale advertising campaigns, all those financial risks, the costs of which are irrecoverable if the attempt fails."[71]

One must however bear in mind that a barrier to entry must also be the result of a prohibited agreement, qualify as an abuse in accordance with Article 82 or in some way substantially contribute to an unlawful act in order to be of interest to competition policy.

[71] United Brands, paragraph 122

7. COMMENTS

Barriers to entry can be seen from two aspects. First, barriers to entry are useful when assessing market power. In order to make a correct analysis of market power one must take into consideration if entry barriers are high or low. Second, barriers to entry may constitute a prohibited act according to EC competition law and prevent or in other ways disturb competition within the single market.

Both aspects are important. From a competition law perspective the first aspect is important since investigating entry barriers is an important step in defining if a firm is dominant. The second aspect is of importance because is ensures free market entrance. From a firm's perspective it is of high interest to have knowledge about the entry barriers.

A barrier to entry is not unlawful in itself. Assessing whether a barrier is unlawful reminds of the assessing of an Article 82 abuse. First, one must establish the relevant market. Second, one must establish whether or not the barrier actually is affecting entry to free market. If that is the case, then the next step is to assess whether the effect is unlawful according to the EC competition policy. When establishing the barrier's affect on market entry I strongly believe that we must look also to the pro-competitive effects. There is no article in the competition policy designed to catch unlawful barriers. Barriers can be caught by Articles 81, 82 or by infringing for example the principles set out in Part One of the Treaty. Because of the lack of strict criteria it is important to assess the barriers in its actual context.

I believe it is clear that economics must be taken into consideration when assessing if a barrier to entry is unlawful. As we saw in chapter 2, one of the goals of competition law is to enhance efficiency. In order to do so, economics must be considered. Only with economic tools can we establish and assess what is efficient. The second goal is to help in the creation of a Single European market and to prevent this intention from being disturbed by the activities of private undertakings. The purpose of the single market is to enhance the economic growth of the member states. To this background, I come to the conclusion that one of the main purposes

of the European competition policy is economic welfare. It therefore seems natural that economics must be taken into consideration. Only economic tools that can help us establish whether we are indeed acting in the interest of economic welfare.

Economics are for a fact taken into consideration when the Commission and the ECJ deal with barriers to entry. The ECJ made some interesting statements regarding the economics in the United Brands case. The ECJ said that there is a need to consider the precise purpose of the agreement, in the economic context in which it is to be applied when assessing if a practice is abusive in the means of Article 82.[72] The ECJ then specified how this could be done in a case of exclusive rights:

"Therefore, in order to decide whether an agreement containing a clause "granting exclusive rights of sale" is to be considered in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, severity of the clauses intended to protect the exclusive dealership or, alternatively the opportunities allowed for the other commercial competitors in the same products by way of parallel re-exportation and importation." [73]

The ECJ has also stated that economic analysis must be made in order to assess if a firm enjoys a dominant position. Economics is needed from the beginning and throughout the whole process of establishing an abusive action according to European competition policy.

Having the goals of competition in thought (efficiency and the single market) one would think that any pro-competitive effects of agreements or acts would be taken into consideration, and that a case which is to be ruled upon would be considered to its whole extent, taken account of both negative and positive effects.

[72] United Brands, paragraph 126
[73] Case 56/65 Société Technique Minière v. Maschinenbau Ulm GmbH 1966

Despite its statements about the needs of economic analyses, the ECJ has pointed out that once it has been established that an agreement has the object to prevent, restrict or distort competition, there is no need to take account of the concrete effects of competition. [74] The effect of that statement is that in cases where the object is clearly the prevention, distortion or restriction of the competition *no further analysis is needed*. That will have for effect that the pro-competitive effects will not be known, and cannot be taken into consideration. Does this imply that there is, in some cases, no need for economic analysis?

It is true that though economic analysis may help to provide the actual context of the case and provide the judges with the economic effects of an action, it is also a costly and time-consuming provision. However, I still believe economic analysis to be needed. Many actions have both positive and negative effects and it can be that the positive effects are stronger than the negative effects. A positive action might be deemed unlawful because no further investigation is made.

In conclusion, from a competition law perspective, it is not the definition of entry barriers that is of most interest. The most important question is without doubt whether the individual barrier constitutes an infringement to EC competition policy. That assessment must be done on an individual basis and it is an assessment that is dependant on many factors, such as the relevant market, the type of barrier, the affect the barrier have on the market, any pro-competitive effects etc.

[74] Craig, de Burca, p.913

8. REFERENCES

Regulations

EC Treaty
Commission Notice 97/C 372/03

Doctrine

Van den Bergh, Camesasca: "*European Competition Law and Economics"*, Intersentia, Antwerpen, 2001

Bork: "*The Antitrust Paradox",* Basic Books, New York, 1978

Butterworth: "*Competition Law Handbook"*, 3rd Edition, London, Butterworths, 1992

Craig, de Búrca: *"EU Law, Text, cases and materials"*, 2nd Edition, Oxford University Press Inc., New York, 1998

Droege, Lysén: *"Introduktion till EU och EG-rätten",* Iustus Förlag, Uppsala, 1997

Gilbert, R. "Mobility Barriers and the Value of Incumbency": Handbook of Industrial Organisation, R Schmalensee & R. Willig (eds), Amsterdam (1989)

Harbord, Hoehn: *"Barriers to entry and Exit in the European Competition Policy"*, International Review of Law and Economics (1994) 14, 411-435

Monheim: *The Application of the Essential Facilities Doctrine in European Community Competition Law: From Whom the Bell Tolls*, Publications by the Institute for European Law at Stockholm University, nr 50, 2001

London Economics: *"Barriers to entry and exit in UK Competition policy: A Report for the Office of Fair Trading",* UK Office of Fair Trading Research Paper No. 2, London, 1994

Pindyck, Rubinfeld: "*Microeconomics"*, 5th ed. Prentice Hall, New Jersey, U.S., 2001

Spence, *"Investment strategy and Growth in a New Market"*, Bell Journal of Economics, 10, 19, 1979

Tirole: *"The Theory of Industrial Organisation",* Cambridge, MIT Press, 1988

Werden: *"The Law and Economics of the essential facilities doctrine"*, St. Louis U.L.J., 1987

Weatherhill, Beaumont: *"EU Law – The essential guide to the legal workings of the European Union",* 3rd edition, Penguin, 1999

Case Law

Case 56 & 57/64 Commission v. Consten SARL & Grundig-Verkaufs GmbH, 1966

Case 56/65 Société Technique Minière v. Maschinenbau Ulm GmbH, 1966

Joined cases 6/73 and 7/73 Commission E.C.R. v. Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp., 1974

Case 27/76 Commission v.United Brands Company and United Brands Continentaal BV 1978

Case 22/78, Commission v. Hugin Kassaregister AB and Hugin Cash Registers Ltd, 1979

Case C-62/86, Commission AKZO v. Chemie BV, 1991

Case C-333/94P, Commission v. Tetra Pak International SA, 1997

Case T-30/89, Commission v. Hilti AG, 1991

Case T-7/89 Commission v. SA Hercules Chemicals N, 1991

Dec. 92/163 Elopak Italia Srl v. Tetra Pak (No. 2) 1992

OJ (1991) L 290/3

OJ (1991 L 334/42

Internet

European Commission's on-line glossary:
http://europa.eu.int/comm/competition/general_info/e_en.html#t15, 2003-12-10

http://www.hjventures.com/glossary-economies-of-scale.html, 2004-01-11