ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 2 Issue 2 **March 2006**

Editorial

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Remarkable changes have taken place in the competition law and policy of the European Union in the last decade. It is hard to think of a competition law examination question in 1996 that would have the same answer today as it did then: except, that is, a question about Article 82. Article 82 cannot be changed by legislation other than a Treaty amendment, so the possibility, for example, of replacing formalistic block exemptions on vertical agreements with a 'new-style' regulation such as Regulation 2790/99 does not arise. The law of Article 82 is to be found in the case-law of the Community Courts, and in particular in the early judgments of the ECJ in *Continental Can*,[1] *Commercial Solvents*,[2] *United Brands*[3] and *Hoffmann-la Roche*.[4] There are not that many judgments; if one looks for precedents on predatory pricing, tie-in transactions or exclusive dealing there are only a few on each practice, and they inevitably turn on the facts of the particular case. From this scarce case-law businesses and their professional advisers have to derive guidance as to the lawfulness of their conduct, and a fairly constant refrain of complaint is that the 'rules' that can be identified are too formalistic, insufficiently aligned with sound economic principles and liable to chill, rather than to encourage, competitive behaviour. In particular it is sometimes asserted that the law of Article 82 provides undue protection to competitors, whereas it should be concerned only with economic efficiency: if a dominant firm can eliminate a competitor from the market by superior performance, this fact of economic life should be accepted. Just as Robert Bork once complained of the US courts' 'uncritical sentimentality in favour of the small guy', so too the law of Article 82 should accept that competition is a ruthless process in which the weakest competitors must face up to economic reality.

The European Commission has accepted that the time is ripe to review the current law and practice on Article 82, and published its *Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* in December 2005. Issues surrounding exploitative and discriminatory abuses will probably be the subject of a further paper in due course; it is not clear whether the Commission will also, at some point in the future, deal with the application of Article 82 in conjunction with Articles 10 and 86 EC.

Comments on the *Discussion Paper* were requested by not later than 31 March 2006. It is clear that the Commission will be inundated with responses, and it is to be expected

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[1] Case 6/72 *Continental Can v Commission* [1973] ECR 215.

[2] Cases 6 & 7/ 73 *Commercial Solvents v Commission* [1974] ECR 223.

[3] Case 27/76 *United Brands Continental BV v Commission* [1978] ECR 207.

[4] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

that many of them will be quite critical. A number of commentators have expressed disappointment that the Commission has not advocated a higher threshold for dominance – the *Discussion Paper* presents a conservative view of this issue, based around the *AKZO* presumed threshold of dominance at 50%; and there appears to be an unwillingness to follow through the logic of section 5 of the Paper, which states clearly that the law on exclusionary abuses should be rooted in the principle of consumer welfare, into the later, detailed sections on predation, single branding, rebates and so on, where there seems to be a desire to cling on to every precedent in the case-law including, some would argue, bad cases such as *Compagnie Maritime Belge v Commission*,[5] where selective price cuts were condemned even where they did not entail sales below costs. In fairness to the Commission, the *Discussion Paper* is just that – a *discussion* paper: it is not a set of draft guidelines, and respondents are entitled to criticise whatever features of it that they dislike. It is also well understood that the Commission faces an enormously difficult task in relation to Article 82 – there are widely differing views, within the Commission itself, from one Member State to another and between different interest groups - as to the true purpose of Article 82 and as to the best way of setting administrable rules that are capable of application by competition authorities and courts and that businesses can reasonably abide by. Although there is an expectation that the Commission will, in due course, proceed to issue draft guidelines on Article 82 and exclusionary abuses, this should not be taken for granted: it is not inconceivable that it might turn out to be too difficult to come up with a set of standards that commands a wide enough acceptance.

Given the importance and the complexity of this debate, it was clearly appropriate that CLaSF should have held a workshop, *Modernising Article 82*, in September 2005, and it is timely that these interesting essays on various aspects of the law and policy in this area should now be published in the Competition Law Review.

In the first essay Liza Gormsen examines the historical roots of Article 82 and argues both for a clarification of the underlying objective of 'protecting competition' and for a change in the methodology of the Commission when examining cases under Article 82, in particular by moving from a form- to an effects-based method of analysis. A particular strength of this piece is its review of the influence of the ordoliberal school of thought, and its emphasis on economic freedom and the desirability of unrestricted access to the market. Much of the literature on ordoliberalism is in the German language, unsurprisingly since it was the 'Freiburg School' that inspired much of it. It is very unfortunate that this linguistic fact has meant that those interested in competition policy in other Member States and who do not have an adequate command of the German language have effectively been deprived of a rich source of scholarship. It is possible to find some interesting material on the subject – David Gerber's splendid book on *Law and Competition Policy in Twentieth Century Europe* is an obvious example – but perhaps there would be less misunderstanding within the debate on Article 82 if more people had access to more of the literature. Even if the time for ordoliberalism has now passed – a very large 'if' that many would dispute – it is important that we

[5] Cases C-395 & 396/96 [2000] ECR I-1365.

should all understand the powerful influence of this doctrine, and the way in which it helped to shape, amongst other things, the law of Article 82.

One of the many mysteries of Article 82 has been the concept of 'objective justification', and one of the omissions has been an adequate explanation of how economic efficiencies should influence the outcome of cases. This is examined in the essay by Ekaterina Rousseva. She explores the case-law on this subject, and concludes that, historically, the concept has been a narrow one relating to objective factors and public policy considerations: in her view the concept does not adequately provide for a 'meeting competition' defence, nor does it provide an effective way of factoring economic efficiencies into Article 82 analysis. This is a thought-provoking study of the case-law, which makes interesting reading alongside the Commission's *Discussion paper*, in which it proposes, in effect, that Article 82 should be read as though it contained an Article 82(3), closely modelled upon Article 81(3).

It is doubtful that there has ever been a more significant case in EU competition law than *Microsoft*. We will live with this case for many years to come as the appeal process continues – inevitably, one assumes, to the Court of Justice – and as further complaints are made to the Commission: a new one was lodged at the end of February 2006. The case is of great interest on the treatment of the abuses of tie-ins and refusals to supply, and clearly has the potential to affect the very business model of an undertaking such as Microsoft and the integration of new applications into its operating software. However the case is also of importance to the wider question of the 'new economy' and the appropriate approach to high-technology, innovation markets: should the concern be for competition *within* or competition *for* the market? And what risks are there for innovation and risky investment in over-obtrusive regulation? This essay examines these issues in depth and acknowledges the important point that an *under*-application of Article 82 may have a dissuasive effect on third party investments in innovation just as *over*-application may deter investment by a dominant firm.

A remarkable feature of Article 82 has been its incorporation, with or without adaptation, into many legal systems around the world. The language of Article 82 has been preferred to that of section 2 of the US Sherman Act in many countries where new legislation has been introduced. An example of this is Singapore, whose law of 2004 entered into force on 1 January of this year. Burton Ong has written a very interesting essay in which he explores the principle similarities and differences between the Singaporean legislation and Article 82: for example the 2004 Act does not apply to exploitative abuses. The essay also considers the particular features of the Singaporean economy and how this will affect the application of the domestic version of Article 82 there.

There is no more vexed question in the law of Article 82 than the treatment of rebates. Many would argue that, provided that a rebate does not entail sales at a loss, it should be legal – a rebate means a lower price, and competition policy is about lower prices. Those that hold this view, or less extreme versions of it, are exasperated by the recent judgments of the CFI in *Michelin*[6] and *British Airways*,[7] and the recent Opinion of

[6] Case T-203/01 *Michelin v Commission* [2003] ECR II-4071

Advocate General Kokott in the *British Airways* case of 23 February[8] as a missed opportunity to set the law in a different direction. Section 7 of the Commission's *Discussion paper* shows just how complex this area has become, and demonstrates that effects analysis can come at the expense of legal certainty. Martin Beckenkamp and Frank Maier-Rigaud present some research work, based on experimentation with a number of students, which demonstrates how powerfully attractive rebate schemes can be when purchasers make procurement decisions, to the point that firms may behave in a way that departs from standard theoretical predictions. Even if lawyers reading this piece may find some of the economic theory complex, they may wish to reflect on the 'loyalty-inducing' effect that rebates are capable of having, and on the implications that this may have for the law in this area.

These essays are a valuable contribution to the wider debate about the appropriate treatment by competition authorities and courts of the unilateral behaviour of firms with substantial market power, a debate which is likely to continue for a considerable time yet.

[7] Case T-219/99 *British Airways v Commission* [2003] ECR II-5917

[8] Case C-95/04P.