

# **ABA 2003 FALL MEETING**

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## **HOW DIFFERENT IS EU ANTI-TRUST ? A ROUTE MAP FOR ADVISORS**

### **AN OVERVIEW OF EU COMPETITION LAW AND POLICY ON COMMERCIAL PRACTICES**

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## **How different is EU anti-trust ? – A route map for advisors**

### **An overview of EU competition law and policy on commercial practices**

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Ladies and Gentlemen,

The globalisation of the economy continues at a rapid pace. Companies from the US and Europe increasingly do business on both sides of the Atlantic. It will therefore not come as a surprise to you that competition enforcement agencies are also “going global”.

At the multilateral level competition agencies world-wide co-operate through the International Competition Network (ICN). The ICN has been established with the active support of the US authorities and the European Commission. So far progress at the ICN has been very encouraging and we will certainly pursue our efforts there.

At a bilateral level I would say that the relationship between the European Commission and the US competition antitrust agencies is among the best that exist between competition agencies in the world. There is an EU-US agreement which lays down the basic rules governing our co-operation. But more importantly at the personal level there is permanent contact and exchange of ideas between both sides.

Against that background it is obvious that comparative antitrust is an increasingly important field of study:

- firms and their advisers need to be aware of the laws which they face when they do business abroad;
- enforcement agencies need to be aware of different systems in order to deal more effectively with multi-jurisdictional cases;
- law and policy makers will get important insights from the study of other systems; and
- international co-operation – be it bilateral or multilateral – presupposes mutual understanding.

I therefore very much welcome the initiative of the ABA Section of International Law and Practice to hold this year’s fall meeting in Brussels and to reserve within the programme an important place for EU competition law.

I have been asked to give during the following 25 minutes an overview of key differences between the EU and US antitrust law in respect of commercial practices of which US firms and their advisers should be aware when doing business in the EU. More specifically I have been asked to present the areas of (1) predatory pricing, (2) fidelity rebates, (3) tying and bundling, (4) access to an essential facility and (5) parallel trade.

Before starting let me make two preliminary remarks.

First, in at least three of those five areas we are currently involved in major case investigations. You will understand that I cannot - neither directly nor indirectly – reveal the line which we intend to take in those ongoing cases.

Second, in June Commissioner Monti announced at a conference in Florence that we have started an internal review of our policy on abuses of dominant positions. He explained that the purpose of that exercise was to evaluate our policy, to assess how it could be made more effective and to define the most appropriate means to make it more transparent. Again, since this is an ongoing process, I will not speculate about the outcome of such policy review.

In the first part of my presentation I will briefly outline the general framework within which the Commission assesses the five types of commercial practices mentioned above. In the second part I will discuss how we apply that framework to the commercial practices in issue and point to differences with US law.

## **I. A brief outline of the general framework**

Article 81 of the EC Treaty essentially prohibits agreements and concerted practices between two or more firms, which restrict competition. The role of Article 81 corresponds broadly to the one of Section 1 of the Sherman Act.

Article 82, by contrast, prohibits in particular abusive behaviour by one or more dominant firms. Its role within the EU system corresponds broadly to the one of Section 2 of the Sherman Act.

Articles 81 and 82 share the same basic objective, namely to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. They also serve the goal of market integration, that is the creation of an open single European market.

The key distinctive features of Article 81 are:

- it applies only to arrangements and not to unilateral behaviour;
- it is in fact split in two tiers:
  - Article 81(1) prohibits all agreements which have as their object or effect to restrict competition;
  - Article 81(3) makes it possible to declare this basic prohibition inapplicable, if (1) the agreement creates efficiencies, (2) those efficiencies are passed on to

consumers, (3) the restrictions are indispensable to attain the efficiencies, and (4) the restrictions do not eliminate competition altogether.

The key distinctive features of Article 82 are:

- it applies only if the investigated undertaking is dominant, that is only if the undertaking at the time when the alleged abuse started was dominant;
- it applies both to single dominance and collective dominance;
- it contains a list of prohibited abusive practices which refers among others to unfair prices, limiting production, discrimination and tying; even if that list is not exhaustive, it does imply that the types of practices that are expressly mentioned therein must at least in certain circumstances be regarded as abusive;
- unlike Article 81, Article 82 does not provide for any exemption to an abuse.

There are two structural differences between Article 82 and US law on monopolisation:

In the first place, Article 82 EC applies only to dominant firms. This means that it does not prohibit a firm which is initially not dominant from using anti-competitive practices to become dominant; nor does it prohibit such a firm from attempting to become dominant.

Section 2 of the Sherman Act, if I understand it correctly, applies by contrast to the wilful acquisition of monopoly power through anti-competitive means as well as to the mere attempt to monopolise. Under US law it is therefore not a necessary precondition that the firm possesses monopoly power when the unlawful monopolising behaviour starts.

Second, the list of prohibited abuses in Article 82 implies that the concept of abuse in Article 82 is meant to include so-called exploitative abuses, i.e. practices by which a dominant firm exploits its market power to harm consumers, customers or suppliers directly. The classic examples are monopoly pricing above the competitive level and output restrictions. They are referred to in letters (a) and (b) of Article 82 which mention “unfair ... prices” and “limiting production ... to the detriment of consumers”.

Under US law excessive pricing by a monopolist does not attract liability. Exploitative practices are regarded as self-correcting because the exercise of market power to raise prices will normally attract new entrants.

As regards exploitative practices, we are obviously aware that in many markets intervention by a competition authority will not be necessary. We are also aware that it is extremely difficult to measure what constitutes an excessive price. In practice, most of our enforcement focuses therefore as in the US on exclusionary abuses, i.e. those which seek to harm consumers indirectly by changing the competitive structure or process of the market.

It is not in our power to change the Treaty. And, in my view, we should continue to prosecute such practices where the abuse is not self-correcting, namely in cases where entry barriers are high or even insuperable. It probably makes also sense to apply

those provisions in recently liberalised sectors where existing dominant positions are not the result of previous superior performance.

## **II. An overview of EU policy on selected commercial practices**

In this second part I will discuss EU policy on five types of commercial practices. The practices in issue have been chosen because the differences in the analysis between US and EU are believed to be more pronounced than in most other areas.

I will concentrate on the analysis of those practices under Article 82 and not under Article 81. I will also confine the discussion to the use of Article 82 in single dominance cases and not address the more complicated issues raised by the analysis in collective dominance scenarios.

### ***1. Predatory pricing***

If I understand current US law correctly a plaintiff seeking to establish predatory pricing by a firm must establish (a) that that firm's prices are below an appropriate measure of its costs and (b) that it has a reasonable prospect or a dangerous probability of recouping its investment in low-cost prices. The emphasis in modern US law is less on the cost standard and more on the possibility of recoupment.

Under EC law for an infringement of Article 82 by way of predatory pricing the European Court of Justice established in *AKZO* a two stage test.

Where a dominant firm charges prices below average variable costs, its behaviour is presumed to be abusive. The presumption is based on the fact that every sale below marginal costs necessarily generates a loss for the dominant firm and can therefore only be motivated by an intention to eliminate a competitor. Average variable costs is being used as a proxy for marginal costs.

Where the dominant firm charges prices above average variable costs, but below average total costs, its behaviour will be regarded as abusive only if it is part of a plan aimed at eliminating a competitor.

Where a dominant firm is charging prices above costs, it is in principle not guilty of predation. It follows however from the *Compagnie Maritime Belge* case that Article 82 may exceptionally also be applicable in the case of above cost pricing. In this case the undertakings concerned enjoyed an almost full monopoly, they engaged in selective price cutting and the Court was convinced that there was a strategy to eliminate the only competitor remaining in the market.

As regards the issue of recoupment the European Court of Justice held in *Tetra Pak II* that it was not necessary for the Commission to prove the likelihood of recoupment. In our recent *Wanadoo* decision we engaged in an analysis of the possibility of recoupment, while stating that we were not legally obliged to do so.

As regards predatory pricing we have therefore in principle slightly differing approaches. In the US the focus is more on recoupment and in Europe the focus is more on dominance, prices below variable costs and intent to eliminate. I wonder however if in practice those differences lead to significantly different outcomes. Where a firm is dominant there are high barriers to entry and recoupment is therefore normally given.

## **2. Fidelity Rebates**

Fidelity rebates are rewards or discounts given to customers who purchase all or a specified portion of their requirements for a given product from a dominant firm.

To my knowledge the US approach to fidelity rebate schemes has been to refrain from challenging such schemes. US law regards price reductions as procompetitive, provided the lowered prices are not predatory or below cost.

In Europe the fundamental question which we ask is whether the rebate constitutes competition on the merits or whether it artificially excludes competitors.

Existing case-law and practice covers distinguishes essentially four situations:

In the first and probably most common situation the rebates are pure quantity rebates. For purchasing of a larger quantity the customer gets a better unit price. In the words of the Court of Justice, the rebate is dependent on quantities fixed objectively and applicable to all possible purchasers. According to the case-law such quantity rebates are lawful.

In the second situation at the opposite side of the spectrum, the rebates reward the customer for purchasing all or most of its requirements from the dominant firm. The rebate will depend on the dominant firm's share in its customer's business. In the US such rebates are known as "market share discounts". In view of their potentially strong foreclosure effects the Community Courts regard them in principle as anticompetitive. The leading case on this type of rebates is still *Hoffman La-Roche*.

In the third situation the rebates reward the customer for purchasing during a given reference period the same or higher quantities than during the previous reference period. The rebate depends on reaching individualised volume targets. The Community Courts have condemned such schemes where the criteria and rules governing the grant of the rebate had exclusionary effects. The leading case here is *Michelin I*.

In the fourth situation, the rebates again reward a customer for reaching certain volume targets over a given reference period, but those targets are no longer individualised. Instead of being based on a comparison between each customer's past and future purchasing policy, the volume levels are standardized for all customers. In its recent judgment in *Michelin II* the Court of First Instance found circumstances in which such non-discriminatory fidelity rebate systems may infringe Article 82.

The field of fidelity rebates is certainly an area where divergences between the US and Europe are greater than in others. But one should be wary of oversimplifications.

We are obviously conscious that rebates as such are instruments of welcome price competition and therefore normally outside Article 82.

What we look at are however fidelity enhancing rebates. The conditions attaching to a rebate may artificially raise a customer's switching costs and thereby foreclose competitors. In that case the rebate scheme is no longer in the interest of competition and consumers in general.

The real issue in relation to rebate schemes is therefore not whether they should be immune to intervention under Article 82, but what should be the level of analysis and proof required for a finding of an abuse.

### ***3. Tying and bundling***

Tying occurs when the supplier obliges a buyer to purchase all or part of its requirements for a second product (the tied product) from the supplier of a first product (the tying product). A manufacturer of printers might for example insist that customers buy also its toner cartridges.

The tied products may be consumables such as photocopying ink and paper, but also after sales or delivery services. Tying may be achieved through various means, such as contractual tying, technological tying or tying in the form of rebates and discounts.

In the US, the law on tying has been subject to some variations over time and it is certainly no easy task for an outside observer to describe in a few words the law as it stands. In the 1992 *Kodak* case the Supreme Court asked (1) whether two separate products were involved, (2) whether the defendant had required the tied product to be purchased with the tying product and (3) whether the defendant had market power in the tying product. The appellate court in the *Microsoft* case may have added to this an obligation to take efficiencies into account.

In Europe both Article 81(1)(e) and Article 82(2)(d) specifically state that tying may amount to infringements of Articles 81 and/or 82.

As regards the treatment of tying under Article 81 our block exemption for vertical agreements exempts tying in vertical relationships if the supplier holds a market share that does not exceed 30% on both the tying and the tied product markets. Above the threshold our guidelines on vertical restraints state that "exemption of tying is unlikely, unless there are clear efficiencies that are transmitted, at least in part, to consumers".

Most cases have however been brought under Article 82.

In *Tetra Pak II* the dominant manufacturer of liquid packaging machines was abusing its position by tying two separate products namely filling machines and cartons.

*Hoffman La Roche* provides for an indirect form of tying through bundled rebates. The Court of Justice condemned “across-the-board” rebates, which induced customers to buy the full range of vitamins supplied by Hoffmann as an abusive form of full-line forcing.

In the *IBM* case the Commission had to deal with a form of technological tying namely “memory bundling”. The Commission was not obliged to issue a formal decision since IBM agreed that it would offer certain central processing units without a main memory or with only sufficient memory as was needed for testing.

In conclusion I would say that both in the US and in Europe the state of the law is not hundred percent clear, but that any divergences are not of a major scale.

#### **4. Essential facilities**

The term “essential facility” describes a situation in which one company controls an input which is indispensable to reach a related downstream market. Refusal to grant third parties access to this facility would eliminate all competition on the downstream market.

US Antitrust law has been referring to essential facilities in the enforcement of the Sherman Act since the first half of the 20<sup>th</sup> century. The United States may therefore well be considered the cradle of the essential facilities doctrine.

Under US law, if I am not mistaken, the holder of the essential facility must grant access where:

- access is indispensable to reach the downstream market, because it is objectively or at least reasonably not possible to duplicate the facility,
- granting access is technically feasible for the controlling undertaking, and
- there are no legitimate business reasons for refusing access.

In the EU the Commission has only in the early 1990ies started to refer to the notion of essential facilities. It did so for instance in cases in which companies operating seaports and using those ports themselves for downstream activities (e.g. ferry services) were held to abuse their dominant position by refusing competitors access to the port facilities.

In its case-law on Article 82 EC Treaty, for example the *Bronner* judgment, the European Court of Justice has so far been reluctant to use expressly the term essential facility. It rather uses the language of refusal to deal, whilst at the same time applying criteria to establish an abuse which are very similar to the requirements under US law.

Like the US courts today, the European Courts pursue a relatively restrictive line as regards third party access to essential facilities. The Community Courts examine with particular care whether TPA to the facility is really objectively indispensable, in the sense that there are no other existing ways to reach the downstream market. They also examine whether for technical, legal or economic reasons it is objectively impossible or at least unreasonably difficult for any third party – whether alone or in



cooperation with others – to establish an alternative facility. Moreover under the aspect of objective justification, the Courts take careful account of the holder's property rights and of the fact that granting access too easily would discourage investors from setting up new facilities.

With regard to third party access to the use of **intellectual property rights (IPRs)** and the question of compulsory licensing, the Court of Justice has developed a closely related line of case law, which is based on similar principles. According to the leading *Magill* case, an IPR holder abuses his dominant position only where he refuses to licence the IPR with the effect of blocking the emergence of a new product for which there is unsatisfied consumer demand. In the pending *IMS* case Advocate General Tizzano recently issued an Opinion in which he defended a similar line. I understand, that US law likewise foresees only very exceptionally the possibility to impose compulsory IPR licensing.

In conclusion I would say that with regard to essential facilities both jurisdictions tackle the issue and strike the balance of interests in quite a similar way. Enforcement practice does not appear to differ to a substantial extent.

### ***5. Market integration and parallel trade***

The Commission's and the European Courts' unstinting support for parallel trade and market integration has its roots in the EC Treaty itself. The treaty provisions setting out the basic principles as well as the specific competition rules show that there is an intimate link between the preservation of competition and the creation of an open single market.

It is therefore no coincidence that Art. 81 and Art. 82 literally qualify collusion and abuses of a dominant position as "incompatible with the common market". The same is true for illegal state aids under Art. 87: they are seen as "incompatible with the common market".

This is due to a historical difference between the basic EC and US antitrust rules. The former were written into the EC Treaty as a lever (among other levers) for the creation and consolidation of a single market within the Community. The Sherman Act, which was enacted more than one century after the "groundwork" towards a single US market through the enforcement of the US Constitution's "commerce clause", aimed essentially at dealing with the big trusts.

Therefore companies easily get in conflict with Articles 81 and 82 when they impede parallel trade between Member States for their products. They restrict intra-brand competition but more importantly they impede the free movement of goods or services within the Community. Parallel trade is seen as a driving force towards market integration.

Not all impediments to parallel trade are outlawed. To fall within Art. 81, they must of course result from an agreement or some other form of conspiracy between the manufacturer and its dealers.

But otherwise the illegality threshold is low. Thus companies cannot restrict the territory into which its buyers may sell the contract goods or services except if it confines itself to restricting active sales into the exclusive territory of another buyer.

The Commission imposes substantial fines on companies which agree with their dealers to ban parallel trade or make such trade economically uninteresting. Nintendo got a € 170 million fine last year.

The European Courts have always upheld our decisions unless they perceive a flaw in the fact finding.

Some of our critics argue that the market integration goal is at least in some cases incompatible with the main objective of protecting competition. We believe that both competition and market integration ultimately serve the same ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

### **III. Conclusions**

Let me sum up the findings of this rapid and therefore necessarily superficial overview.

In some fields both US and EU antitrust have the same approach. In others the approaches differ, but outcomes in individual cases may not differ. Only in a few areas such as exploitative abuses, fidelity rebates or parallel trade both the approach and outcomes are different. Those divergences are mostly the consequence of the different legal frameworks which enforcers on both sides of the Atlantic have to apply. I also wonder whether in the area of commercial practices we should necessarily aim at the same level of convergence as in other areas of our policy such as merger control or cartels. Even inside the EU we accept some divergences in this area.

But the few differences which I was asked to highlight today should not obscure the basic fact that on the vast majority of issues in antitrust there is a very large measure of convergence between the US and Europe. I can assure you that if you had the heads of the US competition agencies with Commissioner Monti and myself in this room today, we would all say that the focus of our concerns over competition are very, very similar indeed.

Ladies and Gentlemen,

Let me now conclude by thanking the organisers for providing us with this excellent opportunity to share and compare our experiences in this important field. Thank you for your attention.