

Modernising article 82

Combining legal certainty and an economic effect-based approach

by *Philip Torbøl**

“That which is a law today is none tomorrow.” Such is the way the English philosopher, Robert Burton, conceived the legal order at the beginning of the 17th century. In those days, the outcome of a legal dispute depended mostly on the size of the bribe one had paid to the jury or on the whim of the King’s Chancellor. Therefore, the only remarkable thing about Burton’s statement at that time was that he had the courage to make it. Somewhat more alarming is the fact that Burton could legitimately have made the same statement in recent years regarding EC competition law.

Especially in relation to dominant companies, recent case law from the European Commission and the European courts has failed to provide continuity and legal certainty. The tendency culminated with the much-disputed *Michelin* decision in 2001, upheld two years ago by the Court of First Instance (CFI), which resulted in a general feeling among practitioners that, where rebates are concerned, anything and nothing can be expected. Thus, the only way a dominant company’s management can ensure the legality of its rebate scheme is to give no rebate at all. This situation is clearly counterproductive and could ultimately lead to a market where the main actors are afraid to compete, the opposite of what competition law is intended to achieve.

As the last stage of its modernisation package, the European Commission’s directorate general for competition (DG Comp) is currently drafting guidelines on the application of article 82 EC. This is a perfect opportunity to finally provide businesses and counsellors with a unique tool that allows them to elaborate and launch competitive initiatives without having to fear unexpected reactions and substantial fines from competition regulators.

Future of article 82

The ongoing debate about the future of article 82 has, however, focused mainly on whether and how to apply an economics-based approach when enforcing EC rules against abuses of a dominant position. Such an economics-based approach also dominated the debate in relation to the reform of article 81 and that of merger control. The European Commission has, on its part, recognised increasingly the importance of economics in competition law, not only to develop basic policies, but also in the enforcement of such policies.

There are good reasons to advocate a more economics-based approach in dominance cases. Two of the most significant cases in recent years, *Michelin* and *BA*, illustrate the form-based approach that, up until now, has been predominant in European competition law enforcement. In these cases, the Commission (with the support of the European courts) based

its decisions on the assumption that rebates granted by the two dominant companies had the “inherent effect” of restricting competition. Remarkably, the CFI endorsed this reasoning and rejected claims that the Commission should have demonstrated a link between the rebate schemes and concrete anticompetitive effects.

This has since led most scholars and many practitioners to praise the virtues of an economics-based approach and, in particular, an effects-based approach, which consists in focusing on the effects on competition of a given conduct rather than prohibiting it outright.

The EAGCP

One of the latest contributions to the debate comes from the European Advisory Group on Competition Policy (EAGCP). The report published in July this year was commissioned by the chief economist of DG Comp, who is himself a recent product of the growing importance given to economics within the European Commission. Not surprisingly, the report argues in favour of an economics-based approach to article 82. In particular, the report strongly advocates applying an effects-based approach to each competition case, whereby the regulator focuses on the anticompetitive effects of the investigated conduct and on the harm caused to consumers. The report reiterates relentlessly that protecting competition is different from protecting competitors.

In the EAGCP’s view, consumer welfare should be at the heart of each competition investigation and the only way to assess properly whether specific conduct benefits or harms competition, is to consider its actual effects on consumers. According to the report, the currently used form-based approach, defining which type of practices are or are not anti-competitive as such, is bound to give false results. Thus, a practice which is actually harmful to competition could escape sanctions on formal grounds, whereas procompetitive practices may be considered to be unlawful simply because they fall within predefined, stringent parameters of outright prohibition. The EAGCP therefore recommends that the form-based approach is entirely replaced by an effects-based assessment that disregards the nature of the practice in question and only focuses on its effects. Rather than anticompetitive practices, what should be defined are types of anticompetitive harm or effects.

From an economic point of view, the suggested approach makes perfect sense: competition law is in essence based on economic theories, and will best serve its purpose if each case is decided upon following an economic effects-based analysis. From a legal point of view, however, the approach and its ultimate consequences give rise to some serious concerns.

* *Philip Torbøl is an associate with McDermott Will & Emery / Stanbrook LLP (Brussels)*

Risks of effects-based approach

The main risk of a full effects-based approach is the danger that legal certainty will not be improved – quite the contrary. Basing competition law enforcement only on the effects of commercial practices requires that business managers and their counsellors anticipate all the consequences of a certain practice before it is launched, failing which they risk being met with sanctions for those practices' anticompetitive effects – even if those were unexpected and unintentional. Indeed, it is the dream of any business manager to be able to predict the economic effects on the market of all the initiatives his company launches. Unfortunately, most of the time, it is impossible. Consequently, an effects-based approach may ultimately lead to a weakening of predictability, and the EU-recognised principle of legal certainty will suffer as a consequence.

Going back to the beginning of this article and to Robert Burton's observation, the lack of legal certainty was precisely one of the problems that the new article 82 guidelines were intended to remedy. Does this mean that, in the name of legal certainty, an effects-based approach should be totally ruled out? No, but DG Comp needs to strike a balance between predictable rules and the need to consider the economic effects on competition of dominant companies' commercial practices. This is also necessary to ensure that the courts retain their competence to rule in competition cases, which would become a complicated task if all cases had to be resolved solely on the basis of individual economic assessments.

In order to take both approaches into consideration, the following conditions may be envisaged:

- Business managers who fully obey the rules should be able to sleep peacefully at night, and therefore not all commercial practices should potentially be subject to sanctions. It must be possible to compete as a dominant company without having to fear unexpected effects of one's practices.
- Consideration should be given to differentiating between hardcore abuses of dominance and "at-risk" practices.
- An effect-based analysis or demonstration should always be required before ruling against non-hardcore practices.
- Even in the case of hardcore practices, the defending company should be given the opportunity to demonstrate the presence of clearly defined procompetitive effects and/or efficiencies that may justify the practice and render it lawful.

Monitoring effects of lawful practices

A problem arises in relation to practices that, although formally lawful, prove to be anticompetitive as a result of their harmful effects on competition. This is one of the points on which the EAGCP report strongly criticises the current form-based approach. In these cases, legal certainty and effects-based approach are in direct conflict with each other. Since legal certainty cannot be compromised on, such cases need to be handled in a different way. DG Comp could, for example, find inspiration in the enforcement model that was used in many EU countries before the prohibition-based model was introduced, namely the control-based model. According to this model, the regulator can scrutinise markets and companies, and carry out investigations. If an investigation shows that competition is suffering from one or more circumstances, the regulator is then entitled to issue appropriate directives to the relevant parties requesting them to change their behaviour or practices. The difference between this and the prohibition-based model is that the companies are immune from fines until the issuing of such directives. As a supplement to the normal prohibition-based enforcement of article 82, such a control-based enforcement would allow DG Comp to catch those practices that wrongfully escape the prohibition and take appropriate measures against them without jeopardising legal certainty.

Certainty tomorrow – maybe

The European Commission has promised publication of a draft of the guidelines by the end of this year followed by public consultation, so it can be expected that the debate will go on for several months. Hopefully, when this is all over, we will be able to note that Robert Burton's statement in fact belonged to the 17th century and that today, lawyers are able to give their clients reliable advice, in particular regarding article 82.

References

Commission Decision of 20 June 2001 in case COM/E-2/36.041 – *PO/Michelin*, OJ 2002 L 143.

Commission Decision of 14 July 1999 in case IV/D-2/34.780 – *Virgin/BA*, OJ 2000 L 30. See also Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission*; and case T-219/99 *British Airways v Commission*.

The European Advisory Group on Competition Policy (EAGCP) report was published on 29 July 2005 and can be found on the European Commission's website:
<http://www.europa.eu.int/comm/competition/publications/publications/#UDIES>