Abuse of Dominant Position and Pricing Practices - A Practitioner's Viewpoint

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The object of this paper is to offer some comments on the way in which the present law concerning Article 82 of the EC Treaty ("EC") and pricing works. These comments are based on some 20 years of experience, advising both dominant companies and market entrants on such issues. In fact, one of my first cases when I started working in EC competition law in 1983 was to apply the EC rules to a dominant company's discount and bonus schemes in the light of the *Michelin* judgement[1]. Not much has changed since then (although there are always clarifications in each case)[2] and therefore I welcome this conference's theme. As the Commission seeks to modernise so many other areas of EC Competition law it also appears appropriate to review Article 82 EC practice to see if it should be improved.

GENERAL

At the outset, I would like to make a few comments on what it is like to work with dominant companies on these issues.

First, in my experience dominant companies generally try to comply with the EC rules. We are continually advising them in many different sectors, reviewing the often complex terms and conditions of modern business and trying not to be a brake on their innovative proposals.

Secondly, by and large the rules are understood and even accepted. However, understanding what is the precise limit of permissible behaviour is not straightforward.

In general, most dominant companies appear to understand the *concept* of an "abuse" of dominant position reasonably well.[3] In particular, exclusionary infringements based on

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

2 For example, in the recent *Michelin* decision, the Commission found that a rebate for respecting "spontaneous customer demand" was unlawful. This had been a frequent rebate justification In France after the first *Michelin* decision; see, OJ L143/1, 31 May 2002, at paras. 107 and 317.

3 "The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the

notions of "leverage" are readily understood (e.g. bundling dominant and non-dominant products).

Nevertheless, the focus in the definition of abuse on the term "normal competition" can be difficult for some. Many companies argue that all they are doing is competing as hard as they can and that all the methods they use to that end are "normal competition". They do not readily accept the narrower definition of "competition by trading performance", which is permitted for the dominant. Often therefore we have to explain that, even though there may be types of competition which appear normal, nevertheless, the dominant company may not use them because of their perceived effects on the "weakened" competition in the market.

Clearly, this is controversial and unpopular with dominant companies. Above all, where a dominant company's competitors are using a certain type of rebate and we are saying that, on the law, the dominant company should not do so. The *application* of the concept of "abuse" is therefore often not so readily accepted.

There are also a number of problematic areas where the rules do not appear clear enough or sufficiently in line with the experience of dominant companies in the markets in which they trade. I propose to focus on these areas in the next section. In various cases, clarifications would be useful.

Thirdly, one has the impression that not many Article 82 EC pricing cases have been brought and these tend to involve companies with very large market shares and multiple infringements, where the issue is the last degree of residual competition. This may simply reflect allocation of enforcement resources, or administrative prudence in only bringing cases where the authority considers it is likely to win. Such a restrained approach is perhaps also inherent in the nature of "abuse control", since many are aware that too active an interventionist policy might be interpreted as sanctioning dominance itself, rather than just its "abuse".[4]

However, such an enforcement approach raises the question as to whether there is (or should be) a conscious policy of pragmatism at lower market share levels (where the risks may not be so great and the effects not so clear).

PROBLEMATIC AREAS ON THE EXISTING LAW

Buyer Power

A frequent problem in practice is that an apparently dominant company supplying a major distribution operation is faced with demands for rebates that may be considered unlawful under Article 82 EC. Classically, the purchaser will demand yearly total turnover rebates (based on all products supplied to all outlets in that period).

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degree of competition still existing in the market or the growth of that competition." Case 85/76, *Hoffmann- La Roche v. Commission* [1979] ECR 461 at para.91.

[4] See, Carles Esteva Mosso and Stephen Ryan in Faull and Nikpay, "*The EC Law of Competition*", at para. 3.13.

Some competition practitioners advise that the dominant supplier cannot discriminate and have different conditions for these large purchasers with buyer power.

Others argue that, even if the supplier has some 50%-60% of a relevant market, the supplier may not be dominant. Partly because the supplier's sales represent only a fraction of the purchaser's sales and partly because the distributor has such scale that the supplier cannot afford to lose access to its many outlets. From the purchaser's viewpoint, different products in different shelves are also just ways to maximise profits and the amount of his operation that he will allocate to a certain type of product can be expanded or reduced accordingly. He may want certain key brands as core to his "one-stop shopping format", but even then he may be prepared to change. In other words, many of these distribution operations have considerable buying power which cannot be ignored by suppliers which are considered dominant on their own product markets.[5]

From an adviser's viewpoint, what is troublesome here is that the law appears neither clear, nor entirely consistent.

In EC merger control, the Commission has accepted arguments that buyer power may be a countervailing force to claims of dominant market power. One thinks of cases such as *Rewe/Meinl* and *Enzo/Stora*[6], although there are now many examples.

As regards behavioural infringements under Article 82 EC there is, as far as I am aware, no equivalent precedent. On the contrary, there is a tendency to reject such claims, noting for example, that in *BPB Industries* the Commission and the European Courts held that buying power was not a defence for a dominant supplier insisting on exclusivity clauses[7]. However, that ruling should not mean that buyer power cannot be a defence to a "dominant" supplier offering an extra rebate because, if not, he faces de-listing or other severe customer sanction.[8]

One senses that the Commission's problem is that, if such an approach is accepted, it is not clear how such recognition should be worked into the overall analysis. For example:

- How much buyer power is enough to justify the additional rebate that would be paid?
- Would such power allow the "dominant" supplier then to compete "normally" and offer a full range of rebates? In principle, what we could be talking about is a situation where, because of the buyer power of the customers in question, there would be ordinary competitive conditions vis-à-vis those purchasers. Or more conservatively, would the dominant supplier only be able to use buyer power as an exceptional defence?
- Where would you then draw the line between the customers "dominated" and those not? One might argue that, in fact, the large-scale customers are so fundamentally different to the smaller ones that markets should be defined differently and that differentiation between the two would be entirely legitimate.

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5 One could also argue that an additional rebate is justified because the whole scale of the distribution operation is worth something more than the individual volume elements that can be achieved by lesser distribution outlets.

6 *Rewe/Meinl*, Case M.1221, EC Official Journal ("OJ"), L274/23, 23 October 1999 and *Enzo/Stora*, Case M.1225, OJ L254/9, 29 September 1999.

7 OJ L10/50, 13 January 1989 at para.162; upheld on appeal Case T-65/89, [1993] ECR II-389 at para. 68.

8 See, in the same sense, Butterworths Competition Law, Section VI, Ed. Sufrin. at para. [649].

We have seen little discussion about this sort of thing in the literature or in the Commission's practice and therefore some are reluctant to advise that there are two different types of customer, justifying legitimate price discrimination between the two. All the more so as each sales channel may ultimately compete for the same end-users to some extent.

It would therefore be interesting (and is perhaps overdue) to see the European Commission take a decision on loyalty rebates, carving out as lawful those rebates given to some large customers based on buyer power, even if that would offer a more complex message. In practice, many companies and their advisers have already concluded that this should be allowed although, on existing case-law and practice, understanding that there are no guarantees!

In any event, as explained above, many businessmen simply consider that they have no choice but to fall in line with such powerful customer demands, even if the current law appears out of date on the issue.

Cost justification

Another frequent issue in practice is cost justification. Based on various statements in European Court case-law and Commission practice, it is often argued that rebates by the dominant which are not strictly cost justified may be considered to be loyalty rebates.[9]

The issue is that many dominant companies are not running their pricing policies by doing strict cost justification exercises. Few rebate systems in my experience are so strict for a variety of reasons:

- Partly because there is great scope for debate as to how to allocate costs and people do not want to get lost in the detail.
- Partly because many "dominant" companies start without that market position and only build up to dominance. By then, the whole structure of pricing in the market has followed an evolutionary process. It is very difficult for a company which has gone along this path to forget such history and change the whole nature of its pricing when it becomes dominant, especially as such pricing may also be a general market practice by then.
- Partly because marketing terms come up at least every year and usually have to be put together, reviewed and issued promptly. It is not practical to insist each time that there be a huge cost justification exercise[10].

As a result, one is reluctant to advise that a change is required until dominance is very clear. Even then, the tendency is to advise that rebate structures should be *broadly* cost justified, rather than minutely analysed. For example, checking that there *are* economies of scale in

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9 See, e.g. *Virgin/British Airways*, OJ L30/1, 4 February 2000, at para 101 and Mr Van Miert, Commissioner for Competition, MEMO/99/42, 22 July 1999.

10 Experience with predatory pricing, bundling and cross-subsidisation cases also confirms how complex it may be to allocate costs.

the transactions concerned and that the rebate scale has not been clearly fixed to meet a particular discriminatory end.[11]

Judging by most of the cases which the Commission brings, it appears that this is enough. The Commission rarely checks the actual cost curve behind the rebate scale.[12] It would be useful if this more pragmatic general approach could be confirmed (if necessary, with a narrower category where a closer check would be expected). If specific analysis is required, I would also hope that would be left to the few cases (perhaps where very high market share is in issue) and then suggest that, in such cases, one still needs to look carefully at all the circumstances.[13]

Services justifying lawful payments

Another area that needs further clarification is the issue of services for which a dominant company may make payments.

In practice, competition authorities often appear to measure performance for the purpose of rebates solely in terms of volumes sold. In other words, they require that all discounts and bonuses should be directly related to the *quantities* sold, even though *qualitatively* some sales may be more difficult than others and therefore deserve more reward or support.

One can understand this. There may be concerns that otherwise qualitative services may be used as a camouflage for anti-competitive conduct. In some cases, such services may be difficult to assess. However, in some cases, *not* to give credit for the nature of the service is wrong and amounts to a form of discrimination.

To give a practical example, I would mention a case of a dominant company that was giving a bonus to a wholesaler operating in a country area, which was supplying a number of outlets spread over a large territory and serving a not large population. The wholesaler's costs of supply to the retail outlets were higher than would have occurred in a big city. The same was true of the countryside retailers. It was also clear that the stock rotation rate of both the wholesaler and the retailers in the countryside was less than their equivalents in cities in the country concerned.

This prompted the dominant company to offer a bonus designed to reward the countryside wholesaler and retailers for the additional costs incurred (of storage, delivery etc.). This was regarded as payment for services to the dominant supplier, namely providing better coverage despite the low rate of sales. Without some such support, there was concern that other products (from other product markets) would be handled instead, leaving the countryside consumers to drive into the cities for the supplies concerned.

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11 In line with the various airport cases. See, e.g. *Brussels National Airport (Zaventem)*, OJ L216/8, 12 September 1995.

12 See, Carles Esteva Mosso and Stephen Ryan, cited above, at para. 3.426., where the authors note that "the Commission has rarely required the direct correlation with efficiencies to be quantified …".

13 Notably, it is not always clear that rebate scales should be on a 'straight line' basis as suggested in the *Virgin/British Airways* Press release, IP/99/504, 14 July 1999.

We found ourselves debating whether these would be considered loyalty rebates and/or discriminatory insofar as, if all rebates had to be volume related, the countryside wholesaler and retailers were not performing at the same level as their city-based equivalents.

I would plead in favour of a solution which would allow for this sort of flexible arrangement, focussing on varied services and not just sales volumes. If not, it appears to me that the focus of review is not close enough and the rebate system may be too rigid.

A similar point relates to marketing allowances that are often paid, not by reimbursing specific costs incurred by the distributor, but through a bonus of a certain percentage of sales in the products concerned broadly rewarding the services in question. Again, the amount paid may not correspond mathematically to the costs of the distributor in pursuing the relevant marketing promotion. Nevertheless, normally it is far too expensive to deal one by one with the administration of reimbursing a dealer on the basis of receipts and therefore one would expect that a reasonably broad approach would be accepted.

In both cases, I would hope that the Commission would agree. If so, it would again be useful if the Commission could confirm so.

How much dealer pressure is too much?

An issue that is one of the most difficult in practice is the balance between a dominant company's rebate scheme and that of a smaller competitor. One is faced with the question whether the amount and form of a rebate will be such as to be insurmountable for a competitor so that, in practice, market entry or expansion is foreclosed.

This law is based on the European Court's positions in *Hoffmann-La Roche* and *Michelin*.[14] The idea is that a small rebate by a dominant supplier applied to all the purchases of a dealer with that supplier cannot be matched by a competitor, which will only have less sales to which the rebate can apply.

In practice, what we suggest to the dominant company is that it complies with the various indications in the case-law and in the Commission's practice as to how to split up the discount and bonus structure in order to reduce the pressure on the dealer to buy from the supplier. In other words, by having short reference periods and/or breaks in the rebate scale which allow switching opportunities, breaking up products into product groups or families, ensuring that the system is transparently managed and ensuring that the system is reasonably cost justified (with the *caveat* noted above).

No one finds this very easy because you usually still end up with a legitimate scale advantage to the dominant company, so the "pressure" still appears great. Clearly also, few dominant companies consider that they are doing something which amounts to normal competition. On the contrary, they usually consider that they are being *prevented* from competing and that the benchmark as to what is lawful is artificial.

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[14] Cited above footnotes 1 and 3. The leading statement of the law is in Case 322/81, *Michelin* at paras. 70-73 and 81-85.

As matters stand, it *is* possible to draft a lawful rebate scheme based on the European Court and Commission rules but, as explained, this remains an uneasy exercise.

Meeting competition as a defence?

A further area that is the subject of great debate is whether and to what extent there is a "meeting competition" defence. I propose to consider the law first and then the underlying policy debate.

Law

In principle, a dominant company has a right to make a proportionate response to a competitor's challenge, but the principle is limited because "such behaviour cannot be countenanced if its actual purpose is to strengthen [the] dominant position and abuse it".[15] In practice therefore, dominant companies are concerned that if they respond, complaints and proceedings will follow.

The classic situation is one where a competitor enters the market, offering a new low price and the dominant company wishes to respond by matching or slightly undercutting that price wherever it is offered.

In such a situation, most consider that, on the current law, if the dominant company responds *on a selective basis*, even if its prices are above predatory levels, it will be found to abuse its dominant position. The usual position is to say that, if a dominant company wishes to drop its price in the face of competition from a third party, then it should do so *generally*, according to some non-discriminatory principle, not on a specific and selective basis. If not, the response is likely to be considered to have gone too far and to be unacceptable exclusionary conduct.

Such an approach is reflected in European Court case-law and Commission practice. For example, in *Hilti*,[16] selective, discriminatory pricing was condemned.[17] Again, in *BPB*[18], the Commission condemned payments to selected merchants in return for exclusivity. The Commission noted: "The offer of promotional payments to individually selected merchants rather than in the framework of a general scheme based on objective criteria served to reinforce the … exclusionary nature of the scheme".[19]

The grey area is how "general" a dominant company has to be in its response. In *BPB*, the Commission did not object to a new rebate for a new size of delivery (so-called "Super Schedule A" rebates for deliveries using a 38 tonne truck). Initially these were used as part of a competitive response in a limited geographic area, where BPB was facing particular competition, but later they were extended throughout the country. The key points for the

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15 *United Brands*, Case 27/76, [1978] ECR 207 at paras.189-190 (repeated in numerous cases since).

16 OJ L65/19, 11 March 1988 at paras. 80–81 (upheld on appeal).

17 Interestingly however, the Commission did allow exceptions to quantity/value discounts to meet a competitive offer or where customers insisted on individually negotiated terms, suggesting that some "meeting competition" and flexibility is allowed (see the undertakings attached to the Decision).

18 OJ L10/50, 13 January 1989 (upheld on appeal).

19 See, especially at paras. 123 –124. Internal documents were also held to support that view (see para.127).

Commission appear to have been that the rebate was *open to all customers* in the area and (mainly) founded on objective justification.[20] Recently, there has also been some (guarded) recognition by the Commission of a meeting competition defence in bidding markets where "the winner takes it all"[21].

Some argue therefore that some "meeting competition" defences should be allowed, especially regionalised responses or competitive responses involving a category of customers, rather than just those to customers with offers from competitors. This would have clear attractions in allowing *some* competitive response, without what may appear an unduly high burden of a full price decrease in the whole market. This is an area where further guidance from the Commission would be welcome.

Underlying policy debate

The key ideas in the current law appear to be as follows:

- If such an approach were *not* required, the dominant company would just 'stamp out' competition before it could get going, whilst protecting its more general 'dominant level' of pricing (elsewhere, at the same time, and for the future after the competitive challenge has been rebuffed).
- In such a scenario, selective rebates, even above cost, are a form of 'predatory foreclosure'. As the Commission put it in *Hilti*, "The abuse in this case does not hinge on whether the prices were below costs…Rather it depends on the fact that because of its dominance, Hilti was able to offer special discriminatory prices to its competitor's customers with a view to damaging their business, whilst maintaining higher prices to its own equivalent customers". [22]
- The issue is not simply about the actual price level, it is about starving a smaller market entrant of business so that it cannot attain the minimum efficiency scale required to be economically viable and match the scale advantages of its dominant rival.
  * Thus, i*n Irish Sugar*[23], the Commission noted: "The maintenance of a system of effective competition does, however, require that competition from undertakings which are only small competitors on the geographic market where dominance prevails, regardless of their position on geographic markets which are separate for the purpose of assessing dominance, be protected against behaviour by the dominant designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power".[24]
  * Again, in *CEWAL*[25], the Commission found an abuse in the establishment of a concerted "exceptional price with the aim of removing a competitor". The Commission noted that "even if the fighting rates were above cost, the subsidisation of the cost of the fighting rates by the conference's normal rates charged on its other sailings is in itself in the case at issue abusive, anti-competitive conduct *which might*

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20 See, paras. 70-74 and 131-134.

21 OECD Roundtable, on Loyalty and Fidelity Discounts and Rebates, 4 February 2003; DAFFE/COMP(2002)21 (Hereafter "OECD Roundtable", available on www.oecd.org/competition); European Commission contribution, page 197 and Summary of Discussion, page 215.

22 *Hilti*, cited above at para. 81; see also OECD Roundtable; Executive Summary, page 10.

23 OJ L258/1, 22 September 1999 (upheld on appeal).

24 At para. 134.

25 OJ L34/20, 10 February 1993 (upheld on appeal).

have the effect of eliminating from the market an undertaking which is perhaps as efficient as the dominant conference but which, because of its lesser financial capacity, is unable to resist the competition practised in a concerted and abusive manner by a powerful group of shipowners operating together in a shipping conference" [26] (Emphasis added).

- A non-predatory, selective response by the dominant is therefore usually considered unlawful.[27] Here, the basic definition of abuse also is critical, because the idea is that small acts by the dominant can impact the structure of competition itself and it is only in that weakened market structure that otherwise normal competition is restricted.
- One senses in the Commission's approach also policy choices to allow *some* market entry, even if small, in particular where this is cross-border and where this may be a first challenge to static dominance held over many years in an EU Member State. The related idea being that once a foothold is established, the competitor can then better develop and compete afterwards.

Clearly, one can argue that this approach is wrong and unduly hard on the dominant. The key ideas are that:

- Few companies will want to do a full, general (market-wide) price decrease in order to deal with a limited challenge. As a result, in a sense, the law creates an easy opening for a competitor to come in unchallenged for a while.
- It would be better competition (and fairer) for the dominant company to be able to respond, since that would give specific price competition (at least in the short term) and then further competition between market entrant and the dominant company will test out which company is the most efficient. Provided that competition is not predatory, there should be no concern. This is the general US view. [28]
- In a sense, this approach also reflects a more robust view of market entry competition. One may argue that EC law encourages small-scale entry where companies take *some* share, whereas a larger (if later) more committed contest of the market would be healthier for competition.
- Some also argue that potential competition may act as an adequate constraint on the dominant.
- This approach really penalises dominance itself, since the dominant company will only be able to compete again fully (including selectively), when it is no longer dominant.

Some also speak of the EC approach having a "chilling effect" on competition, in the sense that the dominant are unable to compete normally. However, this is not straightforward because a similar point can be made if the dominant company can selectively respond. This

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[26] See, para. 82; on appeal, the European Court also emphasised that the conference market share was over 90% and the conduct was openly designed to eliminate the new competitor from the market, *Compagnie Maritime Belge*, Joined Cases C-395/96P and C-396/96 P, [2000] ECR 1-1365 at paras. 117 to 119.

[27] See, in this sense, Butterworths Competition Law, cited above at para [625.1].

[28] OECD Roundtable, United States contribution and Kolasky, "*What is Competition?*", Paper delivered at The Hague, 28 October 2002; especially, pages 7-8 and 10-11; available on www.usdoj.gov/atr/public/speeches. A variant would be to allow the dominant company to make an individualised response where an offer is made to a regular customer, but not below cost and not if that response were then extended to a systematic practice against a new competitor (see, the Finnish contribution to the OECD Roundtable at p.121).

also has a "chilling effect", as it signals to new entrants that entry to a market must be full-scale war or nothing. Even large companies may hesitate to enter on those terms.

It would be interesting to discover more as to why there is such a difference in approach between the EU and the US. Thus far, I have noted:

- In the American contribution to the OECD Roundtable, that there is a certain trend in American practice to have a narrower category of clear rules, in part because of concern about treble damage litigation exposure if courts too readily find that price discounts violate antitrust laws.[29]
- European practice may also be influenced by (i) a "democratic" notion of competition, in which preference is given to facilitating consumer choice (meaning at least two competitors in most situations, if possible)[30] and (ii) the EC Treaty objective to promote wider EU cross-border market integration, rather than pure economics.
- As in other areas of competition, one also senses that Europeans see European markets differently to the way Americans view American markets. This appears to me to be the main explanation for the divergence in approach so far. In Europe, regulators appear to think that many dominant positions are not the result of competitive success, that there is too little change and therefore favour rules which appear to open markets up more quickly. Many loyalty rebate cases also relate to former statutory monopolies, which are considered not to be competitive. Their American counterparts appear to consider that positions of dominance are generally the result of market dynamics, see markets as highly fluid and barriers to market entry as often low, and are therefore more confident that strong competition will occur to counteract any dominance achieved.[31]

Particular types of rebate as abuses – so-called "*per se*" rules

The issue of so-called "*per se*" rules against some types of rebate in EC law has come up recently in two main ways:

First, it is argued that the EC approach against loyalty, progressive and target rebates[32] is a *per se* one since, *focussing on the form of the rebate*, these are considered not to be normal competition for the dominant. It is argued that, particularly in high fixed cost industries, it is completely normal for a dominant company to compete with varied terms (which may include such rebates) for every last customer order and therefore such rebates should not be prohibited *per se*, but only if their *effects* are clearly exclusionary.[33]

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29 OECD Roundtable, Summary of Discussion, page 220.

30 OECD Roundtable, Executive Summary, page 11. Sometimes people appear to equate this with some notion of "fairness" or "fair play", which I do not understand. The issues are (i) that it usually takes two to compete and (ii) even now, many markets are still national, rather than regional or European.

31 Kolasky, "*What is Competition?*", cited above, at page 6.

32 A "loyalty rebate" is defined as a discount or bonus paid for a customer committing to place all or most of its requirements with a dominant supplier. A "progressive rebate" is defined as a discount or bonus paid where a customer purchases more than in a previous reference period (such as the previous year). A "target rebate" is defined as a discount or bonus which is paid if the customer meets a defined sales target, especially where it is set by reference to previous performance or taking into account likely future requirements.

33 Ridyard, "*Exclusionary Pricing and Price Discrimination Abuses Under Article 82 – An Economic Analysis*", 23 European Competition Law Review, p.286.

Secondly, the Commission has suggested as a blanket rule that reference periods for rebates should not exceed three months, even though, on both the Commission's practice and the European Court's case-law, longer reference periods have been accepted.[34] It appears that the Commission wishes to set a clear policy guideline, rather than look at variations.

Predictably, as a practitioner (who may be on either side) I have mixed views about such rules:

- Clearly, there are many valid reasons why dominant companies want to sell more and it is right to show that many rebates are often not *designed* to foreclose competition. However, an effect-based analysis after the event is of little use to competition if, in the meantime, a competitor has been irreversibly pushed out of the market. So, to some event general rules *are* necessary.
- When representing a market entrant, one wants to avoid the cost and delay of a long and intensive market analysis of all aspects of foreclosure in the circumstances. As a defendant's counsel, one usually wants exactly the opposite. All the more so if the rebate in question is only used to a limited extent and therefore its foreclosing effects are not clear.
- "*Per se*" rules as such also have a bad reputation as being overly rigid. However, many businessmen (and even their lawyers) prefer a reasonable rule which can be applied without too much cost and effort and in a reasonable time frame (meaning a week or two) over a perfectionist analysis which takes enormous cost, effort and time.

It is interesting here to note the very candid approach explained in the German section of the recent OECD Roundtable.[35] The German authorities explain that German law (which I have always understood to underpin EC law in this area) does not provide a "secure distinguishing criterion" as to what is competitive conduct and what is abusive. The interests of the dominant are weighed up against the interests of those restricted. Focus on "productive competition" is used (*Leistungswettbewerb* - which I understand to be similar to the EC notion of "normal" competition by trading performance). However, even so, the German authorities suggest that it "is still impossible to draw a secure line" between abusive and competitive conduct: "*There is therefore no realistic alternative to a consideration of interests in each individual case … facilitated by establishing concrete categories of cases*" (Emphasis added). I think that neatly summarises the current situation in EC practice also, where there *are* grounds for specific assessment in some cases, but also grounds for some broad category rules.

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34 See, *British Gypsum* OJ C321/11, 8 December 1992 (six months); *Virgin/British Airways Press Release* IP/99/504, 14 July 1999 (six months). In *Michelin*, cited above, the Commission and the European Court condemned one year reference periods on the facts.

35 OECD Roundtable, page 131.

Recognition of multi-product scale efficiencies

Finally, another issue which prompts debate in practice is whether scale efficiencies which may have an impact on various product markets can be reflected in rebates. As I understand the law, if the efficiencies can be shown (e.g. in terms of multiple product delivery giving economies of scale), then such a rebate will be accepted,[36] (with the sort of *caveat* as to the level of detail you can go into on this assessment made above).

Sometimes there are concerns that such a rebate might amount to bundling, but I would submit that such a case should be clearly distinguished from those cases where, for no obvious efficiency reason, rebates are offered on products sold which belong to different groups.

This may be a simple point, but it would be useful if this (and similar efficiency justifications) could be confirmed and explained further by the Commission to improve legal certainty.

CONCLUSIONS

The list of problematic issues which I have suggested is quite long. In my view, as a result, there is a case for Commission Guidelines designed to clarify the various issues raised and better explain the policy choices made. This would also be a useful tool for ensuring cohesive practice after decentralisation in May 2004.

I am watching with interest the recent drive amongst practitioners to import American rules to the EU. As I understand it, this would involve a significant loosening of the current law. It may also involve a stronger notion of competition, so it merits careful consideration. Unless I am mistaken, it is at the moment out of step with the views of (at least most) European competition authorities and the European Courts. However, it is clearly supported by many practitioners.

There is also a case for recognising a two-tier approach, where dominant companies with very high market shares would be subject to stricter pricing rules than those just reaching the levels where dominance may be raised. One senses that difficulties in implementation have lead to that idea not taking hold, with the Commission preferring to target specific forms of competition which it considers not "normal" for the dominant, rather than who should be "super-dominant" and with what consequence. However, again this issue merits careful consideration, because so much of our work in practice is not with the "nasty" abuse cases of the hugely dominant, but with dominant companies who have earned their position on merit and simply seek the right to continue competing as fully as they can.

[36] Esteva Mosso and Ryan, cited above at para.3.127.