What scope is there for modernisation?

Last autumn a seminar was held in Brussels on the reform of the enforcement of Article 82 EC by the European Commission. This event was sponsored by Wilmer Cutler Pickering Hale and Dorr LLP, the University of Nyenrode and *Global Competition Review*. **ANTONIO CAPOBIANCO**, of Wilmer Cutler Pickering Hale and Dorr LLP reports

Over the last years there have been numerous calls for modernisation of the way in which Article 82 of the EC Treaty is applied, and in particular for a greater focus on the economic effects of practices. In Article 82 EC cases to date, enforcement has been based on the perceived object of the ambiguous practice, with effect being inferred if sufficient market power exists. Recently, the classic positions on fidelity rebates and the special responsibilities of dominant companies have been reaffirmed by the European Court in *Michelin II*, *Masterfoods II* and BA/Virgin.

Claus-Dieter Ehlermann (senior counsel, Wilmer Cutler Pickering Hale and Dorr LLP) introduced the proceedings. The seminar was organised into five panel discussions.

Panel 1: Article 82 EC—the current law and practice

John Ratliff (partner, Wilmer Cutler Pickering Hale and Dorr LLP) gave an overview of the legal principles and introduced some of the themes that would be discussed later in the day, such as the (currently) underestimated importance of buyer power in assessing dominance and abusive conduct, the extreme difficulty in distinguishing between anti-competitive (exclusionary) practices and normal competition; the unsatisfactory approach to what a dominant firm can do to respond to competitive pressure; and the need to balance more economic analysis while not depriving companies of predictability and legal certainty. He concluded by laying the ground for the discussion on what could be a roadmap for the reform. He suggested that the European Commission might distinguish between practices which are clearly not abusive, practices which are presumptively abusive (eg because of market foreclosing effects, but which may be allowed if they have proven positive effects) and 'hard-core' abuses.

Derek Ridyard discussed the key questions which in his opinion should be addressed by the European Commission in the reform:

- Should there be per se abusive practices?
- Can there be an abuse at a threshold below the predation standard?
- What is a cost (or other 'objective') justification?
- What is an essential facility?
- When are bundling and tying really abusive?
- Should economic effects take a role in the Commission's analysis of unilateral conduct?'

Some of these questions may currently involve conflicting answers because the legal standard applied is sometimes problematic if looked at from an economic perspective. He suggested that the reform should rest on two core ideas: no conduct should be considered per se abusive and an effects-based standard should rely on workable economic rules of thumb and guidelines.

Panel 2: Rebates after *Michelin II* and BA/Virgin

This was chaired by Michel Waelbroeck (emeritus professor of European law, Université Libre de Bruxelles and president of the Belgian Competition Commission).

Doug Melamed (partner, Wilmer Cutler Pickering Hale and Dorr LLP) explained that under US law single product rebates are not perceived as a concern if the price remains above costs. He then discussed the recent judgment in *LaPage v 3M*, where multi-product discounts were considered illegal, even if above costs. He considered that overall the opinion in *LaPage* reflected concerns that are more common in the EU, such as a sense of unfairness when a big or multi-product firm seeks to exploit its advantages to the detriment of smaller rivals.

David Sibley (deputy assistant attorney general, Antitrust Division, Department of Justice) proposed a test which he thought might offer a workable approach to distinguishing competitive from anti-competitive bundled discounts. His proposal, which he stressed was not representative of the DOJ position, was to compare the bundled price with the standalone price of the monopoly product, before the bundling strategy. If the standalone price of the monopoly product equals the monopoly price, consumer welfare of the firm's customers over both the monopoly product and the bundled products is higher than under independent pricing. If the standalone price of the monopoly product is higher than the monopoly price, consumer welfare over all products falls.

Patrick Rey (professor of economics, Institute for Industrial Economics, Toulouse) discussed the economic motivations underpinning the policy on rebates. He distinguished between efficiency motivations and anti-competitive motivations. The first set of motivations includes so-called 'Ramsey' pricing (ie, lowering margins on more elastic demand segments), the manufacturer's goal of providing incentives to retailers and the need of the manufacturer to meet competition. The second set of motivations relates to foreclosure and predation. Since some of the rebate schemes may at the same time generate efficiencies and have some foreclosure effect, he suggested that antitrust enforcers in Europe should move from a form-based to an effect-based approach which is better suited to balance the pro- and anti-competitive effects of such conduct. In order to do so, when reviewing rebate schemes antitrust agencies should address the following issues:

- Has there been an exclusionary effect?
- Are there significant efficiencies?
- Are consumers likely to be harmed?

The panel discussion was concluded by Frédéric Jenny (vice president, French Conseil de la Concurrence) who suggested that efficiencies may not be the only factor that antitrust enforcers do (or should) take into consideration when looking at rebates and discounts. He observed that the criticised recent judgments of the European courts on rebates may be justified by the protection of interests other than an efficient allocation of resources. For instance, antitrust agencies may also have an institutional interest in preserving equal opportunities to compete for all the market players. He concluded by saying that the political framework of any reform of Article 82 EC should clarify the factors which should be taken into account, efficiencies being only one of them.

Panel 3: tying and bundling—from *Hilti* to *Microsoft*

This was chaired by Walter van Gerven (emeritus professor, Katholieke Universiteit Leuven, former advocate general at the European Court of Justice). It was the forum for a lively debate between Alex Burnside (partner, Linklaters) and Martin Bechtold (partner, Clifford Chance) on the *Microsoft* decision, with each advocating one side of the case. The panellists did not contest the appropriateness of the test applied by the European Commission which found abusive tying by Microsoft, but rather focused on whether the decision was sufficiently grounded on the facts.

The stage was then taken by Barry Nalebuff (adjunct professor of law, Yale Law School) who gave a presentation comparing the law on tying and bundling in the Ec and the US, and by John Thorne (senior vice president and deputy general counsel, Verizon) who discussed the recent development on bundling after the *LePage v 3M* judgment in the US from an industry perspective. In particular, he suggested that bundled discounts should be allowed and that courts should recognise that they are not well suited to distinguishing between beneficial and anti-competitive bundles, as this involves setting and monitoring costs, pricing and quantity levels.

Panel 4: what scope is there for modernising Article 82 EC abuse practice?

This panel was chaired by Sir Christopher Bellamy QC (president, UK Competition Appeal Tribunal, former judge at the European Court of First Instance) who stressed the importance of courts in the enforcement of competition rules and that the reform of Article 82 EC will have to provide all enforcers with a manageable number of clear legal rules.

The first two panellists presented their personal views on the modernisation of Article 82 EC from the perspective of the Commission. Emil Paulis (director, DG Competition, European Commission) and Pierre Buigues (deputy chief economist, DG Competition, European Commission) confirmed that the European Commission is working on draft guidelines on the enforcement of Article 82 EC. They stated that this is a difficult and time-consuming process which will concern both the concept of dominance and the concept of abuse.

The purpose of the guidelines will be to offer a comprehensive and systematic approach for distinguishing between legal and illegal conduct. This has become very important for two reasons: facilitating consistency amongst enforcers and fostering transparency and legal security for private companies. Paulis said that the European Commission is determined to commit the necessary "R&D effort" in this area and is aware that this may entail a revision of the European Commission's current approach as also endorsed by the European courts. Buigues confirmed that the European Commission is prepared to move away from a legalistic and formalistic approach in favour of enforcement based more on economic principles. This means that the focus of enforcement will be on the effects and not just on the nature of the conduct, but that does not mean that there will be no per se legal conduct.

According to both Paulis and Buigues, the guiding principles for drafting the guidelines will be 'consumer welfare' and 'competition on the merits'. These principles will have to be properly defined, but it is already clear that they will not only be applicable to dominant firms but to all players equally (ie, dominant firms must be allowed to compete on the merits, but must also be prevented from limiting other firms' ability to compete on the merits). It is still an open question whether conduct capable of having exclusionary effects is a sufficient standard for finding an abuse. Further clarifications will be needed in this respect—for instance—should the negative effects on consumers be actual or just likely and should the competitive harm to consumers be direct or does indirect harm also suffice?

The Commission will also have to take a position on whether its assessment will take into account long-term or just short-term considerations. Buigues added that when assessing the effects of conduct on consumers, the Commission may have to look at factors other than price and quantity, such as product quality and availability.

The guidelines will also touch upon the defences available to dominant firms. Both Paulis and Buigues recognised that efficiencies will have to be looked at more closely, but admitted that the balancing of efficiencies with the potential exclusionary effects of certain conduct is a difficult task.

To a question by Claus-Dieter Ehlermann on how the European Commission sees the allocation of the burden of proof in Article 82 EC cases, Paulis replied that while the European Commission will look at each case broadly, it is certainly up to the European Commission to provide evidence of the exclusionary effects of conduct and up to the defendant to provide evidence of the countervailing factors, such as business justifications and efficiencies.

Ulf Böge (president, Bundeskartellamt) suggested that the reform of Article 82 EC should look at the conduct of companies in light of the overall economic context; a test balancing pro- and anti-competitive aspects is required although this may be difficult in practice. The Bundeskartellamt frequently examines whether and to what extent efficiencies arise from a dominant company's conduct in individual cases. He concluded that the reform should not only introduce more flexible economic rules but should also strive to make abuse control predictable and manageable, not least to ensure quick proceedings.

William Kolasky (partner, Wilmer Cutler Pickering Hale and Dorr LLP) offered his views on the notion of competition in the US and how it affects enforcement policy against dominant companies. Enforcement in the US is based on a few clear principles, including the following:

- Government intervention should be limited to clearly illegal conduct
- Rules are not meant to protect inefficient competitors
- Antitrust enforcement should not have the effect of stifling incentives to compete and to invest.

In the US two types of conduct are considered abusive: predation and exclusionary conduct. Courts have defined very manageable criteria for predation based on the comparison of prices with average variable costs (AVC): if price is above AVC they are per se legal; if they are below AVC they are illegal if recoupment is likely. As for exclusionary conduct, it is abusive if it leads to exclusion of an equally efficient competitor and if it is likely to harm consumer welfare by sacrificing short-term profits in order to exclude rivals.

The last panellist, Pieter Kuipers (deputy general counsel—Europe, Unilever) welcomed a review of Article 82 EC which would take into account the changes in the economic reality of European markets which have occurred since Article 82 EC was introduced by the Treaty of Rome. He welcomed the fact that, when assessing dominance, the European Commission would examine other factors, such as barriers to entry and not just rely on market shares. He also pleaded in favour of a wider recognition of buyer power, particularly at retail level, as a factor negating dominance.

Panel 5: closing remarks and discussion

Karel van Miert (chairman of Nyenrode Institute for Competition and former European commissioner for competition) argued in favour of a modernisation of Article 82 EC that would provide "clear and practically enforceable rules". He agreed that EC competition law should not protect inefficient competitors, but added that the great differences in the economic structure of European and US markets may still justify a different approach to abuse of dominance cases in the two jurisdictions. In many cases (he mentioned in particular the newly liberalised markets) protecting competitors means protecting competition. There may be no scope for com-

petition at all if small competitors are not protected in newly liberalised markets.

John Vickers (chairman, Office of Fair Trading) observed that the reform of Article 82 EC will be challenging because it will have to provide legal certainty and to introduce economic analysis into this area of law. Those two objectives may not always be convergent. According to Vickers, a sound reform should depart from the current formalistic approach, which has proved in many cases to be arbitrary and inconsistent. The reform should be based on the acknowledgment that there are no per se abuses and that conduct should be reviewed according to its economic effects. However, he was not in favour of an extreme economic approach which would deprive companies of clear guidance on what is legal and what is illegal conduct.

According to Vickers, the reform should clearly define the object and purpose of Article 82 EC and anchor the enforcement policy to those. He then discussed the three principles which have been advanced for helping to determine when a dominant firm's conduct is unlawfully exclusionary:

- The 'sacrifice' test: is the conduct profitable but for its tendency to eliminate competition?
- The 'as-efficient competitor' test: does the conduct result in the exclusion of competitors which are as efficient as the dominant company?
- The 'consumer harm' test: does the conduct result in the dominant firm excluding rivals whose presence enhances consumer welfare?

Alberto Pera (partner, Gianni Origoni Grippo & Partners) concluded the discussion and the seminar with the lessons to be learned from the reform process that changed the European Commission's approach to vertical restraints under Article 81 EC in recent years. On that occasion, the need for a reform came from the 'inside': the European courts had laid the ground for the reform in more than one judgment, many NCAs had already embraced the new approach at national level and the business community was very much in favour of the reform. The reform of Article 82 EC is very different. The demand for reform comes mainly from the business community, which has been very critical of the European Commission's recent decisions, which have been endorsed by the European courts. Regardless of the differences to the reform on vertical restraints, the current reform of Article 82 EC should learn from that experience and start the revision process from the foundations. The key issues that will have to be tackled include the objectives of Article 82 EC, the legal rules for achieving such objectives and the correct standard of proof. ■

Vietnam – new competition law

Vietnam's long-awaited Competition Law, passed by the National Assembly on 9 November 2004, comes into effect on 1 July 2005. **MARA FOLZ AND LUU TU ANH** of Freshfields Bruckhaus Deringer's Vietnam offices report.

Vietnam's long-awaited Competition Law was finally passed by the National Assembly on 9 November 2004, four years after the initial draft was circulated. The Competition Law regulates unhealthy competitive practices and practices in restraint of competition, including agreements in restraint of competition, abuse of dominant market position or monopoly position, and economic concentrations. The law also establishes a Competition Commission and Competition Council and sets out enforcement measures. This new law, which will come into effect on 1 July 2005, is yet one more important step in the ongoing development of a comprehensive system of commercial law in the country.

Competition rules before the competition law

The main regulations on anti-competitive measures before the Competition Law was passed included the following:

- The 1997 Commercial Law, which contains several provisions to protect consumers (including prohibitions on increasing or reducing prices to the detriment of producers and consumers, deceiving or misleading customers, using deceptive advertisements or conducting unlawful commercial promotions) and to prevent other unhealthy competitive acts (including speculation for market control, dumping of goods, defamation, obstructing, enticing, bribing or threatening the staff of customers or of other business entities and infringing the industrial property of other enterprises).
- Pricing regulations, in particular the Ordinance on Price of the Standing Committee of the National Assembly, dated 26 April 2002, that prohibit any agreements to fix prices aimed at dominating the market or exceeding the market share stipulated by law.
- Decree 54 of the Government dated 3 October 2000 on the protection of intellectual property rights regarding trade secrets, geographical indication, trade names and protection against unhealthy competitive practices relating to intellectual property. Decree 54 defines certain practices as unhealthy competitive acts, including using misleading materials to take advantage of or damage the prestige or reputation of another business.

However, these provisions were poorly enforced and had little effect on actual market competition due to the lack of a comprehensive system of regulations focused on competition issues.

Overview of the Competition Law

The Competition Law is the first law comprehensively governing competition in the market. It regulates unhealthy competitive practices and practices in restraint of competition by all businesses in Vietnam, including "overseas enterprises operating in Vietnam".

The Competition Law also establishes supervisory authorities to regulate competitive practices in the market and sets out measures to enforce its provisions.

Unhealthy competitive practices

These are defined as business practices that are contrary to the norms of business ethics and that cause, or might cause, detriment to the interests of the state or the legitimate rights and interests of other enterprises or consumers.

Unhealthy competitive practices consist of such unethical practices as falsifying product information, infringing business secrets, coercing or defaming another enterprise, disrupting the business activities of another enterprise, using misleading advertisements and promotions, discriminating within an industry association, engaging in illegal multilevel selling of goods, and other acts of unhealthy competition as prescribed by the government. All such practices are prohibited and no exemptions will be granted for such activities.