

Article 82 review

DG-Comp officials now need to set out a convincing theory of likely harm to consumers

by *Philip Marsden**

DG-Competition's discussion paper on article 82 (the Discussion Paper) certainly did its job. It generated an incredible debate about the kind of competition we want in Europe, and the appropriate approach to rebates, bundling and other controversial practices. European Commission officials should be praised for their hard work. They produced a thoughtful and comprehensive paper on exclusionary abuses, engaged in full and frank public debates, and offered a valuable insight into the Commission's evolving thinking. But where do we go now? How much of the public discussion and consultation will end up in the Commission's future approach to article 82?

Right from the start, the Discussion Paper laid down some important policy markers: competition law enforcement should be effects-based and focus on protecting consumer welfare. This signalled a huge modernisation of approach. Case handlers at DG-Comp have noted that now even their most junior colleague will ask them, "What is your theory of harm?" No longer will enforcement action depend on the form a business practice takes; officials know that, for their case to proceed, they must allege an anticompetitive effect.

Effects-based but what effects?

But what effect are they looking for? In introducing the consultation in 2005, Commissioner Kroes made it clear that "article 82 enforcement should focus on real competition problems. In other words, behaviour that has actual or likely restrictive effects on the market, which harm consumers."

The Discussion Paper picked up this gauntlet. Its initial analytical framework section spelled out the focus on consumer harm in detail: "exclusionary abuses are ... behaviours by dominant firms which are likely to have a foreclosure effect on the market... and which ultimately harm consumers"; "foreclosure is said to be market distorting if ... as a likely effect ... prices will increase or remain at a supracompetitive level" (DP, paras 1 and 58). Unfortunately, the drafters took a huge step back in the Discussion Paper's implementation sections, analysing business practices only by reference to the Commission's much longer-held concern about foreclosure of competitors (see DP para 162, in particular).

This shortfall was pointed out on several occasions over the past year as DG-Comp officials travelled throughout Europe, listening to criticisms, and seeking a way of producing clear, practicable and sensible policy guidance. Theirs is not an easy task: they have been asked to follow the effects-based consumer-focused policy implemented in other areas of European competition law, while building on case law that sees potential

exclusion of rivals, or even just slowing rivals' growth, as an abuse. They also had to contend with colleagues in the Commission and member states who resisted reform entirely, trusting their experience as regulators; preferring the old methods of formalism, being suspicious of almost anything a dominant firm might do. In some regions of Europe, officials have more faith in their ability to intervene without proof of harm, arguing that they must act if they are to be effective at all.

Among conflicting economic and enforcement philosophies, however, the search for clarity is also key. Abuse of dominance cases often raise what Judge Richard Posner has called the "exquisite problem" of dealing with conduct that is both exclusionary and efficient. As a result, firms, advisers and enforcers all need clear guidance. This needs to involve a measured approach though. Enforcement that does not consider effects can punish competitive conduct and chill innovation; waiting for clear evidence of actual harm, though, may mean that enforcement comes too late, and when competition has been eliminated.

In addressing these analytical difficulties, DG-Comp officials have sought help from all quarters: academe, business and foreign governments. They have neither been hidebound by precedent nor tried to appease all the differing views of member states. The policy team in charge of review of article 82 has also been operating while the most-challenging abuse cases have been working their way through the courts. The *Microsoft* case in particular has divided commentators, who see it as a lightning rod for debate about bundling, intellectual property rights and mandating access. The case also raises the deeper issue of how to address conduct that increases consumer-welfare in the short term, but against which rivals claim they cannot compete. Meanwhile we've heard that the court's current approach is already chilling procompetitive conduct. If change is going to happen, the Commission has to lead it.

Await more precedent, have more debate?

Amidst this analytical morass, and with so very much at stake, what can the DG-Comp reformers do now? One option would be to postpone their quest for guidelines until there is more consistent case law to draw on. If the recent opinion of Advocate General Kokott in the *BA* case is anything to rely on, we cannot expect an effects-based, consumer welfare-based policy from that quarter. However, with so much going on in Luxembourg, it would still be wise to wait for the Court before casting heavily contested Commission decisions in guidelines.

Further discussion of unilateral conduct is occurring at the International Competition Network and the US agencies, and

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will doubtless help shape a policy in Europe that lives up to the expectations of a global economy. Inevitably, these initiatives will result in consensus on the need for a more economic, effects-based approach to enforcement, with an emphasis on preventing consumer harm. All the debates are moving in the direction of “more economics”, evidence of effects, and proof of likely consumer harm. Europe has started to move in the right direction, and must continue to do so.

An expanded set of 82 guidelines?

There is talk of expanded guidelines dealing with exploitative abuses as well. As these practices usually harm consumers directly, including them in the mix might lead to a more consistent approach to article 82. Guidelines would be welcome if they focus on practices that are likely to lead to economic harm to the market, through price increases or reductions in output.

The focus on consumer harm needs to be bolstered in future policy statements by the Commission. After all, one of the main criticisms of the Discussion Paper was that it did not follow-through with its initial focus on consumer welfare and the principle of competition, not competitors. It set out detailed steps, for example, for analysing conditional rebates like those in *BA* and *Michelin*, but focused only on estimating harm to competitors, not the market itself. The drafters failed to take the step that is essential for any truly effects-based consumer welfare regime – namely, setting out a theory of harm that includes actual or likely harm to consumers themselves.

Article 82(b) clearly states that prejudice to consumers is the test for exclusionary abuses. Making “likely consumer harm” the focus of article 82 would provide us with a modern effects-based regime that includes economic analysis and has the same theory of harm as that used in the control of mergers and agreements.

How likely is a new set of guidelines to focus on consumer harm, though? In its open consultations, the Commission is already considering other tests of harm, including whether the dominant firm is sacrificing profits or otherwise acting in a way that makes no economic sense other than to exclude rivals.

Can recent cases give us any insight? The official line is that the Discussion Paper does not indicate current enforcement policy. Nevertheless, it seems that officials are still setting their sights on exclusion of competitors, rather than harm to consumers – and are using the Discussion Paper to justify it.

In its recent decision to fine Tomra €24m for exclusionary abuses, the Commission used an elaborate economic model of what is known as the “suction effect”, to explain how rivals could not hope to compete with the discounts and rebates offered by the dominant firm. Nowhere is there any serious discussion – let alone proof – of potential harm to consumers, whether through price increases or reduced choice. Nevertheless, Commission officials have stated that the “decision demonstrated how a general system of several types of abusive conduct can achieve a strong cumulative effect on the market. This effect, the likely and actual effect of foreclosing the market, was analysed following the previous case law of the European Court of Justice.” No surprise there, or in the fact that they say that the foreclosure effect is also “based and supported by economic analysis in the spirit of the ...Discussion

Paper”. Developing ever more elaborate models for describing how conduct may foreclose rivals may be in keeping with existing case law and with the Discussion Paper’s focus on foreclosure, and even with the promise to implement an effects-based-policy. However, it goes nowhere towards developing a consumer welfare-based approach. Until DG-Comp explains that side of the equation, it will not have truly modernised its approach to article 82.

When explaining their theory of harm, whether on a merger, an agreement or an abuse, enforcers need to be able to tell a consistent story of likely harm to consumers, not just competitors. Making the most competitive offer usually attracts consumers, inevitably to the exclusion of rivals. So long as the Commission views the *attraction* of a better offer in the pejorative light of a suction effect that makes things more difficult for rivals, we will never have a consumer-based competition policy in Europe.

Likely harm to consumers

DG-Comp officials have come a long way in agreeing to base prohibitions on conduct’s anticompetitive effects, rather than its form. They should not stop, however, at analysing what effect dominant firm conduct may have on rivals. They need to set out a convincing theory of likely harm to consumers.

Consumers are what firms compete for, and what competition policy exists to protect. Discounting, offering rebates and bundling all offer immediate benefits to consumers. These practices should not be condemned without an extensive investigation and overwhelming evidence of likely harm to consumers (not just rivals) over the medium term. Only then can officials be sure that they are following the first rule of enforcement – do no harm; never intervene to deny consumers low prices and added benefits, when the harm alleged is highly speculative and even questionable.

Officials responsible for the reform should take heart. They have written a thoughtful discussion paper, and undertaken a far-reaching, open and frank consultation. They have developed an effects-based approach and business, advisers and judges will require from them evidence of likely or actual harm. The Commission should now follow through and build a consumer-based test of harm into guidelines for article 82.

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