Brian Sher

A solution to the abuse of power

The EC's Competition Directorate has recently issued its long-awaited guidance to curb dominant firms exclusion of their smaller rivals, which it hopes will draw a line in the sand

Winter is a good time for competition guidelines – especially, it seems, on abuse of dominance. In December 2005 the Commission's Competition Directorate, for the first time, put out some kind of statement on its views on this area – a discussion paper running to a lengthy 72 pages. Three years later and after much debate, the Commission has distilled its paper down into a formal 'guidance' document one third of the length.

The guidance sets some clear principles for intervention in this area, essentially based on an assessment that the alleged abuse of power is likely to cause harm to consumers. That may seem a trite statement – but this 'likely harm' standard is actually the crystallisation of quite a new (more business-sensitised) approach than has been the case to date. The Commission has drawn some lines in the sand; the question is are they robust enough.

> The guidance recognises that 'margin squeeze', one of the most fashionable abuse labels of recent years, cannot be separated from the question whether the dominant firm has a duty to supply the rival

Article 82 of the EC Treaty prohibits the abuse of a dominant market position in Europe. There are two steps here. Step one, dominance, involves establishing whether the firm is materially free of competitive market disciplines in the relevant market.

Step two involves analysing particular courses of conduct to establish if they constitute unlawful abuse.

The guidance is only concerned with the second step. More narrowly than that, it is only concerned with "exclusionary" abuses – that is practices which tend to drive out competitors. The other type – "exploitative" abuses

which directly harm consumers (for example, excessive pricing) – are left for another day.

This definition is not as narrow as it initially seems. Drawing a line on exclusionary abuses is one of the most challenging parts of this area of law.

The guidance tackles the subject at two levels: the general and the specific. At the general level it sets a benchmark for regulatory intervention – that on the basis of "cogent and convincing evidence" the conduct is "likely to lead to anti-competitive foreclosure" (essentially to hamper the access of rivals to the market, leading to higher prices).

At the specific level, the Commission delineates four types of conduct: (i) rebates and exclusivity; (ii) tying and bundling; (iii) predation; and (iv) refusal to supply and margin squeeze. Its position on each topic is as clear as it reasonably can be – recognising the fact-based case by case analysis essential in this area.

The first area, rebates in return for reaching volume, growth or share targets, has been one of the most contentious areas in Article 82. British Airways and Michelin were both fined for their rebate programmes with distributors in the past ten years, on the basis of quite a form-focused analysis, and those Commission decisions have been upheld by the European Courts. Meanwhile, the criticism levelled at this narrow approach (famously a US court threw out Virgin Atlantic's complaint against British Airways' programmes on the basis that there was no evidence that they were likely to lead to harmful effects) has led the Commission to modernise its stance. Its settlement in the Coca-Cola incentives case and its ongoing investigation into Intel are clearly aimed at rooting out the (likely) harmful effects only – the guidance is technically complex but essentially seeks to reflect this.

The second area, tying and bundling, is influenced by the European Court of First Instance's 2007 judgment upholding the Commission in Microsoft (bundling of Windows Media Player). Emboldened by this judgment the Commission sent a "statement of objections" on Microsoft's bundling of Internet Explorer within Windows on 16 January, 2009, notwithstanding that the case looks like a re-run of Netscape, a similar challenge ten years ago.

The third area, predation, is about the dominant firm pricing below cost to drive out a competitor with a view to increasing its market power. This area is very much alive, with the UK's Office of Fair Trading announcing in November 2008 that Cardiff Bus had used unlawful predatory practices to squeeze out a low cost, no frills rival.

Finally, the guidance for the first time recognises that "margin squeeze", one of the most fashionable abuse labels of recent years (referring typically to the practice whereby a vertically integrated firm "squeezes" its downstream competitor by selling it raw materials at a cost that does not allow it to make a return) cannot be separated from the question of whether the dominant firm has a duty to supply the rival at all. And, recognising the criticism of its previous stricter approach where the dominant firm and distributor are already in a supply relationship, the Commission has now said the test is the same – the input must be indispensable before regulators will intervene. It is just a question of how readily indispensability will be inferred.

Overall, this guidance reflects the Commission's current enforcement policy. And that is exactly how the Commission has characterised it in the title of the paper, thereby overcoming the time lag in the process of judicial review of its (older, more restrictive) decisions. This is a neat – and bold – solution.

Whether it is a complete solution remains to be seen – national authorities and courts with whom the Commission shares competence for applying the EC competition rules will have to make their own reconciliation of the modern policy statement with the (more restrictive) court judgments.

If those judgments are the sea that might blur the Commission's markings in the sand, the tide is clearly now ebbing – but not yet sufficiently so that the odd wave – or case in a national jurisdiction somewhere – will not periodically splash some water over them.

Brian Sher is a partner at Nabarro specialising in competition law.

LW2901_p20 LegDevs2.MB.indd 20 26/1/09 15:44:31