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Mario Monti's Legacy for Competition Policy in Article 82

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Abstract

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Commissioner Mario Monti's impact on Article 82 of the EC Treaty during his period as EC Competition Commissioner has not been as revolutionary as his impact on other areas of EC competition law. Nonetheless, the European Commission has done serious work on Article 82 cases, notably taking several important decisions: *Microsoft* in the area of refusal to supply and tying and *Michelin II* on rebates. The European Court of Justice (ECJ) and the Court of First Instance (CFI) have also made important contributions to the law on Article 82 with their judgments in *IMS Health* and in appeals from these rebates cases. On a legislative front, Commissioner Monti has brought the Commission's modernization program through to adoption of a new enforcement system in May 2004, with significant re-emphasis of Commission activity on cases with market power, interesting initiatives to allow dominant companies to benefit from Article 81(3) and a general review of Article 82 enforcement.

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I. Introduction

When thinking of the term of office of Commissioner Mario Monti, who succeeded Karel Van Miert as EC Competition Commissioner in November 1999, one does not immediately think of his impact on Article 82 of the EC Treaty (Article 82). It is true that the European Commission's decision against Microsoft[1] stands out as an excellent example of strong enforcement—two words that sum up Commissioner Monti's term. However, unlike the modernization of the implementation of Article 81 of the EC Treaty (Article 81), or the revised EC Merger Regulation, there has not been any revolutionary change in the application of Article 82 during Commissioner Monti's tenure. Nonetheless, there have been interesting developments, as explained later in this paper, including renewed focus on cases involving market power. A review of Article 82 has also now started, which may lead to some modernization in this area of competition policy.

Before outlining developments in Article 82 during Commissioner Monti's term, it is worth considering the Article 82 legacy that he inherited. Two features stand out. First, in perhaps the most important Article 82 case decided by the European Court of Justice (ECJ) during Commissioner Van Miert's tenure, *Oscar Bronner*,[2] the ECJ, following the opinion of Advocate General Francis Jacobs, took a narrow view of the doctrine of essential facilities, rolling back what was up to then an apparently expansive doctrine. Second, the Commission inherited an analytical framework in which certain practices were considered abusive in the hands of the dominant, because of their likely effects. Thus, certain types of progressive rebates were considered abusive, even though non-dominant companies could offer them and, to that extent, they appear to be normal competition. This comes from old ECJ and Court of First Instance (CFI) judgments such as *Hoffmann La Roche*[3] and *Michelin I*.[4] Such law is controversial, limiting as it does the ability of dominant firms to compete, other than through clearly proven,

1 Commission Decision COMP/C-3/37.792, Microsoft (Mar. 24, 2004, not yet reported) [hereinafter *Microsoft*].

2 Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint, 1998 E.C.R. I-7791 (holding that a facility would only be deemed essential where denial of access thereto would be likely to eliminate all competition on the relevant market and where access was indispensable or, at the very least, it would not be economically viable for a company operating at the same scale as the dominant entity to create a second such facility).

3 Case 85/76, Hoffmann La Roche v. Commission, 1979 E.C.R. 461.

4 Case 322/81, NV Nederlandsche Banden Industries Michelin v. Commission, 1983 E.C.R. 3461. *See also*, Case T-65/89, BPB Industries plc and British Gypsum v. Commission, 1993 E.C.R. II-389 and Case T-228/97, Irish Sugar v. Commission, 1999 E.C.R. II-2969. For a recent exposition on the development of the EC law on rebates offered by dominant firms, see Luc Gyselen, *Rebates: Competition on the Merits or Exclusionary Practice?*, *available at* http://www.iue.it/RSCAS/Research/Competition/2003/200306COMP-Gyselen-sII.pdf. The author was at the time an official at the Commission's Competition Directorate-General.

performance- based efficiencies. Rules like this have been one of the reasons why there have been recent calls for modernization of Article 82.

Many of the decisions taken by the Commission over the last five years reflect this inheritance. The question now is whether, with the announcement of a review of the application of Article 82, the Commission may see practical ways to modernize Article 82, consistent with such a background.

This paper begins with two long sections: a consideration of the *Microsoft* decision as it pertains to refusal to supply and tying (Section II) and then an analysis of developments on pricing issues (Section III). We then include three shorter sections, one on the ongoing use of Article 82 in liberalizing industries that were, until recently, state-controlled (Section IV), another on significant normative developments over the last five years (Section V), and then a conclusion setting out some ideas that we believe should guide the Commission when it sets out to modernize the application of Article 82 (Section VI). It will be shown that Commissioner Monti's successor, Neelie Kroes, will start with a rich inheritance of issues on which to work.

II. Microsoft

The Commission's decision against Microsoft, a very detailed text of some 300 pages, was adopted in April 2004. The case, wherein the Commission imposed a huge fine of EUR 497.2 million, concerned two distinct abuses: a refusal to supply and tying. We deal with these issues in turn and, when considering refusal to supply, we will also discuss the ECJ's recent judgment in *IMS Health*,[5] since there is an interesting common theme—when should a dominant company be obliged to license its intellectual property? The Commission also required controversial unbundling and opening up of secondary markets by obliging Microsoft to reveal interface material considered key to competition on those markets. Microsoft has already appealed.[6]

A. REFUSAL TO SUPPLY

The most controversial part of the *Microsoft* decision relates to the Commission's finding that, by refusing to make interoperability information for certain "work group server operating systems" available, Microsoft had abused its dominant

5 Case C-418/01, IMS Health v. NDC Health (Apr. 29, 2004, not yet reported) [hereinafter *IMS Health*].

6 This procedure will take a number of years. Microsoft applied for an interim suspension of the remedies proposed in the Commission's decision. However, the President of the CFI, in an order issued on Dec. 22, 2004, refused to grant this suspension. The President found that while Microsoft had established a prima facie case as to the illegality of the Commission's decision, it had not adduced sufficient evidence to show that implementation of the remedies might cause it serious and irreparable damage.

position.[7] The decision obliges Microsoft to make this information available on a non-discriminatory basis.

The Commission reasoned that Microsoft had a dominant position on the market for PC operating systems, a fact that was not in dispute. The Commission went further, however, and stated that Microsoft was not only dominant but also “the de facto standard operating system product for client PCs.”[8] Microsoft also had a growing share of the market for work group server operating systems, and the Commission considered that the company was already dominant in this market.

Following the ECJ judgment in *Tetra Pak II*,[9] the Commission highlighted the close links between the PC operating systems market and the work group server operating systems market, due to interoperability operating requirements. By refusing to provide full interoperability information, Microsoft was considered to be making it difficult for other systems to operate properly with Windows, thereby restricting competition on the work group server operating systems market. The Commission found that this was part of a “general pattern of conduct” designed to create and exploit “a range of privileged connections between [Microsoft’s] dominant PC operating system and its work group operating system.”[10] The Commission considered that the refusal to disclose limited technical development on the market, thereby indirectly harming consumers, and noted that Microsoft had disclosed interoperability information before it began to develop its own work group product.

The Commission’s remedy does not require disclosure of source code, but Microsoft is obliged to disclose interface documentation. Microsoft is also required to conclude licenses on fair and reasonable terms to the extent its patents or other intellectual property (IP) are necessary for use of the interoperability information. It is noteworthy in this respect that the Commission, while recognizing that a refusal to license would only constitute an abuse of a dominant position in “exceptional circumstances,” stated that it did not consider itself bound by any exhaustive checklist as to such circumstances in the existing case law. Microsoft and the Commission are now locked in a debate as to whether, unlike other cases,[11] the decision requires Microsoft to license competition

7 The information in question related to file, print and group and user administration services for Windows work group networks.

8 *Microsoft*, *supra* note 1, at para. 472.

9 Case C-333/94 P, Tetra Pak International SA v. Commission, 1996 E.C.R. I-5951 [hereinafter *Tetra Pak II*].

10 *Microsoft*, *supra* note 1, at para. 1064.

11 *See, e.g.,* Cases 6/73 and 7/73, Istituto Chemioterapico Italiano SpA v. Commission, 1974 E.C.R. 223 and Joined Cases C-241/91 P and C-242/91 P, RTE and ITP v. Commission, 1995 E.C.R. I-743 [hereinafter *Magill*]. In *Magill*, television listings owners were obliged to provide listings information to a competitor which wanted to offer a new, comprehensive television listings guide.

against its own IP rights, and in the same market as Microsoft, or whether the impact is only on other secondary markets.[12]

About a month after the *Microsoft* decision was taken, the ECJ gave its judgment in *IMS Health*, immediately sparking controversy both for itself and because of potential parallels to the *Microsoft* case.[13]

IMS Health is a German company that provides pharmaceutical companies with data on wholesaler sales to pharmacies. Over the years, in collaboration with the pharmaceutical industry, IMS developed a "brick" structure according to which German postal districts were broken into 1,860 areas, each with a comparable number of pharmacies. The brick structure appeared to be protected by copyright under German law.

The case came to the ECJ on a reference from a German court,[14] with questions as to whether the refusal to give access to that structure was abusive. The ECJ gave an interesting but complex answer, where it restated that a refusal to grant a license is not normally an abuse of a dominant position, but may be so in "exceptional circumstances." After considering the *Magill* and *Oscar Bronner* judgments, the former an IP case and the latter a factual "essential facility" case, the ECJ concluded that for a refusal to license by a dominant firm to constitute an abuse contrary to Article 82, it was "sufficient" that three cumulative conditions be fulfilled:

- **(i)** The undertaking requesting grant of the license must be intending to offer new products or services, for which there is a potential consumer demand and which are not offered by the dominant firm;
- **(ii)** the refusal to license must not be justified by objective considerations; and
- **(iii)** the refusal must eliminate all competition on the secondary market, by reserving it to the dominant company.

As regards the first condition, the ECJ stated that the company that seeks to be licensed must "not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright,

12 *See* Sven B. Völcker, *The implications of Microsoft and IMS Health: Interesting times for dominant intellectual property holders in Europe,* Competition Law Insight, Jun. 2004, at 14, 16-17.

13 *IMS Health*, *supra* note 5.

14 The IMS saga is a long-running one. In response to a complaint, the Commission had originally adopted an interim decision obliging IMS to license its "brick" system. Commission Decision 2002/165/EC, NDC Health/IMS Health: Interim measures, 2002 O.J. (L 59) 18. This interim decision was subsequently suspended by both the President of the CFI and on appeal of the ECJ (Case T-184/01, IMS Health v. Commission, 2001 E.C.R. II-3193 and Case C-481/01 P(R), NDC Health v. IMS Health and Commission, 2002 E.C.R. I-3401 respectively) before being withdrawn by the Commission. Commission Decision 2003/741/EC, NDC Health/IMS Health, 2003 O.J. (L 268) 69.

but intend to produce new goods or services not offered by the owner of the right and for which there is potential consumer demand."[15] This is an interesting position, which offers a fair amount of respect for IP rights. However, there is likely to be dispute as to what constitutes a new product, the meaning of "essentially duplicating,"[16] and proof of the "intention" to offer a new product.[17]

The third condition, which was briefly discussed above in relation to *Microsoft*, relates to the obligation to license to a competitor. IMS argued that it was necessary to identify two separate markets, one in which the dominant undertaking was active and another in which the potential licensee was seeking entry. In response, the Commission argued that it was only necessary to identify two "different stages of production" that are interconnected. In practice, the ECJ chose to combine the two approaches, in the sense that it required two markets, but stated that the upstream market could easily be found. Notably, such a market could be "hypothetical" or "potential," provided that it involved an upstream input that was indispensable for the downstream product. Therefore, the input need not have been sold separately.

The key point for present purposes is that this is a complex and controversial area of law, which Commissioner Monti's successor will certainly have to contend with because of the *Microsoft* appeal. It will be interesting to see if the EC court agrees with the Commission that Microsoft's position is covered by "exceptional circumstances" justifying an obligation to license.

B. TYING

The second abuse found by the Commission in *Microsoft* was the unlawful bundling by Microsoft of its Media Player with Windows. The Commission concluded that PC operating systems and media players are separate products and, given that Windows is so widespread on computers, Microsoft's decision to bundle Media Player guaranteed that this product also became ubiquitous to an extent that could not be matched. The Commission feared that this would make Media Player the industry standard, as content providers and software developers would support Media Player and drop support for competing products, resulting in usage being driven towards Media Player with competitors' products being marginalized. The tying was therefore tipping the market towards Microsoft's product. The Commission also believed that Microsoft would acquire control over related markets such as content encoding software, media delivery software, and digital

15 *IMS Health*, *supra* note 5, at para. 49 and *see* Ivo Van Bael and Jean-François Bellis, *ECJ clarifies the conditions required for the grant of a compulsory licence of copyright under Art. 82*, European Competition Law Newsletter, Jun. 2004, at 1.

16 Pat Treacy, *Long-awaited judgment forces companies to licence IP rights*, The European Lawyer, Jun. 2004, at 12.

17 Völcker, *supra* note 12, at 18.

rights management technology. It seems that the Commission was influenced in this respect by Microsoft's past encounters with antitrust authorities and the possibility of it having a wider tactic to dominate software markets viewed as strategically important. The Commission also considered that Microsoft's dominance could lead to technical development being stunted to the detriment of consumers. Finally, the Commission did not think that the tying of Media Player and Windows could be justified by any efficiency benefits. In reaching its conclusion, the Commission carried out a detailed, careful review of the foreclosing effects of Microsoft's practice on the market.

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The Commission decided that while Microsoft could continue bundling Media Player with Windows, it was obliged to make an unbundled version available at the same time. PC manufacturers could therefore choose which media player they wished to install on their PCs. The decision also prohibits Microsoft from any conduct that would make the unbundled version less attractive and have the same effect as tying (i.e. offering Windows at a discounted rate when purchased with Media Player). Interestingly, the Commission states that if its remedy proves to be ineffective, it "reserves the right to review the present decision and impose an alternative remedy."[18]

As mentioned above, the *Microsoft* decision is on appeal and, given the high profile of the company involved, the amount of the fine imposed, and the future implications for Microsoft's ability to bundle its new products with updated versions of Windows,[19] the decision is bound to be controversial—all the more so since bundling is a frequent practice in the quickly evolving high-tech industries. To an extent, however, it must be said that this was an unusual case. The Commission noted that "Microsoft's dominance presents extraordinary features" and was concerned about the effect of tying on markets characterized by network effects.[20] Dolmans and Graf, in a recent article, summarize this concern well:

> "Markets characterized by network effects may be particularly vulnerable to tying. In such markets, the number of customers who acquire the product

18 *Microsoft*, *supra* note 1, at para. 1012.

19 See Völcker, *supra* note 12, at 15 (emphasizing the fact-specific nature of the Commission's decision which is not "necessarily dispositive for the outcome of any future investigation").

20 *See, e.g.*, *Microsoft*, *supra* note 1, at para. 975. ("The media player market is, in fact, a strategic gateway to a range of related markets, on some of which high revenues can be earned.") On the economies of networks *see* William Bishop, *A Note on the Economics of the Microsoft Decision*, Competition Law Insight, May 2004, at 14.

influences future demand for that product. The wider the product's distribution, the more demand will there be for that product. In such cases, a tie will have an impact beyond the tied customer share because the increased distribution share resulting from the tie will also impact on future demand for the tied product."[21]

It is also arguable that a U.S. court would have followed the same approach in deciding the case. The Commission used a "rule of reason" style analysis, which included consideration of any possible efficiencies. Winckler, Dolmans, and Graf claim that the approach is consistent with the "analytical framework" set out by the U.S. Court of Appeals which remanded the case for further consideration under a rule of reason to the district court.[22] Völcker also considers that the Commission's approach is not significantly different from the approach of the U.S. agencies and courts to Microsoft.

The CFI will now have to decide on the validity of the Commission's decision and the legacy for Commissioner Monti's successor will be to defend it. It should be an important case for tying also but, as noted, it is not clear how broad a precedent will emerge, since the context is rather special and specific.

III. Pricing

A. REBATES: CLASSIC ISSUES[23]

Commissioner Monti's successor will also have to deal with pricing and, in particular, rebates. As explained above, the European Commission rules here are controversial since the cases state that it is generally unlawful for a dominant firm to use loyalty and target rebates, even though other competitors may compete using such practices.[24] The key cases in recent years are *British Airways v.*

21 M. Dolmans & T. Graf, *Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in Perspective*, World Competition 225, 234 (Jun. 2004).

22 A. Winckler, M. Dolmans, & T. Graf, *The European Commission's Microsoft Decision*, Global Competition Review 30, 31(May 2004).

23 *See generally* John Ratliff, *Abuse of a Dominant Position and Pricing Practices: A Practitioner's Viewpoint*, *available at* http://www.iue.it/RSCAS/Research/Competition/2003/200306COMP-Ratliff-sII.pdf.

24 A loyalty or fidelity rebate is a discount that is paid when a customer commits to purchase all or most of its requirements from a particular supplier; a target rebate is a discount that is paid if the customer meets a defined target, especially where it is set by reference to a previous performance or taking account of likely future requirements.

Commission (*BA/Virgin*)[25] and *Michelin v. Commission* (*Michelin II*)[26]—both decisions have already been upheld on appeal by the CFI.

In *BA/Virgin*,[27] the Commission and the CFI found that British Airways (BA) was infringing Article 82 by offering individualized growth incentives to UK-based travel agents, the rebates concerned being based on the agents' past sales for BA during previous reference periods.[28] The Commission imposed a fine of EUR 6.8 million and the decision was upheld in its entirety by the CFI.

The rebates were calculated on the travel agents' total sales, not just on their incremental sales above the target. The Commission observed that this meant that "selling relatively few extra BA tickets can have a large effect on [the travel agents'] commission income."[29] The Commission condemned the rebate scheme as having an exclusionary effect: travel agents, keen to obtain as large a rebate as possible, would be conscious of the need to increase the number of BA tickets they sold, compared to the previous reference period, and would therefore be less likely to sell other airlines' tickets. The scheme thus worked like a fidelity rebate in that it tended to exclude other airlines from which travel agents would be less likely to purchase tickets. The system was therefore "fidelity-building" which, for a dominant company, is considered likely to have serious exclusionary effects on the already weak residual competition in the market. The CFI agreed with the Commission and stressed the progressive nature of the rebates which had a "very noticeable effect at the margin, the increased commission rates were capable of rising exponentially from one reference period to another."[30] The CFI also noted that BA's main competitors in the United Kingdom could not have afforded to offer as attractive a discount scheme.

The Commission had also based its decision on the discrimination between travel agents resulting from the scheme. The rebate was calculated in accordance with a comparison with an agent's previous performance in selling BA tickets. The scheme was therefore considered discriminatory because agents who sold different numbers of BA tickets could receive the same rebate and agents who

25 Case T-219/99, British Airways plc v. Commission (Dec. 17, 2003, not yet reported) [hereinafter *BA/Virgin*], appeal to the ECJ is pending.

26 Case T-203/01, Manufacture française des pneumatiques Michelin v. Commission (Sep. 30, 2003, not yet reported) [hereinafter *Michelin II*].

27 Note that the *BA/Virgin* decision was adopted on Jul. 14, 1999 under then-EC Competition Commissioner Van Miert.

28 Commission Decision 2000/74/EC, Virgin/British Airways, 2000 O.J. (L 30) 1.

29 *BA/Virgin*, *supra* note 25, at para. 29.

30 *Id.* at para. 272.

sold the same number of tickets could receive different payments. This placed certain agents at a competitive disadvantage and infringed Article 82(c). The CFI agreed with this analysis.

In *Michelin II*, the Commission had investigated the practices of this leading European tire manufacturer, which sold new and retreaded tires for heavy vehicles in France.[31] Among other issues, the case concerned rebates based on achieving certain sales and individualized target rebates, based on achieving the same amount of Michelin sales as in previous years.

The Commission objected to several aspects of Michelin's rebate scheme: the relatively long reference period (one year) over which the rebate was calculated; the payment of the rebate on total sales rather than on incremental sales; the late payment of the rebate (it was not paid until the next purchasing cycle); and the scheme's lack of certainty.

The Commission also took into account factors that were specific to the case and the particular industry, namely, that the dealers were only making low margins and indeed were initially forced to sell at a loss; the effect of which was that dealers only established a profit margin once the rebates were paid. As in *BA/Virgin*, the Commission considered that what might look like an objective quantity rebate was in fact loyalty-inducing and had the "inherent effect, at the end of [the reference] period, of increasing pressure on the buyer to reach the purchase figure needed."[32] As a result, Michelin's system was considered likely to have serious market foreclosing effects. The CFI agreed with the Commission's analysis and upheld the fine of EUR 19.76 million.

In both *BA/Virgin* and *Michelin II*, the CFI stated that there is no legal requirement to show that the rebates in question actually produced anticompetitive effects. As noted above, the rebates were condemned as having the likely effect of being loyalty-inducing. The CFI summed up the relevant law in *BA/Virgin* in the following terms:

"[F]or the purposes of establishing an infringement of Article 82, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position *tends* to restrict

31 Commission Decision 2002/405/EC, Michelin, 2002 O.J. (L 143) 1.

32 *Michelin II*, *supra* note 26, at para. 228.

> competition, or in other words, that the conduct is *capable* of having, *or likely* to have such an effect"[33] (emphasis added).

The idea is that such likelihood is inferred for dominant companies because of their market strength.

This approach has been criticized. Some argue that the Commission and the EC courts should adopt a more effects-based economic test for when rebates granted by a dominant firm are in breach of Article 82.[34] These critics argue that a very different approach applies in the United States, where proof of anticompetitive harm resulting from allegedly exclusionary behavior is required. One may also argue that such a "presumptive effect" approach contrasts with other cases in which the Commission and CFI have been at great pains to assess alleged foreclosure effects on the relevant market. For example, in the *Van den Bergh Foods* case,[35] which concerned infringements of Articles 81 and 82 by a dominant ice cream manufacturer in Ireland, the Commission carried out a very detailed investigation before concluding that the practice in question (the supply of a free freezer cabinet to retailers on condition that they used the cabinet exclusively for selling ice cream made by the dominant company) led to the foreclosure of some 40 percent of the relevant market.[36] Arguably, this is also true in comparison to *Microsoft*, where the Commission appears to have undertaken an extensive analysis of the foreclosure effects of tying Media Player to Windows.[37]

Against this, one should bear in mind that the CFI appears to hold determined views in this area. Two different sets of judges in two different chambers of the court were involved in these rulings, and they repeatedly emphasized that they were applying what the English would call "settled" law. In other words, the CFI considers that this is established law, to be accepted and simply followed.

In *Michelin II*, the CFI suggested that a dominant firm could advance an objective efficiency justification for its rebates by showing economies of scale due to increased sales to the particular customer. However, Michelin had not adduced sufficiently detailed information in this respect. In *BA/Virgin*, the position was

33 *BA/Virgin*, *supra* note 25, at para. 293.

34 John Kallaugher and Brian Sher, *Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82*, E.C.L.R. 2004, 25(5), 263-285.

35 Commission Decision 98/531/EC, Van den Bergh Foods, 1998 O.J. (L 246) 1.

36 Note that this analysis was largely carried out in the examination of Van den Bergh's conduct under Article 81.

37 Völcker, *supra* note 12, at 15.

similar. The CFI noted that if an increase in quantity results in a lower cost for the supplier, the supplier is "entitled to give the customer the benefit of that reduction by means of a more favorable tariff… Quantity rebates are thus deemed to reflect gains in efficiency and economies of scale achieved by the dominant undertaking."[38] However, again the CFI considered that BA had not discharged the burden of proving efficiency considerations linked to its rebates. In particular, as noted above, the CFI objected to the rebate being calculated on total rather than incremental sales (i.e. "the additional remuneration of the agents thus appears to bear no objective relation to the consideration arising for BA from the sales of the additional air tickets").[39] Such comments recognizing the place of efficiencies are welcome. One way forward now, both for dominant companies and the Commission, if it adopts guidelines on the application of Article 82, would be to try and make this clearer. One would hope, for example, that dominant companies would not be held to an impossible standard of minute proof of costs and efficiencies. Dominant companies, like their non-dominant competitors, need practical rules.

One would hope that dominant companies would not be held to an impossible standard of minute proof of costs and efficiencies. Dominant companies, like their non-dominant competitors, need practical rules.

The most recent development on rebates is the Commission's negotiations with Coca-Cola. The text of the proposed commitments by Coca-Cola has been published on the Internet and interested parties can submit comments before they become legally binding on Coca-Cola.[40] Coca-Cola has offered the commitments under Article 9 of Regulation 1/2003,[41] a new procedure that enables the Commission to accept binding commitments to bring a possible antitrust violation to an end. At first sight, the Commission's position does not appear dramatically new, although one may note that it appears that the Commission may be finding tying within a product family, which would be a development of its practice. The Commission also appears to be allowing Coca-Cola some exclusivity in some contexts, such as sponsorship, which is a useful clarification for dominant companies.

38 *BA/Virgin*, *supra* note 25, at para. 246. *See also Michelin II, supra* note 26, at para. 58.

39 *BA/Virgin*, *supra* note 25, at para. 282.

40 Undertaking: Case COMP/39.116/B2, Coca-Cola, *at* http://europa.eu.int/comm/competition/antitrust/cases/decisions/39116/tccc_final_undertaking_041019.pdf. *See also*, Press Release IP/04/1247, European Commission, Commission close to settle antitrust probe into Coca-Cola practices in Europe (Oct. 10, 2004); Commission Notice Published Pursuant to Article 27(4) of Council Regulation 1/2003/EC in Case COMP/A.39.116/B2, 2004 O.J. (C 289) 10.

41 Council Regulation 1/2003/EC on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

Hence, the law on rebates remains essentially unchanged under Commissioner Monti. It is an area in which dominant companies claim that they are being prevented from competing, as they see it, "normally" with their smaller rivals, with the same type of rebate schemes as these smaller companies use. Some critics argue that the CFI's argument that BA's competitors could not have matched the level of rebates being offered by BA also risks the CFI being accused of protecting competitors rather than competition.[42] However, if this means that rebates are unlawful if they have the object or effect of denying competitors the critical mass required to compete, the two may be the same. Clearly, there is already much debate as to whether these rules should change in any Commission guidelines on Article 82—an interesting legacy for Commissioner Monti's successor.

B. APPLICATION OF MARGIN SQUEEZE PRINCIPLE

Another topical area in Article 82 is margin squeezing (i.e. where an upstream supplier leaves his downstream competitor too little margin to make a profit). This has long been considered an abuse of a dominant position.[43]

In May 2003, the Commission adopted a decision fining Deutsche Telekom (DT) EUR 12.6 million for what it considered an abusive margin squeeze for wholesale access to the final (or local) telecommunications loop between the last switch and household.[44] The Commission found that DT was dominant in the markets for wholesale and retail access to the local loop. The Commission considered that DT had been "margin-squeezing" and claimed that there was an insufficient spread between DT's (wholesale) local loop access prices and DT's downstream tariffs for retail subscriptions. As a result, third-party competitors could not compete for end customers.

In calculating the margin squeeze the Commission compared the single wholesale service (local loop access) to several retail services (access to analogue, ISDN, and ADSL connections). In itself, this is a complex task, leaving scope for differing interpretations. The Commission then applied a "weighted approach" to prices and costs, aggregating retail access for analogue, ISDN, and ADSL connections on the basis of the number of each variant that DT had marketed to its own end-users.

The Commission then compared the wholesale and retail prices: where the average retail prices were below the level of the wholesale charges, there was a

42 *See, e.g.* Eleanor M. Fox, *We Protect Competition, You Protect Competitors,* World Competition 149 (Jun. 2003) and William J. Kolasky, *What Is Competition? A Comparison of U.S. and European Perspectives,* The Antitrust Bulletin 29 (Spring-Summer 2004).

43 *See* Commission Decision 88/519/EEC, Napier Brown/British Sugar, 1988 O.J. (L 284) 41.

44 Commission Decision 2003/707/EC, Deutsche Telekom AG, 2003 O.J. (L 263) 9. This is the first decision where the Commission applied a margin squeeze test to a multi-product firm. Earlier cases such as Napier Brown-British Sugar dealt with single-product firms (*See id.*).

margin squeeze; where DT's average retail costs were above its wholesale charges, the Commission looked at DT's product-specific costs for providing its own retail services, and considered that there was a margin squeeze if those costs exceeded the "positive spread" between the retail and wholesale prices. DT argued, among other things, that this was too narrow an approach and that revenues for call services (which are included in overall pricing decisions as incremental revenues) should also have been taken into account.

DT also objected that it had little scope for autonomous conduct where its wholesale prices were regulated (apparently at what the German regulatory authority considered to be cost level). DT's retail prices were also regulated, albeit in a different way. However, the Commission argued that DT could still have increased its retail charges to increase the spread between wholesale and retail prices. DT has since appealed to the CFI.

These are complex issues, illustrating how difficult it is generally to implement Article 82. The decision is also controversial because the Commission appears to have overruled the national regulator.

C. PREDATORY PRICING

In July 2003, the Commission also fined Wanadoo Interactive, a subsidiary of France Telecom, some EUR 10.35 million for predatory pricing in ADSL-based Internet access services to the general public.[45] The Commission considered that between 1999 and 2002, Wanadoo had marketed its ADSL services at prices below their average costs (before August 2001 below variable costs; afterwards equivalent to variable costs, but below total costs) while France Telecom was expecting significant profits for its wholesale ADSL provision to Internet service providers (including Wanadoo). In effect, the Commission argued that this was a deliberate policy to preempt competition on the market for high-speed Internet access, when it was first introduced. The abuse was found to have ended in October 2002 when France Telecom reduced its wholesale ADSL prices by some 30 percent. Wanadoo has since appealed to the CFI.

It is understood that the decision contains a discussion of the possibility of recouping initial losses. EC law has not required the Commission to prove that an entity that engages in predation must be able to recoup its losses.[46] In Wanadoo's case, it is understood that the Commission maintains this position but nonetheless demonstrates that, given the market structure (significant barriers to entry), recoupment should have been possible. If so, this will be an interesting development.

45 At the time of writing the decision has not been published. *See* Press Release IP/03/1025, European Commission, High-speed Internet: the Commission imposes a fine on Wanadoo for abuse of a dominant position (Jul. 16, 2003).

46 *Tetra Pak II*, *supra* note 9, at para. 44.

IV. Liberalization

Article 82 has often been a key weapon in the Commission's armory when it has attempted to liberalize markets that were formerly state-controlled, in tandem with Article 86 of the EC Treaty.[47] Commissioner Van Miert's term as EC Competition Commissioner was particularly noted for this. Commissioner Monti has continued the approach of using Article 82 to liberalize markets.

A. CASES INVOLVING DEUTSCHE POST

In one of two decisions taken against Deutsche Post, the former German postal monopoly, the Commission found that the company, by offering unlawful fidelity rebates and by setting predatory prices in the part of the market for parcel delivery that was open to competition, was abusing its dominant position.[48] These practices prevented new entrants from reaching the critical mass required to operate in the relevant market. Deutsche Post was found to be cross-subsidizing its activity in the competitive market from revenue received in the reserved postal market that was not open to competition. The Commission calculated costs in the parcel delivery market by asking what costs would be avoidable if the parcel delivery service were discontinued. The Commission obliged Deutsche Post to introduce accounting separation and a transparent transfer pricing mechanism for services provided on the competitive market. Deutsche Post also agreed to a structural separation of its commercial parcel services from its reserved services in order to eliminate the risk of future cross-subsidization. As a result, Deutsche Post no longer offers any commercial parcel services. The Commission fined Deutsche Post EUR 24 million in respect of the fidelity rebates but did not impose a fine for the predatory pricing, in consideration of the fact that the relevant measure of cost that a "multi-service" postal operator benefiting from a reserved area has to meet in competitive activities had not previously been clarified.

In the second case, the Commission found that Deutsche Post had abused its dominant position in the German letter market when it intercepted, surcharged, and delayed incoming international mail that it had erroneously classified as circumvented domestic mail (so-called "A-B-A remail").[49] The Commission found that Deutsche Post had priced differently for the same service, thus treating international mail in a discriminatory manner, engaged in a "constructive refusal to supply," priced excessively, and limited development of the markets. In view

47 Article 86 of the EC Treaty relates to public companies and companies to which Member States grant special or exclusive rights. The exercise of these rights is generally subject to the rules on competition in the Treaty.

48 Commission Decision 2001/354/EC, Deutsche Post AG, 2001 O.J. (L 125) 27.

49 Commission Decision 2001/892/EC, Deutsche Post AG, 2001 O.J. (L 331) 40.

of legal uncertainty at the time of the infringement, only a symbolic fine of EUR 1,000 was imposed.

The Commission has also found abuses of dominant positions in the postal markets in Belgium,[50] France,[51] and Italy.[52]

B. SETTLEMENTS IN THE ENERGY SECTOR

There have also been a number of important settlements in cases relating to network industries. For example, the Commission obliged the main Spanish electricity generator to modify an agreement whereby it would purchase gas from a Spanish gas company; this action removed a barrier to entry in the market.[53] The Commission also negotiated settlement agreements that helped open up electricity markets, for example, interconnection between the United Kingdom and France.[54] Similarly, the Commission used settlement agreements with five gas companies that had refused access to their pipelines to Marathon, a Norwegian gas producer, to open up the gas market to more competition.[55]

V. Normative Developments: The Application of Article 81(3) to Dominant Companies

A. MODERNIZATION OF THE ENFORCEMENT OF ARTICLES 81 AND 82

No discussion of Commissioner Monti's term would be complete without mention of his work on the modernization of the application of Articles 81 and 82. With the entry into force of Regulation 1/2003 on May 1, 2004, national courts and competition authorities can apply not only Article 82 (this was always the case) but also Article 81 in its entirety, including paragraph three which sets out

50 Commission Decision 2002/180/EC, De Post-La Poste, 2002 O.J. (L 61) 32.

51 Commission Decision 2002/344/EC, La Poste, 2002 O.J. (L 120) 19.

52 Commission Decision 2001/176/EC, Certain new postal services in Italy, 2001 O.J. (L 63) 59.

53 European Commission, XXXth Report on Competition Policy (2000), at 154; Press Release IP/00/297, European Commission, Commission closes investigation on Spanish company Gas Natural (Mar. 27, 2000).

54 European Commission, XXXIst Report on Competition Policy (2001), at 208; Press Release IP/03/1025, *supra* note 45.

55 European Commission, XXXIst Report on Competition Policy (2001), at 207; Press Release IP/01/1641, European Commission, Commission settles Marathon case with Thyssengas (Nov. 23, 2001); Press Release IP/03/1129, European Commission, Commission Settles Marathon Case with German Gas Company BEB (Jul. 29, 2003); and, Press Release IP/04/573, European Commission, Commission settles Marathon case with Gaz de France and Ruhrgas (Apr. 30, 2004).

clearance criteria.[56] In parallel to this decentralization, the Commission has also been reviewing and modernizing how it thinks Article 81 should be applied, in an effort to focus its activity on cases involving market power.

Three particular points may be noted here as regards Article 82. First, Member States retain the right to apply stricter national rules on unilateral conduct.[57] This was a concession to some Member States such as Germany which feel strongly that strict rules should continue to apply in this area.

Second, Regulation 1/2003 provides that the Commission may impose structural remedies for breach of the competition rules.[58] However, structural remedies may only be imposed where they are proportionate and there is no equally effective behavioral remedy, or any behavioral remedy would be more burdensome on the entity than the proposed structural remedy. There has been much debate about whether this could be used to break up a company in an Article 82 case, which certainly appears to be one possible application of the power. However, one may think that would be a rare issue. The more frequent and often equally controversial issue is the compulsory interference with property rights—whether it is IP as discussed above or other property such as ice cream cabinets. In the EC courts' case law, subject to the complexities outlined above, this is, in principle, clearly already possible.

Third, the modernization process has included the introduction of market share ceilings to the general EC block exemptions giving "safe harbors" to certain restrictive practices. Notably, this has been the case for vertical agreements and licensing agreements.[59] The practical point to note, therefore, is that dominant companies cannot normally rely on such safe harbors, but have to assess their practices individually in these circumstances. To this extent, the regulatory position of dominant companies has become more demanding but one may well say understandably so, given their market power.

We have already seen some examples of the Commission's approach in such a situation. For instance, the Commission recently reached an agreement with Interbrew, the Belgian brewer, regarding its "tied house" purchasing system.[60]

56 Council Regulation 1/2003/EC, *supra* note 41.

57 *Id.* at art. 3(2).

58 *Id.* at art. 7.

59 Commission Regulation 2790/99/EC on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21; Commission Regulation 772/2004/EC on the Application of Article 81(3) of the Treaty to Categories of Technology Transfer Agreements, 2004 O.J. (L 123) 11.

60 Press Release IP/03/545, European Commission, European Commission opens up Interbrew's Belgian horeca outlets to competing beer brands (Apr. 15, 2004).

Broadly, among other things, the Commission has agreed that Interbrew may impose a "50% of total beer turnover requirement" when concluding "loan agreements" with bars, along with other restrictions in other agreements. The market shares of Interbrew were 56 percent of the market for pubs, restaurants, and hotels, suggesting dominance, so this is an interesting decision. The decision also appears to indicate that the Commission is willing to accept some requirements provisions for the dominant company, at least where there is a clear justification for such provision.

B. APPLICATION OF ARTICLE 81(3) TO DOMINANT COMPANIES

We have also seen interesting new developments concerning Article 81(3) and dominant companies. Article 81(3) provides a defense to companies whose agreements are caught by Article 81(1), which prohibits agreements that have as their object or effect the restriction of competition. One of the conditions for the application of Article 81(3) is that the agreement does not substantially eliminate competition on the market.

> One may think therefore that, even before any Article 82 guidelines, the Commission's position is already evolving and, usefully, the Commission is sending out signals of a more modern practice.

Interestingly, in its new guidelines on the application of Article 81(3) of the Treaty[61] and its new guidelines on the application of Article 81 to technology transfer agreements,[62] the Commission suggests that Article 81(3) may be available to dominant companies, provided that there is no abuse of a dominant position.[63] In other words, the limit of Article 81(3) is not dominance—as was previously thought by many—but the abuse thereof. This is said to be coherent with the application of Article 82 insofar as the ECJ has already recognized that exclusive licenses may not be per se abusive for dominant companies.[64]

These statements appear to widen the commercial options available to dominant companies and are to be welcomed. They are particularly striking when compared with statements in the relatively recent Commission guidelines on vertical restraints[65] and horizontal[66] agreements, especially as these guidelines

61 Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97.

62 Commission Notice on Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2, at para. 151.

63 *Id.* at para. 106.

64 *See* Case T-51/89, Tetra Pak Rausing SA v. Commission, 1990 E.C.R. II-309.

65 Commission Notice on Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1.

66 Commission Notice on Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, 2001 O.J. (C 3) 2.

were considered to be reflective of a more economic approach to the application of Article 81. For example, the Guidelines on Vertical Restraints appear to exclude the application of Article 81(3) to dominant companies[67] and the Guidelines on Horizontal Agreements state that "Where an undertaking is dominant or becoming dominant as a consequence of a horizontal agreement, an agreement which produces anticompetitive effects in the meaning of Article 81 can in principle not be exempted [under Article 81(3)]."[68] One may think therefore that, even before any Article 82 guidelines, the Commission's position is already evolving and, usefully, the Commission is sending out signals of a more modern practice.

VI. Winds of Reform

As noted above, the Commission has indicated that it is conducting a review of the application of Article 82. In a recent speech, Philip Lowe, the Commission's Director-General of Competition, indicated that the Commission might be in a position to publish draft guidelines early next year, although this may be affected by the change of Commissioner.[69]

It is generally recognized that the notion of "abuse" is in need of review. For example, in a recent article, Sher laments the lack of "internal consistency" within Article 82 and its lack of coherence with other competition provisions of the Treaty of Rome.[70]

In our opinion, any reform must fulfill two objectives.[71] First, the guidelines must spell out the policy objective (or objectives) pursued by Article 82. This is essential for a successful decentralized application of Article 82. In the past, Article 82 has been used as a tool for market integration and liberalization. Unlike in the United States, there are many national champions in Europe that have not earned their dominant positions through greater efficiencies but through state intervention. This makes Article 82 somewhat different to equivalent provisions governing the behavior of dominant entities in other jurisdic-

67 Guidelines on Vertical Restraints, *see supra* note 65, at paras. 153, 211, 222. *See also* Luc Peeperkorn, *E.C. Vertical Restraints Guidelines: Effects-Based or Per Se Policy?—A Reply*, E.C.L.R. 2002, 23(1), 38-41.

68 Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, *supra* note 66, at para. 36.

69 Philip Lowe, The Commission's Current Thinking on Article 82, IBC Global Conference on Abuse of Dominance—Where Next?, Brussels (Sep. 23, 2004).

70 Brian Sher, *The Last of the Steam-Powered Trains: Modernising Article 82*, E.C.L.R. 2004, 25(5), 243-246.

71 *See generally*, Wilmer Cutler Pickering Hale and Dorr Seminar on The Article 82 Abuse Concept: What Scope Is There for Modernization?, Brussels (Sep. 30, 2004).

tions. However, the primary objective of Article 82 must remain the protection of competition and, in this respect, it is very important that the Commission set out what constitutes harm to competition.

Second, the guidelines must indicate the ways and means (i.e. the rules through which the objective of Article 82 is to be attained). These rules must certainly reflect greater economic thinking. However, it is also clear that the business community, practitioners, regulators, and courts want these rules to be practical.

This is a difficult task for the Commission and one of the first major challenges for its new EC Competition Commissioner. Ultimately, however, as during Commissioner Monti's tenure, the CFI and the ECJ will have the last word on the concept of abuse in EC law. The greater economic approach to Article 81 has been favored by the jurisprudence of the EC courts. Given the CFI judgments in *BA/Virgin* and *Michelin II*, it is not evident that the same is true with respect to at least some Article 82 rules. Nonetheless, provided the Commission leads the way and produces clear, sensible, and workable guidelines, we believe that the EC judges may also be receptive to a modernization of Article 82.