

MALTA JUDICIAL SEMINAR  
November 2009

Outline for contributions by Vivien Rose

**Tuesday, 10<sup>th</sup> November 2009**

***Objectives and overview: problem, provisions, practice priorities and penalties***

16.15 Hrs – 17.15 Hrs

Objectives of EC Competition Law and overview of Articles 81, 82 and 86

*Speakers: Mr Adam Scott OBE TD, Competition Appeal Tribunal*

*Ms Vivien Rose, UK Competition Appeal Tribunal*

**Relevant provisions of the Treaty**

- The structure of the Treaty will change once the Lisbon Treaty is brought into effect. But there are some important points that are going to be the same in the future as they are now. First I will give a quick overview of the main competition rules which will be dealt with in more detail tomorrow.
- **Article 81** deals with anti-competitive agreements made between undertakings. These typically include classic cartels among all the European producers of a particular product trying to agree prices and market shares. But it also catches or may catch many other kinds of agreements such as joint ventures, IPR licences, distribution agreements. It is important to recognise that this provision is aimed at agreements between undertakings and not at Member States themselves.
- **Article 82** deals with abusive behaviour of dominant companies – usually by a single dominant company. There are many kinds of abusive behaviour such as excessive pricing, price discrimination, refusal to supply in certain circumstances.
- **Article 86** is less well known but has become increasingly important in recent years – this article unlike Articles 81 and 82 is directed not at undertakings infringing competition law but at the Member State which has, through its own legislation or other State measures, put the undertaking concerned in a position to infringe the competition rules. Where a State has conferred a monopoly or other exclusive rights on an undertaking and has then also through its legislation organized the market so as to favour that firm to the disadvantage of competing firms, the Member State can itself be in breach of Article 86.
- **Articles 87 to 89** deal with State aid – an area of the law which has seen a huge increase in activity the past 18 months. It deals with the grant by Member States of money or benefits which give advantages to particular undertakings in competition with other undertakings who do not get the same benefit. Such aids are not necessarily illegal but they must be notified to the Commission for approval before they are granted and the Commission must then examine whether the aid is compatible or incompatible with the common market.

- **Articles 3(1)(g) and 10.** Additional important articles elsewhere in the Treaty include a provision in the opening articles of the Treaty which establishes that one of the functions of the European Union is to establish competition rules necessary for the functioning of the internal market. This is article 3(1)(g) of the existing EC Treaty and will become article 3(1)(b) of the Treaty on the Functioning of the European Union. Also important is Article 10 of the current EC Treaty (which will become Article 4 of the new Treaty on European Union). This imposes on Member States and the Union a duty of sincere cooperation to assist each other in carrying out the tasks of the Union and prevents Member States from taking any measure which would jeopardize the attainment of the Union's objectives. Note that this obligation has very specific and rather narrow content so far as we are concerned – there are some circumstances in which Member States can be held to be in breach of the competition rules of the Treaty because of the duty in Article 10 but it is still the case that legislation which, for example fixes tariffs for particular services or prevents a particular kind of competition is not contrary to the Treaty.
- The other sets of provisions of the Treaty which may be relevant in competition case are the free movement provisions in **Articles 28, 29 and 30.**
- There is also a wide range of secondary legislation which fleshes out the Treaty provisions: the most important ones include
  - The **Merger Regulation** (Regulation 139/2004 OJ 2004 L24/1) which empowers the Commission to investigate whether proposed concentrations are compatible with the common market or not
  - Procedural regulations which set out how the Commission goes about investigating possible breaches of the competition rules: notably **Regulation 1/2003** (OJ 2003 L1/1)
  - **Block exemption regulations** which describes kinds of agreements which might appear to be restrictive but which are not covered by the prohibition in Article 81(1).
- **The general principles of Community law** which incorporate the principles set out in the European Convention on Human Rights: see currently Article 6(2) of the Treaty of European Union.
- The Treaty provisions form part of the law that the national courts must apply via
  - **direct applicability**
  - **direct effect** and
  - **supremacy** of Community law.

#### **Hierarchy of other legislative instruments**

- ❖ Regulations that are directly applicable which means that they do not have to be enacted in domestic legislation before they have effect in your national law and they also have direct effect which means that they can be relied on by individuals in the courts in actions against the State and against other individuals,
- ❖ Directives that require member states to transpose EU law into national law. If the Member State fails to do this properly then two things follow. First, the Commission can bring proceedings against the Member State in the European

Court for infringement of the Treaty and secondly in the national courts, an individual may still be able to rely on the provisions in the Directive as against the organs of the state.

- ❖ Preliminary Rulings of the ECJ – these are provided in response to a request under Article 234 and bind the national court. There are also the opinions of the Advocate General of the ECJ.
- ❖ Other decisions of the CFI and of the ECJ – whilst these apply to specific factual matrices they also provide interpretations of existing legislation and develop the associated jurisprudence
- ❖ Decisions of the Commission – like CFI/ECJ decisions these apply to specific factual matrices they also provide interpretations of existing legislation and of the Commission's own guidelines and may explain the practice of the Commission as, for example, on penalties and leniency
- ❖ Notices & Guidelines from the Commission – for example - *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC* (2004/C 101/04) and *Guidelines on the application of Article 81(3)* OJ C 101, 27.4.2004, p. 97–118
- ❖ Discussion Papers, Green Papers and White Papers together with complementary Commission Staff Working Papers – for example - *White Paper on Damages Actions for Breach of the EC antitrust rules*, □ COM(2008) 165, 2.4.2008

**Wednesday, 11<sup>th</sup> November 2009**

***Market Definition, Market Power and Market Analysis***

9.00 Hrs – 9.40 Hrs

*Speakers: Ms. Vivien Rose*

*Mr. Adam Scott OBE TD*

*Discussion*

**Market Definition and Market Power**

- The concept of the relevant market is important in many aspects of the competition rules. It is likely to involve economic evidence and submissions. The concept of the relevant market has a specific meaning in competition law which is narrower than the general use of the word “market” in a commercial context.
- A relevant market comprises those goods or services in a specific geographic area which compete with each other in the sense that the price and other characteristics of the products are interchangeable so far as customers are concerned.
- The Commission has issued a **Relevant Market Notice OJ 1997 C372/5** which provides guidance on what these concepts mean and how you go about defining the relevant market.
- The key concepts are
  - The product market and the geographic market
  - Demand-side substitutability and supply side substitutability
  - Price elasticity and the SSNIP test
- The focus when defining the **relevant product market** is to look at the extent to which certain products are substitutable or interchangeable with each other from the point of view of the customer. The exercise is actually one which we come across every day in the supermarket where goods are grouped together so that the consumer can make a choice between the competing products on offer. This is **demand-side substitutability**. Some examples from the case law:
  - Case 27/76 *United Brands v Commission* [1978] ECR 207 (bananas : all fruit);
  - Case T-83/91 *Tetra Pak II* [1994] ECR I-755 (pasteurized : long life milk);
  - Case M.938 *Guinness/Grand Metropolitan* OJ 1998 L288/24 (whisky : all spirits).
- The other important aspect is **supply-side substitutability**, that is, are there suppliers who currently are not supplying a competing product who could change their production to enable them to supply or to increase their current supply of a competing product.

- The definition of the **relevant geographic market** applies the same tests of demand and supply substitutability apply but relating to the territory over which competition takes place. Thus the question is whether there are suppliers who are currently not supplying a particular country or region who could start supplying that area if there was a competitive opportunity.
- The scope of substitutability is determined by the **cross elasticity of demand** between one product and another – if the price of one product increases by a Small but Significant Non-transitory Increase in Price, will a significant proportion of customers change to buying another product (demand side) or and will suppliers be persuaded to enter the market (supply side)?

---

**Wednesday, 11<sup>th</sup> November 2009**

***Market Definition, Market Power and Market Analysis***

***Detailed Exposition II***

11.00 Hrs - 11.45 Hrs

***Concepts of ‘Dominance’ and ‘Abuse’ and Commission guidance paper***

*Speakers: Ms Vivien Rose*

*Mr David Bailey*

### **Dominance**

- Article 82 is based on two principal concepts, the concept of **dominance** and the concept of **abusive conduct**. The other concepts of “undertaking” and “effect on trade between Member States” are the same as discussed under Article 81. The element that dominant position must be held within a substantial part of the common market is usually satisfied even if the territory concerned is small.
- Dominance in a particular relevant market is usually defined as the ability on the part of the dominant undertaking to behave independently of its competitors, customers and ultimately of consumers: Case 322/81 *Michelin v Commission* [1983] ECR 3461.
- The main indicator of dominance is market shares - usually calculated on the basis of the proportion of the total value of the products within the relevant product market supplied by the undertaking under investigation. This information is often regarded as confidential to the individual companies in the market.
- There are many cases which indicate what level of market share is an indication of market power: anything below 30 per cent is not regarded as conferring dominance and anything above 50 per cent is likely, unless there are special circumstances to amount to dominance: Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.
- But there are important additional factors that need to be taken into account

- Stability of market shares over time: e.g. Cases T-24/93 etc *Compangie Maritime Belge Transport v Commission* [1996] ECR II-12-1?
- Is the market share of the undertaking under investigation much larger than the shares of the other participants in the market? If there is one major player and the rest of the market is spread among many small players, it is more likely that the principal player is dominant.
- **Barriers to entry** to the market may also be important. These include
  - Scale economies: where the main participant has lower unit costs because it produces such a large volume of product.
  - Intellectual property rights and other technical barriers: often the main participant has trade mark rights or patent rights over essential elements in making the product. These make it more difficult for market entrants to produce a successful competing product and to persuade customers to change supplier.
  - Brand loyalty and advertising: the main participant in the market may have a well known brand name which is supported by expensive advertising.
- **Countervailing buyer power.** An allegedly dominant undertaking will often argue that it cannot exercise market power because it is selling its products to other big undertakings who exercise. Such evidence usually needs to be treated with caution.

---

**Wednesday, 11<sup>th</sup> November 2009**

**Practice in the light of the UK's experience of public and private enforcement of EC Competition Law following the modernisation reform and the *Courage* judgement**

12.05 Hrs - 12.50 Hrs

*Speakers: Mr. Adam Scott OBE TD*

*Ms. Vivien Rose*

*Mr. David Bailey*

**Private enforcement in national courts – interaction between National Courts and Community institutions**

- The national courts have always had concurrent jurisdiction with the Community institutions for enforcing Articles 81 and 82 because of the direct effect of the competition provisions: see e.g. Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.
- There has always been a “duty of sincere cooperation” between the Member States and the Community based on Article 10 of the Treaty.
- But both these elements have come more to the forefront since Modernisation in 2004

- national competition authorities and the courts of the Member States are able to apply Article 81(3) as well as Article 81(1) and
- Regulation 1/2003 has spelt out the duties of the Member States in more detail.
- Some key elements in the relationship between the Community institutions and the national courts are as follows:
  - **Duty to apply Articles 81 and 82.** Article 3(1) of Reg 1/2003 provides that where a national court is applying its domestic competition to conduct which would also fall within the Treaty provisions, it is under a duty to apply the Treaty provisions as well. See also the duty of the judge to raise the issue of his own motion: Cases C-430 & 431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705 and Case C-312/93 *Peterbroeck v Belgium* [1995] ECR I-4599.
  - **Duty to arrive at a consistent result.** When applying its domestic rules, the national court must not come to a result which is inconsistent with the result under Article 81 or 82. However, the national court may apply other domestic rules e.g. consumer protection legislation to ban conduct which would not be banned under Article 82.
  - **Cooperation between the Commission and the national courts.** The Commission has issued a Notice on Cooperation (OJ 2004 C101/52) explaining how the national court can seek assistance from the Commission. This is also dealt with by Article 15 of Reg 1/2003. The Commission can provide information to the national court and can give an opinion on economic, factual or legal matters but they cannot of course consider the merits of the particular case.
  - **Reference to the Court of Justice under Article 234.** The power to request a preliminary ruling on the interpretation of Community law is always available to the national court in accordance with its own procedures. This jurisdiction covers not only the interpretation of Community measures but also of domestic legislation if it clearly uses concepts that come from a Community measure: see e.g. Case C-7/97 *Bronner v Media print* [1998] ECR I-7791 (Austrian equivalent of Article 82).
  - **Concurrent proceedings** Often the national court is faced with a claim based on Community law where there is some concurrent investigation underway in the Commission or an appeal concerning the conduct in the Community courts. In the UK courts this arose recently in *National Grid Electricity Transmission plc v ABB Ltd* [2009] EWHC 1326 (Ch) where the court decided that the court proceedings should continue to the stage where the parties had exchanged pleadings and started to discuss disclosure of documents but should then be stayed pending appeals to the Court of Justice.