

**Sherman Act
Section 2 Committee
ABA Section of Antitrust Law
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The more things change, the more they stay the same

By Jennifer M. Driscoll

On September 23, 2005, Commissioner Neelie Kroes (Member of the European Commission in charge of Competition Policy) delivered a speech concerning the Article 82 policy review currently being undertaken by European Commission at the Annual Conference on International Antitrust Law & Policy at Fordham University.

According to Commissioner Kroes, the Commission does not intend to propose a radical shift in Article 82 enforcement policy. Rather, the guidelines will develop and explain theories of harm on the basis of a sound economic assessment for the most frequent types of abusive behavior to make it easier to understand EC policy, not only as stated in policy papers but also in individual decisions based on Article 82. Commissioner Kroes stated that Article 82 enforcement should focus on real competition problems--behavior that has actual or likely restrictive effects on the market--which harms consumers.

Commissioner Kroes also discussed whether dominance means "substantial market power." In order to evaluate whether a company has substantial market power one must conduct a detailed analysis of key issues such as the market position of the alleged dominant company, the market position of competitors, barriers to expansion and entry and the market position of buyers. Large market shares alone are not sufficient to conclude that a dominant position exists, and a pure "market share" focus may overlook the impact of competition in the relevant market.

The initial Article 82 policy review will focus on exclusionary rather than exploitative abuses. The definition of exclusionary abuses articulated in the Hoffman-La Roche decision by the European Court of Justice provides a good starting point. According to that decision, (1) the conduct of a dominant firm must have the potential to influence the position of residual competition on the market and negatively influence prices, quantities or innovation and (2) a market distorting foreclosure effect that impacts more than a few competitors must be established.

Commissioner Kroes suggested that one possible approach to defining abusive price based conduct is its effect on "equally efficient" competitors. The benchmark "as efficient" would normally be the costs of the dominant company, except where it is not possible to determine such costs, or the dominant company's "first-mover advantage" in another market. In a similar vein, "competition on the merits" vis-à-vis price based conduct occurs when an efficient competitor that does not have the benefits of a dominant position is able to compete with the dominant undertaking. Commissioner Kroes then posed whether there should be an "efficiency defense" under Article 82, particularly since Article 81 provides such an exemption.

In her prepared remarks (available at http://europa.eu.int/comm/competition/speeches/index_2005.html), Commissioner Kroes acknowledges that "whether it is desirable and indeed possible for there to be an 'efficiency defence' under Article 82" is a "widely debated issue" and

then provides additional guidance on the conditions that a dominant company would need to demonstrate with respect to such efficiencies:

- First, the claimed efficiencies should be realized or be likely to be realized as a result of the conduct concerned;
- Second, the efficiencies should be “conduct-specific” - the unilateral conduct should be indispensable to realize these efficiencies; and
- Third, the efficiencies should outweigh the negative effects of the conduct concerned. This means that one would balance the pro- and anti-competitive effect of the conduct and ensure that, in the final analysis, consumers are not harmed by the conduct. Under Article 81(3) there must be a pass on to consumers. Commissioner Kroes thinks that this should also be the case under Article 82.
- Commissioner Kroes also notes that “competition in respect of a substantial part of the products concerned” must not be eliminated.

Conference participants were permitted to pose questions after the Commissioner’s speech. One member of the audience asked whether collective dominance would be addressed in the policy guidelines. The Commissioner noted that (i) there are very few collective dominance cases and the guidelines should ideally explain circumstances in which collective dominance could be relevant and (ii) the Commission hasn’t taken a case on collective dominance re: economic links and tacit collusion, which may result in more attenuated liability.

Another member of the audience maintained that despite the emphasis on a more economic approach, fairness considerations linger. What is the meant by “the ultimate objective of Article 82 is to protect consumers”? Is preventing harm to consumers the ultimate goal? What about indirect effects? The Commissioner cautioned against listening too much to competitors and too little to consumers--there has to be a balance. At this point she reiterated that the market share analysis should not favor form over substance and should only be a starting point when assessing abuse of dominant position. One must look at the exercise of market power over time. There could be dominance in the short term but if barriers to entry are minimal then competition will enter the market. In that case, the Commission should tolerate short-term dominance.

Another member of the audience asked for clarification on dominance (Is it 50%? 75%?) and postulated that if the Commission provided clarity on dominance the other issues would be less compelling; however, this topic was not explored in depth.

Commissioner Kroes closed by emphasizing that relevant market determinations should not be used as a tool for the competition authorities to improperly gain jurisdiction, citing the Hilti and Hugin decisions. Other important questions to be addressed in the forthcoming guidelines are what data should be used to establish violations and what is the time limit for bringing enforcement actions. She was critical of the British Airways and Michelin II decisions, but said that these were mitigated by the Commission’s recent Coca-Cola decision, which has not yet been published in the Official Journal but is available on the Commission’s web site at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/39116/commitments.pdf>.

Commissioner Kroes rejected the idea that all rebates are bad unless the benefits are passed on to consumers. Although the ultimate goal of all discounts is to induce loyalty, not all

have anti-competitive effects. During a subsequent panel one commentator remarked that it would be nice to hear from the Commission that all rebates are reasonable and legal unless they require exclusivity.

Although Commissioner Kroes' speech was the highlight of the conference, there were other noteworthy discussions. It is anticipated that the Article 82 policy guidelines will be published by the end of the year and will address fault issues and the passing-on defense. (Under EU law both direct and indirect purchasers are entitled to sue.) It was also noted that the consumer welfare standard is ambiguous and there is a need to address the relationship between Article 82 and sector-specific regulations. Finally, because EU law does not allow treble damages or contingency fees in antitrust litigation, there is now a movement toward developing an unjust enrichment approach to damages based on how the defendant profited (rather than awarding damages based on a percentage of turnover) and/or allowing pre-judgment interest from the date of injury.

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