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**Michelin welcomes the European Commission's will to correct its controversial application of Article 82 EC, but regrets its over-regulation-triggered lack of immediate improvement for dominant companies**

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The European Commission has long rendered famous the name of Michelin to antitrust practitioners by condemning its rebate system.<sup>1</sup> Such decision is part of a case law that followed a surprisingly tough evolution, from condemning exclusive quantitative rebates,<sup>2</sup> to standardized rebates not related to justified economies of scale,<sup>3</sup> leading to a “per se” prohibition.

Yet, we consider that applying a “per se” reasoning to regulate abusive conducts is not in line with economic reality, for there cannot be any “per se” abusive conduct. Any assessment of the alleged abusive nature of a practice requires an assessment on a case-by-case basis, notably taking into account the structure of the relevant market. This is particularly the case with rebates which, by definition, seek to benefit the distributor and, ultimately, the consumer, with low prices. We note that, paradoxically, it is precisely

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<sup>1</sup> Commission Decision 81/969/EEC of Oct. 7, 1981, *Nederlandsche Banden-Industrie Michelin*, 1981 O.J. (L 353) 33; Commission Decision 2002/405/EC of Jun. 20, 2001, *Michelin*, 2002 O.J. (L 143) 1; and Case T-203/01, *Michelin v. Commission*, 2003 E.C.R. II-4071 [hereinafter *Michelin II*].

<sup>2</sup> Commission Decision of Jan. 2, 1973, Case IV/26.918, *European Sugar Industry*, 1973 O.J. (L 140) 17.

<sup>3</sup> *Michelin II*, *supra* note 2, at 1.

in the very same area of rebates that the case law applies a “per se” approach. Such a method of “per se” prohibition is inappropriate and results in particularly harsh decisions, lacking economic sense. The numbers speak for themselves: the rebates issue has given rise to the largest number of negative decisions by the European Commission.

Practitioners and economists have long expressed their surprise and concerns against such a hardening by the competition authorities and European courts in their treatment of the pricing conduct of dominant companies. Even officials have, “off the record,” expressed similar concerns.

For these reasons, the need for the current reform process<sup>4</sup> is not questionable and, of course, Michelin reserves a particularly warm welcome to this opportunity to correct the trend toward a less stringent approach that would at last make some economic sense and that would allow dominant companies to correctly assess the risk attached to their pricing policy in the light of Article 82 of the EC Treaty.

The need for clear guidelines is all the more pressing in light of less stringent regulations in other countries. On the U.S. side, for instance, the approach adopted by the competition authorities is radically different, as they have not handed down any decisions which attack loyalty rebate practices, even where such practices are implemented by a dominant company.<sup>5</sup> The most that can be said is that, in the context of private lawsuits,

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<sup>4</sup> In September 2005, EC Competition Commissioner Neelie Kroes gave a speech on the review begun by the European Commission in relation to its intervention in the area of abuse of a dominant position (*see* Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute, New York (Sep. 23, 2005)). Following the presentation of the broad scope of the review by Commissioner Kroes, the Commission published a working document which proposes guidelines on the application of Article 82 of the EC Treaty (*see* EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005) [hereinafter Discussion Paper]).

<sup>5</sup> *See* OECD, ROUNDTABLE ON LOYALTY AND FIDELITY DISCOUNTS AND REBATES (May 2002).

U.S. courts deal with such practices under the approach either of tied sales<sup>6</sup> or of predatory pricing, where the practices lead to prices being applied which are lower than cost.<sup>7</sup>

In light of the above, the idea of a reform is very much welcomed. Not only does it make legal and economical sense, but it is also an opportunity for the Commission to take into account regulatory constraints that large companies do face on a worldwide basis due to discrepancies in the application of the concept of abuse of a dominant position. Indeed, when your main competitors are dominant (e.g., in Japan or in the United States), the reality is that they benefit from a softer application of the concept of pricing abuse, so that you do not compete from an arm's length on a worldwide basis.

The consultation process is also very much appreciated: the Commission has not hesitated to embark on an exercise which is particularly delicate: a public debate, with economic operators on the desired short-term application of Article 82 of the EC Treaty. It is a demonstration of political courage on the part of EC Competition Commissioner Neelie Kroes.

However, we unfortunately fear that it will not meet dominant companies' minimal expectations and it is regrettable that the Discussion Paper does not enough reflect the European Commission's will of a convergence towards the approach that proved right in the United States.

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<sup>6</sup> *SmithKline Corp. v. Eli Lilly & Co*, 427 F. Supp. 1089 (E.D. Pa. 1976), case d 575 F. 2d 1056 (3d Cir. 1978); and *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

<sup>7</sup> *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8<sup>th</sup> Cir. 2000) and *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 69 F. Supp. 571 (S.D.N.Y. 1999), case d 257 F.3d 256 (2d Cir. 2001); see Luc Gyselen, *Rebates: Competition on the Merits or Exclusionary Practice?* in EUROPEAN COMPETITION ANNUAL (C.-D. Ehlermann & I. Atanasiu eds., 2003).

For this reform to loosen up dominant companies' unjustified ties (that time to be reproached to the Commission) and, thus, orient the trend toward more reasonable economical and fair legal assessment, it is imperative that companies be given legal certainty, not to say legal warranty (for companies will never play a game where they could end up being the constant loser).

Unfortunately, despite its many virtues, the text of the Discussion Paper which is currently under discussion requires certain amendments and improvements in order to achieve the desired result, that of a real advance for economic operators and bestowing on them a minimum legal certainty in the implementation of their commercial policy. The content of the current Discussion Paper lacks ambition and does not go sufficiently to the substance of the economic logic first announced by Commissioner Kroes (notably to “protect competition and not competitors”).<sup>8</sup> It is a pity that the current draft of the proposed text has moved away from this.

More particularly, with respect to pricing policy, the Discussion Paper makes too much reference to concepts that are overly-complex (in particular the concepts of “Required Share” and “Commercially Viable Amount/Share”) and leaves important issues unresolved. Some improvements could, even should, consist of: clear principles; safe harbors; rebuttable presumptions of infringing conduct; and clear principles with regard to future reference and application of earlier case law and its interaction with the evolution to be provided for by the Guidelines.

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<sup>8</sup> See Kroes (2005), *supra* note 4.

In our view, the to-be-released new version of the Discussion Paper should, at a minimum, identify and clearly set out what types of conduct, in their maximum limits, are not considered to infringe Article 82 of the EC Treaty and which, therefore, companies in a dominant position have the possibility of implementing in all legal certainty. We are grateful to the officials who have eared and understand the utility to provide for some kind of safe harbors. Luc Peeperkorn and Michael Albers (DG Competition) notably recognize that the drawing up of “safe harbors” is one of the necessary key factors (along with a description of the method of analysis and the use of presumptions to determine which party bears the burden of proof), in order to reconcile a more economic approach, based on the effects of behavior, with the need for predictability and legal certainty.<sup>9</sup>

For example, there is no reason why the text would not provide for safe harbor concerning practices in respect of which the Commission has, for the most part, already recognized them unlikely to lead to restrictions on competition, even on the part of dominant companies, such as: volume commitments which are lower than 30 percent of the distributor’s requirements; uniform retroactive rebates; non-retroactive rebates (whether these are individualized or uniform); and individualized retroactive rebates which apply in respect of a reference period that is limited to three months.

But it is our understanding that although the new proposal will provide for such safe harbors, these would unfortunately not bring sufficient legal certainty, for it seems that the Commission will reserve the right to assess any situation in any case. To this

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<sup>9</sup> European Commission, Article 82 Exclusionary Conduct Discussion Paper: An Interview with Michael Albers and Luc Peeperkorn, Directorate General – Competition of the European Commission (2006).

over-regulation process the difficulty to use complex economic concepts must be considered, as must the fact that the paper does not mention how the guidelines will interact with past case law (not to mention that the most recent trends in European case law on the application of Article 82 EC do not give cause for much optimism (consider, for example, the 2003 judgment of the European Court of First Instance confirming the *Michelin II* decision<sup>10</sup> and the judgment of the European Court of Justice in *British Airways*, confirming the position of the Commission<sup>11</sup>).

Thus, dominant companies will have to wait for the application of a new trend to be confirmed in the jurisprudence. This regrettably wipes away any goodwill on the side of the Commission to end up with particle ready-to-enforce guidelines.

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<sup>10</sup> *Michelin II*, *supra* note 2.

<sup>11</sup> Case C-95/04, *British Airways v. Commission*, 2007 E.C.R. I-2331.