The fine line between market dominance and abuse

When William Shakespeare wrote the words "*O, it is excellent to have a giant's strength: but it is tyrannous to use it as a giant*" in Measure for Measure, the complexities of competition law and market regulation could not have been further from his mind. Yet these words, appropriated by the Competition Tribunal in its decision relating to the excessive pricing complaint against ArcelorMittal South Africa Limited, summarise eloquently the fine line between maximisation by a dominant firm of its size in a particular sector, and the abuse of such size.

The key to a successful navigation by a large firm around the abuse of dominance provisions set out in the Competition Act, lies with a strategic approach to business practice and policy that adheres firmly to the philosophy underlying the Bard's wisdom. This may be illustrated by juxtaposing the Tribunal's findings in the abuse of dominance complaint levelled against British American Tobacco South Africa Limited (BATSA), against the record 1.06 billion Euros fine imposed on the Intel Corporation (Intel) by the European Commission in May 2009.

The Tribunal's decision in the BATSA matter supports the axiomatic but often understated principle that a position of unrivalled dominance is not prohibited or even punishable under the provisions of the Competition Act. Rather it is the *abuse* of such a dominant position that attracts sanction. In the Tribunal's words *"[a]fter an exhaustive examination of the evidence, and contrary to the preconceptions with which many may approach an abuse of dominance allegation against a firm with a near monopoly market share, we do not believe that the applicants have discharged the obligation to show harm to competition*". In this sense, the Tribunal placed great store on the promotional opportunities available to the BATSA's rivals; the complainant's own resources, including international brands and experience; and alternative mechanisms and sites of marketing and promotion "*studiously ignored*" by the complainant.

The Tribunal emphasised that allegations of exclusionary conduct (i.e. abusive conduct on the part of a dominant firm aimed at preventing a competitor from expanding within, or entering into, a particular market) premised on sections 8(c) and (d)(i) of the Competition Act must be supported by evidence of significant foreclosure - without which "*the allegation of exclusionary conduct cannot be sustained*". The "*act of offering a higher price for an input (promotional resources or any other) or a lower price for an output as an illegal inducement of, respectively, a supplier or a customer is to penalise rather than promote competition*".

In essence the decision of the Tribunal reflects that the complainant was outmarketed by BATSA and, rather than expending resources on competing with BATSA in the market place, JTI turned to the competition authorities for a solution. This is borne out by the Tribunal's words that "*we must conclude either that JTI accorded little significance to the promotional opportunities afforded by this channel… or else it has chosen to fight its battles in the Competition Tribunal rather than on the more testing terrain of the market*".

In contrast to the above example are the business practices of Intel which were regarded by the European Commission as abusive in that they skewed competition and denied consumers of product choice in order to protect and maintain Intel's dominant share of the computer chip sales market.

The European Commission found that Intel contravened the EC Treaty antitrust rules (Article 82 in particular) by engaging in two types of illegal practices aimed at excluding competitors from the market for computer chips. Firstly, Intel gave wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, of their computer chips from Intel. Intel was also found to have made direct payments to a significant retailer, Media Saturn Holdings, on condition that it stock only computers with Intel computer chips. Such rebates and payments effectively limited the availability of competitor products, thereby limiting customer choice. Secondly, Intel was found to have made direct payments to computer manufacturers in consideration for halting or delaying the launch of specific products containing the computer chips of its competitor, Advanced Micro Devices (AMD) and to limit the sales channels available to AMD's products. By undermining its competitors' ability to compete on the merits of their respective products, it was found that Intel's strategy was designed to exploit Intel's existing entrenched position in the market, thereby serving to undermine competition and innovation.

In its decision, the Commission did not object to the rebates themselves, but rather to the conditions that Intel attached to those rebates which incentivised computer manufacturers to purchase fewer or none of their computer chip requirements from Intel's competitors. In addition, the Commission was critical of Intel's interference in the relations between computer manufacturers and AMD by making payments to some manufacturers in exchange for postponing, cancelling or imposing restrictions on the introduction or distribution of AMD products.

The field of competition law in general and the rules that attach to firms having achieved that holy grail of market dominance in particular, are often decried as impractical and arcane. Yet the above examples illustrate that the spirit of such principles may be encapsulated in a single line of words written by playwright in 1604!

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