

Pricing and Competition Law

By

Yves Van Gerven, Anne Vallery and Cormac O'Daly

IBJ / IJE lunch debate, De Warande -- 9 June 2009



Pricing and Competition Law

Yves Van Gerven, Anne Vallery and Cormac O'Daly

Introduction

- Competition law imposes well known constraints on companies' freedom to set prices. Notably, throughout the world antitrust authorities have dedicated substantial resources to discovering price cartels and taking action against their members. Likewise, a traditional hostility exists towards resale price maintenance clauses.
- But beyond these examples, there are a wide number of “grey” areas in which competition law impacts pricing. Some of these – such as limits on the rebates that a company may grant – only apply to dominant companies; others apply to all companies.
- The seminar aims to explore a range of these areas and to emphasise the central role that competition law and competition policy occupies – and will continue to occupy despite some political clamour for its enforcement to cede to other demands in the present economic climate – in regulating business. As Competition Commissioner. Kroes recently commented, “*Appliquer les règles de concurrence, pour la santé et la vitalité de nos entreprises, est une nécessité d'autant plus fondamentale en temps de crise. La politique de la concurrence est au coeur de l'économie : elle doit être au coeur de la relance.*” Mrs. Kroes claims that in 2008 the Commission's enforcement actions saved the consumer more than EUR 11 billion. The *Algemene Directie Mededinging/Direction générale de la concurrence* claims that the *Conseil de la Concurrence/Raad voor de mededinging's* actions against cartels in 2008 produced a EUR 45.4 million benefit for Belgian consumers.
- We begin by discussing the issues that can arise in horizontal relationships between competitors. Then we turn to issues arising in vertical relationships between companies operating at different levels of the supply chain. Lastly, we examine the particular issues that apply to companies occupying a dominant position on a relevant market.

I. Horizontal relationships between competitors¹

A. Price cartels

Potential penalties

- Secret agreements between competitors to fix prices (or other parameters of competition such as output) are the most serious breach of competition law as they directly affect prices. They attract high administrative fines from the European Commission and national competition authorities.
- The Commission can fine up to 10% of a company's worldwide consolidated turnover. In recent years fines have been increasing. For example, the Commission fined car glass manufacturers a total of EUR 1.3 billion and Saint Gobain EUR 896,000 in November 2008. In February 2007 lift and escalator manufacturers were fined almost EUR 1 billion. The *Conseil de la Concurrence/Raad voor de mededinging* can impose fines of up to 10% of turnover achieved on the Belgian market and through export. In its *Bayer/Ferro/Solutia/Polynt* decision, fines totalling almost EUR 500,000 were imposed.
- The Commission's 2006 Guidelines on the method of setting fines heavily penalise companies that have restricted competition over a long time: each year of a cartel can lead to the basic amount of a fine being multiplied by 100%. In addition, the Commission often tries to prove a "single and continuous" cartel from a series of meetings, which leads to it finding cartels of longer duration.
- The *Conseil de la Concurrence/Raad voor de mededinging* issued guidelines on calculation of fines in 2004.
- Administrative fines are not the only possible sanction. Some countries, for example the UK and Ireland, have followed the US and introduced criminal sanctions for cartelists. The Commission is also very intent on encouraging private parties to begin damages actions before their national courts. It is studying how national law procedures might be amended to favour private enforcement. The Commission itself has brought a damages action before the *Tribunal de Commerce/Rechtbank van koophandel* in Brussels against four companies fined in the lift and escalators decision.

Burden of proof

- The European Courts allow the Commission considerable leeway in proving cartels: "sufficiently precise and consistent evidence to support the firm conviction that the

¹ Timing constraints mean that not every relevant subject can be addressed here. For example, the Commission has given particular attention to standard setting and agreements relating to pricing of essential patents.

alleged infringement took place ... However ... not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement ... sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement”.

“Agreements” and “concerted practices”

- The basic cartel prohibition contained in Article 81 EC Treaty (and Article 2 of the Belgian Competition Act) not only covers “agreements” that have the object or effect of restricting competition; it also covers “concerted practices”. These are more informal arrangements whereby, although the parties’ conduct falls short of an agreement, they knowingly cooperate to avoid competing or they reveal their future intentions in order to influence other market participants.
- There is a degree of reciprocity/meeting of the minds required in a concerted practice albeit the burden for establishing this is relatively low.
- The European Court of Justice recently held that a one-off meeting between competitors may in certain circumstances constitute a concerted practice.²

Per se infringements

- Article 81 EC covers agreements and concerted practices that have the object or effect of restricting competition. When an agreement has a price fixing object, the Commission need not prove it had this effect.

Bid rigging

- Bid rigging is a particular example of a price fixing cartel. Instead of competing in a tendering process, the contractors agree in advance which of them shall win the tender. Bid rigging is often enabled by so-called cover pricing, which involves submission of token bids and compensation agreements among the contractors.

Avoiding trouble

- Mere non-implementation of an a cartel agreement is not a defence in EU law; where an agreement has the object of restricting competition, the Commission and courts do not have to establish that it also had this effect.³ The Commission will just assume that the company took the cartel into account in its decision-making, decided not to implement it and profited from this strategy.
- Everybody thinks they know what a price cartel is. Experience shows, however, that employees will sometimes implicate their company in a cartel investigation without

² Case C-8/08, *T-Mobile Netherlands BV and others*, judgment of 4 June 2009.

³ The same is true of a concerted practice having the object of restricting competition; the Commission need not demonstrate that the practice also had this effect. See, for example, Case T-53/03, *BPB plc v Commission* at paragraph 116.

being aware of having done this. It is essential that employees who might have the opportunity to meet with and discuss prices with competitors receive regular compliance training. For example, employees who participate in trade association or other meetings come into contact with competitors and should be aware that if the discussion turns to pricing or exchange of other competitively sensitive information, then the correct response is to object expressly to the discussion, have this noted in the meeting minutes and, if necessary, leave the room. Only such a response will constitute “distancing” one’s self from the agreement and be any sort of a defence in EU law.

B. Exchange of business sensitive pricing information

- Price fixing cartel agreements are often underpinned by unlawful information exchanges. Exchange of pricing information among competitors may, however, in itself infringe competition law by substituting cooperation for the uncertainty and unpredictability of competitors’ reactions. This can happen even when there is no agreement or concerted practice as to the actual price levels that the parties to the information exchange will apply.
- Companies’ future pricing plans should never be made known to competitors unless this unintentionally results from a public announcement to customers (but see below regarding concerted practices). The exchange of other non-public pricing policies, such as on applicable discounts, is also likely to infringe competition law.
- Trade associations often assemble aggregate historic data and distribute this to their members. Generally this does not infringe competition law unless the market is highly concentrated in which case the publication of even aggregate statistics may reveal enough to enable companies to ascertain each others’ pricing or other sensitive data (e.g. market shares) from the statistics.

C. Price fixing and exchange of pricing information through vertical links

- Vertical agreements or vertical links may act as a means of facilitating collusion. The Commission is well aware of this possibility and highlights it throughout its Guidelines on Vertical Restraints (e.g. paragraphs 103(ii), 107 and further mentions under many of the specific vertical restraints analysed).
- The main concern is that retailers may inform suppliers of their intended future prices in the expectation that the supplier act as an information conduit and inform other retailers of the intended pricing. In the *Replica Football Kit* case, the UK Court of Appeal stated as follows:

“if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may

be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition. The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.”⁴

- The Belgian press has reported on ongoing investigations into the major Belgian supermarket chains’ relationships with their suppliers.
- Other concerns may arise when independent retailers run stores on behalf of a chain. The agreements governing these relationships sometimes include restrictions such as imposing maximum or fixed prices. This could result in price fixing at the retail level by the upstream chain owner. (See also on resale price maintenance below.)

D. Joint selling

- Joint selling by competitors, through a specially formed company or a joint sales agreement, necessarily leads to agreement on prices. While the European Court of Justice has accepted that joint selling may not always have the object of restricting competition (Case C-399/93, *Oude Luttikhuis*), it normally has the effect of eliminating price competition between the parties and is found to infringe Article 81.
- For example, in the *Floral* decision, the Commission fined the three largest French producers of certain fertilisers for selling their products in Germany via a jointly owned company. The agreement deprived German consumers of the benefits of price competition between the French producers.
- The Commission might accept that joint selling is necessary to enable another form of horizontal cooperation, such as joint production, or to achieve efficiencies through integration of marketing functions, but this would only be in exceptional circumstances.

E. Public price announcements as concerted practices

- The Commission has sometimes accused companies who make (nearly) simultaneous public price announcements of being parties to a concerted practice to raise prices.
- In the leading *Wood Pulp* case, however, the Court of Justice ruled that parallel conduct can only be evidence of a concerted practice where no plausible alternative

⁴ *Argos and Littlewoods and JJB Sports v OFT*, [2006] ECWA Civ 1318, paragraph 141.

explanation exists. The US Supreme Court adopts a similar approach to what US law terms “conscious parallelism”; it examines whether evidence exists “tending to exclude the possibility of independent action”.⁵

- This recognises that it is rational economic behaviour for companies to follow each others’ public pricing policies. In concentrated markets, however, companies must guard against there being information exchange or other practices, such as indirect contacts, that increase market transparency and which may facilitate formation of a concerted practice (see more on information exchange above).
- This is when competition authorities may try to assert that “loose talk” over prices is just “the tip of the iceberg” and is part of an underlying price cartel.

F. Joint purchasing

- Joint purchasing may infringe Article 81. In February of this year Commissioner Kroes, in a letter to an MEP, noted the growing number of buying alliances in the food sector and stated that “such agreements may serve as a tool for foreclosing rivals’ access to essential inputs at competitive conditions and/or for competitors to engage in collusive behaviour on downstream markets”. The Commission makes the same points in its 9 December 2008 Communication on Food Prices in Europe.
- But when SMEs conclude purchasing agreements, the effect normally is pro-competitive as it allows them to purchase at lower prices and thereby match the economies of scale achieved by their larger competitors. In *Gøttrup-Klim* the Court of Justice adopted an economic approach to joint purchasing holding that individual farmers could cooperate to counteract the market power of global fertiliser suppliers. In this case the Court accepted that a rule forbidding the farmers from participating in other forms of cooperation did not infringe Article 81 as it was necessary to the successful functioning of their cooperative.
- Problems with joint purchasing normally therefore only arise if the companies have market power on either the downstream selling market (the main concern) or on the upstream purchasing market. (See further the Commission’s Guidelines on Horizontal Cooperation.)
- Other aspects of purchasing agreements may infringe Article 81. For example, if the agreement mandates favouring domestic suppliers (*Belgian Sugar Beet* case in early 1990s). Joint purchasing agreements must also comply with the rules governing vertical agreements (see Guidelines on Vertical Restraints paragraph 29).

⁵ *Bell Atlantic Corp. et al v Twombly et al*, Supreme Court May 21, 2007.

II. Vertical Relationships between non-competitors operating at different levels of the supply chain

- Vertical agreements concluded by non-competitors operating at different levels of the supply chain are less harmful to competition than horizontal agreements between competitors. Commission Regulation 2790/99 therefore block exempts a wide category of “vertical restraints” from Article 81 provided the supplier’s market share does not exceed 30% (the buyer’s market share must not exceed this percentage when exclusive supply is concerned). The accompanying Commission Guidelines on vertical restraints assist in analysing provisions that are not exempt under Regulation 2790/99 but may not necessarily infringe Article 81.
- Some provisions in vertical agreements, however, are never exempt under the block exemption and result in the entire agreement being declared void.

A. Resale price maintenance

EU view

- Resale price maintenance (RPM) is where a supplier obliges a reseller to sell the supplier’s goods at a fixed or minimum resale price. The Commission considers that RPM has a number of negative effects on competition and in effect views it as vertical price fixing. Block Exemption Regulation 2790/99 excludes RPM from its scope no matter whether it is part of an open distribution system, selective distribution or franchising and irrespective of the parties’ market shares.
- In contrast a supplier whose market share is below 30% may recommend a price or impose a maximum price provided this does not amount indirectly to a fixed or minimum price. If the supplier’s market share exceeds 30%, a recommended or maximum price may be possible but this requires a detailed analysis of competitive conditions in the market.
- The Guidelines on vertical restraints expand on the types of practices that the Commission considers constitute indirect RPM (paragraph 47). These include fixing distribution margins, limiting discounts and linking resale prices to those of competitors.
- If an agreement contains a RPM clause, the Block Exemption no longer applies to the agreement and the Commission will presume that it has an anti-competitive effect. While the parties could try to show efficiencies arising from the RPM, this would be difficult and it is likely that the agreement would be declared void and a fine imposed (the Guidelines on vertical restraints say that individual exemption of hardcore restrictions like RPM is unlikely – paragraph 46). It could, however, be argued that imposition of fixed prices for short promotional periods may be admissible.

- If the agreement qualifies as a “technology transfer agreement” under Commission Regulation 772/2004, the same prohibition on RPM as under Regulation 2790/99 applies to agreements between non-competitors. If the parties to the technology transfer agreement are competitors, then the licensee must have even greater freedom to determine its pricing and the licensor cannot impose maximum or recommended prices. The Commission’s accompanying Guidelines on technology transfer agreements provide greater detail on royalty structures that it considers constitute RPM.

Recent US change

- Recently, in the *Leegin* case the US Supreme Court changed its long-standing view that RPM was a *per se* infringement of the US equivalent of Article 81.⁶ US courts must therefore now apply the “rule of reason” and examine whether in the circumstances the RPM restricts competition. This may produce a more liberal approach to RPM than in the EU.

Any changes in EU?

- Regulation 2790/99 expires in 2010 and the Commission will have to enact a new block exemption. It has been reported that the Member States’ national competition authorities are mainly against changing the EU’s rules on RPM. According to one very recent report, the Commission might be willing to explore options where RPM may be deemed acceptable in certain situations and following a detailed examination.

B. Most favoured nation/English clauses

- The Commission’s guidelines assimilate so-called most favoured nation or English clauses – whereby a purchaser must inform a supplier if another supplier offers a lower price and can only purchase from the second supplier if the original supplier fails to match the lower price – to other “single branding” obligations such as non-compete clauses.
- English clauses are exempt from Article 81 under Regulation 2790/99 if (i) the supplier’s market share is below 30% and (ii) the English clause’s duration does not exceed five years. If these two conditions are not met, an English clause may still be valid but a comprehensive assessment will be required of the entirety of market conditions including the supplier’s market position and the clause’s extent and duration.
- English clauses may also violate Article 81 if the purchaser is required to reveal the identity of the supplier offering the lower price as, like an exchange of information, this increases market transparency and may facilitate collusion. Dominant companies’ use of English clauses may also infringe Article 82 EC.

⁶ *Leegin Creative Leather Product Inc.*, Supreme Court June 28, 2007.

C. Differential pricing obstructing parallel imports

- The ability of non-dominant firms to price differently in different EU Member States is a complex area and will often require detailed market analysis. A leading recent authority, Case T-168/01 *GSK v Commission*, is under appeal to the European Court of Justice.

Export bans

- One of the EU's main goals is the creation of a single European market, which militates against allowing companies' pricing policies to be set purely according to national borders. In pursuit of this goal EU law has favoured the promotion of parallel imports/exports between Member States and the Commission and European courts have often condemned measures aimed at discouraging parallel trade. At the same time, different market conditions may prevail in different Member States and companies will want to charge more in markets where higher prices are obtainable.
- Companies cannot give their distributors absolute territorial protection. Therefore a prohibition on distributors making passive sales in response to unsolicited orders infringes Article 81.
- Measures aimed at discouraging parallel trade have often been used in tandem with export bans, which the European courts have held have as their object a restriction of competition law. Likewise, when such measures have accompanied other means of restricting trade – for example clauses expressly prohibiting exports, the supplier stamping products “Export Prohibited” and clauses requiring the reporting/monitoring of parallel imports – the courts have found them to infringe Article 81. Providing financial incentives for a dealer not to export will normally infringe Article 81 but granting of support payments to dealers disadvantaged by parallel imports into their territories may be lawful.

Dual pricing

- Considerable debate exists regarding the legality of dual pricing. Charging different prices depending on the country into which goods are delivered has been found to infringe Article 81 (*Dunlop Slazenger* and *United Brands*). In *GSK v Commission*, however, the Court of First Instance ruled that GSK's policy of charging different prices to wholesalers selling reimbursable drugs in Spain compared to prices charged when the same products were exported to other Member States did *not* have the *object* of restricting competition. It appears that the CFI was heavily influenced by the different national regulations existing in the pharmaceutical sector. The CFI, however, went on to find that GSK's policy, which even GSK admitted had the object of limiting parallel trade, had the *effect* of restricting competition. In reaching this conclusion the CFI examined the extent to which parallel trade contributed to price competition on the relevant market. As noted above, this judgment is under appeal, in

part as the CFI ruled that the Commission had failed to examine fully whether GSK's policy could be exempted under Article 81(3).

- For the Commission or courts to find an infringement of Article 81, they must prove that an agreement or concerted practice exists. If the supplier merely issues unilateral instructions, this conduct does not fall within Article 81 but it may infringe Article 82 EC if the supplier is dominant (see below).
- If a supplier is not dominant and distributes products through subsidiaries that are part of its corporate group, then the supplier can set different prices in different Member States. It can also oblige its subsidiaries to refer orders from customers located outside their Member States to the subsidiary inside the customer's Member State.

III. Abuse of Dominance

- In EU law it is not unlawful to occupy a dominant position on a relevant market but firms occupying a dominant position must be careful not to infringe Article 82 EC, which prohibits some unilateral pricing decisions as abuses of dominance. Dominance is difficult to define but a company with a market share of 50% is presumed to be dominant and companies with market shares above 40% have also been found to be dominant.
- The Commission's 2008 Guidance on its Enforcement Priorities regarding Exclusionary Conduct ("the Guidance") indicates that the Commission will pursue a more economics-inspired effect-based approach to enforcement under Article 82. This approach has arguably already been present in some of the Commission's decisions (e.g. *Microsoft*) but arguably not in some of the decisions concerning rebates (e.g. *Michelin II* and *British Airways* – the Commission does, however, claim that the *Intel* decision adopts an economic approach). Like all Commission communications, the Guidance does not bind the European courts, which have tended towards more formalistic application of Article 82 – for example in *British Airways* and *Michelin II* the CFI did not examine the rebates' effect on the market but held that it was sufficient that they were "capable of" or "tended to" restrict competition. The Guidance, moreover, is expressly said to outline the Commission's enforcement priorities rather than represent a strict statement of the law.
- The Guidance indicates that the Commission will generally only act under Article 82 when a dominant firm's pricing is capable of harming competition from an "as efficient" competitor. Depending on the context, the Guidance refers to the dominant company's average avoidable cost ("AAC") and long-run average incremental cost ("LRAIC") as benchmarks for assessing whether an as efficient competitor risks being excluded.
- Analysis of pricing under Article 82 is complex so the following by necessity are only some key points to consider.

A. Rebate schemes

- Dominant companies' freedom to grant rebates is a complicated and somewhat controversial area of EU law. While a non-dominant company can structure a rebate policy to reward customer's loyalty etc., a dominant company must be very careful lest its rebates be found to be loyalty-inducing and lead to the exclusion of competitors.
- Loyalty-based; volume-based; and growth-based rebates can infringe Article 82 in certain circumstances. The case-law offers the following guidelines:
 - The higher the rebate, the greater the inducement and the more likely it will be found to have an anti-competitive effect.
 - The longer the period over which the rebate is calculated, the greater its inducing effect.
 - Individualised targets are more likely to be found to infringe Article 82 than generally applicable standardised targets. But the latter can also infringe Article 82.
 - If the rebate applies to all purchases, not only those exceeding the target, it is more likely to infringe Article 82.
 - The criteria for qualifying for a rebate must be transparent, objective and quantitative and must treat customers in the same position alike.
 - A dominant company may prove that its rebate system is justified by cost-based savings.
- The Guidance suggests estimating the effective price charged by the dominant company (taking account of the rebate) over the "relevant range"/contestable part of a purchaser's requirements. The lower the estimated effective price compared to the dominant company's average price, the stronger the loyalty-enhancing effect of the rebate. This test seems difficult to implement in practice.
- The Guidance also suggests that if the dominant company's effective price is above its LRAIC, then an as efficient competitor can normally compete. This might mean that if a dominant company's discounted price is always above its LRAIC, it can benefit from a safe-harbour but it is not clear how much protection this really affords.
- On 13 May 2009 the Commission imposed a fine of EUR 1.06 billion on Intel, in part for its requiring that computer manufacturers purchase all, or almost all, their required x86 CPUs from Intel. Outlining the main features of its *Intel* decision, a Commission official stated that the case demonstrates that the Commission has nothing against rebates and lowering prices in itself but does have concerns when onerous conditions

are attached to the rebates or if the rebates are applied selectively. (Intel also allegedly paid manufacturers to delay launching products based on Intel's rivals' CPUs. The decision is yet to be published so we cannot assess how much of the fine was due to the unlawful rebates system and how much was due to the "pay for delay" abuse.)

- In a very unusual case, *Compagnie maritime belge*, the Commission fined a dominant company for selectively cutting its prices in order to deter new entrants on to shipping routes even though the dominant company's prices were above its average variable cost.

B. Mixed Bundling/Multi-product rebates

- When a supplier sells a number of different products separately on the market but also sells them together at a lower price than if purchased separately, this is termed "mixed bundling" or a "multi-product rebate".
- The Commission objects to this practice if it leads to a company leveraging its market power in one market into a different market or if, as the Guidance puts it, an as efficient competitor offering only one of the products in the bundle is unable to compete with the discounted price of the bundle.
- For example, the Commission imposed a EUR 2.5 million fine on De Poste-La Poste for offering lower prices to customers in the market for delivering letters if they also paid for De Poste-La Poste's B2B service. US courts also object to mixed bundling.⁷
- The Guidance indicates that when the incremental price payable for each product separately is above the dominant company's LRAIC when the products are included in the bundle, an as efficient competitor can compete profitably against the bundle and the Commission is not likely to intervene. If rivals also sell the bundle, or could do so, the Commission will examine whether the bundle's price, as a whole, is predatory.
- The Guidance suggests a number of possible arguments that a dominant company may put forward to justify mixed bundling. These include savings related to production, packaging or distribution, other reductions in transaction costs and enhanced ability to bring new products to the market.

C. Price discrimination

- As noted above, discriminating on the basis of nationality and discouraging cross-border trade within the EU goes against fundamental EU policies. In addition, Article 82(c) expressly states that "applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage"

⁷

Le Page's, Inc v 3M, 324 F3d 141 (3d Cir 2003) (en banc), cert denied, 542 US 953 (2004).

constitutes an abuse of dominance. The concept of an equivalent transaction has been interpreted widely and Article 82(c) has been found to apply even where it appears that the dominant firm's trading partners were not themselves competitors.

- In *United Brands*, the Commission and European Court found that charging different prices to distributors based on their nationality infringed Article 82.
- More recently, in the pharmaceutical sector, the European Court of Justice countenanced that a dominant company could take reasonable and proportionate steps to protect its commercial interests and could refuse to supply orders for unusually high quantities of pharmaceuticals to dealers that essentially wished to export these products to other Member States.⁸ While this case concerned refusals to supply, similar reasoning could perhaps justify differential pricing. Like the Court of First Instance in *GSK v Commission*, discussed above, the Court was influenced by the varying national regulations existing in the pharmaceutical sector and it is unclear if its reasoning would apply in other sectors.
- Price discrimination can also infringe the rules on rebates as it often results in customers receiving different rebates purely because of their location.⁹
- Price discrimination may also infringe Article 81 even when the supplier is not dominant (see above).

D. Excessive Pricing

- When a dominant company sets prices that exceed the economic value of the product concerned, this can infringe Article 82.
- But competition authorities, including the Commission, are reluctant to penalise companies for setting prices that are too high as, quite legitimately, they do not want to assume the role of price regulators. This would, among other things, entail determining an appropriate measure of costs and deciding what constitutes a reasonable margin.
- The Guidance only covers so-called “exclusionary” abuses not exploitative abuses like excessive pricing.

E. Refusal to supply/Margin squeeze

- Setting a price that is excessive may also be part of a dominant company's wider strategy to refuse outright to supply a product. If the product is an essential input to another product, the refusal to supply may itself constitute an abuse of a dominant

⁸ Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia EE and others v GSK*.
⁹ Case C-163/99, *Portugal vs. Commission; Airport Landing Fees*.

position. Refusal to license intellectual property may also be abusive in exceptional circumstances.

- So-called “margin squeeze” occurs when an integrated dominant company charges a downstream competitor a high price for an input on the upstream market. If the dominant company’s downstream price that it charges to customers does not leave the downstream competitor who buys the dominant company’s input much opportunity to compete, the dominant company is said to have squeezed its competitor’s downstream margin.
- The Guidance indicates that the Commission will be concerned if the integrated dominant company does not allow an as efficient competitor to compete profitably on the downstream market. The leading EU case concerns Deutsche Telekom.¹⁰ The *Conseil de la Concurrence/Raad voor de mededinging* recently fined Proximus EUR 66.3 million for margin squeezing.¹¹

F. Predatory pricing

- Predatory pricing occurs when a dominant company lowers prices, thereby sacrificing profit in the short term, in order to foreclose competitors and maintain or strengthen its dominant position in the longer term.
- Generally lower prices benefit the consumer. Therefore competition authorities are reluctant to intervene and investigate allegedly predatory conduct lest this chill healthy price competition.
- In AKZO, there was clear evidence that AKZO intended to eliminate a rival from the market. The European Court of Justice held that (i) when a dominant company prices below its average variable cost (i.e. it makes losses on incremental units), this is presumed to be an abuse of dominance and (ii) when it prices above average variable cost but below its average total cost, the strategy will be abusive if it is part of a plan to eliminate a competitor.
- As noted, the Guidance is more concerned with average avoidable cost and LRAIC. Prices below average avoidable costs are presumed to be abusive while prices below LRAIC are suspect as they can exclude as efficient competitors from the market. In practice, the difference between AVC/ATC (the AKZO standard) and AAC/LRAIC (the Guidance standard) is only relevant for multi-product companies.

¹⁰ Case T-271/03, *Deutsche Telekom v Commission*.

¹¹ In *Pacific Bell Telephone Co. v Linkline Communications, Inc.*, Supreme Court February 25, 2009, the US Supreme Court narrowed the scope of price squeezing to situations where a duty to deal exists at wholesale level: “Plaintiffs’ price squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at a retail level, then a firm is certainly not required to price both these services at a level that preserves rivals’ profit margins.”

- While some US courts require proof of a possibility that the dominant company will be able to recoup its losses once the predatory strategy has succeeded in eliminating/marginalising competitors, this is not a requirement under EU law. This was confirmed most recently in *France Telecom v Commission*.¹²

G. Other

- The category of possible abuses under Article 82 is not closed so other pricing practices may constitute an abuse of dominance. For example, although this is not strictly a pricing example, the *Conseil de la Concurrence/Raad voor de mededinging* recently informally investigated Anheuser-Busch InBev's contracts with suppliers, which, it had been alleged imposed onerous payment conditions obliging the suppliers to agree to delayed payments. The *Conseil de la Concurrence/Raad voor de mededinging* did not find any evidence of this.

¹²

Case C-202/07 P, *France Telecom v Commission*, Judgment of 2 April 2009.

Prijsbeleid van ondernemingen en de mededingingsregels

Yves Van Gerven

Anne Vallery

9 juni 2009

Lunchdebat Instituut voor Bedrijfsjuristen

WILMERHALE® 

WILMER CUTLER PICKERING HALE AND DORR LLP ®



Inleiding

- Prijzen - belangrijke concurrentiefactor
- “Hard-core” – restricties, maar ook “grijze” en “witte” zones
- Strengere handhaving mededingingsregels
 - Europese Commissie
 - Raad voor Mededinging (boete Belgacom Mobile: 66,3 mio EUR)
- Rechtsvorderingen van concurrenten en afnemers
- Positieve effecten van handhaving voor de consument
- Impact financiële en economische crisis



Overzicht

- Horizontale relaties
 - Klassieke prijskartels
 - Andere: info-uitwisseling, prijsaankondigingen, ...
- Verticale relaties
 - Verticale prijsbinding
 - Andere: Engelse clausules, differentiële prijzen,...
- Prijsbeleid van een dominante onderneming



Klassieke prijskartels [1]

- Basisregel: Iedere ondernemer moet zelfstandig zijn beleid op de markt bepalen – geen coördinatie
- Intelligente aanpassing aan marktgedrag van concurrenten toegelaten – bron van informatie?
- Zeer zware inbreuk (“hard-core”):
 - Hoge geldboetes
 - Schadeclaims



Klassieke prijskartels [2]

- “Overeenkomsten”
 - gezamenlijke wil - eenzijdige mededeling van prijzen
- “Onderling afgestemde feitelijke gedragingen”
 - Feitelijke samenwerking die *welbewust* concurrentierisico's vervangt
 - Directe/indirecte contacten (éénmalig – T-Mobile))
 - Causaal verband tussen afstemming en marktgedrag vermoed
- Prijsaankondigingen



Hoe problemen vermijden?

- Lage bewijslast COM – geen “effect” op mededinging vereist
- Goede praktijken
 - Interne “compliance” training
 - Zichzelf distantiëren van het kartel
 - Louter niet-uitvoeren van kartelafspraken geen verweer
- Vertrouwelijkheid van communicatie advocaat-client



Uitwisseling van informatie

- Verhoogde transparantie kan concurrentie bevorderen, maar ook collusie vergemakkelijken (Asnef-Equifax, HvJ, 2006)
- Genuanceerd antwoord van mededingingsautoriteiten: effecten-benadering
 - wegnemen van onzekerheden over de werking van de markt
 - criteria: (i) aard van de informatie (type, actualiteit, aggregatie, frequentie); (ii) oligopolische of versnipperde markt; (iii) niet-discriminatoire toegang
- Maar: Uitwisseling van prijsinformatie problematisch (T-Mobile HvJ, 2009)



Prijsafstemming via verticale relaties

- Prijsafspraken en/of uitwisseling van informatie via distributiekkanalen:
 - Tussen leveranciers via distributeur(s)
 - Tussen distributeurs via gemeenschappelijke leverancier
- Consensus, wederkerigheid?
- Zaak Argos & Littlewoods v. OFT (2006)
- Lopende procedure voor Raad voor Mededinging over grootdistributie schoonheids- en huishoudproducten



Andere voorbeelden

- Gezamenlijke verkooporganisatie
 - Mededingingsbeperkend ongeacht marktmacht partijen
 - Rechtvaardiging uitzonderlijk - geldboetes mogelijk
- Gezamenlijke inkoopcentrales
 - Bezorgdheid COM ivm groeiend aantal inkoopallianties in voedingsector (speech Kroes, februari 2009)
 - Niettemin een gunstige behandeling onder mededingingsregels (KMO's)



Verticale prijsbinding

- Wat?
 - Oplegging vaste of minimumwederverkoopprijs
- EU:
 - “Hard-core”-restrictie in groepsvrijstelling, ongeacht distributievorm
 - Individuele vrijstelling onwaarschijnlijk (bewijs efficiënties) – reëel risico van geldboete
 - Maximum- en adviesprijzen wel toegelaten
 - Herziening EU groepsvrijstelling verticale overeenkomsten per 31 mei 2010



Differentiële prijzen

- Differentiatie van prijzen op basis van nationale grenzen
 - Eenzijdig gedrag of verticale overeenkomst
- Discriminerende prijzen
 - Europese markt of nationale markten
 - Zaak United Brands (HvJ, 1978)
- Afgrendeling van markten
 - Versterking door gebiedsbescherming (rechtstreekse of onrechtstreekse maatregelen)
 - Zaak GSK (GEA, 2006)



Prijsmisbruiken

- Voorwaarde: machtspositie
- Soorten van prijsmisbruiken:
 - Buitensporig hoge prijzen
 - Margin squeeze
 - Roofprijzen
 - Abusieve kortingen
- Misbruik van aankoopmacht
 - Buitensporig lage prijzen



Prijsmisbruiken

- Recente publicatie van de prioriteiten van de Commissie
- Uitsluitingsgedrag
- Gedragingen die de consumenten schaden
- Beginsel van de even efficiënte concurrent (uitzonderingen)
- Criteria voor kosten
 - LRAIC
 - AAC v. AVC
 - ATC
- Objectieve noodzaak en efficiëntieverbeteringen



Buitensporig hoge prijzen

- Uitbuitingsgedrag
- Prijs die economische waarde van product of dienst overschrijdt
- Complexe oefening
 - Relevante kosten
 - Redelijke marge
- Zaak Deutsche Post (Commissie, 2001)
- Zaak « International Roaming » (Commissie, 2005)
- US: Trinko (S. Ct., 2004)



Margin squeeze

- Uitsluitingsgedrag
- Politiek van een verticaal geïntegreerde groep
- Machtspositie stroomopwaarts
- Onvoldoende marge tussen (i) de prijs van stroomopwaartse product of dienst nodig voor de levering van stroomafwaartse product of dienst en (ii) de detailprijs op de stroomafwaartse markt, die niet toelaat kosten (LRAIC) te dekken
- Zaken DT (HvJ, 2008) en Telefonica (Commissie, 2007)
- Zaak Belgacom Mobile (RvM, 2009)
- US: Zaak AT&T (S. Ct., 2009)



Roofprijzen

- Uitsluitingspraktijk
- Prijzen beneden kostprijs (AAC of ATC)
- Globale uitsluitingsstrategie van concurrenten
- Goedmaking van opgelopen verliezen
- Aanpassingsrecht
- Zaak AKZO
- Zaak France Télécom (HvJ, 2009)
- US: Affaire Brook Group (S. Ct., 1993)



Voorwaardelijke kortingen

- Kortingen rechtstreeks gekoppeld aan (quasi-) exclusiviteit
- Kortingen die getrouwheid bevorderen
- Retroactieve of gestaffelde kortingen
- Geïndividualiseerde of gestandaardiseerde drempel
- Test van de rooftprijs voor de daadwerkelijke prijs van het relevante (aanvullende of betwistbare) gedeelte over de relevante periode (AAC of LRAIC)
- Zaken Michelin (GEA, 2003) en BA (HvJ, 2007)
- Zaak Intel (Commissie, 2009)



Selectieve kortingen

- Kortingen boven vermijdbare kosten
- Kortingen voor bijzonder kwetsbare klanten
- Kortingen die de in- of uitvoer belemmeren
- Zaak Irish Sugar (GEA, 1999)
- Zaak Compagnie Maritime belge (HvJ, 2000)



Multi-productkortingen

- Kortingen voor een bundel van producten of diensten
- Capaciteit van concurrenten om identieke bundels te verkopen
- Prijs voor elk van de producten of diensten in de bundel lager dan de kosten (LRAIC)
- Toets van de rooftprijs voor bundel van producten of diensten
- Zaak De Post (Commissie, 2001)
- US: Zaak Le Page (S. Ct., 2004)

Politique de prix au regard du droit de la concurrence

Yves Van Gerven

Anne Vallery

9 juin 2009

Déjeuner-causerie de l'Institut des Juristes d'Entreprise

WILMERHALE® 

WILMER CUTLER PICKERING HALE AND DORR LLP ®



Introduction

- Prix – élément important de concurrence
- Clauses de prix: restrictions caractérisées, mais également zones grises et comportements autorisés
- Contrôle strict du respect des règles de concurrence
 - Commission européenne
 - Conseil de la concurrence (amende de Belgacom Mobile: EUR 66.3 mio)
- Action en justice de concurrents et de clients
- Effets positifs de ce contrôle pour le consommateur
- Impact financier et crise économique



Sommaire

- Relations horizontales entre concurrents
 - Cartels de prix classiques
 - Autres: échange d'information, annonce de prix, etc.
- Relations verticales
 - Prix imposés
 - Autres: clauses anglaises, prix différenciés, etc.
- Pratiques de prix par une entreprise dominante



Cartels de prix classiques (1)

- Règle essentielle: toute entreprise doit déterminer son comportement sur le marché de manière indépendante – pas de coordination
- Adaptation intelligente sur le comportement de ses concurrents autorisée – Source de l'information?
- Infraction caractérisée:
 - Amendes élevées
 - Actions en dommages et intérêts



Cartels de prix classiques (2)

- « Accord »
 - Concours de volontés – communication unilatérale de prix
- « Pratiques concertées »
 - Coopération réelle qui remplace *consciemment* le risque concurrentiel
 - Contacts directs ou indirects (unique – T-Mobile)
 - Lien causal entre la concertation et le comportement présumé
- Annonce de prix



Comment éviter les problèmes?

- Charge de la preuve allégée dans le chef de la Commission – aucune démonstration d'un effet sur la concurrence exigée
- Bonnes pratiques
 - Formation interne de respect des règles
 - Se distancier de tout cartel
 - Simple non-exécution ou déviation d'un accord de cartel pas suffisant
- Confidentialité de la correspondance avocat - client



Echange d'informations

- Une plus grande transparence peut augmenter la concurrence mais également favoriser la collusion (Asnef-Equifax, CJCE, 2006)
- Réponse nuancée des autorités de concurrence - Examen des effets
 - Supprime l'incertitude quant au fonctionnement du marché
 - Critère: (i) nature de l'information (type, actualité, agrégation, fréquence); (ii) marché concentré ou atomistique; (iii) accès non-discriminatoire
- Echange d'informations relatives au prix problématique (T-Mobile, CJCE 2009)?



Fixation de prix par l'intermédiaire de relations verticales

- Accord de prix ou échange d'information par les canaux de distribution
 - Entre fournisseurs via les distributeurs
 - Entre distributeurs via un fournisseur commun
- Consensus, réciprocité?
- Affaire Argos & Littlewoods v. OFT (2006)
- Procédure en cours devant le Conseil de la concurrence à propos de la grande distribution de produits de beauté et d'entretien



Autres

- Vente groupée
 - Restriction de concurrence indépendamment du pouvoir de marché des parties
 - Justification exceptionnelle - Possibilité d'amendes
- Achat en commun
 - Prudence de la Commission en ce qui concerne le nombre croissant d'alliances d'achats dans le secteur alimentaire (Discours de la Commissaire, N. Kroes, février 2009)
 - Néanmoins traitement favorable en droit de la concurrence (PME)



Prix imposés

- Concept: Imposition de prix ou de prix minimaux
- EU
 - Restriction caractérisée dans l'exemption par catégorie, quelle que soit la forme de distribution
 - Exemption individuelle peu probable (démontrer l'amélioration de l'efficacité)
 - Risque réel d'amende
 - Prix maximum et prix recommandé autorisé
 - Révision de l'exemption par catégorie des accords verticaux au 31 mai 2010



Prix différenciés

- Prix différenciés en fonction des frontières nationales
 - Comportement unilatéral ou accord vertical
- Prix discriminatoires
 - Marché européen ou marchés nationaux
 - Affaire United Brands (CJCE, 1978)
- Cloisonnement des marchés
 - Renforcés par une protection territoriale (mesures directes ou indirectes)
 - Affaire GSK (TPI, 2006)



Pratiques de prix abusives

- Prérequis: position dominante
- Types de pratiques de prix abusives:
 - Prix excessifs
 - Amenuisement des marges
 - Prix prédateurs
 - Rabais abusifs
- Abus d'acheteur dominant
 - Abus de prix excessivement bas



Pratiques de prix abusives

- Priorités de la Commission récemment publiées
- Pratiques d'exclusion
- Comportements dommageables pour le consommateur
- Principe du test du concurrent aussi efficace (exceptions)
- Mesure des coûts
 - LRAIC (CMMLT)
 - AAC (CEM) v. AVC (CVM)
 - ATC (CTM)
- Justification objective – gains d'efficience



Prix excessifs

- Abus d'exploitation
- Prix supérieur à la valeur économique du produit ou service
- Exercice complexe
 - Coûts pertinents
 - Marge raisonnable
- Affaire Deutsche Post (Commission, 2001)
- Affaire « International Roaming » (Commission, 2005)
- US: Trinko (S. Ct., 2004)



Amenuisement des marges

- Abus d'exclusion
- Politique d'un groupe intégré verticalement
- Dominance en amont
- Marge insuffisante entre le prix du produit ou service en amont, nécessaire pour le fourniture du produit ou service en aval, et le prix de détail sur le marché en aval, qui ne permet pas de couvrir les coûts (LRAIC (CMMLT))
- Affaires DT (CJCE, 2008) et Telefonica (Commission, 2007)
- Affaire Belgacom Mobile (CC, 2009)
- US: Affaire AT&T (S. Ct., 2009)



Prix prédateurs

- Abus d'exclusion
- Prix inférieurs aux coûts (AAC (CEM) ou ATC (CTM))
- Stratégie globale d'exclusion des concurrents
- Recouvrement
- Droit à l'alignement
- Affaire AKZO
- Affaire France Télécom (CJCE, 2009)
- US: Affaire Brook Group (S. Ct., 1993)



Rabais conditionnels

- Rabais directement liés à l'exclusivité ou à la quasi-exclusivité
- Rabais induisant un effet de fidélisation
- Rabais rétroactifs ou rabais progressifs
- Seuil individualisé ou standardisé
- Test de prédation pour le prix effectif de la fraction pertinente (supplémentaire ou contestable) sur la période pertinente (AAC (CEM) ou LRAIC (CMMLT))
- Affaires Michelin (TPI, 2003) et BA (CJCE, 2007)
- Affaire Intel (Commission, 2009)



Rabais sélectifs

- Rabais au-dessus des coûts évitables
- Rabais offerts à des clients particulièrement vulnérables
- Rabais qui empêchent des importations ou exportations
- Affaire Irish Sugar (TPI, 1999)
- Affaire Compagnie Maritime belge (CJCE, 2000)



Rabais multi-produits

- Rabais offerts sur un groupe de produits ou services
- Capacité des concurrents d'offrir des groupes de produits identiques
- Prix de chacun des produits ou services groupés inférieurs aux coûts (LRAIC (CMMLT))
- Test de prédation du groupe de produits ou services
- Affaire La Poste (Commission, 2001)
- US: Affaire Le Page (S. Ct., 2004)