Exploitative conduct under Article 102

European Competition Day

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Exploitative conduct

- Why address in addition to exclusionary conduct also exploitative conduct?

  - Article 102 was meant to apply also, possibly exclusively, to exploitative conduct (cf. text of 102(a): unfair prices & conditions)

  - Consumer welfare aim; better to protect consumers not only indirectly but also directly against negative effects of market power

  - "Gap" cases: as only abuse of dominance and not the acquisition of dominance can be addressed under Article 102, addressing exploitative conduct may be the only way to protect consumers in certain cases

A consciously tilted balance

- However, Commission prefers intervening against exclusionary conduct because intervention against exploitative conduct may:
  - dampen investment and entry: ex ante high profits work as incentive to invest and innovate and ex post they may work as incentive for others to follow and enter
  - be (more) cumbersome: complicated to calculate what amounts to an unreasonably high price and what is a correct price level and costly to monitor
- Therefore, here too applies the adage "better to prevent than to cure" : favour intervention against exclusionary conduct over action against excessive pricing

What is an excessive price?

- United Brands judgment (C 27/76) provides test with two limbs:
  - Price/cost difference must be excessive

    And
  - Price must be "either unfair in itself or when compared to competing products"

- Court: not the only way to assess excessive prices

The test for excessive pricing

- First limb: Very high profit margin, for instance by comparing:
  - Price with costs of production (Deutsche Post (DP), Helsingborg)
  - Profit margin between products/competitors (DP, Helsingborg)
  - Return on capital between products or sectors

- Second limb: High profits result not from low costs/higher efficiency but from lack of competition leading to high/unfair prices, for instance by comparing dominant firm's price with :
  - its own price in other markets
  - costs of next most profitable competitor
  - price of undertakings in other comparable (competitive) markets (Bodson, SACEM, Helsingborg, Standard & Poor's)
  - prices over time (Rambus)

The test for excessive pricing

- Implicit third limb: Intervention only where market will not solve the excessive pricing in foreseeable future
  - Entrenched dominant position with very high and long lasting barriers to entry and expansion
  - Confirmed by cases: legal monopoly (Deutsche Post, Bodson, Standard & Poor's), monopoly based on network effects (SACEM), natural monopoly (Helsingborg), dominance based on lock-in effect once industry standard is set (Rambus)

- Markets where high profits do not have their signalling function to attract competition

Thank you