Antitrust & Pricing Issues: A Transatlantic Comparison

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Antitrust & Select Pricing Issues

- General principles & standards of review
- Resale Price Maintenance
  - Maximum RPM
  - Minimum RPM
- Predatory Pricing

General Principles

- Antitrust is about "protecting competition, not competitors"
  - Companies should compete vigorously on the merits
  - Not about ensuring outcomes – there will be winners and losers
  - Not about making markets "more competitive" (industrial engineering)
- Goal is to maximize consumer welfare by protecting the competitive process.

> [Purpose of antitrust law] is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, Inc. v. McQuillan (1993)

- Focus on economic effects
- Inter-brand competition vs. intra-brand competition
- Low prices are nearly always a boon for consumers

General Principles

- Two different standards of review (US):
  - Per se treatment – proof of agreement is enough to establish liability
  - Rule of reason – legality of conduct depends on fact-specific assessment of its anticompetitive effects as well as its likely procompetitive benefits
- Horizontal restraints
  - Per se → conduct that would always or almost always tend to restrict competition and decrease output (price-fixing, bid-rigging, market allocation)
  - Rule of reason → everything else (mergers, legitimate joint ventures and other competitor collaborations, etc.)
- Vertical restraints (today) are assessed under the rule of reason at the US federal level

Maximum RPM (US)

- Per se illegal for much of the 20th Century
  - "[A]greements to fix maximum prices, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Albrecht v. Herald Co.* (1968).
- *Continental Television v. GTE Sylvania* (1977) (nonprice vertical restraints):
  - Marked shift to economics as the core framework for determining the lawfulness of restraints
  - Enhancing interbrand competition is "the primary concern of antitrust law." Restraints on intrabrand competition in pursuit of that goal can be acceptable.
  - Vertical restraints can help achieve certain quality and service advantages that can make the manufacturer's product more competitive against rival products

Maximum RPM (US)

- *Atlantic Richfield Co. v. USA Petroleum Co.* (1990):
  - Still per se illegal, but a plaintiff can't suffer antitrust injury (standing issue) from max RPM by a competitor absent predatory pricing
- *State Oil v. Kahn* (1997):
  - Court overruled *Albrecht*. Max RPM is subject to the rule of reason.
  - Max RPM could lead to lower prices, which are good for consumers unless predatory.
  - Per se treatment might encourage forward integration of manufacturers into the distribution chain (which raises its own competition issues)
- Since *Kahn*, no US court has addressed a claim challenging a maximum RPM agreement under the rule of reason.

Maximum RPM (Europe)

- Max RPM, as well as non-binding price recommendations, are generally permitted as long as they do not (indirectly, by pressure, by incentives) lead to minimum RPM
- CJEU and GC considered for decades that RPM constituted a restriction of competition "by object," *i.e.* a per se violation
- *CEPSA* case (2008): CJEU clearly indicated that a vertical agreement containing a RPM obligation does not necessarily constitute an infringement

Minimum RPM (US)

- *Dr. Miles Med. Co. v. John D. Park & Sons Co.* (1911):
  - RPM is illegal because it restricts "the freedom of trade on the part of dealers who own what they sell."
  - Indistinguishable in economic effect from naked horizontal price fixing by a cartel
- Begat nearly a century of (lawful) workarounds – no agreement, no violation of Section 1 of the Sherman Act:
  - Consignment arrangements
  - MSRP
    - *U.S. v. Colgate & Co.* (1919) (company has power to decide with whom to do business and may unilaterally terminate without antitrust liability)
    - *Monsanto Co. v. Spray-Rite Service Corp.* (1984) (under *Colgate*, manufacturer can announce its resale prices and refuse to deal with those who fail to comply; distributor free to acquiesce in order to avoid termination").
  - Minimum advertised price policies

Minimum RPM (US)

- Evolution in economic theory eventually led to *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007):
  - Closely-divided (5-4) Court overturned *Dr.* Miles – all forms of RPM, including minimum RPM, subject to rule of reason
  - RPM that enhances interbrand competition can be lawful . . .
  - . . . but RPM can, on balance, be anticompetitive
- Reactions/impact of *Leegin*:
  - Some political pushback
  - Standard applied at state court level somewhat unclear (varies)
  - Enforcement basically nonexistent at the federal level
  - Private litigation more challenging but still possible (e.g., when defendant has market power)

Minimum RPM (Europe)

- Considered a hard-core restraint under the EU's Block Exemption Regulation and the *De Minimis* Notice (irrespective of distribution systems used such as selective distribution or franchising)
- *2010 Guidelines on Vertical Restraints* acknowledge potential efficiency benefits of RPM, such that exemptions may be granted under Article 101(3)
  - Standard for rebutting concerns re: anticompetitive effect through efficiencies is very high
  - Main potential for harm: may facilitate collusion among suppliers or distributors
  - Main potential benefit: can promote distribution efficiencies

Minimum RPM (Europe)

- Enforcement – focus is at Member State level
  - **Germany:** 2016 decision noted that RPM agreements with distributors for promotional purposes can be acceptable if they apply for a limited period/cover a limited product volume
  - **UK:** Recent focus on online RPM restrictions (bathroom fittings, mobility scooters, commercial catering equipment).
  - Wave of national cases/fines, fueled by leniency requests in the few EU countries where leniency in vertical cases is possible (such as **Austria**, **Romania** and **Sweden**)
- EC e-commerce sector inquiry can be expected to re-focus EC attention on vertical restraints

Predatory Pricing (US)

- Potentially illegal under Section 2 of the Sherman Act (monopolization)
  - All Section 2 conduct assessed under rule of reason
  - Prima facie case → showing of monopoly power + exclusionary conduct
- Low prices are nearly always good for consumers . . .
  - *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* (1986): "[C]utting prices in order to increase business often is the very essence of competition . . . [and] mistaken inferences [can] chill the very conduct the antitrust laws are designed to protect."
  - *Cargill, Inc. v. Montfort of Colorado Inc.* (1986): "[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition . . . ."
  - *Atlantic Richfield Co. v. USA Petroleum Co.* (1990): "Low prices benefit consumers regardless of how those prices are set."
- . . . but can they ever be "too low"?

Predatory Pricing (US)

- *Brooke Group v. Brown & Williamson Tobacco Corp.* (1993) established US test for predatory pricing – plaintiff must prove that the alleged predator
  - is charging prices < an appropriate measure of its costs, and
  - has a dangerous probability of recouping its investment in below-cost prices, because
    - below-cost pricing is capable of driving rivals from the market, and
    - market is susceptible to sustained monopoly pricing following that exit
- Recoupment is key: "Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced . . . ."
- Post-*Brooke Group*, there have been few (but some) successful predation cases.
- Section 1 predation cases

Predatory Pricing (Europe)

- Less skepticism than in the US?
- No recoupment requirement
- Treated as a type of abuse of market dominance under Art. 102 TFEU (i.e. dominance has to be established)
- Substantive test initially established in AKZO (CJEU 1991):
  - Dominance + prices < AVC = presumptively abusive (presumption can theoretically be rebutted by objective justification/no intent of elimination)
  - Dominance + prices > AVC but < ATC = abusive if a plan/intent to eliminate a competitor is proven (no presumption)

Predatory Pricing (Europe)

- Post-AKZO issues addressed:
  - Intent – in principle, subjective intent. Can be inferred from circumstantial evidence
  - "Below cost" – AVC may not be appropriate if fixed costs are high; DG COMP uses LRIC in such cases
  - Exclusionary effect – concerns re: the "as efficient competitor"
  - Selective discounting – to be abusive, must be shown to be part of a scheme to dominate (intent) and to be capable of having that effect

Questions?

Disclaimer / Contact Information

- Antitrust issues are often very fact-specific. This presentation does not constitute legal advice that may be relied upon with respect to any particular party or circumstance. In the first instance, it is always best to contact your legal department when presented with something that may raise antitrust issues.

- For questions about this presentation, please contact:

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