



**Excessive Pricing in Competition Law:  
Never say Never?  
M. Motta and A. de Streel**

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Stockholm, November 9, 2007

# The Conseil's case-law

- No equivalent of Article 82 a) in French law
- The Conseil de la concurrence, however, never said “never”
- ... but never found an abuse of excessive pricing!
  
- 5 cases of abuses of dominant positions
  - Distribution of free sheets, 06-D-39, 15 December 2006
  - Medical liability insurance for obstetricians 06-D-34, 9 November 2006
  - Access film archives, 03-D-18, 10 April 2003
  - Grocery for prisoners, 00-D-27, 13 June 2000
  - Access to port facilities (pending)

# The grocery at the jail of Osny

- Consumers are captive and switching costs are very high
- Consumers' association complains about excessive prices of the products,
  - prices higher than those of the nearest supermarkets
- Gross margin  $< 23\%$  not excessively high
- Yardstick: CC compares the prices in this jail with prices of other firms in other jails, and also with outside supermarkets. Prices in line with the others.

# Access to films archives

- Public monopoly on the archive films market.
- No regulation on prices
- Comparison with market prices impossible
- Costs of the monopoly are very high, due to particular constraints on its activity
- Prices are not out of proportion with costs.
- After the case, the minister decided to promote a clearcut separation between the cost of public service constraints and that of commercial services

# Medical liability insurance

- Obstetricians complained about strong increase in insurance premiums
- But objective justifications: change in the legal environment, much more risk on physicians
  - confirmed by the insurance regulator
- In spite of high premiums, most insurers left the market.

# Distribution of ads papers

- The plaintiff considered integrating upwards: the cost of self distribution would be much higher
- The plaintiff complained about a price increase, but there were objective justifications for it (former deficit)

# Essential facility

- Not mentioned in the draft book
- Doctrine does not refer to fair or cost-oriented prices, only non-discriminatory access
- U.S. Supreme Court
  - *Terminal Railroad*, 1912
  - *Trinko*, 2004: “We have never recognized such a doctrine, [...] and we find no need either to recognize it or to repudiate it here.”
- European Commission used article 82 a) to intervene in regulated industries
  - *Deutsche Telekom* (2003) margin squeeze seen as unfair prices

# Essential facilities

- As said, the Conseil never found excessive pricing
- ... But it issued a number of injunctions to use cost-oriented pricing for access to non regulated EF (interim measures)
- Directory Inquiries opened up to competition
  - Subscriber database = EF
- Infrastructure for digital broadcasting=EF
- Press distribution
  - Software used to manage press distribution
  - Conseil said: “fair economic conditions”
- Rationale: promote the emergence of new markets
- Difficult to check that the injunction are satisfied

# When should one set up an independent regulator?

- Existence of the regulator exogenous in Motta and de Streel
- Access charge to airport facilities: draft directive recommends the creation of an independent regulator
- Same question for access to rail network (tracks) and facilities
  - does not exist in France, exists in the UK (ORR)
  - for port infrastructure
- Role of public ownership of infrastructure (if public --> regulator independent from the government?)
- The Conseil fined a port authority for discriminatory pricing (easier to check)

# A theoretical question

- What about inefficient entry?
- e.g. network effects might provide too strong incentives to entry
  - Carlton and Waldman (2002) in the context of tying: the entrant internalizes network effects that would occur anyway
  - Banning excessive pricing could in certain circumstances avoid too much investment?
  - Realistic?