

Excessive pricing in competition law: Never say never?

Massimo Motta
European University Institute, Florence
Università di Bologna

Alexandre de Streel
Université de Namur

November 2007

Outline of the presentation

1. Introduction
2. When to take an excessive pricing action (if at all)
3. When to find that prices are excessive
4. Suggestions for the guidelines

1. Introduction

Excessive pricing action in competition law, a very ‘hot’ issue for at least two reasons:

1. Dissatisfaction with the liberalisation process in several sectors: pressure for intervention
2. DG-Competition is preparing Guidelines on Article 82

Arguments against excessive pricing actions

1. Distortion of price signals in sectors where market forces are free to operate (in the long-run this may deter entry, and reduce variety)
2. Depriving firms of the reward for their efforts and investments, negative ex-ante effects
3. Legal uncertainty, created by the difficulty of establishing when prices are excessive
4. Which remedies? Continuous monitoring not possible for AAs. If a problem, use a structural remedy
5. AAs may become subject to extensive lobbying

Never say never (but almost never!)

We believe that the above arguments are compelling.

Yet, we suggest that intervention through excessive pricing actions may exceptionally be justifiable in some circumstances that we now identify

However, our guiding principle is that such actions should be taken very rarely, as the risks of making type-I error (intervening when one should not) are far higher than the risks of making type-II error (failing to intervene when one should).

A four-condition test, 1

A basic assumption behind the arguments against excessive pricing actions is that market forces are free to operate

Yet, there are situations where – for different reasons – there may be high and non-transitory barriers to entry and a very strong market position unlikely to be challenged

Condition 1: High and non-transitory barriers to entry leading to a super-dominant position

A four-condition test, 2

In order to avoid that such actions may deprive firms of the reward of their investments and efforts, limit intervention to cases where the source of market power is not due to past investments

Condition 2. The (super-) dominant position is due to current or past exclusive or special rights or uncondemned past anticompetitive practices

Note. This excludes intervention in case of IPRs

A four-condition test, 3

Conditions 1 and 2 often apply to sectors where there is a regulator. When there is a sector-specific regulator, it should be best placed for intervention

Condition 3. No sector-specific regulator has jurisdiction to solve the matter

Note: There may be arguments in favour of AA's intervention in such cases. On balance, we prefer the regulator to be in charge and, in case of conflict, AAs to open an infringement procedure for violation of EU competition law

A four-condition test, 4

In many cases, it may be possible to solve the problem by using advocacy power and ask for a structural solution (e.g., remove legal barriers, eliminate switching costs, correct externalities).

Condition 4. The competition authority should choose the most efficient remedy to solve the anti-competitive excessive pricing

The test, and the case law

The above test identifies conditions for intervention. It seems to us that EU excessive price actions have taken place in sectors indeed characterised by 1. important dominant position, 2. current or past legal monopolies (or IPRs), and 3. no sector regulator with jurisdiction to intervene

One notable exception: IPR (*Parke Davis, Deutsche Grammophone, Renault*), even if main concern was probably impediment to the internal market

Harmony v. Mittal – a South African case where condition 2 was stressed

3 The burden of proving excessive prices

There are several methods available to establish if prices are excessive

We believe that for an action to be undertaken, several of these methods should be used and the finding of ‘excessive prices’ should be robust

Burden of proof: Convergence of indicators and in depth market study

In line with the case law: consistent with the Commission’s approach in *Port of Helsingborg*, as well as NCAs (see *Napp*, *Veraldi-Alitalia*)

4. Towards guidelines

Guidelines should make explicit it is an option of last resort, and in exceptional circumstances. Also:

- Super-dominance requires a safe harbour: no action if a firm has less than 80% market share
- Important to establish where the dominant position comes from
- Avoid intervention when a regulator has jurisdiction
- Try more efficient means to intervene

Finally, high standard of proof for finding that prices are excessive