

MEETING COMPETITION FAIR OR UNFAIR?

DAVID BAILEY
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MEETING COMPETITION

OUTLINE OF PRESENTATION

- ◉ PRELIMINARY COMMENTS
- ◉ MEETING COMPETITION: CUSTOMERS
- ◉ MEETING COMPETITION: DOMINANT FIRMS
- ◉ MEETING COMPETITION: COMPETITORS
- ◉ CONCLUDING COMMENTS

MEETING COMPETITION

PRELIMINARY COMMENTS

- ◉ CASE 27/76 *UNITED BRANDS v COMMISSION* (1978), PARA 189:

“THE FACT THAT AN UNDERTAKING IS IN A DOMINANT POSITION CANNOT DISENTITLE IT FROM PROTECTING ITS OWN COMMERCIAL INTERESTS IF THEY ARE ATTACKED, AND THAT SUCH AN UNDERTAKING MUST BE CONCEDED THE RIGHT TO TAKE SUCH REASONABLE STEPS AS IT DEEMS APPROPRIATE TO PROTECT ITS SAID INTERESTS.”

MEETING COMPETITION

WHAT IS MEANT BY MEETING COMPETITION (1)

- ◉ A RESPONSE TO COMPETITIVE PRESSURE FROM WITHIN AND OUTSIDE THE RELEVANT MARKET?
- ◉ A RESPONSE TO A SPECIFIC OFFER BY AN INDIVIDUAL COMPETITOR?
- ◉ A RESPONSE TO A CUSTOMER'S BUYER POWER?
- ◉ AN INITIATIVE TO WIN NEW CLIENTS?
- ◉ ALL OF THE ABOVE?

MEETING COMPETITION

WHAT IS MEANT BY MEETING COMPETITION (2)

- ◉ DOES MEETING COMPETITION REFER TO:
 - OFFERING THE MARKET PRICE, STANDARD TRADING CONDITIONS ETC.
 - OFFERING THE SAME PRICE, TERMS ETC. AS A PARTICULAR COMPETITOR?
 - OFFERING A SLIGHTLY BETTER PRICE, TERMS ETC. THAN A PARTICULAR COMPETITOR?
 - OFFERING THE BEST POSSIBLE DEAL?

MEETING COMPETITION

WHAT IS THE LEGAL STATUS OF MEETING COMPETITION?

- ◉ IS IT A SEPARATE, STANDALONE DEFENCE?
 - SEE PARA 47 OF OPINION OF AG MAZÁK IN CASE C-202/07 P *FRANCE TELECOM v COMMISSION* (2008)
- ◉ IS IT A TYPE OF OBJECTIVE JUSTIFICATION?
 - SEE PARA 79 OF DG COMP'S DISCUSSION PAPER (2005)
- ◉ IS IT A RELEVANT FACTOR WHEN ASSESSING THE CONTEXT OF THE IMPUGNED CONDUCT?
 - SEE PARA 20 OF COMMISSION'S GUIDANCE ON ITS ARTICLE 102 ENFORCEMENT PRIORITIES (2009)

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO CUSTOMERS?

- ◉ SOME CUSTOMERS ARE BETTER AT NEGOTIATING THAN OTHERS
- ◉ THOSE CUSTOMERS TEND TO SECURE BETTER DEALS THAN OTHERS
- ◉ CHARGING DIFFERENT CUSTOMERS DIFFERENT PRICES FOR GOODS OR SERVICES WHOSE COSTS ARE THE SAME ≠ AN EXCLUSIONARY ABUSE: SEE CASE C-209/10 *POST DANMARK I* (2012), PARA 30

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO CUSTOMERS?

- ◉ E.G. CASE 62/86 *AKZO v COMMISSION* (1986),
PARAS 116-121
 - AKZO OFFERED LOWER PRICES TO INDIVIDUAL MILLS IN THE ALLIED MILLS GROUP THAN LARGE INDEPENDENT CUSTOMERS
 - THE COMMISSION FOUND THAT AKZO'S SELECTIVE PRICES WERE DISCRIMINATORY AND UNLAWFUL
 - THE COURT OF JUSTICE DISAGREED, SINCE THE CUSTOMERS WERE NOT COMPARABLE

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MEETING COMPETITION: FAIR OR UNFAIR TO DOMINANT FIRMS?

- ◉ A DOMINANT FIRM MAY COMPETE ON THE MERITS AND THEREBY WEAKEN OR ELIMINATE COMPETITORS THAT ARE LESS EFFICIENT THAN ITSELF: SEE CASE C-413/14 P *INTEL v COMMISSION* (2017), PARAS 133-134
- ◉ A DOMINANT FIRM HAS A QUALIFIED RIGHT TO DEFEND ITS COMMERCIAL INTERESTS: SEE *UNITED BRANDS*
- ◉ A DOMINANT HAS A QUALIFIED RIGHT TO ALIGN ITS PRICES ON ITS COMPETITORS: SEE CASE C-202/07 P *FRANCE TÉLÉCOM V COMMISSION* (2007), PARA 47

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO DOMINANT FIRMS?

- ◉ CASE C-202/07P *FRANCE TÉLÉCOM v COMMISSION* (2007):
 - WANADOO OFFERED PRICES THAT WERE BELOW AVERAGE VARIABLE COSTS, AND LATER BELOW FULL COSTS
 - WANADOO ARGUED THAT IT WAS RESPONDING TO PROMOTIONAL PRICES OFFERED BY NEW ENTRANTS
 - THE COMMISSION REJECTED THAT ARGUMENT: SEE, IN PARTICULAR, RECITAL 315 OF ITS DECISION
 - THE EU COURTS UPHELD THE COMMISSION DECISION

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO DOMINANT FIRMS?

- ◉ E.G. CASE C-202/07 P *FRANCE TÉLÉCOM v COMMISSION* (2007):
 - YES, IN PRINCIPLE, A DOMINANT FIRM MAY ALIGN ON ITS COMPETITORS' PRICES
 - BUT THERE IS NO ABSOLUTE RIGHT TO ALIGN
 - WANADOO DID NOT HAVE ANY SUCH RIGHT, SINCE
 - WANADOO'S PRICES WERE BELOW COST
 - WANADOO WAS TRYING TO PRE-EMPT THE MARKET, RATHER THAN RESPOND TO COMPETITION

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO DOMINANT FIRMS?

- ◎ CASE C-209/10 *POST DANMARK I* (2012):
 - PARA 29: NO PLAN TO ELIMINATE THE COMPETITOR
 - PARA 36: PRICES ABOVE POST DANMARK'S ATC WERE DEEMED TO HAVE NO ANTI-COMPETITIVE EFFECTS
 - PARA 37: PRICES BELOW POST DANMARK'S ATC & ABOVE AVERAGE INCREMENTAL COSTS \neq EXCLUSIONARY ABUSE
 - PARA 38: AS EFFICIENT COMPETITORS CAN COMPETE WITH PRICES THAT COVER THE 'GREAT BULK OF THE COSTS ATTRIBUTABLE' TO UNADDRESSED MAIL

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO DOMINANT FIRMS?

◎ NB:

- *AKZO* INTERIM DECISION (1983): AKZO WAS PERMITTED TO MEET (BUT NOT UNDERCUT) A LOWER PRICE OFFERED BY A COMPETITOR
- *HILTI* UNDERTAKING (1988): HILTI WAS PERMITTED TO “MEET A COMPETITIVE OFFER”
- *DIGITAL* UNDERTAKING (1997): DIGITAL RETAINED THE RIGHT TO OFFER “NON-STANDARD PRICE-REDUCTIONS TO MEET COMPETITION”

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO COMPETITORS?

- ◉ NB THE MEETING COMPETITION ARGUMENT HAS BEEN UNSUCCESSFUL IN A NUMBER OF CASES
 - CASE T-65/89 *BPB INDUSTRIES* (1993)
 - CASE T-228/97 *IRISH SUGAR* (1999)
 - CASES C-395/96 P *CMBT* (2000)
 - CASE C-202/07 P *FRANCE TÉLÉCOM* (2007)
 - COMMISSION DECISION *INTEL* (2009)

MEETING COMPETITION

MEETING COMPETITION: FAIR OR UNFAIR TO COMPETITORS?

- ◉ WHY HAS THE MEETING COMPETITION ARGUMENT BEEN SO UNSUCCESSFUL?
 - PRICING BELOW AVC: SEE PARA 83 OF DG COMP'S DISCUSSION PAPER (2005); *WANADOO*
 - THE 'MEETING COMPETITION' CLAIM WAS CONTRADICTED BY INTERNAL DOCUMENTS
 - DOES NOT APPLY TO COLLECTIVE ACTIONS: SEE PARA 81 OF DG COMP'S DISCUSSION PAPER; *CMBT*
 - **PROPORTIONALITY!**

MEETING COMPETITION

CONCLUDING COMMENTS (1)

- ◉ SO ... WHAT DOES THE 'MEETING COMPETITION' ARGUMENT CONSIST OF?
 - #1: EITHER A RESPONSE TO THE ACTIONS OF EXISTING/POTENTIAL COMPETITORS OR A GENUINE ATTEMPT TO WIN NEW CUSTOMERS
 - #2: THE DOMINANT FIRM'S CONDUCT MUST NOT SEEK TO STRENGTHEN ITS DOMINANT POSITION NOR BE PART OF A PLAN TO ELIMINATE COMPETITORS
 - #3: THE DOMINANT FIRM'S CONDUCT MUST ALWAYS BE REASONABLE AND PROPORTIONATE

MEETING COMPETITION

CONCLUDING COMMENTS (2)

- ◎ THE MEETING COMPETITION ARGUMENT MAY EXONERATE / JUSTIFY:
 - PRICE DISCRIMINATION, IF THE PRICES REFLECT DIFFERENT COMPETITIVE CONDITIONS OR CLIENT RELATIONS
 - EXCLUSIONARY PRICES THAT REMAIN ABOVE ATC
 - EXCLUSIONARY PRICES THAT REMAIN ABOVE AVC/AAC AND IN THE ABSENCE OF ANY PLAN TO ELIMINATE A COMPETITOR

MEETING COMPETITION

CONCLUDING COMMENTS (3)

◎ SOME OPEN QUESTIONS:

- SHOULD MEETING COMPETITION APPLY TO NON-PRICING AS WELL AS PRICING ABUSES?
- SHOULD MEETING COMPETITION APPLY TO COLLECTIVE ACTION?
- SHOULD MEETING COMPETITION APPLY NOT ONLY TO MINIMISE LOSSES BUT ALSO TO WIN NEW CUSTOMERS?

MEETING COMPETITION

CONCLUDING COMMENTS (4)

- ◎ ALL ELSE BEING EQUAL, SHOULD THE LAW FAVOUR THE DOMINANT FIRM'S INTEREST IN MINIMISING SHORT-TERM LOSSES OR THE INTEREST OF ITS COMPETITORS TO ENTER OR EXPAND?

MEETING COMPETITION

THANK YOU FOR YOUR ATTENTION!

