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The Revival of Excessive Pricing in Europe: State of the Law and Policy Implications

The United Brands Case

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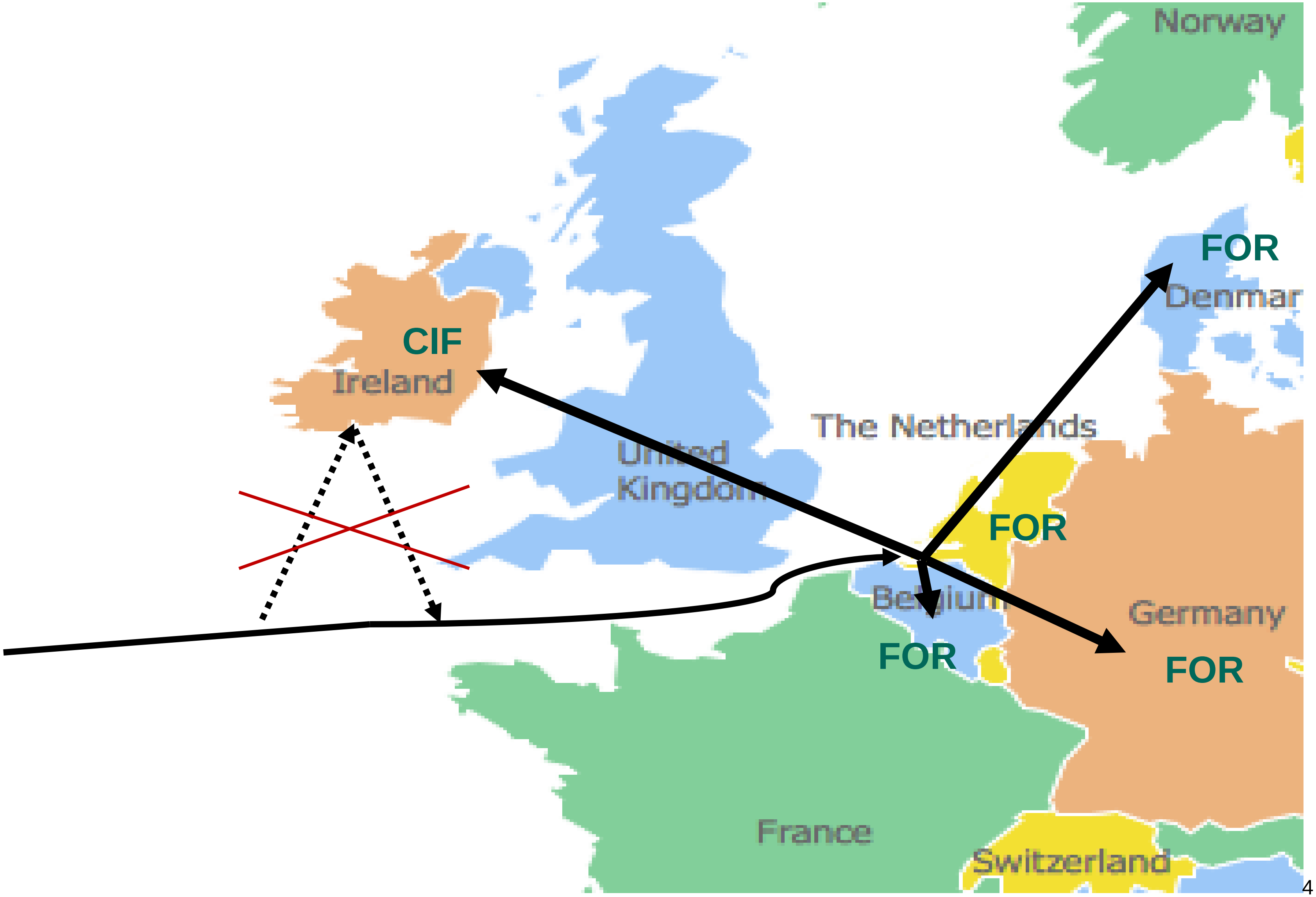
Historical background

- **1973 – First oil shock. Inflation. Role of competition policy to fight inflation (OECD study). Bundeskartellamt: Als ob Wettbewerb.**
- **1974**
  - **January: United Brands (UBC) changes its marketing and distribution policy in the Irish market. Rapid increase in UBC's market share. Deliveries of bananas by road/ferry from Rotterdam (replacing Cork stop-off en route)**
  - **February: Complaint by Danish distributor Olesen about UBC's termination of supply.**
  - **May: Complaint by Irish importers about UBC's "dumping" on the Irish market.**

- **1975**
  - **February: Eli Black, UBC's CEO, jumps from the 44th floor of the PanAm building in New York.**
  - **March: Initiation of Commission proceeding against UBC for abuses of dominance.**
  - **December: Commission Decision finding UBC guilty of four abuses (refusal to supply, export ban (green banana clause), discriminatory and excessive pricing). Fine: 1 million ECU. UBC ordered to terminate the infringements.**
- **1976**
  - **March: UBC's appeal to ECJ.**
  - **April: ECJ suspends order to terminate the pricing infringements.**
- **1978**
  - **February: ECJ judgment.**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Excessive pricing finding in Commission Decision

1. **Prices charged for bananas sold in Germany, Denmark, Netherlands and Belgium/Luxembourg are considerably higher, sometimes by 100%, than the prices charged to customers in Ireland and "accordingly produce a very substantial profit". This conclusion is reached "without analysing UBC's cost structure" on the basis of:**

   - **a comparison of UBC's FOR (free on rail) Rotterdam prices for bananas destined for Germany, Denmark, Netherlands and Belgium/Luxembourg with the prices for bananas destined for Ireland at delivered <u>Rotterdam</u> level (after deduction of transportation costs between Rotterdam and Dublin);**

   - **a statement made by UBC in a letter of 10 December 1974 to the Commission that the Irish prices generated a profit margin which was "considerably smaller" than in some other Member States.**

2. **Prices charged by UBC for Chiquita bananas are excessive in relation to the "economic value of the product supplied" as shown by a comparison with:**

   - **prices of unbranded bananas which are 40% lower "even though the quality of unbranded bananas is only slightly lower". At the very most, only half of that difference is accounted for by difference in quality and costs of advertising.**
   - **prices of competitors in all Member States except Ireland, which are lower.**

3. **Conclusion: in order to terminate the abuse, it would be sufficient for UBC to reduce its prices to a level at least 15% below that currently charged to its customers in Denmark and Germany.**

UBC's request for suspension to the ECJ

- The Commission's order to reduce UBC's prices for Chiquita bananas is "unintelligible, contradictory and unworkable" in light of, inter alia, the fluctuating nature of banana prices which vary from week to week. The Commission responded that the Decision only provided an "indication" of what UBC is expected to do and agreed with UBC that the immediate implementation of the order might cause irreparable harm to UBC. Accordingly, the Commission did not oppose UBC's request.
- The ECJ granted the request for suspension of the order with respect to pricing.

ECJ judgment

1. UBC's arguments:

- Between 1956 and 1973 banana prices in real terms decreased by 50%.
- The Commission could not infer from the statement in the letter of 10 December 1974 that the Irish prices were profitable as UBC clarified in the administrative proceeding that it had incurred losses in 1974.
- The Commission was wrong to use delivered Rotterdam prices for the Irish bananas with which prices in Germany, Denmark, Netherlands and Belgium/Luxembourg were compared. The cost of transportation from Rotterdam to Dublin was incurred for the benefit of bananas sold in all markets, not just in Ireland, as this arrangement made it possible to avoid stopping in Cork to unload the bananas destined for the Irish market, thus reducing the cost of transportation of the entire cargo from Central America to Rotterdam.
- The difference in price between branded and unbranded bananas is fully justified.
- The price difference between Chiquita and other branded bananas was only 7.4% on average.

2. ECJ judgment (excerpts):

250. … charging a price which is excessive because it has <u>no reasonable relation to the economic value of the product</u> supplied would be…an abuse.

251. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the <u>profit margin</u>; however the Commission has not done this since it has not analysed UBC's costs structure.

252. The questions therefore to be determined are <u>whether the difference between the costs actually incurred and the price actually charged is excessive,</u> and, if the answer to this question is in the affirmative, <u>whether a price has been imposed which is either unfair in itself or when compared to competing products</u>.

253. <u>Other ways may be devised</u> — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair.

256. The Commission was at least under a duty to require UBC to produce particulars of all the constituent elements of its production costs.

259. The foundation of …[the Commission's] argument has been the applicant's letter of 10 December 1974 which acknowledged that the margin allowed by the sale of bananas to Irish ripeners was much smaller than in some other Member States and it concluded from this that the amount by which the actual prices f.o.r. Bremerhaven and Rotterdam exceed the delivered Rotterdam prices for bananas to be sold to Irish customers c.i.f. Dublin must represent a profit of the same order of magnitude.

260. Having found that the prices charged to ripeners of the other Member States were considerably higher, sometimes by as much as 100%, than the prices charged to customers in Ireland it concluded that UBC was making a very substantial profit.

261. Nevertheless the Commission has not taken into account in its reasoning several of UBC's letters in which were enclosed a confidential document retracting what is said in its letter of 10 December 1974 and pointing out that the prices charged in Ireland had produced a loss.

265. UBC's retractation, which the Commission has not effectively refuted, establishes beyond doubt that the basis for the calculation adopted by the latter to prove that UBC's prices are excessive is open to criticism and on this particular point there is doubt which must benefit the applicant, especially as for nearly 20 years banana prices, in real terms, have not risen on the relevant market.

266. Although it is also true that the price of Chiquita bananas and those of its principal competitors is different, that difference is about 7%, a percentage which has not been challenged and which cannot automatically be regarded as excessive and consequently unfair.

267. In these circumstances it appears that the Commission has not adduced adequate legal proof of the facts and evaluations which formed the foundation of its finding that UBC had infringed Article 86 of the Treaty by directly and indirectly imposing unfair selling prices for bananas.

Final Comments

- United Brands was the first case in which the Commission applied Article 86 to a company with a market share of only 40-45% (all previous cases involved companies with at least 70-80 % market shares), thus turning dominance into preeminence. The market definition was also peculiar (« the toothless fallacy »). The Commission had its attention drawn to pricing as a result of a complaint about « dumping » by UBC in the Irish market. A rather unusual context in which to make a finding of excessive pricing.

- The Commission Decision also included a finding of discriminatory pricing: UBC set its weekly prices to distributors on the basis of anticipated market prices in each national market thus ensuring that distributors'margins would remain constant throughout the year. These national prices were found to be inconsistent with the common market as they « were just as many obstacles to the free movement of goods » (at 232).