

# “Fairness” in Article 82

What “Special Duties” Do Dominant Firms  
Owe Suppliers and Customers?

John Kallauger  
Latham & Watkins  
Visiting Professor, UCL

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# Are Dominant Firms Obligated to be “Fair”?

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- Central idea of modern competition policy is focus on consumer welfare
- Competition law typically intervenes to regulate conduct that preserves or increases market power
- But Article 82 goes further to protect customers and suppliers from “exploitation”

# “Fairness” and Exploitation

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- The preamble to the EC Treaty declares that the signatory states wish to preserve “fair competition”
- Article 82(a) contains an explicit reference to “unfair prices or selling conditions”

# What Does Fairness Mean in Article 82?

- Do these provisions reflect a general obligation to act “fairly” (in an ethical or socially responsible sense)?
- Should a “more economic approach” to Article 82 limit the “fairness” concept – i.e., as long as a dominant firm’s conduct is not exclusionary it should be “fair”
- Is there a definable middle ground that is consistent with the goals of the Treaty?

# What Does the Treaty Actually Say?

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- The preamble to the Treaty does refer to “fair competition” in the English text
- The French text refers to “concurrency loyal”
- The German text refers to “einen redlichen Wettbewerb”
- The German and French texts both use terms that refer back to established legal ideas of “unfair competition” – based on traditionally accepted commercial practices

# What does the Treaty Say?

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- Article 82(a) does refer to “unfair prices” in the English text
- The French text is similar (“prix inequitable”)
- The German text, however, refers to “unangemessene preisen” – prices that are not appropriate or proportionate

# The Goals of the Competition Rules -- Article 3(g)

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- Article 3(g) states that one of the goals of the Treaty is creation of a “system ensuring that competition is not distorted”
- It is well established that the competition rules, including Article 82, are intended to form this system
- Where the rules are unclear – reference to this goal provides the basis for determining their content (Continental Can)

# What is “Undistorted Competition”?

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- There is a respectable argument that promoting “undistorted competition” should be equated with the consumer welfare standard for assessing conduct
- The better view, however, is probably that “undistorted competition” involves more

# What is “Undistorted Competition?”

- Consumer welfare standard for assessing conduct plus
  - Competitive conduct – adherence to accepted commercial norms (follows from preamble)
  - “Competitive” results (follows from wording of 82(a), 82(b))
    - True market failure indicates distorted competition
    - Usually only occurs if high level of market power exists
    - Welfare loss may also occur because of specific nature of relationship to customer/supplier – “partenaire obligatoire”

# Exploitation and Undistorted Competition

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- Dominant firms are not under a general obligation to act “fairly”
- Dominant firm conduct in respect of customers and supplier may be controlled to correct genuine market failure
- Note that this is consistent with “special duty” language of Michelin I – special duty is to act in a manner that does not distort competition

# Specific Examples -- Pricing

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- The German text of Article 82(a) provides the basis for the traditional approach to pricing abuse
- For a price to be “unangemessene” it must be disproportionate or “out of line” with something
- This has led to concept of “economic value”

# Pricing – What is economic value?

- United Brands set out alternative ways of establishing economic value
  - Production costs
  - Comparable markets
- Economic value also incorporates value to purchaser
  - Example: the value of broadcast rights for a film does not depend on cost of film's production

# When are prices “out of line” with “economic value”?

- Calculation of “economic value” is by its nature inexact
- There is clearly a substantial margin between the economic value and the unfair price
  - Old cases (eg car import inspection fees) involved prices that were clearly “out of line” with any realistic economic value
  - Court in UB not troubled by 8% differential
- Article 82(a) is not a tool for ex ante price regulation – it is a tool for ex post correction of market failure

# Specific Examples -- Contractual Conditions

- Commission considered “unfair” contractual conditions in Tetra Pak II
- Variation on proportionality test
  - Are conditions
    - Onerous?
    - Not reasonably necessary for legitimate business purpose of agreement?
- Relationship to “fairness” in sense of “fair competition” – adherence to good commercial practice

# Contractual Conditions

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- Consider relationship to Article 82(d)
  - “nature or commercial usage” assessment of tying requirement is also based on commercial practice
  - Should non-exclusionary tying requirement be assessed under Article 82(a)?

# Specific Examples -- Refusals to Deal

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- Case law clearly distinguishes between
  - Termination of existing customers (United Brands – action must be proportionate to protection of dominant firms commercial interests)
  - Refusal to supply new customers (Bronner – limited to provision of essential facility)

# Refusals to Deal

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- Different treatment of existing customers and new customers appears to have element of “fairness”
  - Existing customers are dependent
  - New customers are only dependent where supply is essential

# Specific Examples Discrimination

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- Most Article 82(c) cases have involved discrimination that created supposed foreclosure effects on the direct competitors of the dominant firm (e.g., British Airways)
- Cases of pure “secondary line” injury tend to involve discrimination by nationality (e.g. airport charges)

# Discrimination

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- There is substantial economic literature demonstrating that welfare effects of discrimination are at worst ambiguous (in absence of significant competitor foreclosure)
- Should application of Article 82(c) be limited to dominant firms charging for access to essential facilities?
- This would be consistent with Article 82(c) requirement that discrimination lead to “competitive disadvantage”

# Conclusion

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- The text of the Treaty does not support a general obligation of “fairness” on the part of dominant firms
- The text of the Treaty and practice applying Article 82 is equally not consistent with limiting Article 82 to exclusionary conduct
- While Article 82 is not designed to provide a basis for *ex ante* price regulation – it can and should be used as to correct the results of market failure