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### **Meeting Competition: Why it is not an Abuse under Article 82**

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## Meeting Competition: Why it is not an Abuse under Article 82

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Donald Slater and Denis Waelbroeck<sup>1</sup>

### Introduction

Meeting competition occurs when an undertaking lowers its prices in response to the entry of a competitor. Despite accepting that meeting competition can be compatible with Article 82, the Commission<sup>2</sup> and the Court of justice<sup>3</sup> have repeatedly condemned the practice due to the modalities of implementation or “particular circumstances”.<sup>4</sup> However, existing precedent on the subject remains obscurely reasoned and contradictory, such that it is at the present time impossible to give clear advice to undertakings on the circumstances in which meeting competition is compatible with Article 82.

Not only is such legal uncertainty in itself damaging but, in so far as it discourages meeting competition, it appears to us to be harmful to competition. As concerns the latter point, it will be seen that some of the most powerful arguments against prohibiting meeting competition are based on the counterproductive nature of the remedies.

The present article does not, however, aim to propose a simple solution to distinguish abusive and non-abusive meeting competition.<sup>5</sup> Nor does the article aim to give a

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1 Ashurst Brussels.

2 Decision of the Commission of 22 December 1987 in *Hilti*, O.J. (1988) L 65/19; Decision of the Commission of 14 December 1985 in *AKZO*, O.J. (1985) L 374/1; Decision of the Commission of 18 July 1988 in *Napier Brown*, O.J. (1988) 284/41; Decision of the Commission of 5 December 1988 in *BPB*, O.J. (1989) L 10/50; Decision of the Commission of 23 December 1993 in *Compagnie Maritime Belge*, O.J. (1993) L 34/20; Decision of the Commission of 14 May 1997 in *Irish Sugar*, O.J. (1997) L 258/1; Commission press release IP/97/868 of 10 October 1997 on Digital Undertakings.

3 Case T-30/89, *Hilti*, 1991, *ECR* p.II-1439; Case C-62/86, *AKZO*, 1991, *ECR* p.I-3359; Case T-65/89, *BPB*, 1993, *ECR* p.II-389; Case T-83/91, *Tetra Pak II*, 1994, *ECR* p.II-755; Cases T-24, 25, 26 28/93, *Compagnie Maritime Belge*, 1996, *ECR* p.II-1211; Case T-228/97, *Irish Sugar*, 1999, *ECR* p.II-2969; Case C-395/96 P, *Compagnie Maritime Belge*, 2000, *ECR* p.I-1365.

4 See e.g. *Irish Sugar*, *supra* footnote 1, p.184.

5 See BAUMOL, W., “Quasi-Permanence of Price Reductions: A Policy for the Prevention of Predatory Pricing”, *Yale Law Journal*, 1979, Volume 89, No. 1; EDLIN, A., “Stopping above Cost Predatory Pricing”, *Yale Law Journal*, 2002, Volume 111, No. 941.

comprehensive overview of the existing case law in this area.<sup>6</sup> Instead, it takes a more economic approach and aims to lay out in a (brief but) systematic fashion the competitive concerns that might potentially be raised by the practice of meeting competition and in doing so to try to identify the main flaws in the Court and Commission's approach.

## **I A Practical Example**

Let us begin with a practical example:

Domco has 90% of the UK widget market and charges a flat rate of 10 GBP per widget. Newco has begun producing and selling widgets in Scotland and selling them for 7 GBP. Domco, whose average total cost for producing widgets is 5 GBP, essentially has two ways in which to react to his new competitor. He can (a) cut his prices across the whole of the UK (across the board price cuts) or (b) cut his prices in Scotland (selective or targeted price cuts). We will assume here that in both situations Domco keeps his prices above average total cost and therefore cannot be accused of predatory pricing in the traditional AKZO<sup>7</sup> sense of the term.

The above set of facts will serve as a simple basis to look at the competitive concerns associated with non-discriminatory reactive price cuts (section II) and targeted reactive price cuts (section III).

## **II Across the Board Price Cuts to Meet Competition**

With the possible exception of *Compagnie Maritime Belge*,<sup>8</sup> which puts a question mark over this point, above cost, across the board price cuts appear not to be contrary to Article 82 in the eyes of the Commission and the Court.<sup>9</sup> We will nevertheless begin by looking at across the board price cuts, not only because the *Compagnie Maritime Belge* case appears to fall within this category, but also because the arguments are simpler than those in selective meeting competition.

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6 For such an overview see, for example, WAELBROECK, M., "Meeting Competition: Is this a Valid Defence for a Firm in a Dominant Position?" in *Studi in honore di Francesco Capotorti*, Giuffrè, 1999, p.489.

7 *Supra* footnote 1.

8 *Supra* footnote 1. The Commission alleged discriminatory pricing in its decision (at p.83) but this was not reiterated in the operative part of the decision. The Court took this to mean that discrimination was not part of the abuse (see judgment of CFI at p.150).

9 It will be recalled that in *Compagnie Maritime Belge*, it was explicitly stated that price cuts were non-discriminatory.

In broad terms there are two potential competitive concerns with across the board price cuts. Firstly, such price cuts may be thought exclusionary since, if Newco is unable to effectively compete on price, it may be forced to leave the market. This was a key concern expressed by the Court in *Compagnie Maritime Belge*.<sup>10</sup> Secondly, it may be thought that Domco's pricing policy before Newco's entry was exploitative as Domco was able to make deep price cuts in response to Newco's entry and yet still sell above cost. These two concerns are also connected to an extent as, for example, it may be that once Newco has been successfully excluded, Domco will be able to raise its prices again to "exploitative" levels.

As these claims are looked at in more detail, however, it becomes increasingly evident that there exist serious arguments against considering either of these as creating problems under Article 82.

Firstly, accepting that across the board price cuts are exclusionary and therefore abusive essentially equates to introducing a radical new theory of above cost predatory pricing, of doubtful economic validity. Meeting competition is simply competition on the merits and market exit caused by such legitimate competition should not be condemned. Moreover, even if one were to accept that competition law should be concerned by this particular type of price competition, it appears difficult to create appropriate remedies. Secondly, as regards exploitation, given the difficulty of calculating what constitutes an excessive price, one may wonder whether it should be the role of general antitrust enforcers to regulate prices in this way. We will return to the question of exploitation later, but first we will consider in more detail the claim that above cost price cuts can be exclusionary.

## **A. Exclusion**

### **1. The Concern**

The concern of allowing across the board price cuts to meet competition is as follows: Domco - benefiting from significant economics of scale due to its size - will drop its price to some level above costs but at the same level or below the price asked for by Newco. Newco will fail to win any market share and at a certain point will give up leaving Domco to increase its prices again to supracompetitive levels.

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<sup>10</sup> See the CFI's judgment in *Compagnie Maritime Belge*, *supra* footnote 1, p.147-148.

## 2. Pure Price Competition and Anti-Competitive Exclusion

As a preliminary point, it cannot be emphasised enough that the whole point of competition is winning the game/winning market share. Thus, in our scenario Domco at least wants to hold onto the market share it has (excluding Newco from winning Domco's existing customers) and if possible to conquer the remaining 10% of the market. Companies should not be prohibited from competing, and an intent to compete - i.e. win market shares from a competitor and even possibly exclude it from the market - therefore should not be viewed as an abuse. This is nonetheless exactly what the Court appears to do in *Compagnie Maritime Belge*, deducing an exclusionary intent from the use of certain vocabulary (a note stated that *Compagnie Maritime Belge* wanted to "get rid" of a competitor).<sup>11</sup> The question, however, should be how to separate exclusion that results from anti-competitive conduct from exclusion that results from the normal process of competition and such a distinction is incapable of being made on the basis of intent alone.

We are here less concerned with cases where a dominant firm's meeting competition may have been condemned because the practice was coupled with other forms of conduct such as sales below cost<sup>12</sup> or fidelity type rebates<sup>13</sup> but rather by "pure" cases of meeting competition. As will be seen, in such cases it is not at all evident that the practice ought to be prohibited.

Going back to our example, let us now assume that Domco is more efficient than Newco and has lower production costs. In such a scenario, Newco may very well exit the market if Domco lowers its prices. Moreover, Domco quite possibly intends to "get rid" of Newco in this way. However, all this amounts to its exclusion that results from the normal process of competition. Contrary to what the CFI indicates in *Compagnie Maritime Belge*,<sup>14</sup> just by spicing up the language and stating Domco's intention does not transform the latter's behaviour into illegal, anti-competitive exclusion. If a less efficient firm is unable to charge competitive prices, competition authorities ought not to intervene to protect it.

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11 See the CFI's judgment at p.147-148. This is particularly worrying as it means that, while actual effects on the market are irrelevant, one's choice of vocabulary and register can have a profound impact on competitive analysis. Advice to clients on the question of meeting competition should not be limited to pure semantics and tone.

12 As was the case for example in *Tetra Pak II*, see *supra* footnote 1.

13 As was the case for example in *Hilti*, see *supra* footnote 1.

Now, it may be that there is an endless supply of Newcos who can slip in and out of the widget market, forcing Domco either to repeatedly lower its prices to meet the competition or change its tactics (in which case there is clearly not much room for supra-competitive pricing). Alternatively, the market structure may be different. Barriers to entry may be very high and Newcos may be few and far between. Such a situation may theoretically permit Domco to raise prices in between forays by inefficient and therefore unsuccessful Newcos.<sup>15</sup>

However, the fact remains that, regardless of the market structure, Newco's exclusion still results from the normal process of competition.<sup>16</sup> Domco is simply more efficient than its rivals. The Commission and Court should not prohibit this type of legitimate competition on the merits. Such a prohibition would not only undermine the very logic of the competition law system but would also involve colossal practical problems of implementation.

If on the other hand, Newco is actually just as efficient as Domco or indeed more efficient,<sup>17</sup> it is hard to see how Newco could be excluded from the market on price competition alone (assuming that Domco does not price below cost).<sup>18</sup>

Notwithstanding all the above, let us assume that across the board price cuts made to meet competition are considered contrary to competition law. This means that competition law is imposing a price freeze or at least a price floor on Domco.<sup>19</sup>

14 See *supra* footnote 1, p.147-148.

15 This is the type of problem alleged by the Department of Justice in the American Airlines case currently on appeal before the US Supreme Court (*United States v. AMR Corp* 140 F. Supp. 2d 1141).

16 These types of structural factors may influence the court's thinking (see, for example, the Advocate General's remark that the price cuts operated by *Compagnie Maritime Belge* to meet competition were problematic partly because of the ability of *Compagnie Maritime Belge* quickly to expand capacity - see in particular p.132-133 of the Advocate General's opinion). It is our view that differences in market structure such as higher barriers to entry or ability to expand capacity quickly should not influence the categorisation of Domco's behaviour as abusive or not abusive. However, if these factors do influence the Court's thinking then the Court must state that this is the case, otherwise it becomes impossible for dominant firms to predict with any degree of certainty when meeting competition is acceptable and when it is not. In any event, it is difficult to follow the remarks of the Advocate General in *Compagnie Maritime Belge* as the maritime sector contrary e.g. to the airline sector is characterised by the lack of barriers to entry so that *Compagnie Maritime Belge's* practice could never have led to the exclusion of competition.

17 In *Compagnie Maritime Belge*, the new entrant accepted that it was making profit at the level of prices practised by the Cewal conference and indeed it managed to increase in market shares during the period investigated by the Commission.

18 Given limits of space, we will not address the thorny question of how to allocate costs here. This question is nonetheless highly relevant for the meeting competition debate - especially as regards common costs in cases of targeted meeting competition.

19 Alternative solutions not involving price restrictions in the strict sense do exist. Notably, WILLIAMSON suggests restrictions on the dominant firm raising its output for a period after entry (see WILLIAMSON, O., "Predatory Pricing: A Strategic and Welfare Analysis", *Yale Law Journal*, 1977, Volume 87, No. 284). However, this approach runs into problems similar to those for price floors as outlined at points II.A.3 and II.A.4 *infra*. Thus,

Beyond the practical difficulties it involves, introducing such price restrictions is likely to do more harm than good.

### **3. Practical Difficulties of Price Floors**

As regards practical difficulties of this type of restriction, a large number of questions arise: must Domco freeze its prices or can it reduce them to some extent? In the latter event, by how much can Domco reduce its prices? From what point in time do the price restraints apply - when Newco sells its first product, when it starts advertising, when it starts building its factory or perhaps when it intimates that it might enter the market at all? The earlier the price restraints on Domco start to operate, the more these restraints look like all out price regulation (to keep Domco's prices high - not a particularly consumer friendly solution), the later they operate the greater the likelihood that Domco can circumvent the restrictions by lowering its prices preemptively. Moreover, how long should the price restraints apply? Six months, a year, until Domco loses its dominance?

#### **a. Tolerated Level of Price Cuts**

As regards the level of discounts, a preliminary remark that should be made is that the existing case law is confusing.<sup>20</sup> In some cases the Court has accepted not only that a dominant firm lowers its prices to the same level as the new entrant (meeting competition) but that the dominant firm may undercut its new rival (beating competition).<sup>21</sup> However, in yet other cases, dominant firms have been condemned for cutting prices to the same level or even above those of the new entrant.<sup>22</sup>

However, even if we were to settle on relevant benchmarks such as Newco's price level or Domco's existing price and were to settle on acceptable and unacceptable deviations from these benchmarks, problems still remain. For example, what happens if Domco lowers its prices before Newco fixes its own? Do the benchmarks change? This ties in with the next point on timing.

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for example, it is unclear when the output restrictions should apply and more importantly whether such restrictions are helpful at all from a competition point of view.

20 It should be underlined that the case law mentioned here relates to selective discounts as no case law exists specifically on the potentially abusive nature of across the board price cuts above cost.

21 See *BPB*, *supra* footnote 1.

22 See *Compagnie Maritime Belge*, *supra* footnote 2.

## **b. Timing and Duration of Price Restraints**

Probably the greatest problem here is judging how long price restrictions should apply before and after entry (in the sense of a first sale) by Newco.

Imposing price restrictions at any time before entry would be questionable given that this could effectively wipe out any downward pressure exerted on Domco's price by potential competition. However, if Domco can cut its prices shortly before Newco's entry, then the effectiveness of the price restrictions from the point of view of preventing exclusion is brought into question. Any answer to this based, for example, on the possibility of Newco to secure contracts before entering the market simply pushes the problem back in time but does not resolve it.<sup>23</sup>

Imposing price restrictions after entry is equally problematic. If the idea behind price floors is to prevent exclusion then logically these restrictions should only be lifted when the danger of exclusion is gone. However, if the danger of exclusion is gone, then it means that Newco is able to compete effectively with Domco even if the latter does cut its prices. Prohibiting meeting competition in effect becomes a prohibition of dominance as such, in contradiction with the very wording of Article 82 EC and the principle that "the fact that an undertaking 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 step as it seems appropriate to protect its said interests."<sup>24</sup>

A last point should be made here about price ceilings. As noted already, meeting competition could be seen as problematic as the fact that Domco can cut its prices and remain profitable could indicate that its prices pre-Newco entry were excessive. One must wonder how this problem can be answered by creating price floors but also when these price floors disappear whether there is call for introducing price ceilings to curb excessive prices in the future. These questions will be looked at in further detail in the context of our discussion on excessive pricing, however, the point is made briefly here to underline the contradictions that can easily arise in these situations.

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<sup>23</sup> An interesting example of a meeting competition pre-entry price war can be found in the US supreme court's ruling in *Brooke Group v. Brown & Williamson Tobacco* 509 US 209 (1993). As was noted in that judgment, the "rebate war occurred before Brown & Williamson had sold a single black and white cigarette".

<sup>24</sup> Case 22/76, *United Brands*, 1978, ECR p.207 at p.189.



#### 4. Why Price Floors Don't Combat Exclusion

Even if some way were found to overcome the multitude of practical difficulties involved in introducing price floors, one must question whether such restrictions actually do any good. The question of whether such restrictions respond to concerns of abusive exploitation are dealt with below at point II.B. As regards exclusion, it will be seen that, in the vast majority of cases, Newco will not be kept in the market just by imposing a price floor on Domco.

If Newco is just as efficient or indeed more efficient than Domco, then it would have entered the market even in the absence of price restrictions on Domco and more importantly would have been able to compete and stay in the market. The only thing that price restrictions achieve in such a situation is to deny the benefit of any price reductions that Domco might have made in response to Newco's entry. Worse still, depending on the form the price restrictions take,<sup>25</sup> Newco could potentially use Domco's regulated price as an umbrella and price below Domco - to be sure to win market share - but above the price it may have entered at absent the price restrictions.<sup>26</sup> Domco's administratively imposed price floor could even serve as some form of starting reference point for a long and fruitful tacit coordination of the two firms' prices.

Alternatively, if Newco is not as efficient as Domco then it may stay in the market for the duration of the price restrictions imposed on Domco but the moment the restrictions are lifted, Domco will be free to price Newco out of the market. True, customers of Newco have been given the transitory benefits of lower prices but in the mean time have been denied the benefit of any price cuts Domco might have made even in Newco's absence. It is simply not the place of antitrust law to sponsor the forays of inefficient rivals into the market place. As Avocate General Fennelly noted in *Compagnie Maritime Belge*

"[E]ven if they are only short lived, [across the board price cuts] benefit consumers and, secondly, if the dominant undertaking's competitors are equally or more efficient,

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25 This is less likely to happen in some models such as that proposed by EDLIN where price floors only come into play where the Newco enters the market with prices 20% or more below Domco. Nonetheless, one could still argue that absent such restrictions Newco would have priced at even more than 20% below Domco.

26 ELHAUGE considers that in some cases a dominant firm may even raise prices during the period that restrictions are imposed in order to speed the day that the latter are lifted. See ELHAUGE, E., "Why above Cost Price Cuts to Drive out Entrants Are not Predatory - and the Implications for Defining Costs and Market Power", *Yale Law Journal*, 2003, Volume 112, No. 681.

they should be able to compete on the same terms. Community competition law should thus not offer less efficient undertakings a safe haven against vigorous competition even from dominant undertakings.<sup>27</sup>

The only scenario in which the introduction of price floors might benefit Newco in the long run (i.e. prevent its exclusion) is if an inefficient Newco were able, during the period in which price restrictions on Domco were in place, to increase its efficiency so as to be able to compete with Domco after those restrictions were removed. It is advanced here that it is practically impossible to separate on the one hand situations of meeting competition involving such borderline efficient Newcos which may benefit from the existence of price floors and on the other hand situations not involving such Newcos where the effects of price floors are wholly negative.

This point is neatly put by the US Supreme Court in *Brooke Group*, a case concerning alleged above cost predatory pricing, where it was stated that “the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price competition”.<sup>28</sup>

Unfortunately, this is another area where the Court and Commission are silent as to what approach dominant firms should take. In the decision and judgment in *Compagnie Maritime Belge* the price cuts made - as recognised by the Courts is non-discriminatory manner and above cost - by *Compagnie Maritime Belge* were objected to. However, how *Compagnie Maritime Belge* was to react to this was not made clear and certainly none of the numerous questions listed above on existence or level of price floors or timing of application were answered in the case.

## **B. Excessive Pricing**

As noted above, the fact that Domco is able to (substantially) lower its prices to meet competition could be taken as an indication that prices pre-Newco entry were excessive. As a preliminary point, it should be noted that what is being objected to here is therefore not the act of lowering prices to meet competition but the level of Domco's prices at other times.

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<sup>27</sup> *Supra* footnote 2, p.132 of the Advocate General's opinion. A more developed analysis of the efficiency effects of price floors is carried out by ELHAUGE, *supra* footnote 25.

<sup>28</sup> *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 US 209 (1993).

This point will be returned to in the context of selective price cuts to meet competition. However, a brief word should be said regarding the remedies that could be used to combat such excessive pricing.

Price floors don't seem much use as they simply exacerbate the situation by forcing Domco to keep its prices high.<sup>29</sup> In response to this, it could be argued that the concern in the longer term is that by eliminating a competitor through price cuts Domco will be able to maintain excessive pricing longer than it might have if Newco had been given the chance to get established. However, these arguments in effect return us to the exclusionary effects of across the board price cuts to meet competition to which the objections are outlined above.<sup>30</sup>

The alternative would be to introduce price ceilings. Note first of all that, by shifting the focus of the objections to meeting competition from exclusion to exploitation, we arrive at remedies that are diametrically opposed (price floors as against price ceilings). This is worrying given that the Court and Commission are frequently unclear as to whether the problem is in fact exclusion or exploitation.<sup>31</sup> Otherwise, it should be emphasised that although there is some precedent of Article 82 being used to curb excessive prices, the case law in this area is rare and rightly so in our view, given the nebulous concept of "excessive" prices.

### III Selective Price Cuts to Meet Competition

Instead of across the board price cuts, Domco might react to Newco's entry by lowering its prices selectively, for instance in a geographically limited areas as occurred, for example, in Irish Sugar.<sup>32</sup>

The potential objections to such behaviour are again that they could result in exclusion or constitute evidence of exploitation. Due to the extra differential pricing element that exists in cases of selective meeting competition, the analysis of the

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29 "It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high." *Brooke Group*.

30 In this context the comment by the US supreme court in *Brooke Group v. Brown & Williamson Tobacco* is particularly relevant here "Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy".

31 This comment mainly applies to cases of selective price cuts where some customers are paying low prices and are allegedly in danger of being excluded and other are paying high prices and are therefore exploitative. For example, in the case of *Hilti*, the Commission states that Hilti's price cuts exclude its competitors (because they are too low) and are also exploitative (because they are too high).

competitive effects of such behaviour needs revisiting. However, before doing this, it must be stressed that, although it changes our analysis to an extent, the fact that Domco practices differential pricing should not be sufficient in itself to constitute an abuse. Before differential pricing is considered as abusive there should be some element of competitive harm. This approach reflects that taken in the Treaty,<sup>33</sup> which only explicitly prohibits discriminatory pricing where this results in injury downstream (second line injury). Moreover, for discriminatory pricing to be condemned in the US, injury to competitors (first line injury) must be shown. We believe therefore that the Court and the Commission ought not to consider discrimination as abusive without due attention to the need to show the existence competitive harm.<sup>34</sup> We shall return to this question further on.

Before looking at the potential issues of exclusion and exploitation created by selective price cutting to meet competition, we should first briefly consider what response antitrust law should give to this practice, if it is considered problematic. The three most obvious responses are (i) to impose a general price floor on Domco (ii) to insist that, if Domco wishes to make price cuts to meet competition from Newco, it makes these cuts across the board and (iii) a combination of the latter two i.e. allowing Domco to make across the board price cuts down to a certain level, for example down to the same level as Newco but not below.

The appropriateness of each of these solutions will depend to a great extent on what the actual objection to selective price cutting is. Thus, if discrimination is the problem then some solution equalising prices must be envisaged. However, is the discrimination considered bad because it is exploitative? If this is the case, is the better remedy not to prohibit the excessive prices? But what is an excessive price and is discrimination per se an abuse? Alternatively, the discrimination might be considered problematic because it is exclusionary. But excluding whom? If the injury to competition is first line (exclusion of competitors) should one introduce a price floor or upward equalisation of prices? If the injury is second line (because the customer paying the higher price is disadvantaged vis-à-vis its competitors) then is it not only a

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32 See *supra* footnote 1.

33 Article 82(c) prohibits "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" (emphasis added).

34 See, for example, Case C-18/93, *Corsica Ferries*, 1994, ECR p.I-1783.

question of equalising prices whether this be upward or downward equalisation? Thus, failure to identify correctly the type of abuse and resulting harm complained of can easily result in the imposition, not only of undertakings that will fail to solve the problem, but ones that might well exacerbate it.

Having briefly highlighted these important background issues, we will now look at the potentially exclusionary and exploitative effects of selective price cutting.

### **A. Exclusion**

The arguments concerning exclusion laid out above with regard to across the board price cuts considered only exclusion of competitors (first line injury).<sup>35</sup> There seems to be no obvious reason why these arguments should not equally apply to selective price cuts.

However, the selective price cutting scenario has the added element of differential pricing such that one could alternatively argue that customers paying the higher price are put at a disadvantage, with potentially exploitative effects in their regard (second line injury).

### **B. Exploitation**

As a preliminary point it should be noted that, according to the wording of Article 82(c), second line injury is arguably not an alternative argument but rather a prerequisite to the success of any claim that differential pricing is abusive (Article 82(c) prohibits discrimination between trading partners “thereby placing them at a competitive disadvantage”).

It is impossible to state in the abstract whether selective meeting competition causes second line injury as the answer to this question will depend entirely on the facts. Nevertheless, what can be emphasised here is that this condition cannot be ignored or read out of the Treaty. Other than relying on a simple textual argument, the principle reason for this is that discriminatory pricing has indeterminate effects.<sup>36</sup> If there is in fact no secondary line injury resulting from differential pricing then the danger of imposing equal pricing is that any positive effects that result from differential pricing will be lost and for no good reason.

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<sup>35</sup> It is worth pointing out here that discrimination can be considered illegal under US antitrust law only if it produces first line injury. However, even if first line injury has been shown to exist, the defendant may invoke a defence of meeting competition.

<sup>36</sup> SCHMALENSEE, R., “Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination”, *American Economic Review*, 1981, Volume 71.

In fact, where discriminatory pricing has been alleged in meeting competition cases, the Court and Commission have usually made reference to second line injury.<sup>37</sup> This is to be cautiously welcomed but it should nevertheless be stressed that what should be required here is not a simple assertion that there is second line injury but rather concrete evidence that customers are put at a disadvantage e.g. because the input from the dominant firm constitutes an important cost element and they are in a competitive relationship with customers of the dominant undertaking paying lower rates.

Exploitation can also take the form of excessive prices for those who do not benefit from the reduced tariffs. In the case of across the board price cuts, the alleged exploitation does not occur during Newco's presence on the market but rather pre-Newco entry and post-Newco exit. In the case of selective price cuts the alleged exploitation occurs, in addition, during the period of Newco's presence on the market, in the form of higher prices being charged in those areas where Newco is not active (thus, although the added element of differential pricing highlights the allegedly excessive nature of Domco's prices, the excessive pricing occurs throughout).

This takes us back to the argument made above at point III that the competitive harm objected to must be clearly identified if we are not to avoid counterproductive "remedies". If exploitation truly is the problem then the difficulty does not reside in the relative level of the prices but the absolute level of the (higher) prices. Any remedy proposed here would therefore first and foremost involve imposing a price ceiling. The obvious difficulty with this is that this is diametrically opposed to the price floor remedy most often associated with the scenario of meeting competition.

Even if the Court and Commission were to an extent concerned by exploitation,<sup>38</sup> it seems to us that exploitation cannot be alleged and proved on the sole basis of differences in price since there can clearly be factors explaining such differences other than a desire to exploit. Competitive pressure is the most obvious of these, which is of course the whole *raison d'être* of meeting competition. Thus, as the Court itself acknowledged in *United Brands*, price differences are caused by market forces

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37 See e.g. CFI's judgment in *Irish Sugar*, p.183; Commission Decision in *Hilti*, p.80.

38 See e.g. Commission Decision in *Hilti*, p.81.

and are “due to fluctuating market factors such as [...] the availability of [...] competing [products]”.<sup>39</sup>

As stated above, price discrimination is a market reality and many efficiencies can be derived from it.

## Conclusions

The central reason for writing this article was the perceived obscurity of this area of the law. While it is clear that the above contribution is not exhaustively reasoned, it does attempt to highlight the key problems with condemning meeting competition.

Our key points in this regard can be briefly summarised as follows:

- across the board or selective price cuts to meet competition should not be prohibited since the purpose of competition rules should not be to impose price floors so as to protect less efficient undertakings;
- selective price cuts to meet competition are as a general rule a reasonable reaction to competition and should not be prohibited by Article 82;
- the question of exploitation has not been sufficiently dealt with by the Court or Commission and its policy as regards this issue is unclear. This is highly regrettable as in cases where this is considered a problem, the most obvious solution (some form of price ceiling) will often be diametrically opposed to the solution that might be appropriate where the problem is exclusion (some form of price floor).

The Court and Commission both accept that meeting competition is in certain circumstances legitimate and entirely compatible with Article 82.<sup>40</sup> However, in order to advise clients, lawyers must know when meeting competition is not acceptable and the only way this can be done is if the objections to the practice are clearly explained by the Court and Commission.

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39 Case 27/76, *United Brands*, 1978, ECR p.207 at p.215.

40 This has been reaffirmed either expressly or impliedly in every single decision listed *supra* footnote 1.



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