EU-China Workshop on Anti-Competitive Agreement Cases

Abuse of Dominance Cases in Germany

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I. Introduction to German case studies

Some preliminary remarks:

- three different cases (sports goods retail industry; airlines; retail of food industry)
- one horizontal case (abuse of dominance with regard to competitors)
- two vertical cases (abuse of dominance in the manufacturer/seller relationship)
- one clear cut infringement, one probable infringement, one controversial case

I. Preliminary remarks

Most abuse of dominance cases are difficult to proof

- the best abuse of dominance case is an effective merger control
- the overriding principle is to protect competition not individual companies

I. Preliminary remarks

Most abuse of dominance cases are difficult to proof

- horizontal cases are often much more clear cut than vertical ones
- in vertical cases the borderline between things best left to the parties/the market and were government is called to intervene is difficult to draw
- vertical restrictions often do entail efficiencies which have to be balanced against the restrictions

II. General pre-requisites

- ✓ establish dominance and
- ✓ establish abuse

if one of both cannot be proofed properly, the case will fail

II. General pre-requisites

Establish dominance:

- proper delineation of the relevant product market
- proper delineation of the relevant geographical market
- proper assessment of market structure and position of suspected company on the market

II. General pre-requisites

Establish abuse:

- abuse of dominance or simply hard bargaining?
- abuse of dominance or simply inefficient structures of competitors/customers
- abuse of dominance or simply clever business model

III. Lufthansa case

- horizontal abuse of dominance (abuse of dominance between competitors)
- outcome: Lufthansa was ordered to change its price model
- Lufthansa appealed and lost the case in the courts; decision became final
- competitor of Lufthansa is still offering flights on the relevant inter-national connection

III. Lufthansa case

The facts:

- Lufthansa biggest German airline operating on various national and transnational routes
- on some of these Lufthansa is the only airline offering flights
- up to 2001 Lufthansa was the only airline offering flights for passengers on the Frankfurt/Berlin route

III. Lufthansa case

The facts:

- in 2001 a new airline (Germania) started to operate scheduled passenger flights between Frankfurt and Berlin
- a one-way, flexible economic ticket without substantial restrictions was offered at 99,- € (including tax) and outward and return flights for 198,- €
- the tariff is targeted at business travellers (which account for ¾ of all passengers on this route)

III. Lufthansa case

The facts:

- Lufthansa's initial offer on the Frankfurt/Berlin route had been 240,- €/one way and 485,- € for a round trip
- after Germania entered the market with its 99,- € offer Lufthansa introduced a new price regime on the Frankfurt/Berlin route for 100,- € /one way and 200,- € for a round trip;

III. Lufthansa case

The facts:

- the Lufthansa ticket for 100,- € /one way can be booked without the restrictions, with which flexible business tariffs are usually differentiated from budget tariffs (i.e. advanced booking period/minimum stay or Sunday rule/no rebooking possibility)
- the Lufthansa tariff thereby became suitable for business travellers as well

III. Lufthansa case

The facts:

- Lufthansa offers its customers 14 flight frequencies on working days; Germania but 4
- Lufthansa offers its customers additional services (onboard service, use of LH lounges, mileage bonuses for its Miles & More frequent flyer program)

III. Lufthansa case

The facts:

- when Lufthansa introduced its reduced price offer, Germania lost [40% - 50%] of its business customers
- Germania was forced to reduce its price offer to 55,- € when Lufthansa introduced its 100,- € offer
- Germania could not achieve the break even point with this reduced tariff

III. Lufthansa case

The facts:

- Germania would not be able to continue operations on this route if Lufthansa were to continue its price policy
- the Lufthansa flight price is not available on any other route in Germany
- on a comparable route (Munich/Berlin) were Lufthansa faces competition from British Airways, the tariff is 441,- € for a round trip

III. Lufthansa case

The facts:

- Lufthansa’s new tariff did not cover its average costs per paying customer

III. Lufthansa case

The reasoning:

- by charging theses reduced flight tariffs Lufthansa abused its dominant position on the Frankfurt/Berlin route by restricting Germania’s opportunity to compete

III. Lufthansa case

Establish dominance:

- flights between Frankfurt/Berlin constitute a separate product market

- Lufthansa’s market share were at 90%
- Lufthansa has superior resources compared to Germania

III. Lufthansa case

Establish abuse:

- the introduction of the reduced Lufthansa tariff in combination with the additional advantages undercuts the Germania tariff significantly
- Lufthansa accepted possible (temporary) losses

III. Lufthansa case

Establish abuse:

- Germania is a low cost carrier without additional services and a big variety of frequencies on the Frankfurt/Berlin route
- Germania can only compete through lower prices

III. Lufthansa case

Establish abuse:

- Lufthansa ‘s pricing strategy is aimed at forcing Germania out of the market and afterwards recouping the losses by discontinuing the low tariffs as soon as Germania exits the market
- thereby Lufthansa is sending a signal to the market deterring newcomers from entering the market

III. Lufthansa case

Establish abuse:

- the reduced tariff is below the tariff of comparable routes with competition
- undercutting total average costs indicates an abuse of dominance if this is part of an overall price strategy aimed at eliminating competitors
- timing and scope (aimed at business passengers/only on that route) of the introduction is evidence of the intention

III. Lufthansa case

Establish abuse:

- Lufthansa had successfully applied this strategy in the past on the London/Munich route against Go-fly and on the London/Frankfurt as well as the London/Hamburg route against Ryanair and on the Munich/Frankfurt route against British airways; always returning to its original tariffs after the competitors left the market

IV. Asics case

- vertical abuse of dominance (alleged abuse of dominance of a manufacturer against its retailers)
- outcome: still under investigation
- Asics has agreed not to apply its new selective distribution system as long as the case is pending

IV. Asics case

the facts

- Asics is a manufacturer of sports equipment; on its homepage Asics claims to be the market leader for running shoes in Germany with above 40% market share
- Asics sells its products through retail shops in various countries
- in 2011 Asics wrote to its buyers (the retail shops) to announce the introduction of a new selective distribution system

IV. Asics case

the facts

- the selective distribution system shall be based on qualitative as well as quantitative criteria
- the system does not allow for assisting of Internet price machines and the use of third party platforms (Amazon/eBay)
- as a consequence, various retail shops in Germany will not get any Asics products any longer

IV. Asics case

the facts

- some of the retail shops are specialized in selling running shoes and achieve 85% of their turnover with Asics
- all retail shops concerned sell Asics products in a stationary shop as well as through the Internet
- suspicion that Asics looks for a reason to terminate business with those shops

IV. Asics case

the facts

- all the retail shops concerned offer Asics products at considerable discounts via Internet
- Asics had approached those shops in the past for doing so and asked for a stop
- the shops concerned had refused to accept prices set by Asics for selling products to end consumers

IV. Asics case

the facts

- all the retail shops concerned fulfil all criteria of the new selective distribution model
- all the retail shops concerned were thrown out for quantitative reasons (enough other retail shops in the area)
- their turnover in the past with Asics articles has been higher than that of other shops staying in the scheme

IV. Asics case

Establish dominance:

- the product market concerned is the market for running shoes (i. a. due to special features of those shoes and a different pricing strategy, specialized shops, different market shares in different segments)
- the relevant geographical market is national (national distribution systems, different pricing strategy, barriers to entry)

IV. Asics case

Establish dominance:

- market share of Asics is [above 30%]
- market share of other companies is significantly lower
- no market entry in the last five years
- barriers to entry relatively high

IV. Asics case

Establish abuse:

- Asics claims that the introduction of the selective distribution system is necessary to prevent the deterioration of its product image (only qualified sales persons which will be able to explain products to the customer properly)
- quantitative criteria are necessary as to better assist the retail shops remaining in the market

IV. Asics case

Establish abuse:

- selective competition systems are not per se illegal
- they may be applied as long as the market share of no company concerned is below 30%
- if the market share is higher the positive and negative effects on competition have to be balanced

IV. Asics case

Establish abuse:

- questions to be addressed:
- does the product concerned calls for a selective distribution system?
- is the system used indiscriminately
- are the criteria used objective and are they necessary to achieve the envisaged goal
- does the consumer participate adequately

V. Two retail cases

- vertical abuse of dominance (alleged abuse of dominance of a retailer against its supplier)
- outcome: one still under investigation, one settled

V. Two retail cases

the facts:

- in 2008 a merger was cleared, allowing company A (a nation wide operating food retail chain, market leader in Germany) to take over the discount chain of its competitor B
- company A had a discount chain on its own in which the newly acquired discounter was integrated

V. Two retail cases

the facts:

- in this process company A discovered that suppliers had granted the discounter of company B more favourable conditions than the discount chain of company A
- although negotiations for the year 2009 had already been terminated, company A approached its suppliers to get a best price condition

V. Two retail cases

the facts:

- a best price condition does mean in practice that company A would get the conditions most favourable for A regardless of whether that had been negotiated with company A in the past or with company B in the past

V. Two retail cases

establish dominance:

- relevant product market (many according to products concerned)
- relevant geographical market: in most cases national
- market share: [above 30%] on most individual product markets

V. Two retail cases

establish abuse:

- indications: delivery negotiations had been terminated already
- company A asked for the rebates not only for the future but also for the past
- special problem: many suppliers are not willing to cooperate because they are afraid of the possible consequences (de-listing)

V. Two retail cases

the facts:

- food retail company C punishes its suppliers for not delivering contracted goods on time
- punishment: reduction of payment for the goods delivered (lump sum of -20%)
- no investigation into the reasons of the default

V. Two retail cases

the facts:

- no contractual basis for this
- no investigation into the reasons of the default
- no proof of a corresponding damage on the part of the retailer

V. Two retail cases

establish dominance:

- product market definition: no market for "food retail goods" but separate product markets
- geographical market definition: most markets are national
- market share: [above 30%] on most markets concerned

V. Two retail cases

establish abuse:

- indications are: no contractual basis
- lump sum rule instead of proof of damage
- no inquiry into the reasons for the default (mistake of the retail companies side ? act of God? …)

VI. Summary

- ✓ to establish a good case we first need to establish dominance (proper market definition)
- ✓ and to establish an abuse
- ✓ cases are most often complex and require a lot of investigation and a proper balancing of justification arguments