Kluwer Competition Law Blog

Concerted practices, greyhounds, swans and alcoholmeters

Jose Rivas (Bird and Bird, Belgium) · Wednesday, September 15th, 2010

Adam Smith wrote in the Wealth of Nations that *"two greyhounds, in running down the same hare, have sometimes the appearance of acting in some sort of concert. Each turns her towards his companion, or endeavours to intercept her when his companion turns her towards himself. This, however, is not the effect of any contract, but of the accidental concurrence of their passions in the same object at that particular time"*.

With this example the great economist taught us that oftentimes appearances are misleading and it would be foolish to attempt to find a concurrence of wills where there is simply chance, survival instinct or adaptation to the prevailing circumstances.

A European national antitrust authority, when condemning a parallel increase in price of several newspapers, stated: *"such a harmonious behaviour cannot be explained as an independent reaction to market conditions, due to the large number and differing characteristics of market players as well as the variety of options theoretically opened to them. In the same vein that it would not be credible to sustain that the harmonious performance of the Swan Lake by a ballet ensemble is the result of the individual inspiration of each performer"*.

Intelligent adaptation to prevailing market conditions should not be confused with anticompetitive concerted behaviour. However, when the market behaviour of competitors is analogous, how can anyone decide whether it is the result of their individual business survival instinct or the result of anticompetitive concertation?

The European Court of Justice in *T-Mobile* confirmed that notably in highly concentrated oligopolistic markets one single meeting amongst competitors where one of them commits the "indiscretion" of revealing that it intends to lower the commissions it pays to its resellers, suffices to condemn all those present at the meeting for concerting their market behaviour. The reason being that the competitors, although passive recipients of that information, may not be able to reverse the legal presumption that such information influenced their subsequent behaviour in the market. European antitrust law uses a "legal presumption" or the "reversal of the burden of proof" according to which, it is for the affected companies, and not for the accusing authority, to reverse the legal presumption that by remaining active on the market they are presumed to take account of the disclosed information.

The judgment in *T-Mobile* is also interesting because such a concerted practice is condemned as a Competition law restriction by object. Interestingly, on this point, the law treats antitrust violations by object in a similar fashion to drunk driving. Regardless of the result produced, namely, whether

the drunk driver caused an accident or actually created any risk while driving, most legal orders condemn drivers when the alcohol content in their blood or saliva exceeds a certain level. The risk of an accident is so probable that the law presumes it as actual. In her Opinion in *T-Mobile*, Advocate General Juliane Kokott, expressly uses this comparison.

Unfortunately, in antitrust law we have no alcoholmeters to determine with full precision when such a set of ambiguous and imprecise rules have been infringed. Companies often complain about the unpredictability of antitrust laws and the uncertainty this creates when deciding their market strategy. Many will say, with a good reason.

Professor Herbert Hovenkamp in his outstanding book "The Antitrust Enterprise" (Harvard University Press 2005) said *"The rules of antitrust remain unfocused, insufficiently precise and excessively complex. The problem of poorly designed rules is severe, because in the short run rules weigh much more heavily than principles"*.

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