ICN Unilateral Conduct Workshop: Stellenbosch, South Africa

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More than 150 lawyers and economists from nearly 35 jurisdictions came together on November 1-2 for a workshop on unilateral conduct in Stellenbosch, South Africa.[2] The workshop was organized by the ICN's Unilateral Conduct Working Group, and co-chaired by the competition agencies in Australia, Italy, and South Africa. From the first panel on excessive pricing to the concluding session on the treatment of loyalty rebates, the discussions highlighted the sometimes starkly different views and approaches to analyzing pricing conduct by dominant firms under unilateral conduct laws.

The workshop began with a debate on excessive pricing moderated by Judge Dennis Davis, Competition Appeal Court South Africa, with a lively exchange of views on whether prices thought to be excessive should be addressed through competition law enforcement. Massimo Motta, ICREA-Universitat Pompeu Fabra (and former chief economist for DG Competition), contends there is room for excessive pricing in markets where competition does not work – for example in the face of a dominant firm in a market that enjoys legal barriers to entry – and there is no oversight regulator (or in cases of regulatory failure). Motta, however, would not intervene against firms who obtained their dominance by way of innovation, business acumen, or investment, to avoid discouraging innovation and chilling pro-competitive conduct. Motta further cautioned that excessive pricing actions should be a last resort – acknowledging that excessive pricing remedies do not cure a competition issue at root but instead merely lowers the price a dominant firm only for as long as the remedy is in place.

On the other side of the debate, Timothy Longman, US Department of Justice, Antitrust Division, argued that excessive pricing laws are, by definition, not "competition policy" because they start with the essential premise that competition "does not work" or "has failed." Accordingly, excessive pricing laws should be viewed as a substitute or replacement for the work of competition in the free market. This is because in a free competitive market price is the central market organizing principle by which participants make decisions as to whether to supply or buy products. Efforts to interfere directly with this market price function replaces the supply and demand functions of the free marketplace. The resulting market can neither be said to be free nor competitive. Instead, price and supply become a function of government remedy/regulation. Longman argued because excessive pricing regulation is fundamentally at odds with competition, government entities other than competition agencies should determine when and whether such market intervention is appropriate.

Assimakis Komninos, White & Case, noted that historically, excessive pricing cases brought by the European Commission were both rare and only in "hybrid" cases – involving both exploitative and exclusionary conduct (or other issues). However, he pointed out that national competition authorities are becoming increasingly active and that recent European cases involve pure excessive pricing allegations.

The program continued with presentations by competition officials from Italy, Russia, the United Kingdom, and the European Commission, featuring several of the recent challenges

against excessive pricing by dominant firms in the pharmaceutical industry, telecommunications, and gas supply markets and the remedies that may be appropriate if there is a finding of excessive pricing. Participants shared their perspectives on excessive pricing and exchanged practical experience in small group breakout sessions using a hypothetical case study as a springboard for discussion[3]. In assessing the hypothetical, participants considered a number of tests used to determine whether or not prices were excessive, including price-cost tests, price comparators, and profitability analysis. Session moderators noted that the different tests have several practical application difficulties, therefore many jurisdictions with excessive pricing laws rely on a combination of tests. They further discussed how the relevance of the tests depends on the case context and jurisdictional preferences. The session closed with a discussion of remedies and the pros and cons of pricing and behavioural remedies.

The workshop concluded with a session on assessing the competitive effects of loyalty rebates and whether rebates should be viewed as exclusive dealing, predatory pricing, or both. To set the stage for the rebates plenary session, participants discussed application of ICN Recommended Practices on Predatory Pricing[4] and the ICN UC Workbook on Exclusive Dealing Arrangements.[5]

Both the panel on predatory pricing moderated by Mondo Mazwai, Competition Tribunal South Africa, and subsequent breakout session discussions considered questions such as, which measure of cost is appropriate to assess predatory pricing? Are prices below AVC always predatory? Are prices below cost but above a competitor's cost predatory? Can a price above a firm's own cost be predatory? Should the "meeting competition" defence be recognised? Should limit pricing be tolerated? Is there a need for a recoupment test to establish predation? And, must recoupment occur in the same market where predation occurs?

Motta opened the predatory pricing discussion with his observation that under European competition law, there is no recoupment requirement. Rather, a finding of dominance is sufficient to prove barriers to entry to support a coherent strategy to exclude rivals. Speakers from South African and Canada shared lessons learned from predatory pricing cases in their jurisdictions involving price-cost tests in the airline industry.

The exclusive dealing panel, moderated by Yasmin Carrim, Competition Tribunal South Africa, highlighted elements of a flexible rule of reason analysis drawn from the ICN workbook chapter. In his presentation, Alden Abbott, US Federal Trade Commission, outlined potential exclusive dealing efficiencies and harms related to market foreclosure, such as raising rivals' costs, and stressed the importance of focussing on the evidence. Speakers from Japan, Mexico, and South Africa presented exclusive dealing cases brought in their jurisdictions, involving exclusivity provision in contracts for mobile social gaming, ticketing services, and packing and marketing services to citrus farmers. Alvaro Ramos, a private sector participant from Spain addressed some of the practical and procedural difficulties and challenges in

enforcing antitrust rules to exclusivity, including the use of rebuttable presumption, standards of foreclosure, and access to evidence. Participants applied the lessons learned from the panel and the ICN workbook chapter on exclusive dealing to a hypothetical case study based on the FTC's investigation involving McWane, the largest U.S. suppliers of ductile iron pipe fittings, which are used in municipal water systems around the United States. The FTC charged that McWane illegally maintained its monopoly power in the market for U.S.-made pipe fittings by implementing an exclusive dealing policy.[6]

The final session on rebates was moderated by Marcus Bezzi, Australian Competition and Consumer Commission. OECD Competition Expert Chris Pike recounted the 2016 OECD Roundtable on Fidelity Rebates, which considered both predatory pricing and de facto exclusive dealing theories of harm. Gail Levine, US Federal Trade Commission, shared the US experience, including an investigation alleging exclusive dealing that used both sticks (threats) and carrots (rebates) to achieve exclusivity. Speakers from Israel and Turkey presented cases from their jurisdictions, including ports in Ashdod and rebates for beer. In his presentation, Massimiliano Kadar, European Commission, noted that the EC's Intel judgment provides a framework for the appraisal of exclusivity rebates and that the way the framework is applied and the actual sources of evidence necessarily depend on the specifics of individual cases. He asserted that there is no hierarchy between different types of evidence and that the Commission can prove anti-competitive effects in a number of ways.

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[2] The workshop agenda and presentations are available at http://icnuniconductsa18.co.za/.

[3] The hypothetical involved a complaint from several refractories that the alleged dominant firm was excessively pricing microsil (a binder in the production of refractory products) to customers in South Africa. Refractories alleged that there is no reasonable relationship between costs incurred to produce and supply microsil, and the final microsil prices that Emporium charges to refractories.

[4] Predatory Pricing Analysis Pursuant to Unilateral Conduct Laws Recommended Practices, available at https://www.internationalcompetitionnetwork.org/portfolio/predatory-pricing-analysis-uc-laws/.

[5] ICN Unilateral Conduct Workbook Chapter 5: Exclusive Dealing, available at https://www.internationalcompetitionnetwork.org/portfolio/uc-workbook-exclusive-dealing/.

[6] In re McWane, Inc., 155 F.T.C. 903 (2013), affirmed, 783 F3d 814 (11th Cir 2015), cert denied, 136 S. Ct. 1452 (2016).